Title of the Entry: **Collective Rights**

Referring Entries: **Collective Rights**

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Text:

Start with definition from a legal authority where available:

Collective rights describe the rights granted to a collectivity of workers in the course of their relationship with an employer/group of employers. Within the EU legal framework, collective rights are embedded in a variety of EU legal measures and cover (i) worker involvement in enterprise decision-making (information, consultation, participation); and (ii) trade union rights (freedom of association, collective bargaining and collective action).

Where the definition is not sufficient, provide further information:

The EU lacks clear competence in the area of collective rights. Articles 153(1)-(2) TFEU provide a legal basis for the adoption of directives on information and consultation, and the representation and collective defence of the interests of workers and employers, including participation in enterprise decision-making. Trade union rights, including 'pay, the right of association, the right to strike or the right to impose lock-outs' are excluded from the EU's legislative competence (article 153(5) TFEU).

The Community Charter of Fundamental Social Rights of Workers (1989) and the Charter of Fundamental Rights (CFR) contain provisions on: rights of information and consultation[1]; freedom of association for employers and workers[2]; the right to negotiate and conclude collective agreements[3]; and the right to take collective action, including strikes[4]. The substance and exercise of the collective rights contained in the Community Social Charter and the CFR is generally defined by reference to their expression in EU law and national law and practice.

In case of a measure, the main regulatory impact shall be illustrated (other entries than a measure work analogously):

Historical development

Collective rights were excluded from the founding Treaty of the European Economic Community (EEC) (1957). EEC competence was limited to the free movement of workers, equal pay and cooperation in the area of social security.[5] Under article 100 EEC (article 115 TFEU), the Council could on the basis of a unanimous decision, adopt directives which furthered the economic aims of the Treaty. Article 235 EEC (article 352 TFEU) provided a similar, general legal basis subject to a unanimous vote, for the adoption of measures in furtherance of the

[1] Articles 17-18 of the Social Charter; article 27 CFR.
[2] Article 11 Community Social Charter; article 12 CFR.
[3] Article 12-13 Community Social Charter; article 28 CFR.
[4] Article 12-13 Community Social Charter; Article 28 CFR.
[5] See Articles 117–28 EEC Treaty.

Treaty's objectives. The Treaty's provisions reflected a consensus whereby the ability to regulate the employment relationship would remain the preserve of the Member States.

Nonetheless, the EU has, since the 1950s made repeated reference to the importance of increased involvement of the social partners – trade unions and employer representatives – in the economic and social decisions of the Union, and in European companies.[6] Initially, legislative measures adopted from the 1970s onwards, provided for specific collective rights to information and consultation in specific instances, later widened to include general, institutionalised rights to information, consultation and, in some cases, board-level participation (see information and consultation below). The social partners have also been given a role in a complex process of law-making through the social dialogue. In parallel, collective rights have been recognised as fundamental rights (although the regulatory impact of these measures has been subject to the rights' expression in EU and national law).

Fundamental rights

The (non-legally binding) Community Charter of Fundamental Social Rights of Workers (1989) and the Charter of Fundamental Rights (CFR) contain provisions on: rights of information and consultation; freedom of association; the right to negotiate and conclude collective agreements; and the right to take collective action.

i. Information and consultation

Article 17 of the Community Social Charter provides for a general right to information and consultation, taking into account the practices in force in the Member States. Article 18 adds that worker involvement is crucial to effectively manage technological change, restructuring and collective redundancies. This dual purpose – giving workers a voice while also managing the effects of business decisions on the workforce – is reflected in the Community Social Charter's Social Action Programme which encourages dialogue between the social partners in order to manage problems regarding the organisation of the labour market.[7]

The right to information and consultation is now also contained in article 27 of the Charter of Fundamental Rights (2000). The Charter of Fundamental Rights (CFR) was given the same legal effect as the EU Treaties by the Treaty of Lisbon (2009).[8] Article 27 CFR provides that "workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time." Information and consultation in this sense gives workers through their representatives a collective voice within the enterprise; it is a legal way to protect the interests of workers affected by a decision of their employer; and, as such, is part of a more general right to a fair hearing

[6] For an historical overview of developments leading to a European Company, see V Edwards, 'The European Company: Essential tool or eviscerated dream?' (2003) 40 Common Market Law Review 443–464.

