THE RIGHT TO STRIKE IN THE EU AFTER ACCESSION TO THE ECHR

VILIJA VELYVYTE

ST. CROSS COLLEGE

MPHIL

Trinity 2013

ABSTRACT

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VILIJA VELYVYTE, ST. CROSS COLLEGE

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The aim of this thesis is to determine the impact of the EU's accession to the ECHR on the legal protection of the right to strike in EU law. Under the ECHR, the right to strike is protected as an essential element of the freedom of association, Art. 11 ECHR, and may only be limited in strictly defined circumstances that must be provided for by law, have a legitimate aim and be necessary in a democratic society. It is argued that the case law of the CJEU is incompatible with the requirements of the ECHR because the CJEU subordinates the right to strike to the EU's fundamental freedoms by treating it as a restriction on the free movement of businesses and requiring that limitations on such free movement created by the right to strike be assessed for proportionality on a case-by-case basis. It is submitted that to bring its case law in conformity with the ECHR, the CJEU needs to adopt a more equitable balance in the relationship between the right to strike and the economic freedoms, in the way it does when dealing with civil and political rights in the context of the internal market. It is further suggested that a change in the position of the CJEU may be triggered by the EU's accession to the ECHR, which will place the EU under the external judicial review of the ECtHR. However, if the ECtHR is confronted with a *Viking/Laval* type of case involving the right to strike, it may refrain from reviewing the position of the CJEU due to the margin of appreciation to which the EU would be entitled because of its specific constitutional character.

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TABLE OF ABBREVIATIONS

AG	Advocate General
CoE	Committee of Experts on the Application of Conventions and Recommendations (ILO)
CFA	Committee on Freedom of Association (ILO)
CFI	Court of First Instance of the European Union
CFR, EU Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
Convention 87	ILO Convention concerning Freedom of Association and Protection of the Right to Organise
Convention 98	ILO Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively
Convention 151	ILO Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service
ECHR	European Convention on Human Rights
ESC	European Social Charter
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EP	European Parliament
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Labour Conference
ILO	International Labour Organisation
MS	Member States
PWD	Posted Workers Directive (96/71/EC)

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C–438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line [2007] ECR I–10779 ..... 30–34, 43, 52, 55, 59, 84

C–341/05 Laval v Svenska Byggnadsarbetareförbundet [2007] ECR I–11767…….31, 36, 37, 52, 59, 84

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TABLE OF INTERNATIONAL TREATIES

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Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/49 28

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European Social Charter (adopted 18 October 1951, entered into force 26 February 1965) ETS 35 16

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Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12..... 78

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Council Regulation (EEC) No 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L102/14..... 88

TABLE OF OTHER AUTHORITIES

EU and Council of Europe

Commission, 'Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (Monti II)' COM (2012) 130 final 62, 63

Draft Revised Agreement on the Accession of the EU to the Convention 47+1(2013)008 ..... 64, 67, 68, 73, 79, 91

European Parliament, Doc. 2009/2241(INI) Resolution on the Institutional Aspects of Accession of the European Union to the European Convention on Human Rights [2009]..... 80, 83

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Joint communication from Presidents Costa and Skouris, press release no 75 issued by the Registrar of the ECtHR (27 January 2011)..... 81, 82

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International Labour Conference (99th Session) Report III (Part 1A) of the Committee of Experts on the Application of Conventions and Recommendations (Geneva 24 February 2010) 59

INTRODUCTION

A strike is a form of collective action, normally exercised via trade unions, whereby workers in a dispute with their employer (or sometimes with another employer) withdraw their labour in order to pressure the employer to enter into a collective agreement on reasonable terms.[1] Due to their potential to inflict economic harm and the risks they pose on wages and jobs, strikes are considered the most visible and controversial form of collective action in comparison to other types of action, such as overtime bans, working rules, or refusals to carry out certain tasks. Strikes are thus often seen as the last resort for trade unions to pursue their demands in an industrial dispute.[2] Yet, strike action, or the threat of recourse to such action, is often the sole bargaining tool available to workers that is capable of counteracting the inequality of bargaining power inherent in the employment relationship.[3]

For that reason, the right to strike has been widely recognised as an essential element of collective bargaining and one of the most important means through which workers defend their economic and social interests.[4] It is protected under international and European human rights treaties – the ICESCR (Art. 8), ECHR (Art. 11), ESC (Art. 6) and the EU Charter (Art. 28) – and is granted constitutional recognition in

1 C Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012) 37 ELR 117, 119 (Barnard); H Collins, K Ewing, A McColgan, *Labour Law* (1st edn, CUP 2012) 490–536 (Collins, Ewing, McColgan*)*.

2 T Novitz, P Germanotta, 'Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action' (2002) 18(1) IJCLLIR 67, 68–69 (Novitz and Germanotta).

3 Novitz and Germanotta (n 2).

4 B Gernigon, A Odero, H Guido, *ILO Principles Concerning the Right to Strike* (2nd edn, Geneva, International Labour Office 2000) (*ILO Principles Concerning the Right to Strike*); T Novitz, *International and European Protection of the Right to Strike* (OUP 2003) 42 (Novitz); Collins, Ewing, McColgan (n 1).

many countries, including most of EU MS.[5] The right to strike is not expressly recognised in any international labour convention. Regardless, the ILO supervisory bodies, the CoE and the CFA, have protected the right to strike by reading it into provisions of Convention 87 on the Freedom of Association. The committees developed a right to strike from the wording of Arts. 3 and 10, which refer to the right of trade unions to organise with the purpose of defending their members' interests.[6] On the basis of these provisions, the CoE and the CFA have developed extensive jurisprudence defining the meaning, scope and legal status of the right to strike.

The ILO jurisprudence by and large has been transposed into the case law of the ECtHR, which in its recent *Demir* and *Enerji* judgments recognised that the right to bargain collectively and the right to strike are both essential elements of the freedom of trade union association protected under Art. 11 ECHR. Consequently, interference with either of these rights constitutes a prima facie violation of Art. 11 and needs to be justified as necessary in light of the legitimate objectives it pursues.

By contrast, the CJEU, while also acknowledging the fundamental status of the right to strike, has failed to accord it the level of protection consistent with a right derived from the freedom of association, as advocated by the ILO and later endorsed by the ECtHR. Since the landmark decisions in *Viking* and *Laval*, the CJEU has subordinated collective labour rights to EU economic freedoms where these two

5 <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/righttostrike.htm> accessed February 16, 2013; <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm> accessed August 20, 2013; *Novitz* (n 4); KD Ewing, 'Economic Rights' in M Rosenfeld and M Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (1st edn, OUP 2012) 1036–1057.

6 Collins, Ewing, McColgan (n 1) 490–536; *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, Geneva, International Labour Office 2006) 109 –136 (*ILO Digest on Freedom of Association*).

values come into conflict. The CJEU treats the right to strike as a restriction on the free movement of businesses and requires that such restrictions be assessed for proportionality on a case-by-case basis. Strike action will be unlawful in EU law unless it is justified as strictly necessary in light of the objective of worker protection. The position of the CJEU has attracted trenchant criticism from labour law commentators and trade unions, who consider that conditions imposed by the Court on the exercise of the right to strike are likely to dissuade trade unions from resorting to collective action, thus undermining trade union freedom of association. Moreover, the line of reasoning adopted by the CJEU appears to contradict the case law of the ECtHR, which maintains a position essentially opposite to that of the CJEU by requiring that laws and practices restricting the right to strike must be justified by and proportionate to the legitimate objectives they pursue, rather than the other way around.

However, the CJEU may be compelled to revisit its position on the right to strike in the near future. For the past couple of years, the EU has been negotiating an agreement with the Council of Europe regarding the EU's accession to the ECHR. The conclusion of the agreement is imminent because the Treaty of Lisbon obligates the EU to accede to the ECHR. Following accession, the EU will be subjected to judicial review by the ECtHR in terms of compliance with the Convention. The aim of this thesis is to determine how the EU's accession to the ECHR may affect future protection of the right to strike in EU law.

To that end, the thesis is divided into two chapters. Chapter I analyses the case law of the CJEU and the ECtHR concerning the right to strike and collective labour rights more generally with the purpose of assessing the compatibility of the CJEU

with the ECHR. The Chapter concludes by proposing that in order to comply with the requirements of the ECHR, the CJEU needs to accord the right to strike legal protection commensurate with its acknowledged status as a fundamental human right. This would require the Court to strive for a more equitable balance between the right to strike and EU economic freedoms, in accordance with the 'fair balance' methodology employed by the CJEU in its human rights case law and elaborated by AG Trstenjak in *Commission v Germany*.

Chapter II focuses on the legal implications of the EU's accession to the ECHR for the EU's legal order and for its relationship with the ECtHR. In particular, it aims to determine how the potential of the EU's legal liability before the ECtHR could affect the current position of the CJEU concerning the right to strike. If we assume that after accession the right to strike will move to an equal footing with the EU internal market freedoms, as suggested in Chapter I, the CJEU might still attempt to make the policy choice of interpreting the Lisbon Treaty in a way that prioritises economic freedoms over the right to strike. But would that be a viable choice in light of the constitutional and institutional changes brought about by the accession – namely, the EU's duty to comply with the Convention as a matter of international law and the prospect of facing legal liability before the ECtHR in the case of non-compliance? The answer to this question largely depends on the extent to which the Convention and its case law will be transposed by the CJEU into EU law and the extent to which the ECtHR will be willing to review the position of the CJEU.

Although issues relating to the European protection of the right to strike, particularly the *Viking* and *Laval* cases, have attracted considerable scholarly attention, what is largely missing from existing work is a comprehensive,

comparative analysis of the extant case law of the ECtHR and the CJEU coupled with a practical assessment of how the EU's accession to the ECHR may impact the current status of the right to strike in EU law. Such an inquiry will inevitably contain an element of speculation; the EU's accession to the Convention has not yet been finalised, and its effects cannot be determined with absolute certainty. Nevertheless, the contribution of this research lies first in conducting exhaustive comparative analysis of the case law of the two European courts concerning the right to strike, and second in mapping the directions the courts may take when dealing with issues involving the right to strike after accession.

The research for the thesis mainly relies on analysis of the case law of the ECtHR and the CJEU. It examines the judgments of the CJEU in *Schmidberger*, *Omega*, *Viking*, *Laval*, *Rüffert*, *and Commission v Germany*. With respect to the ECtHR, it focuses on the Court's decisions in *Demir and Baykara*, *Enerji Yapi-Yol Sen*, *Kaya and Seyhan*, and *Saime Özcan*, all involving Turkey as a respondent. The analysis in Chapter II rests primarily on the terms of the EU Treaties, the Draft Agreement on the EU's Accession to the ECHR, its explanatory documents and the relevant case law of the ECtHR and the CJEU.

Chapter I of this thesis is based on an article 'Right to Strike in the EU after Accession to the ECHR: Identifying Conflict and Achieving Coherence' forthcoming in Volume 15 (2015) of the Human Rights Law Review.

I THE CONFLICT BETWEEN THE ECTHR AND THE CJEU CONCERNING THE STATUS OF THE RIGHT TO STRIKE

1 The Right to Strike under the ECHR

In the Council of Europe, the right to strike is protected under the freedom of association, Art. 11 ECHR.[7] In recent judgments, the ECtHR held that the right to strike forms part of the freedom of trade union association, is recognised and protected in international law, and therefore may only be limited in strictly defined circumstances that must be provided for by law, have a legitimate aim and be necessary in a democratic society. This finding represents a new development in the case law of the ECtHR. In *Demir and Baykara v Turkey*[8] and *Enerji Yapi-Yol Sen v Turkey*[9] cases, delivered in 2008 and 2009 respectively, the Court reversed its previous jurisprudence that was far less protective of collective labour rights, extending the scope of Art. 11 to include the right to collective bargaining (*Demir*) and its corollary right to strike (*Enerji*) as essential elements of the freedom of association.

(a) Early Jurisprudence

The holding by the ECtHR that the right to collective bargaining and the right to strike are essential, or inherent, elements of the freedom of trade union association under Art. 11 ECHR marks a significant change in the Court's jurisprudence. In the past, the ECtHR was reluctant to grant protection for collective labour rights under

7 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR).

8 *Demir and Baykara v Turkey* (2009) 48 EHRR 54 (*Demir*).

9 *Enerji Yapi-Yol Sen v Turkey* App no 68959/01 (ECtHR, 21 April 2009) (*Enerji*).

Art. 11. The reasons behind the initial position of the Court may have lied in the post-World War II division between civil and political rights, on the one hand, and social and economic rights, on the other.[10] The former category was perceived as requiring the highest level of international protection since it protected individuals' freedom from unwarranted interference by the State. The protection of socioeconomic rights, on the other hand, was primarily left to the discretion of national governments since the realisation of the rights in this category largely depends on positive action by the State, often in the form of policy choices and dedication of financial resources. In the European framework for the protection of human rights, the right to collective bargaining and the right to strike were enshrined in Art. 6 of the European Social Charter – an instrument adopted under the auspices of the Council of Europe in parallel to the ECHR.[11] The ESC was endowed with its own enforcement mechanism, albeit solely based on the supervision of national reports and issuance of non-binding recommendations. Since Art. 11 ECHR protected the right to form and join trade unions but did not explicitly cover other collective labour rights, the ECtHR might have considered that, being inherently social rights, collective bargaining and collective action were not supposed to come under its supervision.[12]

As a result, the ECtHR refused to give an effective interpretation of the 'right to form and join trade unions for the protection of [one's] interests' under Art. 11 ECHR. Since the first judgments in the 1970s in the *Belgian Police*, *Swedish Engine*

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10 Novitz (n 4), 42.

11 European Social Charter (adopted 18 October 1951, entered into force 26 February 1965) ETS 35; European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS 163.

12 V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' HRLR Advance Access published March 1, 2013 doi:10.1093/hrlr/ngt001, 4–5 (Mantouvalou, 'Labour Rights in the European Convention on Human Rights').

and *Schmidt and Dahlström* cases, the Court took the view that the freedom of trade union association affords trade unions a right to be heard in order to protect their members' occupational interests, but left each State a free choice of means to be used towards this end.[13] The Court determined that the rights to collective bargaining and collective action were not necessarily inherent in the right to form and join trade unions for the protection of one's interests under Art. 11.[14] Even as recently as 2002, the Court, in *Wilson and Palmer*, held that 'although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members' interests, it is not indispensable for the effective enjoyment of trade union freedom'.[15] As regards the right to strike, the ECtHR reiterated its earlier finding adopted in *Schmidt and Dahlström* that the grant of the right to strike represented one of the most important means to protect the interests of trade union members, however, there were other ways, too.[16] Essentially, in the view of the Court, both rights, while instrumental in the process of worker protection, were only examples of the means by which trade unions were able to protect their members' interests, but were not indispensable for doing so.[17] Consequently, interference with the right to strike could breach Art. 11 only in two circumstances: one, if trade unions were prevented from employing alternative tactics to defend workers' interests adequately, or two, if

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13 *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578, paras 39–40 (*Belgian Police*); *Swedish Engine Drivers' Union v Sweden* (1976) 1 EHRR 617, paras 39–41 (*Swedish Engine Drivers' Union*); *Schmidt and Dahlström v Sweden* (1976) 1 EHRR 632, paras 34, 36 (*Schmidt and Dahlström*).

14 *Schmidt and Dahlström* (n 13), paras 34, 36.

15 *Wilson v United Kingdom* (2002) 35 EHRR 20, paras 44–45 (*Wilson*).

16 *Wilson* (n 15), para 45; *Schmidt and Dahlström* (n 13), para 36.

17 See also *Swedish Engine Drivers' Union* (n 13), para 39*; UNISON* v *UK*, App no 53574/99 (ECtHR, 10 January 2002), para 31; *Dilek and Others v Turkey* App nos 74611/01, 26876/02 and 27628/02 (ECtHR, 17 July 2007) (*Dilek*).

restrictions on the right to strike were applied in a discriminatory manner.[18] Therefore, until the groundbreaking decisions in *Demir* and *Enerji* cases, trade union freedom of association under Art. 11 ECHR effectively meant that unions merely had to be allowed, in one way or another, to 'seek to persuade the employer to hear' what they had to say on behalf of their members.[19]

(b) New Developments

(i) Demir and Baykara v Turkey

Demir concerned the decision of the Turkish Court of Cassation to nullify a public sector collective agreement. Ms. Demir was a member, and Mr. Baykara the president, of the Turkish trade union for civil servants. The union had signed a two-year collective agreement with the employer, the Gaziantep Municipal Council, which did not comply with its provisions. When the trade union brought a legal action to enforce the agreement, the Turkish judiciary refused to recognise both the union's legal personality and its right to collective bargaining, because Turkish law did not permit civil service trade unionism. The collective agreement was annulled after having been in operation for two years. Furthermore, the union brought a separate claim in the Audit Court, which found that civil servants had no right to conclude collective agreements, and the union was ordered to reimburse the advantages it had obtained under the 'defunct' collective agreement.[20] Having exhausted domestic remedies, the trade union lodged an application to the ECtHR, alleging the breach of

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18 *Belgian Police* (n 13), paras 44–45; *Schmidt and Dahlström* (n 13), paras 36, 39–43; *Wilson* (n 15), paras 47–48; F Dorssemont, 'The Right to Form and to Join Trade Unions for the Protection of his Interests under Article 11 ECHR' (2010) 1 ELLJ 185, 224.

19 *Wilson* (n 15), paras 42, 44; *Demir* (n 8), para 145.

20 *Demir* (n 8), para 114.

the freedom of association under Art. 11 ECHR. The case reached the Grand Chamber, which found unanimously that the right to collective bargaining was 'inherent' in Art. 11. The actions by the Turkish authorities were held to constitute disproportionate and unjustified interference with the trade union's freedom of association.

Justifying a departure from its previous case law, the Court explained that its case law was not definite and thus prone to evolve under the influence of increased standards of protection of collective bargaining in international labour law and State practice:

> [It] is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights.[21]

To define the content and scope of trade union freedom of association, the Court relied on international and regional human rights instruments. With respect to international labour law, the Court referred to the ILO Conventions 87,[22] 98[23] and 151,[24] and the jurisprudence of the ILO CoE. As regards European human rights treaties, the Court cited two – Art. 6(2) ESC and its interpretation by the ECSR, and

21 ibid, para 146.

22 ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise (adopted 09 July 1948, entered into force 04 July 1950) 68 UNTS 17 (Convention 87).

23 ILO Convention (No. 98) concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (adopted 01 July 1949, entered into force 18 July 1951) 96 UNTS 257.

24 ILO Convention (No. 151) concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (adopted 27 June 1978, entered into force 25 Feb 1981) 1218 UNTS 87.

