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THE EU AND THE RIGHT TO STRIKE: REGULATION THROUGH THE BACK DOOR AND ITS IMPACT ON SOCIAL DIALOGUE

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ABSTRACT:

The formal exclusion of the right to strike from the legislative competence of the European Union (EU) under the Treaty on the Functioning of the European Union stems from an understanding that such industrial relations matters were to remain the prerogative of the Member States in compliance with standards set by the International Labour Organisation (ILO). It is argued here that such an approach is manifestly inadequate, for at least two reasons. The first is the significance of the capacity to take industrial action for European social dialogue, which needs to be protected at EU level if the ILO is unable to do so. The second is that the legitimacy of the EU has been bolstered by reference to social rights, and we might therefore expect the right to strike to be protected within this framework (as understood under the jurisprudence of ILO supervisory bodies). These are reasons for the positive protection of a right to strike, but this article also examines how the right to strike has, in fact, been compromised and arguably even negated by the pursuit of economic objectives by the EU. Extensive restrictions have been placed by judicial means on collective action which has potential cross-border effects, but also EU political and economic institutions have sought to prevent purely domestic action taken by trade unions which has the capacity to undermine certain EU macro-economic objectives regarding public expenditure and wage-setting. In this way, the notional exclusion of EU competence over freedom of association and the right to strike can be seen as a bind from which EU institutions have long escaped. What we have instead is extensive EU back door regulation of industrial action which significantly departs from what were widely accepted ILO standards. What is needed is more transparent debate over the activities of the EU in this sphere and their implications for social dialogue.

1. INTRODUCTION

The treatment of the right to strike by the European Union (EU) has long been problematic and contested. The Members of the EU and its predecessors, the European Economic Community (EEC) and the European Community (EC), were wary of seeking to regulate industrial action. They understood freedom of association, the right to strike and the lock-out as lying within their own competence to be exercised as national governments according to socially embedded industrial relations systems, subject only to their other international obligations. Hence, the legislative competence of the EU on social policy under Article 153(5) of the Treaty on the Functioning of the European Union (TFEU) ‘shall not apply to

pay, the right of association, the right to strike or the right to impose lock-outs'. However, this formal exclusion has not been sensible or, indeed, ultimately respected by EU institutions.

Two reasons (at least) are indicative of why the EU should actively protect a right to strike. One is that capacity to exercise a right to strike is determinative of the efficacy of trade unions' participation in social dialogue, a mechanism on which the EU social policy has relied for several decades now. In this respect, it would seem that the EU has been tacitly reliant on national labour laws implementing International Labour Organisation (ILO) standards regarding industrial action, both of which are now under threat. The second is that constructing a basis for legitimacy for the EU within a human rights tradition requires some recognition of the significance of a right to take strike action, acknowledgement of which arguably culminated in the text of Article 28 of the EU Charter of Fundamental Rights 2000, given legal effect by the Treaty of Lisbon on 1 December 2009. We might expect that ILO standards would inform the interpretation and application of that text, but there have already been significant deviations from those norms in the case law of the Court of Justice of the European Union (CJEU).

Overall within the EU, the trend has not been towards positive protection, but rather the exercise of EU powers to negate access to industrial action. This is primarily a response to the fact that collective action by workers and their organisations can limit the exercise by market actors of their commercial freedoms under the TFEU (free movement of workers, free movement of goods, free movement of services and freedom of establishment). This tension is currently resolved so as to ensure that free movement entitlements are prioritised over industrial action. Further, in the wake of the financial crisis, the EU has sought to regulate Member States' macroeconomic policies regarding public spending and wage setting, in ways that have repercussions for collective bargaining. Through these means, access to the right to strike has been limited, not only when industrial action has cross-border effects, but also when action would achieve collectively bargained wage (and other) gains internal to Member States. Further, this has been done in contravention of ILO standards.

The conduct of EU institutions, judicial, political and economic, have therefore evaded the formal exclusion of the right to strike from EU legislative competence and call into question whether such an omission is ultimately sustainable. The deference to national sovereignty (and ILO standards) which Article 153(5) once represented is now lost. Rather, the contours and parameters of the right to strike need to be the subject of transparent political debate rather than covert regulation via the backdoor. While reference continues to be made to 'social dialogue' in key EU policy documents it has become unclear what this can mean in the context of the intentional reduction of trade union bargaining power through various means, including prevention of collective action.

2. THE RELEVANCE OF ILO STANDARDS TO EU SOCIAL DIALOGUE

If we trace the history of treatment of the right to strike by the EU, it is evident that the exclusion of a right to strike from EU legislative competence reflected a more general reluctance to intervene in the domestic industrial relations systems of Member States. However, it is argued here that this apparent 'hands off' approach actually relied on the domestic application of ILO standards, which in turn guaranteed the minimum measures required for effective trade union activity capable of enabling European social dialogue (including sectoral dialogue).

Prior to establishment of the EEC, a group of ILO experts, headed by Bertil Ohlin, considered the place of social standards within a common market.¹ The Ohlin Committee did not advocate the adoption of particular labour standards by the new European institution. Notoriously, its members doubted ‘whether in most countries the existence or absence of collective bargaining and differences in the strength of trade unions appreciably affect relative wages, patterns of production and of international trade...’² This conclusion had the effect of reserving for the ILO (and the ILO’s European Regional Council) the role of setting global and European-level labour standards which would then be applied domestically, rather than through the EEC as an intermediary.³

The ILO Committee recommendations were broadly accepted in the Treaty of Rome’s ‘White Paper’, otherwise known as the ‘Spaak Report’, adopted by ‘the Six’ founding Member States in 1956.⁴ As a consequence, the Title on Social Policy contained in the 1957 Treaty of Rome was extremely restrictive in its scope and the competence given to the EEC. Article 117 reinforced the commitment of Member States to the improvement of social standards, but provided no basis for the Council to make regulations or directives for their protection. Article 118 provided a limited role for the Commission to promote ‘close co-operation between Member States in the social field’ but this was to entail ‘making studies, delivering opinions and arranging consultations’ rather than proposing specific EEC legislation.⁵ Article 119 made provision for equal pay but set out no means for the implementation of this principle (although, obviously, this was to come later). On the whole, social policy was perceived as a matter for domestic politics (and the ILO) rather than the legitimate subject of EEC concerns. A basic cooperation was set in place between the EEC and ILO in 1958 and subsequently extended in various iterations through exchanges of letters.⁶

The Declaration of the then nine Heads of Government in Paris in 1972 followed widespread social unrest and the election of social democratic governments in Europe.⁷ It stated that ‘the same importance’ would be given ‘to energetic proceedings in the field of social policy as to the realisation of the economic and financial union’ and that the conclusion of European-level collective agreements should be made possible.⁸

This change of heart culminated in the adoption of the Social Action Programme of 1974-6, which accelerated in activity in response to the recession which followed the oil shocks. It had become important for the EEC to have a ‘human face’ but this Programme made no mention of the right to strike or Community intervention in the field of industrial action despite a range of arguments which emerged to this effect in the 1970s and continued in subsequent decades.⁹

¹ Report of a Group of Experts, *Social Aspects of European Economic Co-operation* (ILO: Geneva, 1956).

² *Ibid.*, 29.

³ J Murray, *Transnational Labour Regulation: The ILO and EC Compared* (The Hague: Kluwer, 2001), 81.

