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The Right to Take Collective Action in the Council of Europe: A Tale of One City, Two Instruments and Two Bodies

Filip Dorssemont*

1. INTRODUCTION

This contribution seeks to analyse and to assess the protection of the right to take collective action granted by the European Convention on Human Rights (ECHR) (Article 11) as well as by the European Social Charter (ESC) (Article 6(4)).

Both treaties have been concluded within the Council of Europe. Whereas the European Convention on Human Rights (1950) is subject to judicial supervision by the European Court of Human Rights (ECtHR), the European Social Charter (1961) is monitored on purely legal merits as well. The supervision of the ESC is operated by the European Committee of Social Rights (ECSR), which adopts conclusions based upon the reports of the Contracting Parties as well as decisions following the examination of collective complaints. I will not dwell on these institutional and procedural issues. The judicial and quasi-judicial interpretation of both provisions will be compared.

In order to facilitate the comparison, a number of issues will be dealt with. Prior to such an analysis, the slow and timid recognition of the right to collective action by the ECtHR will be reconstructed and the different conceptual framework applied to anchor the right to collective action in both instruments will be studied. The analysis will focus on the issue of the ownership of the right, on the teleological delimitations and on the legitimacy of a number of restrictions (procedural and substantive). I will try to make a comparative assessment of the strengths and weaknesses of both instruments.

II. IMPLICIT AND EXPLICIT RECOGNITION

Whereas Article 6(4) of the ESC (1961) recognises 'the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to

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obligations that might arise out of collective agreements previously entered into', the European Convention on Human Rights does not pay tribute in any explicit way to the right to strike, let alone to a right to take collective action.

In view of the absence of any explicit recognition of a right to bargain collectively in the ECHR, the only prospect for *judicial* recognition of a right to strike stems from the recognition of the freedom of association in Article 11 of the ECHR. This provision starts by guaranteeing freedom of association in a generic way. It continues with the statement that the recognition of 'freedom of association with others' includes 'the right to form and to join trade unions for the protection of his interests'. The question arises whether the existence of a specific right to 'form and to join trade unions' affords latitude for developing a number of corollary rights not regarded as inherent aspects of the more generic freedom of association.[1] The provision seems to be addressed solely to individuals in a process of forming or joining a trade union. Hence, the provision is mute about a *collective* dimension. Article 11 does though set forth a criterion for guiding development of the law. The right to organise is recognised for the sake of 'protection of … interests'.

In the very first case (1975) related to the freedom of trade union association, a Grand Chamber of the ECtHR ruled that the phrase 'for the protection of his interests is *not* redundant'.[2] The idea that trade unions should have means to protect the interests of their members has been reiterated ever since in constant case law.[3] As a matter of principle, the Court recognised that the *telos* of the right to organise could be used to develop corollary rights which are *essential* or *necessarily inherent* to the right to organise. Restrictions to corollary rights which are essential to the freedom of association needed to pass the test of Article 11(2) of the ECHR.

This landmark judgment was the start of the recognition of a number of quintessential or essential corollary rights. The Court has recognised the right to be heard, the right to collective bargaining as well as the freedom of trade union expression as such essential means. In *Adefdromil v France*, the Court furthermore seems to indicate that the right for a trade union to have access to justice concerning matters related to the right to organise also affects that essential hard core.[4]

In sum, it is crucial to assess whether the legal ability to have recourse to collective action is an *essential* means to protect the interests of trade union members. Unfortunately, the ECtHR has consistently recognised the right to strike as *merely* an important means. In *Enerji Yapi Yol Sen*[5] the Court had to rule on the legitimacy of a circular

1 *Per analogiam* B Creighton, 'Freedom of Association' in R Blanpain (ed), *Comparative Labour Law and Industrial Relations* (Wolters Kluwer 2007) 275: 'Whether the latter should be regarded as simply a manifestation of the former, or as a fundamental human right *sui generis*, is a matter of some debate'.

2 *National Union of Belgian Police v Belgium* App no 4464/70 (ECtHR, 27 October 1975).

3 See *Wilson and Palmer v UK* App nos 30668/96, 30671/96 30678/96 (ECtHR, 2 July 2002), para 42; *Enerji Yapi-Yol Sen v Turkey* App no 68959/01 (ECtHR, 21 April 2009), § 24; *Demir and Baykara v Turkey* App no 34503/97(ECtHR, 12 November 2008), para 141.

4 *Adefdromil v France* App no 32191/09 (ECtHR, 2 October 2010), para 58 and para 60.

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

recapitulating the prohibition on civil servants having recourse to any kind of collective action. The Court's judgment was delivered less than seven months after the *Demir and Baykara* ruling and explicitly refers to the binding methodological tools for interpretation developed by the Grand Chamber. Thus, it examines the relation between the right to strike and two rights falling within the ECHR ambit: the right to organise and the right to bargain collectively. The specific reference to the right to bargain collectively is natural insofar as this right had been construed as an essential element of the right to join and form trade unions. This relation is examined in the light of two fundamental social rights instruments of international law. The Court primarily refers to ILO Convention 87. Despite the fact that the provisions of this Convention are mute on the right to strike, the Court takes into account the interpretation given to this instrument by the ILO supervisory bodies. In this respect, the Court observes that these bodies have considered the right to strike to be interwoven with freedom of association ('*un corrolaire indissociable*'). Furthermore, the Court observes that Article 6(2) of the ESC establishes a functional link between the right to bargain collectively and the right to strike. Insofar as the right to bargain collectively is necessarily inherent to the freedom of association and insofar as the right to bargain collectively 'without strike' is deprived of its substance, it could be argued that the right to strike does constitute an essential aspect of the right to organise by means of association.[6] The reference to the ILO case law describing the right to strike as a '*corrolaire indissociable*' warranted the thesis that the Court had implicitly recognised the right to strike as an *essential* element of the right to trade union association.

However, in *RMT v UK*, the Court refuted the thesis that the reference in *Enerji Yapi Yol Sen* to ILO standards could be interpreted as if it would have embraced the idea that the right to strike is indeed a *corrolaire indissociable* of the right to organise. Furthermore, it expressly refused to take an explicit stance on this issue, despite a request to do so from the applicant.[7] However, in a recent Croatian case, *Hrvatski Lijecnicki Sindikat v Croatia*, the Court takes a much more courageous and less ambiguous stance. It stated that the right to strike qualified as the 'most powerful instrument of trade unions to protect the occupational interests of their members'. The concurring opinion explicitly recognises the right to strike as an essential means.[8]

Such a reluctance of the ECtHR is not an insurmountable obstacle for the protection of the right to strike under Article 11 of the ECHR. In the *Unison* (2002) judgment, the Court had to assess whether a statutory restriction in the UK to the right to have recourse to strike violated Article 11 of the ECHR.[9] Despite the fact that the Court

6 See F Dorssemont, annotation to *Demir and Baykara*, 12 November 2008, EHRC 2009/1, pp 68–69. See also JP Marguénaud and J Mouly, 'La jurisprudence sociale de la Cour EDH: bilan et perspectives' (2010) *Droit social* 883, 889 (both authors argue that the approach of the Grand Chamber of the Court in *Demir and Baykara* prompted a recognition of the right to strike as an essential means).

7 *RMT v UK* App no 31045/10 (ECtHR,8 April 2014).

8 *Hrvatski Lijecnicki Sindikat v Croatia* App no 36701/09 (ECtHR, 27 November 2014), para 59.