Art. 28 of the EU Charter.[25] That Turkey had not ratified the ESC and could not possibly be a signatory to the CFR was considered by the Court to be legally irrelevant.[26] The ECtHR also took into account the prevailing practice of European States, the majority of which had come to recognise the right of public servants not holding State powers to engage in collective bargaining in order to determine their wages and working conditions. Having considered the developments in national and international labour law, the Court found that the right to bargain collectively with the employer had become one of the essential elements of the right to form and join trade unions, hence interference with it alone triggered the breach of Art. 11 ECHR.[27]

The ECtHR then turned to assess the lawfulness of the restrictions imposed on collective bargaining by Turkey. Art. 11(2) ECHR permits only those restrictions that are 'prescribed by law', pursue one or more legitimate aims and are 'necessary in a democratic society' for the achievement of those aims.[28] The Court accepted that the annulment of the collective agreement by the Turkish courts was an interference with collective bargaining that pursued a legitimate aim – namely, the prevention of disorder that could be caused by discrepancies between law and practice: the collective agreement was in operation notwithstanding Turkey's prohibition on public sector trade unionism.[29] The Court then went on to consider the necessity of the interference. Restrictions could be lawfully imposed on the exercise of trade union rights by civil servants provided that there were 'convincing and compelling reasons',

25 Charter of Fundamental Rights of the European Union [2000] OJ C364/01 (EU Charter).

26 *Demir* (n 8), para 86.

27 ibid, para 157.

28 ibid, para 159.

29 ibid, para 161.

or a 'pressing social need'.[30] However, restrictions were to be construed strictly and they could not impair the very essence of the right to organise.[31] The ECtHR observed that the Government failed to adduce evidence of any specific circumstances that could have justified the exclusion of the municipal civil servants from the right to form trade unions and engage in collective bargaining.[32] Therefore, the generic prohibition imposed on civil servants to form trade unions and the annulment of the collective agreement concluded between them and the employer could not be justified as 'necessary in a democratic society' within the meaning of Art. 11(2) of the Convention.[33]

(ii) Enerji Yapi-Yol Sen v Turkey

The *Enerji* judgment, which came less than a year after the *Demir* decision, extended the protection of Art. 11 ECHR to the right to strike. The case concerned a State prohibition on industrial action by public sector trade unions. The Turkish government issued a general ban on strike action for civil servants in the context of a national one-day strike aimed at securing the right to collective bargaining for public sector employees. Several board members of the Enerji trade union took part in the strike regardless of the ban and received disciplinary sanctions as a result. After unsuccessful appeals against the sanctions in Turkish courts, the trade union filed an application to the ECtHR alleging that the ban on strikes interfered with the right of its members to form and join trade unions, as guaranteed under Art. 11.

30 ibid, para 119.

31 ibid, para 97.

32 ibid, para 168.

33 ibid, paras 120–126, 164–169.

The ECtHR held that the right to strike was indeed protected under Art. 11 and unanimously found a violation of the freedom of association. In reaching its conclusions, the Court once again invoked the international and European human rights instruments previously cited in the *Demir* judgment. To infer protection for the right to strike from the freedom of association, the ECtHR first referred to the jurisprudence of the ILO CoE and the CFA, and found that the right to strike had become an intrinsic corollary ('*un corrolaire indissociable*') of the right to organise protected under the Convention 87. In addition, the Court relied on Art. 6(2) ESC, which establishes a functional link between the right to bargain collectively and the right to strike, the latter being the means of ensuring the effective exercise of the former.[34]

While the Court acknowledged that the right to strike is not absolute and could be subject to certain conditions and restrictions, especially with respect to public servants, any restrictions should define as clearly and narrowly as possible the categories of officials concerned. A ban drafted in general terms and depriving all public servants of the right to take strike action was too wide a restriction and thus failed to achieve a proper balance between the public interest exceptions listed in Art. 11(2) and the protection of freedom of association. Moreover, the disciplinary sanctions taken against the union were 'capable of discouraging trade union members and others from exercising their legitimate right to take part in such one-day strikes or other actions aimed at defending their members' interests',[35] thus jeopardising the effective exercise of trade union freedom of association.

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34 *Demir* (n 8), para 24.

35 *Enerji* (n 9), para 32.

The significance of *Demir* and *Enerji* lies in the recognition by the ECtHR for the first time that the right to bargain collectively has become one of the essential elements of the right to form and join trade unions for the protection of one's interests (*Demir*), and that trade unions' ability to defend their members' interests is inextricably linked to the right to take strike action (*Enerji*). Consequently, interference with either collective bargaining or collective action will be unlawful under Art. 11 ECHR, unless it is justified as strictly necessary in a democratic society in pursuit of clearly defined public aims.

(iii) Saime Özcan v Turkey and Kaya and Seyhan v Turkey

The judgments of the ECtHR in *Saime Özcan v Turkey*[36] and *Kaya and Seyhan v Turkey*[37] are the most recent in the line of cases brought against Turkey and involving the right to strike. In these judgments, the Court affirmed the position already expressed in *Enerji* that an interference with the trade union freedom of association capable of dissuading workers from resorting to strike action is incompatible with Art. 11 ECHR.[38] The cases concerned penalties imposed on civil servants for participating in strike action organised to improve the working conditions of public sector employees. The applicants, who were teachers and members of a public sector trade union, were penalised for participating in a one-day national strike action. The applicants in the *Saime Özcan* case faced criminal charges. Initially sentenced to imprisonment, their punishments were commuted to fines and a temporary exclusion from public service. Ms. Kaya and Mr. Seyhan received disciplinary warnings. The

36 *Saime Özcan v Turkey* App no 22943/04 (ECtHR, 15 September 2009) (*Saime Özcan*).

37 *Kaya and Seyhan v Turkey* App no 30946/04 (ECtHR, 15 September 2009) (*Kaya and Seyhan*).

38 See also *Urcan and Others v Turkey* App nos 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04, 23676/04 (ECtHR, 17 July 2008), adopted a couple months before *Enerji*.

applicants resorted to the ECtHR, contending that their right to freedom of association under Art. 11 had been breached as a result of the criminal penalties and warnings they had received.

The Turkish Government argued that the sanctions issued against the applicants must be considered necessary as they were issued in response to a pressing social need, since the applicants were absent from their work without informing the authorities and without justification.[39] The Court ruled that the penalties complained about – although very negligible in the case of Ms. Kaya and Mr. Seyhan – were such as to dissuade trade union members from legitimate participation in strikes or other trade union action and were not 'necessary in a democratic society'.[40] The actions of the Turkish authorities therefore constituted a disproportionate interference with the applicants' effective enjoyment of their freedom of association.

Summing up the developments in the case law of the ECtHR, it is most significant that the Court has brought both the right to collective bargaining and the right to strike under the protection of Art. 11 as essential elements of the freedom of association. The approach of the ECtHR, greatly influenced by the ILO jurisprudence, represents huge progress in the European protection of collective labour rights since it elevates collective labour rights to the status of civil and political human rights in terms of the level of protection they enjoy under the Convention. Regarding the right to strike in particular, since *Enerji*, trade unions no longer need to show they do not have alternative means to protect the interests of their members because interference with the right to strike alone is considered to be a

39 *Kaya and Seyhan* (n 37), para 27.

40 *Kaya and Seyhan* (n 37), paras 30–31; *Saime Özcan* (n 36), paras 22–23.

sufficient basis to trigger Art. 11. Furthermore, an interference that merely has the effect of dissuading trade unions from engaging in collective action is still incompatible with the Convention. To be justified, actions restricting the exercise of the right to strike must pass a strict proportionality review. They must be prescribed by law, correspond to a pressing social need and be defined as narrowly as possible so as to preserve the essence of the right to organise.

(c) Controversies Surrounding the Case Law of the ECtHR

As much as the outcomes of the case law of the ECtHR have been praised for improving the protection of collective labour rights, the legal methodology adopted by the Court has been subjected to criticism. The ECtHR has been criticised for lacking a legitimate basis to rely on the standards and jurisprudence of the ILO to justify the reversal of its long-established position under Art. 11 ECHR.

(i) Integrated Human Rights Approach

The methodology employed by the ECtHR in its Art. 11 case law has been referred to in legal literature as the 'integrated human rights approach' – an interpretive technique that extends the protection accorded to civil and political rights to the field of labour relations through integrating social and labour rights in the provisions of human rights treaties.[41] In the case of the ECHR, to define the scope of labour rights protected under Art. 11, the ECtHR resorts to international and regional human rights instruments, the jurisprudence of their supervisory organs, and the prevailing practice

41 V Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 ELLJ 151 (Mantouvalou, 'Are Labour Rights Human Rights').

of European States.[42] The Court's approach reflects a broader global trend towards the use of comparative material in human rights cases by national and international courts.[43]

However, while praised for enhancing the protection of social rights,[44] the integrated approach to interpretation adopted by the ECtHR has been criticised for lacking a firm legal basis or justification.[45] In *Demir*, the Turkish government argued that it was not legitimate for the Court to impose on it obligations concerning the protection of the right to collective bargaining on the basis of the instruments, other than the ECtHR, that Turkey had not ratified and hence was not bound by.[46] The judgments of the ECtHR do not give a clear indication of the legal basis for the recourse to external standards and practices. The Court points out that its analysis rests on the 'consensus emerging from specialised international instruments and from the practice of Contracting States',[47] yet it goes beyond the 'conventional means of interpretation' listed in the Vienna Convention.[48] The ILO conventions and jurisprudence appear to be the Court's point of departure in establishing the international consensus on the matters involving worker protection and thus play the

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42 *Demir* (n 8), para 85.

43 C McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) OJLS 499, 501.

44 Mantouvalou, 'Are Labour Rights Human Rights' (n 41) 176; Mantouvalou, 'Labour Rights in the European Convention on Human Rights' (n 12) 10–11.

45 *Demir* (n 8), paras 53–54; Mantouvalou, 'Labour Rights in the European Convention on Human Rights' (n 12) 3, 9. See also B Langille, 'Can we Rely on the ILO?' (2008) 13 Canadian Lab & Empl LJ 363; B Langille, 'The Freedom of Association Mess: How we Got Into it and How we Can Get Out of it' (2009) 54 McGill LJ 177.

46 *Demir* (n 8), para 86.

47 *Demir* (n 8), paras 76, 85.

48 *Demir* (n 8), paras 65–68, 76, 85–86; *Saadi v the United Kingdom* (2008) 47 EHRR 17, para 62; United Nations Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

key role among the sources relied on by the Court.

(ii) Disagreement Concerning the Right to Strike within the ILO

Given the central importance of the ILO standards in the judgments of the ECtHR, it is noteworthy that a debate within the ILO itself concerning the status of the right to strike questions whether its protection can be drawn from Convention 87 on the Freedom of Association. As previously mentioned, Convention 87 contains no references to the right to strike, and its negotiating history indicates that the Contracting Parties deliberately chose not to include a mention of the right to strike.[49] However, despite the absence of explicit references, the CoE and the CFA used Convention 87 to develop extensive jurisprudence defining the status, content and scope of the right to strike, while repeatedly asserting that the right to strike is inalienable from the right to freedom of association protected by the Convention. Since *Demir* and *Enerji*, the jurisprudence of the committees has been transposed by the ECtHR into its case law under Art. 11.

In response to the activism of the committees, in particular the CoE, the ILO's Employers' Group has consistently contested that protection of the right to strike derives from Convention 87. Under the ILO Constitution, the exclusive mandate to adopt international labour standards (conventions and recommendations) belongs to the ILC, as the ILO's legislative body, while the authority to interpret them is vested in the International Court of Justice. Accordingly, the Employers' Group has since the 1990s challenged the mandate of the CoE to interpret conventions or other international labour standards and argued that Convention 87 does not cover the right to strike. The Employers maintain that the right to strike could perhaps be

[49] *ILO Principles Concerning the Right to Strike* (n 4) 7–10.

acknowledged as an integral part of international common law and, as such, it should not be totally banned or authorised only under excessively restrictive conditions. However, since neither Convention 87, nor Convention 98 contain specific provisions regarding the right to strike, the CoE should not infer from the text of these Conventions 'a global, precise and detailed, absolute and unlimited right [to strike]'.[50] The conflict between the Workers' and Employers' groups reached the climax in the 2012 ILC, where the Employers' Group refused to discuss some of the most serious cases of worker rights violations involving the right to strike, thus paralysing the normal proceedings of the conference.[51]

The controversy within the ILO concerning the right to strike seems to put the developments in the case law of the ECtHR under pressure. Regardless of the eventual outcome, this controversy within world's most authoritative labour rights organisation may impact the evolution of the position of the ECtHR, since it challenges the very foundations of the Court's judgments in *Demir, Enerji* and other collective labour rights cases. The ECtHR's integrated approach to interpreting the Convention heavily relies on the ILO's right to strike jurisprudence. The lack of consensus within the ILO regarding its own jurisprudence and the fact that the integrated approach to interpretation as such has already been criticised as having a dubious legal basis seem to challenge the credibility of the case law of the ECtHR. Against this background, it is not inconceivable that the Court will be less bold and adopt a more moderate position when dealing with future cases involving the right to strike, especially if it deals with cases less extreme than the Turkish ones in terms of

50 *ILO Principles Concerning the Right to Strike* (n 4) 7–10.

51 For a persuasive argument as to why the Employers' Group is wrong, see KD Ewing, 'Myth and Reality of the Right to Strike as a 'Fundamental Right'' (2013) 29 IJCLLIR 145.

the severity of the violations. Should the ECtHR temper its current position, this would in turn have consequences for the protection of the right to strike in the EU after accession. It is therefore important to acknowledge that the position of the ECtHR has weaknesses, and the respective developments under Art. 11 are not immune from challenge or change.[52] However, due to the difficulty of predicting the resolution of the debate within the ILO as well as its implications on the ECtHR, for purposes of comparison with EU law the analysis herein is based on the Court's current position.

2 The Right to Strike in the EU

(a) Treaty Framework

The development of the legal status of the right to strike in the case law of the CJEU can only be fully understood if viewed in the context of the EU's legal order and competences with respect to collective labour rights. Since the Treaty of Rome, the EU's legislative and judicial organs have been conferred by MS broad competences in the field of the internal market. The EU's competence to regulate other policy areas, such as social policy, has always been marginal compared to its internal market powers. That is why in EU law worker rights and labour law more generally have attracted significantly less protection than business freedoms, which have been enshrined in the EU free movement provisions. This disparity is evident even today, notwithstanding that since Maastricht social policy has been introduced into the Treaties and has by now become a self-standing dimension of EU law.

52 T Novitz, 'International Law on the Right to Strike' (*University of Saskatchewan blogs*) <http://blogs.usask.ca/foa2010/files/novitz_transcript_amended.pdf> accessed 2 August 2013.

With regard to collective labour rights in particular, Art. 153(5) TFEU[53] expressly excludes the right to strike from EU-level harmonisation. The right to collective bargaining is not explicitly listed among the exclusions, but at the same time the Treaty provides no clear legislative basis for it.[54] Arguably, collective bargaining may fall under the 'right of association', which forms part of the exclusive legislative competence of the MS together with the right to strike. Given the lack of the EU's legislative competence in the area, collective labour rights only come into the purview of EU law through the case law of the CJEU in the context of EU free movement rules. Therefore, the right to collective bargaining and the right to strike are assessed by the CJEU as potential restrictions on the right of European businesses to establish or provide services across national borders – Arts. 49 and 56 TFEU.

(b) The Right to Strike in the Case Law of the CJEU

The landmark judgments in which the CJEU for the first time defined the relationship between the right to strike and EU economic freedoms were *Viking*[55] and *Laval.*[56] In *Laval,* the Court held that the right to strike must be exercised in accordance with the secondary EU legislation detailing EU free movement rules. In addition, strike action will be lawful only when it is used as a last resort after exhausting other less

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53 Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/49 (TFEU).

54 ACL Davies, 'Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?' in P Alston (ed), *Labour Rights as Human Rights* (OUP 2005) 206–207; B Ryan, 'The Charter and Collective Labour Law' in TK Hervey, J Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights – a Legal Perspective* (Hart Publishing 2003) 67–68, 84–85; see also Art. 156 TFEU, which may be interpreted as implicitly excluding the competence to legislate on collective bargaining.

55 Case C–438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2007] ECR I–10779 (*Viking*).

56 Case C–341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I–11767 (*Laval*).

restrictive means to persuade the employer in the process of collective bargaining (*Viking*).

The principles governing the status of collective labour rights in the context of the internal market were further elaborated by the CJEU in the *Rüffert*[57] and *Commission v Germany*[58] cases. The latter judgments did not concern the right to strike *per se*, but revealed the Court's position on the validity of collective agreements in the context of public procurement – an issue that is highly relevant in assessing the legality of collective action taken on the basis of such collective agreements.

(i) Viking

The *Viking* case concerned an industrial action by transport workers' unions aimed at preventing a ferry operating company from taking advantage of a 'flag of convenience'. Viking – a Finish company that runs ferry services between Finland and Estonia – sought to reflag its ship Rosella under the Estonian flag in order to undercut the minimum wage requirement set out in the collective agreement with the Finnish Seamen's Union (FSU) by employing Estonian workers, thus taking advantage of lower wages. In response, the FSU and the International Transport Workers' Federation (ITF) organised an industrial action with reference to the latter's policy against 'flags of convenience'. The FSU threatened Viking with a strike action, and the seamen's trade union in Estonia, a member of the ITF, agreed not to enter into negotiations or conclude collective agreements with Viking. The company complained that its freedom of establishment under Art. 49 TFEU had been infringed.

57 Case C–346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I–01989 (*Rüffert*).

58 Case C–271/08 *Commission v Germany* [2010] ECR 00000 (*Commission v Germany*).

The case was referred to the CJEU for the preliminary ruling on the matter. The CJEU held that trade unions' actions would constitute an unjustified restriction on the freedom of establishment in cases where collective action is taken without exhausting other, less restrictive means to reach an agreement with the employer.

The CJEU started its analysis by expressly recognising for the first time in its jurisprudence that the right to take collective action, including strike action, is a fundamental right and 'forms an integral part of the general principles of Community law'.[59] However, it is subject to restrictions set by 'Community law and national laws and practices', in accordance with Art. 28 of the EU Charter.[60] The Court then found that the trade unions' actions constituted a restriction on Viking's freedom of establishment because the strike envisaged by the FSU had the effect of making it 'less attractive' for the company to reflag its ship and the 'Flags of Convenience' policy of the ITF was 'at least liable' to restrict the company's exercise of the right to cross-border establishment.[61]

To assess the justification for the restrictions imposed on the company's freedom of establishment, the Court applied the proportionality test. Collective action must pursue a legitimate aim, be justified by overriding reasons of public interest, be suitable for attaining the objective pursued, and not go beyond what is necessary in order to attain it.[62] The Court accepted that 'the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction

59 *Viking* (n 55), para 44.

60 ibid, para 44.

61 ibid, paras 72, 73.

