

This article is published in a peer-reviewed section of the Utrecht Law Review

The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR

Albertine Veldman*

1. Introduction

With the entry into force of the Treaty of Lisbon, the protection of fundamental rights within the European Union is increasingly gaining momentum. Article 6 TEU not only endows the Charter of Fundamental Rights of the EU – already proclaimed at the Nice summit in 2000 – with a binding legal nature, but, moreover, states that ‘the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (hereafter the ECHR). This strengthening of European fundamental rights protection is, of course, to be welcomed. Still, at the same time it raises questions of legal coherency. The legal orders of the EU and the Council of Europe differ in nature and so can the protection of fundamental rights within these orders. This already holds true before the accession of the EU to the ECHR will materialise, as the Union at present must respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of the Union’s law.¹ Indeed, the jurisprudence of the European Court of Justice (ECJ) in the past shows ample examples of the application of fundamental rights that are (also) recognised under the European Convention.

This contribution will focus on the coherency aspects of especially social fundamental rights, more particularly the right to strike, also addressed as ‘the right to collective action’ because there are more types of actions which are feasible to defend the social and economic interests of workers than solely regular work stoppages. When debating the upcoming accession of the EU to the ECHR, social rights including the right to collective action warrant special attention for several reasons.

Firstly, the application of social fundamental rights can highlight, or be a test case for, the upcoming complexities when the European Court of Human Rights (ECtHR) is to adjudicate on EU actions in this field. It is here where the divergent nature of the EU legal order, when it concerns fundamental rights protection, becomes most obvious. Unlike the ECtHR, the ECJ, when applying social fundamental rights, has to give due regard to the economic freedoms of establishment and to provide services and goods, being fundamental principles of the Union’s legal order. As the well-known *Viking* and *Laval* case law has shown,² this requires the balancing of fundamental workers’ rights against economic market

* Associate Professor of Labour Law and Social Policy, Utrecht University School of Law, Utrecht (the Netherlands), email: a.g.veldman@uu.nl.

1 Art. 6(3) TEU.

2 Case C-438/05, *International Transport Workers’ Federation v Viking Line*, 11 december 2007, [2007] ECR I-10779; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, 18 december 2007, [2007] ECR I-11767.

interests, which is unprecedented in international social law, but appears inherent in an European legal order in which the creation and safeguarding of a common market lies at its heart.

Secondly, there is more to the balancing of fundamental social rights and economic freedoms than differing adjudication methodologies of European courts alone. At the end of the day, the politically preferred social economic model of the EU may be at stake. Internationally recognised minimum labour standards all go back to the fundamental principle, adopted in the Constitution of the International Labour Organisation (ILO), that ‘labour is not a commodity’. This entails that labour is not like an apple or a television set, an inanimate product that can be negotiated for the highest profit or the lowest price. Work is part of everyone’s daily life and is crucial to a person’s dignity, well-being and development as a human being. Can minimum labour conditions within the context of the EU internal market nevertheless be subjected to cross-border economic competition, as this was at stake in the above-mentioned *Viking* and *Laval* cases? If so, would, or should, it be up to a ECtHR to decide on that in the future?

A third and final reason for concentrating on the fundamental right to strike in the light of the aforementioned accession of the EU to the ECHR is the remarkable contrast in the evolving case law in this field of the ECJ and the ECtHR. Almost at the same time when the ECJ delivered its rulings in *Viking* and *Laval*, holding that the exercise of the fundamental right to collective action must meet the justification test of the economic freedoms of establishment and providing services, the ECtHR delivered its benchmark rulings in *Demir & Baykara* and *Enerji Yapi-Yol Sen*. In these judgments it gave full protection to the right to collective bargaining and collective action under Article 11 ECHR (freedom of association, including the right to form and join trade unions) with extensive reference to the standards of the ILO and the European Social Charter (ESC), as interpreted by their, respective, international supervisory committees. The rulings constituted ground-breaking decisions, considering that, up until then, the ECtHR had for a time held that the right to collective bargaining and the right to strike were not ‘essential means’ in order for a Member State to uphold the right of trade unions to represent the interests of their members under Article 11.

In the following, the different aspects of legal coherency with regard to the application of the right to strike by both European courts will be discussed more thoroughly. This is done by, firstly, examining the way the ECJ addresses the collision of the social fundamental right to strike and the economic freedoms on the basis of its relevant case law. This analysis includes the legal methodology applied and the possible implications thereof for national trade unions and current national systems of industrial relations (Section 2). Hereafter, the developments in the right to strike in the case law of the ECtHR are addressed (Section 3). This section will, furthermore, contain a brief outline of some of the relevant jurisprudence of the International Labour Organisation and the European Social Charter, this being embedded by the Court in the right to strike under Article 11 ECHR. Section 4 contains a comparative analysis of the approach of both European courts and discusses the apparent incoherencies. In the final section some conclusions are drawn from this, as well as some possible solutions to the problems that are presumed to arise. In this, the role of the EU Charter, the judicial method of balancing applied by the ECJ and the possible role of the European legislator will be taken into account (Section 5).

2. The protection of the right to strike by the ECJ

The decisions of the ECJ in the *Viking* and *Laval* cases are well known and have been discussed intensively.³ Below, the merits of the case law are, therefore, just briefly outlined, thereby concentrating on some of the main points to be raised from the perspective of the clash between fundamental social rights and economic freedoms within the framework of Union law. Although the cases are often summarized in one breath, being both about the right to strike and decided upon with an interval of just one week, it is nevertheless important to separate them from one another in the current context. In adjudicating

3 The list is far too long to be cited here. To name some (rather randomly chosen) English language submissions, i.a., A. Davies, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’, 2008 *Industrial Law Journal* 37, no. 2, pp. 127-148; A. Hinarejos, ‘Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms’, 2008 *Human Rights Law Review* 8, no. 4, pp. 714-729; P. Syrpis & T. Novitz, ‘Economic and social rights in conflict: Political and judicial approaches to their reconciliation’, 2008 *European Law Review* 33, no. 3, pp. 411-426.

fundamental workers' rights, *Laval* shows even more than *Viking* the impact of the specific nature of the EU legal order, compared to the purely human rights-oriented order of the Convention, due to the fact that the specific workers' interests at stake in this case are partially harmonized in view of internal market aims by way of an EU directive.

