STUDY

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Towards an EU-wide right to politically strike: A constitutional perspective

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Towards an EU-wide right to politically strike: A constitutional perspective

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, assesses the status of political strikes in the EU. While workers' strikes generally seek to pressure an employer, "political strikes" are aimed at the government. Even though such political strikes are often organised to defend and protect workers' interests, they can also have exclusively political objectives. Such "purely political" strikes are generally not protected as part of the right to striker under relevant international human rights law or the Member States national legislation.

This document was requested by the European Parliament's Committee on Constitutional Affairs.

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LIST OF ABBREVIATIONS

BALPA	British Airline Pilots' Association
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CFA	Committee on Freedom of Association
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ESC	European Social Charter
Eur. Ct. HR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
JHL	(Swedish) Trade Union for the Public and Welfare Sectors
LO	Swedish Trade Union Confederation
PAM	(Swedish) Service Union United
SAK	Central Organisation of Finnish Trade Unions
TCO	Swedish Confederation of Professional Employees
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

Strikes are typically a tool used by unions in order to put pressure on employers to enter into a collective bargaining process, or to make concessions in the negotiation of a collective bargaining agreement. "Political strikes" are addressed, instead, at the government, in order to protest certain policies or to influence a legislative agenda. Such "political strikes" seek to obtain changes that depend on the government or parliament, and not on any individual employer. They often take the form of general strikes.

Political strikes may relate to policy issues that affect the economic and social interests of workers. They also may relate to issues unrelated to workers' interests: these are "purely political strikes" in the typology proposed in the study.

There exist important variations as regards the regime of political strikes across the 27 Member States of the European Union (EU).[1] In five Member States, strikes pursuing political objectives are explicitly disallowed: the workers going on strike for political motives may be sanctioned, and they run the risk of being dismissed. In contrast, most Member States do not include an explicit prohibition of political strikes, but the exclusion of purely political strikes follows from the definition of the right to strike in legislation or in case-law. 17 Member States define strikes in domestic legislation in a way that, in effect, excludes strikes that are "purely political", since strikes are defined as related to trade disputes opposing workers to employers: in three of these Member States, strikes are explicitly linked to the negotiation of collective agreements, while in 14 other Member States, the exclusion of "purely political strikes" follows from a slightly broader definition of strikes as relating to the protection and promotion of workers social and economic interests, though not necessarily in the context of a collective bargaining process. Finally, in the remaining five Member States, political strikes are explicitly allowed, generally as a result of court cases having considered them to be lawful. This classification of Member States remains delicate, however: in the absence of clear legislation or established case-law in certain Member States, the way how courts might respond to the consequences of political strikes remains speculative.

The scope of the right to collective action under Article 28 of the Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights, Charter) is not clear from the wording itself. Providing greater clarity would be useful, particularly to ensure that the right to strike will not be narrowly interpreted by courts and that economic freedoms, such as the freedom to provide services and freedom of establishment, will not systematically take priority in cases of conflict. This potential risk is exemplified by the *Viking* and *Laval* cases of 2007.[2] Specifically, where the right to strike would be exercised in protest of certain governmental policies, domestic courts may need to be provided with better guidance where such exercise would interfere with the economic freedoms protected under the internal market.

Replacing Article 28 of the EU Charter of Fundamental Rights under the broader framework of international human rights law and the relevant instruments of the International Labour Organization may help to provide such clarity. A close look at the sources cited in the Explanation to Article 28 of the Charter, along with other relevant sources, suggests that while the right to strike extends to strikes that

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1 For more detailed information, please see Chapter 2 of the study.

2 C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779 (ECLI:EU:C:2007:772); C-341/05, *Laval un Partneri* [2007] ECR I-11767 (ECLI:EU:C:2007:809).

protest governmental policies impacting workers' economic and social interests, it does not extend to "purely political" strikes, unrelated to such interests.

Three sources are examined in detail. First, under Article 6(4) of the European Social Charter (ESC), the States parties have pledged, "[w]ith a view to ensuring the effective exercise of the right to bargain collectively", to recognise the "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into." While this wording seems to limit the recognition of the right to strike to situations where workers are attempting to exert pressure on an employer in the context of a collective bargaining process, the European Committee of Social Rights (ECSR) took the view that the right to strike is guaranteed under the European Social Charter as long as it is used to defend the economic or social interests of workers, whether or not in connection with a process of collective bargaining. It is however doubtful whether this extends the right to strike to "political strikes" in protest of the action of the government or to seek a legislative reform, since the ECSR limits its reading of the ambit of collective action under Article 6(4) to disputes between workers and employers; as regards "purely political strikes", entirely unrelated to the interests of workers, they are almost certainly excluded.

Secondly, under Article 11 of the European Convention on Human Rights, each individual is guaranteed "the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests". Since 2002, the European Court of Human Rights has incorporated the right to strike as part of the freedom to form and to join trade unions (since, according to the Court, "strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests"). While this protection seems to cover protest strikes aimed at the government (or broadly defined "political strikes"), it appears that "purely political strikes", unrelated to "the protection of trade union members' interests", are excluded.

While these two first sources are cited in the Explanation accompanying Article 28 of the Charter of Fundamental Rights of the European Union, other sources also should be taken into account. Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to strike (and so does, implicitly, Article 22 of the International Covenant on Civil and Political Rights (ICCPR)). The right of everyone to form and join trade unions is stipulated in the ICESCR, however, "for the promotion and protection of his economic and social interests". This again, while it does allow to extend the protection of this provision to political strikes protesting governmental policies, would seem to exclude the protection of "purely political" strikes.

A similar conclusion can be drawn from the 1948 ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise and the 1949 ILO Convention (No. 98) concerning the Right to Organise and to Collective Bargaining. The ILO supervisory bodies have taken the view that, under ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, 1948, "strikes relating to the Government's economic and social policies, including general strikes, are legitimate"; however, they have not extended their protection to "purely political" strikes as such.

It follows that, in the current state of EU constitutional law, Article 28 of the Charter of Fundamental Rights of the European Union, read in the light of international human rights and labour law, protects the right to political strikes (or "protest strikes"), to the extent that such strikes target issues pertaining to the economic and social interests of workers (going beyond their narrow "occupational interests"); it does not however protect the right to strike that is "purely political", that is, unrelated to workers' economic and social interests.

This reading is not necessarily consensual, however, and (taking into account also the diversity of approaches across Member States) there remains a lack of clarity as to the extent of the protection afforded under Article 28 of the Charter of Fundamental Rights. While Article 153(5) TFEU excludes the adoption of harmonisation measures concerning the exercise of the right to strike across the Member States, the national authorities remain bound to respect the right to strike, as stipulated in Article 28 of the Charter of Fundamental Rights, in the scope of application of EU law. Yet, the lack of a common understanding of the scope of the right to strike under this provision of the Charter may have a chilling effect on the exercise by workers of the right to strike, when they resort to strike in order to protest governmental action: in the current state of EU law, they are uncertain whether or not they would be protected under EU law, since the link between the issue that they target and their economic and social interests may at times be tenuous. Moreover, the divergent approaches across the Member States may cause a risk of fragmentation in the internal market: restrictions to economic freedoms (as illustrated in *Viking* and *Laval* cases) may or may not be considered permissible when the exercise of the right to strike by workers leads to such restrictions, depending on how domestic courts interpret that right. More guidance could therefore, and perhaps should, be provided to domestic authorities, as regards the reading of Article 28 of the Charter of Fundamental Rights.

1. INTRODUCTION

This study examines whether "political strikes" are recognised in the European Union (EU). Strikes are typically a tool used by unions in order to put pressure on employers to enter into a collective bargaining process, or to make concessions in the negotiation of a collective bargaining agreement. They can also be used, however, to put pressure on governments, for instance where legislative reforms are considered that could weaken collective bargaining mechanisms, or that could negatively affect the interests of workers: in such cases, strikes are a form of protest directed not against the employer, but against the government or the legislature. These strikes are called "political strikes": while affecting individual employers, they are really addressing the government.

Such "political" strikes may pursue a range of objectives. They can seek to influence governmental policies that have a direct impact on the rewards of work or on working conditions, for instance if a pension reform is debated in parliament or if austerity policies restrict the ability for social partners to negotiate higher wages or improved working conditions. They can also seek to preserve the right to collective action itself, including collective bargaining: if, for instance, the government considers decentralising collective bargaining, from the sectoral level to the level of the individual company, it would be legitimate for workers to seek to oppose that reform by resorting to a strike. Finally, in the public sector, strikes directed against the government may seek to defend public services, for instance where a privatisation process is considered or where the governmental budget is debated in parliament that includes a reduction of the funding of public services. In such cases, there is a direct link between the interests of workers of the public sector and governmental policies: although the strike would seek to influence governmental policies, it is really the government as employer that is the target of the protest. Finally, political strikes may be entirely unrelated to the interests of workers: workers can decide to strike, for instance, to denounce the lack of governmental action on climate change or to protest against the role of a government in a conflict. These are "purely political strikes", thus described because workers use the instrument of the strike to influence governmental policies on issues other than the defense of their interests. "Purely political strikes" thus defined are a sub-category of "political strikes" more broadly: like other political strikes, they are directed at the government, but they are "purely political" in the sense that the objective they pursue is not connected to the condition of workers.

The question of whether or not "political strikes" are protected arose in the wake of a series of strikes, often taking the form of general strikes that followed the austerity measures adopted in response to the sovereign debt crisis in the years 2010–2012. When the Great Financial Crisis threatened the sustainability of the public debt in a number of Member States[3], in Greece, 17 general strikes took place in 2010–2011 and 12 in in 2012. General strikes were also organised in Spain in 2010, 2012 and 2013. In Portugal, two general strikes took place in 2012 and again in 2013, and there were two general strikes in the two preceding years. All these strikes targeted general governmental policies linked to austerity measures, addressing a message to the government rather than to the employers affected by the strike, but still related to workers' interests. On 14 November 2012, following a call from the Spanish and Portuguese unions, the first ever EU-wide strike was organised: in addition to Spain and Portugal, general strikes were held in Cyprus, Italy and Malta, and solidarity actions also took place in France,

[3] See in particular on these strikes G. Gall, "Quiescence continued? Recent strike activity in nine Western European economies", *Economic and Industrial Democracy*, 34-4 (2013), p. 667-691; and G. Gall, "Les formes contemporaines de l'activité gréviste en Europe occidentale. La domination de la grève politique de masse", *Savoir/Agir*, 2014/1 (n° 27), p. 15-20. DOI: 10.3917/sava.027.0015.