62 ibid, para 75.

on [Art. 49] and the protection of workers is one of the overriding reasons of public interest'.[63] However, a restriction would not be justified if it were established that jobs or conditions of employment were not 'jeopardised or under serious threat' – something that was unclear in the case, considering that in the course of conciliation proceedings Viking had given an undertaking that the reflagging would not involve any redundancies.[64] With regard to the suitability of trade union action, the Court noted that collective action was one of the ways in which trade unions could protect their interests, but there were others.[65] As regards the necessity of collective action, the Court noted that the role of the national court was to decide whether the FSU did not have less restrictive means at its disposal in order to bring negotiations with Viking to a successful conclusion, and whether it had exhausted those means before initiating strike action.[66] Finally, the Court held that the 'flags of convenience' policy alone, without evidence of a serious threat to working conditions, was insufficient to justify a restriction on Art. 49.[67]

Paradoxically, while explicitly recognising the fundamental nature of the right to strike for the first time in its jurisprudence, the CJEU also opened up the possibility of trade unions being held directly liable for their industrial action under EU law by recognising the direct horizontal effect of Art. 49 TFEU.[68] The ability to invoke Art. 49 directly against trade unions where their actions impede business freedoms gives

63 *Viking* (n 55), para 77.

64 ibid, para 81.

65 ibid, para 86.

66 ibid, paras 87–89.

67 ibid, paras 88–89.

68 ibid, paras 57–61.

employers a great incentive to take trade unions to court to assess the compatibility of their actions with EU law. At the same time, trade unions operating in a transnational context are faced with legal uncertainty because they can no longer be sure that collective action taken in accordance with national laws will be lawful under EU law.[69] Moreover, the breadth of the test the Court uses to define a restriction on economic freedoms virtually creates a presumption that collective action is illegal, as it is almost by definition likely to make it 'less attractive' to businesses to exercise their economic freedoms.[70] Such a legal framework will discourage trade unions from using collective action since doing so risks incurring legal liability and may result in an order to pay damages.

Moreover, the proportionality review adopted by the Court to assess the lawfulness of trade union actions has set a very high threshold to justify collective action. Strike action will be unlawful unless it fulfils three conditions. First, trade unions must be able to show that the strike is aimed at protecting the terms and conditions of employment that appear to be under serious jeopardy. Second, trade unions may resort to strike action only after having exhausted all less extreme means to persuade the employer. Third, even if strike action is taken as a last resort and hence is proportionate in the broad sense, it has to comply with the test of proportionality in the narrow sense: the financial burden placed on the employer as a result of strike action must not be excessive in relation to the objective of protecting

69 Barnard (n 1) 120–121.

70 Case C–55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–4165, para 37; N Hös, 'The Principle of Proportionality in the Viking and Laval Cases: An Appropriate Standard of Judicial Review?' (2009) EUI Department of Law Working Paper 2009/06, 16, 19–20 <http://cadmus.eui.eu/bitstream/handle/1814/11259/LAW_2009_06.pdf> accessed 27 July 2013 (Hös).

employment conditions.[71] The proportionality test adopted by the Court imposes a difficult burden on trade unions to legally justify their actions, suggesting a clear-cut hierarchy in EU law between economic freedoms and collective labour rights.

(ii) Laval

The *Laval* judgment was delivered by the CJEU a week after *Viking*. The Court affirmed its position limiting the exercise of the right to strike in cross-border situations and, in addition, greatly reduced the permissible scope of collective bargaining in situations involving the posting of workers within the EU. The case concerned a collective action aimed at obliging a Latvian company to respect a Swedish collective agreement applicable to construction workers. Laval, a Latvian construction company with a subsidiary in Sweden, won a public tender to build a school there and posted Latvian workers to perform the job. In accordance with Swedish laws, the company attempted to negotiate working conditions of posted workers with the Swedish building workers' trade union. Negotiations fell through because Laval did not want to abide by the minimum working conditions laid down in the Swedish collective agreement applicable to the building sector. Instead, the company signed a collective agreement with a Latvian trade union. The wages paid to Latvian workers on the basis of the latter agreement were 40 per cent lower than their Swedish equivalent. The Swedish trade union refused to accept the validity of this agreement and, together with another sectoral trade union, took collective action in the form of blocking the construction site. In response, Laval sued the trade unions in Swedish courts, claiming that its freedom to provide services under Art. 56 TFEU had been violated. The case was referred to the CJEU for a preliminary ruling. The CJEU

[71] Barnard (n 1) 124.

held that the strike action was illegal under both the provisions of the Posted Workers Directive[72] and Art. 56 TFEU.

The Court first assessed whether the PWD provided a legal basis for the Swedish trade unions to take collective action. The PWD governs the working conditions of workers posted from one EU MS to another. The objective of the Directive is to set a 'nucleus of mandatory rules for minimum protection' to be observed in the host country by employers who post workers from their home country to perform temporary work. The PWD itself does not define the material content of the rules. Instead, it allows MS to apply their national rules as long as they are laid down in accordance with one of the means provided for in the Directive. Collective agreements that have been declared universally applicable are listed as one of such means.[73] A universally applicable collective agreement is an agreement that must be observed by all undertakings in the geographical area and in the profession or industry concerned.[74] In the case of *Laval,* Swedish laws made no provision for the universal applicability of Swedish collective agreements, and according to settled practice, the rates of pay in the construction sector were normally set by means of collective negotiations on a case-by-case basis. Considering that, the CJEU held that collective action aimed at persuading Laval to observe the terms of a collective agreement that provided for higher wages could not be objectively justified under the PWD.[75]

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72 Council Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1 (Posted Workers Directive).

73 Posted Workers Directive (n 72), art 3(1).

74 ibid, art 3(8).

75 *Laval* (n 56), paras 69–70.

The Court then assessed whether collective action could be justified under Art. 56 TFEU. As in *Viking,* it recognised that the right to strike is a fundamental right, yet subject to restrictions. Next, the Court found that the blockade of the building site constituted a restriction on Laval's freedom to provide services. The Court applied the proportionality test to determine whether collective action could be justified on the ground of protecting the interests of host State workers against social dumping.[76] The Court accepted that the protection of workers was a legitimate objective but nonetheless decided the blockade could not be justified as appropriate and necessary due to the uncertainties the Swedish system of wage determination presented to Laval.[77] The system lacked provisions that would be 'sufficiently precise and accessible' and rendered it 'impossible or excessively difficult in practice' for Laval to determine its minimum pay obligations.[78] Consequently, collective action aimed at enforcing such minimum pay obligations was unlawful.

The Court's judgment essentially means that unless collective action is aimed at defending working conditions that are laid down in accordance with the PWD, it will be impossible for trade unions to justify their collective action in situations involving the posting of workers. The strike action taken by Swedish unions was held to be unlawful because it purported to enforce an unlawful collective agreement – an agreement that could not be valid under the PWD. In principle, the Court added compatibility with the PWD to the list of conditions governing the lawfulness of collective action in EU law. As a matter of fact, the *Laval* litigation in national courts resulted in an order requiring trade unions to pay approximately €54,000 in damages

76 ibid, paras 99, 103.

77 ibid, para 107.

78 *Laval* (n 56), para 110.

for the company's losses suffered as a result of the industrial action.

(iii) Rüffert

The *Rüffert* judgment elaborated on the situation of posted workers in the context of public procurement and reaffirmed the limits of collective bargaining set by the PWD, as interpreted by the CJEU. The case concerned a German law that confined the right to contract for public works to undertakings committed to pay the wages laid down in the sectoral collective agreement. The law was aimed at counteracting the distortions of competition that could arise through the use of cheap labour. In accordance with the law, a German authority of Lower Saxony launched a public tender to build a prison and stipulated that contractors and sub-contractors had to abide by the minimum rates of pay provided for in the collective agreement applicable to the construction sector. A German company that won the tender subcontracted work to a Polish firm, which agreed to comply with the pay rates laid down in the collective agreement. It later turned out that the subcontractor had paid posted workers less than half of the minimum wage provided for in the agreement. After learning of this, the public authority annulled the contract and imposed financial penalties on the Polish subcontractor. As a result, the German contractor went bankrupt. The liquidator in the bankruptcy procedure claimed the State legislation was incompatible with Art. 56 TFEU. The case was referred to the CJEU for a preliminary ruling.

The CJEU found that the obligation to abide by the minimum wage requirement laid down in the collective agreement constituted a restriction on the freedom to provide services. Although the restriction could, in principle, be justified by the objective of ensuring the protection of workers, it was not in this case. The

collective agreement that fixed the minimum rates of pay did not meet the definition of a universally applicable collective agreement provided for in the PWD[79] because it covered a limited geographical area and applied only to public sector contracts, excluding the private sector.[80] Just as in *Laval*, the objective of worker protection sought by the collective agreement could not justify a restriction on the freedom to provide services because the German local authority did not follow the letter of the PWD. The position of the Court was later reaffirmed in *Commission v Luxemburg*[81] in a slightly different situation, where the Court held that classifying collective agreements under the public policy exception, Art. 3(10) of the PWD, was also only valid when agreements had been declared universally applicable.

The Court also examined the possibility of justification on the basis of Art. 56 TFEU alone. However, it found there was no evidence that special protection would be necessary for construction workers only when employed in connection with a public works contract, excluding the private sector.[82] Essentially, the Court refused to accept justification under Art. 56 applying the same reasoning it used under the PWD. Trade unions were once again prevented from forcing foreign contractors to observe collectively agreed standards in relation to migrant workers where those standards went beyond the minimum recognised by the PWD.

(iv) Commission v Germany

The CJEU's judgment in *Commission v Germany* is the latest in the line of cases

79 Posted Workers Directive (n 72), art 3(8).

80 *Rüffert* (n 57), paras 26–29.

81 Case C–319/06 *Commission of the European Communities v Grand Duchy of Luxemburg* [2008] ECR I–04323.

82 *Rüffert* (n 57), paras 39–40.

concerning the relationship between economic freedoms and collective labour rights. The case arose out of infringement proceedings against Germany and concerned the practice of local authority employers awarding contracts for pension services to bodies specified in collective agreements, without a call for tenders in accordance with the EU Directives on Public Procurement.[83] This practice was authorised by German legislation and had the objective of enhancing the level of retirement pensions.

The CJEU held that Germany violated EU public procurement rules. The reasoning of the Court followed the logic of *Viking* and *Laval.* The Court recognised the fundamental character of the right to bargain collectively, making a reference to Art. 28 of the EU Charter.[84] Nevertheless, the right to collective bargaining had to 'be exercised in accordance with European Union law',[85] which meant in the circumstances of the case that it had to be 'reconciled with the requirements stemming from the [economic] freedoms protected by the FEU Treaty' and implemented in EU public procurement directives.[86] The principle of proportionality had to be observed in the process of reconciliation.[87]

This time, there was however something new in the reasoning of the Court. For the first time in its case law on collective labour rights, the Court emphasised the

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83 Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1; Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114 (Public Procurement Directive 2004/18/EC).

84 *Commission v Germany* (n 58), para 37.

85 ibid, para 43.

86 ibid, para 44.

87 ibid, para 44.

importance of a 'fair balance' to be struck between social and economic interests. Enhancement of the level of retirement pensions for workers had to be fairly balanced against the attainment of business freedoms to pursue cross-border activities.[88] Although the Court used the language of 'fair balance', the balancing process it adopted was asymmetrical and favoured commercial interests over collective labour rights. The Court held it was possible for Germany to accommodate its social policy objectives without completely disregarding the framework of EU public procurement rules.[89] In other words, Germany had failed to execute its social policy in a way that would be least restrictive on business freedoms.

The new shift in the reasoning of the Court may have been influenced by the Opinion of AG Trstenjak, who highlighted the need to adopt a symmetrical approach to the reconciliation of economic freedoms and social rights: 'in the case of a conflict between a fundamental right and a fundamental freedom, both legal positions must be presumed to have equal status'.[90] As a consequence, 'if a conflict between such fundamental freedoms and fundamental rights is established, it must be determined whether having regard to all the circumstances of the case, fundamental freedoms may justify a restriction on the fundamental right to bargain collectively and […] conversely, whether those fundamental rights demand that the scope of those fundamental freedoms and the secondary law based thereupon must be limited'.[91] The conclusions reached by AG Trstenjak did not however reflect a symmetrical application of the proportionality test. Trstenjak concluded that the right to collective

88 *Commission v Germany* (n 58), para 52.

89 ibid, paras 53–56.

90 *Commission v Germany* (n 58), Opinion of AG Trstenjak, paras 79, 81.

91 ibid, para 84.

bargaining was not capable of justifying the restriction on Arts. 49 and 56 TFEU because 'it was possible to conceive of [a less restrictive] alternative scheme compliant with Community law' to achieve the social objectives pursued.[92]

(c) Legal Implications of the Case Law on the Right to Strike

The case law of the CJEU seems to have established that there is a clear-cut hierarchy in EU law between EU free movement rules and collective labour rights, and more generally, between economic and social values of the Union. As a consequence of this hierarchy, the Court imposes strict conditions on the exercise of the right to strike where it comes into conflict with the economic freedoms. In order to comply with EU law, strike action has to pass a rigid proportionality review: first, it must be invoked with the objective of securing employment conditions that are under serious jeopardy *(Viking);* second, those employment conditions must be laid down in accordance with EU directives implementing EU free movement rules, where applicable (*Laval, Rüffert, Commission v Germany*); and third, the exercise of the right to strike must be necessary, which means that strike action must be taken as a last resort after other, possibly less restrictive means have been exhausted (*Viking*).

The proportionality test adopted by the CJEU seems to depart from the international standards of protection of the right to strike as it curtails the legal autonomy of trade union action. Trade union autonomy is an internationally recognised principle that governs the functioning of trade unions and is regarded as a basic prerequisite to their effectiveness.[93] Autonomy effectively means that workers'

92 ibid, paras 215, 227.

93 Convention 87 (n 22), art. 3.

organisations have the right to draw up their constitutions and rules, elect their representatives, organise their activities and formulate their programmes without external interference.[94] The autonomy enjoyed by trade unions is not absolute. The ILO supervisory bodies accept that certain restrictions may be permissible. However, trade unions should not be so burdened by regulation as to be unable to effectively promote the interests of those they represent.[95]

As the CJEU acknowledged in *Viking,* the organisation of collective action by trade unions must be regarded as covered by their legal autonomy.[96] And yet, the proportionality test imposed by the Court on the right to strike seems to significantly restrict that autonomy. First of all, it narrows down the permissible objectives of strike action to one – securing employment conditions that are under serious jeopardy. These restrictions are incompatible with the international and European standards, which accept the lawfulness of collective action as long as it defends the economic and social interests of workers (position of the ILO CoE under Convention 87) or furthers the goals of collective bargaining (position of the ECSR under the ESC, also enshrined in the CFR).[97] Second, by placing the right to strike under the 'least restrictive means' test, the Court seems to ignore the fact that the point of collective action is precisely to act out of proportion thus causing economic harm to the employer in order to put pressure on her to enter into collective agreement on

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94 *ILO Digest on Freedom of Association* (n 6) 109 –136; Collins, Ewing, McColgan (n 1) 490–536.

95 *ILO Digest on Freedom of Association* (n 6) 79–108; Collins, Ewing, McColgan (n 1) 491.

96 *Viking* (n 55), para 35.

97 *ILO Principles Concerning the Right to Strike* (n 4) 11, 13–16; Novitz (n 4) 285; E Kovacs, 'The Right to Strike in the European Social Charter' (2005) 26(4) Comp Lab L & Pol'y J 445, 448; *ILO Digest on Freedom of Association* (n 6) 110. P Syrpis, T Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' (2008) 33 EL Rev 411, 418 (Syrpis and Novitz).

reasonable terms.[98] The threat of recourse to strike action is often the sole bargaining tool workers have to offset the imbalance of bargaining power inherent in the employment relationship and ensure that negotiations with the employer are effective.[99] That is why it is crucial for trade unions to be able to use their right to strike autonomously and strategically. The requirement that strike action be a necessary last resort seems to go against the nature of the right to strike and risks compromising the effectiveness of collective bargaining and trade union activity more generally. Moreover, the test creates a climate of legal uncertainty. Trade unions can no longer rely on national law to secure the legality of collective action, while EU law makes it conditional on a case-by-case assessment of necessity in relation to EU business freedoms, something that is extremely difficult to predict.[100] At the same time, employers are handed a strong incentive to sue trade unions in courts with a promise of pecuniary compensation, a situation that both the ILO CFA and the ECSR have heavily criticised.[101] As a result, trade unions are dissuaded from taking collective action due to the risks involved,[102] which significantly weakens their bargaining power and directly affects their ability to protect workers' rights.

The EU proportionality test also threatens the integrity of national systems of industrial relations and has a damaging effect on the level of worker protection in the region. As a result of the Court's case law, working conditions of migrant workers

98 ACL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 ILJ 126, 143; KD Ewing, J Hendy QC, 'The Dramatic Implications of *Demir and Baykara'* (2010) 39 ILJ 2, 13.

99 Novitz and Germanotta (n 2) 68–69.

100 Syrpis and Novitz (n 97) 418–419.

101 Novitz (n 4) 321.

102 Syrpis and Novitz (n 97) 418–419; Barnard (n 1) 120–121.

will be governed by labour standards of the least regulative MS relevant to the situation in question, unless higher standards are able to survive the high-threshold necessity review.[103] Such approach poses a profound challenge to domestic social policy systems that rely on autonomous collective bargaining in the implementation of national social policy, such as the Scandinavian States.[104] MS find themselves faced with a dilemma: they must either modify their traditional methods of social regulation, or accept the fact that labour standards set by trade unions will most likely be rejected by the CJEU. A number of countries have already followed the first route, which is problematic in light of the lack of EU competence to regulate domestic social matters.[105] Moreover, the Court's position reinforces the idea that social dumping is an acceptable method for businesses to compete in the European market, thus encouraging wage competition among businesses and workers.[106] While encouraging wage competition may be a valid economic policy decision, the Court's asymmetrical position threatens to override the also legitimate aim of MS wishing to maintain their chosen level of worker protection, challenges the capacity of new MS to build their own social models, and risks creating a race to the bottom in European labour standards.[107]

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103 S Deakin, 'Regulatory Competition in Europe after Laval' (2008) University of Cambridge CBR Working Paper 364/2008, 18 <http://www.cbr.cam.ac.uk/pdf/WP364.pdf> accessed 21 November 2012 (Deakin).

104 C Joerges, F Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' (2009) 15 ELJ 1 (Joerges and Rödl).

105 A Bücker and W Warneck (eds), 'Viking – Laval – Rüffert: Consequences and policy perspectives' (2010) ETUI Report 111.

106 *Deakin* (n 103) 14–15, 20–21; J Malmberg, T Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) 45 CML Rev 1115, 1116 (Malmberg and Sigeman).

107 'Rüffert case: ETUC Warns that ECJ's Judgment Is Destructive and Damaging' (*ETUC*, 3 April 2008) <http://www.etuc.org/a/4830> accessed 21 November 2012.

