Conceptualizing the European Regional Diversity on Collective Actions: How to Understand and Define the Right to Strike after the Rome II Regulation and Laval Quartet

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Author: Samuli Huttula

Supervisor: prof. Ulla Liukkunen

HELSINGIN YLIOPISTO
HELSINGFORS UNIVERSITET
UNIVERSITY OF HELSINKI

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Tekijä/Författare – Author

Samuli Huttula

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Tiivistelmä/Referat – Abstract

Lainsäädäntötoimenpiteet sosiaalisten perusoikeuksien kuten lakko-oikeuden ja järjestäytymisoikeuden osalta eivät lähtökohtaisesti kuulu EU:n toimivaltaan. Siitä huolimatta Euroopan unionin tuomioistuimen viimeaikaiset ratkaisut asioissa Viking, Laval ja Rüffert ovat luoneet oman haasteensa sosiaalisten perusoikeuksien ja markkinavapauksien tasapainottamiselle. Näissä tapauksissa EUT tulkitsi sosiaalisten perusoikeuksien rajoittavan perusvapauksia, jota ei voitu pitää EU-oikeuden kannalta hyväksyttävänä vaikka esimerkiksi lakko-oikeudesta säätäminen kuuluu jäsenvaltioiden yksinomaiseen toimivaltaan.

Tutkielma pyrkii vastaamaan siihen, kuinka lakko-oikeus osana järjestäytymisoikeutta tulisi ymmärtää ja määritellä oikeudellisena käsitteenä Eurooppalaisessa kontekstissa. Tarkoituksena on käsitteellistää lakko-oikeuteen liittyvää problematiikkaa sekä kansallisesta että EU-tason näkökulmasta ja peilata sitä EUT:n tulkintakäytäntöön ja jäsenvaltioiden kansainvälisiin velvoitteisiin. Arvion kohteena on myös se, kuinka EU-oikeuden lainvalintasäännöt vaikuttavat lakko-oikeuden harjoittamiseen unionin alueella. Tässä suhteessa perehdytään erityisesti Rooma II asetuksen 9 artiklaan.

Tutkimuksen metodi on lainopillinen eli tutkimus tulkitsee ja systematisoi tietyn oikeudellisen käsitteen muodostamista. Tätä tavoitetta täydennetään hyödyntäen oikeusvertailevaa pohdintaa erityisesti jäsenvaltioiden työmarkkinajärjestelmien osalta. Lisäksi tutkimuksen viitekehyksessä pyritään tunnistamaan EU:lle ominaiseen hajautuneeseen kansainvälisyksityisoikeudelleen sääntelyyn liittyviä ongelmia metodologisesta näkökulmasta ja esittämään perustuslaillisen ulottuvuuden omaaville normikonflikteille ns. lävistävä (diagonal) käsitteellistämistapa.

Keskeisimpänä tuloksena tutkielmassa esitetään jäsenvaltioiden suhtautumisen järjestäytymisvapauteen ja lakko-oikeuteen olevan hyvin monimuotoista. Lainvalintanormeilla voi olla rajoittavaa vaikutusta lakko-oikeuden harjoittamiseen rajat ylittävissä työtaistelutoimenpiteissä. EUT:n tulkintakäytännöllä on hyvin erilaisia vaikutuksia eri jäsenvaltioissa riippuen siitä, miten työmarkkinat on järjestetty. Kokoavasti voidaan kuitenkin todeta, että tietyissä maissa vaikutukset ovat hyvin perustavanlaatuisia ja usein ristiriidassa jäsenvaltioiden kansainvälisten velvoitteiden kanssa. Tähän liittyen huomioidaan myös se, että EUT ei ole luonteeltaan ylikansallinen perustuslakituomioistuin, minkä vuoksi viimeaikainen kehitys ja sen tarkoituksenmukaisuus voidaan kyseenalaistaa.

Avainsanat – Nyckelord – Keywords

kansainvälinen yksityisoikeus, private international law, kansainvälinen työoikeus, international labour law, lainvalinta, choice of law, EU-oikeus, EU-law, oikeusvertailu, comparative law, perusoikeudet, fundamental rights, sosiaaliset oikeudet, social rights

Säilytyspaikka – Förvaringställe – Where deposited

Helsingin yliopiston keskustakampuksen kirjasto

Muita tietoja – Övriga uppgifter – Additional information

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ABBREVIATIONS

CAC	Central Arbitration Committee, UK
CEACR	Committee of Experts on the Application of Conventions and Recommendations, ILO
CFA	Committee on Freedom of Association, ILO
CJEU	Court of Justice of the European Union
EAT	Employment Appeal Tribunal, UK
EC	European Community
ECG	The General Court
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EEC	European Economic Community
EEF	Engineering Employers' Federation, UK
EFO	European Federal Organisations
EMU	The Economic and Monetary Union
EP	European Parliament
EPCA	Employment Protection (Consolidation) Act 1978, UK
ERA 1996	Employment Rights Act 1996, UK
ERA 1999	Employment Relations Act 1999, UK
ESC	European Social Charter
ETUC	European Trade Union Confederation
EU	European Union

FSU	Finnish Seamen's Union
HRC	Human Rights Committee, United Nations
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ILC	International Labour Conference
ILO	International Labour Organization
ITF	International Transport Workers' Federation
OECD	Organisation for Economic Cooperation and Development
OMC	Open Method of Coordination
PWD	Posting of Workers Directive (Directive 96/71/EC)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TUC	Trades Union Congress
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992, UK
UEAPME	European Association of Craft Small and Medium-Sized Enterprises
UNICE	Union of Industrial and Employers' Confederations of Europe

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1 Introduction: Globalization, Economic Freedoms, Social Rights and the EU

Historically, the 20th century introduced elements to the international legal context that have permanently changed our perception of society. The emergence of the human rights as an international, regional and national discourse has created a rising, influential tendency of actively promoting and defending workers' rights among both litigants and lobbyists with various human rights instruments. While the reasons behind utilization of such concepts are evidently different and the mechanisms associated with the usage of human rights instruments vary, there is a perceivable link between the human rights discourse and the effects of market-led globalization.[1] It could be said that one of the side effects of globalization is the ever-growing interest in the field of fundamental social rights[2] and that the status of workers' rights symbolizes the status of human rights in different countries in general. One of the first signs of a deteriorating situation is typically the violation of the most fundamental of workers' rights i.e. the freedom of association.[3]

In the field of labor rights the traditional labor laws and regulatory institutions have had their difficulties to keep up with the pace of transformations in the global economy. The effects of globalization have — inter alia — raised widespread issues or even abuses such as child labour, punishingly long work days, harsh discipline, hazardous working conditions, sexual predation, and suppression of the freedom to associate and organize. One of the strongest indications of supranational intent to address these issues is captured in the core labor standards adopted by the ILO.[4] The intent is not as clear, however, when it comes down to the actual actions that should be done in order to address the issues.[5]

From the perspective of legal interpretation, the relationship of the conflict between economic freedoms and fundamental social rights has never been the easiest. It is a relationship often characterized by enormous tensions.[6] Within the area of the European

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[1] Novitz & Fenwick 2010, p. 1.
[2] Deakin 2005, p. 25; Leary 1996, p. 27.
[3] Leary 1996, p. 22.
[4] Sabel, O'Rourke & Fung 2000, p. 4.
[5] Alston 2005, p. 2.
[6] Bücker & Warneck 2011, p. 13, quoting here, Bercusson B., in "Trade union movement and the European Union: Judgement day", in ETUI Expert Group (Ed.): *Labour Law and Social Europe – Selected Writings of Brian Bercusson*, 2009, 387, 415 *et seq*.

Union the enlargement process in and after 2004 has brought a whole new level of complexity to the already complicated issue. Companies from the new Member States are relying on their economic freedoms as guaranteed by the EU, such as the freedom of establishment and the freedom to provide services, in order to gain access to the entire European market. At the same time, some companies from the old Member States are taking advantage of lower labour costs in the new Member States. Trade unions and workers from the old Member States are forced to take action in order to prevent unfair competition over wages and wage dumping with the tools that they have: The right to bargain collectively and the right to strike. These rights serve as instruments for defending existing standards and improving the living and working conditions of workers beyond the established minimum and are invoked in demanding equal treatment regardless of nationalities. Nonetheless, in the light of the recent developments it has become rather clear that the means are not always up to the task.[7]

Quite unsurprisingly, the European Court of Justice (CJEU) has an influential part to play in this process. Before the CJEU's rulings in cases *Viking*[8], *Laval*[9], *Rüffert*[10] *and Luxembourg*[11], social and economic rules were seen separately in the EU context. The traditional view is closely linked to the history of the EU's development. The European Economic Community was founded to focus purely on economic issues with an understanding that social embedding of the market was not within the competence of the Community and needed to remain within the national realm. Even though the Treaty of Maastricht led to certain social competences being transferred to the European level and the Treaty of Lisbon went even further by aiming to strengthen the 'Social Europe' built on three pillars[12], these developments never questioned the national systems of industrial relations or the rights to bargain collectively and freedom of association. Lately, however, this division has been subject to re-evaluation. The fundamental change was ultimately brought by the aforementioned case law of the CJEU, jointly referred to as the '*Laval quartet'*. In short, the Court ended up ruling that even if the named areas fell outside the

[7] Bücker & Warneck 2011, pp. 13–14.
[8] C-438/05 International Transport Workers' Federation v. Viking Line [2007] ECR I-10779.
[9] C-341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet [2007] ECR I-11767.
[10] C-346/06 Dirk Rüffert v. Land Niedersachsen [2008] ECR I-1989.
[11] C-319/06 Commission v Luxembourg [2008] ECR I-4323.
[12] Social market, social rights and new forms of soft law.

scope of the EU's competences Member States must nevertheless comply with EU law.[13] These rulings have been considered by various scholars and observers alike to represent a victory for those who support liberal markets over more socially oriented integration.[14]

The introduction of Regulation No 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II) is remarkable for a number of reasons. Even though the regulation of torts in the EU has a long history dating back to the preparation of the Rome Convention in 1967, the negotiations of Rome II were everything but easy. For instance, it was during these negotiations that the European Parliament and the Council applied the co-procedure[15] first time ever to a regulation concerning private international law. The text required numerous amendments and the Council and the Parliament had obvious difficulties in reaching an agreement. The importance of the matter is emphasized by the fact that these efforts to develop European conflict-of-law rules ultimately brought cross-Atlantic attention to a whole new level.[16]

Despite the fact that the negotiations of Rome II proved to be overall difficult, there is one specific rule regarding which the controversies far exceeded any other matter covered by the Regulation. The rule in question is the special provision for industrial action. Article 9 of the Rome II Regulation has created the greatest discord among the member states of all the matters of discussion related to the Rome II. The adoption of the special rule was objected by Latvia and Estonia at a very early stage in the adoption process. Both Member States identified Article 9 as their sole reason for voting against both the Common Position[17] and the Regulation in its final form. In their joint statement of 13 September 2006, both Member States underlined that Art 9 could on restrict the freedom to provide services as guaranteed by Community law. It is only reasonable to assume that the statement was directly prompted by the then pending cases of *Laval* and *Viking*. The statement was not *manifestly* incorrect. The political sensitivity of the issue is reflected in

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[13] Bücker & Warneck 2011, p. 14.
[14] Bamber et al. 2010a, p. 17.
[15] As defined in Article 294 of the TFEU, the co-decision procedure is the legislative process which is central to the Community's decision-making system. It is based on the principle of parity and means that neither institution (European Parliament or Council) may adopt legislation without the other's assent.
[16] Kramer 2008, pp. 1–3; The Regulation caught remarkable attention in the US. The European Parliament's rapporteur for Rome II, Diana Wallis, also invited many of the non-European scholars whom had published on the matter to interact in the Brussels negotiations.
[17] Council Common Position (EC) No. 22/2006 of 25 Sept. 2006, at pp. 76–77, 2006 O.J. (C 289E) 68

the decisions which have now opened up the possibility of claims by employers against trade unions based on the restrictive element of industrial action on the fundamental freedoms guaranteed by EU law. Such claims would appear to fall within the scope of the Regulation. And, furthermore, these claims may justify the application of the special rule in Art 9 to determine the law applicable to matters not regulated by EU laws.[18]

[18] Dickinson 2008, pp. 474–475

2 Research Questions and the Scope of the Study

The research problem of this thesis is all about comprehending the complexity of different rules and approaches concerning the right to strike in present day Europe. The issue and underlying presumption here is that the right to strike faces a different reality in each and every country throughout Europe. Traditionally speaking, the EU does not have competences to address matters related to the freedom of association by legislative means i.e. the right to strike as such is not nor should not be subjected to harmonization measures in a strict sense. There are differences in how the Member States address the right to strike or freedom of association in general. It is vital to understand how and why matters like EU legislation and CJEU jurisprudence — more precisely the Rome II Regulation and the Laval quartet — are highly important in this respect. The primary aim of this study is to seek definition for or the content and scope of the concept of the right strike and to understand the existing diversity within the EU area. The primary research question is the following:

> How could the 'right to strike' be defined or understood as a legal concept in the Member States and how does this determination compare to the approach adopted by the CJEU in its recent jurisprudence?

Thus an important part of the study is not only to consider what the Member States consider as legitimate means of exercising the right to strike but also to identify the forms of potential conflict that may arise between national and supranational legislation when dealing with a multipolar legal order such as the EU. The Member States and the EU itself may very well define or approach the definition of a legitimate action differently.

One aspect that is taken into consideration is the development and preparatory work of the Rome II and especially that of Art 9 on industrial action. Thus also the principles related to the interpretation of Community regulations need to be regarded. Given the aforementioned lack of competences, it should also be evaluated how the EU could approach the right to strike with alternative means to harmonization of laws or legislative action. In other words, it is considered if there are any Community measures available that could contribute to the determination at the EU level. The relevance of the recent CJEU jurisprudence regarding industrial actions should be taken into account throughout the study. Furthermore, as the freedom of association is has stabilized its position as an

internationally recognized fundamental right, the definitions used in (public) international law should be taken into consideration as they presumably provide content for the relevant rights in the Member States. With regard to these aspects, the primary question of the study is complemented and further evaluated in two different relations:

> (a) How do the rules of applicable law affect the exercising of the right to strike in the Member States? And,
>
> (b) If it is possible to determine, how is the right to strike and/or how could it be approached with soft law instruments?

Given that the questions place a strong focus on the Member States of the EU, it should be recognized that a truly comprehensive comparative study within the framework of this study would probably not be reasonable or very useful. The fact of the matter is that it can be, and has been, done better and in much greater detail than it would ever be possible at the level of a Master's thesis. Thus a few delimitations to the scope of the study are necessary. First, primary comparative aspects of the study focus on three different industrial relations systems in Europe: The Nordic model[19], United Kingdom and Germany. While the focus from among the Member States of EU is on these three regimes, it does not, in my opinion, explicitly rule out comparative remarks made to other countries when it seems reasonable. The main reason behind the choice of restricting the evaluation to these industrial relations systems is the distinctively direct connection to the Laval quartet[20] but also because of a simple practical perspective. In my opinion, the availability, quality, and quantity of literature concerning these regimes far exceeds other alternatives for the purposes of this work. With respect to this, however, it should be recognized that the scholarly perspective the study is conducted from is inherently Finnish, which might also introduce some level of influence to certain aspects of this thesis. Naturally, I will try to retain a certain level of objectivity as a substantial part of the study concerns rules and principles of EU or international origin.

Regarding the content of the study, there are also a few other substantive matters that are excluded from the scope of the study. Any considerations concerning European Works

[19] The Nordic model in the sense of this work is represented by Finnish and Swedish systems.
[20] Worth mentioning that the cases are jointly referred to as the Laval quartet throughout the study for practical reasons, even though the Luxembourg case is not explicitly dealt with.

Councils (EWC), despite their apparent relationship to the national industrial relations systems, are not dealt with. This is primarily due to the fact that EWC's do not typically have any part to play in industrial disputes which are at the very heart of this study. Also, the impact of the EU's future accession to the European Convention on Human Rights shall not be considered to the extent of its hypothetical implications on the division of jurisdiction between the CJEU and the ECtHR but the possible effects of the ECHR on the definition of the industrial action are somewhat considered.

2.1 About the Method: Legal Doctrine and Comparative Law

One of the most essential features of legal research is that the focus of a study should be on questions that are, from a legal perspective, relevant. In other words, the topic should somehow concern legal norms that actively interact with the surrounding society by legislation or legal thought.[21] The most common method of legal research is legal doctrine (often referred to as legal dogmatics[22]), which consist of a systematic, analytical evaluative exposition of the substance of existing field of law i.e. private law, criminal law, public law, etc. The primary purpose of the legal doctrine is to clarify the content and meaning of the existing law regarding a specific juridical issue. Thus the legal doctrine seeks to answer the question of how one should or how does the law actually function according to the law in force. Even though the research may include philosophical, sociological, historical, and various other forms of considerations, its core consists of the interpretation and systematization of valid law.[23] When compared to the methods used in, for instance, other social sciences the legal doctrine is very unique as it is substantially devoted to practical functioning. The issues are approached by evaluating and formulating well-grounded arguments and weighing them to other possible lines of argumentation.[24] It would be practically impossible, and even inefficient, to find a single, absolutely right way to form

[21] Husa et al. 2008, p. 17.
[22] The terminology is not uniform. Legal doctrine is also called, for instance, "analytical study of law" or "doctrinal study of law" etc.; Pattaro & Pecnezik 2005, pp. 1–2; Timonen 1998, p. 1.
[23] Husa et al. 2008, p. 20; Pattaro & Pecnezik 2005, pp. 1–2.
[24] Timonen 1998, p. 3.

and present a valid argument, as these are highly dependent on the overall framework of the study.[25]

Private international law has a more intimate relationship with comparative law than practically any other legal subject area. The primary reason for this is that both disciplines deal with foreign legal systems: Comparative law studies foreign legal systems directly, while on the other hand, private international law intends to solve potential conflicts between domestic and foreign law. There are, however, a few key differences one should recognize when conducting legal research. According to Reimann, comparative law is not a body of rules but rather an academic discipline as well as a legal method and thus more comparable, for example, to legal history. Private international law is, by definition, a body of positive rules and thus more comparable, for example, to civil procedure. Naturally, the field of private international law encompasses considerable amount of theoretical and academic interest, but the primary purpose of the discipline is ultimately practical: Decisions of transboundary issues in actual disputes.[26]

Comparative law evaluates the regulations and legal phenomenon between at least two legal systems of different countries. Even though it is possible to use comparative law as an independent method of legal research it is often used to complement a research conducted with the primary legal doctrine. It is possible to utilize comparative law research with an emphasis on legal doctrine if, for instance, the purpose is to find out how a matter subject to a certain rule in one legal system is regulated in other systems.[27] With respect to the scope of this study — as stated above — a comprehensive comparative research does not come to question at this point but, as the study includes elements that could be described as identifying differences and similarities, the peculiarities of comparative law are definitely worth considering.

Furthermore, there are a few elements included in this study that are bound to (public) international law. Therefore it is only reasonable to consider the relationship between the disciplines of private and public international law shortly. Traditionally public international law has been distinguished from private international law or conflicts of law.

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[25] Timonen 1998, pp. 7, 15–17.
[26] Reimann 2006, pp. 1364–1365
[27] Husa et al. 2008, pp. 23–24.

From the perspective of public international law private international law is a regime that is a branch of internal law which, in a private law transaction implicating more than one legal system, determines which is the governing legal system under the existing circumstances of a dispute.[28] Even though in this sense there are significant differences between the two disciplines, it should be emphasized that the distinction between internal law, including private international law, and international law today is not as strict as it historically used to be. Rosenne has argued – already back in 1984 – that the increasing number of international transactions involving States, international organizations, multinational enterprises and entities, quasi-public bodies and individuals, especially juridical persons makes the distinction difficult. It is not always clear whether these transactions are governed by any particular system of internal law or by public international law or by a combination of both. This phenomenon is commonly described as transnational law, but also be considered as interstitial law as it forces itself into the interstices between various systems of law. Regardless of the name given to the phenomenon, the regime is growing importance in modern international political and economic life, international trade-unionism, industrial cartelization, liner conferences etc.[29]

2.2 Methodological Framework of the Study

This study seeks to analyze the legal issues outlined at the beginning of this chapter and, also from a practical perspective, determine how a specific legal concept i.e. the right to strike or the right to take collective action could be formulated within the Community area. The study, which does concern the field of private international law and to some extent international labour law, is conducted utilizing the method of legal doctrine and it includes comparative aspects complementing the primary purposes of the study by identifying and defining certain legal concepts and the content of law in the selected Member States of the EU and at the level of the EU itself. For instance, the aforementioned objectives of the study necessitate that the effects the Laval quartet has introduced in the Member States are

[28] Rosenne 1984, p. 9.
[29] Rosenne 1984, pp. 11–12.

compared, as it is possible – or should be even presumed[30] – that these effects differ, which then again might have relevance for the definition of the concept of industrial action. The relationship between public and private international law is an important aspect that is needed to be aware of when dealing with a subject that concerns different legal regimes acting on multiple levels, i.e. national and supranational, as both the EU and international treaties place obligations for the Member States. In this chapter I will try to identify a few significant issues and concerns that require attention regarding the topic of the study and the different divisions of supranational legislation. The chapter also considers a theoretical concept by Christian Joerges based upon the conflict of laws methodology as a new (and necessary) approach to supranational and transnational law-generating structures.

"The European Court of Justice is not a Supreme Court for private law disputes in the European Union."[31]

The European Community is unique regarding legal argumentation. The construction of an "association of states" is symbolized by the various different forms of conflict between supranational and national law. A general equalizing formula, such as the integrative effect of a constitution in a state, does not exist.[32] Joerges suggests that within the multi-level European system it is possible to distinguish between three forms of legal collision – vertical, "diagonal" and horizontal. The diagonal collisions are a unique feature of multi-level systems such as the EU. Thus their recognition is important as they are present constantly within EU and since the competences required for actual problem solving exist, at times, at the level of the EU itself. The metaphor of multi-level system asserts that there is no European "rule" that could be organized hierarchically.[33]

The classic private international law or the conflicts provisions of administrative law for territorially-determined "horizontal" conflicts along with the respective logic of referral are hardly adequate in such cases. Rules of primacy for constitutional law and the Community

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[30] Bücker & Warneck 2011, p. 16: in short, the impact of the *Viking – Laval – Rüffert* rulings will vary substantially in different Member States.

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[32] Ladeur 2010, p. 175; Ladeur illustrates the situation with an example where European competition law meets with national broadcasting law. This conflict could take place in a purely national context, but the division of authority usually follows the definition of subjects of competence nevertheless. And, in EU these competences are determined ultimately by the goals of the internal market. Thus it would first need to be answered: is it possible to designate organizations such as radio as economic activity and regulate it as such?