Greece, and the French-speaking part of Belgium. In the autumn of 2023, similar action was taken by the Finnish unions, coordinated by the Central Organisation of Finnish Trade Unions (SAK) confederation and supported by the Trade Union for the Public and Welfare Sectors (JHL), the Service Union United (PAM), the Finnish Construction Trade Union, and the Industrial Union, who joined in what SAK called the Serious Grounds campaign: this is self-described as a political campaign in protest of austerity measures adopted by the Government of Finland, resulting in cuts to welfare and the fragilisation of workers' rights (including the non-payment of the first day of sick leaves and the tying of wage increases to the export performance of the industry concerned).

The following typology emerges:

Table 1: Typology of strikes

(i) Strikes aimed at influencing a collective bargaining process	Targeting the employer (including employers of other workers, in the case of solidarity strikes)	"**Normal strikes**" concerning industrial disputes
(ii) Strikes aimed at improving wages, working conditions, etc., i.e., the occupational interests of workers		
(iii) Strikes aimed at improving wages, working conditions, etc., i.e., the social and economic interests of workers	Targeting the government (addressing issues that are beyond the reach of the employer to change)	"**Political strikes**", more accurately "**protest strikes**"
(iv) Strikes aimed at influencing general governmental policies unrelated to the interests of workers		"**Purely political strikes**", directed at the government and aiming at objectives unrelated to the protection of workers' interests

Source: Author's own compilation.

This study will assess **whether political strikes (whether "protest strikes" or "purely political strikes", in this typology) are protected as part of the right to collective action in the EU**. It first reviews the status of political strikes at domestic level, providing a comparison across the EU-27 Member States (II.). It then examines the status of the right to collective action in EU law as codified in Article 28 of the EU Charter of Fundamental Rights (III.). Finally, the study assesses the scope of right to collective action, asking whether the right to strike extends to political strikes (IV.). It closes with a brief conclusion (V.).

2. THE STATUS OF POLITICAL STRIKES IN THE MEMBER STATES

This Chapter will present a table on political strikes, with a typology emerging from the comparison between the EU-27 Member States. The table leads to classify countries into three different groups.

In five Member States (Bulgaria, Latvia, Lithuania, Romania and Spain), strikes pursuing political objectives are explicitly disallowed: the workers going on strike for political motives may be sanctioned, and run the risk of being dismissed, since their decision to suspend the employment contract may be deemed unjustified. However, this does not necessarily mean that all strikes directed at the government (rather than at the employer affected by the strike) are unlawful: they may be deemed lawful (and protected as a legitimate exercise of the right to strike) if they aim at the protection of the interests of workers. Only "purely political" strikes, unrelated to the defence of workers' interests, are clearly excluded.

In contrast to this first group of countries, most Member States do not include an explicit prohibition of political strikes. In 17 Member States however, strikes are defined in domestic legislation in a way that, in effect, excludes strikes that are "purely political", since strikes are defined as related to trade disputes opposing workers to employers. This group can be divided in two sub-groups:

- In three Member States (Germany, Poland and the Slovak Republic), strikes are explicitly linked to the negotiation of collective agreements. In other terms, strikes are allowed to the extent that they seek to influence the terms of a collective agreement or to put pressure on the employers to enter a collective bargaining process. This is known as the *Tarifvertragsbezogenheit* of the right to strike under German law.

- In 14 other Member States (Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, France, Greece, Hungary, Ireland, Luxembourg, Malta, Portugal and Slovenia), the exclusion of "purely political" strikes follows from a slightly broader definition of strikes as relating to the protection and promotion of workers social and economic interests, though not necessarily in the context of a collective bargaining process.

Finally, in the remaining five Member States (Austria, Finland, Italy, the Netherlands and Sweden), political strikes are explicitly allowed, generally as a result of court cases having considered them lawful.

The picture is a complex one, however. First, in most countries, the status of political strikes is unclear, due to the absence of clear legislation or established of case-law. Although strikes would not be deemed unlawful for the sole reason that they are addressing a governmental policy rather than putting pressure on a particular employer, it often remains unclear whether they need to present a connection to the social and economic interests of workers, or whether "purely political" strikes are protected. Secondly, the lines are often blurred between the different groups of States. In particular, while the first group of five States explicitly excludes political strikes, this does not imply that any strike including political messages (addressed to the government) is necessarily unlawful: provided the strike is not exclusively political, and is aimed chiefly at defending workers' interests, it may be considered lawful. And as regards the five States where political strikes have explicitly been treated as lawful, strikes still may have to relate to the social and economic interests of workers: while they can be addressed to the government rather than to any particular employer (or even to employers as a group, for instance in the context of a national-level social dialogue), they still may have to fall under objectives that unions may legitimately pursue.

Table 2: Status of political strikes[4]

Member State	Status of political strikes
Austria	The strike is lawful not only when it seeks to influence a collective bargaining process or to put pressure on the individual employer targeted, but also where it seeks to influence legislative reform, or to raise public awareness of specific issues.[5]
Belgium	While a strike does not necessarily have to be directed solely at the employer (the grievance can extend to an entire industry or even to national economic and industrial planning), a majority of the authors believe that the strike still should relate to the social and economic interests of workers.[6]
Bulgaria	According to Articles 16(1) and (7) of the Law on the Settlement of Collective Labour Disputes (LSCLD)[7], strikes pursuing goals contradicting the Constitution or "through which political demands are made" are illegal.
Croatia	Article 205(1) of the 2014 Labour Act provides that: "Trade unions shall have the right to call and undertake a strike in order to protect and promote the economic and social interests of their members or on the ground of non-payment of remuneration or compensation, or a part thereof, if they have not been paid by their maturity date."[8] Although protest strikes addressed to the government are not explicitly prohibited, this definition of the strike appears to exclude purely political strikes from the scope of the right to strike.
Cyprus	The right to strike is recognized provided it is related to a "trade dispute", defined as "any dispute between employers and workers, or between workers and workers, which is connected with the employment or non-employment, or

[4] This table is based on a number of sources, including Bernd Waas (ed), *The right to strike. A comparative view* (Kluwer Law International, Studies in Employment and Social Policy Series Volume 45, 2014); Wiebke Warneck, *Strike rules in the EU27 and beyond: A comparative overview*, Report 103 (Brussels: ETUI-REHS, 2007); and especially the series of "factsheets", updated in 2021, concerning the right to strike, prepared by the European Public Service Union (EPSU), available at: https://www.epsu.org/Article/right-strike-country-factsheets.

[5] EPSU, The right to strike in public services - Austria, Right to strike country factsheet (updated 2021) (by Nina Büttgen, updated by Diana Balanescu), see: https://www.epsu.org/sites/default/files/article/files/Austria%20-%20Right%20to%20strike%20in%20the%20public%20sector%20-%20factsheet%20upd%202021_0.pdf

[6] Filip Dorssemont, "A propos des sources et des limites du droit de grève en Belgique", in: Frédéric Krenc, *Droit de grève : actualités et questions choisies* (Bruxelles: Larcier, 2015, p. 7-34); EPSU, The right to strike in public services - Belgium, Right to strike country factsheet (updated 2021) (by Coralie Guedes, updated by Diana Balanescu) https://www.epsu.org/sites/default/files/article/files/Belgium - Right to strike in the public sector factsheet.pdf

[7] SG No. 21/13.3.1990, as amended by SG No. 7/24.1.2012.

[8] Labour Act (unofficial consolidated text of the Act) OG 93/14, 127/17, 98/19, 151/22 in force from 1 January 2023, available from: https://uznr.mrms.hr/wp-content/uploads/labour-act.pdf

	the terms of employment, or with the conditions of labour, of any person" (Article 2 of the Trade Union Laws as amended from 1965 to 1996 (71/1965)). This is seen to exclude purely political strikes.[9]
Czech Republic	Strikes are legal to the extent that they seek to protect the economic and social rights of workers. It is unclear, but doubtful, whether purely political strikes would be protected.[10]
Denmark	Strikes are lawful to the extent that the participating workers share a common purpose which is "fair and legal". The aim of the strike action must be deemed by the Labour Court to be of relevance to the organisation, which accordingly must have a genuine interest in the dispute in order to call for collective action. However, in practice, a political strike of short duration falls within the scope of the exemption set by the Labour Court and Industrial Arbitration Act, which prohibits fines for brief stoppages of work (Section 12(2) of the Labour Court Act No. 106 of 26 February 2008 and Law amending the Law on Labour and Industrial Arbitration No. 343 of 17 April 2012.).
Estonia	The 1993 Collective Labour Dispute Resolution Act (CLDRA)[11] does not give the right to submit political or other non-work-related demands as grounds for a collective dispute: political strikes are thus in principle prohibited. Trade unions may, however, submit any demands that are not related to working conditions for discussion at meetings, demonstrations and pickets in accordance with the Trade Union Act and the Public Meeting Act; moreover, if the participants of the main strike submit political demands in addition to the demands regarding working conditions, the strike can still be considered lawful.[12]
Finland	Strikes may be directed against the government or governmental policies are not *per se* unlawful: strikes may seek to influence political bodies. However, industrial action concerning matters regulated by a collective agreement or relating to rights disputes or disputes concerning the validity or enforcement of a collective agreement is unlawful since such action may breach the "peace clause" of collective agreements, and therefore work stoppages that (though

[9] Stamatina Yannakourou, *Κυπριακό Εργατικό Δίκαιο* [Cyprus Labour Law] (Nomiki Vivliothiki, 2016), p. 76.

[10] EPSU, The right to strike in public services - Czech Republic, Right to strike country factsheet (updated 2021) (by Diana Balanescu), available from: https://www.epsu.org/sites/default/files/article/files/Czech - Right to strike in the public sector factsheet.pdf.

[11] RT I 1993, 26, 442.