Finally, the Court's case law seems to depart from the EU's commitment to strive for a union whose quest for economic growth is balanced against sustaining the social progress. The EU may have been created as an economic union with a primary goal of establishing a single market; however, at least since the Maastricht Treaty, social policy has formally become part of EU law, and after the reforms brought about by the Treaty of Lisbon it occupies a prominent place among the EU's objectives. Art. 3(3) TEU proclaims, *inter alia*, the creation of a highly competitive *social* market economy and promotion of social justice and protection as objectives of the Union.[108] All together, the objectives listed in Art. 3 are aimed at a broader goal of achieving sustainable development in Europe.[109] Therefore, despite an unequal distribution of EU competences across economic and social domains, the EU is obligated to regulate the internal market in a way that would not undermine the pursuit of its social goals. As the CJEU itself rightly declared in *Viking*, since the EU has not only an economic but also a social purpose, economic freedoms under EU free movement rules have to be balanced against social policy objectives, which include, *inter alia*, improved living and working conditions, proper social protection, and dialogue between management and labour. However, while the rhetoric of the CJEU is in line with the spirit of the Treaty, its actual position is not, at least not after the Lisbon reforms. The proportionality test applied by the Court does not reflect an equitable balance between the economic and social values of the EU as it clearly favours the former over the latter.

(d) Labour Right *versus* Human Right

108 Consolidated Version of the Treaty on European Union [2010] OJ C83/01 (TEU), art 3(3).

109 ibid.

The kind of balance the CJEU has struck between economic freedoms and collective labour rights differs substantially from the Court's approach in its human rights case law, namely where civil and political human rights come into conflict with EU free movement rules.[110] In those cases, the CJEU seems to strive for an equitable balance between the two values. The Court applies a looser proportionality test with respect to the exercise of human rights where they interfere with economic freedoms and accords MS a wide margin of discretion in choosing the level of protection of human rights and implementing strategies to achieve it. By contrast, when performing the proportionality review of trade union actions, the Court accords them no margin of discretion and applies a rule of necessity. Such contrasting approaches suggest that while formally referring to the right to strike as a fundamental right in its judgments, the CJEU does not actually treat it like one. The Court seems to regard collective labour rights as being of lesser value, hence requiring a lower level of protection, than the civil and political rights. The disparity is apparent from the Court's reasoning in the *Schmidberger*[111] and *Omega*[112] cases, the landmark human rights cases in the jurisprudence of the CJEU, in which the Court had to reconcile business interests with the freedoms of expression and assembly, and the right to human dignity, respectively.

Schmidberger was the first case in the history of the CJEU where the protection of fundamental rights was invoked as a justification for restricting fundamental freedoms. The case concerned a permission granted by the Austrian

110 Case C–112/00 *Schmidberger* [2003] ECR I–5659 (*Schmidberger*); Case C–36/02 *Omega Spielhallen* [2004] ECR I–9609 (*Omega*); Case C–244/06 *Dynamic Median* [2008] ECR I–505 (*Dynamic Median*); Case C–208/09 *Sayn-Wittgenstein* [2010] ECR I–13693 (*Sayn-Wittgenstein*); Case C–391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I–3787.

111 *Schmidberger* (n 110).

112 *Omega* (n 110).

government to close a national motorway in order to allow a demonstration against the levels of pollution caused by the heavy traffic on the motorway. A German shipping company Schmidberger argued that the closure of the highway interfered with its freedom to provide services because the company was unable to use its vehicles to transport goods from Germany through Austria and into Italy. The CJEU found that the restriction on the free movement of goods posed by the actions of the Austrian government was proportionate and justified in light of the aim of protecting freedom of expression and freedom of assembly. There were three main factors that led the Court to conclude that interference with Art. 56 was justified: the importance of the fundamental rights in question, the fact that they were exercised in accordance with Austrian law and targeted important societal objectives, and the wide margin of discretion that States enjoy when balancing their human rights standards against the free movement rules.[113]

The *Omega* case concerned a German order prohibiting the operation of games that involved simulated killing on the basis that such games constitute an affront to human dignity, guaranteed in Art. 1(1) of the German Constitution. Omega, a company that operated a laser installation falling under the prohibition, appealed against the order in German courts, which referred the case to the CJEU asking whether it was compatible with the EU free movement rules for a particular commercial activity to be prohibited under national law because it offended the values enshrined in national constitution. In line with its judgment in *Schmidberger*, the Court held that States enjoyed a wide margin of discretion to decide on their public policy, and that the German prohibition 'corresponded to the level of

[113] ibid, paras 82–93.

protection of human dignity which the national constitution sought to guarantee' and 'did not go beyond what is necessary' in order to attain that objective.[114]

A closer analysis of the CJEU's reasoning in *Schmidberger* and *Omega* in light of the Court's judgments in collective labour rights cases shows that the Court does not accord the same level of protection to collective labour rights as to civil and political rights. This is evident from the different weight the CJEU gives to different fundamental rights when assessing each as a justification for restrictions on the free movement, and the intensity of the proportionality review it adopts with respect to each category of rights.

In cases where civil and political rights constitute a restriction on the economic freedoms, the CJEU treats the exercise of those rights as a self-standing legitimate objective capable of justifying the restrictive effect, without looking at broader public policy goals behind those rights. In *Schmidberger*, for instance, asked by the referring court to consider whether the objectives of environmental protection and public health could justify the restrictive effect on the economic freedoms, the CJEU explicitly recognised the fundamental rights – the freedom of expression and freedom of assembly – as themselves distinct grounds capable of justifying restrictions on economic freedoms. *Omega* followed the same logic; the right to human dignity – rather than some broader public policy goal its exercise might lead to – was itself considered a justification for the restrictive effect.

By contrast, in neither of the labour rights cases did the CJEU consider the right to strike or collective labour rights as legitimate objectives in and of themselves,

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114 *Omega* (n 112), paras 31, 37–39.

although the Court referred to a number of instruments that affirmed the fundamental nature of the right to strike. The Court cited the ECHR as a document that reflects the European consensus on the core rights that must be regarded as fundamental, and at least since *Demir* and *Enerji*, this list includes the right to collective bargaining and action as essential elements of the freedom of association. In *Commission v Germany*, the Court relied on the EU Charter to declare that 'fundamental rights as they result from the constitutional traditions common to the Member States, […] shall be interpreted in harmony with those traditions', and noted that in Germany – as well as in Sweden and Finland, for that matter – collective labour rights enjoy constitutional protection under the freedom of association.[115] Notwithstanding, the right to strike was perceived by the Court as merely one of the means to achieve the objective of worker protection, rather than a legitimate objective on its own.

As a consequence, the Court's proportionality review applied with respect to the exercise of civil and political rights was considerably less intense than in the case of labour rights. In *Schmidberger* and *Omega,* the Court acknowledged that States had a wide margin of discretion in protecting human rights and thus mainly focused on the suitability, or reasonableness, of government choices.[116] The Court recognised that economic freedoms and fundamental rights were values of equal importance in EU law and they could both be subject to restrictions.[117] In *Schmidberger*, for instance, relying on Art. 10 and 11 ECHR and its own case law, the CJEU found that freedom of expression and freedom of assembly could be subject to certain limitations justified by objectives in the public interest, as long as those derogations

115 *Commission v Germany* (n 58), para 43.

116 *Schmidberger* (n 111), paras 78–81; *Omega* (n 112), paras 37–39.

117 *Schmidberger* (n 110), paras 77, 81.

were in accordance with the law, motivated by legitimate aims and necessary in a democratic society and, in particular, proportionate to the legitimate aim pursued'.[118] However, interference with fundamental rights must not impair the very substance of the protected rights.[119] The task for the national authorities is therefore to strike a 'fair balance' in the protection of fundamental rights and fundamental freedoms – a view that seems to resemble the 'double proportionality' approach advocated by AG Trstenjak in *Commission v Germany*.[120]

Moreover, States have a wide margin of discretion when choosing the level of protection to be accorded to human rights and later balancing that protection against the exercise of economic freedoms.[121] In *Omega,* the CJEU gave considerable deference to German constitutional tradition to grant special protection to the right of human dignity, without questioning the necessity of doing so. In *Schmidberger,* the Court rejected the proposition of the Austrian national court that the freedom of assembly could have been exercised in a manner less restrictive on the free movement (for example, by holding the demonstration next to the motorway or limiting its duration), explaining that it could have been perceived as depriving the action of a substantial part of its scope. In this regard, AG Jacobs noted in his Opinion that 'the demonstrators could not have made their point nearly as forcefully if they had not blocked the motorway long enough for the demonstration to 'bite'.

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118 ibid, para 79.

119 ibid, paras 80, 90.

120 *Commission v Germany* (n 58), Opinion of AG Trstenjak, paras 192–195; N Reich, 'How Proportionate is the Proportionality Principle?' (Conference 'The Reach of Free Movement', Oslo, May 2011) < http://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2011/free-movement-oslo/speakers-papers/norbert-reich.pdf> accessed 31 July 2013, 19.

121 See also *Dynamic Median* (n 110), para 44; *Sayn-Wittgenstein* (n 110), para 87.

By contrast, when faced with the exercise of the right to strike in *Viking* and *Laval,* the Court adopted a much stricter approach. The focus of review was the necessity of strike action, which was somewhat consistent with the Court's view that in the process of achieving social policy objectives, States should choose the means that are least restrictive on economic freedoms. Moreover, the Court's scrutiny was applied directly to trade union actions, rather than governments', thus extending the horizontal direct effect of the free movement rules to the actions of private actors. While recognising that trade unions were bodies governed by private law whose actions were covered by legal autonomy,[122] the Court did not attempt to accommodate this autonomy when assessing the regulatory effect of trade union actions on the fundamental freedoms. Instead of showing deference and focusing on the test of suitability, the Court placed trade unions under the 'least restrictive means' test, thus undermining the very essence of their autonomy to organise, bargain collectively and take collective action.[123] Trade unions were required to select the course of action that would least restrict economic freedoms in a given situation, and it was precisely because the strike actions were effective and did 'bite' the employer that the Court found them disproportionate. The paradox of this situation is that trade unions, despite their status as private actors, were equated to States in terms of their regulatory role and responsibility in complying with EU free movement rules,[124] and yet, in contrast to governments in *Schmidberger*, *Omega* and other human rights

122 *Viking* (n 55), paras 35, 65; *Laval* (n 56), para 84.

123 Hös (n 70), 12–15. See also Joerges and Rödl (n 104), 13–15.

124 *Viking* (n 55), paras 34–37, 64–65; *Laval* (n 56), para 98.

cases, they were given no margin of discretion in their actions.[125]

It follows from the above that the CJEU does not apply a consistent test when assessing restrictions on the economic freedoms posed by the exercise of fundamental rights. The Court adopts a deferential approach in cases concerning civil and political rights and leaves considerable room for manoeuvre for the national authorities in protecting them. By contrast, in labour rights cases, the Court seems to prefer a strict scrutiny approach, whereby trade unions are given no margin of discretion, hence their exercise of the right to strike is placed under the test of necessity. The inconsistencies in the position of the CJEU indicate that the Court differentiates between civil and political rights, on the one hand, and labour rights, on the other, and in the context of internal market accords a considerably higher level of protection to the former.

3 The ECtHR and the CJEU: Identifying Conflict and Achieving Coherence

Following the EU's accession to the ECHR, the ECtHR will be endowed with a mandate to review the case law of the CJEU. The new legal relationship between the courts will require consistency between their human rights jurisprudence. While the detailed analysis of the legal implications of accession will be discussed in Chapter II, this section focuses on the comparison of the case law of the ECtHR and the CJEU concerning the right to strike and aims to determine how the position of the latter

125 *Dynamic Median* (n 110), para 44; *Sayn-Wittgenstein* (n 110), para 87; Malmberg and Sigeman (n 106), 1130; L Azuolai, 'The Court of Justice and the Social Market Economy: the Emergence of an Ideal and the Conditions for its Realization' (2008) 45 CML Rev 1335, 1350; C Semmelmann, 'The European Union's Economic Constitution under the Lisbon Treaty: Soul-searching among Lawyers Shifts the Focus to Procedure' (2010) 35 EL Rev 516, 527.

should change in order to be brought in line with the former.

The approaches of the ECtHR and the CJEU seem to have one main similarity – both courts call the right to strike a fundamental right. However, there is already a divergence in the way the ECtHR and the CJEU interpret the fundamental nature of the right to strike and the methodology they apply to determine the level of protection it enjoys when there is a conflict between the right to strike and other legal interests.

(a) Opposite Proportionality Reviews

The proportionality test adopted by the CJEU is, in principle, opposite to the way it is applied in the case law of the ECtHR. As with all of the rights in the Convention, the ECtHR takes the right to strike as a starting point in the analysis and then examines the lawfulness of State actions restricting it, in accordance with Art. 11(2) ECHR. To be justified, restrictions must be prescribed by law, pursue one or more legitimate aims, and be necessary in a democratic society for the achievement of those aims.[126] Moreover, restrictions must be construed strictly and must not impair the very essence of the right to organise.[127]

By contrast, the CJEU takes economic freedoms as a starting point and then assesses the justification for restricting them, collective action being on the side of justification. While recognising the need to strike a fair balance in the protection of the EU's economic and social values, the Court places the fundamental freedoms and labour rights in a relationship of a principle and an exception, the right to strike being

126 *Demir* (n 8), para 159.

127 *Demir* (n 8), para 97.

the exception that will be interpreted strictly. To be lawful, strike action must pursue a legitimate aim, be justified by overriding reasons of public interest, be suitable for attaining the objective pursued, and not go beyond what is necessary in order to attain it.[128] As previously discussed, the Court's focus on the necessity of strike action as the central condition of its validity seems to impair the very essence of trade union freedom of association, contrary to the requirements of Art. 11 ECHR.

(b) Circumstances Qualifying the Comparison between the ECtHR and the CJEU

The compatibility of the CJEU's case law with the ECHR must however be assessed in light of the broader circumstances that differentiate the two courts and their case law. These include the constitutional settings in which the ECtHR and the CJEU operate, the contrasting factual circumstances of the cases that came before the courts, and the chronological order of their judgments.

The ECtHR functions within the framework of the ECHR whose sole objective is the protection of human rights in Europe. The Court thus has a clearly defined mandate to supervise the protection of human rights in countries that are parties to the Convention. It hears cases brought against governments that fail to protect their citizens' human rights. Some of the cases involve especially grave labour rights violations, as in the cases against Turkey, where national authorities denied the right to collective bargaining and action for public sector employees and fined those who took part in peaceful protests aimed at improving their working conditions.

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128 *Viking* (n 55), para 75.

The CJEU, on the other hand, functions in a totally different setting. As the principal judicial organ of the EU, the Court bears the responsibility of interpreting and applying EU law, which for the most part involves EU free movement rules. This explains why the methodology of reasoning employed by the CJEU is essentially opposite to that of the ECtHR. Also, cases concerning the right to strike that come before the CJEU will be very different from those dealt with by the ECtHR in terms of both legal and factual circumstances. To take the example of *Viking* and *Laval*, the disputes were horizontal in nature – they arose from litigation between private parties, trade unions and employers, as opposed to government interference with the rights of individuals. Also, the cases concerned competing interests of arguably equal legal value (or at least, there is no clear hierarchy set out in the regime of the Treaties) and importance in EU law – fundamental freedoms versus fundamental rights. Finally, the central issue brought before the CJEU was not interference with the right to strike, but quite the contrary, trade union interference with the exercise of EU fundamental freedoms in the form of strike action. In fact, that interference significantly hurt the interests of businesses that incurred financial losses.

It is also important to take into account that the CJEU's judgments in *Viking* and *Laval* (and *Rüffert*, for that matter) were delivered prior to the ECtHR's decisions in *Demir* and *Enerji*, which fundamentally changed the Court's interpretation of Art. 11 ECHR. The CJEU therefore relied on the earlier position of the ECtHR whereby collective action was regarded as one of the main ways in which trade unions could protect workers' interests, but it was not indispensible for the exercise of the freedom of trade union association under Art. 11. This context could explain why the CJEU accorded to the right to strike a lower level of protection than to other fundamental rights protected in EU law. Yet, even assuming that the CJEU duly followed the case

law of the ECtHR, it is hard to justify the Court's decision in *Commission v Germany*, which was adopted after both *Demir* and *Enerji* and still maintained the same inequitable balance between the economic freedoms and collective labour rights set by the Court in its previous judgments.

While an analysis of the legal frameworks in which the two courts operate, the varying factual circumstances of the complaints that come before them, and the chronology of their decisions may partly explain the discrepancy, the fact remains that the CJEU's position is incompatible with the ECHR. This is evidenced by the lack of consistency in the Court's application of the proportionality test. The way the CJEU applies the test in civil and political rights cases suggests that it treats collective labour rights as inferior to other fundamental human rights, thus endorsing the division between civil and political rights, on the one hand, and labour rights, on the other, something that can no longer be justified in light of the developments concerning the protection of collective labour rights under the freedom of association in the framework of the ECHR. Therefore, unless the CJEU accords the right to strike the protection inherent in the status of being a fundamental human right in EU law, its position will be incompatible with the ECHR.

(c) Compliance with the ECHR: Exemption, Reversed Proportionality or Fair Balance?

It is suggested that to bring its case law in compliance with the ECHR, the CJEU must accord the right to strike the same level of protection as civil and political rights, in accordance with the *Omega* and *Schmidberger* judgments. Accordingly, when dealing with conflicts between economic freedoms and the right to strike, the Court

would be expected to engage in a fair balancing of the two values by way of conducting a proportionality review with respect to each of them. But is that enough? The ECtHR itself does not employ a 'fair balance' methodology when assessing the lawfulness of restrictions imposed on Convention rights, but simply assesses their proportionality. It is therefore important to consider whether the only way the CJEU could bring its position in line with the ECHR would be one of the following options: either excluding collective rights from the reach of the EU free movement rules, or applying the proportionality test only for the purpose of assessing whether the exercise of economic freedoms does not excessively restrict the right to strike.[129]

With regard to the first option, it was submitted by trade unions as well as a number of MS in *Viking, Laval* and *Commission v Germany* that by analogy to the CJEU's reasoning in *Albany,*[130] the right to collective bargaining and action should be excluded from the application of Arts. 49 and 56 TFEU. In *Albany*, the CJEU held that restrictions of competition are inherent in collective agreements concluded between trade unions and employer associations. Yet, collective agreements must be regarded as falling outside the scope of Art. 101 TFEU since otherwise social policy objectives pursued by such agreements would be seriously undermined.[131] Trade unions argued that the CJEU should apply the same logic to the free movement cases, but the Court refused to do so. It explained that unlike in the relationship between collective bargaining and competition law, it is not inherent in the very exercise of

129 K Ewing, 'The Draft Monti II Regulation: An Inadequate Response to Viking and Laval' (2012) IER Briefing Paper <http://www.ier.org.uk/resources/draft-monti-ii-regulation-inadequate-response-viking-and-laval> accessed 21 November 2012.

130 Case C–67/96 *Albany* [1999] ECR I–5751 (*Albany*).

131 *Albany* (n 130), paras 59–60.

trade union rights that EU fundamental freedoms will be prejudiced.[132] At the same time, free movement rules do not affect the essence of trade union rights in a manner equivalent to competition rules.[133] Finally, trade unions proposed that the right to strike should be exempted from the scope of Art. 49 and 56 by virtue of being a fundamental right. The Court rejected this claim as well, noting that the EU Charter, which contains the right to strike in Art. 28, makes clear that fundamental rights must be exercised within the limits of EU law.[134] Against this background, it would be unreasonable to expect that the CJEU's compliance with the ECHR should entail a complete disregard of EU free movement rules.