[33] Joerges 2010, p. 391.

rules for vertical conflicts do not, in principle, serve the purpose either. According to Ladeur, stable demarcations do not or cannot provide satisfying results. What could be utilized effectively, if thought as conflicts laws, are rules of mutual agreement and co-operation determined by individual cases. In this sense, arranging the conflict to be of "diagonal" type seems compatible. In other words, one could also speak of a limited overlap of general national administrative law and particular European administrative law - a problem which is hardly solved with rules primacy, as the duty to ensure *effet utile* is ultimately derived from the principle of co-operation as stated in Art 4(3) of TEU (Art 10 EC). The implication is not merely a duty to effectively implement European administrative law, but to make general forms of civil and administrative law permeable for the fulfilment of the features of a multipolar legal order. The expectation of co-operation is not unidirectional. For example, the institutions of general administrative law simply cannot ignore the realization of the interests of the EC and other Member States or of the citizens of these states when interpreting the factual content of "public interest". The 'diagonal character' of the collision also works the other way around in a way that no primacy in favour of one or the other legal system can be foreseen.[34]

According to Joerges, the normative argument favoring a new understanding of existing EU law is significant in many ways. This understanding furnishes a justification for the validity of the supranational jurisdiction. The interdependence between the Member States of EU has led to a new reality, where they are no longer in a position to guarantee the democratic legitimacy of their policies. EU law on the other hand seeks to compensate these 'failings of the national democracies' and just might induce its legitimacy from this compensatory function. European law has given force to principles and rules that serve the purpose of supranational "recognition". Joerges presents a well-founded clarification with an example: *'the non-discrimination principle, the supranational definition and demarcation of legitimate regulatory concerns, the demands for justification for actions that are imposed upon national legal systems, and the proportionality principle — which supplies a legal yardstick against which respect for supranationally-guaranteed freedoms may be measured — and the demand that all rules may be understood as a concretization*

[34] Ladeur 2010, p. 176.

of a supranational conflicts law, which guarantees that the actions of the Member States are reconcilable with their position within the Community.'[35]

As the competences are divided between the EU and Member States, the division introduces two types of potential conflict that would require mediation arrangements to be identified. There are the possibilities of divergent EU and national political orientations, and between divergent interest constellations in the Member States. Every multi-level system has a need for mediation, but in the case of EU it is of particular importance. The existence of diagonal conflict has resulted in the evolution of intense degree of administrative co-operation, the institutionalization of advice-giving instances, and the systematic construction of non-governmental co-operative relationships. This complex structure can be seen to provide the integral components of a conflicts law that is unable to restrict itself to the individual adjudication of situational cases of conflict and must constantly be engaged in finding more general solutions to universal problems. Simultaneously, the conflicts law must be open to evolution, both methodologically and organizationally, as a practice that has seen (and partly overcome) the development of post-interventionist regulatory practices and legal forms within national law.[36]

Given the previous points as they were presented by Joerges, it would be unreasonable to regard European law in a manner that it is dedicated to constructing a completely comprehensive legal system. Europe has a task to uphold its own motto, "united in diversity" and learn how to accept that it will be accompanied by its internal diversity in the process of integration. Europeanization is not merely a process of change but a learning process as well. Integration should be overseen by conflicts law that is able to generate the law of the European multi-level system via its identification of the principles and rules that govern conflict. The substance of the process cannot be pre-determined by law but it is, however, possible to secure the normative character of the law in a way that defends its justice and fairness within.[37]

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[35] Joerges 2010, pp. 390–391.
[36] Joerges 2010, p. 391; he identifies three types of European conflicts law, which operate in three dimensions: conflicts law of the "first order", conflicts law specific for the European comitology (which has concerned itself to developing substantive regulatory options) and conflicts law governing the supervision of para-legal law and self-regulatory organization.
[37] Joerges 2010, p, 392.

2.3 The Structure of the Study

The substantive part of the study consists of 4 chapters which are briefly introduced here. The first of these chapters, chapter 3, concerns the developments within the sphere of EU conflicts law. In other words the chapter 3 seeks to determine how the concept of industrial action in Art 9 of Rome II should be interpreted and how does the CJEU approach the conflict between fundamental social rights and fundamental freedoms as they originate from EU law. The chapter summarizes the backgrounds and circumstances over which the highly controversial debate revolved and which eventually led to the introduction of the special provision concerning industrial action. Also, the second part of the chapter is devoted to a short presentation and analysis of the Laval quartet. Despite its high level of importance in general the Luxembourg case is not, however, analyzed in this study as it does not concern industrial action or the right to strike in a similar sense as the cases *Viking* and *Laval* do. For the same reasons, the *Rüffert* case is also slightly less dealt with but the drastic implications it has introduced especially in Germany necessitate a certain level of attention. For clarity purposes the term 'Laval quartet' is nevertheless used throughout the study regarding this series of cases.

The following chapter 4 seeks to determine the key issues regarding social regulation within the EU and to analyze the effects of the relevant cases on national industrial relations systems in the reference countries. It should be noted that the part dealing with the characteristics of the industrial relations system in the UK is slightly more detailed in comparison to the previous chapters dealing with the Nordic model and Germany. This due to the fact that, from the author's viewpoint, the common law system is more complex and restrictive than its counterparts under comparison. Hence, its successful understanding is slightly emphasized.

The chapter 5 concerns the essence of the right to strike as it is viewed in various international Conventions and Treaties to which the EU Member States are also parties to. The idea here is that the international background of the regulation regarding freedom of association should provide at least some level of content to the right to strike as the latter has been held a direct offspring of it. Finally, conclusions of the study are presented in chapter 6.

3 Developments within the EU Conflicts Framework

When we are dealing with rules concerning the applicable law that are not of national origin, there are few basic considerations that need to be regarded. First, by the virtue of general principles of public international law[38] on the interpretation and implementation of treaty obligations, the court of the forum state must always consider that the conflict rules that are based on international instruments should be interpreted accordingly with the treaty they originate from.[39] Second, regarding legislation of EU origin, one of the very basic principles is the autonomous interpretation. The autonomy of the text of the regulations is vital in order to ensure their consistent interpretation throughout the Member States. The principle has been constantly emphasized by the CJEU concerning the Brussels Convention. In *Tessili v Dunlop*[40] the Court stated that the Convention frequently uses words and legal concepts that have a different meaning from one Member State to another. Thus the question was raised whether these concepts should be regarded as having their own independent meaning which would be common to all the Member States or, alternatively, referring to the substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is brought. Even though in *Tessili* the Court eventually took the view that it was not possible to provide an autonomous concept of 'place of performance' of a contractual obligation in Art 5(1) of the Brussels Convention it was not more than a week later that the Court made it clear that this approach is an exception rather than a rule. This was the path that would also predominate in its later case law on the Brussels Convention, such as *Eurocontrol*, *Kalfelis v Schröde, and Shearson Lehman Hutton*.[41]

The Rome II Regulation has effect in the Member States without the need for specific implementing legislation and, since the United Kingdom and Ireland elected to participate in the adoption and application of the Regulation, it is applied in all Member States except

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[38] Namely Article 31 of the Vienna Convention on the Law of Treaties.
[39] Bogdan 2012, p. 185.
[40] C-12/76 Industrie Tessili Italiana Como v. Dunlop AG [1976] ECR 1473.
[41] C-29/76 LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol [1976] E.C.R. 154; C-189/97 Kalfelis v. Schröder Case [1988] E.C.R. 5565; Case C–89/91 Shearson Lehman Hutton v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH [1993] ECR I–139; Dickinson 2008, pp. 120–121.

for Denmark.[42] The provisions of the Regulation must be construed in accordance with the principles and guidelines as laid down by the CJEU and should thus be interpreted and applied in the light of the versions existing in the official languages of the Community. Accordingly, all of these versions must be recognized as having the same weight regardless of the size of the population of the Member States using the language in question. Thus, when determining the single meaning and effect to be given to each provision of the Regulation all of the 23 language versions must be taken into account. As a general rule, interpretations reconcilable with all of the languages should be given preference over those compatible with only some of them.[43]

The legal terms used in conflict rules are subject to interpretation just like any other legal rules and, evidently, their interpretation is not always unproblematic. The problem of characterization[44] relates to the need to classify the issue to be decided as belonging to a subject matter scope of application of a specific conflict rule of the forum. As an example, Bogdan explains that '*it has to be decided whether the issue at hand concerns, in the terminology of the conflict rules, the right to inheritance, non-contractual liability, procedure, or falls within the scope of application of one of the other conflict rules'*. While the process can and may even usually be quite straightforward, that is not always the case. Especially when the question in the need of resolving is closely connected to more than one branch of law and these are subject to different conflict rules, characterization can be quite difficult.[45] In contrast to this, however, if the legal concepts defining the scope of application of the forum country's conflict rules have a clear meaning the answers to the questions of characterization are easier to determine. According to Bogdan, this is modestly rare in the private international law of most countries. As far as the Member States of the EU are concerned with the exception of Denmark, the Rome II Regulation should provide (some) solutions to the issue.[46]

The Rome II holds the strong presumption that the concepts utilized in the Regulation receive autonomous interpretation. The scope and the rules of applicable law should carry

[42] Stone 2010, p. 369.
[43] Dickinson 2008, pp. 117–118
[44] The terms classification and qualification are also used as synonyms of the same phenomenon.
[45] Bogdan 2012, pp. 169–171.
[46] Bogdan 2012, p. 172.

a single, uniform meaning across the Member States, which is also clearly stated in the Recital (11), which verifies that since the concept of a non-contractual obligation varies from one Member State to another, for the purposes of the Regulation the concept of a '*non-contractual obligation'* is to be understood as an autonomous concept.[47] Similarly, Recital (30), addressing the scope of Art 12 of the Regulation, provides that the concept of *culpa in contrahendo* is to be considered as an autonomous concept. Although there are no corresponding Recitals for the other rules of applicable law, that should not be taken as an indication that their scope would be subjected to the Member States' rules and concepts. On the contrary, it should be taken as a presumption that the giving of a non-uniform meaning to a term used in the Regulation is exceptional. [48] There is, however, a certain Recital in the Regulation which just *might* indicate such an anomaly. According to some authors this could, or even should, be interpreted as an exception the general rule.[49] The question is, of course, about the scope of Article 9. Recital 27 states the following:

The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

The CJEU seems to prefer a more 'inclusive' approach when it comes down to the definition of industrial action. Cases *Viking* and *Laval* addressed quite different means of action. *Viking* was about an organized effort to exercise negative freedom of contract at collective level whereas *Laval* was about a different type of boycott. These means are treated as expressions of the right to take collective action and CJEU even took the consideration one step further by stating that the general principle of European law on the right to take industrial action covers also blockades. The recognition can be understood as more comprehensive regarding the types of action covered in these cases as in both the

[47] Stone 2010, p. 370; Dickinson 2008, p. 122.
[48] Dickinson 2008, pp. 122–123.
[49] Dickinson 2008, pp. 122–123; Stone 2010, p. 404.

central issue was a sympathy action i.e. an action which intended to improve the conditions of workers attached to a different employer or a branch of economic activity.[50]

3.1 Article 9 of Rome II: Industrial Action

During the preparation process of Rome II, the addition of a special rule concerning non-contractual obligations relating to industrial action resulted from an initiative of the Swedish Government, with the support of the European Parliament. Its introduction was strongly opposed by some Member State delegations and it was ultimately the only provision of the Council's Common Position that was not unanimously supported by all Member States.[51] In its initial response to the Commission Proposal, the Swedish delegation suggested that non-contractual obligations arising out of industrial actions should be governed by the law of the place where the action had been taken (*locus actus*). The perceived necessity for such a rule was linked to the decision of the CJEU in the *DFDS Torline v SEKO*[52] case.

3.1.1 The Need for a Special Provision: DFDS Torline

In *DFDS Torline*, a Danish shipping company had brought an action against a Swedish trade union in the Danish *Arbejdsret* seeking to determine the lawfulness of a threatened industrial action to which a notice was given by a Swedish trade union acting in the interests of the Polish crew of a Danish ship operating between Gothenburg and Harwich. The threatened action consisted of blacklisting the ship *Tor Caledonia* by Swedish port workers, which would have effectively prevented its unloading in Swedish ports. To avoid this, DFDS chartered another ship to operate between Gothenburg and Harwich and, by separate proceedings brought in another Danish court (*Sø- og Handelsret*), sought remedies from the trade union consisting of costs of leasing a replacement ship. The *Handelsret* decided to stay its decision concerning the damages pending the decision of the *Arbejdsret*.

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[50] Dorssemont & van Hoek 2010, p. 231.
[51] Dickinson 2008, p. 471.
[52] Case C-18/02: Danmarks Rederiforening, acting on behalf of DFDS Torline v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation [2004] ECR I-1417

The *Arbejdsret* had, however, serious doubts about its jurisdiction to try the case. The question was essentially about the interpretation of Art 5(3) of the Brussels Convention.[53]

The employer had the intention of obtaining a declaratory judgment and a prevention order via the court intervention. Repression or compensation was not at stake at any point in the *Arbejdsret*. First and foremost, the *Arbejdsret* faced an issue of whether or not legal proceedings limited to the actual lawfulness of an industrial action could be classified as proceedings relating to an obligation arising from tort. In Denmark, the jurisdiction to determine the lawfulness of industrial actions belongs strictly to the *Arbejdsret*, while other courts have jurisdiction to adjudicate claims for any consequential damages if necessary. Furthermore, the *Arbejdsret* had doubts whether Denmark was the state where the harmful event had occurred. As the ship was boycotted in Swedish waters and not in Denmark, the only element supporting the jurisdiction of the Danish court was the flag.[54]

Article 2 of the Brussels Convention states that "*Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State."*[55] In *DFDS Torline* the place of residence of the unions was Sweden and thus Art 2 did not provide the jurisdiction to try the case. Article 5 paragraph 3 did, however, provide for an alternative forum for *"matters relating to tort, delict or quasi-delict."* According to Art 5(3), a defendant who is domiciled in a Member State can also be summoned before the court of another Member State given that this is the court of the place where the harmful event occurred. The Danish shipowner relied on this article to justify the *Arbejdsret's* jurisdiction, but the question was whether Art 5(3) could be used in this case.[56]

Along with Advocate-General Jacobs, the CJEU was in favour of a broad interpretation of the concept "matters relating to tort, which would then also include legal disputes "concerning the legality of industrial action".[57] The CJEU ruled that both the lawfulness and damages actions fell within Art 5(3) of the Brussels Convention. Following its

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[53] C-18/02 *DFDS Torline*, para 12; Dickinson 2008, p. 472; Stone 2010, p. 101; Dorssemont & van Hoek, p. 218.
[54] Dorssemont & van Hoek 2010, pp. 218–219.
[55] Brussels Convention Art 2(1).
[56] Dorssemont & van Hoek 2010, p. 218.
[57] C-18/02 *DFDS Torline,* para 27; Opinion of the Avocate-General Jacobs §§ 33–39; Dorssemont & van Hoek p. 219.

established case law in *Mines de potasse d'Alsace*, *Shevill and Others* and *Henkel*[58], the Court held that "*the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' in Article 5(3) of the Brussels Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it".*[59] The Court took the view that, even if the event giving rise to the damage had occurred in Sweden[60], the financial loss i.e. the damage itself consisted directly of the withdrawal of a ship and replacing it with another and thus it should be up to the Danish court to determine whether that loss could be regarded as having arisen in Denmark. The CJEU also considered that — inter alia — the fact that Denmark was the flag State of the withdrawn ship was to be taken into account.[61] Simplified, the CJEU ruled that it was for the *Arbejdsret* to decide the localization of the damage and that the flag's nationality is an important factor in this determination.

The question of jurisdiction raised an important question of how the court of the flag state would determine the applicable law that governs the tort. The conflict of laws rule of the court would play a highly decisive factor. If the rule would apply *lex loci damni* as a connecting factor, under the circumstances of *DFDS Torline*, the Swedish unions would have to face a foreign court and also run the risk that the legality of their collective action would be assessed by a law they are unfamiliar with. This would undoubtedly create significant risks especially in the case of a sympathy action. Furthermore, if the ship's flag is used as the primary means to determine the jurisdiction, it would be practically impossible to organize an industrial action against 'flags of convenience'[62]. The shipowners would be granted an ability to choose any flag of preference which would not

[58] C-21/76 Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA [1976] ECR 1735, paras 24 and 25; C-68/93 Fiona Shevill and others v. Presse Alliance SA [1995] ECR I-415, I-462, para 20; C-167/00 Verein für Konsumenteninformation v. Karl-Heinz Henkel [2002] ECR I-8111, I-8141, para 44.
[59] C-18/02 *DFDS Torline,* para 40.
[60] C-18/02 *DFDS Torline,* para 41.
[61] Dickinson 2008, p. 472; Stone 2010, p. 101; Dorssemont & van Hoek, p. 217
[62] Dorssemont & van Hoek 2010, p. 219; A flag of convenience is typically selected because of economic advantages gained by selecting a certain legal system, i.e. low level of social protection.

only determine the law applicable to the employment contracts of the crew but also to any sympathy action launched in their interest.[63]

Overall, the primary effect of *DFDS Torline* was that Art 5(3) extends to an action seeking to establish the illegality of industrial action even where, under the law of the forum State, exclusive jurisdiction over such an action belongs to a court other than the court which has jurisdiction over claims for compensation for losses caused by the industrial action. The Court also established that a necessary causal connection between damages and a wrongful act exists in circumstances where an industrial action is a necessary precondition for sympathy action which can result in harm. It was also ruled that the application of Art 5(3) is not affected by the fact that the industrial action was suspended by the trade union pending a rule on its legality.[64] The *Arbejdsret* accepted jurisdiction and concluded that the damage had occurred on board the ship. Danish law was applied to the case and the industrial action conducted in Gothenburg declared illegal under Danish law.[65]

3.1.2 Travaux préparatoires

If there had been any doubts before, it became evident after *DFDS Torline* that the application of the rules of the country where the damage occurred can effectively frustrate the exercising of the right to take industrial action. And such effects needed some countering. The original proposal of the European Commission for Rome II[66] did not, however, include a separate rule for industrial action. The European Economic and Social Committee did not insist having one either, even though some of the members of the Committee are workers' representatives. The incorporation of the special provision came from the exclusive initiative of the European Parliament.[67] During the Council's deliberations the Swedish delegation had argued that since the wording of the relevant provision of the proposed Rome II Regulation is very similar to Art 5(3) of the Brussels Convention, the consequence of the decision in *DFDS Torline* would be that the legality of an industrial action carried out in order to secure working conditions in the state in which the work is to be performed, could be governed by another law. The Swedish delegation

[63] Dorssemont & van Hoek, pp. 219–220.
[64] Stone 2010, p. 101.
[65] Dorssemont & van Hoek 2010, p. 220.
[66] COM(2003) 427 final, 22 July 2003.
[67] Palao Moreno, 2007, pp. 115–116; Dorssemont & van Hoek 2010, p. 217.

also pointed out that, under Swedish law, the trade unions actively seek to secure appropriate terms and conditions of employment and that this process may involve the taking of industrial action. The delegation concluded that the decision in *DFDS Torline* made a special rule for industrial action essential for Sweden.[68]

The European Parliament proposed a rule in its 1st reading stage the following year. The 1st Reading position stated that *"The law applicable to a non-contractual obligation arising out of industrial action, pending or carried out, shall be the law of the country in which the action is to be taken or has been taken."*[69] According to the Report of the EP JURI Committee 'the rights of workers to take collective action, including strike action, guaranteed under national law must not be undermined'. The EP's proposed rule was, however, rejected by the Commission in its Amended Proposal as being too rigid. The proposed rule did not only favour *locus actus* instead of *locus damni*, but did not allow any exceptions based on the country of common residence or on the closer connection of the parties. And meanwhile, in terms of acquired support, the Swedish proposal was not too successful in the Council's Rome II Committee either. In the beginning of 2006 only one other delegation had indicated explicit support to it. This forced Sweden to adjust its proposal. The primary argument was then that industrial relations systems in different countries are often unique and protected by strong governmental interests and, to this extent, the difference is significant to the other situations covered by the general rule. The delegation also concluded that each national system balances the interests of the parties in the market and this balance would be seriously disturbed if an industrial action taken in one country (in compliance with the national system there) could lead to liability under the law of another country.[70]

At the following meeting of the Rome II Committee, a number of delegations indicated a level of support to the proposal, but many remained opposed. Nevertheless, the rule was accepted by a majority of the Member States as an element in the Council's Common Position. In its communication responding to the Common Position, the Commission reacted more favorably to the new detailed definition of the scope of the rule, but a few doubts remained. The primary concern was that, according to the Commission, the text was

[68] Dickinson 2008, pp. 472–473; Palao Moreno, 2007, p. 116.
[69] Dickinson 2008, p. 473.
[70] Dorssemont & van Hoek 2010, p. 220; Dickinson 2008, p. 473; Palao Moreno, 2007, pp. 116–117.

still unclear that it should not extend to relationships vis-à-vis third parties and lacked clarity in this sense.[71] Exactly like the EP's proposal, the Common Position used the *locus actus* as the main connecting factor, but in addition it also identified the provisions scope *ratione personae*. This clarification was actually both an extension and a restriction in comparison to the EP's proposal. The applicability of Art 9 to persons only in the capacity of a worker or an employer (or the organizations representing their professional interests) broadens the scope from the original intention of safeguarding workers' rights to include an action by employers as well. In this respect, the scope of original proposal was significantly widened. The Common Position also recognized the application of the law of the country of common residence, but did not refer to the country more closely connected.[72]

3.1.3 Scope and Content of Article 9

The definition adopted in the Common Position became final. Article 9 of the Rome II introduces industrial action as a separate subcategory in the conflict of laws, differing substantially from the primary principle of Article 4. The special provision promotes the *locus actus* instead of *lex loci damni* as a connecting factor and it does not allow deviations based on a closer connection, whereas Article 4 is sort of 'open-ended' with secondary provisions. The collective action as such is not submitted to a special rule, but only the non-contractual obligations rising therefrom. The provision also introduces an issue of classification. To determine the scope of Art 9, it is needed to be determined which relationships involved in a collective action are considered as non-contractual and which subjects could have carried out the industrial action. Second, it must be considered whether or not the event causing the damage can be characterized as an 'industrial action'. Third, it should be determined whether liability can be established in relation to that specific action i.e. if a tortious consequence exists.[73]

[71] Dickinson 2008, p. 474
[72] Dorssemont & van Hoek 2010, pp. 220–221; Palao Moreno, 2007, pp. 118.
[73] Palao Moreno, 2007, pp. 116–117; Dorssemont & van Hoek, 2010, p. 213.

3.1.3.1 Liability under Art 9 (Scope *Ratione Personae*)

The liability of persons is restricted to those who are 'in the capacity of a worker or an employer' or of the organizations representing their personal interests. The concept seems capable, for example, of extending to former employees and to those employed by others who participate in secondary action. However, it cannot be understood to extend to third parties, such as relatives or friends of workers or interest groups even though they may become involved in an industrial action. It is suggestible that the 'capacity of an employer' should extend to the liability of those representing the employer in a trade dispute[74]. And the reference to the organizations protecting the interests of workers and employers should extend to officials representing these organizations as well. Unless the scope would not encompass these aspects, the protection afforded to workers, employers and their representative organizations by Art 9 would easily be circumvented by suing an individual responsible for implementing particular action.[75]

The reference to 'the rights and obligations of workers and employers' in Recital 27 may be understood to introduce an element of mutuality that restricts the scope of Art 9 to claims arising between the categories of persons referred to, i.e. workers, employers, and representative organizations. Thus any claims brought by third parties are excluded from the scope. However, as Dickinson points out, this question is open to debate. For example, which law should be applied to a claim against a trade union responsible for blockading a port in an employment dispute, when the port owner is brought before a Court by the owner of a cargo shipment that deteriorated in another country as a result of delay due to the blockade? Considering this, it seems reasonable that the Commission responded to the Council's Common Position by expressing concerns as to the lack of clarity regarding the position of third parties.[76]

Although the Commission preferred that Art 9 would not extend to liability other than that between the named parties, the objectives of foreseeability as to the law applicable and 'the protection of the rights and obligations of workers under the law of the place of the industrial action' may appear to point towards the application of Art 9 over the general rule

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[74] This includes, for example, senior management of a business.
[75] Dickinson 2008, p. 480.
[76] Dickinson 2008, p. 480.

in circumstances similar to the aforementioned. Regardless of the preferred view, it is possible that this could be one of the occasions in which it is not ultimately possible to determine a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage.[77]

3.1.3.2 Damages Caused by an Industrial Action

In contrast to other provisions of the Regulation Art 9 refers to liability for 'damages' as in contrast to the singular form of 'damage' contained in other articles. Nevertheless, it should be clear that Art 9 is not restricted to an action for a monetary remedy corresponding to an award of damages in plural form. Art 9 contemplates a non-contractual obligation arising from industrial action that is 'pending' and 'is to be' taken in the future, which would seem, according to Dickinson, consistent only with a claim for injunctive or declaratory relief. Also, the *DFDS Torline* case, to which Art 9 was a direct response to in the first place, concerned monetary and non-monetary claims. And, the terminology used in other language versions[78] suggests that what is contemplated is not a specific kind of remedy but separate elements of damage resulting from the same action. It could have been appropriate, having regard to the concept of 'damage' as defined in Art 2, to refer to 'damage caused by an industrial action' in Art 9 to avoid the uncertainty resulting from the use of plural form. However, it is commonly accepted that the usage of plural form in an EC legislative instrument should be taken to include the singular as well.[79]

Art 9 requires a causal link between the industrial action and the damage suffered by the claimant. French delegation had presented a proposal for a restrictive Recital to the scope of the special rule during the discussions in the Council's Rome II Committee. This would have limited the scope to questions of 'remedy and compensation for direct economic damage caused or likely to be caused' by industrial action and excluded peripheral situations, such as violence committed during a strike, or attacks on property. Even though the proposal was not adopted, a similar result can be achieved by both a literal and a purposive construction of the words used in Art 9 and the relevant Recitals. In any

[77] Dickinson 2008, p. 481.
[78] For instance, the French version uses 'dommages' rather than 'dommages-intérêts' and the German version includes 'Schäden' rather than 'Schadensersatz'.
[79] Dickinson 2008, p. 481.

situations that are not concerned with the protection of the rights of workers and employers acting in those capacities the law applicable to the non-contractual obligation in question should be determined not by the rule of Art 9 but, if otherwise compatible, by the general rule in Art 4.[80]

3.1.3.3 Exclusion of Matters relating to Industrial Relations Law

It emphasized in Recital (28) that certain matters fall outside both the scope of Art 9 and the Regulation as a whole. The Recital states:

The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organizations of workers as provided for in the law of the Member States.