[12] Supreme Court, case No. 3-2-1-159-13, decision of 19 December 2013, Eesti Energia Narva Elektrijaamad AS-i hagi NARVA ENERGIA AMETIÜHINGU vastu streigi korraldamise õiguse puudumise tuvastamisek.

	ostensibly motivated also by political goals) concern work rearrangements within an undertaking have often been declared unlawful.[13]
France	As the purpose of political strikes is not to improve wages or working conditions, courts have ruled that they are an abuse of the right to strike and thus unlawful (Conseil d'Etat, 12 octobre 1956, *Demoiselle Coquant*, n°14163). However, a strike is lawful where it addresses the interests of workers, including where it is mixed with political claims, provided the latter are not predominant.[14] In a decision of 15 February 2006 for instance, the Court of Cassation considered that a strike directed against the reform of pensions was lawful, despite its political character, given that it remained chiefly in defence of the interests of workers.[15]
Germany	Only strike action aimed at the conclusion of a collective agreement is lawful, and political strikes are therefore in principle considered unlawful.[16] This is the *Tarifvertragsbezogenheit* requirement included in the definition of the right to strike under German law, which as detailed below, is considered incompatible with the European Social Charter.
Greece	Article 23(2) of the Constitution defines strike action as "a right to be exercised by lawfully established trade unions in order to protect and promote the financial and the general labour interests of working people". It follows from this provision and from Article 19(1) of Law No. 1264/1982 concerning the democratisation of the trade union movement and the protection of workers' trade union freedoms, that strikes must seek the protection and promotion of workers' economic, labour, trade union and social insurance interests (though they need not relate to a collective bargaining process). Purely political strikes directed against the State that do not involve employment-related demands are unlawful (Court of Appeal of Athens [Efetio Athinon], decision 1/1992). Like in France however, political strikes which are 'mixed', combining political and industrial motives, are protected.

[13] EPSU, The right to strike in public services - Finland, Right to strike country factsheet (updated 2021) (by Evdokia Maria Liakopoulou, updated by Diana Balanescu), available from: https://www.epsu.org/sites/default/files/article/files/Finland Right to strike in the public sector factsheet.pdf

[14] Cour de cassation (chambre sociale), arrêt du 10 mars 1961, JURITEXT0000006956441.

[15] Cour de cassation (chambre sociale), n°04-45.738, Bulletin 2006 V N° 65 p. 58.

[16] EPSU, The right to strike in public services - Germany, Right to strike country factsheet (updated 2021), see https://www.epsu.org/sites/default/files/article/files/Germany - Right to strike in the public sector -EPSU format.pdf

Hungary	Article XVII.(2) of the Basic Law (Constitution) guaranteesthe right to strike: 'Employees, employers and their organisations shall have the right, as provided for by an Act, to negotiate with each other and conclude collective agreements, and to take collective action to defend their interests, including the right of workers to discontinue work.' Under s 1(1) of the Act on Strikes (Act VII of 1989 on Strikes), which confirms the constitutional provision, the right to strike may be exercised only for the protection of workers' economic and social interests. Strikes of a purely political nature are therefore not protected (although the ILO database indicates that this question remains heavily disputed[17]).
Ireland	Section 8 of the Industrial Relations Act, 1990, defines a strike as a "cessation of work by any number or body of workers in combination or a concerted refusal or a refusal under a common understanding of any number of workers to continue to work for their employer intended as a means of compelling their employer to accept or not to accept terms or conditions of or affecting employment", and Section 10 of the Act confers immunity from prosecution or civil action for conspiracy where workers are taking industrial action in "contemplation of furtherance of a trade dispute". Despite this restrictive working, political strikes are considered lawful.[18]
Italy	Although strikes in principle should aim at the conclusion of a collective agreement, the Constitutional Court has recognised the principle of political strikes, unless their aim is to subvert the democratic system established by the Constitution (strikes aimed at overthrowing the constitutional order or at blocking or impeding the functioning of democratic institutions would also be offences under Articles 503 and 504 of the Criminal Code); the Supreme Court also (decision No. 16515 of 2004) considers political strikes to be protected under civil law, within these limits.[19]
Latvia	Article 23(1)4°, of the Strike Law of 23 April 1998 specifically provides that "A strike or strike application shall be

[17] See https://www.ilo.org/dyn/ceelex/en/f?p=14100:1100:0::NO::P1100_ISO_CODE3,P1100_SUBCODE_CODE,P1100_YEAR:HUN,,2019, para. 6.4.1.1.

[18] EPSU, The right to strike in public services - Ireland, Right to strike country factsheet (updated 2021) (by Cristina Inversi, updated by Diana Balanescu) https://www.epsu.org/sites/default/files/article/files/Ireland -Right to strike in the public sector factsheet.pdf

[19] EPSU, The right to strike in public services - Italy, Right to strike country factsheet (updated 2021) (by Coralie Guedes, updated by Diana Balanescu), available at: https://www.epsu.org/sites/default/files/article/files/Italy - Right to strike in the public sector factsheet.pdf

	recognized as illegal if: (...) the strike is initiated to express political demands, political support or political protest".[20] This leaves open the question, however, of whether strikes with mixed motives (seeking both to defend the interests of workers and to express a political message) are lawful.
Lithuania	Article 251(3), 3°, of the Labour Code (Law of 14 September 2016 No XII-2603) provides that a strike may be declared unlawful if it "was declared due to demands that were not put forward in the established procedure, or due to political or other demands irrelevant to the labour and employee-related interests of the strikers". Purely political strikes are thus unlawful; again however, this leaves open the question whether strikes with mixed motives are lawful.[21]
Luxembourg	Article 11(4) of the Constitution states that: "The law guarantees trade union freedom and organises the right to strike." The Court of Cassation has confirmed that workers could lawfully suspend the execution of the contract of employment in order to claim a wage increase without having to fear sanctions (Cass., 24 July 1952, PAS. L. 15. 355). The protection of the right to strike, however, does not extend to purely political strikes.[22]
Malta	The Employment and Industrial Relations Act (EIRA) XXII of 2002[23] provides for an immunity of trade unions and employers' associations from tort actions as a consequence of industrial action when the action is taken in "contemplation or furtherance of a trade dispute" (Articles 63 and 64 of the EIRA). This protection therefore does not extend to purely political strikes.
The Netherlands	The Dutch Supreme Court has held that organising a strike to put the Government under pressure could fall within the scope of Article 6(4) of the European Social Charter (which since 1986 is considered directly applicable by Dutch courts), as long as the strike aims at labour-related issues (e.g. the retirement age) that are usually subject of negotiations between trade unions and employers; the fact

[20] https://likumi.lv/ta/en/en/id/48074-strike-law.

[21] EPSU, The right to strike in public services - Lithuania, Right to strike country factsheet (updated 2021) (by Natalja Mickeviča, updated by Diana Balanescu), available at: https://www.epsu.org/sites/default/files/article/files/Lithuania - Right to strike in the public sector factsheet.pdf.

[22] EPSU, The right to strike in public services - Luxembourg, Right to strike country factsheet (updated 2021)(by Coralie Guedes, updated by Diana Balanescu), available at: https://www.epsu.org/sites/default/files/article/files/Lithuania - Right to strike in the public sector factsheet.pdf

[23] Available at: https://legislation.mt/eli/cap/452/eng/pdf.

	that the employer affected by the strike may not be able to influence decisions of the Government is immaterial.[24]
Poland	Article 17(1) of the Collective Labour Dispute Resolution Act (CLDRA) of 23 May 1991 states that: "A strike is a collective work stoppage by employees for the purpose of settling a dispute concerning interests" listed (in Article 1 of the same Act) as "working conditions, wages or social benefits as well as union rights and freedoms of employees or other groups of workers entitled to trade union membership". A strike may be called only as a last resort and only with the aim of concluding a collective agreement.
Portugal	While Law No. 65/77 lays down regulations on strike action and the rights and obligations associated with it, the right to strike is organized by Decree-Law No. 392/74 of 27 August 1974. Its provisions do not extend to purely political strikes.
Romania	Article 190(2) of Law No. 62/2011 on social dialogue explicitly provides that strikes may not seek political aims; strikes with "mixed" motives, however, including political demands but in the interest of workers, would be covered.
Slovak Republic	Section 16 of the Collective Bargaining Act (No. 2/1991) defines the conditions under which strikes may be resorted to in the context of a collective bargaining process; the definition does not appear to include purely political strikes.
Slovenia	Since Article 1(1) of the 1991 Law on Strikes/Strike Act defines a strike as an organised stoppage of work by workers, with the purpose of exercising economic and social rights and interests arising from work, purely political strikes are considered unlawful.
Spain	Article 11 of Royal Decree-Law 17/1977 explicitly provides that "a strike is illegal: a) When it is initiated or sustained for political reasons or for any other purpose unrelated to the professional interest of the affected workers."
Sweden	Article 14 of the Instrument of Government (Constitution) (1974:252) protects the right to strike, using a formulation ("A trade union or an employer or employers' association shall be entitled to take industrial action unless otherwise provided in an act of law or under an agreement") that suggests that the right to strike should aim at the protection of workers' interests, thus excluding strikes of a purely

[24] The leading cases decided by the Dutch Supreme Court (Hoge Raad) are *Enerco* (judgment of 31 October 2014) (ECLI:NL:HR:2014:3077) and *Amsta* (judgment of 19 June 2015) (ECLI:NL:HR:2015:1687).

	political nature.[25] While it appears from an interim judgment of the Labour Court of 1 June 2022 that political strikes could be protected, provided they do not result in a disproportionate infringment of the right of the employer to conduct a business,[26] such a conclusion would be premature as this case still awaits full resolution.

[25] EPSU, The right to strike in public services - Luxembourg, Right to strike country factsheet (updated 2021) (by Andrea Iossa, updated by Diana Balanescu), available at: https://www.epsu.org/sites/default/files/article/files/Sweden - Right to strike in the public sector.pdf.

[26] See the comment by Erik Sinander, available at: https://eapil.org/2022/07/08/the-swedish-labour-court-on-international-sympathy-actions/.