The second option – the reversal of the proportionality review – draws on the recent report of the ILO CoE issued in the *BALPA* case.[135] The case concerned a strike action by the members of a UK Pilot Union (BALPA) that followed a decision of its employer, British Airways (BA), to set up a subsidiary company in France using pilots that were paid less than the BA pilots. BALPA members decided to go on strike in fear of the negative consequences that the decision would have on their employment conditions. The strike action was however cancelled after BA requested a preventive injunction in British courts, claiming that collective action would be illegal in light of the findings of the CJEU in *Viking* and *Laval* cases. BA claimed damages estimated at £100 million per day to compensate for the potential work

132 *Viking* (n 55), para 52; *Laval* (n 56), para 86; *Commission v Germany* (n 58), paras 45–47.

133 *Commission v Germany* (n 58), para 49.

134 *Viking* (n 55), paras 43–44; *Laval* (n 56), para 91.

135 International Labour Conference (99th Session) Report III (Part 1A) of the Committee of Experts 208–209 (Geneva 24 February 2010) <http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282010-99-1A%29.pdf> accessed 21 November 2012; International Labour Conference (100th Session) Report III (Part 1A) of the Committee of Experts 187 (Geneva 16 June 2011) <http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282011-100-1A%29.pdf> accessed 21 November 2012.

stoppage. BALPA did not follow through with the strike, explaining that it would risk bankruptcy should it be required to pay the damages claimed by the BA. Subsequently, BALPA filed a complaint to the ILO.

The ILO CoE reported twice on the complaint, both times expressing 'serious concern' about the practical limitations on the effective exercise of the right to strike in the EU and concluding that the proportionality doctrine articulated by the CJEU is incompatible with the ILO Convention No. 87. The Committee observed that 'when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it […] never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services'. Moreover, the threat of an action for damages that could bankrupt the union, now possible in light of the *Viking* and *Laval* judgements, renders collective action 'irrelevant and meaningless' and creates a situation where the rights under Convention 87 cannot be exercised. The Committee concluded that the proportionality test adopted by the CJEU is likely to have a significant restrictive effect on the exercise of the right to strike in a manner contrary to the Convention.

The findings of the ILO CoE may have significant implications on the future status of the right to strike in Europe, considering especially that the ECtHR heavily relies on the ILO Conventions and the jurisprudence of their supervisory bodies in the interpretation of Art. 11 ECHR. Admittedly, as already discussed, the implications of the ILO jurisprudence on the European protection of the right to strike may depend on the future outcome of the dispute between the Workers' and Employers' groups regarding the legal status of the right to strike in international law. Notwithstanding, the ILO findings in *BALPA*, if followed by the ECtHR, could mean that in order to

comply with the ECHR, the CJEU would need to reverse its proportionality test and apply it with respect to the economic freedoms, rather than collective labour rights. That said, *BALPA* ruling must be seen in the context of the EU's legal order. In the ruling, the CoE itself acknowledged the specific nature of EU law by noting that it did not intend to judge on the correctness of the CJEU's decisions in *Viking* and *Laval,* as they set out an interpretation of EU law. As previously pointed out, the objectives of the Union include both an economic and a social dimension, which requires constantly keeping the two in a fair balance. The reversal of the proportionality test, which would entail favouring the right to strike over the economic freedoms, appears to compromise that balance and thus departs from the imperatives of the EU Treaties. Therefore, in the framework of EU law, the reversal of the proportionality test does not seem to be a Treaty-compliant way for the CJEU to achieve conformity with the ECHR.

However, there seems to be an in-between way for the CJEU to comply with the ECHR, while at the same time respecting EU Treaties and preserving the constitutional character of the Union. It is suggested that the CJEU should treat the right to strike as equal to civil and political rights, hence entailing the same level of protection. The Court would therefore be expected to strive for a 'fair balance' in the protection of economic freedoms and the right to strike through applying a double proportionality test to assess the lawfulness of restrictions that each of the legal interests impose on each other, in accordance with the *Schmidberger* judgment and as elaborated in the Opinion of AG Trstenjak in *Commission v Germany*.

The balanced approach to the protection of economic freedoms and labour rights would require a two-fold enquiry into their relationship. In addition to

assessing the proportionality of restrictions that collective labour rights impose on the exercise of the economic freedoms, the CJEU should examine whether the exercise of economic freedoms is justified and proportionate given their capacity to restrict the exercise of collective labour rights.[136] In the case of the right to strike, the Court would be expected to add to its current proportionality review the assessment of whether the exercise of the freedom of establishment or freedom to provide services – for example, in the form of asking for an injunction to restrain strike action – is appropriate and necessary for the achievement of the economic objectives of the Union in light of the impact it has on the right to strike.[137] Most importantly, the two-fold inquiry should take into account a margin of appreciation to be enjoyed by trade unions as autonomous actors of industrial relations. The 'fair balance' approach would arguably ensure that both legal values, the right to strike and the economic freedoms, are limited to the extent that allows each of them to attain their optimal effect.[138]

The European Commission advocated for this position in the Draft Monti II Regulation that aimed to clarify EU rules and principles governing the interaction between the exercise of social rights and fundamental freedoms without reversing the case law of the CJEU.[139] The Commission's proposal was based on the Court's free movement case law, ILO reports and the Opinion of AG Trstenjak in *Commission v Germany*. The proposal was eventually withdrawn due to the objections expressed by

136 P Syrpis, 'Reconciling Economic Freedoms and Social Rights – The Potential of Commission v Germany (Case C–271/08, Judgment of 15 July 2010)' (2011) 40 ILJ 222, 226.

137 Barnard (n 1), 124.

138 Barnard (n 1), 122.

139 Commission, 'Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (Monti II)' COM (2012) 130 final.

national parliaments regarding a lack of the EU's legislative competence to regulate collective labour rights. However, the significance of Monti II lies in that it recognised the general equality of the fundamental rights and fundamental freedoms in EU law and highlighted the need for national courts to strike a fair balance in the process of reconciliation of both legal values.[140]

To summarise all of the above, there is a clear disparity in the way the ECtHR and the CJEU treat the right to strike. The same proportionality test the ECtHR uses to assess the lawfulness of interference *with* the right to strike is used by the CJEU to assess the lawfulness of the interference with the EU internal market freedoms *caused by* the right to strike. The proportionality review conducted by the CJEU reflects a hierarchy in the EU's legal order, whereby the right to strike is subordinated to the economic freedoms. As long as the CJEU maintains this hierarchy, its position will be incompatible with the case law of the ECtHR under of Art. 11 ECHR. In order to bring its case law in line with the ECHR, the CJEU has to (i) treat the right to strike as a fundamental human right protected under the freedom of association, (ii) apply the 'fair balance' test by conducting a double proportionality review, and (iii) give a degree of deference to trade unions in carrying out their activities.

[140] Monti II, arts 3.4.2, 3.4.4.

Chapter II of this thesis is based on and expands on a chapter originally written for Mark Freedland and Jeremias Prassl (eds), 'EU Law in the Member States: Viking, Laval and Beyond', forthcoming in Hart Publishing, an imprint of Bloomsbury Publishing Plc.

II POST-ACCESSION RESOLUTION OF THE CONFLICT BETWEEN THE ECTHR AND THE CJEU

Having established in Chapter I that there is a conflict in the way the ECtHR and the CJEU treat the right to strike and that the CJEU needs to change its position to comply with the ECHR, Chapter II seeks to determine how in practice the conflict may be resolved and coherence between the courts achieved after the EU's accession to the ECHR.

Although the EU's accession to the ECHR is yet to be finalised (the Accession Agreement must be approved by the CJEU, unanimously voted for by the Council and ratified by MS), it is imminent because the Lisbon Treaty places the EU under an obligation to accede by stating that 'the Union *shall* accede to the ECHR'.[141] The goal of accession is to strengthen the protection of human rights in Europe by submitting the EU to the independent external control of the ECtHR with regard to the rights protected under the Convention.[142]

If we assume that after accession the right to strike will move to an equal footing with the EU internal market freedoms, as suggested in Chapter I, this would not necessarily guarantee a change in the jurisprudence of the CJEU. The CJEU could continue prioritising economic freedoms to keep consistency in its own case law and its interpretation of the Treaty. In fact, resistance on the part of the CJEU to reconcile its position with the standards of the ECHR is to be expected, considering that the

141 TEU (n 108), art 6(2).

142 Draft Revised Agreement on the Accession of the EU to the Convention 47+1(2013)008 (Accession Agreement), Preamble; T Jagland (Secretary General of the Council of Europe), JP Costa (President of the European Court of Human Rights), Joint statement, Council of Europe press release 437(2010), <https://wcd.coe.int/ViewDoc.jsp?id=1628875&Site=DC> accessed 6 May 2013.

Court has in the past been reluctant to accept external legal obligations that would interfere with its mandate or the constitutional character of the EU and employed the notion of 'EU law autonomy' as a legal tool to reject them.

In this regard, Chapter II seeks to answer two main questions. The first is whether in light of the constitutional and institutional changes brought about by the accession – namely, the EU's duty to comply with the Convention as a matter of international law and the prospect of facing legal liability before the ECtHR in the case of non-compliance – the CJEU will be willing to reverse its reasoning in future cases involving the right to strike, or whether it will use the 'autonomy' defence to disregard the standard of protection accorded to the right to strike by the ECtHR under Art. 11 ECHR. The second question is, if the CJEU decides to dismiss the case law of the ECtHR and maintain its current position regarding the balance between the right to strike and the economic freedoms, to what extent such decision will be scrutinised by the ECtHR.

The purpose of Chapter II is therefore to determine whether the judicial review of the CJEU to be performed by the ECtHR after the EU's accession to the ECHR could have the effect of compelling the CJEU to reverse its case law on the right to strike, whether on its own or by virtue of a ruling by the ECtHR. To this end, Chapter II will first discuss the legal implications of accession for the EU's legal order and for its relationship with the ECtHR, and then assess what role these implications will play in practice when the CJEU and the ECtHR deal with cases involving the right to strike after accession.

1 Constitutional and Institutional Implications of Accession

(a) The Role of the ECHR in the Legal Order of the EU

The ECHR already plays an important role in the EU legal order. The Convention is mentioned in Art. 6(3) of the Treaty and recognised by the CJEU as a source of 'special significance' to identify the general principles on EU fundamental rights.[143] It also has a special place in the EU Charter, which relies on the ECHR to determine the meaning and scope of those Charter rights that have corresponding provisions under the Convention.[144] However, despite the references to the ECHR in the Treaty, the case law of the CJEU, and the Charter, the conformity of EU law with the standards of the ECHR largely depends on the willingness of the CJEU to follow them.[145] As a matter of fact, the Court's reliance on the ECHR has been selective and inconsistent.[146] An example of this trend in the area of collective labour rights is *Commission v Germany*,[147] where the CJEU ignored the new developments in the ECtHR concerning the protection of collective bargaining notwithstanding the fact that the EU Charter (which refers to the Convention) was already in force at the time. Such practice shows that while being of 'special significance' to the EU protection of human rights, the ECHR can also be deviated from and marginalised by the CJEU because the CJEU is not legally bound to follow it.

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143 TEU (n 108), art 6(3); Case C–260/89 *ERT* [1991] ECR I–2925, para 41; Case C–274/99 P *Connolly v Commission* [2001] ECR I–1611, para 37; Case C–94/00 *Roquette Frères* [2002] ECR I–9011, para 25.

144 EU Charter (n 25), art 52(3).

145 W Weiss, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon' (2011) 7 EuConst 64, 75–80 (Weiss); S Douglass-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Aquis' (2006) 43 CML Rev 629, 665.

146 Case C–4/73 *Nold* [1974] ECR 491, para 13 (*Nold*); Case C–374/87 *Orkem* [1989] ECR 3283, paras 29, 34; Case T–236/01 *Tokai Carbon* [2004] ECR II–1181, para 405; Case T–99/04 *AC Treuhand* [2008] ECR 1501, para 45; Case C–571/10 *Servet Kamberaj v IPES* [2012] ECR 00000, paras 62–63, 79–80, 92.

147 *Commission v Germany* (n 58).

Against this background, the EU's accession to the ECHR entails a substantial change to the present EU legal framework for the protection of human rights.[148] It integrates the Convention into EU law, grants it a legally binding status, and institutionalises the relationship between the CJEU and the ECtHR by placing the former under the scrutiny of the latter.[149] Following the accession, the ECtHR will have the task of reviewing the acts, measures or omissions of the EU for compliance with the ECHR.[150] Judicial review of the EU is supposed to foster the broader goals of accession – to ensure the coherence of European human rights standards and avoid situations where States would have conflicting legal obligations stemming from their membership in both the EU and the Council of Europe.

In practice, judicial review means that the EU may incur legal liability before the ECtHR if it fails to conform to the standards of the ECHR. There are two ways the EU may find itself involved in the proceedings before the ECtHR. It may become a respondent in a case where an alleged violation of the Convention stems from EU laws or the actions of EU institutions. Alternatively, it may act as a co-respondent in proceedings initially brought against an EU MS, where that MS infringed the Convention while implementing its obligations under EU law and the violation could have been avoided only by disregarding EU law.[151] When the EU joins the case as a co-respondent, the CJEU shall be afforded sufficient time to assess the compatibility with the Convention of the challenged provision of EU law, if it has not yet done so

148 Opinion 2/94 EC Accession to the ECHR [1996] ECR I–01759, paras 34, 35 (Opinion 2/94).

149 Accession Agreement (n 142), Explanatory Report, paras 7, 21; Opinion 2/94 (n 148).

150 Accession Agreement (n 142), preamble; Explanatory Report, para 5.

151 Accession Agreement (n 142), art 3(3).

(known as the 'prior involvement' procedure).[152]

(b) The Process of Judicial Review of the EU in Relation to the Right to Strike

As was already pointed out, the goal of Chapter II is to determine what role the post-accession judicial review of the EU performed by the ECtHR will play in resolving the normative conflict between the CJEU and the ECtHR regarding the protection of the right to strike. Arguably, the potential of the EU's liability before the ECtHR should compel the CJEU to align its case law with the requirements of the ECHR. However, such outcome is not self-evident. There are a handful of substantive and procedural legal obstacles that may prevent the courts from reconciling their currently conflicting positions on the matter. Examination of a hypothetical post-accession dispute may help to illustrate how constitutional and institutional changes brought about by the accession may, in practice, influence the process by which the CJEU and the ECtHR will consider future right to strike cases.

The analysis begins by hypothesising a post-accession dispute before the CJEU concerning the exercise of the right to strike in a cross-border situation – somewhat of a *Viking* and *Laval* type of case. A dispute of this kind could arise before the CJEU in two circumstances. First, it could reach the Court by virtue of a preliminary reference, where trade union action obstructs a European business's freedom of establishment or freedom to provide services. The second possibility is the aforementioned procedure of prior involvement, whereby the EU becomes co-

[152] Accession Agreement (n 142), art 3(6).

respondent to proceedings before the ECtHR.

Let us consider this second circumstance. Suppose a trade union feels wronged by a national court order requiring it to pay compensation for interfering with a business freedom, and files a complaint against the State claiming a violation of Art. 11 ECHR. In this case, the ECtHR will first ask the CJEU to assess the compatibility of EU free movement rules with Art. 11, given that the CJEU has not done so before. The Court would then have to revisit its pre-accession case law on the right to strike, including *Viking* and *Laval* judgments, in light of the EU's membership in the ECHR. Of course, this would also be the case if the CJEU received the case through a preliminary reference from a national court handling the initial dispute (the first scenario referenced above). So ultimately, regardless of how the issue reaches it, the CJEU can be expected to reconsider its pre-accession position.

The next issue is how judicial review of the EU will proceed in the ECtHR. In the event that the CJEU delivers a ruling that is unfavourable for the right to strike, the ruling will most likely be reviewed by the ECtHR, either as the next step in the proceedings after the prior involvement of the CJEU, or following an appeal that challenges the decision of the national court and the CJEU's preliminary ruling on the matter. Therefore, the final adjudicator in the case would always be the ECtHR, which would essentially have to decide whether the CJEU's chosen balance between the right to strike and economic freedoms is compatible with Art. 11 ECHR.

2 Dispute before the CJEU

The actual post-accession impact of the ECHR on the EU protection of the right to

strike will depend on the way the Convention is received within the framework of EU law. In practice, the standards of the ECHR – including obligations under Art. 11 – may be modified through the case law of the CJEU incorporating them into EU law. It is therefore suggested that the outcome of a *Viking/Laval* type of case after accession will largely depend on the way the CJEU deals with certain legal side issues related to the international nature of the Convention. The issues identified as crucial to the present analysis include the legal ranking of the ECHR within EU law, the Court's usage of the doctrine of EU law autonomy, and the role to be accorded to the EU Charter in its relationship with the ECHR. The following analysis seeks to assess the extent to which each of these legal issues could influence the outcome of a post-accession case before the CJEU concerning the protection of the right to strike.

(a) The CJEU Rules on the Legal Ranking of the Convention

After the EU becomes a party to the Convention, the ECHR will be incorporated into the EU legal order. However, the extent to which the Convention and the case law of the ECtHR will be absorbed into EU law will depend on the legal ranking of the ECHR within the EU after accession.

The ECtHR has declared on several occasions that the ECHR has no direct effect or supremacy over national legal orders.[153] Therefore, according to the general principles of international law, the reception of the Convention and its jurisprudence within domestic legal orders is to be determined by domestic law.[154] For instance, the

153 See eg *Swedish Engine Drivers' Union* (n 13), para 50; *Lithgow and Others v the United Kingdom* (1986) 8 EHRR 329, para 205.

154 I Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 31 ff; MN Shaw, *International Law* (6th edn, CUP 2008) 129 ff.

German Federal Constitutional Court holds that the Convention has the same legal status as ordinary laws, but ranks lower than the Constitution.[155] The Spanish Constitutional Court, on the other hand, interprets Spanish constitutional rights in light of the ECHR, and Spanish courts must abide by ECHR case law as a matter of constitutional obligation.[156] By contrast, the UK's Human Rights Act, which gives domestic legal effect to the ECHR, does not require Parliament to legislate compatibly with the Convention or place a legal duty on UK national courts to follow the case law of the ECtHR.[157] Just like national supreme courts, after accession the CJEU will be expected to determine the hierarchical status of the ECHR and its case law in the EU legal order.

The Lisbon Treaty does not give unequivocal guidance regarding the legal ranking of the ECHR after accession. Art. 6(2) TEU, which obliges the EU to accede to the ECHR, is silent on the ranking of the Convention.[158] Art. 216(2) TFEU, which governs the EU's conclusion of international agreements, states that 'agreements concluded by the Union are binding upon' the EU institutions and MS. The latter provision has been interpreted by the CJEU as placing international agreements in between primary and secondary EU law.[159] It follows that the ECHR would rank

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155 C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 MLR 254, 275–276 (Eckes).