In the matters covered by Art 9, the applicable law must be determined in accordance with other rules of private international law of the forum Member State. The law applicable under Art 9 will, however, apply to determine the legal and factual criteria that a trade union or other representative body must meet in order to be exempted from non-contractual liability for industrial action.[81]

3.1.3.4 The Connecting Factor: *Locus Actus*

According to Art 9, and without prejudice to Art 4(2), the law applicable to a non-contractual obligation caused by an industrial action is the law of the country where the action is to be, or has been, taken. The connecting factor refers to the country in which the acts of the workers collide with the interests of the employer, or vice versa. The country in question is not necessarily the same as the country in which the defendant acts, as the defendant's involvement may be limited to an act preparatory to the actual industrial action. For example, this could be the case when a trade union serves a notice of industrial action. The law applicable under Art 9 is subject to displacement by the reason of reference to Art 4(2) if the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs. In this

[80] Dickinson 2008, p. 482.
[81] Dickinson 2008, p. 482.

case the law of the country of common habitual residence will apply. There is no reference to Art 4(3) and thus the law applicable under Art 9 cannot be displaced on the basis of a manifestly closer connection to another country. According to Dickinson, the reason for including the rule for common habitual residence without the more flexible escape clause is a bit confusing, but it seems to be a part of the overall conviction of the framers of the Regulation that the rule reflects the legitimate expectations of the parties. However, this is not always the case. It may lead to unsatisfactory results, for example, if an international trade union based in London and acting from its headquarters organizes a blacking in Sweden to a ship operated from Harwich owned by an English company. The law applicable to a claim against the union to prohibit the action would be, in this case, English law.[82]

3.1.3.5 Characterization

Art 9 applies only to non-contractual obligations. The law applicable to contractual obligations, such as enforcement of the contract between worker and employer or between a trade union and its members, must be determined in accordance with the Rome I Regime.[83] As stated above[84], a possible interpretation of the Recital 27 is that it forms an exception to the interpretation of the concepts used in the Regulation, and thus 'industrial action' would not be given autonomous meaning.[85] According to this view Recital 27 would effectively mean that the concept should be understood in accordance with the law of the country in which the relevant action is to be, or has been, taken. The law of the forum cannot be applied to answer this question as this would not serve the objectives identified in Recital 27 and might lead to Art 9 being construed more narrowly or broadly than is necessary to protect workers carrying out industrial action in another country. As the case *Viking*[86] illustrates, proceedings in a case with an international dimension may be brought otherwise than before the court of the country where an industrial action takes place and application of any other law than the law identified by Art 9 to determine the

[82] Dickinson 2008, p. 438; According to Palao Moreno at p. 123, however, in the scenario where the flag would be considered flag of convenience, that law should not be considered closely connected to the situation. Overall, he considers that there are no strong reasons for complete abandonment of the ubiquity rule corrected by the closest connection test.
[83] Dickinson 2008, p. 477.
[84] See *supra*, p. 16 note 48.
[85] Palao Moreno, 2007, p. 118.
[86] See *infra*, chapter 3.2.1 at p. 31.

exact meaning of 'industrial action' would reduce abilities to predict the law applicable to claims arising out of acts that might be argued to constitute industrial action.[87]

Even if this interpretation is accepted, however, the outer limits of what may constitute 'industrial action' may still fall to be defined by reference to the terms of Art 9 and the relevant Recitals. These suggest that, at a very minimum, an action must be concerned with the relationship between workers and employers. Thus, for instance, an action taken in order to protest government policies would fall outside the scope of Art 9.[88] It is also likely that the concept of industrial action is meant to refer to a legal concept rather than a sociological phenomenon. The difference between the two is significant. Should the interpretation point out to a sociological concept, it would cover a sociological concept or a whole existing social reality. If the latter interpretation is accepted, an industrial action is considered to be de facto exercising of freedom recognized and protected by internal rules of a country, which the workers and employers enjoy in order to defend specific interests. Any other objectives or means of action that do not follow or fall within the definitions of this freedom fall out of the legal category of industrial action. A reference to a sociological category would be far more extensive by definition. The original amended proposal of the EP justifies the special provision as being a fundamental right by nature. This reference was not, however, mentioned in later statements. The Council's Common Position merely states that 'the Regulation now also contains a rule on industrial action in line with the proposal of the European Parliament' and 'with the aim of balancing the interests of workers and employers, this rule consists of applying the law of the country where the industrial action was taken'. Dorssemont and van Hoek argue that it is doubtful that this kind of an expression would actually refer to a sociological category and thus Art 9 should be considered to be restricted to a legal concept — from where a question can be raised — but which legal order should provide the definition of this concept?[89]

The law on industrial action is not harmonized in anyway as the European Community has no regulatory powers on the subject. Comparative law research has shown considerable variation on what Member States allow as legitimate actions, the most common type of

[87] Dickinson 2008, p. 478
[88] According to Dickinson these include, for example, a blockade of a port in protest reductions in fish quotas or a motorway go-slow to raise awareness about fuel duties.
[89] Dorssemont & van Hoek 2010, p. 228.

industrial action being undoubtedly the right to strike. Other types of action can still be legitimate. For example, the Dutch Supreme Court has recognized go-slow strikes and work-to-rule as legitimate forms of industrial action and under Swedish law, a boycott and a blockade are considered a legitimate means of action.[90] To be added, the regulation of strike actions in the UK is completely different in comparison to other Member States.[91]

These differences are not merely matters of substance. The differences also exist with regard to the source of the law underlying the qualification. In many countries the right to strike is laid down in the Constitution, as it is for example in France, Spain and Italy. Regulation on a constitutional level is usually applied only to specific forms of industrial action whereas other possible forms would then be considered illegitimate. These jurisdictions lack a 'general category' of industrial action which could be legitimate or illegitimate. The legality of an action depends on their classification by the constitution. Actions that do not draw their legitimacy from the constitution are subject to rules on breach of contract, tort law and even criminal law.[92]

Given the phrasing used in Recital 27, it would seem that the Regulation assumes a general principle that the law of the country where the industrial action was carried out would be applied with the objective of protecting the rights and obligations of workers' and employers. This can be derived also from the rationale of the European Parliament regarding the chosen connecting factor throughout the preparation process. [93] Thus the preamble would refer to the Member States' internal rules with respect to the right to take industrial action and for the definition the category itself. The phrasing seems quite confusing from the perspective of private international law as the admissibility and the qualification are one and the same.[94] The issue of the qualification in the national conflict of laws is typically subject to *lex fori* but that does not mean that the private international law categories are identical to the ones used in domestic law. Classification must take into account possible differences between the legal systems involved. Even the concepts that

[90] Dorssemont & van Hoek 2010, p. 228.
[91] See *infra*, chapter 4.3.2 at p. 65.
[92] Dorssemont & van Hoek 2010, p. 228.
[93] Palao Moreno, 2007, p. 122; Dorssemont & van Hoek 2010, p. 229; Dickinson 2006, p. 478.
[94] Dorssemont & van Hoek 2010, p. 229.

are purely of national origin might be needed to be interpreted more extensively than what their meaning is in the sense of the *lex fori*.[95]

Another important reason which would suggest not to restrict classification on the national definitions of the concept is the origin of the conflicts rule. The classification based on comparative studies as an approach is particularly valuable with regard to conflicts rules that stem from an international convention or some other type of international co-operation. The terms in conflict rules are given autonomous and universal meaning without being restricted to the terminology and established classification of *lex fori*, *lex causae* or any other particular legal system. Uniform conflict rules would eventually lose their purpose if they would be given different scopes depending on their interpretations in different courts of different countries.[96] As a general rule the concepts used in EU laws and in Rome II Regulation must be interpreted autonomously.[97]

The primary reason for the autonomous interpretation in EU Regulations is that it is the only way to ensure consistent application of the rule in different Member States. If the definition of a concept is left to the Member States' internal rules it is usually stated *expressis verbis*. Autonomous interpretation has been used by the CJEU in the context of Brussels Convention and Regulation. The Rome II is also based on the same principle as indicated in preamble 11. It would seem possible to consider that the ambiguous phrasing in Recital 27 was not meant to create an exception to the general principle. The second sentence of the preamble could support this view as well. Thus it is possible to suggest that the existing differences in the Member States' internal rules on the scope of the right to take industrial action would be quoted as a justification of the special provision. In this sense, Recital 27 should not be interpreted as an exception to the general principle.[98]

Again, a comparison of the different language versions could be useful to clarify this issue. Under present circumstances, however, such comparisons have not provided any further clarification as, according to Dorssemont & van Hoek, the translation of the relevant private international law category seems to rely heavily on terminology derived from the

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[95] Bogdan 2012, p. 186; Dorssemont & van Hoek 2010, p. 229.
[96] Bogdan 2012, pp. 174–176.
[97] C-27/02, Petra Engler v. Janus Versand GmbH [2005] ECR I-481, para 33; See also *supra*, pp. 15-16.
[98] Dorssemont & van Hoek 2010, pp. 229–230.

national context. Different translations refer to the concept of industrial action in various manners. For instance, the Dutch version does not refer to the 'strike' but to a generic term of '*collective actie'* which responds to the broad recognition of the right to industrial action adopted by the Dutch Supreme Court. German language version utilizes similarly broad category of '*Arbeitskampfmassnahmen*' while the French version reduces the category to the two best-known varieties of '*grève'* (for the workers) and *'lock out'* (for the employers). In comparison to, for instance, the Dutch version the concept used in the English version i.e. 'industrial action' is narrower as it limits the collective dispute to the relationship between employers and workers. Furthermore, the Italian language version, '*danni causati da un'attività sindacale'*, would seem to reflect an organic view of the concept.[99]

3.2 The Laval Quartet

Recent jurisprudence of the CJEU provides a rather dramatic excursion to the status quo of collective labour rights in Europe at least for the time being. Each case of the Laval quartet concerns the consequences of what Joerges calls "social deficit", or the incomplete addressing of the social sphere within the institutionalization of the on-going integration project. It is, according to him, possible to outline a somewhat major disjunction between the conceptual orientation of the CJEU and the approach promised by European conflicts law. This juxtaposition does, however, provide for documentation of the main regulative principles offered by the conflicts of law perspective.[100]

Before analyzing the case law in detail, it should be kept in mind that the particular type of conflict which was before the CJEU in *Laval* and *Viking* has not been regulated by the detailed transition arrangements in the accession treaties. Also, as it is typical for the most of the free movement cases, the actions involved are not directed against Member States but against labour unions which are governed by private law, and which traditionally enjoy

[99] Dorssemont & van Hoek 2010, p. 230.
[100] Joerges 2010, p. 392.

a high level of autonomy guaranteed by both national and European constitutional provisions.[101]

In the Nordic countries there is high level of support for self-regulation by social partners among all political parties. Employers accept collective bargaining and collective agreements as the primary tools for regulating working conditions. The stability of the Nordic industrial relations models is bound to this strong ideological and political consensus. Even though some legislative restrictions have been introduced, it does not change the fact that the underlying general consensus is that the employment conditions should be fixed by the social partners through autonomous collective bargaining. European legislation is, however, becoming an increasingly important tool for the social partners. For instance in Sweden, the Swedish Employers' Confederation has gone quite far in leveraging EU legislation to restrict trade union power. Employers see that legal changes are necessary but do not openly challenge the Swedish model. The effects – which shall be dealt with in the following chapters – of the judgments are still welcomed as they have somewhat weakened the position of the Swedish trade unions.[102]

3.2.1 Viking

The Viking Line operates ferry services between Finland and Estonia (and Sweden). Their ships were sailing under the Finnish flag but, due to the decision made by the management of the company, were about to be re-flagged under the Estonian flag. The primary reason behind the decision was to take advantage of the lower wage costs in Estonia. The Finnish Seamen's Union (FSU) reacted by threatening to take collective action if the process would not be stopped. Furthermore, the FSU requested the International Transport Workers' Federation (ITF), with reference to its flag of convenience campaign, to ask their members not to negotiate with Viking. The ITF affiliates agreed that only trade unions established in the country where the vessel's owner is based should be able to conclude collective agreements that cover the concerned vessel(s). The Viking Line responded by

[101] Reich 2008, p. 127.
[102] Bruun et al. 2011, pp. 36–37.

bringing legal proceedings against the ITF and the FSU in the English Commercial Court, as the ITF is based in London. Finnish law was applied to the case.[103]

The *Viking* case relates directly to Finnish conditions and there are strong national interests involved. The case was eventually settled in a confidential deal between the parties. Any significant reactions to this case in Finland or demands for legal changes related to the case have been so far absent. There has been active debate around the judgments, but in this respect it is also stressed that they only apply in cross-border situations. In general, the impression has been that this might lead the courts to be more willing to grant interim jurisdiction in labour law cases dealing with industrial actions.[104]

While, in the view of the Finnish employers, the maritime sector is of quite special concern in Finland, the Viking case does not appear to originate from any concerted effort of employers to leverage EU law in order to achieve reductions to trade union powers.[105] The aim would seem to be more of a legal measure to further employer interests in a specific area of concern in the maritime sector.[106]

3.2.1.1 Arguments before the Court

According to Warneck, there are four different points in the *Viking* judgment that can be distinguished: the right to take collective action as a fundamental right; the scope of freedom of establishment and the question of whether employment law is included in this scope; the horizontal direct effect; and the proportionality test with regard to collective action.[107]

The right to take collective action, including the right to strike, is recognized by the CJEU as fundamental rights and thus an integral part of the general principles of Community law. These rights are nevertheless subject to certain restrictions accordingly with Article 28 of the Charter of Fundamental Rights of the European Union, which indicates that the right is subject to "Community law and national laws and practices". [108] The CJEU has held that

[103] Warneck 2010, p. 7; Bruun et al. 2011, p. 31.
[104] Bruun et al. 2011, p. 31.
[105] Cf. note 131 at p. 37.
[106] Bruun et al. 2011, p. 38.
[107] Warneck 2010, p. 8.
[108] Warneck 2010, p. 8; Reich 2008, p. 133.

the national employment legislation falls within the scope of Community free movement law and thus no special treatment is applied. This is, however, debatable. The trade unions concerned in *Viking* argued before the Court that a similar reasoning given in the *Albany* case should be applied in the respective case as well.[109]

In *Albany International* the Court ruled that 'the social policy objectives pursued by agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment'.[110] Even though the recognition was not exactly explicit, the ruling in this case effectively meant that the protection of freedom of association required that management and labour were not subjected to EC competition law provisions.[111] The CJEU gave preference to social considerations over economic ones by creating an employment-related exemption from EC competition law. A collective agreement negotiated by the social partners, by virtue of its nature and purpose, fell outside the scope of Article 105 TFEU. In *Viking*, arguably, the Court could have issued a similar reasoning that collective agreements fall outside the scope of the freedom of establishment. [112]

However, one argument about and against the usefulness of this approach would be its apparent limitedness. The fundamental rights entitlements still constitute a mere exception to the standard application of Community law and cannot provide the basis for a proactive effort to enforce workers' rights.[113] The argument established by the Court in *Albany* was intended to be used in connection to competition law and the case did not concern industrial action as such. In other words, there is no 'non-statutory exemption' from the application of the EU free movement rules available when a collective action by labour unions confronts the market access or business restructuring of individual businesses from other Member States.[114] Also, it seems that if EU legislation comes into conflict with national implementations of international obligations, for example prior ILO Conventions, the Commission's recommendation to denounce the relevant Convention would in fact

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[109] Warneck 2010, p. 8.
[110] Case C-67/96 Albany International BV v. Stichting Bedrijfsfonds Textielindustrie [1993] ECR I-5751, para 59.
[111] Novitz 2005, p. 227.
[112] Warneck 2010, pp. 8–9.
[113] Novitz 2005, p. 227.
[114] Reich 2008, p. 129.

prevail. This was the case in CJEU's *Stoeckel*[115] ruling, after which basically every EC member state denounced the ILO Night Work Convention (No. 171).[116] The Court also seems to give much more preference to references of the civil and political rights set out in the ECHR over the ones recognized by the ILO which are socio-economic by nature.[117]

The opinion of the Court in *Viking* was clear. The argument here was that the same kind of reasoning which was used in Albany case *"... cannot be applied in the context of the fundamental freedoms set out in Title III of the Treaty"* and that *"it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree."*[118]

The *Viking* case implies a conflict between two incompatible legal regimes. European law guarantees the freedom of establishment but does not govern industrial disputes and refers to the national law instead accordingly with Article 153 (5) TFEU. Both sides, i.e. the defendants and plaintiffs, presented arguments that reveal something rather uncomfortable about the current state of European conflicts law. Joerges clarifies this state of affairs as the *'uncomfortable fact that the realm of European law has now almost completely forgotten the primary elements of conflicts law.'* [119]

What the Court actually did in *Viking*, is that it went even further than just ruling the collective agreements to fall within the scope of free movement law. The Court established that the law may also be invoked against trade unions (horizontal direct effect). Traditionally, the freedoms set forth in the TFEU are directed at the level of Member States, but now the statement was that the freedom of establishment "may be relied on by a private undertaking against a trade union or an association of trade unions".[120] Effectively it means that an employer is, from now on, able to take trade a trade union to court in order

[115] C-345/89 Criminal proceedings against Alfred Stoeckel [1991] ECR I-4047.
[116] Bronstein, Arturo: "Labour Law Reform in EU Candidate Countries: achievements and challenges", ILO Discussion Paper 28 February 2003 (Malta), p. 5, note 14.
[117] Novitz 2005, p. 227-228.
[118] Case C-438/05 *Viking*, paragraphs 51–52; Warneck 2010, pp. 8–9.
[119] Joerges 2010, p. 393.
[120] CaseC-438/05, paragraph 61

to obtain a judgment on the legality of any collective action, by merely arguing that its action is violating their economic freedoms.[121]

In the light of these newly established principles, the CJEU viewed the trade unions' right to take collective action as a restriction on the freedom of establishment. The question was then if such restriction could be justified. In other words, certain conditions needed to be met. These conditions are often referred as the 'proportionality test', which ultimately requires that the action possesses a legitimate aim, must be justified by overriding reasons of public interest, must be suited to attaining the objective pursued and not go beyond what is necessary in order to attain it.[122]

The Court concluded that the right to take collective action to protect workers' interests is a legitimate aim. Thus, in principle, it justifies a restriction of the fundamental freedoms guaranteed by the TFEU.[123] Whether or not the objectives pursued by collective action involve the protection of workers interests is a matter for the national courts to evaluate. The CJEU does, however, seem to set quite strict guidelines on how such cases should be reviewed and judged. The question seems to be if the jobs and/or the conditions of employment are actually jeopardized – or at least under a serious threat – because of an undertaking or an enterprise. Furthermore, it is significant to establish whether the means of collective action actually made it possible for the pursued objective to be achieved and, if they did, whether any other (less restrictive) means existed and had been exhausted prior to the collective action.[124]

The defendants had argued that the conflict actually took place outside the EU, but the CJEU was willing to accept the "hint" given by the plaintiff that Finland should exercise its competence of constructing its laws regarding industrial disputes "with due respect for Community law"[125]. The result would seem to suggest that this leads to the subordination of labour law by the economic law. The thought behind the argumentation of both parties is in line with the category of a vertical collision, yet neither made any effort to identify a proper conflict collision norm and pressed for a more direct decision. For the defendants

[121] Warneck 2010, p. 9.
[122] Case C-438/05 *Viking*, paragraph 75; Warneck 2010, p. 9.
[123] Case C-438/05 *Viking*, paragraph 77; Warneck 2010, p. 9.
[124] Case C-438/05 *Viking*, paragraphs 80–89; Warneck 2010, p. 9.
[125] Case C-438/05 *Viking,* para 40.

the freedom of establishment guarantees of Community law were a non-interest as the EU has no competences over industrial disputes and for the plaintiffs the Community guarantees were accompanied by a finding that national labour law should be disapplied.[126]

3.2.1.2 Evaluation of the Conflict in Viking and the Reasoning of the Court

If we would consider these issues from the viewpoint of one of the primary operations of conflicts law, i.e. characterization, the aforementioned conceptions seem slightly shallow. The problem has dramatic constitutional dimensions. From this perspective, it is clear that the controversy should not be resolved by a decision that asserts the supremacy of freedom of establishment. The jurisprudence of the Court can offer alternatives of which some are arguably better. The previously mentioned *Albany* case is, for instance a good example in this respect as well as the Court was ultimately willing to restrict itself and its own jurisdiction and thus avoided to label the Dutch collective pension schemes as cartels under European Competition law. Instead, the Court sought to establish the co-existence of the two legal forms. According to Joerges, this is merely an example of the various suggestions that have been made detailing an appropriate conflicts-oriented solution that does not derive from the supremacy principle.[127]

The much emphasized (by scholars and commentators alike) aspect of the *Viking* judgment is the first explicit recognition by the Court of the right to strike as a fundamental right, forming "an integral part of the general principles of Community law the observance of which the Court ensures…"[128] Joerges suggests that the sentence, which is seemingly positive at the first look, actually turns the focus away from the primary conflict which was put before the Court. And this conflict, which has everything to do with the perceived incompatibility of national regulation on industrial disputes with the EU's economic freedoms, cannot be solved by simple means of transposition of the conflictual relationship into a purely European legal realm where it is eventually solved by the hierarchical precedence of fundamental freedoms and rights. Admitted though, this transposition of a conflict issue into European realm was something actually quite difficult as the Court came to this conclusion by asserting that the right to strike relates to the fundamental principles

[126] Joerges 2010, p. 393.
[127] Joerges 2010, p. 394.
[128] Case C-438/05 *Viking,* para 44.

of the EU. As these principles were established (primarily) in order to review legislative actions, their application against private actors should be nevertheless considered inappropriate.[129]

3.2.2 Laval

The *Laval* case was referred to the CJEU by the *Arbetsdomstolen* (Swedish Labour Court) 15 September 2005. The Latvian company Laval had won a tender for construction work at a public school in the Swedish town of Vaxholm and posted their workers from Latvia to Sweden in order to fulfil their contractual duty. As a standard procedure, the Swedish unions initiated negotiations with Laval with the intention of establishing a collective agreement on wages and other working conditions, as these are always negotiated on a case-by-case basis in the Swedish industrial relations system. The Latvian company intended, however, to take advantage of the lower wages in Latvia and signed a collective agreement there. As the negotiations in Sweden failed, the Swedish trade unions blockaded the construction site. Their action was further supported with a solidarity action by the Swedish electricians' trade unions.[130] By the virtue of Article 9 of Rome II, the claims regarding the non-contractual liability of the Swedish unions for damages suffered by Laval were subject to Swedish law.[131]

Regarding the origins of the *Laval* case, Bruun, Jonsson and Olauson argue that, even though never officially admitted, "*it would seem that the agenda of the Swedish Employers Confederation, which had provided the Latvian company with financial support in the lawsuit, was to try to establish a principle of proportionality for industrial action within Swedish law*. " The strategy was to establish a proportionality test for industrial actions in cross-border disputes which could eventually be applicable also in domestic cases. The *Laval* case ended up, however, having a far greater impact on the Swedish autonomous collective bargaining model. [132]

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[129] Joerges 2010, p. 395.
[130] Warneck 2010, pp. 7–8, Reich 2008, p. 125.
[131] See also Dorssemont & van Hoek 2010, p. 244: Hypothetically, if the Latvian workers or the Latvian unions were also involved in the action, the *locus actus* may have not been the decisive factor as the party causing the damage and the injured party would have shared a common place of residence in the sense of Article 4 para 2 of Rome II.
[132] Bruun et al. 2011, p. 26.

