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EUROPEAN WORKERS' FREEDOM TO ASSOCIATE IN THE EUROPEAN COURTS

Abstract

By comparing the jurisprudence of the two European Courts this article seeks to find an acceptable level of trade union rights in Europe. The focus is on the proportionality test introduced by the European Court of Justice (ECJ) in the process of finding a balance between fundamental rights and fundamental freedoms and also on the extension of the content of article 11 of the European Convention by the European Court of Human Rights (ECHR).

Keywords: European Court of Justice; European Court of Human Rights; EU fundamental freedoms of movement; right to strike; collective bargaining; collective agreement.

Introduction

The following article is designed to shed light on the issue of protection of freedom of association as a trade union right in the European context. By analyzing and comparing the case law of the two European Courts (the ECJ and ECHR) the paper intends to answer the following question: what is the acceptable level of freedom of association in Europe? The issue became relevant after the two courts have developed their jurisprudence in different directions. Even though the court of the European Union also protects freedom of association as a trade union right, it gives privilege to the rules on freedom of movement of the EU when they come into clash with those trade union rights. On the opposite, the ECHR has expanded the traditional content of freedom of association and eventually the margin of appreciation of the member states in relation to this value has been shrunk.

The two Courts operate in the same region and the same countries are subject to their jurisdiction. Therefore, it is essential to analyze what are the standards in relation to freedom of association established by the Courts.

European Union Chapter

The idea behind the creation of the European Union was to avoid further military confrontation in the region. For that purpose it was decided to integrate strategically important sectors of the economy.¹ Treaties created in the framework of the Union aimed at deepening general economic cooperation in Europe by establishing a common market of goods, workers, services and capital.²

The ECJ has contributed to this process. Through Article 258 TFEU and by relying on the *direct effect doctrine* the Court has interpreted the Treaties in support of single market (*Cassis de Dijon, 1979*).³ The human rights discourse appeared in the judgments of the ECJ on a relatively later stage.⁴

Freedom of Association in the ECJ Jurisprudence

The ECJ started its case law on freedom of association with the case of *Bosman* where the Court has recognized freedom of association as a general principle of EU law.⁵ A following case was *Albany* where the right to form and join trade unions and the right to collective action were also recognized as general principles of EC Law.⁶ In the case of *Commission v Germany*, the court further recognized the right to *collective bargaining*.⁷

These developments seemed promising. However, the situation has changed in 2007 when the Court was asked to strike a balance between the two confronting values – economic freedoms and trade union rights. The first such case was a *Viking Line*.

Viking Line Case

In this case,⁸ the company (*Viking Line*) wanted to reflag one of its vessels (Rosella) operating under finish flag. Trade unions feared that reflagging would cause deterioration of the working conditions of the crew and threatened with the strike action. *Viking Line* took the case to the UK court alleging the violation of rights on freedom of movement of workers, freedom of establishment and freedom to provide services guaranteed under Articles 39, 43, 49 EC under the Community law. The case was referred to the ECJ for preliminary ruling (Para 6-27).

The ECJ explicitly recognized the *right to strike* as a fundamental right, however, stated that exercise of this right nonetheless may be subject to

certain restrictions. Referring to the previous cases of *Schmidberger*⁹ and *Omega*¹⁰ the court noted that even though protection of fundamental rights can justify restrictions on the fundamental freedoms (“freedom of establishment and provision of services”) it does not mean that fundamental rights are out of scope of EC law and in this particular case out of scope of article 43 EC (Para 42-47).

The Court rejected an idea to apply reasoning in *Albany*¹¹ by analogy.¹² In the opinion of the Court the fact that agreement or activity is excluded from the competition rules does not mean that it is also excluded from the free movement provisions, as these two sets of provisions are applicable in different circumstances (Para 48-54).

Regarding the issue on horizontal direct effect the Court was of the opinion that article 43 EC confers rights on private undertakings that can be relied on against trade unions. The Court did not take into account the argument that trade unions are not public entities and therefore, article 43 EC should not create any obligations for them, as the Treaty creates obligations only for member states. According to the Court for the realization of the freedom of provision of services it does not matter if the obstacles are resulting from the acts made by public entities or by associations and organizations not governed by public law (Para 56-66).

The Advocate General¹³ explained that private actors, while being now subject to the Treaty rules on freedom of movement are not necessarily held to exactly the same standards as state authorities; instead,

the court may apply different levels of scrutiny, depending on the source and seriousness of the impediment to the exercise of the right to freedom of movement, and on the force and validity of competing claims of private autonomy (Para 49).

The Court decided that the action of the trade unions in the present case constituted restriction on the freedom of establishment; however, that restriction might be justified if there is an “overriding reason of public interest, such as the protection of workers” and only if the “restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective”. The final conclusion whether the actions of the trade unions were justified or not the ECJ has left to the national court.

Interestingly, the Court makes referral to the ECHR case law (*National Union of Belgian Police v. Belgium*, no. 4464/70, ECHR, 1975; *Wilson*,

National Union of Journalists and Others v. United Kingdom, ECHR, 2002). It emphasizes that under ECHR the right to strike, right to collective agreement and collective bargaining are considered as “one of the main ways” in which trade unions can protect their members, but not necessarily the only (Para 86-87).