9 *Unison v UK* App no 53547/99 (ECtHR, 10 January 2002).

repeated that recourse to strike action was just an important and not an essential means to protect workers' interests, it *did* assess whether this restriction, when taken separately, contravened Article 11. The Court adopted a similar approach in subsequent cases related to restrictions on the right to strike (*Dilek; Enerji Yapi Yol Sen*)[10] and in a case related to a restriction to the freedom of collective bargaining (*Demir and Baykara I*).[11]

Ewing has rightly pointed out that this shift in case law constituted significant progress.[12] Inevitably, the question arises whether the Court will conduct a more stringent scrutiny when prohibitions or restrictions to *essential* means of trade union action are at stake, as opposed to 'mere' important means. In my view, there is no immediate evidence to validate such a hypothesis. However, it might be argued that restrictions, let alone prohibitions, to *essential* means need to be considered less 'necessary' in a democratic society in comparison to restrictions to merely important means. In other words, it might be argued that the margin of appreciation for the Contracting Parties to restrict, let alone prohibit, essential means is smaller. In fact, in *RMT* the Court stated that legislative action striking at the core of trade union activity is subject to a lesser margin of appreciation than interventions affecting secondary or accessory aspects.[13]

III. ANCHORING THE RIGHT TO COLLECTIVE ACTION: THE RIGHT TO ORGANISE AND THE RIGHT TO BARGAIN COLLECTIVELY

Another important difference between the ECHR and the ESC relates to the conceptual framework applicable to the right to collective action. Whereas the ECHR relates the right to strike to an issue of the right to organise, the ESC dissociates the two rights. The right to organise is enshrined in Article 5 of the ESC, whereas the right to collective action is mentioned in Article 6(4) of the ESC. The Contracting Parties need to recognise the right to take collective action 'with a view to ensuring the effective exercise of the right to bargain collectively'.

Article 6(4) of the ESC does not constitute a coda of the catalogue. Strategically, it rather strikes at the heart of the right to collective bargaining. Collective bargaining would be pointless, insofar as workers and their organisations could *not* have recourse to collective action.

The question arises to what extent these divergent conceptual frameworks have an impact upon the way in which the right to strike or to collective action needs to be construed. In my view, there is a potential impact on the issue of ownership as well as on the issue of the legitimacy of the objectives of strike action. At first sight, both avenues amount to the conclusion that the right to strike is a trade union issue. If the right to

10 *Dilek and others v Turkey* App no 74611/01, 26876/02 and 27628/02 (ECtHR, 28 April 2008). *Enerji Yapi-Yol Sen v Turkey* App no 68959/01 (ECHR, 21 April 2009).

11 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 21 November 2006).

12 K Ewing, 'The Implications of *Wilson* and *Palmer*' (2003) 32 *Industrial Law Journal* 1, 18.

13 *RMT v UK* App no 31045/10 (ECtHR,8 April 2014), para 87.

strike is a corollary right of the right to organise, such a nexus is self-explanatory. Furthermore, collective bargaining usually tends to be associated with trade unions. Thus, ILO Convention 98 deems the freedom of collective bargaining and the right to organise as intertwined. At first sight, this seems to warrant the conclusion that there is no scope for a spontaneous or wildcat strike under either instrument. On closer examination, however, Article 6 of the ESC makes a distinction between voluntary *negotiations* between employers or employers' organisations and workers' organisations and *collective bargaining*. It does not specify which actors are holders of the right to collective bargaining. Though the ECHR does not seem to provide any scope for a right to strike which is unrelated to the right to organise, spontaneous strikes could be seen as an expression of the freedom of assembly, which has been enshrined in Article 11 of the ECHR.

The anchoring of the right to strike within the right to organise allows for a broad approach to the legitimacy of strike action. Since the right to organise is being granted for the protection of workers' interests, it is consistent to argue that any objective which is related to those interests needs to be considered as being legitimate. Article 6 of the ESC takes a very different stance. The mere fact that the right to strike is being restricted to a conflict of interests is not a major obstacle, since the notion of interests also pops up in Article 11 of the ECHR as well. More problematic and more restrictive is the reference to collective bargaining. The latter seems to be restricted to the bargaining parties *in the conflict*, leaving a very limited scope to collective actions or protest actions against governmental actors which are not involved in a genuine bargaining procedure.

In my view, anchoring the right to strike within the right to bargain collectively inevitably raises an issue on the legitimacy of procedural restrictions. Some will argue that the structure of Article 6(4) suggests some chronological order between a bargaining process on the one hand and recourse to collective action in case of failure of such a process. Whether this interpretation is justified will be dealt with below. Article 11 of the ECHR does not suggest that there is any scope for restrictions, other than purely substantive ones.

IV. COLLECTIVE ACTION VERSUS STRIKE: A CATALOGUE

The case law of the European Court of Human Rights essentially deals with one *species* of collective action, ie strike action. The semantics of Article 6 of the ESC are much broader. The provision suggests that strike action is one among other species of collective action.

One of the ECtHR's Turkish decisions provides guidance on the question whether the Court's protection extends from a right to strike to a more comprehensive right to take collective action. The Turkish government argued in *Dilek and others*[14] that

14 *Dilek and others v Turkey* App nos 74611/01, 26876/02 and 27628/02 (ECtHR, 28 April 2008).

the collective action concerned did not concern a strike and did not fall within the ambit of the ECHR. In this case, a number of civil servants had left their post for a couple of hours at a toll plaza on the Bosphorus Bridge. They wanted to protest against the working conditions applicable to them. The Turkish government and the applicants disagreed whether the action concerned could qualify as strike action. However, the Court felt reluctant to enter into such a semantic debate, considering the question of the definition of strike action to be irrelevant insofar as the action concerned constituted a 'collective action within the context of the exercise of trade union rights' in the generic meaning of the term.[15]

Hence, it seems that the Court wanted to make it clear that the mere fact that a collective action did not constitute a strike action was not of such significance as to fall outside the ambit of Article 11 of the ECHR. In sum, in considering that the action fell within the ambit of Article 11 without indicating whether it constituted a strike or not, the Court seems to have recognised a more comprehensive right to take collective action. In my view, the mere fact that the interruption of the toll-collecting activity only lasted a couple of hours does not constitute a reason to disqualify the action as being a strike action. Despite the Court's language,[16] the collective action does not constitute a go-slow (*action de ralentissement*). Despite the similar effects of the action concerned, it does not constitute a case of free public transport (*grève libéralité*). It is extremely dangerous to assume that *Dilek* allows us to state that actions resulting in 'toll-free' public transport fall within the ambit of Article 11 of the ECHR. Similarly the latter do not constitute strikes, since they require the employees to continue performing to some extent their work, despite its dysfunctional character.[17]

Article 11 guarantees freedom of *peaceful a*ssembly. Certain types of peaceful assembly can take the form of non-violent resistance, such as a sit-down on a public road interfering with access to a particular location. Such forms of action used to be seen by the European Commission of Human Rights as an expression of freedom of peaceful assembly.[18] In a similar vein, in *Barraco v France* the Court ruled that a collective action organised by a drivers' union fell within the ambit of the right to peaceful assembly. On the facts of the case, a truck driver participated in a so-called 'snail operation' (*operation escargot*) completely obstructing traffic on a public highway by driving slowly or even stopping.[19]

15 *Dilek and others v Turkey* App nos 74611/01, 26876/02 and 27628/02 (ECtHR, 28 April 2008), para 57.