The question of whether the so-called *Lex Britannia* legislation was actually contravening the provisions of the EC Treaty, and in particular the free movement of services, was a specific concern in the *Laval* case.[133] Briefly told, the Swedish *Lex Britannia* basically allowed the Swedish labour unions to start industrial actions against the undertaking which had not yet concluded an agreement with representative labour union of its employees.[134] The CJEU concluded that the Lex Britannia failed to take into account collective agreements to which the companies were already bound in their home state. This led to a situation where such companies were discriminated against as they were treated in the same way as domestic companies which had not concluded any collective agreement. The CJEU, referring to Art 46 EC (Art 52 TFEU), declared that discriminatory rules may be justified only on grounds of "public policy, public security or public health". The aim of the *Lex Britannia* did not fall within this scope, and thus the provision was deemed incompatible with Articles 49 and 50 EC Treaty (Arts 56 and 57 TFEU).[135]

The Court did not only declare the Lex Britannia incompatible with EU law, but also introduced a strict interpretation of the PWD. While the CJEU did, once again, recognize the collective action as a fundamental right, it concluded at under the circumstances of the *Laval* case the specific action was illegal with respect to Article 56 TFEU and PWD provisions. With regard to the right to strike and the scope of the fundamental freedoms of EU, the judgement in *Laval* follows the same pattern as in *Viking*. The proportionality test was once again applied. Accordingly, the stated reasoning of protecting the interest of host state workers against social dumping may constitute an overriding reason of public interest, which in principle, could therefore justify a restriction of fundamental freedoms.[136] The blockading action by a trade union also falls within this objective. [137]The

[133] Bruun et al. 2011, pp. 26–27; The *Lex Britannia* is a specific section in the Co-Determination Act which states that a Swedish union can take industrial action against a foreign company even if the company is bound by a foreign collective agreement.
[134] Reich 2008, pp. 137–138. Worth noticing, the law does not contain any specific exemption concerning industrial action against undertakings established within the EU. This is an aspect that was criticized already during Sweden's accession to the EU, but was not properly dealt with in the ratification proceedings of the treaties.
[135] Bruun et al. 2011, p. 28.
[136] C-341/05 *Laval*, para 103.
[137] C-341/05 *Laval*, para 107.

Court nevertheless ruled that in this case the action could not be justified by PWD provisions or by overriding reasons of public interest.[138]

3.2.2.1 Interpretation of the PWD before Laval

Before the Laval quartet, it was questionable whether the PWD should be understood strictly as a minimum labour law directive or a free movement of services directive. The difference between these two is significant, as the former aims at protecting the host state labour and/or the posted workers, while the latter serves the interests of cross-border service providers by limiting the regulatory powers of the host state in relation to posted workers. The question arose in relation of various aspects of the Directive. For example, Article 3(7) of the Directive provides for the obligation to protect the 'hard nucleus' of rules and that application of more favourable terms and conditions for workers are not prohibited in any way. It does not, however, clarify whether this means that the host state may extend conditions providing more favourable terms or that the posted workers may rely on their domestic employment conditions that are *per se* more favourable. Another question was about Article 3(10). The host state may extend employment conditions on matters other than the hard nucleus to posted workers in the case of public policy provisions. The concept of public policy provisions is not, however, defined exhaustively. As Malmberg puts it, should the concept be considered more or less the same as the overriding reasons of public interest utilized in *Gebhard*, or should it be construed more narrowly?[139]

The PWD concerns "importation" of cheaper labour from low wage economies into high-wage ones and adopts a compromise solution for the conflicts of interest under these circumstances. The application of specific working conditions to such arrangements is determined in Article 3 (1) of the Directive. The PWD demands, for instance, that the legally binding minimum wage level of the host nations is applied for posted workers as well. This functions as a collision norm actively protecting posted workers and securing

[138] Warneck 2010, p. 10
[139] Malmberg 2011, pp. 78–79.

interests of employees within high wage economies, as it ensures that the undercutting of wages is restricted in the hosting state.[140]

Regardless of the inconclusive questionability of the essence of the PWD, the primary function of the Directive was nevertheless commonly accepted to be the determination of the mandatory minimum level of protection which the employers must guarantee when posting workers to perform temporary work in the territory of another Member State where the services are provided. If this is accepted, the directive was to be understood as a minimum directive like with every other directive in the social field. The purpose of the PWD was thus considered to lay down the absolute minimum working conditions that member states have to ensure. In fact, according to the case law of the CJEU[141], it was presumed that the member states could extend their national labour laws to concern posted workers as well, even though this would clearly introduce an active restriction on the free movement of services.[142] The justification for the extension of national labour law could be established with the so-called 'Gebhard-formula'. In *Gebhard*[143], the Court had ruled that a restriction on the free movement of services can be accepted only if it is justified by overriding reasons of public interest and is considered to be proportional. The primary amendment established by the PWD in the first place was that the hosting countries were no longer only permitted but obligated to ensure this certain 'nucleus of mandatory rules for minimum protection', which was to be defined by (a) rules laid down by statutes or by universally applicable collective agreements (for the building sector) and (b) concern certain specified terms and conditions such as health, safety, minimum wages etc.[144]

In this sense, the PWD should have not prevented member states to provide for higher level of protection. The interpretation adopted in *Laval* changes this aspect drastically as the indication is that the host Member State or the social partners are unable to require for

[140] Joerges 2010, p. 396.
[141] For instance, C-113/89 Rush Portuguesa Limitada v. Office National d'Immigration [1990] ECR I-1417.
[142] Barnard 2013, p. 380.
[143] C-55/94 Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, para 37; Barnard 2013, p. 528.
[144] Malmberg 2011, p. 78; Barnard 2013, p. 529; Warneck 2010, p. 10.

better conditions than what is provided by the PWD. What follows is that the PWD provisions are de facto limiting the level of protection guaranteed to posted workers.[145]

3.2.2.2 The Interpretation of the PWD Established in Laval

A substantial part of the CJEU's ruling concerns considerations devoted to the interpretation of the PWD. The very essence of this interpretation is stated in the considerations 69–71 of the judgment. These paragraphs indicate that a Member State which has not determined the minimum wages in accordance with the means provided for in the PWD cannot impose case-by-case negotiations at the place of work on undertakings that are established in other Member states. The undertakings should be able to ascertain the conditions they have to guarantee for their posted workers in advance.[146]

Sweden had relied upon Article 3(8) of the PWD to retain its industrial system of collective bargaining. General principles of Community legislation also seemed to support this expectation. As a general rule, the Member States retain regulatory competences in matters that are considered as "matters of public concern" by the Community. Even though secondary law, i.e. regulations and directives, might restrict this competence it is only to the degree to which Community doctrine of pre-emption in the area of the relevant national competence can be justified. According to Recital 22 of the PWD, the Directive does not impact "the laws of the Member States concerning collective action to defend the interests of the trades and professions", while at the same time Article 3 (1) (c) states that minimum rates of pay are "defined by the national law and/or practice of the Member States to whose territory the worker is posted". The very definition of the pre-emption doctrine draws its content from the principle of supremacy, but it does also include the idea that the conflicts law functions as a tool demarcating and coordinating Community tasks with national competences.[147]

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[145] C-341/05 *Lava,l* para 80; Warneck 2010, p. 10.
[146] C-341/05 *Laval,* paras 69,70 and 71; Warneck 2010, p. 10
[147] Joerges 2010, pp. 396–397, also quoting here Damian Chalmers, in Damian Chalmers et al. (eds), European Union Law, (Cambridge: Cambridge University Press, 2006, p. 188: *"The sovereignty of EU law requires not only that it takes precedence over national law, but also that EU law, alone, determines its legal effects. It is a matter for EU law to determine which fields it governs, and what legal effect it has in those areas. These questions are anchored in the doctrine of pre-emption."*

While it might seem reasonable, especially from the perspective of the posting undertaking, that the lack of sufficiently precise and accessible provisions make it impossible or excessively difficult for the foreign service provider to determine obligations to comply with regards to the minimum pay in practice, it should be noted that this kind of indeterminacy is inherent to every industrial relations system relying on collective bargaining. What the CJEU is thus actually demanding could be considered more or less of a complete reformulation of Swedish law in this regard. And all of this due to the calculating interests of foreign businesses or undertakings. This is a prime example of the very unfortunate aspects of European integration, namely the dissolving of national labour constitutions in favour of a more market-oriented one.[148]

Barnard suggests that if the perspective of the CJEU is considered, it should be asked how precisely did the collective action impose costs which, according to the Court, made it 'more difficult' or 'less attractive' for Laval to operate in Sweden. If it is accepted that extraterritorial application of Latvian law and/or Latvian collective agreements was out of the question, the remaining explanation could be intuition. The Latvian company had difficulties of fulfilling a legitimate contract due to the Swedish strike action — something that the EU accession had promised in the name of free access to the markets in services in other Member States — which ultimately was enough to trigger Article 56 TFEU. The effect of the judgment is, however, substantially more excessive. The ruling allows challenges to host-state rules which differ from those that apply at the state of origin from which follows that a mere difference between the rules is sufficient to constitute a restriction on the free movement. This is something the Court has rejected before and could potentially lead to near ridiculous circumstances in future. According to Barnard, there is no reason why German tourists might not argue that the requirement to drive on the left side of the road in the UK hinders their free movement since British rules are different from those in Germany.[149]

3.2.3 Rüffert

The Land Niedersachsen (the German state of Lower Saxony) held a tender involving construction work at a local prison. The tender was won by a German company which

[148] Joerges 2010, p. 397; C-341/05 *Laval,* para 110.
[149] Barnard 2013, p. 22.

subcontracted the work to a Polish company.[150] It was soon uncovered that the 53 Polish workers were actually receiving only 46.57% of wages paid to their German colleagues working on the same site. The public procurement law of Niedersachsen stated that "contracts for building services shall be awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in the place where those services are performed …". Similar regulations are found in a number of other German federal states as well. The circumstances led the Land Niedersachsen to apply the contract non-compliance clauses and imposing financial penalties for the company.[151]

Because of the fact that the Public Procurement Act (*Landesvergabegesetz*) of Land Niedersachsen referred to collective agreements that were not universally applicable and since the scope of the Act was restricted to public procurement[152], the CJEU came into a conclusion that it did not comply with Article 56 TFEU and PWD provisions. According to Warneck, the interpretation of the Court was that Land Niedersachsen did not fulfil the criteria for fixing minimum rates of pay as set forth in the PWD. This could be done by laws, regulations or administrative provisions and/or by universally applicable collective agreements or arbitration awards. As the Public Procurement Act did not concern minimum levels of pay and the collective agreement was not universally applicable, the rate of pay could not be imposed on foreign service provider.[153]

3.2.3.1 The Ruling of the Court

The *Rüffert* case was all about public procurement. In Germany, it is not uncommon for the Federal States to have clauses in their statutory public procurement regulations that require bidders for public sector contracts to provide a commitment that they would pay wages on the level determined by (in force) collective agreements. After the *Rüffert* decision, existing collective agreement compliance clauses were no longer enforced as such. There has been, however, some development recently that aims to accommodate such clauses

[150] To be precise, it was Mr Rüffert who had liquidated the assets of Objekt und Bauregie GmbH & Co. KG who refused to recognize the obligations placed by the German law; Joerges 2010, p. 398.
[151] Warneck 2010, p. 8.
[152] I.e. the act was not applicable to private sector contracts and the employers working on private construction contracts did not enjoy similar protection.
[153] Warneck 2010, p. 11; Joerges 2010, p. 398; Case C-346/06, *Rüffert*, paras 21–35.

with the CJEU requirements.[154] In the *Rüffert* case, the collective agreement compliance clauses of Lower Saxony were the subject of the decision. In the wake of the decision, the companies no longer had obligations to file a statement of collective agreement compliance.[155] Afterwards, the majority of the Federal States which had compliance clauses prior to the decision have now amended their laws in order to comply with the CJEU ruling, although few exceptions remain[156].[157]

The Court utilized the same reasoning it had previously conducted in *Laval*. The PWD outlines the maximum level of protection for posted workers without the possibility to specify a higher level of protection with a collective agreement.[158] The need for justifying the restriction on the freedom to provide services was once again emphasized. In *Rüffert*, the reasoning of protecting workers interest was not sufficient to justify the restriction, as the legislation applied only to the public sector. The Court did not accept the financial sustainability of social security systems or the autonomy of trade unions as sufficient reasons for a restriction either.[159] According to this interpretation of the PWD, it would seem that the Member States are unable to demand that companies participating in a public tender undertake to pay the level of minimum wages set by a collective agreement in force at the place where the service is performed.[160]

3.2.3.2 Applicability of the Laval Reasoning

Regardless of the Court's interpretation in *Rüffert*, the situation of the *Laval* case was not directly comparable to the one in Germany. While in Sweden it was generally thought that trade unions would ensure that posted workers would be covered by Swedish collective agreements, the approach adopted in Germany was different. At the time of Rüffert, the Posted Workers Act (*Arbeitnehmer-Entsendegesetz*) stipulated that collective agreements in specific branches, which have been given universal applicability, covered posted workers as well. Primarily because of these structural differences, the *Laval* decision had not had any significant influence to the rulings in German courts. As such, however, the

[154] Bücker et al. 2011a, p. 73.
[155] Bücker et al. 2011a, p. 80.
[156] Bavaria, Hessen and Schleswig-Holstein have not resorted in any amendments.
[157] Bücker et al. 2011a, p. 81.
[158] Case C-346/06, *Rüffert*, paras 32–33; Warneck 2010, p. 11.
[159] Case C-346/06, *Rüffert*, paras 41–42.
[160] Case C-346/06, *Rüffert*, para 43.

legislation in Germany has been subject to a strong political and academic debate as was with the *Viking* case even though the industrial relations systems of Germany and Sweden are different with respect to the regulation of posted workers.[161] The criticism that the decisions have received resemble each other to a large extent with a few points, however, specifically made with respect to the *Laval* case. One is that the decision does underline the incompatibility of the Swedish industrial relations system with the PWD. According to the German understanding of fundamental freedoms and rights, every form of governmental or public power is, in principle, obliged to respect these rights. The CJEU should have first assessed whether the PWD took into account the relevant fundamental rights, not the other way around by assessing whether the exercising of the right to take collective action was within the bounds of the PWD.[162]

The logic behind the CJEU's reasoning is rather confusing. It determines the purpose of rules binding the state to collective agreements without any respect to the origins of these rules, i.e. the intensive political discussions and the legislative process which have been recognized by the German Constitutional Court to be in accordance with the German Constitution. While there exists the potential that collective agreements may affect the constitutionally recognized fundamental freedoms it is obvious that the German Constitutional Court would not accept that the obligation to respect for collective bargaining would not effectively constitute an employment protection measure. As the opinion of the CJEU might differ, it would need to explain why its interpretation of the purpose of German legislation should prevail. European precedence is not self-explanatory especially when the legislation on collective bargaining and the PWD concern two different legal subjects.[163]

[161] Bücker et al. 2011a, pp. 54–55.
[162] Bücker et al. 2011a, p. 56.
[163] Joerges 2010, pp. 398–399.

4 Social Policy of the EU, Relevance of the National Structures and the Impact of the Recent Developments to the Industrial Relations Systems

Trade union rights in Europe are recognized in various ways. The rights have been promoted with terms such as "inalienable and imprescriptible human rights." The freedom of association is recognized in the revised text of the European Convention on Human Rights and the European Social Charter recognizes a right for all workers and employers to join local, national or international organizations for the protection of their economic and social interests.[164] Within the European Union, the freedom of association of workers and employers constitutes the very foundation of a system to which labour relations that aspire to place the values of social pluralism is built on. This is the existing reality in virtually all of the Member States. Freedom of association and the rights linked to it, organizational and activity rights alike, are a few of the defining elements of the European social model, which is actively seeking to address the extremely complex issues of an ever-developing society through social dialogue between workers and employers.[165] Historically speaking, however, the ability of the EU to regulate and to enact on the field of labour law has been quite modest.

The task of upholding collective labour rights i.e. the freedom of association, the right to engage in voluntary collective bargaining and the right to strike is, at least for the time being, falling primarily to the Member States within the Community area. This is due to Article 153 (5) TFEU which excludes freedom of association and the right to strike from the EU's legislative competences. One apparent underlying reason for this is that it has been considered as an inappropriate matter for EU intervention, as the systems of collective bargaining in the Member States are too distinctive to be subjected to shared norms. Thus the matter has traditionally been handed to the discretion of Member States, accordingly with the principle of subsidiarity.[166] While the EU has no competence to adopt a directive dealing explicitly with the protection of freedom of association, there is, however, a possibility of indirect recognition of the potentially important role of the 'social

[164] Valdés Dal-Ré 2005, p. 33.
[165] Valdés Del-Ré 2005, p. 41.
[166] Novitz 2005, p. 218.

partners' in managerial decision-making and the implementation of European labour standards.[167]

4.1 Minimalistic Approach to Social Regulation

Back in 1957 when the Roman Treaties were concluded the prominent thought in the European Economic Community was that there was no particular need for a specified social policy. The factual danger of 'social dumping' existing among the Member States was recognized but, rather than actually dealing with the issue, it was presumed to solve itself. The idea was that the establishment of a single European Market would eventually lead to a gradual harmonization of social policy throughout Europe and thus the focus was nearly exclusive in favour of the establishment of a framework to the common market. One of the key features included in this focus was the free movement of workers — which clearly has had its implications on social policy — but it was considered merely as a necessary precondition for the common market. Regardless of the intentions of Arts 117 and 118 EEC, the Member states remained almost exclusively responsible for social policy. The only exception was the recognition provided by Art 119, which introduced the principle of 'equal pay for equal work' with respect to the relationship between genders. This provision was, however, directly meant to prevent using of women as cheap labour and thus had very little to do with women's liberation whatsoever.[168]

One aspect which is, according to Weiss, important to remember is that the Community has made progress in the social policy area not because of, but in spite of, the Treaty. While the unemployment rates climbed in the early 1970s it became obvious that progress in social policy is not an automatic implication of the establishment of a common market. After the summit of 1972 in Paris the Community was destined to take a few important steps in the area of social policy. The pragmatic result which had introduced a detailed social action program and a number of directives[169] dealing with social policy was,

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[167] Novitz 2005, p. 223.
[168] Weiss 1998, p. 197.
[169] These directives were primarily based on Art 100, which empowers Community to legislate in order to fight distortion of competition, and, on Art 235, which provides an accidental competence for the Community

unfortunately, proven to be quite fragile as well. The method relied heavily on unanimous support of the Member States. The system broke down in 1980 after the Government in the UK had changed and unanimous decision making was no longer a viable option. The discussion was revived by the efforts of the Commission's new president Jacques Delors who initiated a public debate on the 'European Social Dimension', leading to the formulation of European Single Act. The new Art 118a allowed the Community to legislate on health and safety by qualified majority. These new powers did, however, remain as an exception and the primary means of legislation still depended on unanimous decision-making. Thus an effort was made by developing a Community Charter of Fundamental Social Rights for Workers, even though it was strongly opposed by the UK. These developments eventually formed the foundation to amend the Treaty and introduce the inclusion of the social partners to the legislative process.[170]

4.1.1 The Community Charter of Fundamental Rights of Workers

The historically minimalistic approach to fundamental social rights does not necessarily mean that there has not been any interest in protecting such rights. Ex Article 136 EC (Article 151 TFEU) does not emphasize ILO standards directly but, according to Novitz, the two instruments it explicitly mentions reflect their significance.[171] The Community Charter of Fundamental Rights of Workers declares that the employers and workers of the European Community have the right to freedom of association for the purpose of forming professional organizations or trade unions of their choice to defend their economic and social interests.[172] Originally, the 1989 Charter was originally granted only with a declaratory status. However, upon closer examination, the effects of the Charter cannot be seen as merely declaratory in the historical context. For instance, the Charter is directly referred to in the Preamble to the Treaty on European Union (TEU) as well as it is referred to in article 151 of TFEU (Article 136 EC). Following the declaration in 1989, the Commission also produced a Social Action Programme with legislative proposals based on the Charter. The programme was carried out with concerns over social consequences of the

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to legislate in the case when the objectives set by the Treaty cannot be achieved with the specific powers provided for in the Treaty. Neither of these articles had a direct link to social policy but they were still used.

[170] Weiss 1998, pp. 198–199.

[171] Novitz 2005, p. 218.

[172] Valdés Dal-Ré 2005, pp. 33–34.

established Single European Market, as the social policies practiced earlier did not seem adequate in filling the task.[173]

Arguably, there exists a level of similarity with other later established European legislative instruments, such as the Charter of Fundamental Rights of the European Union, which dedicates the right of freedom of trade union association to all individuals. It could even be said that the influence is very much perceivable. The Charter has been forming guidelines of interpretation and impacted legislative measures to an extent, and thus, the 'declaratory nature' of it is very much questionable. The interest and the idea for the protection of freedom of association and the protection of workers is there, but unfortunately, it still is an observable fact that the collective labour relations also constitute an area that has been very resistant to any real influences from the Community law.[174] Accordingly, the traditional view of EC labour law has been that the minimum labour standards and the protection of workers are ensured, but the employment policy considerations, for example, have been ignored as being irrelevant to this context.[175]

4.1.2 Regulatory Measures: Hard law and soft law

Regulatory measures within the fields of European social and labour law are traditionally classified as either harmonization or co-ordination which, in other words, translates to either 'hard law' or 'soft law' instruments. Historically, the employment regulation falls under the latter category. The Member States co-operate within the sphere of employment policy, but there have been few to none competences for the Community to regulate national labour markets.[176] However, it should be noted that the soft law still is nonetheless a way of exercising public power. This presumption is especially crucial within the context of EU. As Klabbers explains, if a situation is faced, where it is impossible to agree upon a regulation, or if it would be difficult to legitimate within the scope of EU's legislative powers, or if it some another way would be undesirable from the national legislator's viewpoint, a soft law instrument should be more advisable. These instruments are often applied as resolutions, codes of conduct or action programs. And they all originate from

[173] Bercusson 2009, p. 139.
[174] Valdés Dal-Ré 2005, pp. 33–34.
[175] TFEU Article 149, para 2; See also, Bercusson 2006, pp. 32–33.
[176] Bercusson 2006, p. 32.

legislative authorities as means to exercise public power. No matter how 'soft' the resulting application would be. This has clearly been understood by the CJEU as well. The Court has not hesitated in applying soft law instruments when it has deemed it appropriate enough.[177]

One of the 'softer' competences of reflexive harmonization is provided by the open method of coordination (OMC). The purpose of the OMC is explicitly about experimentation and learning. The process was first tried and tested in the policies supporting EMU, from where it 'spilled' over into the field of employment.[178] Article 156 TFEU allows the Commission to 'encourage cooperation between the member states and facilitate the co-ordination of their action in all social policy fields'. In contrast to the 'soft law' competence under Art 153(2)(a) TFEU, which is subject to the exclusion of freedom of association and the right to strike by Art 153(5)[179], Art 156 explicitly refers to the 'right of association and collective bargaining'. Even though it does not provide for a legislative competence, it allows the Commission to engage in research, to produce reports and to encourage consultation on both national and international dimensions of these issues. Advocates of OMC consider it to offer a 'third way' between regulatory competition and harmonization, as it can also be used in areas which are not easily susceptible to regulation either because of the subject matter or because of a lack of clear Union competence.[180] In other words, it does justify Commission activity directly related to collective labour rights. In fact, according to Davies, Art 156 is only one of various elements in a much broader tendency to use 'soft law' elements in social policy. The Social Policy Agenda of the Commission outlines 'objectives' for the EU and member states both and identifies various types of 'action' to be taken in pursuit of these objectives. The Agenda is partly implemented through legislation but majority of actions do not involve any changes to existing law.[181]

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[177] Klabbers 2006, p. 1195.
[178] Barnard 2013, p. 672.
[179] It should be noted that, according to Reich 2008 p. 128, in a strict literal sense, Art 153(5) only excludes Community legislation in the area of strikes and lock-outs, but it does not limit the effects of primary law on industrial action.
[180] Barnard 2013, p. 673.
[181] Davies 2005, p. 198: For example, the Commission Communication on the Social Policy Agenda of 28 June 200, COM(2000) 379 final determines such objectives of developing the social dialogue at EU and national level. It designates actions that include: 'launch a reflection group on the future of industrial

The OMC is an integral part of the 'soft law' approach. The idea is that EU should set the goals for social policy and the member states would still have discretion as to how these goals are reached. In order to achieve precision to the process, the targets are still set and monitored for the member states. There are, however, no sanctions for failure to meet these targets and the idea that member states would be able to learn from each other during the monitoring process is much emphasized. Regardless of the lack of sanctions, the soft law approach has clear advantages. Community law has long been criticized for being rigid and inflexible, failing to respond to different conditions in member states and industrial relations traditions. The soft law approach addresses, or might even overcome, these issues to a high degree. The risk of Member States' resistance to Community initiatives is reduced when these initiatives are not legally binding as it is unlikely that they would be considered threatening as such.[182] For these reasons, the soft law approach can be considered as a 'smart' regulatory technique as it maximizes the possibility of the acceptance of regulations and compliance with them. It does not, however, mean that the technique would not have its disadvantages. The vagueness is one obvious problem as the 'actions' do not involve targets clear enough against which the assessment of the progress of the Community and the member states would be possible. Furthermore, the Commission has indicated preference to keep the monitoring process at a high level of generality, which is clearly reflected in Commission Communication of the Scoreboard on Implementing the Social Policy Agenda of 6 February 2003, COM(2003) 57 final.[183]

Overall, the soft law competences are not very well suited for setting minimum standards as they lack strict enforcement procedures. There is still a role for hard-law harmonization in the EU. If a legally binding minimum standard is in place, the soft law becomes useful tool in encouraging member states to offer more generous level of protection. For the protection of collective labour rights it is not, however, able to take the place of a directive setting out minimum standards.[184]

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relations' and 'promote interaction between social dialogue at European and national level through national round tables on issues of common interest --.'
[182] Davies 2005, p. 198.
[183] Davies 2005, p. 199.
[184] Barnard 2013, p. 673; Davies 2005, p. 199.