2.1. The Viking case

The facts

Viking, a ferry operator incorporated under Finnish law, sought to reflag its vessel by registering it in Estonia. This was due to the higher wages applicable under a collective bargaining agreement, governed by Finnish law, with the Finnish Seamen's Union (hereinafter: 'the FSU'). Based on the 'Flag of Convenience' policy of the International Transport Workers' Federation (hereinafter: 'the ITF'),⁴ the FSU requested that the ITF, whose headquarters was in London, send out a circular asking its affiliates to refrain from entering into negotiations with Viking, which it duly did. Following the expiry of the applicable collective labour agreement, the FSU threatened strike action against Viking in order to deter Viking from its plans to reflag its vessel. Viking applied to the English court for an injunction to stop the trade unions' actions, on the grounds that it infringed Article 43 EC on the freedom of establishment (now Article 49 TFEU).

The ruling

The ECJ, in addressing the questions raised by the English Court of Appeal, began by considering the applicability of Article 43 to the unions. The Court did not consider trade unions to be public bodies, but it held that the free movement provisions 'do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services'.⁵ The Court further held that collective bargaining and collective action were inextricably linked, hence also collective action fell within the scope of Article 43.⁶

In respect of whether the collective action at issue constituted a restriction within the meaning of article 43 EC, the ECJ concluded that the FSU's action 'has the effect of making less attractive, or even pointless (...) Viking's exercise of its right to freedom of establishment' because Viking would enjoy less favourable treatment than other economic operators established in the host state.⁷ It was also held that ITF's campaign against flags of convenience 'must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment'.⁸

Turning, finally, to the question of justification, the Court already recognised the fundamental nature of the right to collective action, referring to the ESC, ILO Convention No. 87 on Freedom of Association and the Right to Organize and to Article 28 of the EU Charter.⁹ Still, the exercise of a fundamental right must be reconciled with the requirements of the Treaty. The Community not only has an economic, but also a social purpose and social policy interests must be balanced with the free movement rules. It turns out that 'balancing' implies that the respective collective action must meet the justification test for the restriction of free movement, including its proportionality test. Still, the ECJ accepted that the right to take collective action for the protection of workers is, in principle, a legitimate interest which can justify a restriction of the freedom of establishment.¹⁰ Leaving it up to the national court to apply the justification test to the facts of the case, it continued, however, to give very narrow guidance on this. Factors to be considered were if the collective action indeed served the protection of workers, meaning there was a serious threat to jobs or conditions of employment at issue,¹¹ whether the collective action

4 The ITF has a long-standing and well-known campaign against the use of 'flags of convenience', meaning the use of the flag of one country where lower labour standards apply by a beneficial owner situated in another country.

5 *Viking*, supra note 2, Para. 33.

6 *Ibid.*, Para. 36-37.

7 *Ibid.*, Para. 72.

8 *Ibid.*, Para. 73.

9 *Ibid.*, Para. 43.

10 *Ibid.*, Para. 77.

11 *Ibid.*, Para. 81.

was suitable for ensuring the achievement of the objective pursued,¹² and if the union had exhausted other, less restrictive, means available to resolve the dispute before initiating a strike.¹³

2.2. *The Laval case*

The facts

Central to the dispute in *Laval* is again the issue of social dumping. Having won a public tender in Sweden to renovate a school, the Latvia-based construction company Laval posted workers to Sweden. Estimates suggest that these posted workers earned around 40% less than their Swedish counterparts. Concerned that the posting of cheaper labour to Sweden would undermine the labour standards of Swedish construction workers, the trade union opened negotiations with Laval with the aim of extending the applicable collective agreement to the posted workers, allowing the union to negotiate minimum wages for them. The negotiations failed and the union, supported by the electricians' union, began a blockade of Laval's building sites. In response, Laval called on the Swedish Labour Court to rule that the action was unlawful because of an infringement of the free movement of services, and to be compensated by the unions for the losses it had suffered.

The ruling

Responding to the questions raised by the Swedish court, the ECJ partly reasoned along the same lines as in *Viking*. It considered the right to collective action to be a fundamental right that, however, had to be reconciled with Article 49 EC (now 56 TFEU). The latter also applies to private unions because 'compliance with Article 49 EC is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services'.¹⁴ Again starting out from the perspective of the economic freedom that may be restricted 'only if (the restriction) pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest',¹⁵ the Court accepted that 'the right to take collective action for the protection of the workers of the host state against possible social dumping may constitute an overriding reason of public interest'.¹⁶ However, dealing with the merits of the case itself, the Court did not find the unions' action to be justified. It is here that the Posted Workers Directive¹⁷ came into play. Although not applicable in the present case because directives lack horizontal effect, the Court slipped it into its proportionality test.

The said Directive basically strikes a balance between workers' protection and the free movement of services by compelling the host Member State to apply a mandatory minimum set of employment conditions according to its national law, including a minimum wage, to posted workers from other Member States. This has to be accomplished by national laws, generally applicable collective agreements or, where such mechanisms are lacking, by other ways that ensure the equal treatment of foreign and national firms. Because of the Scandinavian system of industrial relations, in which trade unions enjoy a large autonomy to regulate labour, Sweden has no legislation on a minimum wage, expecting the relevant trade union to negotiate a minimum wage for each work place with the employer. The ECJ, however, took exception to this system of 'case-by-case' negotiations because it lacked transparency for foreign firms, unduly restricting their trade prospects.¹⁸ Moreover, it perceived that the content of the collective agreement sought by the union would also be an infringement of the Directive, since the union was seeking negotiations on additional subjects that went beyond the minimum terms and conditions envisaged in Article 3(1).¹⁹

¹² *Ibid.*, Para. 84.

¹³ *Ibid.*, Paras. 86-87.

¹⁴ *Laval*, *supra* note 2, Para. 98.

¹⁵ *Ibid.*, Para. 101.

¹⁶ *Ibid.*, Para. 103.

¹⁷ Directive 1996/71/EC.

¹⁸ *Laval*, *supra* note 2, Paras. 69-70, 100.

¹⁹ *Ibid.*, Paras. 70 and 79.