⁴ Discussed in P Davies, ‘The Emergence of European Labour Law’ in W McCarthy (ed.), *Legal Intervention in Industrial Relations* (OUP, 1992), 319

⁵ These were only ‘procedural powers’ as was evident from Joined Cases 281, 283, 285, 287/85 *Germany, UK and others v Commission* [1987] ECR 3203.

⁶ For the current extent of cooperation, see <http://www.ilo.org/brussels/ilo-and-eu/european-commission/lang--en/index.htm> accessed 9 December 2015.

⁷ W Streek and P Schmitter, ‘From National Corporatism to Transnational Pluralism: Organised Interests in the Single European Market’ (1991) 19 *Politics and Society* 133 - 164, 138.

⁸ Declaration of the Heads of State and Government of the Member States, Paris, 20 October 1972, EC Bulletin 10/1972, 19 - 20.

⁹ Bulletin, Suppl. 2/74; [1974] OJ C13/1. W Däubler, *Der Streik im öffentlichen Dienst* (Tübingen, 1971), 188; and W Däubler and H Hegge, *Koalitionsfreiheit* (Baden, 1976), 132 - 133; cited in A Jacobs, ‘Towards

Instead, the Commission's emphasis was on the gradual introduction of enhanced European level 'social dialogue'. This process began with the development of sectoral standards through adoption of opinions and recommendations by joint committees consisting of representatives of management and labour at the European level. These sectoral committees, the first of which were established in 1955 and others in the 1960s, were of limited effect, except perhaps in agriculture. Nevertheless, it was anticipated that more could be achieved by these means, perhaps even amounting to genuine collective bargaining.¹⁰ By 1986, the Single European Act, which had introduced for the first time a distinctive legal base for social policy measures and scope for 'qualified majority voting' at least regarding health and safety, formally recognised 'social dialogue' between management and labour at the European level, which was to be assisted (although not compelled) by the Commission. It was the Agreement on Social Policy appended to the Maastricht Treaty (which the UK would not initially sign) that made explicit provision for social dialogue to play a role in the formulation of EC Directives and for 'framework agreements' to be concluded which would then be applied by the social partners nationally and potentially adopted as EU directives.¹¹ This measure was then 'mainstreamed' into the Amsterdam Treaty and remains in Articles 154 and 155 of the Treaty on the Functioning of the European Union (TFEU) after the Lisbon Treaty where its relevance and operation has not been fundamentally changed.¹²

Notably, the specific exclusion of 'pay, the right of association, the right to strike or the right to impose lock-outs' which was introduced by the Maastricht Social Chapter has also been retained and is now set out in Article 153(5) of the TFEU. There remains some ambiguity as to what we might understand by the term 'the right to strike' in this context, but it is arguable in the light of the continuing cooperation agreement with the ILO that it was to be understood in accordance with the established jurisprudence of the ILO supervisory bodies, particularly the ILO Governing Body Committee on Freedom of Association (CFA) which had produced a *Digest of Decisions* to which there could be ease of reference;¹³ and that the term was also be understood in conjunction with the national industrial relations and constitutional traditions of Member States (to which the Court of Justice had referred under its general principles jurisprudence).¹⁴

Antonio Lo Faro has suggested that the form of social dialogue envisaged at European level was to serve regulatory and legitimacy objectives rather than those normally associated with

Community Action on Strike Law' (1978) 15 *CMLRev* 133 at 147. See also Committee of Experts, *The Prevention and Settlement of Industrial Conflict in the Community Member States* (the Treu Report) (Luxembourg: Commission, 1984) and Lord Wedderburn, *Freedom of Association and Community Protection: A Comparative Enquiry into Trade Union Rights of the European Community and into the Need for Intervention at Community Level* (Luxembourg: European Commission, 1992).

¹⁰ B Bercusson, *European Labour Law* (Butterworths, 1996) at 83-94.

¹¹ See T Treu, 'European Collective Bargaining Levels and Competences of the Social Partners' in P Davies, A Lyon-Caen, S Sciarra and S Simitis (eds.), *European Community Labour Law: Principles and Perspectives: Liber Amicorum Lord Wedderburn* (Oxford: OUP, 1996); A Jacobs and A Ojeda-Aviles, 'The European Social Dialogue – Some Legal Issues' in *A Legal Framework for European Industrial Relations* (ETUI, 1999) and P Syrpis, 'Social Democracy and Judicial Review in the Community Order' in C Kilpatrick, T Novitz and P Skidmore (eds.), *The Future of Remedies in Europe* (Hart, 2000).

¹² See P Syrpis, 'The Treaty of Lisbon: Much ado... but about what?' (2008) 37(3) *ILJ* 219.

¹³ For the current 5th edition, see

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_090632.pdf accessed 11 December 2015.

¹⁴ T Novitz, *International and European Protection of the Right to Strike* (OUP, 2003) at 250-253.

collective bargaining.¹⁵ That view would be consistent with the continued exclusion of a right to strike from EU competence. However, while this might be true of the consultative legislative and international regulatory powers of trade unions as social partners under Article 154 and 155 TFEU, this is less likely to be an accurate observation in relation to the other activities of the social partners under Article 152, and in particular the longstanding sectoral social dialogue process (formalised in 1998). It is in this context that industrial power in the relevant sector may make a tremendous difference to the concessions extracted as minimum standards at European level.¹⁶ Recent studies indicate that employers are reluctant to enter into binding agreements, but that the incidence of agreement did increase after 1994 and accelerated in the 2000s as sectoral social dialogue committees began to operate more effectively.¹⁷ What has yet to improve substantially is the quality of the agreements and their national level implementation. Here, social scientists consider that much depends on perceptions of representativity and the complex relationships with national level organizations.¹⁸ As has been observed: ‘strong unions can impose coordinated bargaining at the European sectoral level’, especially in the rail and water transport sectors.¹⁹ More recently, an enthusiasm for negotiation on new topics has reaped few rewards insofar as there is a reluctance to engage in bargaining on pay and working time,²⁰ topics also now the subject of controversy in national level collective agreements within the EU, as we shall see below.²¹

The viability of trade unions as constituents of the European Trade Union Confederation (ETUC), but more importantly at sectoral level, ultimately depends on their capacity on the national stage and their key role in collective bargaining there. That turns on what might be termed ‘auxiliary’ legislation enabling access to industrial action,²² agreed by Member States within the ILO (and approved there by all tripartite factions) to constitute an essential element of freedom of association protected under ILO Conventions Nos 87 and 98. In this way, the development of EU social dialogue can be seen as connected to (and indeed symbiotic with) the preservation of collective bargaining systems in Member States, the foundational rules of which were established under the jurisprudence of ILO supervisory bodies hearing complaints on violation of the constitutional principle of freedom of association or examining

¹⁵ A Lo Faro, *Regulating Social Europe: Reality & Myth of Collective Bargaining in the EC Legal Order* (Hart, 2000). For a concurring view that the social dialogue should be regarded in broader deliberative democratic terms, see also N Bernard, ‘Legitimising EU Law: Is Social Dialogue the Way Forward? Some reflections around the UEAPME Case’ in J Shaw, *Social Law and Policy in an Evolving European Union* (Hart, 2000).

¹⁶ See for a contemporary overview of the operation of social dialogue as publicised on the European Commission website: <http://ec.europa.eu/social/main.jsp?catId=480&langId=en> accessed 8 December 2015.