The case of *Viking* was returned to the Court of Appeal and the parties settled the case (probably, because of the uncertainties generated by the judgment). Though, the terms of settlement remains confidential, it is known that *Rosella* is now registered in Sweden.¹⁴

Commentaries on Viking Line

According to Catherine Barnard the test of proportionality established by the Court for the national judiciaries will cause significant problems for trade unions in future. It does actually suggest that industrial action is the last resort and national courts have to check if the union has exhausted all other avenues under national law, before finding the industrial action proportionate. She also criticized the fact that trade unions are now in the same position as states, with the same responsibilities. They are now subject to the same obligations as states, while at the same time they cannot invoke any of the defenses provided by article 46 EC (now, Article 52 TFEU), such as public policy, because these provisions were drafted with states in mind.¹⁵

Alan Dashwood agrees with the Court that free movement provisions certainly do apply directly in some cases but the problem is to know which these cases are. This is the question the answer to which is not provided by the Advocate General and that must be decided on a case by case bases. It is also problematic to strike a balance between the need of subjection of certain private actors to the Treaty provisions on freedom of movement and the need to respect the private autonomy of these actors as protected under domestic law.¹⁶

According to Tonia Novitz the term “protection of workers”, which can be used to justify restrictions on freedom of movement provisions of the EU is very restrictive and narrow. Only if jobs and conditions of employment are seriously under threat can trade union’s action be considered as protection of workers. Opposite to this, the ILO provides wider interpretation. In the Digest of Decisions the Freedom of Association Committee of the ILO states that the exercise of the right to strike cannot be used only for defense of occupational and economic interests, but also for

“seeking solutions to economic and social policy questions and problems facing the undertakings which are of direct concern to the workers”.¹⁷

The Laval Case

Laval was a case¹⁸ on the same issues decided right after the *Viking Line*. In this case a Latvian construction company (Laval) posted 35 Latvian Workers to Sweden to fulfill the contract. Posted workers were earning 40% less per hour than comparable Swedish workers. Even though Laval was in a collective agreement with the Latvian trade unions the major Swedish construction trade union wanted Laval to apply the Swedish national agreement. The agreement covered number of issues, including the obligation for Laval to pay a special building supplement to an insurance company to finance group life insurance contracts. Importantly, the pay to the workers was not defined and was left to be negotiated on local level between the local trade union (*Byggettan*) and the employer on a case-by-case basis after the tie in to the Swedish collective agreement. The negotiations were unsuccessful.

Swedish trade unions initiated strike action and blockaded the building site. The Latvian company eventually went bankrupt. Latvian workers returned to Latvia (Para 27-38).

Laval commenced proceedings in the Swedish national court. While the issues under consideration involved EU law, the Swedish Court referred the case to the ECJ for preliminary ruling.

The Advocate General reaffirmed that right to strike is a fundamental right and a general principle of the community law. However, this is not an absolute right and certain restrictions can be put on it. Here he cites the case law of the ECHR where it is recognized that the right to strike can be one of the means that the states might or might not choose to guarantee the right to freedom of association for trade unions protected under article 11 ECHR. It is stressed that the right to strike is not upheld by article 11 and might be subject to national laws and regulations that limits its exercise (Para 72, 78).

Advocate General suggested that with regard to the particular situation in *Laval* exercise of the trade unions' right of collective action falls within the scope of Community law, namely, provisions on freedom of providing services. The court shared the opinion of the Advocate General and stated that Community law is applicable to the strike action taken by the trade unions in Laval (Para 86-95).

According to the Court trade union action which is designed to force service providers to sign the contract, which contains more favorable terms and conditions than the Directive 96/71 article 3(1)

is liable to make it less attractive or more difficult for such undertakings to carry out construction work in Sweden and therefore constitutes a restriction on the freedom to provide services within the meaning of article 49 EC (Para 99).

After deciding that the trade union action was a restriction on the freedom of provision of services, the Court dealt with the question if that restriction was justified or not. The Court started with the statement that activities of the Community include not only creation of the internal market without boundaries but also a policy in the social sphere and that these two activities should be balanced against each other. According to the Court the restriction on fundamental freedoms is justified by application of the right to take collective action for the protection of the workers of the host state against possible social dumping, because it may constitute an overriding reason of public interest within the meaning of the case law of the Court. In the present case of *Laval* the Court observes that the blockading action by trade unions aimed at ensuring that posted workers have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers. However, according to the Court forcing foreign undertaking to sign the collective agreement creates such an obstacle that cannot be justified by such an objective. The level of protection guaranteed by the Directive 96/71 is limited to that is provided by article 3(1), unless the foreign undertaking itself voluntarily signs a collective agreement in the host member state which provides more favorable terms and conditions of employment. The Court then makes a referral to public policy provisions under article 3(10) of the Directive explaining that if there are issues other than that provided under article 3(1) (in present case these were the pecuniary obligations mentioned in the Swedish collective agreement) of the Directive that the host state wants to apply under public policy provisions it is necessary that the state first opt to article 3(10) which Sweden in the present case did not do (Para 81-84). Therefore, *Laval* is only required to observe nucleus mandatory rules for minimum protection in the host member state (Para 99-108).

The Court separately mentions the imposition of negotiations on minimum pay by trade unions on the foreign undertaking and states that

in general such action is not prohibited by the Community law; however, in the particular circumstances of the case the collective action cannot be justified in the light of the public interest objective where the host state does not have on place any laws or regulations that are sufficiently precise and accessible and do render it possible for the undertaking to determine the obligations with which it is required to comply as regards minimum pay.