3. THE STATUS OF THE RIGHT TO COLLECTIVE ACTION UNDER EU LAW

3.1. The EU Charter of Fundamental Rights

Article 28 of the EU Charter of Fundamental Rights recognizes the right to collective bargaining and action:[27]

> *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.*

The importance of these guarantees in the EU was further acknowledged in the European Pillar of Social Rights, which was endorsed by the European Parliament (Parliament), the Council of the European Union (Council) and the European Commission (Commission) on 17 November 2017 at the Social Summit for Fair Jobs and Growth held in Gothenburg, before being approved the following month by the European Council, and now complemented by an Action Plan for its implementation, endorsed in March 2021 at the Porto Social Summit.[28] Principle 8 a) of the European Pillar of Social Rights states the following:

> *The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States.*

The scope of the right to collective action remained in dispute, however. Article 28 of the EU Charter of Fundamental Rights refers to this right as having to be protected "in accordance with Union law and national laws and practices", and the treaties provide only for cooperation between Member States as regards the right of association and collective bargaining between employers and workers,[29] specifically excluding the adoption of harmonisation measures as regards the right to strike.[30] The right to collective action nevertheless is protected under EU law, and it can be invoked, in particular, to justify restrictions to the fundamental economic freedoms also protected in the treaties. It is to this question that we turn next.

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27 OJ C 326, 26.10.2012, p. 391–407.

28 COM(2021)102 final, 4.3.2021.

29 Article 156 TFEU.

30 Article 153(5) TFEU.

3.2. The right to collective action and fundamental economic freedoms protected in the internal market

3.2.1. The *Viking* and *Laval* cases before the CJEU

The question of the scope of the right to strike was raised in the EU legal order in relation, in particular, to the economic freedoms of the treaties. In the important *Viking* case,[31] the International Transport Workers' Federation (ITF) and its local affiliate, the Finnish Seaman's Union (FSU), resorted to collective action in order to prevent Viking, a Finnish ferry boat operator, from re-flagging a Finnish vessel as an Estonian vessel to escape the application of Finnish employment laws and the applicable collective agreement.

The Court of Justice of the European Union (CJEU, Court) considered that such collective action, in the form of a strike and a boycott, should be treated as a restriction to the freedom of establishment under Article 43 EC (now Article 49 TFEU), since it has "the effect of making less attractive, or even pointless, […] Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State".[32] The Court acknowledged that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty, and that the protection of workers is one of the overriding reasons of public interest recognised in its case-law.

Referring to the social provisions of the EC Treaty, it also noted that the EU has "not only an economic but also a social purpose", which implied that "the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC [now Article 151 TFEU], inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour".[33] However, even if they pursue a legitimate aim compatible with the EC Treaty and are justified by overriding reasons of public interest, restrictions to freedom of establishment are only acceptable insofar as they are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary in order to attain it.

While the Court recognised the legitimacy for unions to seek to safeguard the rights of current employees of the vessel, it expressed the view that any collective action going beyond that objective would be disproportionate: resorting to strikes or boycotts to avoid reflagging would be unacceptable, in the eyes of the Court, if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat. Such would be the case, in particular, if the company concerned has agreed to a binding undertaking that the reflagging would not result in terminating the employment of any person employed by them at the time it is made, even if such undertaking does not require the renewal of short term employment contracts or if it does not prevent the redeployment

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31 Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, [2007] ECR I-10779.

32 Case C-438/05, para. 72.

33 Case C-438/05, para. 79.

of any employee on equivalent terms and conditions.[34] In other terms, collective action by unions may seek to *protect the acquired rights of existing employees*: it would be abusive if it served, instead, to *discourage the exercise of freedom of establishment* by companies seeking to relocate themselves to benefit from a more favourable regulatory environment.

The *Viking* judgment was soon followed by the companion judgment in *Laval*.[35] In *Laval*, the Court was asked by the Swedish Labor Court to deliver a preliminary ruling in a case opposing a Latvian contractor, Laval un Partneri Ltd., to a Swedish trade union. A subsidiary company to Laval intended to use Latvian posted workers on a construction site in the town of Vaxholm, for the renovation and extension of school premises. It intended to pay these workers less than the minimum amount stipulated in a collective agreement concluded between, on the one hand, the Swedish building and public works trade union, in its capacity as the central organisation representing building workers, and the central organisation for employers in the construction sector (Sveriges Byggindustrier). This collective agreement imposed a number of pecuniary obligations for the employers bound. These obligations, including on the hourly wage and other matters referred to in Article 3(1), first subparagraph, (a) to (g) of the 1996 Posted Workers Directive[36] such as working time and annual leave, went beyond those set out in the applicable Swedish legislation; indeed, some of them related to matters not referred to in that Article. Agreeing to the terms of this collective agreement would have extended the same obligations to the Laval company. However, Laval had signed, on 14 September and 20 October 2004, in Latvia, collective agreements with the Latvian building sector's trade union, of which 65% of its workers were members. None of the members of the Swedish trade unions parties to the collective agreement concluded with the Sveriges Byggindustrier were employed by Laval. The Laval company therefore considered that it should not conclude another, separate collective agreement for work to be performed in Sweden. Following the refusal of Laval to agree to the terms of the collective agreement proposed by the Swedish unions, a social conflict followed. It led ultimately to other trade unions boycotting all Laval's sites in Sweden. In February 2005, the town of Vaxholm requested that the contract between it and Baltic be terminated. A month later, Laval was declared bankrupt.

The main question submitted to the Court concerned the interpretation of the Posted Workers Directive and of Article 49 EC (now Article 56 TFEU), guaranteeing the freedom to provide services.[37] The 1996 Posted Workers Directive allowed the Member States which have no system for declaring collective agreements or arbitration awards to be of universal application to base themselves on collective agreements "which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which

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[34] See para. 82 of the judgment and the 10th question referred to the European CJEU by the the Court of Appeal (England and Wales) (Civil Division).

[35] Case C-341/05, Laval un Partneri Ltd., [2007] ECR I-11767. For useful commentaries, see Aravind R. Ganesh, 'Appointing Foxes to Guard Henhouses : The European Posted Workers' Directive', Columbia J. of Eur. L., vol. 15 (2008), p. 123; S. Deakin, 'Regulatory competition after Laval', Cambridge Yearbook of European Legal Studies, vol. 10 (2009), pp. 581-609; A.C.L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', Industrial Law Journal, vol. 37 (2008), p. 126; J. Malmberg and T. Sigeman, 'Industrial Action and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European CJEU', Common Market Law Review, vol. 45 (2008), p. 1115.

[36] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

[37] The Laval case also concerned the recognition of collective agreements concluded in one Member State by another Member State in the context of the transnational provision of services, and the right to equal treatment without discrimination on grounds of nationality. These aspects of the case are not discussed here, since they are irrelevant to the present study.

are applied throughout national territory", provided that their application to the service providers established abroad does not result in any discrimination between them and national undertakings in the same sector (Article 3(8)). The Court noted however that in the decentralised Swedish system, management and labour are entrusted with the task of "setting, by way of collective negotiations, the wage rates which national undertakings are to pay their workers and that, as regards undertakings in the construction sector, such a system requires negotiation on a case-by-case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned".[38] Therefore, the rates of pay set by existing collective agreements cannot be imposed on service providers established in other Member States, who cannot be obliged to negotiate with the local unions to that effect.

The Court noted that, while the Posted Workers Directive provides for the protection of posted workers by imposing compliance with certain mandatory requirements imposed under the host Member State's legislation, it did not allow the host State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond such mandatory rules for minimum protection (as listed in Article 3(1), first subparagraph, (a) to (g), Directive 96/71).[39]

Turning then to the requirements of Article 49 EC (now Article 56 TFEU) and to the question of whether the collective action resorted to by the Swedish unions was in violation of this provision, the Court took the view that "the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC [Article 56 TFEU]".[40]

The Court acknowledged that the right to take collective action is a fundamental right recognised under Community law: such right, the Court noted,

> is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC [now Article 151 TFEU] – and Convention No 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – and by instruments developed by those Member States at Community level or in the context of the EU, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC [Article 151 TFEU], and the Charter of Fundamental Rights of the EU proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).[41]

[38] Case C-341/05, para. 69.

[39] Case C-341/05, paras. 80-81.

[40] Case C-341/05, para. 99.

[41] Case C-341/05, para. 90.

The right to take collective action thus may constitute an overriding reason of public interest justifying, in principle, a restriction of one of the fundamental freedoms guaranteed by the Treaty.[42] This right may be subject to certain restrictions, however, and must be exercised in accordance with national and EU law. The Court defines its role as having to balance the right to collective action against the freedom to provide services:

> Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC [Article 151 TFEU], inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.[43]

The question of whether unions had abused the right to collective action was central to the Court's deliberations. The Court took the view that the obstacle to the freedom to provide services resulting from the collective action launched by the Swedish unions could not be justified with regard to the objective of improving social protection, since, "with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State".[44] In other terms, collective action cannot seek to impose obligations on employers beyond the obligations the host State must impose in accordance with Article 3(1) of the Posted Workers Directive. The Court thus concluded that the blockade imposed by the Swedish unions on the construction side of the company's subsidiary violated Community law and could not be allowed: Article 49 EC (Article 56 TFEU) and Directive 96/71 preclude a trade union from resorting to collective action in order to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of the said directive, more favourable conditions than those resulting from the relevant legislative provisions in the State concerned, while other terms relate to matters not referred to in Article 3 of the directive.

Following the answer of the CJEU, the Swedish Labour Court decided to impose on the Swedish unions that they pay 342 000 euros in damages to Laval's Latvian trustee in bankruptcy, to compensate for the industrial action they had taken.[45] The Swedish legislature also drew the consequences from the judgment.[46] In 2010, legislative amendments colloquially known as the "Lex Laval" brought changes to the Co-determination Act (1976:580) and the Foreign Posting of Employees Act (1999:678). In particular, Section 5a of the latter Act imposed strict limitations on the exercice of collective action by unions. It provided that "[an] industrial action against an employer for the purpose of regulating

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42 Id., para. 103. See, e.g., Joined Cases C-369/96 and C-376/96, Arblade and Others [1999] ECR I-8453, paragraph 36; Case C-165/98 Mazzoleni and ISA [2001] ECR I-2189, paragraph 27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, Finalarte and Others [2001] ECR I-7831; Case C-36/02, Omega [2004] ECR I-9609, paragraph 35.