[7] Communication from the Commission concerning its Action Programme on the Community Charter of Social Rights COM(89) 568 final, pp. 31-35.

[8] See further O De Schutter, 'The CFREU and its Specific Role to Protect Fundamental Social Rights' in F Dorssemont, K Lörcher, S Clauwaert and M Schmitt, *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart, 2019).

at work.[9] Yet article 27 is constrained by the CFR's scope of application (article 51(1) CFR). In Case C-176/12 *Association de médiation sociale*, the Court of Justice confirmed that Article 27 was not sufficiently clear in its content to bestow a subjective right on workers. As such, it could not be relied upon in a case between private parties. The effect of article 27 is therefore limited to its expression in EU legal instruments and national laws and practices.

Article 27 also does not commit the EU to a specific ideal-type of information and consultation. The Directives which contain a right to information and consultation (see below) have sought to complement rather than replace the different forms of worker involvement in the enterprise (ranging from information, consultation, and collective bargaining to more extensive involvement in the employer's decision-making process) across the Member States.

ii. Freedom of association

The right to join a trade union – freedom of association – is contained in article 11 of the Community Social Charter and article 12 CFR. The provisions recognise two components to freedom of association: (i) the right to establish trade unions; and (ii) the right to join (or in the case of the Community Social Charter also the right not to join) a trade union. While article 11 of the Community Social Charter defers to national law and practices in the definition of the right, article 12 CFR corresponds in its level of protection of freedom of association to that contained in other international human rights instruments (especially article 11 European Convention of Human Rights and article 5 of the European Social Charter 1961, with associated jurisprudence).[10] Article 12 CFR has a broad material scope and extends to the freedom to form a trade union, to participate in trade union activities and to receive protection in the exercise of trade union activities.

Most of the EU case law predates the coming into force of the Charter and most judicial activity in this field has taken place before the European Court of Human Rights (ECtHR). The limited EU law jurisprudence that exists tends to give a broad interpretation of the right to freedom of association, in line with the approach taken by the ECtHR. Thus, in Case C-260/89 *ERT* the Court of Justice recognised freedom of association as a fundamental right which will bind EU institutions when they are legislating or adopting administrative measures, and the Member States when they are implementing, derogating from or acting in the field of EU law. The Court has also recognised a right to form trade unions and participate in trade union activity applicable to staff of EU institutions (see Case 175/73 *Kortner* and more recently T-75/14 *USFSPEI*). In Case C-499/04 *Werhof*, the Court insisted that EU secondary legislation be interpreted in light of freedom of association.

[9] For a discussion of the value of information and consultation as a fundamental right see ACL Davies, *Perspectives on Labour Law* (CUP, 2008), pp. 180-81. For treatment of article 27 by the Court of Justice see Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2. For a comprehensive analysis of article 27, see B Veneziani, 'Article 27 – Workers' Right to Information and Consultation within the Undertaking' in F Dorssemont, K Lörcher, S Clauwaert and M Schmitt, *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart, 2019).

[10] On article 12 CFR, see further A Jacobs, 'Article 12 – Freedom of Assembly and Association' in F Dorssemont, K Lörcher, S Clauwaert and M Schmitt, *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart, 2019).

Notwithstanding the jurisprudence, the provision's application is limited by the CFR's field of application (article 51(1) CFR) to the institutions and bodies of the EU, and to the Member States when implementing EU law. As article 153(5) TFEU expressly excludes EU competence to legislate on freedom of association, the extent to which there exists a standalone fundamental right to freedom of association within EU law is limited.

iii. Collective bargaining and collective action

The right to collective bargaining (the process of negotiating and concluding collective agreements between trade unions and an employer (or its representatives)) and collective action is the necessary corollary of freedom of association; without protection of the former, the latter becomes redundant. There is substantial regulatory diversity amongst the different Member States in this area. The extent to which these rights are protected at EU level as comprehensive or overarching rights is limited.

Article 153(5) expressly excludes EU competence in relation to the right to strike but *not* in relation to collective bargaining. However, as collective bargaining depends on the right to freedom of association – which is excluded from the EU's competence (see above) – the extent to which the EU can, in practical terms, be proactive in legislating on collective bargaining is limited.