156 AS Sweet, H Keller, 'Assessing the Impact of the ECHR on National Legal Systems' (2008) Yale Law School Faculty Scholarship Series Paper 88, 683–684 <http://digitalcommons.law.yale.edu/fss_papers/88> accessed 10 May 2013.

157 Eckes (n155) 275 –276, citing Human Rights Act 1998, s 2 and *R* v *Horncastle and others* [2009] UKSC 14 [11].

158 TEU (n 108), art 6(2).

159 Joined Cases C–402/05 P and C–415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I–6351, paras 307, 308 (*Kadi*); See also Case C–327/91 *France v Commission* [1994] ECR I–3641; Case C–61/94 *Commission v Germany* [1996] ECR I–3989, para 52; Joined Cases C–317/04 and C–318/04 *Parliament v Council and Commission (PNR)* [2006] ECR I–4721.

below primary EU law, which also means below the free movement rules. Such ranking of the ECHR would be rather unfavourable for the protection of the right to strike in cross-border situations.

However, Art. 216(2) TFEU may not be the correct guide in this instance because the ECHR is different from the international agreements typically concluded by the EU and is governed by a set of distinctive rules. The EU's accession to the ECHR is mandated by the Treaty itself, and for a very particular purpose – to ensure the EU's accountability for the violations of human rights. Against this background, it would seem that excluding primary EU law from the purview of the Convention and not subjecting it to scrutiny by the ECtHR would defeat the very purpose of accession.

Moreover, the terms of the Accession Agreement seem to presuppose the review of EU primary law. Art. 3, which introduces the co-respondent mechanism, explains that the EU MS may only become co-respondent in proceedings initiated against the EU when an application before the ECtHR calls into question a provision of the TEU, the TFEU or any other provision having the same legal value.[160] This provision is intended to ensure that MS will participate when one of the Treaties has to be revised.[161] Art. 3 thus gives an indication that the scope of judicial review encompasses primary EU law, which in turn affirms the position that the Convention should rank above the Treaties for the purposes of the protection of human rights. The Explanatory report to the Agreement supports this interpretation by stating that 'the

160 Accession Agreement (n 142), art 3(3).

161 G Gaja, ''Co-Respondent Mechanisms' According to the Draft Agreement for the Accession of the EU to the ECHR' (2013) ESIL Paper 2(1)/2013 <http://www.esil-sedi.eu/node/266> accessed 20 April 2013.

EU should accede to the Convention on an equal footing with the other Contracting Parties, that is, with the same rights and obligations', and that 'the current control mechanism of the Convention should, as far as possible, be preserved and applied to the EU in the same way as to other Contracting Parties', [162] which implies that no parts of EU law should be a priori excluded from the supervision of the ECHR. The view that primary EU law falls under the purview of the Convention also seems to be prevailing in the extant legal literature on the EU's accession to the ECHR.[163]

With regard to the status of the ECHR case law, Art. 46 of the Convention provides that Court judgments are only binding *inter partes,* which means that neither the ECtHR itself, nor member states that are not parties to the dispute, are bound by individual judgments. It follows that decisions of the ECtHR adopted specifically with respect to the EU would be binding on it, regardless of whether they concern primary or secondary EU law. If the ECtHR finds that the EU has violated Art. 11 ECHR by unduly restricting the exercise of the right to strike, the CJEU will be bound to follow that decision when faced with similar issues in subsequent cases. However, the CJEU would not be *per se* bound by the whole body of case law under the ECHR.

When it comes to the EU law perspective on the matter, the CJEU has recognised that the Union's 'capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or

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162 Accession Agreement (n 142), Explanatory Report, paras 7, 21.

163 S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 HRLR 645, 664–666; JP Jacqué, 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 CML Rev 995, 1006–1007; T Lock, 'Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 CML Rev 1025, 1038 (Lock, 'Walking on a Tightrope').

designated by such an agreement as regards the interpretation and application of its provisions'.[164] This statement seems to indicate that the CJEU would indeed be bound by the rulings of the ECtHR adopted in cases involving the EU, but it says nothing about a general legal duty to observe the case law of the ECtHR. Therefore, the CJEU would not be legally obligated to follow *Demir* and *Enerji* when dealing with the right to strike cases in the future.

Does this mean that unless the ECtHR deals with a complaint brought against the EU specifically, the CJEU will be free to disregard the standard of protection accorded to the right to strike under Art. 11 ECHR? The answer is no. First of all, the ECHR is a 'living instrument', whose rights have been greatly shaped by the evolutionary interpretation of the ECtHR. The meaning and scope of those rights cannot be properly understood without reference to the case law. This suggests that the CJEU would at least be expected to take into account the rulings of the ECtHR when interpreting Art. 11 of the Convention. Otherwise, the CJEU would find itself at risk of being brought under the review by the ECtHR, which could result in the EU's liability for non-compliance with its international legal obligations concerning human rights.

Notably, the extent to which the CJEU would be willing to take into account the jurisprudence under Art. 11 ECHR also depends on the circumstances surrounding the respective judgments of the ECtHR. For instance, as explained in Chapter I of the thesis, the factual circumstances of *Demir* and *Enerji* were very different from those faced by the CJEU in *Viking* and *Laval*. Given these contextual differences, the CJEU may conclude that *Demir* and *Enerji* do not control in certain

164 Opinion 1/91 *EEA Agreement* [1991] ECR I–6079 (Opinion 1/91), paras 39–40.

cases arising in the context of EU law. Thus, the Court's chosen balance between economic freedoms and the right to strike might not be considered incompatible with the ECHR on the basis of the two cases. On the other hand, the ECtHR might eventually address situations that more closely resemble *Viking* and *Laval*, in which case decisions of the ECtHR, even if not adopted with respect to the EU and thus not legally binding on it, may exert much greater influence on the CJEU. If the developing case law of the two courts begins to more closely overlap, the CJEU will presumably be more cognisant of the risk that its position might be deemed by the ECtHR as incompatible with Art. 11.

(b) The CJEU Resorts to the Doctrine of Autonomy of EU Law to Justify Deviation from Art. 11 ECHR

Assuming that the ECHR would formally rank above both primary and secondary EU law, its legal force may however be modified through the Court's use of the doctrine of autonomy of the EU legal order. The doctrine of EU law autonomy is aimed at preserving the constitutional identity and supremacy of EU law and essentially means that EU law is an independent legal order that cannot be subordinated to the rules of another legal order, national or international. The goal of this section is to assess the application of the doctrine in relation to accession and determine how it may impact the CJEU's reception of Art. 11 ECHR and its jurisprudence in future cases involving the right to strike.

The doctrine of autonomy of EU law has developed through the case law of the CJEU as a two-faceted concept. Initially, it meant the EU's independence and supremacy over domestic legal orders of the MS (internal dimension), and was later

extended by the Court to include the EU's relative independence from the international legal order (external dimension). The notion of autonomy entered the case law of the CJEU as the Court's response to MS persistently questioning the regulatory powers of the Union (Community). The origins of the notion can be traced back to the *Costa v ENEL* judgment of 1964, where the Court first pronounced on the supremacy of EC law, stating that EC law, being 'an independent source of law' *('une source autonome'*), prevails over conflicting national law.[165] The judgment raised political concern among the MS fearing that the supremacy of Community law could undermine human rights protected under domestic constitutions.[166] The unease among MS led the Court to pronounce shortly after *Costa* on the autonomy of EC law in the context of the human rights protection. [167] In *Internationale Handelsgesellschaft,* for instance, the Court declared that respect for human rights, previously having been regarded as peripheral to the common market project, formed an integral part of the general principles of Community law.[168] The protection of human rights, 'whilst inspired by the common constitutional traditions' of the MS and international human rights treaties, had to be ensured 'within the framework of the structure and objectives of the Community'.[169] This meant that human rights, borrowed from other regimes and translated into EC law, had an autonomous meaning, which had to be determined in light of the broader Community objectives. Through the concept of autonomy, the Court prevented significant distortions in

165 Case C–6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.

166 G de Burca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 AJIL 668.

167 Case C–29/69 *Stauder v City of Ulm* [1969] ECR 419; Case C–11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 (*Internationale Handelsgesellschaft*); *Nold* (n 146).

168 *Internationale Handelsgesellschaft* (n 167).

169 ibid, para 4; *Nold* (n 146).

application of EU law in different MS and ensured that, in case of a normative conflict, EU law would not be subordinated to national legal orders, even when the conflict concerned domestic constitutional norms.[170]

The external dimension of autonomy, which defines the EU's relationship with international law, entered the case law of the CJEU in the context of the EU intending to conclude international agreements that had the potential to modify the legal order of the EU without formally amending the Treaties. Employing the notion of autonomy as justification, the CJEU refused to sanction the EU's adherence to international treaties as long as there was a risk that a treaty in question would alter the allocation of competences within the EU or prejudice the exclusive jurisdiction of the CJEU to interpret EU law.[171]

Over time, the internal and external dimensions of autonomy have converged. The CJEU's scope of review of international measures gradually expanded to include conformity with EU law of any type of international obligation, and on broader grounds than simply its effect on the allocation of competences within the EU. For instance, in the recent decision of *Kadi*,[172] the Court refused to be bound by legal obligations deriving from the UN Charter on the ground that they posed a threat to the EU's constitutional integrity expressed in the protection of human rights.[173] The Court explained that 'an international agreement cannot affect the allocation of powers fixed by the Treaties or […] the autonomy of the Community legal system'

170 Weiss (n 145), JW van Rossem, 'The Autonomy of EU Law: More is Less?' in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence* (The Hague: TMC Asser Press/Springer 2013).

171 See eg Opinion 1/91 (n 164); Case C–459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I–4635 (*Mox Plant*); *Kadi* (n 159); Opinion 1/09 *Unified Patent Litigation System* [2011] I–01137.

172 *Kadi* (n 159), para 283.

173 Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI, art 103.

and cannot 'have the effect of prejudicing the constitutional principles of the EC Treaty', which included fundamental rights.[174] Consequently, the CJEU annulled EC Regulations implementing the UN Security Council resolutions adopted under Chapter VII of the UN Charter because they interfered with the fundamental rights protected in the Community's legal order. Therefore, since *Kadi*, the EU's autonomy vis-à-vis international law is no longer aimed at simply preserving the allocation of competences within the Union, but rather at protecting, in broader terms, its constitutional character; international legal obligations that threaten the constitutional character of the EU will be disregarded.

When it comes to international human rights regimes, such as the ECHR, the EU's relationship with them is very similar to its relationship with competing domestic human rights regimes, as defined in *Internationale Handelsgesellschaft*. The EU will accept external human rights standards after the CJEU has re-interpreted them in the context of EU law. The Court's recent judgment in *Elgafaji*[175] portrays this relationship in more detail. The Court dealt with the meaning of subsidiary protection under Art. 15(c) of the Asylum Qualification Directive[176] in light of Art. 3 ECHR, whose interpretation by the ECtHR provided authoritative guidance on the matter. The CJEU affirmed that prohibition of torture under Art. 3 ECHR 'forms part of the general principles of Community law, and […] the case-law of the [ECtHR] is taken into consideration in interpreting the scope of that right in the Community legal order'. However, the requirements for subsidiary protection in EU law had to be

174 *Kadi* (n 159), paras 282, 285, 316.

175 Case C–465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I–00921 (*Elgafaji*).

176 Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12, art 15 (c).

interpreted 'independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR'.[177] The Court ended up ruling that the meaning of certain criteria for granting subsidiary protection under the Asylum Directive was not equivalent to their interpretation under Art. 3 ECHR. The *Elgafaji* decision demonstrates that, at least in the present state of EU law, the ECHR standards are ultimately accepted into the legal system of the EU, but only after they have been internalised by the CJEU in light of the Union objectives and thus translated into EU human rights standards.

What role, if any, will the autonomy play in the context of accession? The CJEU already declared back in 1996 that the EU's accession to the ECHR would substantially modify the constitutional structure of the EU, which was why the Court ruled out the EU's first attempt to accede to the Convention.[178] However, the situation is different this time. The autonomy of EU law cannot preclude the act of accession because it has been authorised by the Treaty of Lisbon. Nevertheless, the role of autonomy does not end here. The main legal instruments that govern the EU's accession to the ECHR – Art. 6(2) TEU, Protocol 8 that elaborates on the content of Art. 6(2), and the Draft Accession Agreement – all affirm, in one way or another, that the EU's accession to the Convention will preserve the 'specific characteristics' of the Union as an autonomous legal order and shall not affect its competences, including the exclusive competence of the CJEU to interpret EU law.[179] The EP reiterates that the CJEU 'will remain the sole supreme court adjudicating on issues

177 *Elgafaji* (n 175), para 28.

178 Opinion 2/94 (n 148).

179 TEU (n 108), art 6(2); Protocol 8 Relating to Art. 6(2) of the Treaty on European Union the Accession of the Union to the European Convention of on the Protection of Human Rights and Fundamental Freedoms; Accession Agreement (n 142), Preamble and Explanatory Report, paras 3, 5, 32.

relating to EU law and the validity of the Union's acts, [and the ECtHR] must be regarded not as a superior authority but rather as a specialised court exercising external supervision over the Union's compliance with obligations under […] the ECHR'.[180] A strong emphasis in all these documents on the need to accommodate the specific character of the EU suggests that the doctrine of autonomy may determine the extent to which the CJEU is going to incorporate the ECHR and its case law into EU law.

As practice indicates, the CJEU is likely to use the concept more aggressively in cases involving discrepancies, or conflicts, between EU law and the ECHR. The level of protection of the right to strike is a prominent example of such a conflict. Therefore, it is to be expected that in future disputes concerning the right to strike the CJEU could employ the notion of autonomy as a tool to preserve the special constitutional place that economic freedoms occupy in the Treaty and disregard the rigorous standard of protection accorded to the right to strike under Art. 11 ECHR.

(c) The CJEU Uses the Charter of Fundamental Rights to Reinforce the ECHR

The autonomy of EU law may indeed become an obstacle for developments under Art. 11 ECHR to be transposed into EU law; however, the impact of the doctrine may be offset, or at least substantially mitigated, by the EU Charter of Fundamental Rights. Since its entry into force in December 2009, the EU Charter has been granted

180 European Parliament, Doc. 2009/2241(INI) Resolution on the Institutional Aspects of Accession of the European Union to the European Convention on Human Rights [2009], para 1 (EP Resolution on Accession).

binding legal status equal to the EU Treaties.[181] The Charter has rapidly gained primary importance in the recent case law of the CJEU and has become the point of departure in the Court's judgments involving fundamental rights. It was cited in some thirty judgments between its entry into force and early 2011, and by June 2013, the number of references to the CFR had exceeded one hundred.[182] As the EU's own human rights instrument, the EU Charter will arguably play a significant role in the future human rights case law of the CJEU. More importantly, it has the potential to strengthen the impact of the ECHR within the EU by facilitating its integration into EU law. The Charter explicitly incorporates the ECHR into EU law as an integral part of the Charter itself, thus providing the way for the CJEU to overcome the autonomy of EU law when it deals with human rights enshrined in the Convention.

Art. 52(3) CFR provides that 'in so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the Convention'. Art. 52(3) reflects the fact that half of the fifty Charter provisions are borrowed from the ECHR and the case law of the ECtHR,[183] and seeks to ensure consistency in the interpretation of human rights standards under the two instruments. Read together with Art. 6(1) TEU, Art. 52(3) seems to integrate the provisions of the Convention borrowed by the Charter into primary EU law.[184]

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181 TEU (n 108), art 6(1).

182 Joint communication from Presidents Costa and Skouris, press release no 75 issued by the Registrar of the ECtHR (27 January 2011) (Joint communication from Presidents Costa and Skouris); Statistics from http://curia.europa.eu/.

183 J Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' (2009) 6 EHRLRev 768, 769.

184 Weiss (n 145) 71.

Art. 52(3) does not explicitly mention the case law of the ECtHR. However, given that the purpose of Art. 52(3) is to ensure coherence between the CFR and the ECHR and avoid conflicts between the decisions of the two European courts,[185] it would seem that the case law under the Convention should fall within the scope of the provision. The official Charter Explanations[186] relating to Art. 52(3) support such interpretation by stating that 'the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the [ECtHR] and the [CJEU]'. Also, the CJEU itself has recently affirmed that where the Charter rights are the same as those in the Convention, the Court should follow the jurisprudence of the ECtHR.[187]

Considering that by virtue of Art. 52(3) the majority of the rights protected under the ECHR get absorbed into the provisions of the Charter, the doctrine of autonomy seems to become irrelevant for the protection of those rights in the EU legal order. However, there is a caveat to this conclusion. The Explanations to Art. 52(3) stress that compliance with the Convention must not 'adversely affect […] the autonomy of Union law and that of the [CJEU]'. The reference to the autonomy in this context could mean that the CJEU retains the right to reinterpret Convention rights in the framework of EU competences and objectives, as discussed in the previous section on the doctrine of autonomy. This could be detrimental for the future protection of the right to strike since on the basis of Art. 52(3) CFR the CJEU would be free to subordinate the right to strike to economic freedoms by resorting to an

185 T Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 The Law and Practice of Int'l Courts and Tribunals 375, 384–385 (Lock, 'ECJ and the ECtHR'); Joint communication from Presidents Costa and Skouris (n 142), para 1.

186 Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17 (Charter Explanations).

187 Case C–400/10 *PPU JMcB v LE* [2010] ECR 000, para 53.

autonomous interpretation of Art. 11 ECHR.

However, the reference to autonomy in the context of Art. 52(3) cannot be interpreted as simply a reference to the doctrine of autonomy as it has been used by the CJEU in the past, when the Court would reject or modify the rules of external legal regimes. On the contrary, autonomy in this context seems to indicate that the CJEU has an autonomous right to go beyond, but never below, the level of protection offered by the Convention. The last sentence of Art. 52(3) explains that compliance with the ECHR 'shall not prevent Union law providing more extensive protection', thus making the ECHR a minimum standard within the EU legal order.[188] Explanations to Art. 52(3) support such interpretation by adding that 'in any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'.[189] This approach also seems to have political support, as the EP has stressed in its resolution on accession that 'the ECHR will constitute the minimum standard of protection […] and will be crucial, in particular, in cases where the protection granted by the EU is inferior to that provided under the ECHR.'[190]

Finally, the impact of Art. 52(3) on the protection of the right to strike depends on which provision of the Charter the CJEU is going to use to define the meaning and scope of the right to strike. According to the wording of Art. 52(3), the Charter rights shall be endowed with the meaning and scope of the Convention rights only if they have corresponding provisions therein. A list of corresponding rights can

188 Joined Cases C–92/09 and C–93/09 *Volker und Markus Schecke GbR and Hartmut Eifert* [2010] ECR 000, paras 50–52; Lock, 'ECJ and the ECtHR' (n 185) 382; K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 EuConst 388, 394–395.