4.2 EU's Reliance on Member States

There are a few issues regarding the EU's reliance on its member states in effective protection of collective labour rights. First, the trade unions and employers' associations have a long history of being consulted in the formulation of the social policy of the Community and thus the member states are expected to have trade unions and employers' associations that can actually participate in the legislative process at the EU level.[185] The desire to extend consultation reflects general concerns of the Commission and Council with 'good governance' and greater involvement of civil society in EU decision-making and implementation of its policies. This initiative is thus not entirely a new one, especially given the historical role of the European Economic and Social Committee in the EC.[186]

Because of Article 154 TFEU the Commission is obliged to engage in a two-stage consultation process with the social partners. In the first stage the 'possible direction of Community action' is to be taken into account prior to submitting proposals in the social policy field. Then, if the Commission considers the measure to be 'advisable' and decides to take action on a particular issue, the social partners must be consulted on 'the content of the envisaged proposal'. At this stage, the social partners may decide to reach an agreement themselves through the social dialogue procedure set out in Article 155. This allows them to take the matter away from deliberation by the Commission. The agreement may lead to contractual relations between the parties, which can be implemented either by the social partners at member state level or by a Council decision on a proposal from the Commission. An agreement on a matter covered by Article 153[187] may be implemented as a directive. Vice versa, an agreement on a matter not covered by Article 153 could not be implemented as a directive because this would fall outside the powers of the Community. This kind of an agreement could, however, be given effect through the collective mechanisms provided by the first part of Article 155(2). [188]

The General Court (ECG)[189] has pointed out that legislation which is enacted as a result of the social dialogue bypasses the European Parliament and thus its legitimacy should be

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[185] Davies 2005, pp. 177–178.
[186] Novitz 2005, p. 224.
[187] Or, in other words, labour law matters over which the Community has competence
[188] Davies 2005, p. 178; Novitz 2005, p. 224; Bamber et al. 2010a, p. 15.
[189] Or the Court of First Instance prior to the coming into force of the Lisbon Treaty.

sought from another source.[190] The legitimacy depends on the representativeness of the social partners which then again depends on the existence of thriving collective bargaining structures at the national level. The problem is that if collective bargaining is weak the legitimacy of Community law may be undermined.[191]

4.2.1 Representativeness at the European Level

The Commission has determined the criteria of representativeness in its Communication of 14 December 1993 and reaffirmed it in another Communication of 20 May 1998.[192] The criteria consists of three aspects which include that the social partner organizations should (1) be cross-industry or relate to specific sectors or categories and be organized at European level, (2) consist of organizations which are themselves an integral and recognized part of member state social partner structures and with the capacity to negotiate agreements, and which are representative of all member states, as far as possible, and (3) have adequate structures to ensure their effective participation in the consultation process. From these aspects, the second one is, according to Davies, of particular interest. The Commission seems to determine the representativeness of European organizations by looking at the national role of their constituent parts and thus the question of legitimacy of the social dialogue at European level depends on the representativeness of the social partners within each member state.[193] The assumption seems to be that the EU member states effectively provide for adequate protection of freedom of association which, according to Novitz, is in itself questionable.[194]

The primary organization representing workers in the social dialogue is the European Trade Union Confederation (ETUC) of which members all are involved in collective bargaining and consultation at the national level and most are represented in the national delegation to the ILO. Even though its status has been challenged by other representative organizations, the ETUC remains clearly the most plausible candidate to represent workers

[190] For example, T-135/96 Union Européenne de l`Artisan et des Ptits et Moyennes Enterprises (UEAPME) v. Council [1998] ECR II-2335.
[191] Davies 2005, p. 179.
[192] COM(93) 600 final, para 24; COM98) 322, para. 1.2.
[193] Davies 2005, p. 179; Bamber et al. 2010b, p. 142.
[194] Novitz 2005, p. 224.

at the European level.[195] Nevertheless, the issue still persists as the legitimacy of the ETUC is ultimately derived from the legitimacy of national trade union federations. Davies points out the problem reasonably well using the UK as an example. Even though the vast majority of unions are affiliated to the TUC, it does not mean that it would cover all of them. The TUC is basically the organization that best represents unionized workers in the UK, and given that trade union members are a minority of the workforce as a whole, it is quite hard to argue that the TUC would be a good representative of all workers. Furthermore, it is highly likely that the structural problem s will only expand with any enlargement of the EU, as some of the recently acceded countries have very low union density.[196]

For the same purposes, employers are represented by three main organizations: the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Association of Craft Small and Medium-Sized Enterprises (UEAPME), and the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP). The most important of these organizations is UNICE which consists of the members who are the main cross-industry representative organizations of private employers in each member state. These organizations have a strong, established position in as social partners in their respective member states because of their involvement in social dialogue and representation at the ILO. Unfortunately it is quite hard to determine their representativeness at the national level because of the fact that it is hard to acquire reliable information about the number of firms who are members of national organizations or the number of people they actually employ. And, the case remains the same on the available data on public sector organizations.[197]

It could be possible to answer the question of legitimacy by simply stating that the social partners can be representatives even if they do not have widespread membership. For instance, ETUC could be considered to act in the interests of both unionized and non-unionized workers. The problem here would be that a role similar to NGOs is problematic

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[195] Davies 2005, pp. 179–180; Bamber et al. 2010a, p. 14.
[196] Davies 2005, p. 180; Bamber et al. 2010a, p.16.
[197] Davies 2005, pp. 180–181; Bamber et al. 2010a, pp. 14–15; This has been confirmed by a study of Institut des Sciences du Travail – Université Catholique de Louvain, Report on the Representativeness of European Social Partner Organisations (1999).

for organizations that are usually membership-based. The interest of the non-unionized workers does not always go hand in hand with their unionized counterparts and, if conflicts arise, union leaders would be forced to represent the interests of unionized workers over other considerations. The same would be true regarding the employer associations as well.[198] Moreover, it should be emphasized that there are no actual guarantees that all interested social partners are even given the opportunity to participate in the EU social dialogue process, as the questions of representativeness are solved at the stage at which the Commission recommends adoption of a directive giving legal effect to the collective agreement.[199]

4.2.2 Relevance of the National Structures

As Community legislation permits implementation of the obligations it contains by collective bargaining it therefore relies upon collective bargaining structures at the national level. While it can be considered a positive aspect that this approach involves the social partners at the national level in the implementation of Community law and respects the desire of member states to use collective agreements over legislation as a means of fulfilling their obligations, it is nevertheless possible that the social partners might bargain over more basic obligations than what was intended to be left to the discretion of the Member States. There is no regulation concerning the process by which decisions are reached in the social dialogue. The relationship between the residual implementation obligation and the collective implementation is hard to determine and, on behalf of the Commission, it is particularly difficult to monitor the compliance of Member States' implementation measures when they consist of collective agreements and legislation both. The acceptance of implementation through collective agreements may prove to be hazardous as the Community cannot reinforce it with proper regulation of the bargaining process.[200]

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[198] Davies 2005, p. 181.
[199] Novitz 2005, p. 225; T-135/96 UEAPME v. Council [1998] ECR II-2335.
[200] Davies 2005, pp. 182–183; Novitz 2005, p. 225; Furthermore, the CJEU may not be in the best position to evaluate the efforts of the social partners, which the case 312/86, Commission v. France, [1998] ECR 6315 demonstrates: the Court ruled that implementation by social partners had failed because only sixteen collective agreements had been renegotiated to take account of the Equal Treatment Directive. Bercusson (2009, p. 453) points out that there are inconsistencies in the Court's reasoning. The evaluation of necessary

Lack of formality also introduces some other issues, mainly because of the fact that the industrial relations approach it reflects seems to overlook the public regulatory aspect of these proceedings and appears to slightly inappropriate in a context where the bargaining powers of social partners are far from what they would be in their national counterparts, as there are no European-level entitlements or practical means to call industrial action.[201]

4.3 A Short Comparison of the National Industrial Relations Systems

Every country has a history and legacy of institutions, procedures and customs of its own. With respect to legal research, it is essential that the different policies and practices are understood in their historical and political-economy context and with respect to actors' strategies as well as domestic and supranational institutions. As every country and their respective systems are inevitably affected by external circumstances and internal factors, they are under constant change and are best described as anything but static.[202] Considering this, the relevance of the historical context in which the national structures are formed in cannot be overemphasized.

One of the main features of the Nordic industrial relations systems is their high degree of organization of both social partners. The levels of trade union membership are high in both the private and public sectors. For instance, in Sweden unionization is above 70% even though the number has actually declined in the 21st century. Especially white-collar workers, academics and the public sector are highly unionized in all of the Nordic countries. Similarly, a high percentage of employers belong to employer organizations. Generally, somewhere around 95% of all employees are covered by collective agreements. The collective agreements are legally binding to all employees and all employers who are members of the signatory organizations.[203]

At present Germany is the most industrialized and populous country of Europe and its economy has become extensively integrated to the EU. The sudden integration of a

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amendments should be assessed against the number of agreements containing clauses that need amending, and not against the total number of agreements altogether.

[201] Novitz 2005, p. 226.

[202] Bamber & Pochet 2010, p. 1.

[203] Bamber et al. 2010a, pp. 24–25; Bruun et al. 2011, p. 20.

socialist economy into a capitalist social-market economy after the unification of the two halves of Germany in 1990 created challenges for the political economy which can still be seen today. For example, despite the current state of industrialization, and the comparatively high level of total employment rates in the unified Germany, the employment relations are far less institutionalized and established in the eastern parts of the country.[204] In comparison to other OECD or EU member states the level of industrial disputes has been notably low throughout the last decade.[205]

For the past few decades, the UK employment relations have gone through important changes. The post-1979 governments led by Margaret Thatcher introduced changes which accelerated a tendency to diminish union movement in terms of its size, shape and influence in job regulation. After 1997, the succeeding new-Labour governments did not reverse these previous changes in general but did, however, introduce foundations of minimum standards in the workplace.[206] Regardless of these efforts, many of the current restrictive elements in UK labour law are directly descendent from the actions of the Conservative Government reforms between 1980 and 1993.[207]

The means how the government sets employment relations policy and legislation is through Department for Business, Innovation and Skills (BIS). The EU and CJEU have strong role in the determination of UK employment law. The central union federation is the Trades Union Congress (TUC), which has 66 affiliated unions representing almost 7 million workers in total. TUC determines its policy in annual Congress and between congresses this responsibility is delegated to its General Council. The employers are represented by national employer associations, from among which the Confederation of British Industry (CBI) represents larger employers who affiliate through their employers' organization. These associations are, for example, Engineering Employers' Federation

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[204] Bamber et al. 2010a, p. 17.
[205] Zumfelde 2005, p. 284.
[206] According to Bamber et al. 2010a, the most important of these foundations were a national minimum wage, a right not to work more than forty-eight hours a week, four weeks' paid leave, a discipline and grievance procedure along with a right to be accompanied by a union official or work colleague, a right to no-discrimination (on grounds of religion, belief, sexual orientation, or age), a right to union recognition for collective bargaining in specific circumstances, equal treatment for part-time and fixed-term employees compared with their full-time colleagues, protection for public-interest disclosure, paternity leave, adoption leave, parental leave and time of for domestic emergencies, and a right for parents of children up to 6 years of age to request flexible working with an obligation on employers to treat the request seriously
[207] Ryan 2005, p. 719.

(EEF) and British Printing Industries Federation (BPIF). They provide support for employers on questions about employment related matters and represent employers in European Federal Organizations (EFOs). Other associations are, for example, the Institute of Directors, the Federation of Small Businesses, the British Chambers of Commerce and the Chartered Institute of Personnel and Development (CIPD).[208]

Collective bargaining influences the contracts of somewhere around 45% of British employees and is much more widespread in the public sector. The public sector forms approximately 20% of the total workforce and around 70% of the public sector employees are covered by collective bargaining. Otherwise, the influence collective bargaining varies greatly and merely 22% of private sector employees are covered. Union membership densities are around 16% in the private sector and 56% in the public sector leading to an average of 28% in total. UK has a voluntarist approach to employment relations and a system of co-determination does not exist. Government ministers and other officials do not play an active part in the settlement of industrial disputes in general.[209]

4.3.1 The Status of Social Partners

In Sweden, the right to unionize and the right for unions and employees to negotiate on issues concerning employees i.e. hiring and firing, reorganizations etc. is provided for in the Co-determination Act (*Medbestämmandelagen*). Unions are recognized as legal entities and their representatives have the right to conduct their union related duties as protected by law. The unions are responsible for organizing employee representation without independent channels. Officials are, for example, provided for with a right to paid leave from employment for union work and with an office to conduct their work. Employees in companies and public-sector organizations employing more than twenty-five people can have two representatives and two deputies on the board. The decision of such representation is made by local unions having a collective agreement in force with the employer. In principle, the unions represent only union members.[210]

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[208] Bamber et al. 2010a, p. 29.
[209] Bamber et al. 2010a, p. 30.
[210] Whereas works councils represent all employees; Bamber et al. 2010a, pp. 144–145; Herzfeld Olsson 2005, p. 689.

In Finland and Sweden there are no general restrictions to the right to take industrial action when there is no binding collective agreement in force but the parties are bound to refrain from industrial action for the duration of the binding agreement. When the collective agreement has expired i.e. parties are not bound by a collective agreement they are free to initiate strikes and lockouts. The initiator of an industrial action has to give notice to the other party and inform the National Mediation Office (in Sweden) or National Conciliator's Office (in Finland). For strikes and lockouts, the approval in Sweden is determined by the appropriate board whose decision is not, however, binding. Under specific circumstances these decisions have though precipitated the enactment of a special law.[211] Nevertheless, there are no statutory regulations governing legitimate industrial actions. The social partners have established so-called basic agreements instead which are in force even if there is no binding collective agreement. Typically these cover, for example, the continuous functioning of essential services despite of possible industrial action in order to protect people and property. Rules exist for regulating disputes that threaten the public interests and rules that are intended to minimize other forms of industrial action than strikes, blockades and lockouts. However, there are no rules that would require an industrial action to be proportionate.[212]

Overall, the social partners enjoy extensive self-governance with very little state supervision. In the absence of statutory regulations, social partners have considerable freedom in running their internal affairs. Also, there are very few statutory provisions regulating the collective bargaining system and, in principle, the partners decide for themselves how to operate the system. For example, in Sweden the collective bargaining system is somewhat centralized[213] and the bargaining takes place on three levels in the private sector: at national cross-sector level between national employer and employee organizations, at sector or branch level, and at company level. Legally binding collective agreements can be concluded at all levels.[214] Collective agreements are signed by unions with either an employers' association or an individual employer. If the agreement is made with an individual employer it is considered as a substitute agreement. The agreement has

[211] Bamber et al. 2010b, p. 158.
[212] Bruun et al. 2011, pp. 20–21; Herzfeld Olsson 2005, p. 691.
[213] Even though currently the system is under a process of decentralization, as collective bargaining on pay and conditions of employment no longer takes place at national level.
[214] Bruun et al. 2011, p. 21.

to be in writing and to include certain stipulated subjects, i.e. employment conditions. In general, the collective agreements cover matters over pay, working hours and overtime, but additional employment conditions such as insurance and holidays may be set as well. The agreements are usually applied throughout whole Sweden for a particular sector. Collective or substitute agreements signed in a specific workplace cover all of the employees including non-unionized workers. Such an agreement should always be signed if it is requested even by a single employee. Contrary to a few other countries, however, these agreements cannot be extended to other enterprises, i.e. a specific agreement for a workplace concerns that workplace per se.[215]

The trade unions hold the primary responsibility of supervising the realization of employee rights. The role of state inspectors is, in principle, limited to the control of the workplace environment. Traditionally, the Nordic model is well described by a spirit of cooperation in the labour market between the trade unions and the employer organizations.[216] However, the ideological and political consensus on self-regulation does not mean that conflicts would be impossible. For instance, recourses to different strategies in order to strengthen the respective interests of the partners can lead to calls for state intervention in the regulation of industrial relations. Usually, when such calls for legislation come from employer organizations, the purpose is to restrict trade union power. Calls from trade unions are typically requests for further statutory provisions either strengthening their bargaining position or reducing employers' powers.[217]

The German system of employment relations is characterized by a high degree of legalization. The principle of bargaining autonomy is, however, guaranteed and respected by all state authorities and thus there are no governmental interventions at any stage of collective bargaining.[218] The unions are based on the principle of industrial unionism (*Industriegewerkschaften*) which is why the total number of unions is rather low in

[215] Bamber et al. 2010b, p. 158; Also worth mentioning is that collective bargaining had suffered some decentralization in the 1980s, but the 1997 Industrial Agreement (Industriavtalet) eventually led to a new level of cooperation at sector level. Currently, these types of agreements are considered as main agreements, or central agreements, and are concluded by an employers' association and a union. A local union may sign a local agreement with an employer to complement the main agreement. For instance, pay levels are typically set locally.
[216] Bruun et al. 2011, p. 22.
[217] Bruun et al. 2011, p. 22.
[218] Bamber et al. 2010a, p. 19: It should be kept in mind that Germany is a federalist state, even though the impact of federal states on the employment relations system is quite limited.

comparison to many other Member States. The primary actors at the national level are the Confederation of German Employers' Associations (*Bundesvereinigung Deutscher Arbeitgeberverbände*, BDA) and the German Trade Union Federation (*Deutscher Gewerkschaftsbund*, DGB). Between the mid-1990s and the early 200s the number of DGB affiliates was reduced from sixteen to eight by takeovers and mergers. Two of the biggest unions form almost 70% of all DGB-affiliated union memberships. The density ratios have declined, however, to a level of merely 20% which has led to financial losses and questions of legitimacy for the unions. From the employers' perspective, Germany belongs to a group of countries that have interrelated forms of interest representation, that is, general or trade associations and specific employers' associations. There is a strict division of labour between these two groups: general associations are responsible for representing more general interest while the latter are responsible for social policy issues and employment relations including collective bargaining. [219]

Certifications and recognition of unions has never been a major issue in Germany and there are only a few general legal requirements concerning unions. In principle, unions must promote the working and economic interest of their members' as well as conditions of work. The membership related requirements must be on a voluntary basis and it has to be independent from the 'other side of the industry', all state authorities and political parties, and, it must have a democratic structure. Finally, it must be able to exert pressure on their opponent, and they must recognize the law on collective bargaining.[220]

The legal base for collective bargaining is found in the Collective Agreement Act (*Tarifvertagsgesetz*). The Act includes the principle of bargaining autonomy and excludes all kinds of governmental interference. The primary type of collective contracts is between employers' associations and unions at regional and sector level and the national sector agreements have very little importance. Collective agreements are used to cover all of the issues related to working conditions, the most important being wages and working hours, but they could also cover other issues such as overtime premiums, holidays, training etc.[221]

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[219] *Wirtschafts-* or *Unternehmensverbände* and *Arbeitgeberverbände*; Bamber et al. 2010a, pp. 19–20.
[220] Bamber et al. 2010b, p. 144.
[221] Bamber et al. 2010b, pp. 156–157; One interesting fact is that the relationship between provisions in collective agreements and legislated minimum standards is not always easy to determine. There is no legislated minimum wage and, as far as other conditions are concerned, some minimum standards are

The certification officer maintains a list consisting of unions and employers associations in the UK. The enlisting is highly essential for the unions, as it is required in order to apply for a certificate of independence which is needed to apply for statutory recognition under the Employment Relations Act 1999. The certification officer does not have powers to investigate the affairs of a union in general, but may adjudicate on specific complaints of alleged breaches of statute or certain union rules and, under certain circumstances, appoint an inspector to investigate the financial affairs of a union. Under the ERA 1999, a union can obtain recognition by the employer for collective bargaining purposes if 40% of the relevant workforce votes for this and constitutes a majority in the ballot. The same Act also established a similar procedure for de-recognition of a union after three years of statutory recognition. When the decisions of application related to statutory recognition and de-recognition are not agreed on voluntarily, they are handled by the Central Arbitration Committee (CAC). The CAC also settles disputes between unions and employers when the question is about disclosure of information for collective bargaining purposes.[222]

There is no general right for the unions of workplace entry in the UK. Employees are, however, entitled to be accompanied to disciplinary or grievance hearings by a companion who can be a union official. As a part of a lawful picket, union officials are also able to attend a workplace as long as they are accompanying and representing an employee for the purpose of peacefully obtaining or communicating information, or if they are peacefully persuading any person to work or abstain from working. [223]

Collective bargaining in the UK is generally based on voluntarism. Under certain circumstances the ERA 1999 does provide statutory recognition for unions, which the CAC can also enforce on employers. Regardless of this possibility, most new union recognitions have been made on a voluntary basis and the interference of the CAC is rare. There is a method for collective bargaining set out in the Trade Union Recognition Order 2000 which the CAC has to consider when imposing legally binding methods of conducting collective bargaining on the parties. Most of the collective agreements in UK provide for workplace or enterprise bargaining and there is very little room for pattern

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typically set by legislation but supplemented and improved by collective agreements; see also, Zumfelde 2005, p. 277.

[222] Bamber et al. 2010b, pp. 145–146; Ryan 2005, pp. 732–733.