2.3. Assessment of the case law with regard to the balancing of social rights and free movement rights

Implications of the balance struck

The strike action, central to the *Laval* decision, appears not to be so much balanced against the fundamental freedom to provide services, but rather to be assessed in isolation as an (unlawful) technique under the Posted Workers Directive.²⁰ While it is not the objective of this Directive to reconcile the exercise of the fundamental right to collective action with fundamental economic freedoms, the Union even lacking competence in the field due to Article 153(5) TFEU, the Directive can still be regarded as a ‘legislative balance’ struck between the freedom to provide services and the social policy goal of workers’ protection. As interpreted by the ECJ, though, the weight seems to shift to the side of its internal market aims. This was to be underlined in the later *Rüffert* case, which ruled out the adoption in the local government’s tender specifications of a so-called social clause ensuring the observance of the applicable collective labour agreement, because the collective agreement was not universally applicable.²¹ Despite the fact that the Posted Workers Directive compels the Member State to ensure a nucleus of *minimum* employment conditions is applied to posted workers and states in Article 3(7), this shall not prevent the application of more favourable employment conditions to workers, the Court, nevertheless, held in *Laval* that the minimum employment conditions of Article 3(1) to be applied by the host state also constituted the maximum.

According to the Court, Article 3(7) merely covered the situation in which a firm signed ‘of its own accord’ a collective agreement in the host state providing for more favourable terms and conditions.²² This suggests that trade unions do have the freedom to engage in collective bargaining on terms of employment beyond the nucleus of Article 3(1) of the Directive, but not to back it up with the threat of industrial action in case of foreign-based contractors.²³ Such an industrial action would surely be unjustified since the collective agreement sought would be concluded on a case-by-case basis. Here it appears that the Court envisages that collective bargaining can be isolated from collective action.²⁴ However, without ‘equality of arms’ for both sides of industry the system of voluntary collective bargaining would simply not work. According to the views of the ILO, collective action is the corollary of collective bargaining and, therefore, is indispensably connected to the freedom of association and the right to collective bargaining. Remarkably, the ECJ held in *Viking* that collective bargaining and collective action *are* inextricably linked, however, using the argument to bring collective action within the scope of Article 49 TFEU (*supra*, Section 2.1).

Implications of the horizontal effect of the free movement provisions

By doing so, the provisions on the free movement of establishment and services were accorded horizontal effect. However, appointing private unions to be addressees of the public interest law provisions guaranteeing free movement, comes at a price.²⁵ On the one hand, trade unions are conceived as being semi-public organizations deemed capable of ‘regulating, collectively, the provision of services’;²⁶ on the other hand, they cannot invoke the exceptions laid down in the Treaty or in the Posted Workers Directive in respect of public policy considerations. According to the ECJ in *Laval*: ‘[trade unions] not being bodies governed by public law (...) cannot avail themselves of that provision by citing grounds of public policy.’²⁷ Bestowing (semi-)public responsibilities on trade unions while at the same time conceiving them as ordinary private persons, also does not seem to sit very well with the fact that the social partners,

20 Cf. A. Van Hoek & M. Houwerzijl, ‘Loonconcurrentie als motor van de interne markt? Deel I’, 2008 *Nederlands tijdschrift voor Europees recht*, no. 7/8, pp. 190-205.

21 Case C-346/06, [2008] ECR I-01989. See, i.a., A. Van Hoek & M. Houwerzijl, ‘Loonconcurrentie als motor van de interne markt? Deel II’, 2008 *Nederlands tijdschrift voor Europees recht*, no. 12, pp. 337-346; A. Bückler & W. Warneck (eds.), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert*, 2011.

22 See *Laval*, *supra* note 2, Para. 81.

23 Cf. Davies 2008, *supra* note 3, p. 129.

24 *Ibid.*

25 Cf. Davies 2008, *supra* note 3, p. 130.

26 See *Laval*, *supra* note 2, Para. 98. Compare also *Viking*, *supra* note 2, Para. 33.

27 See *Laval*, *supra* note 2, Para. 84.

according to the Treaty, may implement directives and, at the European level, are awarded a regulatory role in social policy matters with priority over the Commission and Parliament.²⁸

Oscillating methods for scrutinizing proportionality

More generally, in the application of the balancing test by the ECJ trade unions apparently enjoy far less leeway when compared to the margin of discretion allowed for Member States to protect fundamental rights.²⁹ This is even, or perhaps more, so when these rights have but a particularly national constitutional dimension like in *Omega* or *Sayn-Wittgenstein*.³⁰ Still, in *Viking* and *Laval* the ECJ took no note of the particularity of national social systems and the, sometimes also constitutionally-based, national traditions of industrial relations, especially those in which the attainment of national social policy goals may fall within the autonomous reign of the social partners. Furthermore, as Barnard points out, the case law makes clear that the protection of the fundamental right to strike as such cannot justify the restriction on free movement, but requires the exercise of the fundamental right to pursue a wider legitimate aim, i.e. the protection of workers, and be suitable to that end.³¹ Moreover, the aim of workers' protection is not one to be accepted lightly but requires a 'serious threat' to the jobs or employment conditions at issue. To conclude, national courts must assess whether other possible means have been exhausted, thereby implying that the exercise of a fundamental social right may only be a last resort.

In the case that the fundamental right to be protected is exercised by private interest groups, analogous to *Viking* and *Laval*, the differences in the methodology applied by the ECJ seem even more striking. When compared to the *Schmidberger* case dealing with a road blockade by environmental groups in Austria restricting the free movement of goods,³² the ECJ assessed proportionality in that case by a far more 'marginal' test. The Austrian Government, in authorizing the protest action, was not compelled to scrutinize whether the particular exercise of the freedom of assembly or of expression by the social interest groups served a wider legitimate aim such as environmental protection and whether the environment was indeed seriously threatened. Neither was the State compelled to assess if the particular protest action was suitable to achieve that environmental aim and if other, less restrictive means had been exhausted by the demonstrators before initiating the road blockade. In contrast, it was found adequate that 'citizens were (...) manifesting in public an opinion which they considered to be of importance to society',³³ while for the means applied to be proportionate it sufficed that the road blockade was a single occasion during a limited period and accompanied by public alerts to limit its implications.³⁴

Implications for the national systems of industrial relations and the national unions

The intrusiveness of the assessment required by national courts into trade union autonomy may place considerable restraints on the exercise of the fundamental right to take collective action in cross-border industrial disputes. Because of this, and the fact that universally applicable legislation is required under the Posted Workers Directive depending on the particularities of the national collective bargaining system, the course taken by the ECJ 'may be seen as threatening not only autonomous collective bargaining structures in the Member States, but also the flexibility inherent in the European Social Model and, in particular, the Open Method of Coordination'.³⁵ Following the decisions by the ECJ, the European Trade Union Confederation uttered a strong protest on the first count, stating that 'an intolerable uncertainty

28 Resp. Art. 153(3) and Arts. 154-155 TFEU.

29 Cf. Case C-112/00, *Schmidberger*, [2003] ECR I-5659; Case C-36/02, *Omega*, [2004] ECR I-9609; Case C-208/09, *Sayn-Wittgenstein*, [2010] ECR I-13693.