16 *Dilek and others v Turkey* App nos 74611/01, 26876/02 and 27628/02 (ECtHR, 28 April 2008), para 6.

17 See the contribution for the AFDTSS colloquium of 21 March 2008: JP Marguénaud and J Mouly, 'Convention européenne des droits de l'homme et droit du travail' <http://afdt-asso.fr/fichiers/publications/cedh.pdf>. Accessed 6 April 2016.

18 *X v Federal Republic of Germany* App no 13079/87 (Commission of Human Rights, 6 March 1989).

19 *Barraco v France* App no 31684/05 (ECtHR, 5 March 2009). The Court assessed that such a criminal prosecution against one of the drivers participating could be considered to be justified in view of the fact that there was a legitimate goal (protection of public order and of the rights and freedoms of others) and that the restriction could be considered to be 'necessary in a democratic society'. See also Lörcher who argues that this judgment amounts to the recognition of strike action in order to participate to a demonstration (*das Recht auf Proteststreik*). In this respect: K Lörcher, 'Internationale Rechtsgrundlagen des Streikrechts' in W Däubler (ed), *Arbeitskampfrecht* (Nomos 2011) 178.

In some judgments involving Turkey,[20] the Court felt extremely reluctant to address the issue of the right to strike and to assess whether the recognition of such a right was an essential element of the right to form and join trade unions. In the cases concerned, civil servants had been absent from their work in order to participate in a demonstration in support of a claim for better working conditions. This approach is astonishing, insofar as all applicants explicitly referred to their right to form and join a trade union. In all five cases, the restriction based on the statutory prohibition of civil servants having recourse to collective action was considered to be disproportionate.

As for Article 6 of the ESC, it is clear from the text that this provision relates to both strikes and lock-outs—even though the latter are not explicitly mentioned in the text of Article 6(4) of the ESC or in the gloss to this provision in the Appendix. The European Committee of Social Rights (ECSR) came to this conclusion because the 'lock-out is the principal, if not the only, form of collective action which employers can take in defence of their interests'.[21] However, in a statement of interpretation dating back to 1978, the ECSR indicated that the ESC does not at all enshrine an obligation to ensure such a principle in the legal order of the Contracting Parties, let alone to ensure full equality between the right to strike and the right to lock out.[22]

The ECSR has made the effort during the XIVth and XVth monitoring cycles to ask some of the Contracting Parties to indicate whether other means of collective action were protected in their legal order. The mere fact that the ECSR has made such an effort suggests that the notion of collective action includes the right to strike, but cannot be restricted to it. At present, the conclusions of the ECSR do not give any guidance on the collective actions of workers falling within the scope of Article 6(4) of the ESC. A recent decision,[23] which was issued upon a collective complaint by the European Trade Union Confederation (ETUC) and the Belgian representative trade unions, sheds more light on this troublesome issue. The applicants argued that the right to picketing in a way which effectively though peacefully blocked the entrance to an undertaking fell within the ambit of Article 6(4) of the ESC. They claimed the judicial orders prohibiting this obstructive picketing (as well as non-obstructive or less obstructive picketing) in summary proceedings to be an unjustified restriction of the right to take collective action. The complaint urged the ECSR to adopt a position regarding the preliminary

20 *Karaçay v Turkey* App no 6615/03 (ECtHR, 27 March 2007); *Urcan and others v Turkey* App nos 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04 (ECtHR, 17 July 2008); *Saime Özcan v Turkey* App no 2953/04 (ECtHR, 15 September 2009); *Kaya and Seyhan v Turkey* App no 30946/04 (ECtHR, 15 September 2009); *Dilek and others v Turkey* App nos 74611/01, 26876/02 and 27628/02 (ECtHR, 28 April 2008).

21 ECSR, Statement of Interpretation, Conclusion, 31 May 1969.

22 ECSR, Statement of Interpretation, Conclusions VIII, 31 January 1984.

23 ECSR, *CSC, CES, CGSLB, FGTB v Belgium* Collective Complaint no 59/2009. See F Dorssemont, 'Libres propos sur la légitimité des requêtes unilatérales contre l'exercice du droit à l'action collective à la lumière de la décision du Comité européen des droits sociaux' in I Ficher, PP Van Gehuchten and others (eds), *Actions orphelines et voies de recours en droit social* (Anthémis 2012) 129–48; JF Neven, 'Les piquets de grève, la procédure sur requête unilatérale et les pouvoirs du juge des référés après la décision du comité européen des droits sociaux du 13 septembre' (2012) *Revue de droit social* 393.

question whether these actions were protected at all under Article 6(4) of the ESC, prior to the assessment of the justified character of that restriction.

In two crucial paragraphs (paras 35 and 36) of its decision, the ECSR seems to draw a line between the kind of actions which fall within Article 6(4) and those which fall outside the ambit of the provision. The ECSR indicated that picketing procedures which do not violate the right of 'other workers to choose whether or not to take part in the strike action' fall within the ambit of Article 6 of the ESC.

In my view, the ECSR draws a line between collective action which is peaceful and action which is not. The first falls within the ambit of Article 6 of the ESC, the latter does not. In this respect, the approach is not entirely distinct from the approach adopted by the ILO Freedom of Association Committee.[24] More importantly, the ECSR goes at length to define when an action ceases to be peaceful. Strikers should refrain from intimidation or violence against non-strikers. In case of obstructive pickets, these obligations are fulfilled, and such action is protected. Belgian trade unions thus do not have recourse to intimidation or violence, but they may block the access to the undertaking through physical blockades. The mere fact that a person who would like to work is prevented from doing so, does not mean that he or she has no choice but to participate in the strike or not. Indeed, a person who is unable to have access and is unable to work will not for that matter be considered as a striker. This does not mean that the ECSR is opposed to the recognition of a right of employees willing to work to have access to the enterprise, which could in fact restrict the exercise of the right to take collective action. However, a collective action which is at odds with those rights does not cease for that reason to fall within the ambit of Article 6(4) of the ESC.[25]

V. OWNERSHIP: INDIVIDUAL OR COLLECTIVE?

The issue of the personal scope of the right to take collective action seeks to identify the owner of such a right. Such an apparently simple question embraces a number of issues. A first issue relates to the question whether Article 11 of the ECHR guarantees both workers (organisations) *and* employers (organisations) a right to take collective action. This question is abundantly clear in Article 6 of the ESC, which mentions both workers and employers as owners of the right to take collective action. The subsequent issue relates to the restriction of the right to take collective action for categories of civil servants, which are specified in Article 5 of the ESC as well as in Article 11 of the ECHR. Last but not least, the question arises whether holders of this right can have

24 International Labour Office, *Freedom of Association. Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (International Labour Office 2006), 545: 'Regarding various types of strike action denied to workers (wild-cat strikes, tools-down, go-slow, working to rule and sit-down strikes), the Committee considers that these restrictions may be justified only if the strike ceases to be peaceful'.

25 See also ECSR, Decision no 119 (3 July 2013) *LO and TCO v Sweden* Collective Complaint no 85/2012.

recourse to collective action without the consent of a collective actor. In other words, the question arises whether there is a distinction between the ownership of the right to participate in a collective action and the right to call such a collective action.