[223] Bamber et al. 2010b, p. 146; Ryan 2005, p. 738.

bargaining. The procedure of statutory recognition provides for recognition for the purposes of wages, working hours and holidays. Voluntary collective agreements have wider scope of bargaining and can include, for example, topics about training, redundancy, sick pay, equal opportunities etc. Nevertheless, legislated minimum standards apply to all employees and workers and cannot be reduced to a level below these definitions.[224]

4.3.2 The Right to Take Industrial Action

Unlike in other Nordic countries, the right to take industrial action is explicitly protected by the Constitution of Sweden. The level of protection does not, however, reach the individual employees. The right is reserved for trade unions, individual employers and employer organizations. Thus it is only trade unions that can effectively carry out collective actions. The rationale behind the rule is the fact that the right to take collective action is inseparable from the right to collective bargaining which, by definition, is a trade union right. Every worker, whether organized or not, is permitted to take part in official actions.[225] Furthermore, these rights cannot be restricted other than by law or collective agreements. Therefore it is impossible for the government to unilaterally restrict the right to take industrial action as such restrictions would require a law adopted by the parliament. In Finland there is no explicit provision regarding the right to strike in the Constitution, but the law is nevertheless very similar. The section on freedom of association has generally been interpreted to include the right to collective bargaining and industrial action. For instance, in the *Viking* case the parties agreed that the industrial action planned by the Finnish Union was not illegal under Finnish law. The restrictive element originated purely from EU law. In comparison to Sweden and Finland, the main differences in Denmark and Norway in this respect are that in the former there is a demand for proportionality and in the latter certain restrictions exist on the use of boycotts.[226]

Against the historical backgrounds of the Nordic industrial relations systems, the high level of scepticism with regard to EU legislation is not unexpected. EU legislation does not often permit exceptions in national legislation or collective agreements, but introduces a more restrictive element to the freedom of the labour market. The EU regulations are generally

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[224] Bamber et al. 2010b, p. 159; Ryan 2005, pp. 736–737.
[225] Herzfeld Olsson 2005, p. 700.
[226] Bruun et al. 2011, pp. 23–24.

seen to be in contrast to the Nordic concept that labour market regulation is primarily a concern of the social partners involved. When implementing the PWD, Sweden and Denmark had understood Article 3.8 of the Directive[227] as a "loophole" in the PWD designed to enable Nordic countries to use their own systems. After the *Laval* judgment, however, it would seem that the drafters of the PWD had another purpose: a model, in which a Member State may decide that a particular collective agreement should apply to posted workers. And based on their misinterpretation, neither Sweden nor Denmark took any direct decision to implement this possibility.[228]

In Germany, the freedom of association is protected by the Constitution in two variants. In the negative form, it means that employees can refrain from joining any interest organization and in the positive sense it means that no individual can be prevented from joining. The freedom of association is considered to include both the freedom of taking collective action and the right to strike. The substantive content of the freedom of association is primarily determined by case law, which actively seeks to guarantee a balance of power and strength between social partners with regard to collective bargaining. The social partners have the right to negotiate collective agreements independently from government influence. Any restrictions to the freedom of association require statutory basis and justification by other fundamental rights or other rights guaranteed by the German Constitution and must also hold up to the principle of proportionality. [229]

Regardless of the high level of legalization in employment relations legislation, there is an exception. In Germany's case that is industrial action. The rules for industrial action have been established by major decisions of the Federal Labour Court and the Constitutional Court. The unions are the only party actually allowed to provoke a strike. If a strike has not been approved by a trade union it is determined as a wild-cat strike, and illegal by definition. According to the Federal Labour Court, strikes must be aimed ted to the

[227] The article states that "-- In the absence of a system for declaring collective agreements to be of universal application --, Member States may, if they so decide, base themselves on -- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory."
[228] Bruun et al. 2011, p. 25.
[229] Bücker et al. 2011a, p. 50–51; Zumfelde 2005, p. 276, 278.

conclusion of collective agreements. Therefore a strike aimed to achieve goals that cannot be covered in collective agreements is also illegal.[230]

The situation in the UK is quite different to the one in many other Member States. There is no general right to strike. Therefore strikes can, to a certain extent, even be discouraged by criminal, civil and administrative means.[231] UK common law understands strike action as a breach of contract and, additionally, in circumstances of action short of a strike, and employee may breach the fundamental term of co-operation implicit within the contract of employment. Thus an employee may, for example, forfeit their wages even in respect of a partial strike. Employees might also be vulnerable to dismissal, unless certain statutory protections apply. Trade unions are generally liable for damages by committing the tort of inducing a breach of contract by the employee, and there are also several other torts which enable employers and third parties affected by industrial action to hold trade unions liable for losses resulting from industrial action.[232] Industrial actions executed in pursuit of collective bargaining are allowed as long as the action can be framed within the definition of a lawful trade dispute. British labour legislation finds its foundations in the first Trade Disputes Act 1906 and the legislative basis of industrial relations is mainly contained in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A). UK legislation provides unions and strikers with a limited immunity from a specific range of common law actions in tort. Hence, when a court approaches an industrial action, the starting point is the illegality of the action, from where the Court moves to consider the available statutory immunities from prosecuting. This immunity is set out in the (TULR(C)A).[233]

Industrial actions can be protected as long as the legal requirements are met: (1) the dispute is between workers and their employer, (b) a secret postal ballot has been held and the majority of members voting have supported the action, and (c) detailed notice about the proposed action has been given to the employer at least seven days before it commences. Otherwise, there is no protection for industrial actions as these would be considered ‘unofficial’. Basically this means that, for instance, secondary actions are usually, if not

[230] Zumfelde 2005, p. 284.
[231] Bowers 2002, p. 514; such as income support benefits may be withheld from strikers.
[232] Hayes et al. 2011, p. 199.
[233] Hayes et al. 2011, p. 201; Ryan 2005, p. 721.

always, defined as unofficial.[234] The requirement of a ballot has, however, proven to be problematic. For instance, in *Shipping Company Uniform Inc v. International Transport Workers Federation* [1985] ICR 245, the High Court stated that it would have been necessary to hold a ballot prior to the industrial action regardless of the fact that under the union's rules clearly stated that it had no individual members. A ballot would have been de facto impossible to execute, but the action was still deemed illegal.[235]

4.3.2.1 Common Law Specifics

Currently, there are eight ways in which common law and status regulate and control strikes and other industrial action, which are (a) breach of the worker's contract of employment, (b) liability of unions for economic torts of including breach of contract, interference with contract, or trade or business intimidation and conspiracy, (c) government emergency powers, (d) residual criminal liability (mainly concerns conspiracy and control of picketing), (e) a unions member's right to remove authorization by the union for strikes and industrial action held without a proper ballot, (f) the right of a member to complain against his union about unjustifiable discipline (TULR(C)A 1992, ss 64 to 67), (g) the right of a member to complain of indemnification by his union of individuals who take part in industrial action (TULR(C)A 1992, s 15), (h) the right of a member to complain on unlawful application of union assets by trustees of unions (TULR(C)A 1992, s 16).[236]

There are no requirements in British law that the aims of collective action are proportionate to the harm such an action causes and there are no requirements that the means used are proportionate to the objectives. It is sufficient that the stated objectives of the industrial action fall within those set out in s.244 TULR(C)A. From the trade union perspective this is, however, heavily restrictive, as the requirement for a trade union to justify its action is based upon the degree to which it has met its statutory obligations to plead immunity with

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[234] Bamber et al. 2010b, p. 159.
[235] Ryan 2005, pp. 736–737; According to Staughton J, the way out would have not been to amend the requirements to hold a ballot but for the union to change it rules. This reasoning does not, however, pay too much consideration to the fact that this would alter both the character and legal position of a federation to treat the members of its membership organizations as its own members too.
[236] Bowers 2002, p. 515.

the Court.[237] For the purposes of TULR(C)A 1992, ss 237 to 239, the concept of 'strike' remains, however, undefined. There are some references by, for example, the EAT for the definition of industrial action for continuity purposes in Sch 13 to the EPCA 1978[238] and in a contractual case of *Tramp Shipping Corporation v Greenwich Marine Inc. [1975] ICR 261*, the latter being seemingly more appropriate. In *Bowater Containers Ltd v Blake, EAT 522/81*, an individual protest did not qualify as industrial action. As Bowers quotes, the Master of the Rolls considered that *'a strike is a concerted stoppage of work by men done with a view to improving their wages or conditions or giving vent to a grievance or making a protest about something or other or sympathising with other workmen in such endeavours'.* Furthermore, it has been quite difficult for the UK courts to identify and distinguish a strike from other forms of industrial action. [239]

The actual effect of industrial action on the individual contract itself is rarely, according to Bowers, 'of direct importance' as the employers do not wish to disturb post-strike calm by resorting to courts in order to sue individual workers for these breaches.[240] The effect of industrial action on the contract is still important, as it indirectly provides the illegality basis for the economic torts of intimidation, inducing breach of contract, and conspiracy. Thus the employer can seek redress from strike leaders and unions unless they are acting in contemplation or furtherance of a trade dispute. The most valuable remedy is still, however, an injunction to prevent a strike altogether.[241] Regarding every forms of industrial action, and especially strikes, UK courts frequently grant injunctive relief where the employer has made out a 'good arguable' prima facie case and on the basis of a 'balance of convenience' test. Employers in general prefer to take pre-emptive action rather than pursue a claim for damages after a strike for two reasons. First, an injunction stops the strike action on its tracks. Second, s22 of TULR(C)A places a cap on the level of damages which can be awarded against a trade union found liable in tort, so if the industrial action proceeds, the employer might not be fully recompensed for the losses. If it is the employer that is likely to suffer economic loss by virtue of a strike, UK courts almost invariably grant interim injunctive relief to the employer. This state of affairs is something

[237] Hayes et al. 2011, p. 205.
[238] Now ERA 1996, ss 210–219 and 235(5).
[239] Thompson v Eaton Ltd [1976] ICR 336; Bowers 2002, p. 336, 337.
[240] Still, this has happened, for instance, in Boxfoldia v NGA [1988] IRLR 383.
[241] Bowers 2002, p. 516.

that has been heavily criticized by the ILO CEACR and the Council of Europe's Social Rights Committee.[242]

If we turn the focus into other forms of industrial action, the answers would seem to be even vaguer. The categories are everything but closed. Bowers explains that for the purposes of TULR(C)A 1992, ss 237 to 239, tribunals and appeal bodies have been more or less reluctant to limit the interpretation of what may constitute other form of industrial action. The question is rather bound and answered with respect to the specific circumstances of each case. The phrasing includes (at least) actions of go-slow, work-to-rule, concerted non-cooperation, and probably picketing of the employer's premises. Typically these types of activities break the contractual obligation that an employee shall not disrupt the employer's enterprise.[243] These types of contractual breaches are still not the only types of action that may constitute 'other' industrial actions. In *Faust v Power Packing Casemakers Ltd [1983] IRLR 117*, the Court of Appeal held that a concerted withdrawal of cooperation over admittedly voluntary overtime also constituted an industrial action. It was enough that the action was conducted with the intention of drawing benefits from management and applied actual pressure. [244]

For lock-outs the ERA 1996, s 235(4) provides a definition for the purposes of continuity of service. A lock-out is defined as 'the closing of a place of employment, suspension of work, refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute, done with a view to compelling those persons to accept terms and conditions of or affecting employment'. This definition was applied in *Fisher v York Trailer Co. Ltd [1979] ICR 834*, but it is not fully conclusive. The Court of Appeal has taken a broader view after. For instance, in *Express & Star Ltd v Bunday [1988] ICR 379*, the Court decided that the definition of a lock-out is not applicable word for word. Nevertheless, according to May LJ the definition may indicate the sort of ingredients that one should look for. May and Croom-Johnson LJJ both held the question of breach of contract as being a 'material consideration' when determining if there was a lock-out under

[242] Hayes et al. 2011, p. 208; see also *infra*, note 345 at p. 94.
[243] Secretary of State for Employment v ASLEF (No. 2) [1972]2 QB 455; Bowers 2002, pp. 336–337.
[244] Bowers 2002, p. 337.

the circumstances of the case.[245] In his dissention opinion Glidewell LJJ did, however, regard the aspect of an employer refusing to let all employees work unless they undertake to perform the terms of their contract as a matter of law and thus unable to constitute a lock-out. The Court of Appeal eventually ruled that it was correct as a matter of fact in determining that the employees were taking part in industrial action at the date of their dismissals. The employer was not conducting a lock-out.[246]

4.3.2.2 Dismissals

In the UK, the protection from dismissal in response to strike actions is more limited than in other Member States. Both the ILO CFA and CEACR have criticized this because they consider that workers should be entitled to take legitimate and peaceful industrial action without the threat of dismissal. The employer's power to dismiss a worker in this respect derives from the breach of the contract of employer. There are, however a few limitations to this, such as the protection from selective dismissal[247] and the time-limited protection[248], but the worker must be taking part in a protected industrial action to qualify for protection. This means an 'official' action that will not give rise to liability in tort.[249]

Nevertheless, a strike suspends the contract of employment. What follows is that there is no right to pay during a strike until normal service has been resumed.[250] There are other uncertainties as well. Even though the employers' sue strikers for damages only rarely, the calculation of damages has proven to be a major difficulty for the UK Courts. The courts have prima facie rejected proportionate shares of overhead expenses as the appropriate measure[251], but have awarded the claimant for costs of hiring substitutes[252]. Obviously if, for instance, a factory would be running at a loss, chances are that a strike would actually

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[245] The case involved a dispute over the introduction of new technology into a local newspaper, during which employees' access to the premises where they worked was refused, only exception being one single door manned by management members. When employees arrived through this door, they were consequently taken into a meeting at which they were asked if they would be willing to work with the new equipment. Everyone refusing to work was suspended without pay. The question was whether or not there was a lock-out for the purposes of the former s 62.
[246] Bowers 2002, p. 337.
[247] An employer must basically dismiss either all, or none, of the striking employees.
[248] Employees are shielded from dismissal for a protected period of twelve weeks.
[249] Hayes et al. 2011, p. 213.
[250] Bowers 2002, p. 517; Notably some other forms of industrial action do not necessarily lead to full loss of wages, i.e. work-to-rule and go-slow actions.
[251] Ebbw Vale Steel, Iron and Coal Co. v. Tew (1935) 79 SJ 593.
[252] National Coal Board v Galley [1958] 1 WLR 16.

enhance the company's profitability by reducing wage costs and only nominal damages would be possible to secure.[253] Overall, the situation is clearly more uncertain and even problematic from the viewpoint of the individual strikers than it is, for example, their Nordic equivalents.

4.4 Industrial Relations in the Aftermath of the Laval Quartet

The Laval quartet has shown that the way jurisdiction is regulated has a definite impact on the outcome of the litigation related to industrial disputes. As far as possible, there should be correlation between the applicable law and the competent Court. This is especially true in the field of collective labour law, whose distinctive character and close link to the way the domestic labour markets function require great understanding of the way the rules operate.[254]

4.4.1 The Impact in the Reference Countries

The newly established PWD interpretations do have a potential of causing widespread consequences especially for Member States such as Sweden whose industrial relations regimes are based on the autonomous collective bargaining model. The free movement of services is supported to the maximum and Article 56 TFEU has direct horizontal effect on trade unions. It is quite understandable that the decision caused a shock-wave among the public and especially among union-activists in Denmark and Sweden. Sweden ultimately placed a Governmental Committee in early 2008 with the intention to find a solution which made sure that both the Swedish labour market model would be preserved and EU legislation would be fully respected. The Committee published a report in December 2008, which was heavily criticized by both sides of the social partners. The parliament did, however, adopt certain amendments to the labour law based on the Committee's proposals, including a statutory provision on the right to take collective action against an employer posting workers to Sweden.[255]

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[253] Bowers 2002, p. 518.
[254] Bücker et al. 2011b, pp. 355–356.
[255] Bruun et al. 2011, pp. 28–29; This provision contains three requirements needed to be met by the industrial action aimed at regulating conditions for posted workers in order to be legal. First, the demanded

As the posting employer is not in any way obligated to register, inform, or otherwise notice about the posting, the practical effect of the *Laval* amendments to Swedish labour law is that the posted workers are guaranteed with only a level of highly unstable protection. It has become arguably impossible to guarantee the rights set forth in the PWD for workers posted to Sweden. Also, there are no requirements to be represented in Sweden by a person with the right to represent the employer in a collective agreement. The Swedish government's intention was supposedly to reconcile the interest of Sweden in preserving the national labour market model and the EU requirement for free movement of services. Should the posting of workers become frequent, the preservation of the model as it is for the time being, is very doubtful. The amended law does not offer very extensive protection. And, it remains to be seen whether the amended law will be accepted by the Commission and the CJEU.[256]

All of the relevant CJEU decisions do have an influence on the German national system of industrial relations. This is most obviously demonstrated by the fact that previously the notion that freedom of association and the regulation of working conditions by national level collective agreements of the social partners was the dominating principle, and now the CJEU rulings have fundamentally changed this perception. Even though the *Viking* and *Laval* cases did not directly concern Germany, they have triggered a lot of debate on the possible consequences for freedom of association at a national level. These cases are, in fact, already having a restricting influence on industrial conflicts.[257] The *Rüffert* case, on the other hand, demonstrated an impact far beyond what was expected after *Laval*. As a consequence, German public procurement laws were changed. One of the major consequences of these changes is that those employers who were paying standard wages in accordance with collective agreements are now disadvantaged by the new provisions. The adoption of the new type of compliance clauses means that the number of collective

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conditions must correspond to the conditions contained in nationwide collective agreements generally applied in the relevant sector and the foreign service provider is to be informed that he may be confronted with demand for concluding certain kinds of collective agreement. Second, industrial action may be used in support of a demand for such conditions to be applied, but the trade unions may only demand conditions falling within the 'hard core' of the PWD, i.e. minimum levels as regards rates of pay or other conditions derived from the central sector agreement. Third, the demands must be more favourable to the posted workers than the conditions stipulated by the law itself. Nevertheless, even if this criterion is met, collective action is forbidden if the posted workers already enjoy equivalent or better conditions under their contract, whether collective or individual.

[256] Bruun et al. 2011, pp. 30–31, 39.

[257] Bücker et al. 2011a, pp. 97–98.

agreements that are, or can be, referred to is smaller. Public procurement legislation has lost its function as a supporting element to the autonomous system of industrial relations as it now only includes those collective agreements that are generally applicable. [258]

The national executive of the German Trade Union Congress, the DGB, has called for reforms. The DGB's opinion was that Art 3 of the PWD should be modified to clarify the fact that the article referred to minimum conditions and that Member States could set more favourable working conditions for their workers if deemed necessary. The DGB also demanded a limit on the duration of any posting and that contracts which are established solely for the purpose of posting abroad should automatically be subject to the legislation of the host country. Also, legislation was called to recognize internationally accepted workers' and trade union rights.[259]

Overall, the *Rüffert* decision has caused major problems and, at least, the danger of social dumping. Arguably the foreign bidders have a competitive advantage due to the lower wages and lower social security contributions allowing them to win more tenders. There is a significant difference between the recently adopted compliance clauses and those prior to *Rüffert*, with the new ones typically referring to existing, legally binding collective agreements. These agreements have a tendency to regulate only certain minimum standards that often are likely to be below actual local wages. Furthermore, these clauses are no longer applicable to public procurement in general, but only to sectors listed in the Posting of Workers Act (*Arbeitnehmer-Entsendegesetz*).[260]

4.4.2 Alternative Point of View: Laval Quartet and the UK

Hayes, Novitz and Reed identify three different effects of the relevant CJEU case law to the UK industrial relations system. First is described as the 'chilling effect' which inhibits industrial action. The 'ripple effect' undermines collective bargaining, and the 'disruptive effect' directs against UK industrial relations.[261]

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[258] Bücker et al. 2011a, p. 98.
[259] Bücker et al. 2011a, pp. 83–84.
[260] Bücker et al. 2011a, p. 85.
[261] Hayes et al. 2011, p. 227.

The *BALPA*[262] dispute illustrates the difficulties faced by trade unions intending to call industrial action when free movement issues are at stake. In this case BALPA had concerns about the terms and conditions under which pilots would be employed by a new British Airways (BA) subsidiary, which was to operate out of other European States on US routes. BALPA had accepted that the new subsidiary, Open Skies, would offer lower terms and conditions to new pilots and recognized a need to establish a separate bargaining unit for them. BALPA did not, however, receive the assurances and guarantees they desired in respect of career progression and terms and conditions for current BA mainline pilots, and thus a strike action was eventually planned. BALPA gave notice of industrial action. The response from BA was to claim any strike action would be restricting their freedom to provide services and cited the CJEU in *Viking* and *Laval* in support of their view and was prepared to sue for damages of £100 million for each strike day. BALPA applied to the High Court for a declaration of the legality of their action, but eventually realized that regardless of the outcome, the case would progress on appeal to the Court of Appeal and House of Lords, with the prospect of further reference to the CJEU. Strike action never took place.[263]

So far this is the only case concerning this issue in the UK. The precise circumstances in which the UK courts will regard free movement rights being at issue remains uncertain, but the CJEU judgments delivered in *Viking* and *Laval* give reason to suspect that this assumption will readily be made in cases which have a transnational dimension. UK trade unions are uncertain about the potential existence of a new tort – a breach of EU law, arising from the direct effect of free movement rights. This would be a tort for which no statutory immunity exists under the UK law and hence could introduce the prospect of an unlimited damages award against a trade union.[264] According to a fairly recent observation of the ILO Committee of Experts in 2010 on the application of Convention No. 87 addressed to the UK, the Committee took the view that there was an infringement of freedom of association by failing to provide sufficient level of legal protection for workers who were defending their occupational interests.[265]

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[262] British Air Line Pilots Association v British Airways litigation in 2008.
[263] Hayes et al. 2011, pp. 227–228; Bellace 2014, p. 64.
[264] Hayes et al. 2011, p. 228.
[265] Bellace 2014, pp. 64–65.

According to Hayes et al., the *Laval* judgment restricts the scope of legitimate objectives in the context of a dispute over trade union recognition covering posted workers. The CJEU considered industrial action aimed at establishing workplace bargaining to enable negotiations over minimum wages as illegitimate, as it would make it 'less attractive' and 'more difficult' for the foreign service provider to carry out their work in the host state. This constitutes a key exception to the basis on which UK legislation establishes the existence of a lawful 'trade dispute'. The relevant statutory provision make reference to an entitlement to take industrial action which relates primarily to the recognition by employers or employers' associations of the right of a trade union to represent workers in negotiation or consultation or other procedures relating to terms and conditions of employment. The employers of posted workers will, as it seems, be exempt from this fundamental tenet of UK labour law.[266]

In terms of scale and pure numbers, it would first seem that the PWD poses only a small problem for the UK. However, there are four times more EU workers in Britain than there are Britain's working elsewhere in Europe. And there is, without going into further details, mounting evidence of systematic abuse of foreign workers in large sectors of the UK employment market.[267] It is important to recognize that the CJEU case law in *Viking*, *Laval*, *Rüffert* and *Luxembourg* applies to the integration of employment protection for posted workers within the labour systems of host states. The UK Government is unlikely to ratify ILO Convention No. 94 in the near future, but at the same time is to a large extent insulated from the contradictions which arise in trying to align the decision in *Rüffert* with public procurement obligations in international law. However, the UK government has not indicated any reactions to public concerns relating to worker exploitation, the structural impact of migrant workers on the labour market and obligations to promote gender equality.[268]

[266] Hayes et al. 2011, pp. 230–231.
[267] Hayes et al. 2011, p. 235.
[268] Hayes et al. 2011, p. 239.

5 The Right to Strike as an International Human Right

The Laval quartet affects directly the scope within which collective actions are allowed. The wage and employment conditions against which an industrial action can be taken are limited in a way that is not exactly natural in Nordic countries. The *Laval* judgment makes it clear that there can be no collective bargaining with EEA companies when workers are posted to Sweden. A trade union cannot demand that a foreign service provider would enter into bargaining on the conditions applicable as it would present an obstacle to the free movement of services. Given that all forms of trade usually require some level of negotiation and that the restrictions emanating from EU legislation have an impact on areas in which collective bargaining can take place their implications should be questioned. This is especially true with regard to ILO Conventions 87 and 98.[269]

If the design and concept of the fundamental freedom of association at the national levels is compared with the acknowledged European freedoms it should be taken into account that the ECJ has not yet sufficiently determined what is meant by freedom of association.[270] Even though the parliaments in Denmark and Sweden have amended their labour laws adjusting them to their interpretation of the current legal situation, there still exists a certain amount of uncertainty. Regarding this, Bruun et al. have presented the following question: does the fact that the Lisbon Treaty has entered into force render the CJEU judgments obsolete? Could it be possible that Advocate General Cruz Villalón is right in his opinion and the situation has changed since Art 9 TFEU and the EU Charter of Fundamental Rights became primary law? The CJEU has not yet had to give an answer to these questions.[271]

The right to take industrial action is, by definition, a fundamental right recognized in several international instruments.[272] If we are determined to examine what the content and meaning of the concept of industrial action is, the international law binding on the Member States should be a natural starting point as it provides the very basis of the relevant standards. This is not to say, however, that comprehending the variety of regulations and

[269] Bruun et al. 2011, p. 38.
[270] Bücker et al. 2011a, p. 50–51.
[271] Bruun et al. 2011, p. 40.
[272] Dorssemont & van Hoek 2010, p. 230.

principles concerning the right to strike, or more precisely the freedom of association from which the former originates from, would be straightforward and easy. As will be demonstrated in this chapter, the issue encompasses both a high level of political sensitivity in the historical context and a complexity of interactions between various international instruments.