Commentaries on Laval

The strict reading of the Directive 96/71 was criticized by Catherine Barnard. Referring to article 3(7) (“Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favorable to workers.”) as to the saving clause *Barnard* is of the opinion that this provision was always thought to be meant that Directive provided the floor of the rights, while the states (usually assumed host state) could go further by imposing higher standards, subject to the ceiling of article 49. She criticized the position of the court that article 3(7) applies to the situation of foreign service providers only if they voluntarily sign a collective agreement in the host state which offers superior terms and conditions for their employees, a scenario which is very unlikely. Therefore, she thinks that the court came very close to making article 3(1) not a floor but a ceiling.¹⁹

Mia Rönnmar shares the view of Barnard about the Directive 96/71. She agrees that after *Laval* the Directive has become not only a minimum Directive as it is stated in article 3(7) and recital 17 of the Preamble, but also – a maximum Directive that is “establishing a ceiling for the terms and conditions of employment that a trade union or a state may require foreign service providers to apply to employees”.²⁰

Following Cases

The strict reading of the Directive 96/71 was supported by the ECJ also in other cases. In *Ruffert* the Court reiterated the idea developed in *Laval* that level of protection guaranteed to posted workers is limited to that provided for in article 3(1), first subparagraph (a) to (g) of Posting Directive, unless it is provided otherwise by host state laws or collective agreements and unless the posting undertaking commits itself to voluntarily sign the

collective agreement in the host state guarantying the posted workers more favorable conditions of work.²¹

In the case of the *Commission v. Luxemburg*, the state was accused in a wider interpretation of the Directive 96/71 and namely article 10. According to the Commission the public policy provision under article 10 was interpreted by the national legislation of Luxemburg too broadly, inclusive of the requirement of a written employment contract or a written document established in accordance with directive 91/533;²² automatic indexation of remuneration to the cost of living; the regulation of part time work and fixed-term work; and respect for collective agreements. The provisions of the national law obliging foreign companies to provide additional information on posted workers and also assign representative in Luxemburg for labor inspection purposes were considered by the Court as unjustified restriction on freedom to provide services.²³

Conclusion

The developments of the ECJ case law were criticized by the ILO and also by the European Trade Union Confederation. According to the ILO Committee of Experts the doctrine the ECJ has elaborated in the *Laval* and *Viking* cases is very likely to have a significant restrictive effect on the exercise of the right to strike, the manner that is contrary to the ILO Convention 87.²⁴

The European Trade Union Confederation prepared a draft amendment to the Lisbon Treaty – *Protocol on the Relation between Economic Freedoms and Fundamental Social Rights in the Light of Social Progress*. The Protocol states that highly competitive social market economy is not an end in itself but should be used to serve the welfare of all (article 1). Therefore, neither economic freedoms, nor competition rules shall have priority over fundamental social rights and in case of conflict the later shall take precedence (article 3(1)). This approach however was criticized in the Monti report, where it was stated that Treaty changes does not seem realistic in the short term.²⁵

For professor Simon Deakin, *Viking* and *Laval* cases are the result that followed the shift of the EU economic constitution from ordoliberal to neoclassical model. Both models oppose the direct state intervention in the economy. However, neoclassical thought is more extreme and see markets as essentially self-equilibrating. Neoclassical approaches view

the labor law rules and collective bargaining practices as inherently inefficient and therefore in the neoclassical approach the principal role of the courts is to remove legislative interventions through deregulation. The view that labor regulations are inherently restrictive is what lies on the bottom of the *Viking* and *Laval* cases. The author also refers to the term “social market economy” mentioned in the Lisbon Treaty and considers it as an echo from the 1950 ordoliberal thought. However, *Deakin* thinks that this cannot be used as a “bulwark against further deregulation” and suggests that there is a need for alternative law-market relationship to be considered.²⁶

Council of Europe Chapter

The outrages of the Second World War stimulated the establishment of one more international organization – the Council of Europe (hereinafter COE). Unlike the European Union which became concerned with human rights issues on a relatively later stage of their existence, the COE was seen from the very beginning as an organization created for the purposes of human rights protection. According to the Statute the aim of the organization, is “... to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress” (COE Statute, article 1.b). It was believed that one of the key elements for achieving this aim stated above was “... the maintenance and further realization of human rights and fundamental freedoms” (COE Statute, article 1.b).

The European Convention on Human Rights was created in the framework of the Council. With the help of the European Court of Human Rights the Convention guarantees the most essential human rights in the region, including trade union freedoms. Article 11 of the Convention states everyone’s right to freedom of association, including “the right to form and to join trade unions for the protection of his interests.”

Even though the Convention is brief on trade union freedoms²⁷ and does not mention specific trade union rights, the position of the Court is that “the Convention is a “living instrument” which must be interpreted in the light of present-day conditions”.²⁸ This enables the Court not only to bypass the *Travaux préparatoires* but also to adapt and re-state its case law.²⁹

Freedom of Association in the ECHR Jurisprudence

The first case where the Court deliberated about the content of the right to form and join trade union for the protection of workers interests was *National union of Belgian Police v. Belgium 1975*.³⁰ The issue was a right of trade unions to be consulted. The Court stated that the right to consult is “not an element necessarily inherent” in Article 11. The Court did not take into account international practice, namely the European Social Charter 1961 which guarantees such right (Para 38).

According to the Court trade unions should enjoy a “right to be heard” in order to protect their interests. In order to achieve this end states are free to choose the means. According to the Court, “while consultation is one of these means, there are others” (Para 39).

In the Case of *Swedish Engine Drivers’ Union v Sweden 1976*³¹ trade unions claimed a right to enter into collective agreement. The Court again disregarded article 6.2 of the European Social Charter and in the same vein as in the *National Union of Belgian Police* case stated that trade unions have the right to be heard and that Article 11.1 leaves states a choice to choose the means for attaining that purpose. In the opinion of the Court “while the concluding of collective agreements is one of these means, there are others” (Para 40).

In the case of *Schmidt and Dahlström v. Sweden 1976*³² the issue was a right to strike. The Court recognized that right to strike constitutes one of the most important means for trade unions to protect occupational interests of their members. However, the Court was of the opinion that there are also other means for protection of occupational interests and states are free to choose (Para 36).