30 For an extensive analysis of this aspect, see S.A. de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', 2013 *Utrecht Law Review* 9, no. 1, pp. 169-192.

31 C. Barnard, 'EU "Social" Policy: From Employment Law to Labour Market Reform', in P. Craig & G. De Búrca, *The Evolution of EU Law*, 2011, p. 371.

32 Case C-112/00, *Schmidberger*, [2003] ECR I-5659.

33 *Ibid.*, Para. 86.

34 *Ibid.*, Paras. 85 and 87.

35 R. Zahn, 'The Viking and Laval Cases in the Context of European Enlargement', 2008 *Web Journal of Current Legal Issues*, no. 3, at <www.webjcli.ncl.ac.uk/2008/issue3/zahn3.html>.

(was created) for unions involved in virtually any case of industrial action over migration and free movement.³⁶

The restraints on autonomous collective bargaining and collective action are aggravated by the fact that trade unions may be faced with claims for damages by the employer if it were to transpire that their action was unjustified under European law, as was experienced by the Swedish unions in *Laval*.³⁷ The notorious English *BALPA* case, involving a cross-border relocation of labour at British Airways, shows that the possible amount of damages to be paid can easily bankrupt an union, forcing it in the end to abstain from taking the industrial action it anticipated.³⁸ Moreover, a cap on the amount of damages to be generally retrieved from trade unions, common in some Member States in order to prevent this effect, could well be incompatible with the established principle of EU law requiring national remedies for the breach of Union law to be effective and equivalent to remedies in domestic law. A national cap on the amount of damages in case of a breach of the free movement provisions will probably not apply to non-union actors.

3. The protection of the right to strike by the ECtHR

When adopting its human rights instruments, the Council of Europe drew a strong distinction between civil and political human rights, contained in the European Convention (1950) and watched over by an international court, and the social and economic rights laid down in the European Social Charter (1961)³⁹ and accompanied by a 'light' regime of supervisory committees and, later on, an optional collective complaint procedure (1995). The social rights of especially collective bargaining and collective action have never really fitted the general distinction made, encompassing 'freedoms' that, like the 'classical' human rights, are not 'programmatic' in nature but require predominantly abstention by the State. Still, according to the long-standing case law of the ECtHR, established in the 1970s and reiterated as recently as 2002,⁴⁰ collective bargaining and strike action were not rights which were guaranteed as such by the European Convention. The Court did hold Article 11 ECHR (i.a. the right to form and join trade unions) to safeguard the freedom to protect the occupational interests of workers by trade union action; however, the choice of means to be used by the State in order that the trade union 'should be heard' fell within the Member State's margin of appreciation.⁴¹ 'Whilst concluding collective agreements (or initiating strike action) is one of these means, there are others.'⁴² This view was to be changed into its opposite by *Demir and Baykara*, followed up by *Enerji Yapi-Yol Sen*.⁴³

3.1. The cases of *Demir & Baykara* and *Enerji Yapi-Yol Sen*

Demir & Baykara

The *Demir & Baykara* case concerned the legal status and collective bargaining rights of a Turkish civil servants' union. When the trade union brought legal action to enforce the collective agreement it had concluded with a local municipal council, it was eventually successful. This ruling, however, was ultimately quashed by the Court of Cassation on the ground that collective bargaining by public servants required specific domestic legislation, which was absent. As a consequence the trade union was denied legal personality and, hence, the collective agreement which had been concluded was deemed null and void. After an unanimous chamber of the ECtHR held that the applicants' rights had been violated under

36 Resolution adopted by the Executive Committee of the ETUC at its meeting of 4 March 2008 in Brussels, EC.179, see at <www.etuc.org>.

37 See J. Malmberg, 'Trade union liability for "EU-unlawful" collective action', 2012 *European Labour Law Journal* 3, no. 1, pp. 5-18, who offers a critical assessment of the aftermath of the *Laval* case in Sweden.

38 For a detailed description of the (discontinued) litigation in the English *Balpa* case, see K.D. Ewing & J. Hendy, 'The Dramatic Implications of *Demir and Baykara*', 2010 *Industrial Law Journal* 39, no. 1, pp. 44-46.

39 The ESC was revised in 1996, but the revised charter has not been ratified by all EU Member States.

40 *UNISON v the United Kingdom*, [2002] Appl. No. 53574/99, ECHR 2002-I.

41 *National Union of Belgian Police v Belgium*, [1975] Series A, No. 1, Para. 38; *Swedish Engine Drivers' Union v Sweden*, [1976] Series A, No. 20, Para. 40; *Schmidt and Dahlström v Sweden*, [1976] Series A, No. 21, Para. 36.

42 Ibid.

43 *Demir and Baykara v Turkey*, ECtHR (Grand Chamber) 12 November 2008, Appl. No. 34503/97; *Enerji Yapi-Yol Sen v Turkey*, ECtHR 21 April 2009, Appl. No. 68959/01.

Article 11,⁴⁴ the case was referred, at the request of Turkey, to the Grand Chamber. This Court, also unanimously, held that there had been a violation of Article 11 on account of (a) the interference with the right to form a trade union and (b) the annulment *ex tunc* of the collective agreement entered into by the trade union following collective bargaining with the employer.