43 Case C-341/05, para. 105.

44 Case C-341/05, para. 108.

45 Decision. 89 of 2 December 2009 (Case No. A 268/04).

46 For a comprehensive assessment, see N. Bruun and J. Malmberg, "Lex Laval: Collective Actions and Posted Workers in Sweden", in R. Blanpain & F. Hendrickx (eds), Labour Law Between Change and Tradition, Liber Amicorum Antoine Jacobs (Kluwer, Alphen aan den Rijn, 2011), pp. 21-33.

conditions for posted workers through a collective bargaining agreement may [in principle] only be taken if the conditions demanded: 1. correspond to the conditions contained in a collective bargaining agreement concluded at central level that are generally applied throughout Sweden to corresponding workers within the sector in question; 2. relate only to a minimum rate of pay or other minimum conditions [as limitatively enumerated in section 5 of the Act]; and 3. are more favourable for the workers than those prescribed by Section 5". Moreover, such industrial action "may not be taken if the employer shows that the workers, as regards pay or within the areas referred to in Section 5, have conditions that in all essential respects are at least as favourable as the minimum conditions in such a central collective bargaining agreement". In order to rely on this protection from industrial action, the employer therefore does not need to be bound by a collective agreement with a trade union in its own country, nor must it prove that it is legally required to comply with the minimum conditions concerned: it is sufficient that the employer proves that such conditions benefit in fact the workers employed.[47]

3.2.2. The reaction of the International Labour Organisation supervisory bodies

It is doubtful whether the position of the CJEU in the *Laval* and *Viking* cases is compatible with the obligations of the Member States under the human rights instruments they have ratified. The supervisory mechanisms of the International Labour Organization (ILO) have expressed their concerns in this regard. In an Observation addressed to the United Kingdom and Northern Ireland less than a year after *Laval* and *Viking* were decided, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)[48] received a complaint filed by the British Airline Pilots' Association (BALPA). The complaint, dated 22 October 2008, explained that after the members of the BALPA voted to go on strike, following a decision by their employer, British Airways (BA), to set up a subsidiary company in other EU States, BA sought a judicial injunction prohibiting the strike, based upon the argument that the action would be illegal under *Viking* and *Laval*, and claimed that, should the work stoppage take place, it would claim damages estimated at £100 million per day. This led the union to suspend to decision to go on strike. In its Observation adopted in response to the complaint, the CEACR expressed its "serious concern" that "the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised". It explained:

> "While taking due note of the Government's statement that it is premature at this stage to presume what the impact would have been had the court been able to render its judgement in this case given that BALPA withdrew its application, the Committee considers, to the contrary, that there was indeed a real threat to the union's existence and that the request for the injunction and the delays that would necessarily ensue throughout the legal process would likely render the action irrelevant and meaningless. Finally, the Committee notes the Government's statement that the impact of the ECJ judgements is limited as it would only concern cases where freedom

[47] See European Committee of Social Rights, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, para. 91.

[48] The Committee of Experts is made up of independent, impartial jurists who consider whether a member State has complied with its obligations as a signatory to Conventions No. 87 or No. 98. The CFA is a tripartite committee of the Governing Body, with members (representing governments, workers and employers) having practical experience of labour issues. It decides an average of 60 cases a year, which involve specific factual issues.

> of establishment and free movement of services between Member States are at issue, whereas the vast majority of trade disputes in the United Kingdom are purely domestic and do not raise any cross-border issues. The Committee would observe in this regard that, in the current context of globalisation, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating. The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention."[49]

With regard specifically to the impact in Sweden of the *Laval* judgment CJEU, the CEACR took the view that the decision adopted by the Swedish courts, that followed the receipt of the answer of the CJEU in the *Laval* case, raised serious concerns under the 1948 ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise and under the 1949 ILO Convention (No. 98) concerning the Right to Organise and to Collective Bargaining.[50] The most important concern of the CEACR was that, as a result of the legislative changes made in Sweden, unions have been chilled from exercising the right to call for industrial action.[51] As regards the damages imposed on the Swedish unions, the CEACR noted that "the union in question has been held liable for an action that was lawful under national law and for which it could not have been reasonably presumed that the action would be found to be in violation of European Law". It underlined that, when examining the permissible restrictions to the right to strike, it had never in the past "included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services": in fact, the ILO Committee of Experts was challenging the very idea that the right to take collective action could be balanced against the fundamental economic freedoms as stipulated under the EU treaties. Moreover, while expressing its agnosticism as regards the abolition of the 'Lex Britannia', it remarked that the new version of the Foreign Posting of Employees Act in fact denied posted workers the possibility to choose which union should defend their interests, since the amendments to the Act not only restricted the possibility to have recourse to collective action to the cases where the minimum conditions of the 1996 Posted Workers Directive are at stake, but also prohibited unions from taking industrial action "even if they have members working in the enterprise concerned and regardless of whether a collective agreement covers the workers concerned, provided that the employer can show that the employees' terms and conditions are as favourable as the minimum conditions in the central collective agreement".[52] In other terms, the foreign nationality of the company as such could be an obstacle to the industrial action, even though the workers posted in Sweden by that foreign company may have preferred to join a Swedish union and to have that union call for an industrial action against the company concerned.

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49 Observation (CEACR) adopted 2009, published 99th ILC session (2010).

50 International Labour Conference, 102nd Session, 2013 Report of the Committee of Experts on the Application of Conventions and Recommendations (Sweden), ILC.102/III(1A), p. 176.

51 Id.

52 Id., p. 177.

3.2.3. The reaction of the European Committee of Social Rights

The Swedish unions also filed a complaint before the European Committee of Social Rights, under the Council of Europe's Revised European Social Charter.[53] The complaint alleged in particular that the amendments to its labor legislation were in violation of the undertakings of Sweden under Article 6 (2) and (4) of the Revised European Social Charter, concerning respectively the duty to promote collective bargaining and the right of workers and employers to resort to collective action.[54]

In its decision of 3 July 2013, the European Committee of Social Rights found that the restrictions to the conclusion of collective agreements were such that the situation in Sweden was not in conformity with Article 6(2) of the Charter.[55] It also considered that, whereas the right to resort to collective action is not absolute and may be limited, for instance, to protect public order or the rights and freedoms of others (such as the right of co-workers to work, or the right of employers to engage in a gainful occupation), "national legislation which prevents *a priori* the exercise of the right to collective action, or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards would not be in conformity with Article 6§4 of the Charter, as it would infringe the fundamental right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers".[56] In a thinly veiled allusion to the balancing exercise achieved by the CJEU between the freedom to provide services and the right to resort to collective action, the Committee added:

> "[T]he facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers."[57]

It is probably an overstatement to say that the CJEU treats economic freedoms as having "a greater a priori value than core labour rights". However, what the European Committee of Social Rights does correctly identify is that, due to the respective positions of the CJEU of the on the one hand, and of the

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[53] The European Social Charter was initially adopted in Turin on 18 October 1961, to complement, in the field of economic and social rights, the European Convention on Human Rights. A Revised European Social Charter was adopted on 5 May 1996, adding a number of rights to the original instrument. Some Member States of the Council of Europe have immediately joined the Revised ESC: this is the case, in particular, for States of Central and Eastern Europe, who acceded to the Revised European Social Charter when joining the Council of Europe. Some Member States who were parties to the 1961 European Social Charter acceded to the new instrument after its adoption. Finally, some Member States are bound by the 1961 European Social Charter and have not joined the Revised European Social Charter. Article 6(4) of the European Social Charter, however, has not been amended when the Revised European Social Charter was adopted.

[54] The complaint also invoked Article 19(4) of the Charter, alleging a violation of the right of migrant workers to equal treatment, and the obstacles to the right to collective bargaining which resulted from the amendments introduced in 2009 to the Foreign Branch Offices Act (1992:160) and the Foreign Branch Offices Ordinance (1992:308), which removed the obligation to have a legal representative in Sweden when they conduct economic activities in Sweden for companies within the European Economic Area. These dimensions of the case need not concern us here.

[55] Id., para. 116.

[56] Id., para. 120.

[57] Id., para. 122.

European Committee of Social Rights itself on the other hand, the balancing exercise proceeds rather differently in the two instances: whereas, for the CJEU, the resort by unions to industrial imposes a restriction to the freedom to provide services (or, at least, to the attractiveness of exercising such freedom), so that collective action is seen as allowable only to the extent it is not disproportionate, the Committee assesses whether the restriction imposed to collective action in the name of complying with EU law can indeed be justified. In theory, "balancing" should erase out such differences in framing. In practice however, the framing does matter: it is telling, for instance, that the CJEU would never ask whether the freedom to provide services has been disproportionately affecting the right of unions to resort to collective action.[58]

[58] Other questions addressed in the decision of the European Committee of Social Rights are not examined here. For a fuller treatment, see, inter alia, Marco Rocca, "A clash of kings - The European Committee of Social Rights on the 'Lex Laval' … and on the EU framework for the posting of workers", European Journal of Social Law, vol. 3 (2013), pp. 217-232.

4. THE SCOPE OF THE RIGHT TO COLLECTIVE ACTION

4.1. The sources of Article 28 of the EU Charter of Fundamental Rights

The Explanation appended to Article 28 of the Charter [59] states the following:

> "This 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. 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."

The three instruments cited in the Explanation to Article 28 of the Charter of Fundamental Rights either explicitly refer to the right to collective action, including strikes, or have been interpreted as guaranteeing a right to collective action. However, the nuances between these instruments are important to acknowledge.

4.1.1. The European Social Charter

Article 6 of the European Social Charter includes a paragraph 4 under which the States parties have pledged, "[w]ith a view to ensuring the effective exercise of the right to bargain collectively", to recognise the "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into." [60] At the time of its adoption in 1961, the European Social Charter was the first international human rights instrument explicitly recognising the right to strike. It links the right to strike with the right to collective bargaining, however, rather than to freedom of association or the right to form and join unions. (Indeed, Article 5 of the European Social Charter, which protects freedom of association, is silent on the right to strike.) This is in contrast with the position adopted since 1952 by ILO's Committee on Freedom of Association Committee (CFA), which takes the view that "the right to strike and that of organizing trade union meetings are essential elements of trade union freedom". [61]

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[59] For the text of the Explanations, see OJ C 303 of 14.12.2007, p. 17. The Explanations to the Charter, which are "drawn up as a way of providing guidance in the interpretation of this Charter", "shall be given due regard by the courts of the Union and of the Member States" (Article 52(7) of the Charter).