This conclusion of the Court on a right to strike was challenged in the case of *Unison v The United Kingdom 2002*,³³ which was declared inadmissible. Applicants argued that prohibition of strike affected the very core of the right to organize. For proving the close link between the right to organize and the right to strike the applicant pointed to the reports and conclusions of the ILO and the ESC. The Court did not accept the challenge and repeated its previous case law that the strike action is one of the means and states have wide margin of appreciation in choosing the means. However, interesting is to observe that the Court explicitly reviewed such restriction against principles governing restrictions in Article 11.2. Such a review was taking place in the previous case law only in

relation to core/essential aspects of freedom of association, which the right to strike was not that time.³⁴

In the case of *Wilson, National Union of Journalists and Others v The United Kingdom 2002*³⁵ the issue was a right to bargaining. The Court again stated that the right to collective bargaining might be one of the means by which trade unions protect the interests of their members, but it is not indispensable for the effective enjoyment of trade union freedoms (Para 44). Important is the fact that in this case the Court takes note of European Social Charter 1961 and the ILO Conventions (Para 48).

Demir and Baykara v. Turkey

The position of the Court in regard the elements of trade unions freedom to associate remained unchanged until 2008. In *Demir and Baykara v. Turkey 2008*³⁶ civil servants' trade union started litigation against a local government claiming that the latter did not fulfill certain obligations derived from the collective agreement signed between them.

The Court of Cassation of Turkey noted that the legislation at that time when the trade union was founded did not permit civil servants to form a trade union and bargain collectively. The union never enjoyed a legal personality since its foundation and therefore did not have a capacity to take or defend court proceedings. According to the Audit Court the members of the trade union had to reimburse the additional income they received as a result of defunct collective agreement (Para 26-29).

The Cassation Court explained that even though certain rights and freedoms are mentioned in the Constitution, some of them are not directly applicable and requires the enactment of further legislation. Without such specific legislation these rights (including the freedom to join a trade union and to bargain collectively) could not be exercised. In the view of the Court the trade union could not rely on the ILO Conventions either, while they were not incorporated into domestic law and there was no implementing legislation enacted.

The case was referred to the ECHR. In 2006 the Chamber judgment was delivered where the Court established a violation of Article 11 on account of the domestic courts' refusal to recognize the legal personality of the applicants' trade union and the annulment by those courts of the collective agreement between the trade union and its members' employers. The case was referred to the Grand Chamber which upholds the Chamber judgment.

The Court mentions two guiding principles that mark the evolution of case law as to the substance of the right of association: firstly, the Court takes into account the totality of the measures taken by the state in order to secure freedom of association, subject to its margin of appreciation; and secondly, the Court does not accept restrictions on the essential elements of the freedom of association, without which that freedom would become devoid of substance. This said the Court enumerates already established essential elements of the right of association: the right to form and join a trade union, the prohibition of closed shop agreements (*Sørensen and Rasmussen v. Denmark*, 2006) and the right of a trade union to seek to persuade the employer to hear what it has to say on behalf of its members. The Court makes it clear that the list is not finite. It emphasizes a “living” nature of the Convention and the importance of the development of the international law. (Para 140-146)

The Court makes reference to number of international instruments (ILO Conventions 98 and 151; ESC Article 6.2; EU Charter, Article 28) and also the common practice of the member states that guarantee a right to collective bargaining and right to enter into collective agreement for workers, including those public servants. Based on these developments in the international and national law the Court thinks that its previous case law, where the right to bargain collectively and right to enter into collective agreements was considered to be just means should be reconsidered and these two rights should constitute essential elements of the freedom of association protected under Article 11. The Court pays due regard to the principles of legal certainty and foreseeability not to depart from the precedents, however, the Court is of the opinion that sometimes it is a necessary step in order to embrace reforms and improvements (Para 147-153).

While applying the mentioned principles to the present case, the Court decided that the annulment of the collective agreement constituted interference with the applicants’ trade union freedom (Para 157). According to the Court the refusal to accept the applicants’ right to enjoy the right to bargain collectively and persuade the authority to enter into a collective agreement did not correspond to a “pressing social need” and was not “necessary in a democratic society”. This conclusion was based on several factors: the collective bargaining and the right to enter into collective agreement are recognized by the international instruments which Turkey was party to at that time (ILO Convention 98); there is no evidence that supports that public servants in the present case were belonging to the

category of the public servants (officials whose activities are specific for the administration of the state) in relation to which ILO allows restrictions; omission of the law, caused by the delay of the legislator, cannot be accepted as a justification for the annulment of a collective agreement. Therefore, the Court established a violation of Article 11 on account of the annulment *ex tunc* of the collective agreement entered into by the trade union Tum Bel Sen following collective bargaining with the employing authority. (Para 162-170)

Judge Zagrebelsky wrote a separate opinion. He did not accept the argument of the Court that recognition of the right to collective bargaining as essential element of the freedom of association was caused by “the perceptible evolution in such matters, in both international law and domestic legal systems”. He correctly mentions that the new and recent fact that may be regarded as indicating an evolution internationally is only the proclamation of the EU Charter of Fundamental Rights 2000.³⁷ As for the evolution of the domestic legislation the Judge is of the opinion that it is difficult to assess the time and period from which a significant change became perceptible. Therefore, the conclusion of the judge is that

the Court’s departure from precedent represents a correction of its previous case-law rather than an adaptation of case-law to a real change, at European or domestic level, in the legislative framework or in the relevant social and cultural ethos (Para 2).