The Court's Grand Chamber placed the international instruments related to freedom of association and collective bargaining at the centre of its analysis.⁴⁵ For this purpose, it reflected, first, on its approach to international law more generally. More specifically, it stated that the analysis of the 'evolving norms of national and international law' is an essential feature of interpreting the ECHR as a 'living' document.⁴⁶ In this regard, the Court did not consider it necessary that (all) the international instruments referred to had been ratified by Turkey. 'It will be sufficient (...) that the instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of Member States (...) and show, in a precise area, that there is common ground in modern societies'.⁴⁷

Subsequently, the Court applied this reasoning to its analysis of the trade union's rights under Article 11. Importantly, the Court relied on international instruments when examining whether the right to collective bargaining actually fell within the scope of the right to organize. As has been mentioned before, up until then the Court had refused to consider the right to collective bargaining to be an essential element of Article 11. The Court now stated, however, that the list of essential elements also had to 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.⁴⁸

The Court then turned to analysing the relevant international law framework. Here, it focused on ILO Convention No. 98 and ILO Convention No. 151 on Labour Relations in the Public Service. Whilst noting that, in accordance with Article 6 of ILO Convention No. 98, public servants were not covered by that instrument, it pointed to the ILO Committee of Experts' settled position that this exception must be restricted to those officials whose activities are specific to the administration of the state, like for instance (some) members of the police force or members of the armed forces.⁴⁹ After referring to Article 6(2) ESC as interpreted by the European Committee of Social Rights (ECSR), the EU Charter and state practice,⁵⁰ the Court, on these grounds, reached the conclusion that the right to bargain collectively had, in principle, become one of the essential elements of Article 11(1), extending also to civil servants except for very specific cases, a category to which the applicants, however, did not belong.⁵¹

The Court also explicitly used ILO instruments, besides a more general reference to 'regional instruments' and 'European practice' in order to establish the substance of the right to collective bargaining under Article 11. Again following an examination of ILO Convention No. 98 and the reports of the ILO Committee of Experts,⁵² it held that the Turkish Government omitted to show how the interference was 'necessary in a democratic society',⁵³ or corresponded to 'a pressing social need',⁵⁴ under the allowed restrictions grounds of Article 11(2).

Enerji Yapi-Yol Sen

Only a few months later, this new approach was confirmed in the case *Enerji Yapi-Yol Sen*.⁵⁵ The case concerned the right to strike of, again, a Turkish public service trade union, as public sector employees

44 ECtHR 21 November 2006, Appl. No. 34503/97.

45 *Demir and Baykara v Turkey*, supra note 43; the summary draws on the discussion paper by F.C. Ebert & M. Oelz, *Bridging the gap between labour rights and human rights: The role of the ILO in regional human rights courts*, 2012, Geneva: International Institute for Labour Studies (see at <www.ilo.org>).

46 See *Demir*, supra note 43, Para. 68.

47 *Ibid.*, Para. 86.

48 *Ibid.*, Para. 146.

49 *Ibid.*, Paras. 147-148.

50 *Ibid.*, Paras. 149-151.

51 *Ibid.*, Para. 154.

52 *Ibid.*, Para. 166.

53 *Ibid.*, Para. 163.

54 *Ibid.*, Para. 164.

55 See *Enerji*, supra note 43.

were prohibited from taking part in a national one-day demonstration to secure the right to collective bargaining. In this judgment the Court drew on the fundamental considerations developed in *Demir & Baykara*, albeit in a more succinct form. The right to collective action was not explicitly considered to be 'essential' (though 'important') to secure freedom of association and the right to organize. Instead, the Court relied on the interpretations of ILO Convention No. 87 by the ILO supervisory bodies, according to which the right to strike is an intrinsic corollary of workers' freedom of association.⁵⁶ With reference to *Demir & Baykara* and after recalling that the ESC also recognises the right to strike as a means of ensuring the effective exercise of the right to collective bargaining, the Court concluded that the right to collective action was protected by Article 11. As to its content, acknowledging the right to strike was not absolute, the Court found that the Government had not demonstrated 'the need in a democratic society for the impugned restriction', due to its blanket ban on strike action for all public servants.⁵⁷

3.2. Assessment of the case law's impact

The impact of the cases can hardly be over-estimated. In the present context, however, the implications of the case law of the ECtHR may be confined to a threefold assessment. Firstly, the European protection of fundamental social rights is, of course, significantly enhanced, due to the fact that 'the ECtHR (i) repudiated its earlier decisions on the question of trade union rights, (ii) embraced collective bargaining as an essential right protected by Article 11, and in doing so (iii) introduced a body of reasoning that should apply with equal force to other forms of trade union activity, notably the right to take collective action'.⁵⁸ The latter is supported by the later rulings in *Özcan* and *Kaya and Seyhan*, concerned with disciplinary action for taking part in protest strikes.⁵⁹ Although concerned principally with the question of the individual sanction, that could only be an issue if the strike action itself was protected under the Convention.

Secondly, because of the use of a dynamic and intertextual interpretation method of Article 11 ECHR, the Court embedded the international labour law standards of the ILO and the ESC and the jurisprudence of its supervisory committees into that right.⁶⁰ Thereby, the body of principles and decisions which has evolved in international law on the social rights of collective bargaining and collective action is now indirectly subjected to a new, and more effective, international enforcement mechanism. While the findings and decisions of the ESC and ILO committees, although granted much authority, are formally non-binding,⁶¹ the European Convention has its international Court attached, taking legally binding decisions.

Thirdly, as a consequence of the former, this opens up the possibility for trade unions and individual trade union members to have an alleged infringement of their social rights to be adjudicated upon by, ultimately, the ECtHR, also in those Member States, like for instance the UK, that did not accept the collective complaint procedure under the ESC. More importantly, adjudication by the ECtHR could possibly distress the decisions of the EU institutions after the accession of the EU to the ECHR, due to the apparent conflict between the line of reasoning of the ECtHR and the ECJ in respect of trade union rights, to be discussed more carefully in the next section. Some commentators already speculate about the 'mouth-watering possibility of a high noon conflict between the two', appealing to trade unions and trade unionists to bring claims to Strasbourg.⁶² In this, they might not have to await actual accession to

⁵⁶ *Ibid.*, Para 24.

⁵⁷ *Ibid.*, Para 32.

⁵⁸ Ewing & Hendy, *supra* note 38, p. 4.

⁵⁹ *Saima Özcan v Turkey*, Appl. No. 22943/04 (15 September 2009); *Kaya and Seyhan v Turkey*, Appl. No. 30946/04 (15 September 2009).