[60] ETS No. 35 (signed in Turin on 18.10.1961). The Revised European Social Charter, (ETC No. 163, signed on 3.5.1996), uses the same wording. For a detailed comment, S. Clauwaert, "The right to collective action (including strike) from the perspective of the European Social Charter of the Council of Europe", *Transfer*, vol. 22(3), pp. 405-411.

[61] R. Ben-Israel, International Labour Standards: The Case of Freedom to Strike (Deventer: Kluwer, 1988), pp. 64-66; T. Novitz, International and European Protection of the Right to Strike (Oxford: Oxford Univ. Press, 2003), p. 192.

As such, Article 6(4) of the European Social Charter appears on its face to be more restrictive in its recognition of the right to strike than its recognition by the ILO's CFA: it seems to limit such recognition to instances when workers seek to put pressure on an employer in the context of a collective bargaining process. This restriction has been largely nullified, however, by the European Committee of Social Rights, which has broadened the notion of collective bargaining to any kind of social dialogue between management and labour: "the right to strike", according to the ECSR, "should be guaranteed in the context of any negotiation between employers and employees in order to settle an industrial dispute. Consequently, prohibiting strikes not aimed at conclusion a collective agreement is not in conformity with Article 6 § 4".[62] In conclusions related to Germany, the European Committee of Social Rights explicitly rejected a narrow reading of this provision based on the *Tarifvertragsbezogenheit* included in the definition of the right to strike under German law: it noted that "there are many circumstances which, apart from any collective agreement, call for 'collective bargaining', such as when dismissals have been announced or are contemplated by a firm and a group of employees seeks to prevent them or to serve the re-engagement of those dismissed. Any bargaining between one or more employers and a body of employees (whether *de jure* or *de facto*) aimed at solving a problem of common interest, whatever its nature may be, should be regarded as 'collective bargaining' within the meaning of Article 6."[63]

While underlining that Article 6(4) of the European Social Charter could not be relied upon to "justify strike action taken for political ends", the ECSR confirmed in its more recent case-law that the banning of strikes which are not concerned with the conclusion of collective agreements (as according to the interpretation by German courts of Article 9(3) of the Constitution) is incompatible with this provision of the Charter.[64] This suggests that the right to strike is guaranteed under the European Social Charter so long as it is resorted to in order to defend the economic or social interests of workers, whether or not in connection with a process of collective bargaining. It is however doubtful whether this extends the right to strike to "political strikes", in protest of the action of the government or to seek a legislative reform, since the ECSR limits its reading of the ambit of collective action under Article 6(4) to disputes between workers and employers.[65] A reading of Article 6(4) ESC extending to political strikes could be justified, however, in situations where the protests are directed against political weaking collective bargaining: that, at least, was the interpretation of the Dutch Supreme Court (*Hoge Raad*) in a landmark decision of 30 May 1986 concerning a strike on the Dutch railroad in 1983, in which it directly applied Article 6 § 4 of the European Social Charter.[66]

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62 *Digest of the case- law of the European Committee of Social Rights* (Strasbourg: Council of Europe, September 2008), p. 56.

63 *Digest of the case law of the European Committee of Social Rights* (Strasbourg: Council of Europe, September 2008), para. 199 (referring to Conclusions IV, Germany, p. 50).

64 Conclusions XX-3 (Germany) (2014); and Conclusions XXI-3 (Germany) (2018).

65 Filip Dorssemont, "Article 6. The right to bargain collectively. A matrix for industrial relations", in N. Bruun, Kl. Lörcher, I. Schömann and St. Clauwaert (eds), The European Social Charter and the Employment Relation (Oxford and Portland: Bloomsbury, 2017), pp. 249-288, at p. 273.

66 Hoge Raad, 30 May 1986, nr. 12698, NJ 1986, 688 Spoorwegstaking.

4.1.2. The Community Charter of the Fundamental Social Rights of Workers

The second source cited in the Explanation appended to Article 28 of the Charter of Fundamental Rights is the Community Charter of the Fundamental Social Rights of Workers, proclaimed at the European Summit convened in Strasbourg on 9 December 1989 by 11 of the then 12 Member States (with the exception of the United Kingdom).[67]

This "Charter", which remains a non-binding political declaration, includes a paragraph 13 which provides that "The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements". Although this paragraph is separate from the paragraph (12) in which the Community Charter of the Fundamental Social Rights of Workers refers to the right to negotiate and conclude collective agreements, the reference in paragraph 13 to "conflict of interests" does suggest that the right to collective action, including the right to strike, does not extend to situations unrelated to "conflicts of interests" between workers and employers.

4.1.3. The European Convention on Human Rights

The third source referred to in the Explanations to Article 28 of the EU Charter of Fundamental Rights is Article 11 of the European Convention on Human Rights. This provision guarantees to each individual "the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests".

Article 11 ECHR is therefore silent about the right to strike (as it is, indeed, about the right to collective bargaining). The European Court of Human Rights however, the ultimate interpreter of the Convention, took the view in the *UNISON* case of 2002 that "Article 11 may be regarded as safeguarding the freedom of trade unions to protect the occupational interests of their members", and it considered that resorting to strike, while not the *only* means a union has at its disposal to ensure the protection of the interests of its members, was at least *one* means of doing so: it thereby brought strikes under the protection of Article 11 ECHR, noting that "the prohibition of the strike must be regarded as a restriction on the applicant's power to protect those interests and therefore discloses a restriction on the freedom of association guaranteed under [Article 11, § 1, ECHR]".[68]

In the subsequent case of *Dilek and Others v. Turkey*, in which the applicants had left their jobs for a period of a few hours in protest against their working conditions in the public sector (they were in charge of collecting toll fees, and the car drivers therefore did not pay such fees during a few hours), the Court considered that, "without speculating on the extent to which Article 11 of the Convention grants the right to strike and what is the definition of this right in the context of this Article, […] the

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67 COM(89) 471 final.

68 Eur. Ct. HR (3rd section), *UNISON v. the United Kingdom*, Appl. No. 53574/99, decision of 10 January 2002 (inadmissibility). The Court considered, however, that the application was manifestly ill-founded, since "the impact of the restriction on the [UNISON union's] ability to take strike action has not been shown to place its members at any real or immediate risk of detriment or of being left defenceless against future attempts to downgrade pay or conditions". In the case of *Schmidt and Dahlström v. Sweden*, the Court had already taken the view that, while calling for a strike is one of the most important means unions have at their disposal to defend the interests of their members, a strike is not the only means for them to do so: it therefore rejected the view expressed by the applicants that the right to strike is an "organic right" included in Article 11 ECHR. See Eur. Ct. HR, *Schmidt and Dahlström v. Sweden*, Appl. No. 5589/72, judgment of 6 February 1976 (Series A, No. 21), para. 36.

slowdown in work of the applicants for a duration of three hours could be considered as general collective action in the context of the exercise of trade union rights", thus falling under the ambit of Article 11 ECHR.[69] Perhaps paradoxically, while Article 11 ECHR is not explicit about the right to strike, the protection provided of this right by the European Court of Human Rights is on its face (as regards the scope of the right to strike) broader than under Article 6 § 4 of the European Social Charter, because it is not linked to the negotiation and conclusion of collective bargaining agreements ; it remains linked, however, to the protection of the interests of the workers resorting to a strike (Article 11 ECHR speaks of the individual's right to form and to join trade unions "for the protection of his interests").

In another case concerning Turkey, decided in 2009, the European Court of Human Rights noted: "What the Convention requires is that the legislation allows unions, in accordance with arrangements not contrary to Article 11, to fight for the defense of the interests of their members (Schmidt and Dahlström v. Sweden, February 6, 1976, §§ 34 and 36, series A no. 21; Belgian National Police Union v. Belgium, October 27, 1975, § 39, series A no. 19; Swedish Union of Locomotive Drivers v. Sweden, February 6, 1976, § 40, series A no. 20). [...] Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests [...]. The Court also observed that the right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights".[70] The recognition of the role of the right to strike in unions' protection of its members' interests was further confirmed in the case *Hrvatski Lijecnicki Sindikat v. Croatia*, which concerned a ban on strike action by a trade union of medical practitioners who wished to enforce an annex to a collective agreement for the healthcare sector.[71]

[69] Eur. Ct. HR (2nd section), *Dilek and Others v. Turkey*, Appl. Nos. 74611/01, 26876/02 and 27628/02, judgment of 17 July 2007, para. 57 (This author's translation. The official French text reads: "sans spéculer sur le point de savoir dans quelle mesure l'Article 11 de la Convention octroie le droit à la grève et quelle est la définition de ce droit dans le cadre de cet Article, la Cour estime que le ralentissement de travail des requérants pour une durée de trois heures pourrait être considéré comme une action collective d'ordre général dans le contexte de l'exercice des droits syndicaux »).

[70] Eur. Ct. HR, *Enerji Yapi-Yol Sen v Turkey*, Appl. no. 68959/01, Judgment of 21 April 2009, para. 24.

[71] Eeur. Ct. HR, *Hrvatski Lijecnicki Sindikat v. Croatia*, Appl. No. 36701/09, Judgment of 27 November 2014, paras. 56-60.

4.2. The right to collective action under international human rights law and international labour law

4.2.1. The relevance of international human rights treaties and ILO conventions

It is striking that the Explanation to Article 28 of the EU Charter of Fundamental Rights abstains from making references to the relevant instruments adopted within the United Nations or the ILO. It cites neither the International Covenant on Economic, Social and Cultural Rights (ICESCR) nor the International Covenant on Civil and Political Rights (ICCPR), although Articles 8 and 22 of the respective covenants are directly relevant to the right to collective action[72]; nor does it refer to ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize (1948) or to ILO Convention (No. 98) concerning the Right to Organize and Collective Bargaining (1949).

The lack of such references to the relevant UN or ILO instruments is consistent, however, with the general reluctance of the drafters of the Explanations to the Charter to refer to such instruments, with the exception of certain selective references to the International Covenant on Civil and Political Rights and to the Convention on the Rights of the Child,[73] as well as to the 1951 Geneva Convention on the Status of Refugees, which has a privileged position in Union law.[74]

These instruments remain relevant, however, for the interpretation of the EU Charter of Fundamental Rights, which should be read in the light of general international human rights law. In addition, the human rights instruments which all EU Member States have joined are in principle instruments from which the CJEU of the may seek inspiration in order to develop the general principles of Union law which it upholds in accordance with Article 6(3) of the EU Treaty. Indeed, in developing general principles of EU law, the CJEU considers that it may seek inspiration not only from the domestic constitutions of the EU Member States, but also from "international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories", which "can supply guidelines which should be followed within the framework of Community law".[75] In other terms, fundamental rights as protected in the EU legal order are not limited to the partial codification of these rights in the Charter: the EU treaties explicitly provide a mandate to the CJEU to develop fundamental rights beyond the Charter, in order to avoid situations in which the EU Member States would have to choose between complying with EU law or remaining faithful to their commitments under the human rights instruments they have ratified.