Commentaries on Demir

In the article by Ewing and Hendy, the authors offered a detailed analysis of the *Demir and Baykara* judgment. In the view of the authors while interpreting the rights under article 11 the Court abandoned the “original intentions of the drafters” and embraced an idea of a “living document”. According to the authors the Court also considered the other treaties (ILO Conventions, ESC) as living instruments because it has relied not only on the texts of those treaties but also the respective interpretations of the supervisory bodies.³⁸

For some scholars with reconciliation of multiple conceptions of the right to collective bargaining the Court in *Demir and Baykara* underlines the convergence of international and European sources. Because of the comparative method it applies the Court also makes it compulsory for the states to comply with the obligations emanating from the ILO standards

and ESC. By writing the *Demir*, the Strasbourg Court explicitly embraces the international context of the right to collective bargaining which is intended to safeguard domestic labor law and social guarantees against economic values and international competition.³⁹

In the opinion of Barnard one of the striking features of the *Demir* is the extensive reference made to the international sources, particularly the ILO Conventions and EU Charter of Fundamental Rights in justifying the reversal of its previous case law on the scope of Article 11. She makes comparison with the ECJ rulings in *Viking* and *Laval*, which disregarded international instruments and thinks that ECHR is more open to international sources than ECJ.⁴⁰

Some of the commentators are rather skeptical to this new interpretative approach of the ECHR. Jacobs is writing on the harmonization issue regarding the right to bargain collectively. He is of the opinion that the ECHR should not go further in harmonizing national laws in regard to collective bargaining because these laws have their roots in historical development of collective bargaining (different from one country to another) and are expression of power relations touching upon which will disturb the power balance in the states.⁴¹

Enerji Yapi-Yol Sen v. Turkey

One more case that came soon after *Demir and Baykara* and caused much of the disagreement between scholars and commentators was a case of *Enerji Yapi-Yol Sen v. Turkey 2009*.⁴² The case concerned a right to strike of civil servants who were banned from taking part in a national one day strike planned by trade unions in order to secure the right to a collective bargaining agreement. The circular prohibiting public sector employee from such action was published by the Prime Minister's Public-Service Staff Directorate. Some of the trade union members still took part in the strike action and received disciplinary sanctions as a result (Para 6-15).

In this case, the Court established a violation of Article 11.1. The Court disapproved the general character of the circular, prohibiting all public servants to take part in the strike action. According to the Court these sanctions are likely to discourage union members and anyone else wishing to participate legitimately in such a day of strike or action to defend the interests of their members (Para 32).

The Court repeated itself that strike action which enables a trade union to be heard constitutes an **important aspect** for the protection of trade union members' interests (*Schmidt and Dahlström v. Sweden 1976, §36*). However, unlike its previous case law on the right to strike the Court makes reference to the ILO and ESC instruments stating that ILO supervisory bodies recognize the right to strike as an indissociable corollary of the right of trade union association protected under ILO Convention 87 (here the Court makes notice of *Demir and Baykara* which mentions in detail the International Law instruments in this regard). The Court also recalls ESC which recognizes a link between the collective bargaining and the right to strike and considers the right to strike as a mean for ensuring effective exercise of the right to collective bargaining (Para 24).

Commentaries on Enerji

According to Ewing and Hendy, the fact that the Court referred to the ILO and ESC and recognized strike action as a corollary to the right to bargain collectively (which on its part is recognized as an essential element of freedom of association protected under Article 11, *Demir and Baykara, §153*) strongly suggests that the Court has recognized the right to strike, in so far as it is exercised in furtherance of collective bargaining, as equally essential. The commentators also paid attention to the fact that the Court in this case did not mention that the right to strike was one of the important means and that there are others at the disposal of the states. Instead, by using the ration in *Demir and Baykara*, the Court stated that the government interfered with the applicant's right to strike and only this interference was enough to establish a violation of article 11.1. The authors also made emphasis on the fact that the linkage between the collective bargaining and strike is long recognized in international law and therefore the conclusion of the Court in this case was logical.⁴³

Dorsemont shares the view that the Court in *Enerji* implicitly recognized the right to strike as an essential element of the trade union freedom. He finds it unfortunate that the language of the Court in *Enerji* is not the same as in *Demir and Baykara* and right to strike is still formulated as an important mean only, instead of essential. However, he pays attention to the fact that the Court prefers to tackle the justified character of the prohibition under the angle of proportionality. The prohibition of strike was not justified because of its generic character.⁴⁴

In her article published in 2013, Catherine Barnard compares *Enerji* and *Viking* judgments and emphasizes a very important fact: in *Viking* the Court adopted an essentially single-market approach and found strike action unlawful unless justified and proportionate. While in *Enerji* the ECHR adopts a human rights perspective according to which strike action is lawful and any restriction to it must be narrowly construed.⁴⁵

Following Cases

An interesting judgment delivered by the Grand Chamber in 2013 was case of *Sindicatul "PĂSTORUL CEL BUN" v. Romania, 2013*.⁴⁶ The case concerns a refusal of the Romanian authorities to register a trade union formed by priests of the Romanian Orthodox Church. The Grand Chamber in this case quashed the Chamber judgment and decided that the refusal of the authorities to register the trade union was a direct consequence of the right of the religious communities to organize their activities in accordance with the provisions of their own statute.

In its assessment the Court made a reference to the ILO Conventions and *Demir and Baykara* only in that part of judgment where it has established that clergy men were involved in the employment relationship and therefore they fall within the scope of Article 11 (Para 142). This way Court established interference in the right of applicants to form trade unions. There was no mention of *Demir and Baykara* and ILO Conventions when the Court was deciding whether such interference was necessary in a democratic society.

One intriguing aspect that this judgment offers is found in the paragraphs where the Court speaks about general principles on the right to form and join the trade union. The Court lists the essential elements of the right to organize: the right to form and join trade unions; the prohibition of closed-shop agreements; the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members; and the right to bargain collectively. The Court does not mention the right to strike among the enumerated essential elements. However, noticeable is the fact that the Court refers to this list as "non-exhaustive" (Para 135).