5.1 Labour Rights in a Shrinking World

Workers' rights are human rights, yet the international human rights movement devotes little attention to the rights of workers. At the same time, trade unions and labor leaders rarely enlist the support of human rights groups for the defense of workers' rights. A regrettable paradox: the human rights movement and the labor movement run on tracks that are sometimes parallel and rarely meet.[273]

The opening words of the classic essay by Virginia A. Leary remain true today. As she further continues, the catalogue of international human rights that includes work-related rights is broad: The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the conventions adopted by the International Labor Organization.[274]

One of the many effects of globalization at the international level that are often considered undesirable is the active pressure that is placed for the employers. These developments have, in my opinion, a few general similarities to the issues introduced by the EU's enlargement process. This is, for instance, due to competition on wages and terms of employment. Workers are the actual party suffering the most under such developments. This is due to the unfavourable consequences from the adverse effects of regulatory, or even more likely, deregulatory competition which is exercised by states and designed to attract investments. Developments like this are usually even further enhanced by sudden changes in economy, such as the 'credit crunch' related to the global economic crisis of the early 21st century. The crisis suppressed the available credit in the markets and thus had tremendous effect for the capacity of available private capital to invest. Obviously, when

[273] Leary 1996, p. 22.
[274] Leary 1996, p. 22.

there was no private capital available the states were facing an issue of having no investors for their financing. If labour relations are considered, every global recession always leads to, at best, restructuring of private and public enterprises. And in the worst case, recessions can lead to rather unfortunate circumstances where the amount of lay-offs is significantly increased. Either way, access to the labour market is considerably obstructed as the terms and conditions of work have a tendency to be diminished nevertheless.[275]

What has also been commonly accepted is that globalization significantly accelerates the interdependence development between states. The policies of one state are becoming more and more likely to have impact outside their territories. The capacity of a state to respect human rights, including labour rights, is definitely affected when foreign actors are introduced.[276] Non-state actors have their part to play in the process. Particularly the ones that benefit the most of globalization and the ones that are directly born out of it: multinational corporations and international organizations[277]. The concerns about the policy autonomy of states and their ability to control aspects of labour rights within their borders are emphasized as the international instruments, such as the Covenants of the United Nations, primarily bind states and it is only states that can be held accountable for any violations.[278] Nonetheless, the states are not the only actors that form, operate and engage in supranational (employment) relations on the global level.

From the perspective of labour rights the most important UN core human rights treaties are without doubt the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Their provisions offer the most detailed and specific coverage on labour regulation and, more importantly, they are not limited to any particular groups such as minors or migrant workers. Furthermore, an important note is that discrimination is not a prerequisite for their appliance as it is with some other conventions, although both Covenants do prohibit discrimination in relation to the enjoyment of labour rights.[279]

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[275] Novitz & Fenwick 2010, pp. 1–2.
[276] Joseph 2010, p. 342.
[277] WTO, IMF and the World Bank etc.
[278] Joseph 2010, pp. 342–343.
[279] Joseph 2010, pp. 331–332.

Both ICCPR and ICESCR make a direct reference to the ILO Convention No 87 on the freedom of association. Article 8(3) of ICESCR is of particular importance. This is due to the fact that the ILO Convention allows limitation on the rights of the members of armed forces and the police but, unlike the ICESCR, it does not include government administration. Thus, a state restricting the ability to join and form unions for public servants would be not only in breach of the rights stated in ILO Convention No 87, but with the Covenant as well.[280]

5.2 Social Rights as Human Rights

The idea of labour rights as human rights is inevitably a developing concept. For an evolving ideology it is fairly difficult to find two commentators providing an exactly alike opinion. Different theories such as religious, liberal, libertarian and socialist are merely examples that highlight this discretion. Tensions between and within different schools of thought have had a significant influence on the standards of what we consider as civil and political rights in distinction to social and economic rights today. In particular, the effect can be seen in the separation of individual rights from the collective rights. Historically speaking, this categorization has been debated a lot, but generally accepted. However, as Novitz and Fenwick suggest, this has also been somewhat confusing. That is, at least from the standpoint of applying human rights concepts in the interests of workers'. Controversially enough, the division still has permanently influenced the western liberal legal culture and the international labour rights.[281]

Transnational flows of goods and services are enabled by legal and institutional architectures consisting of the rules of contract and commercial law facilitating international trade and protecting property rights. The last few decades have also introduced regulation aiming to ensure the free flow of economic resources across borders and to the removal of regulatory barriers to trade. In general this type of regulation intends to success in the integration of national markets, but it also creates an additional market mechanism at the same time: a market for legal rules in which different regulatory systems

[280] Kaufmann 2007, p. 40.
[281] Novitz & Fenwick 2010, pp. 3–4.

compete with each other. As the states compete from the resources the quality and substance of the regulation they provide becomes an aspect of comparative economic advantage. And the effects of such competition can be seen directly in the social welfare systems in particular as they are creations of the same nation states.[282]

The economic, social and cultural entitlements, which were indeed debated over as early as in the seventeenth century, do not principally have similar position under the traditional human rights discourse as their civil and political counterparts. For workers and organizations seeking to pursue or protect their interests over collective bargaining or industrial action, i.e. collectively, the issue has always been quite straightforward. Traditional human rights discourse has not been, in many circumstances, sufficient in protecting these interests.[283]

The civil and political rights, in the sense of their liberal conception, can be understood as rights which operate in a way quite different to their economic, social and cultural counterparts. Traditionally, these rights are seen as acknowledgements for each individual person, which enact on a way of creating a personal space, or a 'sphere', within which every individual is free from the control of the state. By the traditional definition these are considered as negative rights, i.e. rights that are not to be subjected to any state action that would interfere with their existence but do not require any positive action by states in a strict sense. In contrast to the negative rights, the economic, social and cultural rights are considered as positive rights. These are considered as entitlements to individuals as well but, rather than prohibiting state interference, the rights require positive action by states in order to be implemented. The provision of social goods by states and the need for state action is the primary outline when specifying the definition of positive rights.[284]

5.3 ICCPR and ICESCR Labour Provisions

The relevant provisions regarding labour rights in the ICESCR are articles 6–10 and 12. The right to work is guaranteed by article 6. The right to just and favourable conditions of

[282] Deakin 2005, p. 38.
[283] Novitz & Fenwick 2010, p. 4.
[284] Novitz & Fenwick 2010, p. 14.

work is recognized in article 7. Article 8 states the right to join effective trade unions, which is an important aspect in balancing the relationships with employers and employees. Article 9 recognizes rights to social security which, accordingly, should include compensation rights and unemployment benefits as well. In general, article 10 guarantees protection and assistance for families and children, and the sub-provisions highlight these details with a right of paid maternal leave in 10(2) and protection against the exploitation of young people in employment context in 10(3). Article 12 obliges states parties to take measures in protecting the right to the highest attainable standard of health including industrial hygiene in paragraph 2(c) and to combat occupational diseases in paragraph 2(b).[285]

The ICCPR offers somewhat narrower protection of labour rights within the relevant provisions. Article 8 absolutely prohibits slavery and servitude as well as it prohibits forced labour. However, it allows some degree of derogation in the form of 'hard labour' designed to form a part of normal civic obligations.[286] Article 22 guarantees freedom of association, and is considered to include the right to form and to join trade unions. Therefore, this provision actually overlaps to some extent with article 8 of ICESCR in this respect. Finally, article 25(c) offers some amount of protection for the right of employment in the public sector.[287]

5.3.1 Evaluation of the ICCPR and ICESCR Obligations

According to article 2(1) of the ICCPR the state parties undertake *"- - to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*[288] Thus, the states are required, for example, to combat any form of forced labour directly under the provisions of article 8.[289]

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[285] Joseph 2010, p. 332.
[286] These obligations include sentences, military conscription and other forms of national service etc.
[287] Joseph 2010, p. 332.
[288] ICCPR article 2(1).
[289] Joseph 2010, p. 333.

However, the ICESCR does not offer a similar level of protection despite the fact that it is clearly the more important Covenant in relation to labour rights. The obligation provision in article 2(1) of ICESCR reads: *"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."*[290]

This phrasing does not directly oblige state parties to guarantee the rights provided by the ICESCR, but rather requires the states to 'try hard' in protecting the provided rights. The state parties are supposed to progressively increase the enjoyment of these rights accordingly in relation with available resources. In contrast to a direct requirement for state parties to ensure the protected rights, it is significantly harder to uncover any violations of the ICESCR with this kind of a soft obligation. Arguably it makes it also easier to evade findings of violations as it is usually easier to determine whether or not a state has protected provided rights to a sufficient degree than it is to determine whether or not the actions or measures taken by a state in order to meet the kind of 'appropriate means of attempt' requirement. In other words, it is difficult to prove accountability for obligations if it cannot be determined if any obligations have actually been breached.[291]

The reason behind the fact that the ICESCR offers weaker terms of state obligations than ICCPR may be found in the historical conceptualization of positive and negative rights. In the western liberal tradition, the economic, social and cultural rights are considered to give rise to positive duties in contrast to civil and political rights which are considered as negative by nature. This is clearly demonstrated by the main argument of the UN General Assembly for drafting two Covenants back in 1951 in the first place. It was exactly the enforceability and justiciability of civil and political rights that separated them from the economic, social and cultural rights in the debate.[292] As mentioned above, positive rights require actions for fulfilment, while the negative rights are met by simply refraining from certain actions. Obviously, it is very much more effortless to refrain from action, which

[290] ICESCR article 2(1).
[291] Joseph 2010, p. 333.
[292] Kaufmann 2007, p. 35.

effectively means doing nothing, than it is to undertake positive acts or responsibilities.[293] Upon closer examination of the justiciability of both Covenants in a historical context, this has been quite obvious. The ICCPR rights have always been justiciable, which has long been confirmed and promoted by the Optional Protocol (OP) to the ICCPR. The OP allows individuals to submit complaints against state parties to the Human Rights Committee (HRC). No mechanism allowing individuals to submit claims against states parties for breaches of human rights violations existed under the ICESCR, until quite recently. Thus it has been traditionally a long-term conclusion that the economic, social and cultural rights are indeed non-justiciable and inappropriate for judicial determination.[294]

However, today the scope of the reporting procedures, which are the main tools for monitoring compliance with the Covenants, has notably broadened. The UN General Assembly adopted an Optional Protocol to ICESCR on 10th December 2008, which provides a similar complaint system for individuals as does the one under the OP of ICCPR. The OP opened for signature on 24 September 2009 and as of February 2014 the Protocol has 45 signatories and 12 state parties. It entered fully into force on 5 May 2013. From the viewpoint of labour rights, these developments are welcome as the consensus on the matter clearly signals a certain change in the previously held ideas. Economic, social and cultural rights are not inherently non-justiciable.[295]

5.3.2 The Substantive Content of the ICESCR Rights

Even though the provisions of ICESCR are progressive and thus not as direct and demanding as the 'immediate' obligations provided by the ICCPR, these rights are still de facto obligations with meaningful content. Therefore, any retrogressive measures by state parties are, per se, violations. Naturally, such measures might be legitimate under certain circumstances. Deliberate retrogression might be necessary in order to reallocate resources to improve the enjoyment of one social right in favour of another. However, states do need to be able to demonstrate such necessity. Furthermore, there are also some immediate elements in the ICESCR. Such are, for instance, the exclusion of arbitrary discrimination in article 2(2). The CESCR has confirmed that this duty is, in fact, immediate. Implementing

[293] Joseph 2010, p. 333.
[294] Joseph 2010, p. 334.
[295] Kaufmann 2007, p. 35; Joseph 2010, p. 334.

ICESCR rights is thus never possible in a discriminatory manner. According to Joseph, any discrimination in regard to the rights stated in ICESCR is actually actionable under the ICCPR and the OP. States cannot give preference to certain segments of society when adopting these rights.[296]

There are also minimum essential levels for each ICESCR right. This interpretation was laid down by CESCR in its General Comment 3 on 'The Nature of State Party Obligations', where it is confirmed that there are presumptive, immediate obligations for states parties to provide 'minimum core' levels of ICESCR rights. Without exception, the states bear the burden of proof that such levels are not met due to true inability rather than unwillingness or neglect.[297]

The ICESCR does, however, surpass the level of obligations in comparison to ICCPR in one specific area. This is with the reference to the international assistance and cooperation. The CESCR has confirmed that cooperation for development and the realization of ICESCR rights is an actual duty for all States parties. This aspect of international expansion of obligations might set requirements for states to enact positive actions to improve the realization of economic, social and cultural rights in other states especially when the other state has no means or is unable to provide for minimum core rights itself.[298]

5.3.2.1 The Right to Strike

Within the sphere or economic, social and cultural rights, the trade union rights are protected under article 8 of ICESCR, which contains a specific clause of the right to strike. Article 8 with reference to the paragraph 1(d) reads: *"The States Parties to the present Covenant undertake to ensure the right to strike, provided that it is exercised in conformity with the laws of the particular country."* While such right is recognized and protected by many national laws and regional treaties, the details of national regimes vary from jurisdiction to another. The ICESCR provision remains as the only explicit and direct recognition of the *right to strike* in any global human rights instrument.[299] Neither of the two major ILO conventions on freedom of association refers to the right to strike as such.

[296] Joseph 2010, pp. 335–336.
[297] Joseph 2010, p. 336.
[298] Joseph 2010, p. 336; Macklem 2005, p. 72.
[299] Joseph 2010, p. 348; Macklem 2005, p. 62.

The ILO supervisory bodies have, however, held that the right to strike is one of the essential means available to workers and their organizations for promoting and protecting their economic and social interests.[300] Even though most strikes are, in principle, exercised by trade unions in a collective manner, the right to strike is stated clearly as an individual right in the Covenant. Conclusively, the provision should thus cover the protection of an individual worker in case of a dismissal based on exercising the right to strike. The article is a hybrid provision that includes both individual and collective rights at the same time.[301]

From the very beginning, article 8 has been controversial. During the preparations it was first argued and debated over whether the right to form unions should be included in the ICESCR at all. This was based on the fact that freedom of association was already protected by the ICCPR. It was further argued, that since this right would target only a specific group of people and not everyone, it is not actually a human right at all, at least technically speaking. It was finally adopted after significant compromises, and as Kaufmann suggests, *"coherence is not one of its biggest merits."*[302]

At first glance, it is possible to deduce that the paragraph 1(d) could de facto prevent strike actions in certain circumstances, as the laws of a particular country might prohibit strikes. However, this is not the case. The CESCR has laid down Concluding Observations that, for example, have expressed concerns that Mauritian laws were operating in a way that would actually prohibit most strikes, and that Russian authorization requirements for strike actions were set at an unreasonably high levels. This interpretation ensures that the right to strike contains substantive content and thus it cannot be unreasonably constrained by any municipal laws.[303] It can be also argued, that the right to join and form trade unions is an integral part of the freedom of association found in article 22 of ICCPR, which is not subject to progressive realization. Thus, the 'restriction' of article 2(1) would be inapplicable. This is based on the phrasing which obligates the states to ensure and not merely to recognize the rights stated in the article. With this interpretation, article 8 would be self-executing as well as justiciable.[304]

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[300] Leary 1996, p. 34.
[301] Kaufman 2007, p. 41.
[302] Kaufman 2007, p. 40.
[303] Joseph 2010, pp. 348–349; Macklem 2005, pp. 72–73.
[304] Kaufman 2007, p. 40.

5.3.2.2 JB et al v Canada

Historically speaking, the difficult nature of the freedom of association as a fundamental right, especially with reference to the evident overlapping between the ICCPR and ICESCR is emphasized in the HRC's case of *JB et al v Canada*[305]. In this case, a number of trade union members submitted an OP communication to the HRC. The authors of the communication referred to a prohibition to strike in the Province of Alberta in Canada under the Alberta Public Service Employee Relations Act of 1977 and claimed that such prohibition constitutes a breach of article 22 of the ICCPR. While both Covenants guarantee the freedom of association and the joining to and forming of trade unions, the ICCPR does not explicitly mention the right to strike, nor is it mentioned in the *travaux préparatoires*. The majority of HRC deduced that the right would need to be implied from the words of article 22, and further noted that the explicit inclusion in the ICESCR actually indicated that it was not a fundamental aspect of the right considered. Therefore, as the opinion of the majority, the case was decided inadmissible.[306]

According to Leary, the opinion of the majority was, however, unpersuasive and its credibility questionable as the very forceful dissenting opinion was signed by five of the most respected members of the Committee. [307] In their opinion the HRC minority stated that it was rather unsurprising that the right to strike was absent from article 22 of ICCPR and from the *travaux préparatoires* as well. The article supposedly guarantees a general freedom of association, which should extend far beyond trade unions and thus the absence of a specific reference to a strike actions should have been considered inconclusive. The fact that the spoken right is included in the ICESCR does not imply that it is absent from the ICCPR. Especially when the detailed specificity of the former and the intended generality of the latter are taken into account it would have actually been inappropriate to include a specific reference to the right to strike in the ICCPR. The question of whether or not article 22 protects the right to strike should have been most certainly admissible.[308]

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[305] CCPR/C/28/D/118/1982.
[306] *JB et al v Canada*, para. 6.3 and 7; Joseph 2010, p. 349; Leary 1996, p. 34.
[307] Leary 1996, p. 34.
[308] *JB et al v Canada*, (Individual Opinion) para. 3, 4 and 13; Joseph 2010, p. 349.

Furthermore, the minority correctly noted that the right to strike is protected under the ILO Convention No 87 on Freedom of Association and the Right to Organize. In fact, the ILO had already deemed the Alberta law relevant to the case to be in breach of the Convention No 87. In the opinion of the minority, there was no reason to interpret article 22 in a different manner that was already deemed by the ILO in a comparable consideration. The ILO Convention No 87 does not explicitly include a right to strike, but it is considered as an essential activity by which the workers can protect their interests and which is one of the prime functions of trade unions. With reference to the safeguard clause of article 22(3), which basically states that article 22 should be interpreted in line with ILO Convention No 87, it would seem almost irrational not to accept the minority opinion.[309]

The rights stated in the ICCPR article 22 and the ICESCR article 8 are similar, but differ substantially in their scope. In terms of interests that can be promoted by trade unions, the ICCPR provision is significantly broader. It is meant to promote the fact that the freedom of association is not only an economic right, but also a political and civil right. It has a unique threefold character, which underlines the fact that it is an indispensable part of a democratic society. Political interests cannot be nourished without the community and contact with others, and it is the very reason why the freedom of association can be found in both Covenants. Failure to include it in ICCPR could have given the impression that it is not a civil right. The ICESCR promotes the aspect of protecting economic and social interest, while the ICCPR underlines the general interest of everyone.[310]

Despite the outcome of the *JB et al v Canada*, HRC has later actually indicated concerns in Concluding Observations over restrictions on the right to strike. And these are exactly stated with a direct reference to article 22 of ICCPR. For instance, the HRC stated 2004 that (then) recently founded Lithuanian regulations which primarily restricted the right to strike may amount to a violation of article 22[311]. It is difficult to determine the meaning of this approach, especially when similar 'serious concerns' were already expressed earlier over a Chilean law imposing a general prohibition to the freedom of association as well as the right to strike.[312] It could be concluded that, following the criticism, the HRC does now

[309] Joseph 2010, pp. 349–350; Kaufmann 2007, p. 44.
[310] Kaufmann 2007, p. 44.
[311] Joseph 2010, p. 350.
[312] Macklem 2005, pp. 72–73.

recognize the right to strike as an inalienable part of article 22. However, it is still factually inconclusive whether or not the HRC has really departed from the precedent in *JB et al v Canada*.[313]

5.4 The ILO as a Foundation

The International Labour Organization (ILO) was established in 1919 and thus it significantly predates most other international human rights instruments, which have materialized after WWII in general. It is possible that this is one of the reasons behind the fact that labour rights have a tendency to exist in a separate sphere among other international human rights bodies at the global level. Even though it can be suggested that the international human rights movement initiated with the founding of ILO and the adoption of first international labour conventions[314], it is not very far-fetched to state that when the labour rights are inalienably connected with the ILO the UN bodies have had the chance and ability to concentrate more specifically on other human rights issues in need of attention. Naturally, the UN human rights treaties do recognize and protect labour rights but, up to date, any contributions in actually *developing* these rights have been more or less modest.[315]

The ILO was founded on the grounds of utilizing the language of human rights and social justice to justify its existence. In addition, the founding also was evidently a direct response to concerns by states that domestic labour market regulations would increase prices of production and thus introduce competitive disadvantages against countries that lack the regulations of protecting workers interests. International labour law was welcomed as a form of fair competition as it acted as an intermediary between employers and between countries.[316] The freedom to form unions was first stated in the ILO Constitution of 1919 and the importance of labour unions was further emphasized in the ILO Convention No 26 of 1928. These rights were even more stressed over after the WWII, as

[313] Kaufman 2007, p. 44; Joseph 2010, p. 350.
[314] Macklem 2005, p. 63.
[315] Joseph 2010, p. 331.
[316] Macklem 2005, p. 64.

the unions were considered as safeguards against dictatorships.[317] The freedom of association was reaffirmed in the 1944 ILO Declaration of Philadelphia and codified by the adoption of ILO Conventions No. 87 on Freedom of Association and Protection of the Right to Organize Convention 1948 and No. 98 on the Right to Organize and to Bargain Collectively, 1949. Perhaps most importantly, the ILO Constitution implies an explicit commitment to freedom of association by the virtue of ILO membership regardless of whether the relevant ILO Conventions on freedom of association have been ratified. [318] Respect for freedom of association and collective bargaining is also included in the ILO's Declaration on Fundamental Rights and Principles at Work of 1998 which is also binding for the states as part of ILO membership. Despite the fact that ILO has not agreed on a Convention on the right to strike, it is nevertheless accepted as a key aspect of collective labour rights in the ILO's practice.[319]

Recently, given that both labour law theory and labour law practice have evolved quite considerably, the approaches adopted by ILO have been quite symbolic in comparison. With respect to the 1998 Declaration on Fundamental Principles and Rights at Work, the human rights aspects are further emphasized with the reformulation of the ILO's traditional standards and principles into modern day language. The reformulation established – or confirmed – the four 'core labour standards': the freedom of association and collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination in employment.[320]

5.4.1 ILO Conventions and Recommendations

The traditional mechanisms of ILO in protecting workers' rights are conventions and recommendations. Briefly introduced, these include the Committee of Experts on the Application of Conventions and Recommendations (CEACR) which primarily considers

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[317] Kaufmann 2007, p. 32.
[318] Leary 1996, p. 29.
[319] Davies 2005, p. 191; ILO, Digest of Decisions and Principles of the Freedom of Association Committee (1996), para. 447.
[320] Tortell 2010, p. 384; Worth mentioning is also that the 1998 Declaration emphasizes terminology of principles rather than rights. Alston (2005, p. 3.) summarizes that the most plausible explanation — even though overlooking the fact that these are recognized by the UDHR and ICESCR both — is that the drafters felt that they could not refer to certain principles as rights in relation to states that had not ratified the relevant ILO Conventions responding to each of the four issues.

government reports, and the Conference Committee on the Application of Standards which is a standing committee of International Labour Conference.

In contrast to other established core labour rights, the right to freedom of association enjoys an exclusive supervisory mechanism: The Committee on Freedom of Association (CFA). The introduction of Conventions No 87 and 98 necessitated a mechanism which would be better suited for responding to complaints related to the suppression of trade unions and restrictions on industrial actions. The Committee of Experts reviews governments' compliance with respect to their obligations in ratified Conventions but does not examine specific incidents. Since the ILO membership obligates respect for freedom of association by itself it was also expected that complaints may arise in member States that had not ratified Conventions Nos 87 and 98.[321] The subject was debated over the early 1950s and eventually ended up in a proposal which reflected the tripartite composition of the Governing Body. After discussions held with ECOSOC in November 1951 the Governing Body established the Committee on Freedom of Association.[322]

Regardless of whether a state has adopted or ratified the relevant freedom of association conventions, the CFA examines complaints submitted by governments, workers or employers on violations of trade union rights by states. The CFA is a tripartite body comprised of members and working under the supervision of the ILO Governing Body, and it also enacts by recommending action to governments through the Governing Body.[323] The CFA has actively and repeatedly criticized governments, for instance, of not sufficiently respecting collective bargaining as an instrument of negotiating the terms and conditions of public sector employment, or in other words, the employment conditions of their own employees.[324] Furthermore, the Constitution of ILO[325] allows the Governing Body to set an ad hoc Commission of Inquiry for complaints of serious non-compliance with ratified conventions. So far, there have been only 12 Commissions of Inquiry established.

[321] Bellace 2014, pp. 44–45.
[322] Bellace 2014, pp. 45–46.
[323] Tortell 2010, p. 385; Edström 2011, p. 59.
[324] Macklem 2005, p. 66.
[325] Articles 26–29 and 31–34.