The European Social Charter identifies the holder of the right to take collective action in a rather unambiguous way. The right needs to be ensured in favour of 'workers' *and* 'employers'. The European Convention is mute on the existence of such a right and hence on the issue of ownership. However, Article 11 of the ECHR refers to the right to form and join *trade unions* for the protection of the interests (of the members of the latter). Employers' associations tend to be distinguished from trade unions. The notion of trade unions (*syndicats*) refers to an association of employees as opposed to employers. The case law of the European Court of Human Rights deals exclusively with collective action of employees. No cases regarding lock-out have been brought before the Court. In *Matelly v France*,[26] the Court seems to have given an implicit definition of what constitutes a trade union. It has indeed suggested that a trade union is an association for the defence of the *professional* and *moral* interests of the employees.

Brems and Haeck[27] have suggested that the specific recognition of trade unions should be extended to employers' organisations for reasons of equality of arms. ILO Convention 87 (1948), Article 10 defines workers' and employers' organisations within the meaning of the Convention as 'any organisation of workers or of employers for furthering and defending the interests of workers or of employers'. Employers are unambiguously included within the scope of the right to organise. In the past, the Court had to deal with a number of associations of self-employed who claimed that their right to organise had been violated, insofar as public authorities refused to register them as trade unions or syndicats.[28] The refusal was based upon the consideration that the legislation on trade unions defined the latter as associations of employees. The mere fact that the Court did not consider these decisions to be a restriction of the right to organise does not in my view suggest that it has clarified the scope of the notion of a *trade union*. The mere fact that trade unions under Turkish or Romanian law are not open to the self-employed does not mean that the notion of trade unions under Article 11 of the ECHR is exclusive of employers' associations.

Both the ESC and the ECHR provide a specific provision on the members of the armed forces and of the police. The ECHR allows Contracting Parties to provide restrictions to the freedom of associations of the armed forces and the police. The ESC allows Contracting Parties to preclude members of the armed forces from forming and joining trade unions, whereas it solely allows restrictions to the exercise of that right by members

26 *Matelly v France* App no 10609/10 (ECtHR, 2 October 2013).

27 E Brems and Y Haeck, 'Vrijheid van vreedzame vergadering en vrijheid van vereniging' in Y Haeck and J Vande Lanotte (eds), *Handboek EVRM*, vol II (Intersentia 2004), p 18 (see the use of the Dutch 'evenknie').

28 *Hayvan Yetistiricileri Sendikasi v Turkije* App no 27798/08 (ECtHR, 11 January 2011) and *Manole et les cultivateurs directs de Roumanie v Roumanie* App no 46551/06 (ECtHR, 16 June 2015).

of the police force. The difference between the two provisions has recently been highlighted by the Strasbourg Court in the cases *Matelly v France* and *Adefdromil v France* (above). The Court has indicated that a blanket prohibition of the freedom of association to the detriment of the armed forces and the police is contrary to Article 11 of the ECHR. The approach of the ESC is different. It allows a blanket prohibition of the freedom of association to the detriment of the armed forces.

The mere fact that the Court distinguishes between prohibitions and restrictions has not prevented it from considering that a blanket prohibition of the right to strike to the detriment of the police could be justified. In *Junta Rectora del Ertzainen Nazional Elkartasuna (ERNE) v Spain*,[29] such a prohibition was not considered to be disproportionate. This case also seems to clarify that restrictions of the freedom of association to the detriment of the armed forces and the police need to pass a test of proportionality which is as severe for this category of workers as for any category of workers.

The fact that the Court relates the recognition of the right to strike to the freedom of (trade union) association inevitably raises the question whether the ECHR guarantees workers a right to have recourse to 'spontaneous' or 'wildcat' strikes, ie strikes neither authorised nor organised by trade unions. The Strasbourg Court has not yet had the occasion to elucidate whether a blanket prohibition of wildcat strikes can be justified under Article 11 of the ECHR. In my view, the nexus between the right to strike and the right to organise would amount to the logical conclusion that these actions fall outside the ambit of Article 11 of the ECHR. The only protection which could be granted might stem from the exercise of the freedom of assembly. One might argue that such a dogmatic stance is counter-intuitive in view of the Court's individualistic approach as evidenced by its case law on the negative freedom of association.

The case law of the ECSR is much more explicit on this issue. A former member of the ECSR, Stein Evju,[30] has made an extensive analysis of the case law of the ECSR between 1971 until a more or less Copernican conclusion in 2004 relating to Sweden. In that conclusion, the ECSR has stated that

> It considers that the reference to 'workers' in Article 6(4) ESC relates to those who are entitled to take part in collective action but says nothing about those empowered to call a strike. In other words, this provision does not require states to grant any group of workers authority to call a strike but leaves them the option of deciding which groups shall have this right and thus of restricting the right to call strikes to trade unions. However such restrictions are only compatible with Article 6§4 if there is complete freedom to form trade unions and the process is not subject to excessive formalities that would impede the rapid decisions that strike action sometimes requires.[31]

29 *Junta Rectora del Ertzainen Nazional Elkartasuna (ERNE) v Spain* App no 45892/09 (ECtHR, 15 April 2015).

30 S Evju, 'The Right to Collective Action under the European Social Charter' (2011) 3 *European Labour Law Journal*, sections 213–217.

31 See ECSR, Conclusions, 31 May 2004 (Sweden).

The Digest[32] has been adapted in order to take into account this important 'restatement' by the ECSR. It summarises the position by stating that 'the decision to call a strike can be taken only by a trade union provided that forming a trade union is not subject to excessive formalities'. A time frame of 30 days to establish a trade union under Portuguese law was considered excessive.[33]

VI. DELIMITATIONS OR INTERNAL RESTRICTIONS: ON SOLIDARITY STRIKES AND PROTEST STRIKES

Teleological restrictions are restrictions which stem from a '*telos*', ie the underlying rationale behind the recognition of the right to take collective action. The word 'restrictions' might be seen as inappropriate. Teleological 'restrictions' could qualify as conditions which *delimit* the recognition of the right to strike. For this reason, they don't need to pass a proportionality test. The application of a proportionality test indeed presupposes that an action falls within the ambit of the Convention or of the Charter. Hence, teleological restrictions could qualify as internal restrictions.

Article 11 of the ECHR only seems to suggest that strikes need to be related to the protection of interests. Such a teleological contextualisation provides scope for a generous assessment of strike objectives. Any objective aimed at the defence of workers' interests against any actor capable of jeopardising these interests should be considered as legitimate.

It is rather difficult to assess how the European Court will deal with the legitimacy of teleological restrictions imposed by Member States. The most obvious victim of teleological restriction is the solidarity strike. The legal status of solidarity strikes in the Member States of the Union is far from undisputed. In the past, the Court was confronted twice with the provisions in the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992 which outlaw the solidarity strike.

In *Unison* a strike that was to take place in the context of a transfer of undertaking had been disqualified by British judges as a trade dispute between workers and their current contractual employer.[34] The employees of the transferor had gone on strike in order to safeguard existing rights after the transfer. The British judges considered in a very formalistic manner that the action was not undertaken in the context of a trade dispute between the workers and their current employer, because it did not fall within the narrow scope of permitted action in British law at the time. The ECtHR did not validate this reasoning to justify restricting the right to strike. It instead took an alternative avenue, describing the particular economic interest that the business had in the continuity of its services and the exercise of freedom of contract as a legitimate objective for restricting the right to strike.

32 Digest, 152 <www.coe.int/en/web/turin-european-social-charter/case-law>. Accessed 6 April, 2016.
33 ECSR 2014, Conclusion XX-3 (Portugal).
34 See n 9.

Although dismissing the application, the Court did not go along with the British government's assertion that those interests could only be defended within the narrow context of a 'trade dispute'.