⁶⁰ Cf. D. Harris et al., *Law of the European Convention on Human Rights*, 2009; T. Novitz, 'Protection of Workers under Regional Human Rights Systems: An Assessment of Evolving and Divergent Practices', in C. Fenwick & T. Novitz (eds.), *Human Rights at Work. Perspectives on Law and Regulation*, 2010, pp. 409-438; Ebert & Oelz, *supra* note 45, p. 13. See also Ólafson *v Iceland*, ECtHR 27 April 2010, Appl. No. 20161/06 for an example of an extensive analysis by the Court of international labour principles in respect of Article 11 ECHR, directly based on the *Digest of the Freedom of Association Committee of the Governing Body of the ILO* and on the conclusions of the European Committee of Social Rights.

⁶¹ Cf. for a critical assessment of, for instance, the complaints procedure of the ESC, R. Churchill & U. Khaliq, 'The Collective Complaints System of the European Social Charter: An effective Mechanism for Ensuring Compliance with Economic and Social rights?', 2004 *European Journal of International Law*, no. 3, pp. 417-456.

⁶² Ewing & Hendy, *supra* note 38, p. 4 and pp. 41-42.

the ECHR when alleging that a particular decision of a national court giving effect to *Viking* and *Laval* constitutes a breach of the Convention.⁶³

4. Comparative analysis

In the following a comparative analysis will be made of the general methods of adjudication applied by both European courts in respect of the protection of the fundamental right to strike. The comparison does not see to the particularities of the case law discussed, as the underlying facts differ, but focuses on the body of norms, principles and interpretation methods flowing from these benchmark cases, which will generally apply to the courts' assessment of the lawfulness of strike action in Europe. Cases brought before the ECJ will, of course, be confined to strike actions involving industrial disputes on the migration or relocation of labour in order to have an cross-border element, but this does not interfere as such with the competence of the ECtHR. This Court can assess whether a Member State, which after its accession to the Convention will include the EU, has complied with the fundamental right to strike as protected by Article 11 ECHR, irrespective of the nature of the industrial dispute that caused the (anticipated) particular strike action. Even before the actual accession of the EU, as already indicated in the former section, national Member States might be faced with a dual set of international obligations when a strike action in their territory restricts fundamental economic freedoms. National Member States are under the obligation to give effect to Union law but at the same time are not absolved from their Convention responsibility in the areas covered.⁶⁴ It is from these perspectives that the comparison is drawn.

From the assessments of the case law of the ECJ and the ECtHR, delivered in Sections 2 and 3, it can be concluded that possible legal incompatibilities might arise from the way in which the fundamental right to strike is applied and protected by the respective European courts in the case of cross-border strike actions.⁶⁵ These legal incoherencies are mainly manifested in respect of (i) the general legal methodology applied, (ii) the nature of the restriction grounds allowed for, (iii) the proportionality required, and (iv) the perception of the relationship between the rights of collective bargaining and collective action. These points will be addressed below.

(i) General legal methodology applied

Under the systems of the European Convention and the TFEU the respective legal methodologies applied for assessing the lawfulness of (cross-border) strike actions seem hard to reconcile. The methods applied by the ECtHR and the ECJ start out from opposite directions. Strike action being a fundamental right protected under the Convention implies that any state intervention, including by its judiciary, must meet the restriction grounds provided for by Article 11(2). An injunction by a national court to stop a particular trade union's action will, therefore, require that this restriction is 'prescribed by law and is necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.'

Because of the fundamental nature of the economic freedoms, the EU law system, on the other hand, only allows for a strike action that infringes these principles if the trade union's action 'pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest'.⁶⁶ So, where the ECtHR is compelled to scrutinize the lawfulness of the particular *restriction* or even a ban on the fundamental right to strike, the ECJ must assess the lawfulness of *resorting* to the fundamental right to strike when it considers the particular strike action to be an infringement of a fundamental economic freedom. The chances of the outcome of such differing starting points in legal reasoning being

63 In *Bosphorus Airways v Ireland*, Appl. No. 45036/98 (20 June 2006), the ECtHR held that measures taken by a Member State to give effect to Community law did not absolve it from its Convention responsibility in the areas covered. Still, it also held the protection of fundamental rights by Community law to be equivalent to that of the Convention system. With the upcoming accession of the EU to the ECHR, though, understanding the latter stance as irrefutable would make such an accession meaningless.

64 Ibid.

65 E.g. S. Laulom, 'Les Arrêts Viking et Laval: Et après?', 2010 *Droit Ouvrier*, no. 578, pp. 570-575.

66 *Laval*, supra note 2, Para. 101.

contradictory seem fairly great due to the fact that both legal systems embrace a strict interpretation of the limitations allowed for in regard of the question asked.

(ii) The systems for a limitation of the exercise of fundamental rights

In respect of the nature of the restriction grounds allowed for when fundamental rights are concerned, it is recalled that under EU law trade unions cannot avail themselves of the exception grounds laid down in the TFEU (or in the Posted Workers Directive) in respect of public policy considerations (supra, Section 2.3). Still, the right to take collective action for the protection of workers can be an (unwritten) justification ground according to the ECJ, albeit the national court has to assure itself of a sufficient cause for taking collective action in the given case (supra, Section 2.1). As stated before, the exercise of a fundamental social right as such is not a sufficient ground for justification, but taking strike action can, nevertheless, fit the EU system of limitations on free movement depending on the circumstances of the case.

Taking the different starting point of the ECtHR, it is, however, doubtful if the exercise of an economic freedom can also fit the system of limitations of the ECHR. The grounds mentioned in Article 11(2) do not envisage economic interests to be a 'pressing social need'. Moreover, especially in case of the fundamental right to strike, it is exactly the negative economic consequences for the employer that is perceived to be the 'firing power' of the weapon of collection action, counterbalancing the employer's position who only has to lean back to prevent collective bargaining in the interests of workers. Because of this, the chances seem also remote that the protection of the employer's interests of establishment or to provide services can be conceived as being necessary 'for the protection of the rights and freedoms of others' under Article 11(2) ECHR. According to the ECSR's settled position on the interpretation of Article 31 ESC,⁶⁷ which is equivalent to Article 11(2) ECHR, the employer involved in the industrial dispute cannot be regarded as a third party. After all, unlike third parties the employer is in a position to protect his interests by settling the dispute with the trade union.