The very recent case concerning the violation of the right to strike was a case of *The National Union of Rail, Maritime and Transport Workers v. The United Kingdom 2014*.⁴⁷ The case concerned a right to secondary strike action where the applicant was a representative of a very small number of employees in the workplace, organizing striking action among which

would not have any disruptive effect on the work and eventually would not lead to any results. According to the applicant it could better protect the interests of its members if it was allowed to organize a secondary strike action in support of the workers concerned (Para 16). Secondary action is expressly excluded from statutory protection by Section 224 of the Trade Union and Labour Relations (Consolidation) Act 1992.

For the first time in its jurisprudence the Court recognized that the secondary strike action is a right protected under the article 11.1. The reference was made to *Demir and Baykara*, acknowledging the importance of the established international norms (ILO, ESC) in the interpretation process of the Convention rights (Para 76, 77).

The Court, however, did not establish a violation of article 11.1. The Court distinguished this case from *Demir and Baykara*. Unlike the latter, in this case the core elements of freedom of association (which, according to the Court, can be a primary strike action) were not at stake and therefore state enjoyed a wide margin of appreciation (Para 88).

If the restriction upon the secondary strike action was justified by the fact that it was not core but secondary or accessory aspect of the trade union activity, it follows logically that in case of primary strike action states should enjoy a very narrow margin of appreciation because they deal with the core element of freedom of association.

Conclusion

From the above discussion, we see that the ECHR has broadened the content of freedom of association. Some of the rights, not considered as essential elements for the realization of trade unions freedom under article 11 before are now considered as such. Interestingly, this development in the ECHR case law started right after the ECJ cases. If *Demir* and *Enerji* are response to the *Viking* and *Laval* or is it just a coincidence is a matter of speculation, which I am not going to discuss here. The fact is that the ECHR has started a new cycle on freedom of association and it is not certain how far it can go.

Comparative Analysis of the ECJ and ECHR Jurisprudence

The main idea of the Schuman Plan was to create an organization which would mobilize control over the natural resources (steel and coal) of

the member states of this organization and in this way make sure that one state cannot wage a war without others knowing about it. This is how the idea of the European Union emerged. The idea was realized in a number of Treaties which united the certain number of European states and set internal rules. The rules were mainly concerned with deepening general economic cooperation by establishing common market among member states, where goods, persons, services and capital can flow freely without any custom control. The human rights agenda appeared in the Treaties on a relatively later stage. The first EU Treaty that explicitly mentioned human rights was the Maastricht Treaty 1992.

This was not a case with the Council of Europe. From the very beginning the Council was seen as an organization the main purpose of which was to protect human rights.

I believe that this difference between the EU and COE has shaped the approach that the institutions under their structure have developed with time towards human rights. From the very beginning the main challenge for the ECJ was to guarantee proper functioning of the EU law. In the last decades its task became more complicated because now it has to protect human rights as well. The ECHR, on the other hand, was always concerned with human rights protection and only.

Speaking of freedom of association it should be mentioned that the issues related to freedom of association is scattered in the EU among different documents and judgments, including EU Treaties, EU Charter and ECJ jurisprudence. On the opposite, the COE is more systematic in this regard. It is guaranteed by three major articles in the two major human rights instruments (ECHR, ESC). Both instruments are backed by the supervisory institutions (the European Court, the ECSR) which consistently interpret the provisions of the right. This makes it easier to identify the content of the freedom of association and the ways to guarantee it.

The case law of the ECJ regarding the freedom of association takes start in the case of *Bosman*⁴⁸ where the Court established that that freedom of association constitutes a general principle of the EU law. In the case of *Albany*⁴⁹ the Advocate General upholds the right to form and join trade unions as a core element of freedom of association. The case of *Werhof*⁵⁰ offers recognition of a negative right of employees to organize. In the *Viking*⁵¹ case the ECJ explicitly recognized the right to strike as a fundamental right. Finally, the right to bargain collectively and the right to conclude collective agreement were also recognized by the ECJ in the case of *Commission v. Germany*.⁵²

On its hand, the ECHR also recognize all the mentioned elements of freedom of association as *inherent in the right to form and join* trade unions guaranteed under article 11. In the case of *Sindicatul* the Court lists the essential elements of the right to organize: the right to form and join trade unions; the prohibition of closed-shop agreements; the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members; and the right to bargain collectively. The Court was not very explicit in recognition of the right to strike. However, it is still noticeable that the European Court distanced itself from its previous case law on this matter.

At one glance it seems that the case law of the ECJ and ECHR equally recognize the freedom of workers and employers to associate and that there is no much divergence in their positions. The impression has a valid basis because freedom to associate was step by step recognized by the ECJ. The same was also happening in the ECHR, which in the beginning did not recognize the inherent elements of the freedom of association. Even though the language of the two courts is not exactly the same (the ECHR uses the terms “inherent right”, while the ECJ speaks about general principles of the EU) the content is very similar.

However, as it is well established in the legal scholarship the recognition of the legal norms is one thing and the application of them in practice is another. As we already saw the balancing exercise that the Court had to deal in the *Viking Line* ended up with introduction of the proportionality test, according to which the national courts must first assess if the jobs of the workers were “jeopardized or under serious threat” and only if the answer is positive to assess whether the trade union action “was suitable for ensuring the objective pursued and does not go beyond what is necessary to attain that objective”. This proportionality test was considered to be very strict by legal scholars, putting trade unions in a very difficult situation when strike becomes a last resort.