In the subsequent *RMT* case, the Court was confronted with what it considered to be a genuine solidarity strike.[35] The Court acknowledged that contrary to what was the case in *Unison*, the workers were prevented from going on strike for the defence of the interests of other workers. The Court adopted an expansive approach to the right to organise, granted 'for the defence of *his* interests' in Article 11 of the ECHR. The solidarity strike fell within the ambit of Article 11 of the ECHR. Hence, the Court would assess the legitimacy of the restriction on the basis of a more substantive assessment of the legitimacy of the strike. The legitimacy of the solidarity strike was assessed on the basis of the conflicting rights and freedoms of *others*. For a number of not entirely convincing and indeed contradictory reasons, this assessment proved to be detrimental for the workers on strike.

First and foremost, it is incomprehensible that a Court recognising as a matter of principle the legitimacy of the right to have recourse to solidarity strikes refuses to condemn a State which is well known to have outlawed solidarity strikes for decades in the most categorical and absolute manner. Quite astonishingly, the Court uses the longevity of this statutory prohibition as an argument in favour of a presumption that the provision is justified. The longer a restriction lasts, apparently the more legitimate it becomes. Secondly, the Court has taken great efforts to confirm the intertextual canon of interpretation it had pledged in the Grand Chamber judgment in *Demir and Baykara*. It honours the ECSR as a particularly qualified body. Despite the acknowledgement of the existence of a wealth of international materials, the Court ignores this body of case law by suggesting there is a difference in nature between the judicial case based approach of the Court and the more general and abstract assessment of the monitoring bodies (ECSR and ILO expert committees). This observation ignores in my view the existence of the more concrete collective complaint procedures. Thirdly, the Court explicitly states that the distinction between merely important and essential means of interest protection is immaterial, whereas it states that 'if a legislative restriction strikes at the core of a trade union activity, a lesser margin of appreciation is to be recognised to the Member States'. Last but not least, the Court adopts a double standard on purely speculative arguments. Whereas it considers the application of the prohibition to be justified on the basis of the assumption of the UK government that solidarity strikes might generate a *risk* of disruption of the economy, it refuses to take into consideration the 'speculative' argument of the defendants that they would have won the day if they could have had recourse to a solidarity strike.[36]

Article 6 of the ESC adopts a much more narrow approach to the *telos* of collective action. It states that the right to take collective action has been recognised solely with a

35 *RMT v UK* App no 31045/10 (ECtHR, 8 April 2014). For in-depth analysis: A Bogg and KD Ewing, 'The Implications of the *RMT* Case' (2014) 43 *Industrial Law Journal* 221.

36 *RMT v UK* App no 31045/10 (ECtHR, 8 April 2014), para 87.

view to ensuring the effective exercise of the right to *bargain* collectively. Furthermore, Article 6(4) of the ESC refers to a context of conflicts of *interests*. According to a statement of interpretation, the latter need to be opposed to conflicts of rights, 'such as conflicts related to the existence, validity or interpretation of a collective agreement'.[37] The context of Article 6 of the ESC suggests that a recourse to collective action presupposes conflicts of interests *between* actors engaged in a process of collective bargaining.

The question might arise how the solidarity strike needs to be assessed under the ESC. In some authoritative comments, former members of the ECSR have argued that solidarity strikes fall outside the ESC.[38] In my view, this statement is questionable and is not corroborated by any interpretative statement or even a conclusion or decision from the ECSR. From a formal point of view, solidarity strikes or actions do concern conflicts between employers and employees. The ECSR has never explicitly stated that these conflicts need to concern conflicts between workers and *their* employer. Hence, there is no reason to assume that the notion of a conflict of interests needs to be interpreted in the narrow meaning of the British TULRCA 1992. In fact, the ECSR has indicated that the provisions of the TULRCA 1992 are far too restrictive and violate Article 6 (4) of the ESC. The ECSR has indicated that the approach of the British legislator deprives employees of the right to exercise pressure on a person who might be distinct from the contractual employer, but is in fact the corporate person who has a major influence over the working conditions and the socio-economic interests of the employees involved.[39]

In a recent landmark judgment the Dutch Hoge Raad has ruled that a boycott inspired by solidarity does fall within the ambit of Article 6(4) of the ESC. It is sufficient that there is a reasonable nexus between the solidarity strike and a process of collective bargaining, the ambit of Article 6(4) of the ESC. The mere fact that a secondary action could contribute to the satisfaction of the demands put forward in the primary action was deemed sufficient.[40] Contrary to what the Strasbourg Court suggested in the *RMT* judgment, no proof needs to be given that the trade unions would have won the day provided that they had recourse to a solidarity action.

In sum, the nexus between the right to strike and freedom of association precludes the question of whether workers and trade unions can have recourse to collective action solely in a context of collective bargaining. The European Social Charter inevitably raises such a question due to the functional linkage between collective action and collective bargaining. The ECSR has avoided the detrimental effect of the linkage by broadening the notion of collective bargaining to any kind of social dialogue between management

37 ECSR, Conclusions I, 31 May 1969, Statement of Interpretation.

38 A Swiatkowski, *Charter of Social Rights of the Council of Europe* (Kluwer 2007) 227–28; M Mikkola, *Social Human Rights of Europe* (Bookwell Ltd 2010) 283.

39 See especially ECSR, Conclusions, XX-3 (UK).

40 See Hoge Raad, 31 October 2014 (*Enerco*), JAR, 2014/298 met noot van EM Hoogeveen. For in-depth analysis see: F Dorssemont, 'Collectieve acties uit solidariteit, als correlariumvan de vrijheid van collectief overleg (artikel 6ESH) en van de vrijheid van vakvereniging (artikel 11 EVRM)' (2015) *Arbeidsrechtelijke annotaties* 72.

and labour.[41] Thus strike action undertaken outside the formal bargaining procedures involving trade unions, though related to a dialogue between management and labour *sensu lato*, falls within the ambit of Article 6 of the ESC. However, as already pointed out above the ECSR has argued that Contracting States do have the possibility to restrict the ability to call a strike to trade unions, on condition that forming a trade union is not subject to excessive formalities.[42]

In my view, as a matter of principle teleological restrictions to collective action cannot narrow the ability of trade unions to 'protect the interests of their members'. Any teleological restriction narrowing down such an objective needs to be justified under Article 11(2) of the ECHR. The wording of the ECHR does not provide any conclusive arguments for restricting the protection of workers' interests to the ambit of the employment contract. Prima facie, these interests should also include the *social* and *economic* interests of workers outside the employment relationship. Moreover, such interpretation is consistent with the nature of an instrument which seeks to defend civil and political rights.

As pointed out by Novitz, the *Unison* judgment restricts the interests to 'occupational interests',[43] whereby the exact scope of this expression remains unclear. She has expressed a legitimate concern that the notion of occupational interests seems to be narrower than that of 'social and economic interests' upheld by the ILO supervisory bodies. Though the restriction to occupational interests has been used on previous occasions,[44] it is troublesome. It adds a restriction to the interests at stake that is not enshrined at all in the text of the Convention. Furthermore, due to the canon of intertextual interpretation introduced by *Demir and Baykara*, a broad conception of those interests should prevail. In my view, the notion of 'occupational' strike can be opposed to 'political' strike *sensu stricto*. The exclusion of the defence of 'political interests' should not prevent a trade union from defending the genuine socio-economic interests of the working class against governmental institutions.[45]

VII. PROCEDURAL RESTRICTIONS: ARE THEY ALLOWED IN THEIR OWN RIGHT?

For the sake of this contribution, procedural restrictions are defined as formal requirements which have to be fulfilled prior to any recourse to collective action. The violation

41 <www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf> 56: 'Within those limits, the right to strike should be guaranteed in the context of any negotiation between employers and employees in order to settle an industrial dispute. Consequently prohibiting strikes not aimed at concluding a collective agreement is not in conformity with Article 6 para 4'.