Under ILO law, which so far has provided strong guidance for the ECtHR when interpreting trade union rights, there is even less room to manoeuvre, in order to include economic freedoms in the established system of lawful restriction grounds. Following ILO Convention No. 87, as interpreted by the Committee of Experts and the Committee on the Freedom of Association, the prohibition of strikes could only be acceptable in case of 'essential services' in the strict sense of that term, i.e. services whose interruption could endanger the life, personal safety or health of the whole, or part of the population.⁶⁸ In its 2010 Report the Committee of Experts, reflecting on the impact of the ECJ's case law on the effective exercise of the right to strike in the British *BALPA* case (supra, Section 2.3), stated in so many words: '(...) the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.'⁶⁹

(iii) Concept of proportionality

The ECJ's proportionality test in order to balance the opposing rights of workers and employers appears difficult to reconcile with the norms and principles on strike action applied in international law and in the domestic law of the majority of Member States. Because these norms and principles are taken into account by the ECtHR when interpreting Article 11 of the Convention, one may assume that problems of incoherency will arise once the EU accedes to the ECHR. Although the concept of proportionality generally applied by the ECJ seems flexible and allows for a lenient as well as a strict interpretation (supra, Section 2.3), the guidance provided in *Viking* to access proportionality in case of trade union action turns out to be very strict. This holds especially true for the assessment of a sufficient cause for strike action ('serious threat to jobs or employment conditions'), as well as the exhaustion of all other means to resolve the dispute.

⁶⁷ Article G in the revised European Social Charter (1996).

⁶⁸ I.a. 1996 *Digest*, Para. 544; and 326th Report, Case No. 2135, Para. 267; 307th Report, Case No. 1898, Para. 323; 309th Report, Case No. 1865, Para. 145; 321st Report, Case No. 2066, Para. 336; 336th Report, Case No. 2383, Para. 767.

⁶⁹ ILC, 99th Session (2010), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III [1A], 2010, p. 209.

Of course, by its very nature strike action will be a last resort when all negotiations have failed or were refused. One has to assume that trade unions will not take such decisions without due consideration. After all, a strike action may also harm the occupational interests of the workers (no pay; the economic welfare of the company guarantees the jobs at the end of the day). Nevertheless, according to international labour law standards Member States can set some requirements by law in respect of the legitimacy of a strike action. This covers, for instance, the need to give prior notice when a strike is called, allowing the employer to resume negotiations or take precautionary measures, or requirements as to the number of workers who have to agree to a strike.⁷⁰ Examinations by the judiciary of a sufficient cause for the action or of the possibilities for further negotiations prove, however, to be problematic because they could amount to unlawful state interference with the right to collective action itself.

Deciding on whether workers' interests are indeed sufficiently harmed or whether there is still room for negotiations implies that national courts have to become substantially involved in the industrial dispute. This leaves ample room for interpretation by national courts and, possibly, the influence of political sentiments. As Brian Bercusson pointed out: 'Any test based on proportionality in assessing the legitimacy of collective action is generally avoided in the industrial relations morals of Member States for the very reason that it is essential to maintain the impartiality of the state in economic conflicts.'⁷¹ The ECSR, reporting on the *ultimum remedium* requirement in Dutch law, remarked: 'The fact that a national judge may determine whether recourse to strikes is 'premature' is not considered (...) to be in conformity with Article 6(4) ESC, as this allows the judge to exercise one of the trade unions' key prerogatives.'⁷² Again commenting on the UK's *BALPA* case, the ILO Committee of Experts simply stated: 'The Committee observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services. (...) The Committee is of the opinion that there is no basis for revising its position in this regard.'⁷³

(iv) The relationship between the right to collective bargaining and the right to collective action

The perception of the relationship between the rights to collective bargaining and to collective action in EU law and international law has already been discussed (*supra*, Section 2.3). The issue relates to strikes in respect of social dumping. In *Laval* the ECJ placed an outright ban on collective action following case-by-case collective bargaining with foreign-based employers, due to the constraints of the Posted Workers Directive. Since the ECJ, however, does allow for collective bargaining beyond the terms of the Directive with foreign-based contractors on condition that such a firm signs an agreement of its own accord, the right to collective action is isolated from the right to collective bargaining. The latter is contrary to international labour law standards, by which collective action is perceived as the intrinsic corollary of the freedoms of collective bargaining and association. The ECtHR, in its interpretation of Article 11 of the Convention, confirmed as much in *Enerji*.⁷⁴ Bearing in mind the significance of the uniform application of human rights, it seems difficult to imagine that the ECtHR would put this principle aside in respect of foreign-based contractors only. Indeed, *within* a Member State the trade unions would undeniably enjoy the fundamental right to collective action in order to back up a collective bargaining process on posted workers' employment conditions.

5. Conclusions and the way forward

Since the *Demir* and *Enerji* cases, by which the socio-economic rights of collective bargaining and strike were incorporated into the 'classical' human rights catalogue of the ECHR, it seems that the ECtHR and the ECJ are likely to head for a clash in respect of the protection of the fundamental right to strike, once

70 Cf. J. Servais, *International labour law*, 2011, pp. 121 et seq.

71 *Assessment of the Opinions of the Advocates General in Laval and Viking and Six Alternative Solutions*, advice to the ETUC, 2007, p. 304. Available at <www.etuc.org/a/4295>.

72 Conclusions XVII-1, Netherlands, p. 319; Digest of the case law of the ECSR, 2008, p. 55.

73 See note 69, *supra*.

74 See note 43, *supra*, Para. 24.

the EU accedes to the ECHR. The legal systems of the ECHR and the TFEU are difficult to reconcile in this regard. From the disparities that are outlined in the former section two main reasons for legal incoherency in this field can be distilled. Firstly, the methodologies applied to reconcile the opposite interests of workers and employers in the EU internal market start out from different directions. As is broadly discussed above, the ECtHR starts out from the possible infringement of the fundamental right to strike, whereas the ECJ starts out from the possible infringement of a fundamental economic freedom. Secondly, and more importantly perhaps, within a human rights law system, especially one that embeds the international labour law standards that show common ground in modern societies, economic freedoms of establishment or to provide services or goods are only to be conceived of, in the end, as business interests that cannot as such outweigh fundamental trade unions' rights. On the other hand, it is easy to understand why within the EU legal order these same economic freedoms are deemed 'fundamental', given that the creation and safeguarding of an European internal market is one of its principal aims. It is also from this perspective that it is suggested that the particular strict approach taken by the ECJ in *Viking* and *Laval* can perhaps be explained by the fact that trade unions could easily engage in protectionism leading to retaliatory measures and eventually to the fragmentation of the internal market.⁷⁵ Still, because of the multilevel nature of the EU legal order the problem appears to be more complex than that.