¹⁷ This may be linked to the institutionalisation of social dialogue sectoral committees from 1998 or the commitment of the social partners themselves to initiate an autonomous meeting at the Social Summit held in Laeken in 2001. See P Pochet, ‘Sectoral Social Dialogue? A quantitative analysis’ (2005) 11(3) *Transfer* 313; P Pochet, A Peeters, E Léonard and E Perin, (2009) *Dynamics of European Sectoral Social Dialogue* (European Foundation for the Improvement of Living and Working Conditions, 2009); and A Bogg and R Dukes, ‘The European Social Dialogue: From autonomy to here’ in N Countouris and M Freedland (eds) *Resocialising Europe in a Time of Crisis* (Cambridge, 2013) 466 at 471.

¹⁸ E Léonard, ‘European Sectoral Social Dialogue: An Analytical Framework’ (2008) 14(4) *European Journal of Industrial Relations* 401.

¹⁹ B Bechter, B Brandl and G Meardi, ‘Prospect of European Sector Bargaining: necessary and sufficient conditions for the occurrence of supranational interest coordination’ 16th ILERA World Congress, Philadelphia, USA, 2–5 July 2012; see also B Bechter, B Brandl and G Meardi, ‘Sectors or Countries? Typologies and levels of analysis in comparative industrial relations’ (2012) 18(3) *European Journal of Industrial Relations* 185. This mirrors the observations of Bogg and Dukes n 18 above at 492.

²⁰ TJ Prosser and E Perin, ‘European Tripartism: Chimera or Reality? The ‘new phase’ of the European social dialogue in the light of tripartite theory and practice’ (2015) 57(3) *Business History* 376.

²¹ See text accompanying n 76 below.

²² See Bogg and Dukes n.17 above at 486-489 on auxiliary legislation and the right to strike.

reports regarding compliance with ILO instruments such as Conventions Nos. 87 and 98. The problem today is, however, that compliance with ILO standards in EU Member States is now in decline, calling into doubt the infrastructure for this aspect of European social policy.²³ That decline may, in part, be linked to the Employer group's attempt to rebel against established ILO jurisprudence on the right to strike,²⁴ a schism apparently mended,²⁵ but which reveals the fragility of what were thought to be long-established tripartite norms which underlay European social dialogue.

3. EU RECOGNITION OF THE HUMAN RIGHT TO STRIKE

The provision which is essentially a 'preamble' to the Social Policy Title, Article 151 of the TFEU, provides that 'the Union and the Member States' have 'in mind fundamental social rights such as those set out in' the European Social Charter of 1961 (ESC) and the Community Charter of the Fundamental Social Rights of Workers 1989 (CCFSRW). The text of Article 151, in this respect, is essentially that inserted as Article 117 of the Treaty on European Union by the Treaty of Amsterdam in 1997. Both the ESC and the CCFSRW make specific provision for the right to the right to strike. The ESC does so in Article 6(4), while in the CCFSRW provision is made for the right to strike in 'point 13'.

It might seem curious that the content of these instruments (and their specific mention in the Treaties) stands in direct contradiction to the specific exclusion of the right to strike from the remit of European social policy in the succeeding provisions of the Social Title; there being no sign in the Treaty of Lisbon of any amelioration of this position. One explanation might be that, under the ESC, ratifying States have a choice of binding provisions within certain set limitations, so the right to strike need not be viewed as necessarily included by virtue of mention of this instrument.²⁶ Another explanation might be that the CCFSRW was only agreed to by eleven of the then twelve Member States; the UK never made any commitment to compliance except in the form of adherence to the Treaty of Amsterdam (where the instrument was also mentioned alongside the ESC in Article 1, inserting a fourth recital into the then TEU).²⁷ A more accurate assessment may be that the apparent inconsistency was allowed because the protection (and regulation) of the right to strike was being achieved at Member State level (presumably, although perhaps not always wholly at least in the case of the UK, in accordance with ILO standards).²⁸

²³ See Prosser and Perin n.20 above and also C Degryse, M Jepsen and P Pochet, *The Euro Crisis and Its Impact on National and European Social Policies*, Working Paper 20-13.5 (ETUI, 2013).

²⁴ See Report of the CCAS, ILC Record of Proceedings (2012), Part I/22. For commentary see Lee Swepston, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' (2013) 29(2) *The International Journal of Comparative Labour Law and Industrial Relations* 199; Janice Bellace, 'The ILO and the Right to Strike' (2014) 153(1) *International Labour Review* 29; Claire La Hovary, 'Employers' Group 2012 Challenge to the Right to Strike' (2013) 42(4) *Industrial Law Journal* 338.

²⁵ See ILO Tripartite Meeting Report TMF APROC/2015/2, Geneva, 23-25 February 2015.

²⁶ ESC 1961, Article 20.

²⁷ For arguments that UK opposition diluted the content and effect of the CCFSRW, see L Betten, 'Towards a Community Charter of Fundamental Social Rights' (1989) 1 *NQHR* 77, at 81-4; SJ Silvia, 'The Social Charter of the European Community: A Defeat for European Labor' (1990-91) 44 *Industrial and Labour Relations Review* 626 at 638; and B Bercusson, 'The European Community's Charter of Fundamental Social Rights of Workers' (1990) 53 *MLR* 624 at 626.

²⁸ See KD Ewing, *Britain and the ILO* (Institute of Employment Rights, 1994); T Novitz, 'Freedom of Association and "Fairness at Work" – An Assessment of the Impact and Relevance of ILO Convention No. 87 on its Fiftieth Anniversary' (1998) 27(3) *ILJ* 169.

The ESC and CCFSRW could from 1997 be expected to inform interpretation of the EU Treaty provisions pertaining to social policy, but as an expression of ‘social rights’ both might have been thought to be non-justiciable and subject to policy based exceptions.²⁹ In this way these instruments might be compared, unfavourably, to the European Convention on Human Rights 1950 (ECHR), which today receives direct acknowledgement as a source of the ‘general principles’ of EU law, currently under Article 6(3) of the Treaty on European Union (TEU).

The drafting of what is now Article 151 of the TFEU, of course, predates the adoption by EU institutions of the EU Charter of Fundamental Rights of 2000 (EUCFR), which may explain why Article 151 makes no mention of that instrument. The EUCFR is remarkable for its apparent blending of economic and social with civil and political rights – the indivisibility of rights is emphasised.³⁰ It sets out both an entitlement to freedom of association ‘which implies the right of everyone to form and to join trade unions for the protection of his or her interests’ (Article 12) and the right to strike ‘in accordance with Union law and national laws and practices’ (Article 28). However, the EUCFR is also notable for the ways in which the instrument also treats certain commercial rights are treated as human rights. Personal ‘freedom of movement and of residence’ is protected under Article 45, although apparently not freedom of goods, services or establishment. The right to property is protected under Article 12 and ‘the freedom to conduct a business in accordance with Union law and national laws and practices is recognised’ under Article 16.

There are links between the text of the EUCFR and the ESC and CCFSRW, so that there is scope for an integrated understanding of the former as a manifestation of existing EU Treaty commitments. ‘Explanations’ relating to the EUCFR³¹ indicate that Article 12 is based on Article 11 of the ECHR and Article 11 of the CCFSRW. Article 28 is said to be based on ‘Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14)’, although no explanation is given as to why it is a right to be regarded as subject not only to national laws, but ‘Union law’. It is interesting that the Explanations observed that: ‘The right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR.’ Further, notably, ‘[t]he modalities and limits for the exercise of collective action, including strike action, come under national laws and practices...’.