ECJ references to the ECHR case law is an issue deserving attention. In the beginning the ECJ was using the ECHR jurisprudence in order to justify its approach. In *Viking Line* the reference was made for supporting the idea that some elements of the freedom of association are not recognized as inherent by the ECHR and therefore ECJ has no obligation to take them into account. However, after the ECHR recognized these elements as inherent in the cases of *Demir* and *Enerji* the ECJ did not accept it. In the case of *Commission v. Germany*, the Court makes reference to the *Viking* case and the proportionality test introduced by the Court therein. According

to the Court the exercise of the fundamental right to bargain collectively must be reconciled with the EU freedoms of movement stemming from the EU Treaties. The Federal Republic of Germany was said to violate the EU Directives (92/50 and 2004/18) on freedom of establishment and the freedom to provide services in the field of public procurement.

It is very true that freedom of association is not an absolute right and its restriction is allowed by all international and regional instruments. However, the restrictions upon it should be strictly limited and justified on a case by case basis. The proportionality test enacted by the ECJ in the *Viking* does not offer sufficient protection for the freedom of association. The test is very strict and does not leave much room for the maneuver for trade unions.

ECHR on the other hand does not have to deal with the economic issues and the fundamental freedoms of movement of the EU. The task of the ECHR is simpler compare to its counterpart; it is only concerned with human rights protection. Not surprisingly, the approach of the ECHR is more human rights oriented.

There is also a similarity between the courts case law; both of them provide a detailed definition of the rights that constitute elements of the freedom of association. ECHR explicitly refers to the ESC and the ILO and takes note of the definitions they provide. The ECJ also refers to the international instruments, including the ECHR. The language of the ECJ is not as explicit as the language of the ECHR but the fact itself that they refer to the international instruments suggests that they are willing to take their interpretations into consideration.

Conclusion

In conclusion, it can be said that the EU went for a long journey to establish human rights discourse in its institutions, including and probably most importantly in the ECJ. Human rights gradually became concern of the EU. It took some time before the recognition of the trade union freedoms actually happened. It can be said that human rights, including freedom of association is protected under the EU law and the ECJ jurisprudence. The problem arises when these human rights are in contradiction with the EU's fundamental freedoms of movement. In these cases the ECJ, though trying to introduce balance between these competing freedoms, in fact

abandons human rights approach and focuses more on the interests of the internal market.

The fact that EU Charter has acquired legally binding force did not change the attitude of the ECJ. The last bastion is the EU's accession to the ECHR, provided by article 6.2 TEU. Professor Filip Dorssemont thinks that a shift in the ECJ case law is likely to take place in case of EU accession to the ECHR. In that case the ECHR which puts genuine fundamental workers' rights at the heart of the matter will force EU institutions, including ECJ to abide by the judgments delivered in Strasbourg.⁵³ Catherine Barnard also thinks that accession will be a significant move in terms of protection of social rights.⁵⁴

Indeed, accession of the EU to the ECHR has a potential to shed light on many aspects regarding human rights, including trade union freedoms. If the Europe becomes more human rights focused, remains to be seen.

NOTES

- ¹ A. Reinisch, *Essentials of EU Law*, Second Edition, Cambridge University Press, 2012, p. 3-4.
- ² D. Chalmers, G. Davis, G. Monti, *European Union Law, Cases and Materials*, Second Edition, Cambridge University Press, 2010, p. 12-13.
- ³ P. Craig and G. de Burca, *EU Law, Text, Cases, And Material*, Fifth Edition, Oxford University Press, p. 583.
- ⁴ Case 29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969]; Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, [2002]; Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003].
- ⁵ C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995]; § 79-80.
- ⁶ C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999]; Opinion of AG Jacobs: § 139, 158.
- ⁷ Case C-271/08 *European Commission v Federal Republic of Germany* [2010]; Para. 37.
- ⁸ Case C-438/05 *International Transport Workers' Federation, Finish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007].
- ⁹ In Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] the ECJ made a balancing exercise between the free movement of goods on the one hand and the freedom of expression and the freedom of assembly on the other hand and reached the conclusion that because of the overriding public interest freedom of expression and the assembly prevail over the EC rules on free movement of goods; Para. 77-94.
- ¹⁰ In Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] the ECJ had to use a balancing tool between the freedom of provision of services on the one hand and the respect for human dignity as a general principle of EC law on the other. Here the court stated that protection of human dignity ensured by the national constitution can justify restriction on the provision of services; Para. 34-41.
- ¹¹ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999].
- ¹² In *Albany* the ECJ found that certain restrictions of competition are inherent in collective agreements between workers and employers organizations and the social policy objectives pursued by such agreements can seriously be undermined if subjected to the rules on competition under article 85(1) EC (now, article 101(1) TFEU).

- ¹³ Case C-438/05 *International Transport Workers' Federation, Finish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007], Opinion of AG Maduro.
- ¹⁴ C. Barnard, *Viking and Laval: An Introduction* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. C. Barnard, Hart Publishing, 2008, P. 484.
- ¹⁵ C. Barnard, *Viking and Laval: An Introduction* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. C. Barnard, Hart Publishing, 2008, P. 472, 483.
- ¹⁶ A. Dashwood, *Viking and Laval: Issues of Horizontal Direct Effect* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. C. Barnard, Hart Publishing, 2008, P. 533-534.
- ¹⁷ T. Novitz, *A Human Rights Analyses of the Viking and Laval Judgments* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. C. Barnard, Hart Publishing, 2008, P. 557-559.
- ¹⁸ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets, avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007].
- ¹⁹ C. Barnard, *Viking and Laval: An Introduction* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. C. Barnard, Hart Publishing, 2008, P. 475-476.
- ²⁰ M. Rönmar, *Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the Laval Case from a Swedish and Nordic Perspective* in the Cambridge Yearbook of European Legal Studies, Volume 10, 2007-2008, Ed. C. Barnard, Hart Publishing, 2008, P. 523.
- ²¹ Case C-346/06 *Rechtsanwalt Dr. Dirk Ruffert, in his capacity as liquidator of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* [2008]; Para 34.
- ²² Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.
- ²³ Case C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] Opinion of AG Trstenjak, Para 20-32.
- ²⁴ Report of the Committee of Experts on the Application of Conventions and Recommendations, iloex No. 062010GBR087, 2010.
- ²⁵ *A New Strategy for the Single Market at the Service of Europe's Economy and Society, Report to the President of the European Commission Jose Manuel Barroso*, by M. Monti, 9 May 2010, p. 70.
- ²⁶ S. Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's "Social Market Economy"* in *The Lisbon Treaty and Social Europe*, edited by N. Bruun, K. Lorcher and I. Schoman, Hart Publishing, 2012, p. 29-31.