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72 Both Article 8 ICESCR and Article 22 ICCPR contain a common paragraph 3 which, in the form of a "non prejudice" clause, refer to International Labour Organisation Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize.

73 The Explanations to Articles 19 and 49 of the Charter do include references to the International Covenant on Civil and Political Rights; and the Explanations to Article 24 of the Charter make an explicit reference to the Convention on the Rights of the Child as a whole.

74 The 1951 Convention on the Status of Refugees is referred to in the Treaty on the Functioning of the European Union (TFEU) as having to guide the Union's common policy on asylum, subsidiary protection and temporary protection (Artide 78(1) TFEU). The CJEU has reiterated, on various occasions, that rules of EU law dealing with asylum must be interpreted in the light of the Geneva Convention (see, inter alia, Joined Cases C-411/10 and C-493/10, *N.S. and Others* [2011] ECR I-13905, paragraph 75; Case C-364/11 *Abed El Karem El Kott and Others* [2012] ECR, paragraph 43; Case C-528/11, *Zuheyr Frayeh Halaf* (EU:C:2013:342), para. 44).

75 Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, para. 13 (emphasis added).

4.2.2. International human rights law

Under Article 8 ICESCR, the States Parties to that Covenant (including all EU Member States) undertake to ensure the right of everyone to form and join trade unions "for the promotion and protection of his economic and social interests". This provision also guarantees the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations, as well as the right of trade unions to function freely. Finally, Article 8 ICESCR guarantees "the right to strike, provided that it is exercised in conformity with the laws of the particular country" (Article 8(1)(d)).

Article 22 ICCPR, in turn, guarantees the right of everyone to freedom of association with others, including the right to form and join trade unions for the protection of his interests. Although this provision is more succint than Article 8 ICESCR and does not refer explicitly to the right to strike, the Human Rights Committee, established in order to supervise compliance with the ICCPR, has interpreted Article 22 ICCPR to include a duty to guarantee "workers' freedom of association in practice, including the right to organize, the right to collective bargaining and the right to strike",[76] and to "lift the undue limitations on the right to strike".[77]

Under these instruments, the right to strike is therefore directly protected as a legitimate exercise of union rights. During the negotiation of the International Covenant on Economic, Social and Cultural Rights, the dominant view was that the right to form and join trade unions would remain theoretical without recognising also the right to strike. Consistent with this view, the expert bodies tasked with supervising compliance with the covenants consider that the right to collective bargaining and the right to strike should be considered essential to the effective exercise of the freedom to form and join trade unions: it is in order to obtain concessions from the other social partner that workers' and employers' organisations alike form unions, and for workers, the right to strike, which Article 8(1)(d) ICESCR mentions explicitly, is a key tool to exercise pressure and obtain higher wages or better working conditions.

Both the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have therefore sought to protect the right to strike in their review of the implementation of the ICESCR and the ICCPR by the States parties.[78] They have insisted, in particular, that the regulatory framework should define the right to engage in union activities, including the right to strike, with sufficient clarity, in order to avoid that workers refrain from engaging in such activities out of fear of reprisals.[79] Such a "chilling effect" may be particularly important where broadly worded criminal provisions, referring for instance to terrorist activities or to the "obstruction of business", are used to prosecute trade unionists or workers participating in strikes.[80] While agreeing that the preservation of essential services may justify restrictions to the right to strike,[81] they have also insisted that such essential services should be

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76 CCPR/C/DOM/CO/6 (2018) (Dominican Republic), para. 32.

77 CCPR/C/BLR/CO/5 (2018) (Belarus), para. 55, d).

78 For the Committee on Economic, Social and Cultural Rights, see, e.g., E/C.12/KEN/CO/1 (2008) (Kenya), para. 19; E/C.12/BEL/CO/4 (2013) (Belgium), para. 13. For the Human Rights Committee, see, e.g., CCPR/C/EST/CO/3 (2010) (Estonia), para. 15; CCPR/C/BLR/CO/5 (2018) (Belarus), para. 55, d); CCPR/C/GIN/CO/3 (2018) (Guinea), para. 46; CCPR/C/DOM/CO/6 (2018) (Dominican Republic), para. 32.

79 E/C.12/TKM/CO/2 (2018) (Turkmenistan), paras. 25-26; E/C.12/ITA/CO/5 (2015) (Italy), paras. 32-33.

80 E/C.12/ESP/CO/6 (2018) (Spain), paras. 28-29; E/C.12/KOR/CO/4 (2017) (Republic of Korea), paras. 38-39; E/C.12/AUS/CO/5 (2017), paras. 29-30; CCPR/C/GTM/CO/4 (2018) (Guatemala), paras. 36-37; CCPR/C/KAZ/CO/2 (2016) (Kazakhstan), para. 54, (a).

81 E/C.12/CPV/CO/1 (2018), para. 37.

understood restrictively, as services the interruption of which would endanger the life, personal safety or health of whole or part of the population.[82] The Committee on Economic, Social and Cultural Rights has expressed its concern in certain situations where the regulatory framework provided broad powers of requisition to the public authorities in the event of strikes, going beyond the need to preserve essential services.[83] It has also found that restrictions to the right to strike of schoolteachers or of workers in the railway sector could not be justified by invoking the "essential" nature of the service that they provide.[84]

The precise scope of the right to strike remains controversial. The insertion of the phrase "for the promotion and protection of his economic and social interests" following the reference, in Article 8 ICESCR, to the right of everyone to form and join trade unions, can be seen as a way to limit that scope. This choice was debated during the drafting of the ICESCR. Belgium had proposed not to include is, arguing that trade union rights "should be absolute, and independent of the purpose sought by the individual"; other delegates involved in the negotiation retorted that unions should not be allowed to exercise their rights to involve themselves in general debates about social and economic policies and legislation.[85] However, since the wording finally agreed upon in Article 8(1)(a) ICESCR (the right to form and join unions "for the promotion and protection of his economic and social interests") in fact seeks to provide an expansive protection of the right (which should be allowed to be exercised not only in order to *protect* one's interests, but also to *promote* them), commentators take the view that "only organizations pursuing 'purely political' issues, detached from workers' interests, would fall outside the scope of Article 8, in which case it would be an artifice to characterize them as trade unions in any case".[86]

This reference in Article 8(1), a) of the ICESCR to "the promotion and protection of his economic and social interests" would appear to also influence the scope of the right to strike. During the negotiation of Article 8 ICESCR, Iran expressed a concern that it might be difficult to distinguish "between strikes engineered by political intriguers and those started to promote the real economic and social interests of the workers".[87] However, even if that interpretation were to prevail, it still would allow for the protection of strikes directed at the government, in protest of certain governmental policies or legislative reforms, provided that such protests relate to the promotion and defence of the rights of workers.

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82 Compilation of decisions of the Committee on Freedom of Association (International Labour Organisation: Geneva, 2018), para. 1417.

83 E/C.12/BGD/CO/1 (2018) (Bangladesh), paras. 42-43 (concerning "the prohibition of strikes or lockouts under broad and undefined circumstances, such being considered as posing a serious hardship to public life or prejudicial to the national interest, and in new establishments owned by, or established in collaboration with, foreigners"); E/C.12/CAF/CO/1 (2018) (Central African Republic), para. 32; E/C.12/KOR/CO/4 (2017), paras. 38-39.

84 E/C.12/DEU/CO/6 (2018) (Germany), paras. 44-45 (teachers); E/C.12/RUS/CO/6 (2017) (Russian Federation), paras. 34-35 (railway workers).

85 See M. Craven, The International Covenant on Economic, Social and Cultural Rights (Oxford: Oxford Univ. Press, 1993), p. 253; and B. Saul, D. Kinley and J. Mowbray, The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases, and Materials (Oxford: Oxford Univ. Press, 2014), p. 502.

86 Saul, et al., The International Covenant on Economic, Social and Cultural Rights, pp. 502-503, citing Craven, The International Covenant on Economic, Social and Cultural Rights, p. 253.

87 Saul, et al., The International Covenant on Economic, Social and Cultural Rights, p. 576.

4.2.3. The instruments of the International Labour Organization

As already noted, the Explanation to Article 28 of the EU Charter of Fundamental Rights also omits any reference to the corresponding ILO instruments, in particular ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize of 1948, and ILO Convention (No. 98) concerning the Right to Organize and Collective Bargaining of 1949.

These omissions too are surprising, since these ILO instruments are the most explicit about union rights. Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize essentially protects the right of workers and employers to establish and, "subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization" (Article 2), as well as the right of organizations set up "for furthering and defending the interests of workers or of employers" (Article 10) to "draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes" (Article 3). Under Convention (No. 98) concerning the Right to Organize and Collective Bargaining, States are committed to protect individuals from anti-union discrimination, and to take measures necessary "to encourage and promote the full development and utilisation of machinery for voluntary negotiation 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" (Article 4).

Neither of these ILO instruments provide an explicit recognition of the right to strike, and whether or not the right to strike is implicit in the union rights they protect has been highly controversial within the organisation, starting in 1989, but especially since the 101st session of the International Labour Conference held in 2012.

The very recognition of the right to strike as a right protected under the ILO conventions has recently been disputed. Despite the absence of an express provision protecting the right to strike in ILO Convention No. 87, both the Committee on Freedom of Association (CFA) (as of 1952), and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) (as of 1959, and essentially taking into consideration the positions adopted by the Committee on Freedom of Association), gradually developed a number of principles around the right to strike. They did so on the basis of Articles 3 and 10 of the Convention, which respectively set out the right of workers' organisations to organise their activities and to formulate their programmes, and define the objective of these organisations as being to further and defend the interests of workers.