Indeed, the EUCFR is itself limited in its application. First, in accordance with the First Declaration to the current TEU: ‘The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.’ This is stressed by Protocol 30 which seeks to limit its application to Poland and the UK, particularly in respect of Title IV in which

²⁹ See L Betten ‘The EU Charter on Fundamental Rights: A Trojan Horse or a Mouse?’ (2001) 17 *IJCLIR* 151, 157, who observed that, since 1989, the only case in which the ECJ had referred to the CCFSRW was Case C-84/94 *UK v Council* [1996] ECR I-5755. Also it was alleged in the Report of the Expert Group on Fundamental Rights *Affirming Fundamental Rights in the European Union: Time to Act* (Brussels, European Commission DG for Employment and Social Affairs, 1999), at 14 that status is given to the ECHR in preference to the ESC and ILO Conventions.

³⁰ J Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’ in T Hervey and J Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Hart Publishing, 2003), 15.

³¹ See the updated ‘Explanations Relating To The Charter Of Fundamental Rights’ (2007/C 303/02) available in OJ C 303/17, 14.12.2007 the Preface to which makes clear that: ‘Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.’

protection of the right to strike and other ‘solidarity’ rights are situated. Rather, under Article 51(1): ‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.’ So, one might expect Article 28 to merely prevent EU institutions acting in contravention of the right to strike (and Member States when implementing EU law), rather requiring that Member States respect the right to strike in a purely domestic context when they would otherwise choose not to do so.

There was a sizeable window between adoption of the EUCFR in 2000 and the entry into force of the Lisbon Treaty, due to which the instrument is now formally recognised in Article 6(1) of the TEU. Initially, the CJEU seemed reluctant to refer to the EUCFR in preference to the ECHR.³² However, a constitutional shift has now taken place³³ such that the CJEU has become a ‘human rights adjudicator’, which refers to the ECHR and the case law of the European Court of Human Rights (ECtHR) less than it did previously.³⁴

What one might not expect from this human rights approach is any curtailment by the CJEU of the right to strike. After all, Article 53 of the Charter states that: ‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party...’ The ‘Explanations’ indicate that such agreements are to include instruments such as the ECHR but one might also include, by implication, the ILO Constitution and Conventions. In the *Viking* and *Laval* cases,³⁵ the CJEU made reference to the right to take collective action, drawing on a range of sources as diverse as Article 28 of the EUCFR, ILO Convention No. 87 and Article 6(4) of the ESC, but ultimately restricted the exercise of that right in ways that contravene ILO standards³⁶ and the ESC.³⁷ This is arguably not only a breach of ILO and ESC norms but also of the ECHR. In *Demir & Baykara v Turkey*, a Grand Chamber of the ECtHR said that, when applying Article 11 of the ECHR, it ‘can and must take into account elements of international law other than the Convention’ as well as ‘the interpretation of such elements by competent organs’ and found Turkey in breach on the basis of the ESC and ILO Conventions.³⁸ Therefore, in the collective action cases, the Court would seem to have departed from the principles inherent in Article 53 of the EUCFR.

³² E.g. Case C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA* [2004] ECR I-3425.

³³ J Fudge, ‘Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining and Strikes’ (2015) 68 *Current Legal Problems* 267 at 269.

³⁴ G de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator’ (2013) 20 *MJ* 2.

³⁵ Case C-438/05 *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line* (‘*Viking*’) [2007] ECR I-10779; Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* (‘*Laval*’) [2007] ECR I-11767.

³⁶ ILO CEACR Report on UK compliance with Convention No. 87 (2013).

³⁷ *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No. 85/2012, Decision on admissibility and on the merits, 3 July 2013, (‘*LO and TCO v Sweden*’). See also AM Swiatkowski, ‘Resocialising Europe through a European Right to Strike Modelled on the Social Charter?’ in Countouris and Freedland n.17 at 412-3.

³⁸ *Demir and Baykara v Turkey* Application No 34503/97, 12 November 2008 at para. 85. See also V Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’ (2013) 13 *Human Rights Law Review* 529.

The approach taken by the CJEU may be due to the fact that its primary orientation is economic and that it is suspicious of collective rights.³⁹ The concern of the CJEU lies with breach of EU law (such as free movement rights) and whether the exercise of a human right is proportionate to that breach. Were a test applied from an ECHR perspective, the primary issue would be breach of the human right and whether the application of EU law was proportionate. The answer to the latter might be very different to the former.⁴⁰

For this reason, various commentators have observed that accession of the EU to the ECHR, as promised by Article 6(2) of the current TEU (post-Lisbon), might offer greater protection for workers' human rights, including the right to strike.⁴¹ However, the effect of the CJEU's Opinion 2/13 on 18 December 2014 which states that the draft accession agreement is incompatible with the EU Treaties means that no meaningful progress has yet been made in this direction.⁴²

4. COLLECTIVE ACTION AND MARKET FREEDOMS

The scope for conflict between collective action and market freedoms was exposed in the *Spanish Strawberries* litigation that took place in 1997.⁴³ While the French government was ultimately held accountable for the actions of protestors blocking free movement of goods, the tension was ultimately determined in favour of an exemption of national labour laws from European level intervention in what came to be known as 'the Monti Regulation'.⁴⁴ That instrument left the content of the 'right to strike' to be defined by Member State governments, offering no European-level definition or protection of such a right. Contemporary commentators (including this author) criticized the measure on this basis, but it can be conceded with hindsight that at least it was consistent with the exclusion of the right to strike from EU legislative competence and remains vastly preferable to what has followed.⁴⁵ Later a much harder line was taken whereby, in an attempt to promote employer exercise of market freedoms, the CJEU has engaged in backdoor regulation of the right to strike.

³⁹ See as recent examples of the CJEU's orientation in this respect, Case C-176/12 *Association de médiation sociale (AMS) v CGT*, Judgment of 15 January 2014; and Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd* [2013] IRLR 744, Judgment of 18 July 2013 (*Alemo-Herron*). Discussed in T Novitz, 'The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?' (2015) 31(3) *The International Journal of Comparative Labour Law and Industrial Relations* 243.

⁴⁰ See KD Ewing and J Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *ILJ* 2.

⁴¹ V Velyvyte, 'The Right to Strike in the European Union After Accession to the European Convention on Human Rights: Identifying conflict and achieving coherence' (2015) 15 *Human Rights Law Review* 73; A Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR' (2013) 9(1) *Utrecht Law Review* 104.

⁴² See L Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection – On *Opinion 2/13* on EU Accession to the ECHR' (2015) 15 *Human Rights Law Review* 485 who notes concern expressed by President of the ECtHR, Dean Spielman, as to this 'great disappointment'. See also regarding political will in the Commission to achieve accession, EPRS, *Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty* March 2015, at 23.

⁴³ Case C-265/95 *Commission v France* [1997] I-6961.

⁴⁴ Regulation 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L337/8, Article 2. Named after Mario Monti, the competent European Commissioner leading on this internal market measure.

⁴⁵ G Orlandini, 'The Free Movement of Goods as a Possible "Community" Limitation on Industrial Conflict' (2000) 6 *ELJ* 341, at 358. Also Novitz n 14 at 162.