It could also be said that the unions in cross-border disputes are striving for a level playing field in the internal market in respect of workers' protection. Cross-border business should adhere to local labour standards so as not to undermine the employment conditions of the workers already present. It turns out that the EU system does offer such a protection system in respect of the European labour market because free-movement workers are entitled to equal treatment with home-state workers. But when posted workers are concerned or in the case of downward pressure on home state labour standards because of the relocation of labour to other Member States, an effective level playing field is lacking. This brings us to the heart of the matter. The lack of a true European system of industrial relations alleviating economic competition on labour conditions comparable to those on the national level results predominantly from the fact that the Member States want to preserve national sovereignty over their social systems. It is not without reason that the subjects of wages and strike action are explicitly excluded from the Union's competences in the Treaty. Nevertheless, the ECJ brought the subject of strikes in by the backdoor, requiring the *exercise* of the right to strike to comply with the Treaty.

Although the conflict concerning the right to strike arises between two autonomous, yet different European legal orders, it appears the issue underlying this conflict stems basically from controversies over competences in the social field within the Union's multilevel order. This could perhaps give some indication of the ways out of the impasse. To start with, it seems unlikely that the ECtHR could bridge the gap on the basis of its current interpretation of the Convention. Even when this Court would not exclude the Union's economic freedoms from the list of lawful restriction grounds under Article 11(2) ECHR, there is still the problem of disparities in the protection of human rights. Single Member States cannot allow economic reasons to prevail over fundamental trade unions' rights in case of an 'internal' strike action, whereas the EU could do so in case of a cross-border strike.

When the dispute is to be resolved within the Union's legal order itself, the first option could be an adjustment in the case law of the ECJ. One could argue that the now binding EU Charter on Fundamental Rights might have changed the relevant legal landscape. Article 28 of the Charter does contain the rights to collective bargaining and to collective action. Nevertheless, taking into account the scope of the guaranteed rights, according to Article 52, it is doubtful the Charter will shed any new light on the matter: rights shall be exercised under the conditions and within the limits defined by the Treaties.⁷⁶ With the Charter having probably no profound impact on conflicts between fundamental rights or freedoms, this leaves just a change in the current position of the ECJ. Still, a retreat by this Court, for instance by giving the exercise of trade unions' rights immunity with regard to the free movement provisions, seems difficult to envisage.⁷⁷ The ECJ will want to have some means of control, especially in the case of a

⁷⁵ E.g. De Vries, *supra* note 30.

⁷⁶ Article 52(2) of the Charter.

⁷⁷ In *Albany* (C-67/96, [1999] ECR I-05751) the Court granted collective agreements such an immunity in respect of EU competition rules,

misuse of the strike weapon, when it comes to such fundamental EU principles. Adjustments are perhaps more feasible with regard to the strictness of the proportionality test applied, in order to bring it more into line with the restriction grounds accepted under ILO law and the ESC. Whether this is likely to happen, however, remains to be seen. These internationally accepted restriction grounds, like demanding a cooling-off period or the continuation of minimum services,⁷⁸ exclude the possibility of any balancing of rights or interests of those involved in the dispute.

The second way out would be the political one. An attempt has recently been made with the proposal for a so-called *Monti II* Council Regulation.⁷⁹ Invited by the Council to bring clarity in the exercise of the freedom of establishment and the freedom to provide services alongside fundamental social rights, the text proposed by the Commission was, however, not very promising. On the one hand, the proposal provided in respect of its scope that ‘this regulation shall not affect in any way the exercise of fundamental rights as recognized in the Member States, including the right or freedom to strike (...)’.⁸⁰ On the other hand, the proposal laid down the balancing rule of *Viking* and *Laval*, which does potentially limit the exercise of the freedom to strike at the national level in the case of an industrial dispute involving a cross-border element. Nevertheless, according to the regulation, not only strike actions should respect the economic freedoms but, conversely, the exercise of free movement should also respect fundamental rights.⁸¹ How this ‘double test’ could be applied in practice seemed difficult to visualize. For the part that the proposed balancing test coincided with the *Viking and Laval* rulings, it was in conflict with the indicated scope of the regulation.⁸² Moreover, there was the question of the legislative competence of the Union in view of Article 153(5) TFEU. In the end overall dissatisfaction with the proposed regulation caused a third of the national parliaments to draw their first ‘yellow card’,⁸³ a procedure on the principle of subsidiarity made possible by the Lisbon Treaty.⁸⁴ On 11 September 2012 the Commission decided to withdraw its proposal.

Because the legal coherency problems discussed hide a long-term political struggle over the lines that run between the EU single market and the social dimension at the national level, one may conclude that a regulatory solution is not within reach. Hence, the chances of the ECJ and the ECtHR having their ‘high noon conflict’ in the end do not seem that remote. Although it may take a while before the EU actually accedes to the ECHR, there are certainly interesting times ahead.

see A. Jaspers & K. Mortelmans, ‘Cao’s en mededingingsrecht’, 2000 *Sociaal Maandblad Arbeid*, no. 7/8, pp. 324-339. However, an analogous application of this case law was already turned down by the Court in *Viking*.

78 Cf. Servais, *supra* note 70.

79 COM(2012) 130.

80 Article 1(2) of the proposed regulation.

81 Article 2 of the proposed regulation.

82 Cf. F. Dorssemont, ‘De ontwerp-Verordening Monti II, oude wijn (azijn) in nieuwe zakken?’, 2012 *Arbeidsrechtelijke Annotaties* 11, no. 2, pp. 3-35.

83 See for the objections made and the national parliaments involved: Dossier No. APP/2012/0064 at <www.ipex.eu>.

84 Protocol No. 2.