189 EU Charter (n 25), arts 52(3); Charter Explanations to art 52(3) (n 186); Lock, 'ECJ and the ECtHR' (n 185) 382.

190 EP Resolution on Accession (n 180), para 17.

be found in the Charter Explanations to Art. 52(3) and includes Art. 12 CFR, the freedom of association, whose meaning is the same as Art. 11 ECHR. It follows that in cases where the CJEU looks at Art. 12 CFR to determine the meaning and scope of the right to strike, it would first need to look at Art. 11 ECHR and the jurisprudence of the ECtHR, which would ensure that the right to strike would be afforded in EU law the level of protection equal to that provided under Art. 11 ECHR.

However, the Charter also contains another article, Art. 28, which the CJEU may choose to use when it deals with future cases concerning the right to strike. Art. 28 – the right to collective bargaining and action – is not however included in the list of articles that have corresponding provisions in the ECHR. Moreover, it is exactly Art. 28 that the CJEU relied on to define the meaning and scope of the right to strike in *Viking* and *Laval*, and the meaning of the right to collective bargaining in *Commission v Germany.*[191] In all these cases, the Court mentioned the ECHR just in passing, notwithstanding that the Explanations to Art. 28 CFR explicitly refer to Art. 11 ECHR, stating that the right to collective bargaining and action has been recognised by the ECtHR as 'one of the elements of trade union rights laid down by Art. 11 of the ECHR'. The link of the right to strike to the freedom of association is important as it acknowledges the indivisibility of socioeconomic and civil and political human rights, endorsed by the ILO supervisory organs and the ECtHR. Moreover, the reference to Strasbourg case law under Art. 11 reflects the developments in the ECtHR at the time of drafting of the Charter and suggests that the meaning and scope of Art. 28 is to be redefined in accordance with the latest developments in Art. 11 case law. Therefore, the CJEU arguably erred in *Commission*

[191] *Viking* (n 55), para 44, *Laval* (n 56), para 91, *Commission v Germany* (n 58), paras 37, 43.

v Germany by ignoring the latest developments under Art. 11, notwithstanding the fact that the judgment was delivered after the *Demir* decision and after the EU Charter had entered into force.

Moreover, *Commission v Germany* is not an isolated example of the CJEU's reluctance to make use of Art. 52(3) CFR and integrate the standards of the ECHR into primary EU law. Broader analysis of the Court's case law suggests that when dealing with human rights cases, the CJEU prefers the CFR to the ECHR and omits references to the latter entirely if the former provides sufficient clarity on the issue.[192] Gráinne de Búrca conducted an analysis of all cases in which the CJEU referred to the Charter since its entry into force. During the period in question (December 2009 – September 2012), the Court referred to the CFR in 78 cases, and in 15 out of these cases it also referred to the ECHR, with 5 cases involving mention or discussion of ECHR case law, and the other 10 merely mentioning an ECHR provision.[193] The research conducted by De Búrca seems to confirm a trend in the CJEU's case law to interpret the provisions of the Charter in isolation from the case law of the ECtHR. Therefore, despite the fact that the Charter integrates Art. 11 and its jurisprudence into primary EU law, there is no guarantee that the CJEU will bring its case law in compliance with the ECHR using Art. 52(3) CFR, especially if the Court decides to maintain its current position regarding the balance between economic freedoms and collective labour rights after accession.

In a nutshell, the legal value of the Charter is that it explicitly integrates the

192 Case C–110/10 *Solvay SA v Commission* (CJEU, 25 October 2011), para 48; Case C–389/10 *KME v Commission* (CJEU, 8 December 2011), paras 119, 133; *Kamberaj* (n 146), paras 62–63, 79–80, 92.

193 G de Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 2 (De Burca, Court of Justice as a Human Rights Adjudicator).

Convention and its interpretation by the ECtHR into primary EU law without there being a need to confront the test of autonomy. However, in practice, the Charter alone is incapable of guaranteeing that the CJEU will in fact be willing to use it to reinforce the Convention in EU law, especially where the case law of the CJEU appears to contradict the case law of the ECtHR. Here is where the role of the EU's accession to the ECHR becomes crucial: the prospect of judicial review of the CJEU, established by the Accession Agreement, should secure that the CJEU's reliance on the Convention becomes more consistent.

It is clear from the above analysis that neither the EU's accession to the ECHR nor the CFR alone can trigger a change in the CJEU's position towards compliance with Art. 11 ECHR. Accession creates an international legal duty for the EU to comply with the ECHR to be secured through the judicial review of the EU, but from the perspective of EU law, its effect may be offset if the CJEU resorts to the doctrine of EU law autonomy in the interpretation of Convention rights. The Charter, on the other hand, internalises the standards of the Convention through Art. 52(3), thus overcoming the autonomy of EU law, but if the CJEU is not willing to make use of Art. 52(3) in practice, the Charter loses its potential to integrate the ECHR into EU law. Therefore, only a combined effect of Art. 52(3) CFR and the prospect of judicial review brought about by the accession can be expected to provide a way for the Convention to be integrated into EU law and the requirements of Art. 11 ECHR to define the meaning and scope of the right to strike within the EU.

3 Dispute before the ECtHR

After accession, any ruling of the CJEU that concerns human rights protected under

the ECHR, such as the right to strike, will be subject to review by the ECtHR. The proceedings of judicial review before the ECtHR can be instituted either as the result of an appeal challenging a ruling of the CJEU (together with a national court decision adopted on the basis of the preliminary ruling), or following the prior involvement of the CJEU in a dispute that originally arose before the ECtHR. The ECtHR would therefore be the ultimate arbiter as to whether the CJEU's chosen balance between the right to strike and economic freedoms is compatible with Art. 11 ECHR. However, before judging the merits of a case, the Court would have to deal with two legal side issues that could greatly influence the final outcome. These issues are the fate of the *Bosphorus* presumption after accession and the application of a margin of appreciation with respect to the EU obligations under the Convention. The goal of this section is to assess the extent to which the *Bosphorus* and margin of appreciation doctrines may impact the level of protection to be accorded to the right to strike by the ECtHR in the context of EU law.

(a) The ECtHR Rules on the Tenability of the *Bosphorus* Presumption

The *Bosphorus* presumption, also known as the doctrine of equivalent protection, is a default rule established by the ECtHR whereby the Court will refrain from judicial review, presuming that a State has not departed from the requirements of the Convention, in situations where that State merely implements legal obligations flowing from its membership in an international organisation, as long as that organisation protects human rights in a manner equivalent, or comparable, to that of the Convention. In the *Bosphorus* case, the presumption of equivalence was applied with respect to the EU, thus showing considerable deference to the EU's human rights standards and the CJEU's case law. If upheld after the EU's accession to the

ECHR, the presumption would frustrate any possibility for the ECtHR to scrutinise EU law and review the decisions of the CJEU. Moreover, if the ECtHR declined to review the compatibility of EU law with the ECHR, the CJEU would have no incentive to reconsider its current position that prioritises economic freedoms over the right to strike. In this regard, it is argued below that the *Bosphorus* presumption will no longer be tenable after the EU's accession to the ECHR.

The *Bosphorus* case[194] concerned the seizure of an aircraft by Irish authorities in compliance with an EC Regulation,[195] which in turn was adopted to implement a UN SC resolution. The legal issue before the ECtHR was the alleged violation of the Regulation, as implemented in domestic laws, with the right to property, enshrined in Art. 1 of the First Protocol to the ECHR. Prior to the proceedings before the ECtHR, the regulation had been considered by the CJEU, which recognised in a preliminary ruling that the interference with the right to property was not disproportionate. The ECtHR therefore had to judge the compatibility of the Regulation with the ECHR, the CJEU's decision confirming the validity of the Regulation in EU law, and (indirectly) the original UN SC resolution. The ECtHR refused to assess the conformity with the Convention of Ireland's implementation of the Regulation because the level of EU human rights protection was perceived by the Court to offer equivalent protection to that of the ECHR.

The ECtHR first noted that the parties to the ECHR were not prohibited from transferring sovereign power to an international organisation, such as the EC. However, 'as the holder of such transferred sovereign power', the EC was not itself

194 *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005) (*Bosphorus*).

195 Council Regulation (EEC) No 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L102/14.

held responsible under the Convention because it was not a party to it. In fact, the ECHR did not foresee at the time a possibility for international organisations to adhere to it. Nevertheless, the fact that the Convention did not bind the EC could not excuse the non-compliance with the ECHR by EC MS. The Court explained that a MS remained responsible for all acts and omissions of its organs regardless of whether they were rooted in domestic law only or were a consequence of the State's membership in the EC.[196]

Surprisingly, the Court then went on to establish a general rule whereby it will presume that a State has acted in compliance with the Convention if it had no discretion in implementing the legal obligations flowing from its membership in the organisation, as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered equivalent, or comparable, to that provided by the Convention.[197] Such presumption could be rebutted if, in the circumstances of a particular case, the Court found the protection of the Convention rights by the respective organisation to be 'manifestly deficient'. The Court did not however engage in a substantive assessment of the level of protection afforded to the right to property by the EU in the circumstances of the *Bosphorus* case. Nonetheless, it found no 'manifest deficiency' in EU human rights protection because 'there was no dysfunction of the mechanisms of control of the observance of Convention rights'.[198] As noted in the Separate Concurring Opinion by Judge Ress, the equivalence of protection was established by only looking at the formal and procedural mechanisms for human rights review performed by the CJEU, rather than

196 *Bosphorus* (n 194), para 152. See also *Matthews v United Kingdom* (1999) 28 EHRR 361, para 32.

197 *Bosphorus* (n 194), paras 155, 156.

198 *Bosphorus* (n 194), paras 159–166.

the specific case of the right to property.

The *Bosphorus* decision has been perceived in legal literature as an attempt by the ECtHR to avoid reviewing the EU human rights standards without it being a party to the Convention, to accommodate the autonomy of the EU legal order, and to preserve international cooperation between the Council of Europe and the EU.[199] As a consequence of the *Bosphorus* doctrine, however, the EU MS are no longer liable for human rights violations when they apply EU law, while at the same time the EU itself is exempt from scrutiny. This situation creates a gap in the protection of fundamental rights in Europe.

How will the EU's accession to the ECHR affect the *Bosphorus* doctrine? On the face of it, it may seem that the grounds for the ECtHR to maintain *Bosphorus* will become even firmer. The level of protection of human rights in the EU has never been higher now that the EU Charter – which integrates Convention standards into EU law through Art. 52(3) – has been granted binding status by the Lisbon Treaty. It would therefore seem that the presumption of equivalent protection established in *Bosphorus* should continue to apply, and with greater force than ever.

However, it is suggested that the *Bosphorus* doctrine should prove untenable after the EU becomes a party to the Convention because it will lose its *raison d'être*.[200] It has been pointed out earlier in the analysis that the actual rationale behind

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199 *Bosphorus* (n 194), para 156; S Douglas-Scott, 'Bosphorus v Ireland' (2006) 43 CML Rev 243 (Douglas, 'Bosphorus'); L Besselink, 'The EU and the European Convention of Human Rights after Lisbon: From 'Bosphorus' Sovereign Immunity to Full Full Scrutiny?' (2008) <http://ssrn.com/abstract=1132788> accessed 20 April 2013; Lock, 'ECJ and the ECtHR' (n 185); T Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights' (2010) 10 HRLR 529.

200 De Burca, Court of Justice as a Human Rights Adjudicator (n 193).

Bosphorus was the attempt by the ECtHR to avoid judging the legal responsibility of the EU without it being a party to the Convention and to preserve the mutual respect and cooperation between the ECtHR and the CJEU. The equivalence of human rights protection might have been used by the ECtHR merely as a legal tool to justify the EU's exemption from judicial review. The EU's accession to the ECHR seems to eliminate the real motives behind the exemption. The EU's act of accession expresses an intention of the MS to submit the organisation to external review with respect to the protection of human rights. By acceding to the ECHR, the EU consents to be bound by the standards of the ECHR and decisions of the ECtHR. Therefore, the EU will no longer be outside the jurisdiction of the ECHR and, more importantly, will accede to it 'on an equal footing with the other Contracting Parties, that is, with the same rights and obligations'.[201]

Moreover, the continued application of the *Bosphorus* presumption would be counterproductive in achieving the primary goal of accession – to attain the coherence of human rights protection in Europe through submitting the EU under the external review of the ECtHR. In this regard, the Draft Agreement expressly points out that 'the current control mechanism of the Convention should, as far as possible, be preserved and applied to the EU in the same way as to other Contracting Parties'.[202] Accession therefore eliminates the reasons for retaining the *Bosphorus* presumption, and the terms of the Accession Agreement leave no room for the EU to continue receiving a privileged treatment in comparison to other Contracting Parties.

(b) The ECtHR Grants the EU a Margin of Appreciation

201 Accession Agreement (n 142), Explanatory Report, paras 7, 21.

202 Accession Agreement (n 142), Explanatory Report, para 7.

The margin of appreciation is a doctrine established in the case law of the ECtHR whereby Contracting Parties are accorded some room for manoeuvre, subject to the supervision by the ECtHR, in fulfilling their obligations under the ECHR. Like the *Bosphorus* presumption, margin of appreciation is a doctrine of judicial deference. However, in contrast to the former, the latter does not exempt a State from judicial review, but rather entails a review less intense than the Court would normally perform on the basis of its "full" jurisdiction under Art. 32 ECHR. Essentially, the Court will apply a looser proportionality test when assessing the lawfulness of national legislative, administrative or judicial measures that restrict fundamental rights, thus allowing State authorities some leeway to decide on the necessity of a particular restriction. Situations when a margin of appreciation will normally be granted concern conflicts between the Convention rights and specific local constitutional or cultural traditions.[203]

The present study does not purport to conduct a comprehensive analysis of the margin of appreciation doctrine or the case law thereof. It rather seeks to determine whether the doctrine could be applied with respect to the EU in a post-accession dispute concerning the conflict between the right to strike and EU economic freedoms. To that end, it is suggested that after the EU's accession to the ECHR, the ECtHR would indeed accord a considerable margin of appreciation to the EU when assessing its compliance with the Convention, out of respect to the specific legal

[203] 'Margin of Appreciation – an overview of the Strasbourg Court's margin of appreciation doctrine' (*Open Society Justice Initiative*, April 2012) <http://www.opensocietyfoundations.org/sites/default/files/echr-reform-margin-of-appreciation.pdf> accessed 20 April 2013 (Overview of Margin of Appreciation); D Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) University of Cambridge CELS Working Paper <http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf> accessed 20 April 2013.

character of the EU. However, it is also argued that the scope of discretion granted to the EU would be exceeded if the CJEU subordinated the right to strike to economic freedoms by placing it under the proportionality test.

The rationale behind the doctrine of margin of appreciation helps understand why, in the first place, it should apply with respect to EU actions following the accession. The doctrine reflects the recognition by the ECtHR that the ECHR, as an international instrument, has only a subsidiary role in protecting human rights – the primary responsibility lying with national governments – and hence it will be interpreted differently in different member states, given their divergent legal and cultural traditions.[204] The Court normally resorts to the margin of appreciation in connection to those Convention provisions that have limitation clauses, such as articles 8 – 11. Situations when national authorities would be given certain margin of action include cases of public emergency, national security, sensitive moral or ethical issues, and cases that require balancing of competing interests or Convention rights.[205] In such cases, the ECtHR shows a degree of deference to the judgment of national authorities because they are in a better position than an international judge to decide on the necessity of a particular restriction, given their special knowledge of domestic situation as well as the primary responsibility to protect human rights under national law. In this way, the ECtHR allows European societies to maintain their unique values and traditions, and address their particular needs.[206]

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204 The Belgian Linguistic case (No 2) (1968) 1 EHRR 252, para 10; *Handyside v UK* (1976) 1 EHRR 737, para 48 (*Handyside*); *Branko Tomašić and Others v Croatia* App no 46598/06 (ECtHR, 15 January 2009), para 74; Overview of Margin of Appreciation (n 203).

205 *Handyside* (n 204)*; Klass v Germany* (1978) 2 EHRR 214; *Brannigan & McBride v UK* (1993) 1 EHRR 1; *Evans v UK* (2007) 41 EHRR 21 (*Evans*); Overview of Margin of Appreciation (n 203).

206 Overview of Margin of Appreciation (n 203).

Arguably, the EU should benefit from the doctrine of margin of appreciation because just as national legal orders, the EU legal order is an independent system of law that has its own constitutional identity and specific legal values and traditions. Naturally, the constitutional identity of the EU is of a different character than that of national legal orders because the EU is an international organisation, created on the basis of an international treaty to perform specific tasks in the framework of clearly defined objectives. Therefore, 'specific local conditions' that would be the basis for the ECtHR to accord to the EU a margin of discretion would not pertain to the cultural or religious traditions of nation States, but rather to the constitutional traditions that stem from the provisions of the Lisbon Treaty. The creation of the internal market, being one of the central objectives of the EU, is a primary example of a legal tradition that largely defines the constitutional character and structure of the EU. Therefore, in a dispute involving a conflict between the right to strike and EU internal market freedoms, the ECtHR would be expected to show a degree of deference to the CJEU in its assessment of the relationship between the two competing values in light of EU law.

The latter proposition finds support in the legal instruments governing the EU's accession to the ECtHR, which all put emphasis on the specific constitutional character of the EU. As mentioned in the discussion on EU autonomy, Protocol 8 of the Lisbon Treaty and the terms of the Accession Agreement both require preservation of the specific legal order of the EU, while also providing that accession must not affect Art. 344 TFEU, which requires that disputes concerning the interpretation and application of the EU Treaties be settled in accordance with the provisions of the Treaties, i.e. by the CJEU. On the one hand, the mandate of the ECtHR does not extend to interpreting or applying domestic law, or EU law after

accession.[207] The ECtHR confines itself to ruling on the compatibility of national law with the requirements of the ECHR. However, the legal assessment conducted by the Court necessarily involves a degree of interpretation of national law, as it is part of the context in which the alleged infringement has occurred.[208] Therefore, when judging the compatibility of the CJEU's position on the right to strike with the ECHR, the ECtHR will arguably need to assess the legal relationship between the right to strike and economic freedoms in the context of EU law, in order to be able to assess the lawfulness of the restrictions that the latter impose on the former. Such an exercise seems to require interpretation of EU free movement rules, which is purely a question of EU law. Any judgment of the ECtHR that would decide on the legal value of EU free movement rules appears to threaten the autonomy of EU law and the exclusive jurisdiction of the CJEU, as the sole interpreter of EU law. Consequently, in order to preserve the autonomy of EU law and comply with the terms of the Accession Agreement, the ECtHR would be required to grant a margin of appreciation to the CJEU to assess the necessity of the restrictions imposed on the right to strike by the fundamental freedoms.

Assuming that the ECtHR accorded a margin of appreciation with respect to the CJEU's position on the right to strike, the judgment of the CJEU would only be scrutinised by the ECtHR if the CJEU exceeded its margin of appreciation. This raises the question of the scope of the margin of appreciation; namely, whether a position of the CJEU placing the right to strike under the test of proportionality when it comes into conflict with the economic freedoms falls within the scope of discretion to be enjoyed by the CJEU. The case law of the ECtHR gives some guidance on the

207 *Huvig* v *France* (1990) 12 EHRR 528, para 28.