The detailed facts and reasoning of the *Viking* and *Laval* cases⁴⁶ have been discussed extensively elsewhere,⁴⁷ and so are only outlined briefly here. In *Viking*, the CJEU determined that threatened collective action organised by a national union and coordinated action by a global union federation designed to prevent reflagging of a vessel (likely to lead to job losses and lower wages) could constitute breach of the employer's freedom of establishment, where the reflagging would involve the movement of control of the vessel to another EU Member State. Collective action could only be justified for the protection of workers' interests (narrowly construed) and, even then, only as a last resort and if the measures taken were proportionate to the harm suffered. In *Laval*, the CJEU determined that, unless 'social dumping' was at issue, it would always be a breach of EU law for a union to call collective action to challenge the refusal of an employer to engage in collective bargaining in respect of posted workers, as this would impose unpredictable costs on a service provider from another Member State and was in breach of the Court's reading of the Posted Workers' Directive.⁴⁸

In both instances, it was not the governments (respectively Finnish and Swedish) who were to be held accountable, but rather the trade union(s) calling such action. They were seen as appropriate subjects of the application of horizontal liability by virtue of the role that industrial action can play in collective bargaining (which in turn regulates paid work),⁴⁹ but were not entitled to claim the public interest justifications which would otherwise be available to a Member State. This meant that trade unions could potentially bear unlimited costs for calling industrial action which might have cross-border effects, but were left without many defences and with a great deal of uncertainty as to whether, after the fact, their actions would be found to be proportionate.⁵⁰ These two judgments had a profound chilling effect on trade union organised industrial action, leading to unofficial wildcat strikes in the UK East Lindsey and other disputes.⁵¹

So exercise of the right to strike was in this way regulated by the CJEU, even though the legislature was barred from intervention under Article 153(5) of the TFEU. This is problematic since neither of the judgments in *Viking* or *Laval* seem reflective of the shared constitutional or industrial relations traditions of the Member States, rather the judgments

⁴⁶ See n 35 above.

⁴⁷ For eg, contemporaneous discussion in ACL Davies, 'The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences' (2006) 35(1) *Industrial Law Journal* 75; ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* cases in the ECJ' (2008) 37 ILJ 126; P Syrpis and T Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' (2008) 33 *European Law Review* 411. For more recent reflections, see M Freedland and J Prassl (eds), *Viking, Laval and beyond*. (Hart, 2014); S Evju (ed.) *Cross-border services, posting of workers, and multilevel governance* (University of Oslo, 2013); Evju S (ed.) *Regulating transnational labour in Europe: the quandaries of multilevel governance* (University of Oslo, 2013); and R Zimmer, 'The Right to Take Collective Action: Prospects for change in light of the European Court of Human Rights Decisions' in A Blackett and A Trebilcock (eds) *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015) especially at 196-7.

⁴⁸ Directive 96/71 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.

⁴⁹ *Laval*, para 98; *Viking*, para. 65.

⁵⁰ K Apps, 'Damages Claims Against Trade Unions After *Viking* and *Laval*' (2009) 34 *European Law Review* 141.

⁵¹ For discussion of the East Lindsey industrial dispute and other effects, see L Hayes, T Novitz and H Reed, 'Applying the *Laval* Quartet in a UK Context: Chilling, ripple and disruptive effects on industrial relations' in A Bückler and W Warneck (eds.), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Ruffert*, (Nomos, 2011), 195–244.

would seem to require contravention of established laws and practices.⁵² This would seem to be a frolic of the CJEU's own, designed to further market integration in a complex and difficult time of EU enlargement of membership.⁵³ While some consider that the importance of distributional outcomes within the common market justified the outcomes in the *Viking* and *Laval* cases, there remain outstanding concerns as to whether the judgments operate to bar industrial action by posted workers themselves or prevent solidarity between workers across borders.⁵⁴ These uncertainties make it harder for workers to organise and respond to ongoing attempts by employers to cut labour costs.

Further, while the Court was willing to explicitly recognise a right to collective action, arising by virtue of ILO and ESC instruments,⁵⁵ there was no mention of the jurisprudence developed under their auspices. It is arguable that, with the subsequent judgment of *Demir and Baykara* delivered by the ECtHR, the CJEU could now take a different approach on the same facts, especially given subsequent ECtHR case law on the right to strike.⁵⁶ However, that proposition has yet to be tested before the CJEU, which does not seem in an overly deferential mood, judging from Opinion 2/13. What is clear is that the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) is critical of the impact that the *Viking* and *Laval* had on the ability of unions to call industrial action which has cross-border effects (in particular, the use made of British Airways of the uncertain legal position established by CJEU case law to prevent a strike through the threat of unlimited liability).⁵⁷ Further, in relation to Sweden (where the *Laval* dispute arose), the CEACR has observed that 'foreign workers should have the right to be represented by the organization of their own choosing and that the organization of their choice should be able to defend its members interests, including by means of industrial action' and has requested that the Swedish government review the legislation with the social partners.⁵⁸ Indeed CEACR engagement with this issue prefaced and followed the findings of the European Committee of Social Rights (ECSR) which has found that Swedish legislation adopted in response to the *Laval* case is in breach of Article 6(4) of the ESC insofar as limits possibilities to resort to

⁵² T Novitz, 'The Impact of *Viking* and *Laval*: Contesting the social function and legal regulation of the right to strike' in E Ales and T Novitz (eds), *Collective Action and Fundamental Freedoms in Europe: Striking the Balance* (Intersentia, 2010) at 251-273. See also Zimmer n 47 above at 197.

⁵³ T Novitz, 'Labour Rights as Human Rights: Implications for Employers' Free Movement in an Enlarged European Union' in C Barnard (ed.) 9 *Cambridge Yearbook of European Law* (Hart Publishing, 2006-2007), at 357 - 386. See also for an appreciation of this context, D Schiek, *Economic and Social Integration: The challenge for EU Constitutional Law* (Edward Elgar 2012) at 231-232; and for analysis of the issues associated with partitioning the market in the context of enlargement, P L Lindseth, 'Viking's "Semantic Gaps": Law and the Political Economy of Convergence in the EU', forthcoming in B Davies and N Fernanda (eds) *EU Stories: Critical and Contextual Histories of European Jurisprudence* (Cambridge University Press, 2011) citing the Opinion of AG Poiares Maduro delivered on 23 May 2007 [2007] ECR I-10784, I-10801, para. 62.

⁵⁴ D Leczykiewicz, 'Conceptualising Conflict between the Economic and the Social in EU Law after *Viking* and *Laval*' in Freedland and Prassl n 47 especially at 316 - 322.

⁵⁵ See *Viking* at para. 43; *Laval* at para. 90.

⁵⁶ See for example *Enerji Yapi-Yol Sen v Turkey*, Appn 68959/01, 21 April 2009, but also *Hrvatski Lijecnicki Sindikat v Croatia*, Appn 36701/09, judgment of 27 November 2014, para. 59 which describes the strike as 'the most powerful instrument to protect occupational interests of its members'.

⁵⁷ See n 36 above; also *Application by the British Air Line Pilots Association to the International Labour Organisation* (2008), para. 173. See also ILO CEACR Report on UK compliance with ILO Convention No. 87 (2010) at 208-9; and CEACR Report (2013) at 196.

⁵⁸ See CEACR Observation adopted 2012 and published 102nd ILO session (2013).

collective action and subjects ‘contravention of the obligation to keep “industrial peace”... to legal sanction and the possibility of economic and even punitive damages’.⁵⁹

It could be argued that a ‘double proportionality’ test could resolve the dominance of economic freedoms over human rights currently operating under EU law. According to such an approach, not only should the exercise of the right to strike be proportionate to the interference with EU law, but the exercise of EU free movement rights can be seen as an interference with the right to freely associate (including the right to strike) and therefore also subjected to a proportionality test. This is the preferred option, for example, of Phil Syrpis in his comment⁶⁰ on AG Trystenjak’s Opinion in *Commission v Germany* (which hinted at such an approach but ultimately did not apply it).⁶¹ It has again been endorsed as the most sensible approach in a recent analysis of the *status quo* by Vilija Velyvyte.⁶² However, while the aims of both commentators are worthy as an attempt to reconcile the EU Treaties with the ECHR, such an approach seems likely to lead ultimately to uncertainty and confusion.