42 <www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf> 56. On the distinction between the right to participate in a strike and the right to call a strike see Evju (n 28) 213–16.

43 T Novitz, *International and European Protection of the Right to Strike* (Oxford University Press 2003) 232–33.

44 *Schmidt and Dahlström v Sweden* App no 5589/72 (ECtHR, 6 February 1976) Series A No 21.

45 <www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_090632.pdf> 529.

of these requirements will affect the legitimacy of collective action. These restrictions range from merely providing information of imminent strike action, with or without notice or a cooling-off period; to an obligation to allow for mediation, conciliation or arbitration; to ballot procedures which submit the legitimacy of strike action to a majority decision of the trade union members concerned. In some countries, the idea is held that strike action constitutes an *ultimum remedium*. These procedures boil down to preventive restrictions.

Two cases of the ECtHR relate directly to the existence of procedural restrictions under UK law. In the *NATFHE* case, the Court had to deal with the TULRCA 1992 provisions regarding the organisation of a strike ballot. The applicant union alleged that the obligation to provide a list of its members who will have to take part in the ballot to their employer constituted an unjustified restriction of the right to organise. The disclosure of the identity of the unionised workers to their employer was considered to entail a serious *risk* of anti-union discriminatory measures. Despite the union's claim that Article 11 of the ECHR indeed encompassed a right to strike, it seems likely that the trade union was trying to convince the European Commission on Human Rights to condemn the UK in view of the individual rather than of the collective issues involved.

In this respect, it is interesting to observe that the trade union also invoked Articles 8 and 10 of the Convention. The Commission recognised that there 'may be specific circumstances in which a legal requirement on an association to reveal the names of its members to a third party could give rise to an unjustified interference with the rights under Article 11'. However, despite a history of anti-union discrimination since time immemorial, it was unable to construe 'that there was something inherently secret about membership of a trade union' (*sic*).[46] In *RMT*, the Court had the occasion to dwell on the legitimacy of the ballot procedures in British law. However, the request was considered to be inadmissible, since manifestly ill-founded. The Court considered that the procedural restrictions had only forced the trade union to delay the collective action, after a failed attempt to organise the ballot procedure.

Both Article 6(4) and Article 31 of the ESC allow for procedural restrictions. The latter allows for restrictions on Charter rights generally by providing that

> The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

Whereas procedural restrictions based upon Article 6(4) of the ESC stem from 'collective agreements previously entered into', procedural restrictions based upon Article 31 can be based upon other legal sources. As we see, it is sufficient that they are prescribed

46 *National Association of Teachers in Further and Higher Education* App no 28910/95 (ECtHR, 16 April 1998) 25 EHRR CD 122. See also Novitz' qualification of the Court's view as 'fairly naïve': Novitz (n 39) 231.

by *law*. However, this latitude is restricted by the requirement that procedural restrictions under Article 31 always need to serve the legitimate objectives defined in Article 31 and need to be necessary in a democratic society.

Apparently, restrictions in collective agreements do not need to pass these latter tests. In fact, Article 31 deals with substantive restrictions based upon the balancing of competing public and private interests. For these reasons, on a strict reading of Article 31 it is difficult to justify purely abstract procedural restrictions unrelated to such a balancing exercise. The fact remains that the approach of Article 31 is substantive rather than procedural.[47] Arguments related to the *travaux préparatoires* or to 'the structure' of Article 6 are far from convincing or compelling. The ECSR has nevertheless appeared to accept the legitimacy of procedural restrictions, but has stated in a more general way that the ballot method, the quorum and the majority required for such a procedure cannot be such that the exercise of the right to strike is excessively limited.[48]

The ECSR has also held that a majority requirement of two-thirds is excessive.[49] In more recent conclusions, the ECSR is extremely critical towards the very existence of a ballot procedure. In a recent conclusion, regarding the UK, it has stated that the mere juxtaposition of an obligation to notify a strike as well as to organise a referendum was considered as excessive. This conclusion reiterates an earlier position adopted in 2010.[50] As far as the obligation to give notice is concerned, the ECSR has never opposed this practice. Insofar as this notice will often go hand in hand with a notice period, a caveat is necessary. The ECSR has indeed insisted that such a notice period should be of a reasonable duration.[51] The same conclusion is warranted for pre-strike conciliation procedures. The latter can be combined with a notice period. As far as the latter are concerned, the issue of their conformity needs to be assessed in the light of Article 6(3) and (4) of the ESC. An obligation to notify not merely a strike action, but the duration of that action was considered to be excessive, despite the fact that it affected so-called essential services in Italy.[52]

The *ultimum remedium* principle has been severely criticised by the ECSR, when it took notice of the so-called *Douwe Egberts* judgment. In *Douwe Egberts*,[53] the Hoge Raad in the Netherlands has referred to the ESC in order to argue that the right to

47 See in this respect L Schut, *Internationale normen in het Nederlandse stakingsrecht* (Sdu 1996) 186. See also M Tilstra, *Grenzen aan het stakingsrecht* (Kluwer 1994) 331.

48 See <www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf> 57 and Evju (n 28) 217–18.

49 ECSR, Conclusions XX-33, 2014 (Czech Republic, a majority requirement of two-thirds was considered as excessive). Conclusions, XX-3 (Hungary: The committee insists that the majority concerned need to consist of trade union members, instead of all employees involved).

50 ECSR, Conclusions XX-3, 2014.

51 ECSR, Conclusions XX-3, 2014 (Czech Republic, a cooling-off period of 30 days was considered to be excessive, starting from the day when the mediator was acquainted with the subject matter) (a majority requirement of two-thirds was considered as excessive).

52 ECSR, Conclusions, XX-3 (Italy).

53 Hoge Raad, 28 January 2000, Nederlandse Jurisprudentie 2000, 292.

take collective action was construed as an *ultimum remedium*. For this reason, the Supreme Court argued that a judicial decision prohibiting a strike considered to be premature needed to be upheld. In a subsequent conclusion the ECSR has considered that nothing in the Charter warrants the idea that a right to take collective action could be prohibited because a judge has the feeling that there was still sufficient scope for negotiations. The ECSR has indicated in this respect that the doctrine of the collective action as an *ultimum remedium* would inevitably urge judges to assess the appropriate character of a strike instead of restricting them to an assessment of the legality. As a result, in the *Amsta* landmark judgment, the Dutch Supreme Court (Hoge Raad) mitigated its previous position regarding the *ultimium remedium* character of the right to take collective action. It states that such a condition cannot be construed any longer as a sufficient or independent reason to outlaw collective action. The latter court does indicate that procedural considerations can come into play within an assessment of a more substantive balancing exercise, based upon Article 31 of the ESC.[54]

VIII. SUBSTANTIVE RESTRICTIONS WITHIN A SYSTEM OF VALUES?

As is the case with most rights under the ECHR and the ESC, the right to collective action can be made subject to substantive restrictions, ie restrictions based upon conflicting private and public interests. The private and public interests which can justify restrictions are enumerated in an *exhaustive* way in Article 11(2) of the ECHR and in Article 31 of the ESC. For the issue of the right to take collective action, substantive restrictions can be extremely detrimental for the effective recourse to collective action. Collective actions seek to exert pressure on an antagonist in order to influence his conduct and to enforce demands. In the case of a primary action, this will be operated by economic damage directly inflicted upon this antagonist.