208 Lock, 'Walking on a Tightrope' (n 163) 1035–1036.

matter. The Court will usually take into account a number of factors when determining the breadth of the margin of appreciation, such as the nature of the right, the aim pursued by the contested measure, the European consensus on the issue, and other relevant circumstances of the case. For instance, the margin will be wider when there is no consensus among the Contracting Parties 'either as to the relative importance of the interest at stake or as to the best means of protecting it'.[209] The Court will also be more lenient when national authorities are required to strike a balance between competing private and public interests or conflicting Convention rights.[210] In the latter case, the Court will query 'whether the interference [by the authorities] constitutes a proportionate balancing of the competing interests involved'.[211]

As regards the nature of the protected right, in cases concerning interferences with Art. 11, the ECtHR holds that 'in determining […] whether a "necessity" – and therefore a "pressing social need" – within the meaning of Art. 11(2) exists, States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision'.[212] The Court has on several occasions stressed that the exceptions set out in Art. 11 are to be construed strictly and that only convincing and compelling reasons can justify restrictions on the freedom of association.[213] The ECtHR has also emphasised that margin of appreciation 'does not mean that [the

209 *Evans* (n 205), para 77; *Schalk & Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010) (*Schalk & Kopf*), para 98.

210 ibid; *Chassagnou v France* (1999) 29 EHRR 615, para 113.

211 *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010) (*A, B and C v Ireland*), para 238.

212 *Demir* (n 8), para 119.

213 *Sidiropoulos and Others v Greece* (1999) 27 EHRR 633, para 40 (*Sidiropoulos and Others v Greece*); *Demir* (n 8).

Court] has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient."'[214] With respect to the right to strike specifically, the ECtHR reiterated in *Enerji* that legal restrictions on the right to strike should be defined as clearly and narrowly as possible, balancing the protection of the right to strike with the public interest exceptions listed in Art. 11(2).[215] It is important to bear in mind that the Court's conclusions in *Enerji* relate to the specific circumstances of that case, which concerned a general, unconditional ban on strikes applied to public servants, who were merely exercising their freedom of peaceful assembly by taking part in a demonstration aimed at protecting their right to collective bargaining. It is therefore difficult to draw general conclusions from the Court's judgment.

How can we apply the Court's guidelines to a hypothetical dispute involving the CJEU, the right to strike and EU economic freedoms? We could identify two factors that would be the most relevant to the assessment of the breadth of the CJEU's margin of appreciation: the nature of the protected right and the need to reconcile competing interests. As alluded to above, the importance of the right to strike as an essential element of the freedom of association under Art. 11 suggests that the CJEU would only have limited discretion in restricting it. On the other hand, the CJEU would seem to enjoy a wide margin of appreciation in fulfilling an uneasy task to balance competing legal interests – the protection of the internal market freedoms (an

214 *Sidiropoulos and Others v Greece* (n 213), para 40.

215 *Enerji* (n 9), para 32.

interest of constitutional nature, stemming from the provisions of the Lisbon Treaty) versus the protection of the right to strike (an obligation flowing from Art. 28 CFR and Art. 11 ECHR).[216] Because the two most salient factors regarding the margin of appreciation are in opposition, it is difficult to predict what the ECtHR would determine that margin to be. Nonetheless, the best prediction is that the review would be of medium intensity – lesser than strict, but greater than marginal.[217]

Notwithstanding the ambiguity about what margin of appreciation the ECtHR might identify as appropriate, the course of its analysis is more predictable. The Court would need to determine whether the decision of the CJEU reflects a 'proportionate balancing of the competing interests involved' and whether the reasons put forward by the CJEU to justify the interference with the right to strike are 'relevant and sufficient'.[218] The CJEU, on its part, would be expected to engage in the human rights type of reasoning, which would require approaching economic freedoms as a restriction on the right to strike and assessing whether the exercise of business freedoms does not place a disproportionate burden on it. A failure on behalf of the CJEU to engage in the proportionality analysis of the restrictions imposed on the right to strike (economic freedoms being the restrictions) would arguably constitute a procedural failure to conduct a proportionate balancing of competing interests or provide sufficient justification (or 'convincing and compelling reasons') for interference with Art. 11.[219] It is thus possible to imagine at least one situation when the CJEU would clearly overstep its margin of appreciation, which is if in a future

216 *Evans* (n 205), para 77; *Schalk & Kopf* (n 209), para 98.

217 J Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 ELJ 80, 112–114.

218 *Sidiropoulos and Others v Greece* (n 213), para 40; *A, B and C v Ireland* (n 211), para 238.

219 For comparison, see *Hirst v the United Kingdom (No 2)* (2006) 42 EHRR 41, para 41.

dispute involving the conflict between the right to strike and economic freedoms the Court would simply reiterate the logics of the *Viking* and *Laval* judgments.

If the CJEU conducts the 'proportionate balancing of the competing interests', the question then is whether it would matter what the substantive outcome of this exercise would be. In other words, would it be enough for the CJEU to simply draft its judgment in a way that reflects proportionate balancing of the right to strike and economic freedoms, in order to stay within the limits of its margin and avoid a substantive review by the ECtHR? The answer would seem to be no because the ECtHR never limits itself to a procedural review when dealing with violations concerning the freedom of association under Art. 11. However, in the case of the EU, the picture is more complex. Internal market freedoms are not simply an interest competing with the exercise of the right to strike, but a defining feature of the EU's constitutional order, which the Accession Agreement purports to preserve. The *Bosphorus* doctrine, even if no longer applicable, manifests the high level of respect that the ECtHR shows to the EU legal order. It is therefore plausible to assume that, despite the importance of the rights protected under Art. 11 ECHR, the ECtHR would grant to the CJEU a relatively broad margin of appreciation, and the review performed by the ECtHR would be essentially procedural. As a result, the CJEU could possibly remain in compliance with the Convention even if, in principle, it prioritises economic freedoms over the right to strike, so long as its judgments are drafted in a way that reflects a proportionate balancing of competing values. Put differently, if the CJEU placed both the right to strike *and* EU business freedoms under the proportionality test, the decision would probably be respected by the ECtHR regardless of its substantive outcome.

A caveat to the above analysis is whether the outcome of the hypothetical case could differ depending on which court hears it first. For instance, if the dispute first appears before the CJEU as a free movement case, it seems to be more likely that the CJEU would solve the matter employing the legal reasoning typical to free movement cases: the right to strike would be regarded as a restriction on a business freedom, hence its lawfulness would be assessed in accordance with the proportionality test. Assuming the CJEU's decision was appealed to the ECtHR, the latter would then have firmer grounds to reverse it, considering that the CJEU's judgment would not reflect a proportionate balancing of the right to strike and economic freedoms or provide sufficient justification for interference with Art. 11 ECHR. On the other hand, if the dispute first comes before the ECtHR in a case brought against a MS and the CJEU steps into the dispute through the prior involvement mechanism, it would be given a clear task of assessing the lawfulness of restrictions imposed on the right to strike in light of Art. 11 ECHR. In such circumstance, the CJEU would arguably engage in the human rights reasoning when drafting its decision, which would show that the Court engaged in weighing the two competing values against each other. The ECtHR would then be expected to respect the EU's margin of appreciation and review the ruling of the CJEU procedurally, without interfering with the interpretation of EU internal market rules. We can therefore speculate whether the outcome could depend on the circumstances in which the courts have to judge the issue. On the other hand, these circumstances may not matter because the CJEU would be aware of the possibility of the review in either case and thus might be more cautious when dealing with the rights protected under the ECHR after accession under either scenario.

A conclusion to be drawn from the above analysis is not a very positive one

for future protection of the right to strike in the EU. Even if a dispute concerning the right to strike and involving the EU as a respondent reaches the ECtHR, a major obstacle for the Court to scrutinise the position of the CJEU seems to be the margin of appreciation doctrine. On the one hand, the EU would no longer be able to benefit from the *Bosporus* presumption. However, it seems that the effect of *Bosphorus* would be at least partially retained by granting to the EU a margin of appreciation in fulfilling its obligations under the Convention. Considering the specific character of the EU's legal order and also the fact that the relationship between the CJEU and the ECtHR has long been based on mutual respect and cooperation,[220] the margin of appreciation granted to the CJEU is likely to be considerably broad. Therefore, it is probable that the ECtHR would respect whatever judgment the CJEU delivers with respect to the right to strike, unless the CJEU's judgment was not drafted in a way that reflected a proportionate balancing of the right to strike and economic freedoms.

[220] Lock, 'ECJ and the ECtHR' (n 185); Douglas, 'Bosphorus' (n 199) 243.

CONCLUSION

This thesis sought to determine the impact of the EU's accession to the ECHR on the protection of the right to strike in EU law. To that end, the thesis was divided into two chapters, the first concerned with an analysis of the case law of the ECtHR and the CJEU involving the right to strike, and the second focused on the legal implications of the EU's accession to the ECHR for the protection of the right to strike in EU law.

The objective of Chapter I was to compare the case law of the CJEU with that of the ECtHR to determine how the CJEU should modify its position to bring it in line with the standards of the ECHR. The analysis revealed that the proportionality test employed by the CJEU in its right to strike cases represents the reverse of the test used by the ECtHR. Essentially, the test the ECtHR uses to assess the lawfulness of laws or practices that restrict the right to strike is used by the CJEU to assess the lawfulness of strike action itself, which is treated as a restriction on the exercise of economic freedoms.

Despite the apparent contrast in reasoning, one cannot simply conclude that the CJEU's position is incompatible with the ECHR without taking into account that the methodology employed by the CJEU in its free movement case law is dictated by the special constitutional order of the EU, where economic freedoms are at the centre of both EU law and the mandate of the CJEU. Therefore, the CJEU's position cannot be brought into compliance with the ECHR simply by reversing the proportionality analysis or exempting the right to strike from the reach of EU free movement rules. To do either would infringe the Treaties.

In this context, it has been proposed that the CJEU could achieve compliance

with the ECHR without departing from the imperatives of the EU Treaties by adopting the fair balancing methodology it already uses when dealing with conflicts between economic freedoms and civil and political rights. The CJEU's human rights jurisprudence proves that the Treaty emphasis on the economic freedoms is not an obstacle to preserving a high level of protection of human rights and indicates that the CJEU is in fact treating collective labour rights as less fundamental than civil and political rights. The proposed 'fair balance' methodology would require the Court to apply a double proportionality test in the relationship between the right to strike and economic freedoms, and accord trade unions a margin of appreciation in exercising their freedom to organise for the protection of workers' interests. The 'fair balance' test could arguably limit both the right to strike and the economic freedoms, but only insofar as each value could be optimised without undermining the essence of the other.

The goal of Chapter II was to determine how the EU's accession to the ECHR would impact in practice the resolution of the normative conflict between the ECtHR and the CJEU regarding the status of the right to strike. In this vein, the Chapter sketched a scenario of a post-accession litigation involving the right to strike before each of the courts. The analysis of hypothetical proceedings before the CJEU showed that if the Court decided to maintain its current position on the relationship between the right to strike and economic freedoms, it may refuse to incorporate the standards of Art. 11 ECHR into EU law by falling back on the notion of EU law autonomy. However, it was suggested that the reliance on EU law autonomy may be overcome by the combined effect of the EU Charter, which integrates the ECHR into primary EU law, and the prospect of the EU's legal liability before the ECtHR, introduced by the accession.

With regard to the dispute before the ECtHR, it was submitted that the Strasbourg Court might refrain from substantially reviewing the CJEU's position on the right to strike on the basis of the margin of appreciation to which the EU institutions would be entitled when deciding matters that reflect the EU's special constitutional character. Of course, the ECtHR could also determine the CJEU exceeded the scope of the margin granted to it. Arguably, the margin would be exceeded if, in future cases involving the right to strike, the CJEU simply reiterated its *Viking/Laval* methodology, thus clearly subordinating the right to strike to the economic freedoms.

Notwithstanding the findings of this thesis, the development of the legal status of the right to strike in EU law remains a matter of uncertainty and controversy. As discussed in Chapter I, the propositions of this thesis rest on the assumption that the position of the ECtHR is firmly established and will not be affected by the outcome of the dispute between the Workers' and Employers' groups within the ILO. In addition, the EU's accession to the ECHR has not yet been finalised. Therefore, any assessment of the accession's impact on the case law of the CJEU inherently involves a degree of speculation as it is based on the EU's past relationships with external legal orders and the Court's role thereof. In the end, the CJEU will be the one to interpret the Accession Agreement and decide to what extent the Agreement, Convention and case law of the ECtHR will bind the EU. Notably, the CJEU may turn out to be more willing to adapt its case law to the position of the ECtHR than this thesis assumes. Consequently, at this stage, the thesis is incapable of providing exhaustive and definite answers regarding the future status of the right to strike in EU law. However, the value of the analysis lies in exploring the circumstances that may either positively or negatively affect the protection of the right to strike after

accession, while at the same time acknowledging the limitations of such an exercise.

Most importantly, several findings reveal the potential of accession to enhance the protection of the right to strike in the EU. First, the fact that the position of the CJEU concerning the right to strike – apart from being incompatible with the ECHR – is also inconsistent with its own human rights case law provides the CJEU with a solution to achieve compatibility with the Convention while relying on its own legal methodology (proclaimed in civil and political rights case law). Such a solution also ensures that neither the mandate of the CJEU nor the autonomy of EU law would be compromised in the process. Second, the CJEU can use the now-binding EU Charter to facilitate the integration of the ECHR into EU law and strengthen the impact of accession on the protection of the right to strike. Lastly, the prospect of the EU's liability before the ECtHR gives the CJEU a strong incentive to do so.

BIBLIOGRAPHY

Books

– *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, Geneva, International Labour Office 2006)

Brownlie I, *Principles of Public International Law* (6th edn, OUP 2003)

Collins H, Ewing K, McColgan A, *Labour Law* (1st ed, CUP 2012)

Gernigon B, Odero A, Guido H, *ILO Principles Concerning the Right to Strike* (2nd edn, Geneva, International Labour Office 2000)

Novitz T, *International and European Protection of the Right to Strike* (OUP 2003) 42

Shaw MN, *International Law* (6th edn, CUP 2008)

Articles

Azuolai L, 'The Court of Justice and the Social Market Economy: the Emergence of an Ideal and the Conditions for its Realization' (2008) 45 CML Rev 1335

Barnard C, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012) 37 EL Rev 117

Callewaert J, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' (2009) 6 EHRLR 768

Davies ACL, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 ILJ 126

Davies ACL, 'Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?' in P Alston (ed), *Labour Rights as Human Rights* (OUP 2005)

De Burca G, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 2

De Burca G, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 AJIL 668

Dorssemont F, 'The Right to Form and to Join Trade Unions for the Protection of his Interests under Article 11 ECHR' (2010) 1 ELLJ 185

Douglas-Scott S, 'Bosphorus v Ireland' (2006) 43 CML Rev 243

Douglass-Scott S, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Aquis' (2006) 43 CML Rev 629

Douglas-Scott S, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 HRLR 645

Eckes C, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 MLR 254

Ewing KD, Hendy J QC, 'The Dramatic Implications of *Demir and Baykara'* (2010) 39 ILJ 2

Ewing KD, 'Myth and Reality of the Right to Strike as a 'Fundamental Right'' (2013) 29 IJCLLIR 145

Gerards J, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 ELJ 80

Jacqué JP, 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 CML Rev 995

Joerges C, Rödl F, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the CJEU in Viking and Laval' (2009) 15 ELJ 1

Kovacs E, 'The Right to Strike in the European Social Charter' (2005) 26(4) Comp Lab L & Pol'y J 445

Langille B, 'Can we Rely on the ILO?' (2008) 13 Canadian Lab & Empl LJ 363

Langille B, 'The Freedom of Association Mess: How we Got Into it and How we Can Get Out of it' (2009) 54 McGill LJ 177

Lock T, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights' (2010) 10 HRLR 529

Lock T, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 The Law and Practice of Int'l Courts and Tribunals 375

Lock T, 'Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 CML Rev 1025

Malmberg J, Sigeman T, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) 45 CML Rev 1115

Mantouvalou V, 'Are Labour Rights Human Rights?' (2012) 3 ELLJ 151

Mantouvalou V, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' HRLR Advance Access published March 1, 2013 doi:10.1093/hrlr/ngt001

McCrudden C, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20(4) OJLS 499

Novitz T, Germanotta P, ‘Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action’ (2002) 18(1) IJCLLIR 67

Ryan B, ‘The Charter and Collective Labour Law’ in TK Hervey, J Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights – a Legal Perspective* (Hart Publishing 2003)

Semmelmann C, ‘The European Union’s Economic Constitution under the Lisbon Treaty: Soul-searching among Lawyers Shifts the Focus to Procedure’ (2010) 35 EL Rev 516

Syrpis P, Novitz T, ‘Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation’ (2008) 33 EL Rev 411

Syrpis P, ‘Reconciling Economic Freedoms and Social Rights – The Potential of Commission v Germany (Case C-271/08, Judgment of 15 July 2010)’ (2011) 40 ILJ 222

Van Rossem JW, ‘The Autonomy of EU Law: More is Less?’ in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence* (The Hague: TMC Asser Press/Springer 2013)

Weiss W, ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon’ (2011) EuConst 64

Lenaerts K, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 EuConst 388

Miscellaneous

– ‘Margin of Appreciation – an overview of the Strasbourg Court’s margin of appreciation doctrine’ (*Open Society Justice Initiative*, April 2012)

– ‘Rüffert case: ETUC Warns that ECJ’s Judgement Is Destructive and Damaging’ (*ETUC*, 3 April 2008)

Besselink L, ‘The EU and the European Convention of Human Rights after Lisbon: From ‘Bosphorus’ Sovereign Immunity to Full Full Scrutiny?’ (2008) SSRN Working Paper

Bücker A and Warneck W (eds), ‘Viking – Laval – Rüffert: Consequences and policy perspectives’ (2010) ETUI Report 111

Deakin S, ‘Regulatory Competition in Europe after Laval’ (2008) University of Cambridge CBR Working Paper 364/2008

Ewing K, ‘The Draft Monti II Regulation: An Inadequate Response to Viking and Laval’ (2012) IER Briefing Paper

Gaja G, ‘‘Co-Respondent Mechanisms’ According to the Draft Agreement for the Accession of the EU to the ECHR’ (2013) ESIL Paper 2(1)/2013

Hös N, ‘The Principle of Proportionality in the Viking and Laval Cases: An Appropriate Standard of Judicial Review?’ (2009) EUI Department of Law Working Paper 2009/06

Novitz T, ‘International Law on the Right to Strike’ (*University of Saskatchewan blogs*) <http://blogs.usask.ca/foa2010/files/novitz_transcript_amended.pdf> accessed 2 August 2013

Reich N, ‘How Proportionate is the Proportionality Principle?’ (Conference ‘The Reach of Free Movement’, Oslo, May 2011)

Spielmann D, ‘Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’ (2012) University of Cambridge CELS Working Paper

Sweet AS, Keller H, ‘Assessing the Impact of the ECHR on National Legal Systems’ (2008) Yale Law School Faculty Scholarship Series Paper 88