What do we do if *both* the interference with the fundamental freedom is disproportionate and so is the interference with the human right? The ultimate question which must be addressed is which should prevail. Article 6(2) of the TEU is clear that it must be the human rights (as the superior trump) which has overriding importance and as the stated objective of accession to the ECHR would demand. Yet again, Opinion 2/13 indicates that the CJEU does not agree with my analysis.

The other potential solution is legislative, but this of course has to be an internal market measure because a social policy instrument would seem to be excluded by Article 153(5). If so, we face again ‘backdoor’ regulation. This option was attempted, but has, ultimately failed. Further, of course, any solution would have to be seen as Treaty compliant by the Court.

In 2010, Mario Monti, the former Competition Commissioner (and then Prime Minister of Italy) on request from the President of the European Commission, presented his report on ‘A New Strategy for the Single Market’. That report accepted that the *Viking* and *Laval* case law had ‘the potential to alienate from the Single Market and the EU a segment of public opinion, workers’ movements and trade unions, which has been over time a key supporter of economic integration’⁶³ He proposed a legislative measure that might re-establish balance of economic and social interests within the EU.

At least two drafts of what became known as the ‘Monti II’ Regulation were leaked before the official version was made public. In the final version,⁶⁴ the exception clause (or ‘Monti clause’) stated that the Regulation would not affect ‘the exercise of fundamental rights as recognised in the Member States, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States in accordance

⁵⁹ See n 37 above and especially *LO and TCO v Sweden* at para. 84. Note that this finding has since been endorsed by the Council of Europe’s Committee of Ministers in Resolution CM/ResChS(2014)1, 5 February 2014.

⁶⁰ P Syrpis, ‘Reconciling Economic Freedoms and Social Rights – The Potential of *Commission v Germany* (2011) 40 *Industrial Law Journal* 222 at 226.

⁶¹ Case C-271-08, *Commission v Germany*, Judgment of 15 July 2010 [2010] ECR I-7091 at paras 193-195.

⁶² Velyvyte n 41 at 96-7.

⁶³ http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf accessed 10 December 2015. See p. 68.

⁶⁴ Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services COM(2012) 130 final, 21.3.2012.

with national law and practices’ and could be seen as a minor victory, since it did not like the earlier leaked draft (which followed the wording of Article 28 of the EUCFR) make reference to ‘Union law’. However, the rest of the instrument was more controversial.

Arguably, the crucial provision was Article 2: ‘The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.’ The first leaked draft added that there would be ‘no primacy’ between the two, a statement then dropped as seemingly too controversial, but this is clearly the gist of the provision. It is a version of the double proportionality test. This was deeply unsatisfying to contemporary labour law commentators, such as Keith Ewing, who pointed to the primacy of human rights as a priority.⁶⁵

Additionally, the Monti II proposal offered the option in Article 3 for ‘alternative dispute resolutions’ to be decided by national member states and social partners at European level, which might resolve situations where the clash acknowledged in Article 2 arose. However, under para. 3 of Article 3: ‘The modalities and procedures for out-of-court settlement may not deprive interested parties from recourse to judicial remedies for their disputes or conflicts if the mechanisms referred to in paragraph 1 fail to lead to a resolution after a reasonable period.’ Moreover, a paragraph was issued after the first initial leaked draft to ensure that the operation of ADR would be ‘without prejudice to the role of national courts’.

Finally, Monti II was to introduce an ‘Alert mechanism’ (in Article 4) whereby ‘Whenever serious acts or circumstances affecting the effective exercise of the freedom of establishment or the freedom to provide services which could cause grave disruption to the proper functioning of the internal market and/or which may cause serious damage to its industrial relations system or create serious social unrest in its territory or in the territory of other Member States, arise, the Member State concerned shall immediately inform and notify the Member State of establishment or origin of the service provider and/or other relevant Member States concerned as well as the Commission.’ The way in which the Commission and other Member States could or should respond was clouded in mystery. The early leaked drafts had indicated that the Member State should take action to ‘remedy the situation’ and the Commission was given powers to propose additional measures. Those obligations were replaced in the official draft with only ‘an information exchange’ requirement.

Neither those States wishing to protect the right to strike nor those seeking to restrict collective action were satisfied by Monti II and as such, it became the first subject of a ‘yellow card’ issued by the national parliaments of the EU under the Treaty of Lisbon’s ‘Early Warning System’. After twelve parliaments adopted ‘Reasoned Opinions’ objecting to the EU legislative proposal (acting as a ‘virtual third chamber’), the Commission was required to review Monti II. The Commission then had three options: to maintain, amend or withdraw the proposal. The Commission opted for the last of these.⁶⁶ So, for the time being, judicial regulation at the EU level prevails, supplemented by the extra-legal administrative

⁶⁵ KD Ewing, *The Draft Monti II Regulation: An Inadequate Response to Viking and Laval* (Institute of Employment Rights, 2011); available at <http://www.ier.org.uk/sites/ier.org.uk/files/The%20Draft%20Monti%2011%20Regulation%20by%20Keith%20Ewing%20March%202012.pdf> accessed 10 December 2015.

⁶⁶ See I Cooper, ‘A Yellow Card for the Striker: National parliaments and the defeat of EU legislation on the right to strike’ (2015) 22(10) *Journal of European Public Policy* 1406 at 1407 and 1421.

influence of EU institutions in the context of the financial crisis and macro-economic management.

5. THE FINANCIAL CRISIS, WAGE CONSTRAINT AND PRESCRIPTIONS FOR DOMESTIC INDUSTRIAL RELATIONS

Since the financial crisis, certain labour law measures have repeatedly emerged as key aspects of legal reform in EU Member States prompted by EU institutions.⁶⁷ They began with ‘austerity’ measures put in place by the Troika (the European Central Bank, the European Commission and the International Monetary Fund) in the memoranda of understanding accompanying bailout packages (reinforced by a European Stability Mechanism and the Euro Plus Pact).⁶⁸ There have been only four ‘bail-out programmes’ (Greece, Portugal, Ireland and Cyprus) and four ‘financial assistance programmes’ (Hungary, Latvia, Romania and Spain).⁶⁹ However, a wider uniformity of approach following a familiar pattern has been prompted by the Europe 2020 Growth Strategy⁷⁰ and accompanying Country Specific Recommendations (CSRs) made to Member States by the Commission as a method of macro-economic management.⁷¹ As of July 2015, specific recommendations are made to those countries in the Euro-area but individual Recommendations approved by the Council are addressed to each individual Member State, with a common emphasis on debt reduction and reform of wage setting.⁷² This has been accompanied by a new ‘Excessive Deficit Procedure’ designed to prompt action by any State whose budget deficit exceeds 3% of GDP or whose public debt exceeds 60% of GDP.⁷³ Such intervention in the economic policies of Member States is seen as vital for supervision of the Euro as a currency (under Economic and Monetary Union), as well as administration of the EU internal market.⁷⁴

As the Commission’s most recent proposal for a Council Recommendation (as of November 2015) states: ‘Sustaining and strengthening growth in the euro area requires continued policy efforts to support a balanced adjustment in the private and public sectors, improve the adjustment capacity and increase the economy’s competitiveness and growth potential in the medium to long term.’ Also identified as a problem is not only debt but ‘persistent structural

⁶⁷ See S Clauwaert and I Schömann, *The Crisis and National Labour Law Reforms: A mapping exercise* ETUI Working Paper 2012.04; A Koukiadaki, I Tavora and MM Lucio, *The Transformation of Joint Regulation and Labour Market Policy in Europe during the Crisis: Comparative Project Report* (University of Manchester/The European Commission, 2014); and K D Ewing and J Hendy, *Reconstruction After the Crisis: A manifesto for collective bargaining* (Institute of Employment Rights, 2013).