- 27 Article 11 does not specify the identity of the holder of the rights concerned, but mentions “everyone” instead; the objective of the article 11 is also structured in general terms: protection of interests.
- 28 *Sigurdur A. Sigurjonsson v. Iceland*, application no. 16130/90, §35, ECHR 1993.
- 29 F. Dorssemont, *The Right to Form and Join Trade Unions for the protection of His Interests under Article 11 ECHR, An Attempt “to Digest” the Case Law (1975-2009) of the European Court of Human Rights*, European Labor Law Journal, Volume 1 (2010). No. 2, p. 197.
- 30 *National union of Belgian Police v. Belgium*, application no. 4464/70, ECHR, 1975.
- 31 *Swedish Engine Drivers’ Union v. Sweden*, application no. 5614/72, ECHR, 1976.
- 32 *Schmidt and Dahlström v. Sweden*, application no. 5589/72, ECHR, 1976.
- 33 *Unison v. The United Kingdom*, application no. 53574/99, ECHR, 2002.
- 34 F. Dorssemont, *The Right to Form and Join Trade Unions for the protection of His Interests under Article 11 ECHR, An Attempt “to Digest” the Case Law (1975-2009) of the European Court of Human Rights*, European Labor Law Journal, Volume 1 (2010). No. 2, p. 227.
- 35 *Wilson, National Union of Journalists and Others v. The United Kingdom*, applications nos. 30668/96, 30671/96, 30678/96, ECHR, 2002.
- 36 *Demir and Baykara v. Turkey*, application no. 34503/97, Grand Chamber, ECHR, 2008.
- 37 It’s difficult to disagree with the Italian Judge on this point as the international documents on the basis of which the Court derives the conclusions in the judgment (ILO Conventions, ESC, ICESCR, ICCPR) date back to 1950’s and 1960’s.
- 38 K.D. Ewing and J. Hendy QC, *The Dramatic Implications of Demir and Baykara*, Industrial Law Journal, Vol. 39, No. 1, 2010, p. 6-8.
- 39 A. Jacobs, *Article 11 ECHR: The Right to Bargain Collectively, under Article 11 ECHR* in F. Dorssemont, K. Lorcher and I. Schomann (eds.) *The European Convention on Human Rights and the Employment Relations*, Hart Publishing, 2013, p. 312.
- 40 C. Barnard, *The Protection of Fundamental Social Rights in Europe after Lisbon: a Question of Conflicts of Interests* in S. de Vries, U. Bernitz and S. Weatherill (eds.) *The Protection of Fundamental Rights in the EU after Lisbon*, Hart Publishing, 2013, p. 43-44.
- 41 A. Jacobs, *Article 11 ECHR: The Right to Bargain Collectively, under Article 11 ECHR* in F. Dorssemont, K. Lorcher and I. Schomann (eds.) *The European Convention on Human Rights and the Employment Relations*, Hart Publishing, 2013, p. 314-315.
- 42 *Enerji Yapi-Yol Sen v. Turkey*, application no. 68959/01, ECHR, 2009.

- 43 K.D. Ewing and J. Hendy QC, *The Dramatic Implications of Demir and Baykara*, *Industrial Law Journal*, Vol. 39, No. 1, 2010, p. 14-15.
- 44 F. Dorssemont, *The Right to Form and Join Trade Unions for the protection of His Interests under Article 11 ECHR, An Attempt “to Digest” the Case Law (1975-2009) of the European Court of Human Rights*, *European Labor Law Journal*, Volume 1 (2010). No. 2, p. 230.
- 45 C. Barnard, *The Protection of Fundamental Social Rights in Europe after Lisbon: a Question of Conflicts of Interests* in S. de Vries, U. Bernitz and S. Weatherill (eds.) *The Protection of Fundamental Rights in the EU after Lisbon*, Hart Publishing, 2013, p. 43.
- 46 *Sindicatul “PĂSTORUL CEL BUN” v. Romania*, application no. 2330/09, ECHR, 2013.
- 47 *The National Union of Rail, Maritime and Transport Workers v. The United Kingdom*, application no. 31045/10, ECHR, 2014.
- 48 C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995].
- 49 C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999]; Opinion of AG Jacobs.
- 50 C-499/04, *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* [2006].
- 51 Case C-438/05 *International Transport Workers’ Federation, Finish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti* [2007].
- 52 Case C-271/08 *European Commission v Federal Republic of Germany* [2010].
- 53 F. Dorssemont, *How the European Court of Human Rights gave us Enerji to cope with Laval and Viking*, in *Before and After Economic Crisis, What Implications for the “European Social Model”?*, edited by M. Moreau, Edward Elgar Publishing Limited, 2011, p. 231-232.
- 54 C. Barnard, *The Protection of Fundamental Social Rights in Europe after Lisbon: a Question of Conflicts of Interests* in S. de Vries, U. Bernitz and S. Weatherill (eds.) *The Protection of Fundamental Rights in the EU after Lisbon*, Hart Publishing, 2013, p. 43-44.