Article 22 of the Constitution requires the member states to submit an annual report explaining how they are implementing the Conventions they have ratified. In case a state fails to fulfil this obligation, other states can make a complaint or a trade union can make a representation to that effect. The Governing Body refers complaints to a Commission of Inquiry where appropriate according to Arts 26–9 of the ILO Constitution. The Commission publishes its report and the Committee of Experts on the Application of Conventions and Recommendations follows up on implementation of the Commission's recommendations. The representations are reviewed by the Governing Body, which also decides whether to publish the representation along with a possible response received from the relevant government or to appoint an ad hoc committee in order to investigate the case further.[326]

5.4.2 The Right to Strike in the ILO Context

A single explicit reference to the workers right to strike with regard to the actions of the International Labour Conference (ILC), the Governing Body, the Committee on Freedom of Association, and the Committee of Experts is hard to find. Nevertheless it should be taken as a presumption that the lack of a declarative statement regarding the existence of such a right is inconclusive.[327] Arguably the textual absence of the right to strike has allowed the ILO supervisory bodies to develop the scope and meaning of the right to strike over the years.[328]

The right to strike is indeed a notion that has developed over time. Its history dates back to the earliest days of the ILO. It is therefore extremely important to recognize how terminology has been used over time. Terms used in 1919 or 1948 may very well have different implications which have changed or evolved during the ILO's nearly 100 year history.[329] For instance, for those on the Commission on International Labour Legislation who drafted the Part XIII of the Treaty of Versailles the "freedom of association" was indeed more extensive that merely meaning the joining together of workers in trade unions for the purpose of collective bargaining. At the end of the First World War, strikes were

[326] Davies 2005, p. 192.
[327] Bellace 2014, p. 31.
[328] Zou 2012, p. 105.
[329] Bellace 2014, p. 31.

taking place everywhere in Europe. The Commission had to understand that engaging in collective bargaining also meant supporting the respective demands by threatening to take industrial action and occasionally resorting to use of economic pressure in the forms of picketing and strikes. In this sense, freedom of association extended to actions taken by workers to further their occupational interests.[330]

During the discussions in 1947 and 1948 in the Conference committee dealing with the Convention No. 87, the Committee on Freedom of Association and Industrial Relations, the only serious disagreement was about whether there should be an express mention of a right not to join a union. Any limitations to the right to strike as such were never proposed or even suggested. And what is very obvious is that the matter did not go unnoticed. The Office's preparatory paper included elements from the original submissions to the ECOSOC[331] explicitly listing the right to strike as a matter to be considered. Furthermore, it would have actually been rather improper to include any sort of a qualifier to the formation of associations and the activities they could engage in as in 1948 it was clear that some countries had banned certain forms of industrial action which the Convention was designed to permit.[332]

Even today the CFA cases are decided strictly on the basis of the facts of the case and the Committee does not make general statements about freedom of association. The ILO does approach the right to strike on a case-by-case basis which is – to some extent – similar to the common law practice. And the CFA is the primary instance responsible for the development of this case law. If the cases are reviewed, it becomes clear that according to CFA there is a right to strike, but it is not an unlimited right.[333] For example, the CFA has held that the right to strike is not limited to industrial disputes relating to collective bargaining, but has excluded political strikes and strikes that are systematically decided upon before any negotiations have taken place. This means that, in principle, strikes would be allowed as long as social or economic interests of workers are concerned and that workers can utilize the right to strike when social and economic policy problems that

[330] Bellace 2014, p. 35.
[331] UN Economic and Social Council.
[332] Bellace 2014, pp. 42–43.
[333] Bellace 2014, p. 48; Currently the CFA has decided almost 2900 cases after its initiation in 1952.

concern them directly are at stake. Sympathy strikes should be allowed given that the initial strike is lawful.[334]

Even though strikes are usually exercised by organizations, such as trade unions, the term 'workers' used in both ILO Conventions gives an indication that the right could also be an individual right and the CFA has confirmed that it is a right of workers and their organizations. However, the ILO has also been willing to accept that the right to take collective action may be reserved for trade unions only. Thus, prohibitions by law on wild cat strikes (or unofficial industrial actions) have been accepted by the ILO.[335] The supervisory bodies have considered, for example, obligations to give prior notice, to engage in conciliation and voluntary arbitration, to obtain agreement of a given majority where it does not make a strike action difficult or even impossible and to hold a secret ballot to decide on strike action as legitimate conditions for the exercising of the right to strike. Furthermore, the legislative principle that prohibits strikes during the time a legally binding collective agreement is in force has been considered acceptable regardless of clearly restrictive element it constitutes.[336] In addition, ILO Conventions do not assess closed shop arrangements, leaving the question to the individual states to address.[337]

With reference to the responses of ILO in matters concerning freedom of association, one definition can be established: ILO has demonstrated that the jurisprudence of CFA is definitively expressed in the language of rights. ILO has also concluded that the freedom of association is an integral part of the protected, basic human rights. Trade union rights are to be respected regardless the level of development of the country concerned. ILO has considered all complaints concerning freedom of association to have an extremely high level of importance.[338] However, without trying to deny the commitment and achievements by ILO, a few issues still remain. Albeit the CFA and Commission of Inquiry are potentially powerful tools for workers and their representative organizations, the lack of enforcement procedures beyond voluntary compliance arguably means that in cases where

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[334] Zou 2012, p. 106.
[335] Edström 2011, pp. 58–59; Zou 2012, p. 106.
[336] Zou 2012, p. 106–107.
[337] Case No 188, Report No 34, 1960 (Denmark) - Complaint date: 25-OCT-58, Swiss Printing Workers' Union and the Swiss Federation of National Christian Trade Unions, Freedom of Association cases, International Labour Organization.
[338] Tortell 2010, pp. 400–401.

the State's co-operation is the primary issue, achieving real-life effective solutions remains uncertain.[339]

Conclusively, the freedom of association as it has been addressed in the ILO since 1919 does include the right of workers to act in defense of their occupational interests and this was confirmed in Convention No. 87 in 1948. In the historical sense this right has been referred to as the right to strike by the CFA.[340] Throughout its existence, the CFA has given the right to strike an essence of being an "intrinsic corollary" of the right to organize protected by Convention No. 87. Articles 3, 8 and 10 of Convention No 87 are aimed at protecting trade unions' right to organize their administration and activities, to formulate their programmes and to further workers' interests. These are also the articles that have been continuously interpreted to implicitly include the right to strike.[341]

5.4.3 The ILO and the EU

The relationship between the EU and ILO has been described by the European Commission and Council as one of 'cooperation' and constructive dialogue. Novitz has suggested that this kind of a conception of this relationship is alert to the creative aspects of discourse, and, it also summons up a vision of a deliberative process. This process establishes the possibility that those formulating EU social policy can actually benefit from information relating to the treatment of international labour standards in other organizations while contributing to the formulation of these standards and their enforcement internationally.[342]

The means by which the EU might recognize core international labour standards set by the ILO are by internal regulatory action and via EU external relations. The first, designed to govern the conduct of member states, can be achieved in different ways including protection of workers' rights through Treaty articles, EC directives relating to social policy, soft law initiatives, and the fundamental rights jurisprudence of the CJEU. In external relations, recognition can be made by making trade and aid preferences

[339] Tortell 2010, p. 407; For instance, in Belarus the biggest achievement has been in merely maintaining a dialogue that will allow progress to actualize in future if the political will in the country should change.
[340] Bellace 2014, p. 66.
[341] Zou 2012, p. 105.
[342] Novitz 2005, p. 215.

conditional on compliance with international labour standards. While the relationship of the ILO and the EU is further considered in the chapter 5, it should be emphasized here that the implementation of ILO norms within the Union was initially minimal and still is far from comprehensive. As an international actor the EU has definitely taken more interest in the promotion of these standards as a condition for access of third countries to trade and aid. In this sense, justification is sought via direct references to ILO Conventions.[343]

With respect to EU regulation, particular concerns have been raised in relation to the right to strike as recognized by the ILO as a vital aspect of freedom of association. If true solidarity between workers across the Union is to be made possible, a European provision for the right to strike would be necessary. Fears have been expressed that the free movement of goods might prevent workers taking industrial action. To some extent, this issue has been addressed by the 'Monti' Regulation.[344] This regulation identifies the right to strike as an exception, but does not provide for an actual European definition of the scope of legitimate industrial action. Also, it would seem that the Commission does not consider the absence of a treaty base for the protection of freedom of association as a problem. In the context of EU's external relations, the Commission has held the opinion that the fundamental principles and rights at work recognized and identified by the ILO apply in their entirety to the countries of EU. This statement does not, however, clarify the fact that this is done by virtue of the independent commitments of EU member states as member of the ILO and not by EU regulation. The Commission's intervention has been seemingly limited to merely recommending ratification of certain ILO Conventions. Apparently the Commission assumes that the member states are complying with their international obligations to respect freedom of association. Unfortunately this is not always the case in EU member states, as demonstrated by a few CEACR Individual Observations concerning Convention No. 87 of 2003 (namely the ones concerning Austria, Belgium, Denmark and Germany).[345]

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[343] Novitz 2005, p. 216.
[344] Council Regulation 2679/98 [1998] OJ L337/8, Art 2.
[345] Novitz 2005, pp. 219–220; Novitz mentions, for example, the UK being almost continuously in breach of Convention Nos. 87 and 98, Austria has breached the Convention No. 87 by virtue of its reluctance to allow foreign workers to be eligible for election to works councils, Denmark has failed to allow foreign nationals to engage in collective bargaining when employed on Danish ships, and Germany's refusal to allow public servants to strike has been heavily criticized

Those core international labour standards that do not, or cannot receive protection by the virtue of adopted directives, can still achieve recognition through CJEU fundamental rights jurisprudence. If the Court adopts such rights as "general principles", these can also be applied to limit the scope of EC (EU) law or activities of EU institutions and even restrict the actions of the member states. The Court has a history of appreciating that international labour standards can actually constitute fundamental rights. For instance, with respect to the prohibition of discrimination on the grounds of sex the Court has made a direct reference to respective rights set out in the ILO Convention No. 111. Already in the *Bosman*[346] case, the Court stated that the principle of freedom of association is 'one of the fundamental rights which, as the Court has consistently held . . . are protected under the Community legal order'.[347]

5.5 Evolving Views? The Negative and Positive Rights Revisited

According to Fernando Valdes Dal-Re, in the reality of the legal framework and practice of the European systems of labour relations, the term collective rights of workers and employers constitutes a synthesis concept which encompasses a complex combination of legal faculties of a very diverse content. It is possible to classify collective rights in this sense by 'major differentiation criterion' into rights of organization and rights of activity.[348]

The rights of organization can be further divided into two groups of rights: individual and collective proprietorship. The individual proprietorship includes both 'positive rights', as in the right of all workers to form and to join an organization, and a 'negative right' respectively, which is the right to refrain from joining an organization. Collective proprietorship rights are extended to the representative organizations' rights. These rights include, for instance, the right to draw up administrative regulations and to form or join organizations of second or higher rank. Activity rights are understood as the rights that enable the exercising of industrial actions. Activity rights exist for workers and employers

[346] Case C-415/93 Union Royale Belge des Sociétés de Football Association and Others v. Bosman and Others [1995] ECR I-4921.
[347] Novitz 2005, p. 226.
[348] Valdés Del-Ré 2005, p. 39.

as individuals and to their respective organizations for the protection of their economic and social interests. Accordingly, the concept of industrial action includes measures such as collective bargaining, trade union actions in a company or the right to strike.[349]

When considered the actual reality of what workers' usually seek within the sphere of rights, a relation to civil and political, or 'negative' rights is quite often discovered. The primary claims that workers make as individuals, or the ones that trade unions (or other representatives) make on behalf of them, are usually within the context of the freedom of association, such as to act in association engaging in collective bargaining. In this context, the question is especially about the exercising of their rights without the interference of the relevant state. Therefore, a submitted claim is usually a request for freedom of action such as immunity from civil or criminal liability for organizing or participating in an industrial action.[350]

Today, the traditional dichotomy between the positive and negative rights can be, and has been, questioned. These considerations are actively gaining ground among (labour law) scholars, and it would seem that these opinions are influencing the international human rights discourse as well. As Sarah Joseph puts it, *"the strict division of civil and political rights on the one hand, and economic social and cultural rights on the other into categories of 'negative' and 'positive', is misleading. All rights have positive and negative aspects."* She further argues that, for instance, it is impossible for a state to guarantee the freedom from torture by simply agreeing to refrain from it. Measures always need to be taken, such as training programs for relevant personnel and legislative actions to ensure procedural aspects. Opportunities for torture must be prevented and, when such threats arise, they must also be detected and intercepted.[351] Regarding the EU context, Weiss has argued that one, and probably the most important, reason for the introduction of fundamental social rights to the founding Treaties was exactly the fact that it would help to overcome the false dichotomy between traditional fundamental rights and social or economic rights.[352]

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[349] Valdés Del-Ré 2005, p. 39.
[350] Novitz & Fenwick 2010, p. 16.
[351] Joseph 2010, p. 334.
[352] Weiss 1998, p. 203.

The perceivable fact is that some provisions which are traditionally considered as civil and political rights seem to have a lot of positive characteristics and, vice versa, some rights provided by ICESCR seem largely negative by nature. For example, the right to fair trial in article 14 of ICCPR sets legislative requirements for such things as trained judges and occasionally legal aid. Even though this is stated in the ICCPR, which should be implying negative rights, the undertone is clearly positive. A similar observation can be made with respect to article 8 of the ICESCR, which contains an obviously negative aspect to it as the states are required to refrain from interfering with proper functioning of trade unions.[353] To take an even more basic example, one could consider freedom and equality. These two rights are very much in danger to remain merely formal if the social capacity to enjoy them is not taken care of. Civic rights need a firm social basis to actually be relevant. The interrelation of traditional fundamental rights and fundamental social rights is more than merely of one being basic for every (enlightened) society and the other just an instrument of a welfare state – these rights are two sides of the same coin.[354]

Arguably, all human rights predicate similar obligations with each other. Typically, these call for respecting, protecting and fulfilling the enjoyment of relevant rights. Each and every obligation can be categorized in a similar manner that has been used to categorize human rights in positive and negative rights. And there are no obvious reasons why every obligation could not be categorized as either negative or positive. For instance, the obligation to respect a right entails negative obligations and the obligations to protect and fulfil rights and duties are positive by nature. The active protection of human rights in which the states must enact on, should include enforcement of legislation and controlling the actions of non-state actors to a reasonable but sufficient degree. This is especially emphasized in the area of labour rights when considered how much the private sector has control over the availability of work. The fulfilment obligations should safeguard adequate resource allocation especially for those in a position unable to provide for themselves.[355] Thus, one could come to conclusion, that the question is more about the perspective and opinion rather than whether or not the right is actually negative or positive by nature.

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[353] Joseph 2010, p. 334.
[354] Weiss 1998, pp. 203–204.
[355] Joseph 2010, pp. 334–335.

This kind of rationalization has also been practiced by the Committee on Economic, Social and Cultural rights. Accordingly, it has emphasized that the states actively have the obligation to 'respect, protect and fulfil' the rights set in place by the ICESCR. Obligation to respect, for instance, requires the states not to take action that would lead in denying individuals access to the Covenant rights. Furthermore, the obligation to protect requires measures that actively ensure that neither enterprises nor private individuals can prevent individuals from exercising their rights. Finally, in order to fulfil the obligations the states must actively take positive actions intended to facilitate people's access to and utilization of resources and the means to enjoy the respective rights. The obligation is especially important with respect to the segment of people who are unable to exercise or access their rights beyond their control, states must positively enact and 'step in' to provide such rights directly.[356]

A debate over the positive and negative aspects of rights was under consideration in the negotiations of the European Charter of Fundamental Rights. The concern was whether the social and economic rights, in contrast to civil and political rights, should be included in the EU Charter at all. The question was — once again — about the justiciability of economic and social rights. Opinions to this were divided between those who favoured including the social and economic rights in the Charter and those who wished to exclude them. The primary arguments for exclusion were founded on the grounds that social and economic rights were not part of the existing *acquis communautaire*, or that they fell outside the competences of the EU. Thus, it was considered that it should also be ensured that the EU Charter would not become an instrument for any future expansions of EU competences in the social sphere of rights.[357]

The parties that would have included the social and economic rights in the Charter were even further divided. First, there were those who wished to separate some economic and social rights as being justiciable and subjective from the rights that are programmatic. The justiciable rights would be included in the first section of the Charter with civil and political rights and the programmatic rights would have a separate chapter. Secondly, there were suggestions of adopting an inclusion of a specific horizontal clause which would

[356] Kaufman 2007, p. 35.
[357] Bercusson 2006, pp. 36–37.

prevent any extensions of EU competences through the Charter provisions. This clause would have been applicable to the Charter in general, but specifically aimed towards the social and economic rights. Finally, there were also few who would have included social and economic rights alongside the civil and political rights altogether.[358] The outcome was something in between. The Charter included a single list of fundamental rights which were both civil and political as they were social and economic alike. The EU Charter was approved by the European Council but it was limited to a political declaration and thus had no formal legal status.[359] That is, until the establishment of the Lisbon Treaty in 2009.

[358] Bercusson 2006, pp. 37–38.
[359] Bercusson 2006, pp. 38–39.

6 Conclusions

There are definitively significant differences on how the Member States traditionally approach freedom of association and what do they consider as legitimate means of collective action. The diversity exists all the way up to the constitutional levels. These differences are emphasized and underlined when the historical context of the national industrial relations systems is examined. Thus it is difficult to establish a certain single meaning of the right to strike in Member States' national legislations. If some definition for the essence of the right to strike should be established, the determination could be better sought trough international treaties. In this sense, the idea of workers' rights predates pretty much every other international human rights instrument. Both the UN Covenants and the Conventions adopted by the ILO do recognize the right to strike and provide content for the concept. Even though these instruments are traditionally considered to provide for internationally recognized minimum standards, it can also be established that the international obligations are nonetheless de facto obligations with meaningful content.

As such, it is also possible to regard the freedom of association and the relevant rights rising therefrom as the very defining elements of the European social model. In a complex system of the EU diversity has always existed which has necessitated development of elements like the social dialogue. Even though the freedom of association and the right to strike have been recognized as fundamental rights of the Community, the lack of legislative competences at the EU level effectively hands the determination of these concepts exclusively to the Member States. In principle it could be possible, but also remains unseen for the time being, whether the soft law approaches like the OMC are accepted as a true alternative to address issues such as collective actions at the EU level.

Ever since the *DFDS Torline*, it has been clear that the rules of applicable law can have an effect to the effective exercising of the right to take collective action. It is also evident that the case directly prompted the introduction of a special provision on industrial action in Rome II. One of the defining elements throughout the whole preparatory phase of Article 9 was that it was intended for and associated with the protection of the rights of workers. It was also suggested by the Swedish delegation that the diversity of different industrial relations systems in Europe needed safeguarding against the potential implications by the *DFDS Torline* case. The underlying idea was that if the matter was not addressed the

delicate balance of the national labour markets would be seriously disturbed. Overall, it is possible to consider that the inclusion of Article 9 does in fact demonstrate at least some level of intent to respect the right to strike on behalf of the EU legislator. However, the actual solution does not necessarily provide for the intended level of protection.

In other words, there exists a legitimate doubt that Art 9 of Rome II is not up to the task it was originally called to address. The pressing need was the uncertainty arising out of the doubt that applying the *lex loci damni* as a connecting factor to industrial disputes would lead to undesired results. It is likely that under similar circumstances to the *DFDS Torline* these uncertainties might be avoided in future. However, the question of whether the *locus actus* as a connecting factor is sufficient to protect the fundamental rights of workers i.e. the right to strike seems rather confusing and definitively inconclusive. Article 9 is applicable only to the non-contractual obligations rising out of industrial actions. First of all, it is questionable whether the issue of characterization regarding the concepts utilized in Art 9 can be conclusively determined. To be added, the provision does have the potential to subject parties of a single industrial dispute in cross-border cases to different legal regimes if the law applicable to a tort rising out an industrial action and the law applicable to the action itself are different. This has been suggested by, for instance, Dorssemont and Van Hoek[360]. Such effects seem hardly adequate if the protection of the right to strike is concerned.

The Laval quartet has even further emphasized the fact that the regulation on jurisdiction can have potentially tremendous consequences to the outcomes of litigations in industrial disputes. And these litigations can affect the national legislations of the Member States rather directly. The CJEU has itself considered the right to strike as a fundamental right of the Community but it is highly questionable whether the decisions of the Court actually take the diversity of the European industrial relations systems properly into account. The decisions have introduced rather dramatic changes in legislation in some Member States such as Sweden and Germany. As previously mentioned, what is basically demanded from Sweden means more or less of a total reformulation of the Swedish law. In contrast to this, on the other hand, comparative studies have shown that in some Member States the effects

[360] Dorssemont & van Hoek 2010, p. 250.

have been next to none[361]. Nevertheless, if it is taken into account that the EU relies heavily on the Member States' to actively protect the fundamental rights, the judgments seem inconsistent at the very least. The Court seems willing to almost bypass constitutional considerations if the market freedoms are threatened. As long as the Member States have jurisdiction over industrial relations, it is questionable whether the CJEU can claim primacy in this sense.

The approach of solving aforementioned conflicts issues with a rule of supremacy seems unsatisfactory. It is suggestible that when constitutional dimensions are under consideration rules for vertical conflicts do not provide desirable results. The circumstances would call for mediation. According to Joerges, the CJEU has a specific task to fulfil in this sense. It must evolve supranational law which mediates between different European traditions and interests and which resolves conflicts of interests appropriately. The fact that Member States are not properly equipped for the task does not suddenly turn the Court into a "*super-constitutional-court equipped with the powers to reformulate constitutional orders of the Member States*", even though the competences may sometimes overlap in the sense of a diagonal conflict.[362]

With respect to the definition of the freedom of association in the international context there are concerns that, in the light of the Laval quartet, EU law could be contradicting the international obligations of the Member States. For instance, the ILO has raised serious concerns over the position of the right to strike within the EU area. It is seems possible that the effects of these cases may induce breaches by ILO membership countries regarding the ILO Conventions 87 and 98. The ILO Committee of Experts has expressed such a view in its 2013 General Report on the Application of Conventions and Recommendations. According to Bruun et al., even if these considerations would not be regarded as legal questions in a strict sense, they do give rise to complex political questions. In Sweden the two confederations of employees have jointly submitted a special comment to the CEACR on Sweden's application of the relevant ILO Conventions arguing that the Swedish Laval legislation violates the international obligations of the country. These arguments include, for example, the fact that facilitating a company's entry into a market is not a reason

[361] See, for instance, Bücker et al. 2011b, pp. 318–320.
[362] Joerges 2010, p. 399.

accepted by the ILO for restricting the right to take industrial action. The situation calls for political initiative. Member States cannot accept that EU would force them to actively violate their international commitments.[363]

If some further considerations regarding such initiatives would be considered there are few developments that should be shortly mentioned. First, it is possible that the most adverse restrictive effects of the Laval quartet might actually be mitigated by the entering into force of the Lisbon Treaty and thus the transposition of the EU Charter into primary law. The question remains, however, open for the time being. From the perspective of the fundamental social rights, and the right to strike in particular, the development seems nevertheless largely positive. Second, another solution to the issue might be provided by the EU's future accession to the ECHR. Without going into further detail on the possible division of competences between the two relevant Courts it is suggestible that, at the very least, the accession *could* have a positive influence to the CJEU's acceptance of fundamental social rights. Traditionally speaking, the ECtHR has been modestly reluctant to regard the collective bargaining or the right to strike as vital aspects of the freedom of association, which has also influenced the CJEU to some extent in the past. The approach of the ECtHR has, however, changed following the Grand Chamber's judgement in *Demir and Baykara v Turkey*[364]. In this case, the ECtHR held that the right to bargain collectively with the employer has, in principle, *become* one of the essential elements of the 'right to form and to join trade unions for the protection of interests' set forth in Article 11 of the Convention.[365] The ECtHR's later jurisprudence has also shown similar developments. As indicated by the Grand Chamber, any interference with the right to strike must be justified with reference to Article 11(2) ECHR. While the ECtHR has evolved its view on the right to strike, it is rather hypothetical to assess whether the CJEU will accept this interpretation in the future.[366] It remains to be seen how the CJEU takes these developments into consideration.

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[363] Bruun et al. 2011, pp. 41–42.
[364] Demir and Baykara v Turkey [2008] ECHR 1345.
[365] *Ibid*, para. 154; Novitz & Syrpis 2010, p. 468.
[366] Affaire Dilek et Autres v Turquie (App nos 74611/01, 26876/02 et 27628/0) Judgment of 17 July 2007; Enerji Yapi-yol Sen v Turkey [2009] ECHR 2251; Novitz & Syrpis 2010, p. 468.