⁶⁸ See M Ruffert, ‘The European Debt Crisis and European Union Law’ (2011) 48 *CMLRev* 1777; discussed in C Kilpatrick, ‘Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry’ EUI Working Paper LAW 2015/34.

⁶⁹ C Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’ (2014) 67 *Current Legal Problems* 199 at 230.

⁷⁰ See Communication from the Commission, EUROPE 2020: A strategy for smart, sustainable and inclusive growth COM(2010) 2020 final 3.3.2010. For a contemporary application and interpretation see http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/index_en.htm accessed 10 December 2015.

⁷¹ http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm accessed 10 December 2015.

⁷² http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm accessed 10 December 2015; although note that to avoid duplication no further individual CSR was addressed to Greece at that time, although it will be published later.

⁷³ See http://ec.europa.eu/economy_finance/economic_governance/sgp/corrective_arm/index_en.htm accessed 10 December 2015.

⁷⁴ This is evident from the most recent Recommendation for a COUNCIL RECOMMENDATION on the economic policy of the euro area COM(2015) 992 final 26.11.2015.

rigidities in national labour and product markets'.⁷⁵ Accordingly, the Commission's key aim is to reduce public spending (so as to address budgetary deficits) and to reduce wage costs generally (so as to attract or even just maintain foreign direct investment).⁷⁶

What this has meant in practice is that a series of legislative measures have been taken across the EU to restrict collective bargaining in the public sector and civil service where trade union membership has traditionally tended to be highest and where objections might be raised regarding structural reforms of social service provision and changes in terms and conditions (especially regarding reduction of wages and increase of working time).⁷⁷ Further, measures have been taken more generally to dismantle national and sectoral level bargaining alongside redefinition of collective bargaining to include non-trade union members and to deny national level and sectoral bargaining.⁷⁸

Arguably, the austerity measures recommended by EU institutions in the context of the financial crisis should be subject to the constraints imposed by the EUCFR, so that human rights considerations (including those applicable to labour standards) restrict the national labour law reforms that follow from the economic policies of the EU. That said, the case of *Pringle*⁷⁹ casts doubt on this proposition, since the CJEU has indicated that: 'It must be observed that the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism.' Whether formally in breach of the EUCFR or not, however, it is apparent from complaints made to the ILO that industrial action and protest is under threat in EU Member States.

The EU clamp down on trade union engagement in wage setting in the public sector has come directly into conflict with ILO jurisprudence developed by both the CFA and the CEACR. Those supervisory bodies have consistently stated that it is acceptable to restrict the right to strike in respect of public servants exercising authority in the name of the States (such as members of the judiciary or key administrators), but that most workers in the public sector will not come within this category. Where public sector services may also be essential services, the cessation of which could cause injury to health and safety, strikes may also be restricted but this should again not affect those workers for whom withdrawal of their labour

⁷⁵ Ibid at 2.

⁷⁶ ANNEX to the Recommendation for a COUNCIL RECOMMENDATION on broad guidelines for the economic policies of the Member States and of the Union COM(2015) 99 final 2.3.2015 at 2.

⁷⁷ There is a growing resource of studies of this trend. See n 65 above, but also F Rocha, G Feigi, S Leonardi, J-M Pernot, A Toleroff, L Tomev and C Triafantafollou, 'The New EU Economic Governance and its Impact on the National Collective Bargaining Systems' (Madrid, 2014); C Kilpatrick and B De Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* LAW 2014/05; and G Van Gyes and T Schulten (eds), *Wage Bargaining under the New European Economic Governance: Alternative Strategies for Inclusive Growth* (ETUI, 2015).

⁷⁸ A Koukiadaki and L Kretsos, 'Opening Pandora's Box: The sovereign debt crisis and labour market regulation in Greece' (2012) 41 ILJ 276 at 290-3; I Szabo, 'Between polarization and statism – effects of the crisis on collective bargaining processes and outcomes in Hungary' (2013) 19(2) *Transfer* 205 at 211; HA Costa, 'From Europe as a model to Europe as austerity: the impact of the crisis on Portuguese trade unions' (2012) 18 *Transfer* 397 at 408; and A Trif, 'Romania: collective bargaining under attack' (2013) 19(2) *Transfer* 227 at 231-2.

⁷⁹ Case C-370/12, *Pringle v Ireland*, judgment of 27 November 2012.

would not have such consequences.⁸⁰ Denmark,⁸¹ Germany⁸² and Malta⁸³ are already in breach of ILO standards in this respect. New proposals for the restriction of strikes in the public sector and civil service in countries such as Bulgaria,⁸⁴ Croatia,⁸⁵ Latvia⁸⁶ and Luxembourg⁸⁷ have been the subject of concern expressed by the CEACR. The Czech Republic,⁸⁸ Estonia⁸⁹ and Poland⁹⁰ are also proposing to review legislation concerning strikes, which might correct existing breaches, but also have the capacity to be more repressive. The UK Trade Union Bill which would significantly reduce access to industrial action in ‘important public services’ has not yet received comment from the CEACR, but is clearly in breach of established ILO standards.⁹¹

Although not an entirely uniform trend, with Lithuania having amended its Labour Code in 2014 to correct incompatibility with ILO Convention No. 87,⁹² there would seem to be a general pattern towards restriction of industrial action and other forms of protest in EU Member States. In Hungary, concerns have been raised by the ways in which the newly adopted Labour Code which prohibits ‘any conduct of workers including the wish to express their opinion – whether during or outside working time – that may jeopardize the employer’s reputation or legitimate economic and organizational interests’,⁹³ while in Greece, issues arise regarding criminal charges brought against trade unions in the maritime sector.⁹⁴ In Portugal it is also alleged that that trade union leaders were arrested and assaulted after a rally.⁹⁵ Overall, the escalation in civil unrest following austerity seems to have been met with increasingly autocratic measures.⁹⁶

Nevertheless, the ILO supervisory organs do not want to seem too critical of ‘emergency measures’, so that where governments indicate that the measures that they are taken are prompted by the ‘economic crisis’ and prescriptions demanded under the memorandum of understanding (with the IMF, European Commission and European Central Bank), they have

⁸⁰ ILO Committee on Freedom of Association, *Digest of Decisions*, 5th edn (Geneva: ILO, 2006), paras 570 – 590.

⁸¹ CEACR Direct Request – ILO Convention No. 87 (Denmark) adopted 2013, published 103rd ILC session 2014. See also for a complaint regarding restriction of collective bargaining among teachers in Denmark, CFA *Case No. 3039 (Denmark)* October 201

⁸² CEACR Observation – ILO Convention No. 87 (Germany) adopted 2014, published 104th ILC session 2015.