The Court's case law relating to mere restrictions (as opposed to prohibitions) of the right to take collective action has not been very beneficial for trade unions. In fact, in several cases predating the *Demir and Baykara* judgment, the Court refused to censure such restrictions, allowing them to easily pass the test of Article 11(2) of the ECHR. As indicated previously, in *Unison* the Court refused to consider the restriction to the right to strike as disproportionate. Despite the fact that the injunction imposed by the British judges seems to have been based on the narrow statutory definition of a trade dispute, the Court upheld the judgment on the illicit character of the dispute by replacing the former with a distinct rationale based upon a balance of the rights protected under the Convention and the 'protection of the rights and freedoms of others'.

The Court referred in this context to the particular economic interest that the business had in the continuity of its services and the exercise of freedom of contract

54 Hoge Raad, 19 June 2015, Jurisprudentie Arbeidsrecht 2015/1260.

as a legitimate objective for restricting the right to strike. The Court did not refer to the issue of public safety which was at the heart of the undertaking concerned, a hospital. It was not an established fact that the strike would endanger public health. The Court seems to have endorsed the view espoused by the British government that these 'interests' fall under the 'rights and freedoms of others' within the meaning of Article 11(2) of the ECHR.

Unison's infamous course was extended further in *Federation of Offshore Workers' Trade Unions*.[55] At issue in this case was a strike prohibition imposed by an administrative measure. The prohibition was supplemented by a compulsory arbitration procedure to settle a wage-bargaining dispute involving offshore workers. Notwithstanding the fact that such a prohibition in a non-essential service was considered incompatible with ILO standards by the ILO Freedom of Association Committee *and* the fact that the compulsory arbitration procedure had been criticised by the European Committee of Social Rights on the basis of Article 6(4) in conjunction with Article 31 of the European Social Charter, the application was deemed manifestly ill-founded by the Court. The Court considered that the *administrative restrictions* which had been challenged in vain before the Norwegian courts did pass the test when balanced against the interests of public safety, 'rights and freedoms of others' and health.

Though the canon of interpretation expressed in the Grand Chamber's *Demir and Baykara* judgment might have prompted the Court to adopt a more cautious approach when scrutinising such restrictions, taking into account more specific international instruments and their interpretation, the first post-*Demir and Baykara* test case (ie, *Trofimchuk*) proved to be extremely disappointing.[56] In *Trofimchuk*, the Court adopted a dangerous approach by considering the fact that a picket action which only lasted two hours had provoked 'serious disruption to the workplace processes'.[57] Indeed, it is the essence of any collective action that it provokes a serious disruption to the workplace processes. The most current form of collective action, ie strike action, inevitably leads to serious disruption, since labour is an essential 'resource' in any undertaking.

Both the French and the Italian courts have made it abundantly clear that *mere* damage to production needs to be disregarded when imposing restrictions on the right to strike.[58] The question thus arises whether this consideration of the Court satisfies the canon of interpretation developed in *Demir and Baykara*. This canon urges the Court to take into account 'the practice of European States reflecting their common values'.[59] Comparative research would have revealed that the criterion the

55 *Federation of Offshore Workers' Trade Unions and others v Norway* App no 38190/97 (ECtHR, 27 June 2002).

56 *Trofimchuk v Ukraine* App no 4241/03 (ECtHR, 28 October 2010).

57 *Trofimchuk v Ukraine* App no 4241/03 (ECHR, 28 October 2010), para 46.

58 See G Ghezzi and U Romagnoli, *Il diritto sindacale* (Zanichelli 1997) 221; G Giugni, *Diritto sindacale* (Cacucci editore 2006) 247; B Caruso and A Alaimo, *Diritto sindacale* (Il Mulino 2012) 288; P Lokiec, *Droit du travail: Les relations collectives de travail* (Presses universitaires de France 2011) 395; B Teyssié, *Droit du travail: Relations collectives* (Litec 2005) 500.

59 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008), para 85.

Court used is at least puzzling. It might be argued that the reference to the disruption of the production processes needs to be understood as a reminder of the goal of the notification procedure. The latter should give the employer fair opportunity to reduce the damage to his enterprise. In this respect, insofar as proper notification has been given, the mere fact that the notified industrial action could provoke serious disruption should be disregarded.

The question arises whether the legitimate justification of the protection of the 'rights and freedoms of others' under Article 6 of the ESC also covers purely economic damage inflicted upon an employer who is a party to the conflict of interests. Two separate arguments could be put forward to claim that such a justification does not meet the test of Article 31. First, it could be argued that economic damage and 'rights and freedoms' are two different concepts. Whereas a violation of a right does not always entail economic damage, neither does inflicting economic damage always correspond to the violation of rights and freedoms. Furthermore, it is unclear whether the 'rights and freedoms' concerned need to be 'rights and freedoms' of a fundamental character or not. Insofar as mere economic damage inflicted upon an antagonist allows for a restriction of the right to take collective action, there is in my view a serious risk that 'proportionality' will be used not as a measure to assess the legitimacy of a restriction, but as a condition for the legitimacy of the exercise of the right to take collective action.

The Digest does not provide any guidance on this quintessential issue. It focuses on restrictions justified by public interests. In an important conclusion delivered by the Committee following critical observations by the Belgian trade unions (FGTB and CSC) on the Belgian Report, the Committee has condemned the application of the doctrine of the *abus de droit* on the following grounds:

> Analysis of this case law also shows that a change is taking place, to the extent that certain decisions forbid strikes themselves, and no longer only certain practices linked to them. In such cases, the proportionality criterion is used by the judge. The Committee observes that use of the concept of abuse of right or the proportionality criterion is leading the courts to act as judges of strikes' appropriateness, and consequently of their lawfulness. Thus, if the judge considers that the harmful effects of a strike are disproportionate or that the strike could be organised at a less damaging time without losing its effectiveness, a ban will be imposed. Urgent applications are also sometimes submitted on a preventive basis. The Committee considers that the judicial practices concerned restrict the exercise of the right to strike beyond the restrictions accepted in Article 31 of the Charter.[60]

In my view, this conclusion amounts to a clear-cut prohibition of the proportionality principle.

60 ECSR, XVI-1 (Belgium 2002). See also F Dorssemont, 'La non conformité du droit belge realtof à l'action collective parrapport à la charte sociale européenne' in *Actualité du dialogue social et du droit de grève*, bar report (Larcier 2009) 194, 196.