This jurisprudence of the supervisory bodies in favour of the recognition and protection of the right to strike is supported by the Workers' Group within the ILO, who consider that the right to strike is "an indispensable corollary of the right to organize protected by Convention No. 87 and by the principles enunciated in the ILO Constitution": in their view, "without the right to strike, freedom of association would be deprived of its substance".[88] The positions of the CFA and of the CEACR were criticised, however, by the Employers' group in the Committee on the Application of Standards of the International Labour Conference.[89]

Such disputes concerning the interpretation of ILO Conventions can, under Article 37(1) of the ILO Constitution, be submitted to the International CJEU. In a vote held on 10 November 2023, the ILO's Governing Body decided to request such an interpretation from the ICJ. The 14 delegates of the

[88] ILO, Giving Globalization a Human Face (2012), p. 48.

[89] ILO, Giving Globalization a Human Face (2012), para. 117.

Workers' group voted in favour of this request, together with 19 government representatives on the Governing Body. Seven other government representatives voted with the Employer group against referring the matter to the ICJ, while two governments abstained.

Whether or not the right to strike can extend to "political strikes" is a more complex matter. Unions have the right to organise in order to defend the occupational interests of their members. Under ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, the CFA has affirmed that "[p]rotests are protected by the principles of freedom of association only when such activities are organized by trade union organizations or can be considered as legitimate trade union activities as covered by Article 3 of Convention No. 87", and it further stated that "[w]hile [it] has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, it has regarded it as such only in so far as it is utilized as a means of defending their economic interests".[90]

The ILO supervisory bodies takes the view, however, that since "workers' and employers' organizations should have the right to organize their activities *in full freedom* and to formulate their programmes" to that end (emphasis added), this should include "the right to organize protest action, as well as certain political activities (such as expressing support for a political party considered more able to defend the interests of members)".[91] Similarly, it considers that "legislation which prohibits the exercise of trade union functions solely on the grounds of political belief, affiliation or activities is not compatible with the right of organizations to elect their representatives in full freedom": the position of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) is that "the practice of giving a broad interpretation to legislation which imposes restrictions so as to deprive certain persons of the right to be elected to trade union office solely on the grounds of their political beliefs or affiliation is not compatible with the Convention".[92]

According to the Workers' group within the ILO, the right to strike should therefore be understood extensively, in accordance with the logic that unions may seek to address not only issues such as wages or working conditions, but also broader social and political matters: according to the workers' representatives, "strike objectives could not be limited only to the conflicts linked to the workplace or the enterprise, particularly given the phenomena of enterprise fragmentation and internationalisation. This was the logical consequence of the fact that trade union activities should not be limited to strictly occupational questions. This was the reason why sympathy strikes should be possible, as well as strikes at the sectoral level, the national and the international level".[93]

The views expressed by the ILO supervisory bodies are nuanced. They consider that, while ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, 1948, does not extend protection to "purely political" strikes as such, nevertheless "strikes relating to the Government's economic and social policies, including general strikes, are legitimate".[94] It expresses its view as follows:

> "[T]rade unions and employers' organizations responsible for defending socio-economic and occupational interests should be able to use, respectively, strike action or protest action to

[90] Compilation of decisions of the Committee on Freedom of Association (sixth edition, 2018), paras. 204, 210 and 751.
[91] ILO, Giving Globalization a Human Face (2012), para. 115.
[92] ILO, Giving Globalization a Human Face (2012), para. 105.
[93] ILO, Giving Globalization a Human Face (2012), p. 48.
[94] ILO, Giving Globalization a Human Face (2012), para. 124.

> support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members. Moreover, noting that a democratic system is fundamental for the free exercise of trade union rights, the Committee considers that, in a situation in which they deem that they do not enjoy the fundamental liberties necessary to fulfil their mission, trade unions and employers' organizations would be justified in calling for the recognition and exercise of these liberties and that such peaceful claims should be considered as lying within the framework of legitimate trade union activities, including in cases when such organizations have recourse to strikes".[95]

In a case concerning Poland, the CFA was faced with the allegation that Poland was in violation of Convention No. 87 due to the lack of legal regulations allowing trade unions to organise strikes on socio-economic issues and general strikes. In response, the CFA requested the Government to take the necessary measures in order to ensure that workers' organisations are able to express, if necessary, through protest actions, more broadly, their views as regards economic and social matters affecting their members' interests.[96] This still falls short of recognising the right to strike for purely political motives. However, when faced with this restriction, the CEACR took the view that the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers. It therefore requested the Government to take the necessary measures in order to ensure that workers' organisations are able to express, if necessary, through protest actions, more broadly, their views as regards economic and social matters affecting their members' interests.[97]

According to the ILO's Committee on Freedom of Association, "Organizations responsible for defending workers socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living".[98] Moreover, "while purely political strikes do not fall within the scope of the principles of freedom of association, trade unions should be able to have recourse to protest strikes, in particular where aimed at criticizing a government's economic and social policies".[99] Therefore, "a ban on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association".[100]

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95 ILO, Giving Globalization a Human Face (2012), para. 124.

96 CFA, Case No. 3111, the Independent and Self-Governing Trade Union (NSZZ) 'Solidarność' v the Government of Poland, Report No. 378, June 2016.

97 Direct Request (CEACR) - adopted 2018, published 108th ILC session (2019).

98 CFA, Case No. 2838, Greece, Report No. 373, October 2014.

99 CFA, Case No. 2509, Romania, Report No. 344, March 2007, para. 1247.

100 CFA, Case No. 2473, United Kingdom, Report No. 348, November 2007.

5. CONCLUSION

Returning to the typology proposed in the introduction, Article 28 of the EU Charter of Fundamental Rights, read in the light of Article 6(4) of the European Social Charter and of Article 11 of the European Convention on Human Rights (both of which the Explanation to the Charter refers to), but also taking into consideration Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights, and the position adopted by ILO supervisory bodies under ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, 1948, protects the right to political strikes ("protest strikes"), to the extent that such strikes aim at issues related to the economic and social interests of workers (going beyond their narrow "occupational interests").

"Purely political strikes", as defined in the typology presented in the introduction, are therefore not protected as an exercise of fundamental rights. The interruption of work in protest of certain governmental policies unrelated to the interests of workers would not in general be protected by courts as a legitimate suspension of the employment contract. It would clearly be insufficient, however, to protect the right to strike only when the strike relates to the negotiation of collective bargaining agreements: indeed, such a narrow protection, as exists in Germany, has been condemned by the ILO bodies since 2001. However, it would be insufficient to protect the right to strike only when it is directed against employers. Strikes linked to trade disputes can involve certain political elements, as they may be perceived as in support or against certain governmental policies or certain political parties, without losing their protection ("mixed strikes"). In addition, "political strikes", intended as a protests against governments (and often taking the form of general strikes) are also protected. This protection extends as long as these strikes are related to the protection and the promotion of economic and social interests of workers..

Thus, the right to strike may be exercised in protest against austerity policies, which would translate for instance in the reduction of the level of old age pensions, flexibilisation of labour law, or limitations to the increase of wages in line with the cost of living.

Article 153(5) TFEU excludes the adoption of harmonisation measures concerning the exercise of the right to strike across the EU Member States. At the same time however, the national authorities are bound to respect the right to strike, as stipulated in Article 28 of the EU Charter of Fundamental Rights, in the scope of application of EU law. The lack of a common understanding of the scope of the right to strike under this provision of the Charter may cause two problems. First, it may have a chilling effect on the exercise by workers of the right to strike, when they resort to strike in order to protest governmental action: in the current state of EU law, they are uncertain whether or not they would be protected under EU law, since the link between the issue that they target and their economic and social interests may at times be tenuous. Secondly, the divergent approaches across Member States may cause a risk of fragmentation in the internal market: restrictions to economic freedoms (as illustrated in the cases of *Viking* and *Laval*) may or may not be considered allowable when such economic freedoms are restricted by the exercise by workers of the right to strike, depending on the interpretation given to that right by domestic courts.

For both of these reasons, more guidance should be provided to domestic authorities. This could take the form of a communication of the European Commission, linking the reading of Article 28 of the EU Charter of Fundamental Rights to the relevant sources of international law, and setting out clearly the extent to which political strikes are a protected form of collective action under EU law (while excluding the extension of such protection to "purely political" strikes, unrelated to the economic and social interests of workers).

A final comment concerns the thin line separating the protected right to strike on the one hand and, on the other hand, the "purely political" strike. This line may evolve in time, depending in part on what is considered to be part of the "economic and social interests" of workers. This obviously cannot be reduced to purely material interests related to wages, pensions, or working time. In particular, the well-being of workers may be interpreted broadly to include whether the work performed is meaningful, or whether it supports (or instead hurts) society or the environment.[101]

In the *Jaeger* case of 2003,[102] the CJEU of the discussed the protection provided by the 1993 Working Time Directive[103] in the context of the on-call service (*Bereitschaftsdienst*) provided by doctors in hospitals. The Court noted in its judgement that "the concepts of safety and health as used in Article 118a of the Treaty, on which Directive 93/104 is based, should be interpreted widely as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organisation of working time. [...] [S]uch an interpretation derives support in particular from the preamble to the Constitution of the World Health Organisation to which all the Member States belong. Health is there defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity".[104] Workers concerned that they are complicit in the destruction of the planet because they are employed in the fossil energies sector, or that they contribute to the commission of war crimes because their company sells arms to countries involved in such a conflict in which war crimes are committed, may argue that their protest against the failure of the government to take bolder climate action, or to better control arms exports, threaten their well-being at work, and thus their health in the holistic meaning of the expression retained by the World Health Organisation. Just like workers are not a commodity, work is not just time provided in exchange of material compensations: it is also an opportunity for flourishing. The exercise of the right to strike may serve to ensure it does.

[101] The author is grateful to Elise Dermine (ULB) for the remarks she provided in this connection.

[102] Case C-151/02, *Norbert Jaeger*, judgment of 9 September 2003, EU:C:2003:437.

[103] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

[104] Case C-151/02, para. 93.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, assesses the status of political strikes in the EU. While workers' strikes generally seek to pressure an employer, "political strikes" are aimed at the government. While such political strikes are generally in the defence and protection of workers' interests, they can also aim at exclusively political objectives. Such "purely political" strikes are generally not protected as part of the right to strike, whether under relevant international human rights law or in the domestic legislation of the EU Member States.

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