⁸³ CEACR Direct Request – ILO Convention No. 87 (Malta) adopted 2014, published 104th ILC session 2015.

⁸⁴ CEACR Observation – ILO Convention No. 87 (Bulgaria) adopted 2014, published 104th ILC session 2015.

⁸⁵ CEACR Direct Request – ILO Convention No. 87 (Croatia) adopted 2014, published 104th ILC session 2015; see also connected concerns regarding removal of collective bargaining in the civil service and public sector, CEACR Observation – ILO Convention No. 98 (Croatia) adopted 2014, published 104th ILC session 2015.

⁸⁶ CEACR Direct Request – ILO Convention No. 87 (Latvia) adopted 2014, published 104th ILC session 2015

⁸⁷ CEACR Direct Request – ILO Convention No. 87 (Luxembourg) adopted 2014, published 104th ILC session 2015.

⁸⁸ CEACR Direct request – ILO Convention No. 87 (Czech Republic) adopted 2013, published 103rd ILC session 2014.

⁸⁹ CEACR Observation – ILO Convention No. 87 (Estonia) adopted 2013, published 103rd ILC session 2014.

⁹⁰ CEACR Observation – ILO Convention No. 87 (Poland) adopted 2013, published 103rd ILC session 2014.

⁹¹ M Ford and T Novitz, ‘An Absence of Fairness... Restrictions in Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44 *ILJ* 522 at 530 - 535.

⁹² Case No 2907 (Lithuania), Report No 376, October 2015; see also CEACR Observation – ILO Convention No. 87 (Lithuania) adopted 2014, published 104th ILC session 2015.

⁹³ For criticism and concern expressed by the CEACR, see Direct Request ILO Convention No. 87 (Hungary) adopted 2014, published 104th ILC session 2015.

⁹⁴ CEACR Observation – ILO Convention No. 87 (Greece) adopted 2014, published 104th ILC session 2015.

⁹⁵ CEACR Direct Request – ILO Convention No. 87 (Portugal) adopted 2013, published 103rd ILC session 2014.

⁹⁶ See generally Rocha et al n 77 and on repression of social protests in Spain, at 204.

merely asked to be kept informed and advise that social dialogue is appropriate in the meantime. After the treatment of trade unions exposed in the ILO *Report on the High Level Mission to Greece*,⁹⁷ in Case 2820, a complaint by Greek General Confederation of Labour and others, the ILO CFA urged ‘that permanent and intensive social dialogue be held on all issues raised in the complaint.’⁹⁸ The ILO CEACR also noted in 2013 that creation of a space for inclusion of social partners in policy-making was vital.⁹⁹ Essentially the same recommendations have recently been made in CFA cases concerning Portugal and Spain.¹⁰⁰ But is this a satisfactory response or rather one that is merely politically convenient, given the overarching threat to ILO supervisory standards posed by the recent ILO Employers’ group rebellion?

The European Commission has now indicated that all future measures are to be taken in consultation with the social partners as a facet of ‘social dialogue’,¹⁰¹ but this has not been the history of reforms undertaken under memoranda of understanding to date in Greece and Romania,¹⁰² and seems unlikely to be restored in a context where the bargaining power of trade unions at national level is being stripped away. In a study on *Social Dialogue and The Public Services in the Aftermath of the Crisis*, Stephen Bach and Alexandra Stroleny detected signs of resilience, but also potential for ‘a dialogue of the deaf’.¹⁰³ They have observed the restriction of traditional forms of industrial action and see that broader protests and demonstrations (while more prevalent) have not had any impact on the configuration of austerity programmes, leaving ‘trade unions in retreat’.¹⁰⁴ Given the ongoing policy prescriptions which the CSRs indicate will continue under the Europe 2020 strategy (another 5 years at least), one wonders how long the current economic ‘emergency’ can be considered to continue as a basis for the exclusion of standard ILO norms. One also wonders whether there will be strong and effective trade unions capable of social dialogue at EU or national level by the end of that period.

6. CONCLUSION

This article has examined the justifications for and the impact of the exclusion of the right to strike from EU legislative competence. What is revealed is a complex matrix of backdoor regulation which does little to legitimise the EU or its current practices regarding industrial action.

There was, arguably, a case for the EU to create legislative powers enabling the adoption of social policy instruments protecting the right to strike and this would have been consistent with the EU’s apparent commitment to social dialogue and human rights protections. Such

⁹⁷ (Geneva: ILO, 2011) para. 304.

⁹⁸ In November 2012 at para. 1003.

⁹⁹ See ILO Committee of Experts, Report on Greece, ILO Convention No. 87.

¹⁰⁰ Case No 3072 (Portugal) Report No 376, October 2015; Case No 2947 (Spain), Report No 371, March 2014.

¹⁰¹ ANNEX - Integrated guidelines - to the Proposal for a COUNCIL DECISION on guidelines for the employment policies of the Member States COM(2015) 98 final 2.3.2015, at 3; European Commission, *A New Start for Social Dialogue* (Brussels: 2015).

¹⁰² In Greece certain key measures were adopted not only without social dialogue but without Parliamentary debate by the Ministerial Council, see Act6/2012; for a comparable failure of social dialogue in Romania where the so-called ‘Social Dialogue Act’ of 2011 was ‘passed unilaterally by the government without being debated in parliament and without involving the social partners’, see Trif n 76 above at 233.

¹⁰³ S Bach and A Stroleny, ‘Social Dialogue and the Public Services in the Aftermath of the Economic Crisis: Strengthening partnership in an era of austerity’ (European Commission project, 2014) VP/2011/001 at 56.

¹⁰⁴ Ibid. at 62.

instruments might have pre-empted the intervention of the CJEU to protect market freedoms. We cannot be sure of this, given that any legislation would have been subject to the Court's interpretation of the Treaties.¹⁰⁵ However, the provision for such legislative powers would have signalled to the Court that restriction of freedom of goods, establishment and services by collective action could be appropriate and proportionate. This would then have been bolstered by acknowledgement of the right to strike in Article 28 of the EUCFR.

This is a story that could have been, but never happened. Instead, the legislative exclusion regarding the right to strike has made room for the CJEU to reconfigure the content and limitations of that right according to the Court's perception of market imperatives. Additionally, the administrative processes associated with the new economic governance of the EU have made further incursions into national legislative protections of collective bargaining and industrial action, particularly in the public sector and civil service, while worker protest more generally has been constrained. These are, then, dangerous times, in which we might wish to reopen political debate on the status of the right to strike at EU level. Certainly, we can no longer rely merely on ILO maintenance of these standards.

The EU institutions currently operate by using a dangerous form of Orwellian doublethink.¹⁰⁶ We are told that austerity and prioritisation of market freedoms mean that we have to restructure labour markets so as to redress their structural rigidities. This leads directly to unprecedented limitations on collective bargaining, industrial action and other forms of trade union activity. Yet, at the same time, we are told that, despite austerity and despite the prioritisation of market freedoms, the measures taken will be palatable because 'social dialogue' will still be protected at the EU and national levels. But what sort of social dialogue is this without strong trade unions, collective bargaining or a right to strike? It is time to answer that question.

¹⁰⁵ For a very helpful discussion of CJEU case law regarding the relationship between primary and secondary law, see P Syrpis, 'The Relationship between Primary and Secondary Law' (2015) 52 *CMLRev* 461.

¹⁰⁶ G Orwell, 1984 (Penguin, 1950), chapter 3.