The ECSR has provided more guidance on the conflict between the right to strike and 'public interests'. The notion of 'public interest' is mirrored by the notion of '*ordre public*' in the French language version, which clearly warrants a very restrictive reading.[61] It has given much more guidance on the scope of the kind of public interests which could justify restrictions, than on that of private interests. Some of these public interests are listed explicitly, such as 'national security' and 'public health'. In my view, the potential restriction on the ground of morals is not a relevant reason to restrict the right to strike. It is difficult to understand how demands related to socio-economic interests could qualify as 'immoral', despite the fact that the ECSR has considered in an old conclusion related to Germany that the prohibition of immoral strikes was compatible with the ESC.[62]

Thus, the reference to public interest cannot justify a general restriction affecting the entire 'civil service'.[63] Although the ECSR has argued that some services affect the public interest and can qualify as essential, the latter does not warrant a generic sectoral prohibition either. Such a generic sectoral prohibition was considered to be excessive in two decisions following a collective complaint procedure. In a Bulgarian case, such a generic sectoral prohibition was at stake in the electricity (production, distribution and supply), communications and healthcare sectors.[64] The Committee said all these services qualified as essential services. This approach is divergent from the approach adopted by the ILO Freedom of Association Committee[65] (which does solely recognise electricity and communications as essential services, as opposed to communications). In an Irish case, a generic ban of strike in the police force was considered to be disproportionate as well.[66] It seems logical to assume that the ECSR is suggesting that a minimum service is a more proportionate way to restrict the right to strike in such a scenario. It has not yet had the opportunity to indicate at length how the legitimacy of the design of this minimum service needs to be assessed. In a recent conclusion regarding Serbia, involvement of workers as such and on the same footing as employers has been put forward as an essential element.[67] In my view, the recent decision of the ECtHR in *Veniamin Tymoshenko and others v Ukraine*[68] might provide proper guidance, insofar as it insists on the importance of sufficient clarity and foreseeability.

61 In the same vein: APCM Jaspers, *Nederlands stakingsrecht op een nieuw spoor* (Kluwer 2004) 95–97.

62 See in this respect Conclusion II (Germany), Article 6(4) 1971. The notion of *Sittenwidrigkeit* is more related to the issue of damages inherent in strike action than to the objectives of the strikes. Nowadays this issue tends to be regulated by the notion of proportionality (*Verhältnismâssigkeit*). See W Reinfelder, 'Sonstige Schranken des Streikrecht' in W Däubler (ed), *Arbitskampfrecht* (Nomos 2011) 294.

63 See ECSR, Conclusions, XX-3 (Denmark); ECSR, Conclusions XX-3 (Germany).

64 See ECSR, No 32/2005 *European Trade Union Confederation (ETUC), Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour 'Podkrepa' (CL 'Podkrepa') v Bulgaria*. See also critical conclusions in regard to Iceland regarding a ban on strike in civil aviation: ECSR, Conclusions, XX-3 (Iceland); ECSR, Conclusions, XX-3 (Slovak Republic).

65 International Labour Office, *Freedom of Association. Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (International Labour Office 2006), 585.

66 ECSR, *European Confederation of Police (EuroCOP) v Ireland* Complaint no 83/2012.

67 ECSR, Conclusions, XX-3 (Serbia).

68 *Veniamin Tymoshenko and others v Ukraine* App no 48408/12 (ECtHR, 2 October 2014).

IX. A COMPARATIVE ASSESSMENT

A comparative analysis between the two distinctive provisions both protecting a right to take collective action warrants the inevitable question, which of the two provisions could qualify as more progressive, ie as providing more protection against restrictions.

In my view, there is no obvious answer to this question. At first sight, Article 6(4) of the ESC might qualify as the most likely candidate for a more progressive approach. The European Social Charter could be seen as the more specialised instrument, focusing more on workers' rights, whereas the European Convention on Human Rights tends to be related to civil and political rights.

In my view, these academic qualifications are not decisive. In fact, the distinction should not be exaggerated. The Court has indicated in *Airey v Ireland* that this distinction is not decisive:

> Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[69]

The intertextual canon of interpretation set forth in *Demir and Baykara* only corroborates such a vision.

In my view, Article 6(4) of the ESC is much more lenient on the justification of restrictions as opposed to the European Convention on Human Rights for a number of reasons. First, it allows for restrictions based upon collective agreements without any limit whatsoever. Article 31 is not applicable to these restrictions. Though the ECHR would indeed recognise these restrictions as 'prescribed by law', they would still have to pass the test of being required by one of the legitimate aims enumerated in Article 11(2) of the ECHR. Furthermore, they would have to pass a proportionality test.

As indicated above, the right to collective action in the ESC has been delimited in a much more narrow way. The nexus with collective bargaining does not provide much scope for collective action directed against governmental policies. Insofar as governmental policies tend to restrict the freedom of collective bargaining, the collective action could be seen as undertaken with a view to ensure the effective exercise of collective bargaining.

As indicated above, the ESC is much more restrictive as far as collective actions by the armed forces are concerned, allowing for a blanket prohibition of the latter.

In my view, this rather negative comparison to the detriment of the ESC needs to be mitigated however from at least three points of views. First, the right to organise in the ECHR is not a textbook example of arms being granted to both employers' and workers' organisations. The recognition of the right to collective action is derived from the

69 *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979), para 26.

protection of interests of members of trade unions, ie workers. The latter does not mean that employers' organisations cannot benefit from the generic recognition of the freedom of association. However, this freedom has been fleshed out from a purely individual perspective. It does not suggest that Contracting Parties need to ensure means of collective action to all associations. Furthermore, the Strasbourg Court does tend to restrict the freedom of association to occupational interest or labour related interest in a narrow way. This narrows the protection from a teleological point of view as well. A more intertextual approach in the line of *Demir and Baykara* is needed to overcome this hurdle. Last but not least, the Strasbourg Court is more lenient in allowing restrictions based upon purely economic interests of employers than the ECSR, irrespective of whether these interests can be linked to economic freedoms that allegedly qualify as being 'fundamental'. In sum, the ECSR has another view on the system of values, as is evidenced in the courageous stance it took in the *Laval* decision.[70]

This negative assessment of the Strasbourg case law can be explained (not justified) by the margin of appreciation granted to States and the subsequent reluctance of the Court to deal with issues which are intimately linked to systems of industrial relations.

These divergencies between the two instruments should not give rise to the use of either the European Convention or of the European Social Charter to lower the higher level of protection afforded by the twin instrument. Both instruments contain provisions preventing such a use of the provisions (ECHR, Article 18 and ESC, Article 32). In two French cases[71] related to a blanket prohibition of the armed forces and the military police, the French government tried to argue that the leeway allowed under the ESC to allow a blanket prohibition on the right to organise could be used to circumvent the more severe stance of Article 11 of the ECHR on such blanket prohibitions.

Thus, the less progressive stance of the ESC was unsuccessfully invoked to lower the standard of the ECHR. The ECtHR killed the debate *in nuce* by stating that Article 11 of the ECHR did not provide scope for any other interpretation than that of precluding prohibitions. In view of the outcome of this *interpretatio cessat in claris* approach, there was no need to revert to intertextuality as a tool for interpretation at all. In my view, the twisted logic of the French government on this isolated issue is at odds with Article 31 of the ESC (and the corresponding Article H of the Revised European Social Charter).[72]

70 *Laval un Partneri Ltd v Svesnka Byggnadsaretareförbundet*, CJEU, Case C-346/06, 18 December 2007. *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint no 85/2012 and ECSR, Conclusions, XX-3 (Sweden). For a recent comment, see M Rocca, 'A Clash of Kings: The European Committee of Social Rights on the "Lex Laval" and on the EU Framework for the Posting of Workers' (2013) 3 *European Journal of Social Law* 217; N Moizard, 'Le droit d'action collective en droit de l'Union après la décision *LO et TCO c. Suède* du Comité européen des droits sociaux' (2015) *Revue trimestrielle des Droits de l'homme* 26(1103), 603.

71 See the cases *Adefdromil v France* App no 32191/09(ECtHR, 2 October 2013) and *Matelly v France* App no 10609/10 (ECtHR, 2 October 2013).

72 'The provisions of this Charter shall *not* prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which *more favourable treatment* would be accorded to the persons protected.'