A framework for EU level collective bargaining has been institutionalised through the social dialogue since the Maastricht Treaty (see below). This framework runs parallel, or in addition, to national systems of collective bargaining. The EU legislature has otherwise largely abstained from adopting legislation which might affect national systems and practices of collective bargaining. Article 152 TFEU obliges the EU to take into account 'the diversity of national systems' of industrial relations, and to respect the autonomy of the social partners.

Articles 12-13 of the Community Social Charter guarantee the right to negotiate and conclude collective agreements, and to resort to collective action including the right to strike, under the conditions laid down in national law and practice. Article 28 CFR recognises the right to negotiate and conclude collective agreements, and the right to have recourse to strike action within the CFR's scope of application. There has been substantial debate on the importance of article 28 CFR against the backdrop of the judicial recognition, by the Court of Justice, of the limits of collective bargaining and collective action in a number of high profile cases (particularly Case C-438/05 *Viking* and Case C-341/05 *Laval*). Barnard has described the inclusion of the right to collective bargaining and collective action as 'symbolic'[11] and the positive effect of the Charter's recognition of the rights is generally considered to have been very limited.[12]

Overall, the collective rights contained in the Community Social Charter and the CFR depend for their expression on EU legal intruments and national laws and practices. The following sections therefore consider the main EU legal instruments in the area of collective rights. This is

[11] C Barnard, 'Article 28: the Right of Collective Bargaining and Action' in S Peers et al (eds), *The EU Charter of Fundamental Rights* (Hart Publishing, 2014), p. 794.
[12] For an up-to-date overview of the literature in this area see F Dorssemont and M Rocca, 'Article 28 – Right of Collective Bargaining and Action' in F Dorssemont, K Lörcher, S Clauwaert and M Schmitt, *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart, 2019).

split into two sections: information and consultation; and trade union rights.

Information and Consultation

i. Specific rights to information and consultation

Following the adoption of an ambitious Social Action Programme (1974), Article 100 EEC provided the basis for two legislative measures which marked the beginning of the EEC's foray into collective rights: Directive 75/129/EEC on collective redundancies and Directive 77/187/EEC protecting the acquired rights of workers on the transfer of an undertaking.[13] The Directives do not seek to harmonise national laws in their respective areas but to provide minimum levels of protection for workers under EU law in order to mitigate the social consequences of managerial decisions to restructure their business or dismiss workers.

Directive 75/129/EEC on collective redundancies initially introduced a duty to consult where an employer was contemplating collective redundancies only with representatives of a recognised trade union. This has since been expanded following the ECJ's decisions in Case C-383/92 *Commission v UK* and Case C-188/03 *Junk* to a universal duty on the employer to inform and consult with either worker representatives or a recognised trade union (with a recognised trade union taking priority status over other worker representatives) 'in good time with a view to reaching an agreement' (article 2(1)).

Directive 77/187/EEC protecting the acquired rights of workers (now Directive 2001/23/EC) applies when an employer (transferee) proposes to transfer their business to a new owner (transferor). The Directive seeks to ensure that employees are not adversely affected by the change in identity of their employer. To that end, it imposes information and consultation duties with worker representatives or a recognised trade union on both the transferor and the transferee.[14] Information and consultation must take place 'in good time' and before workers are directly affected by the transfer (art. 7).

The requirement for unanimity contained in articles 100 EEC/235 EEC precluded the adoption of other legislative measures until the introduction by the Single European Act (SEA) in 1986 of Article 118A EEC. Article 118A EEC permitted the EEC to adopt harmonising measures in the area of health and safety by relying on qualified-majority voting. Against the backdrop of a second Action Programme on health and safety that had been adopted in 1984,[15] article 118A EEC provided the basis for a number of general and specific Directives, including the Framework Directive 89/391/EEC on health and safety at work, which includes specific requirements for consultation with employee representatives. Article 11(1) of the Framework Directive 89/391/EEC gave workers (and/or their representatives) a right to

[13] For background, see B.A. Hepple, 'The Crisis in EEC Labour Law' (1977) 6 *Industrial Law Journal* 77. A third Directive (Directive 80/987/EEC on insolvency; now Directive 2008/94/EC) was adopted at the same time. While the Insolvency Directive also aims to provide some protection to employees in the event of their employer's insolvency, it makes no provision for collective rights and is therefore not discussed in this entry. See further M Sädevirta, 'Limitations of Minimum Employee Protection through Guarantee Payment on Employer Insolvency – An Analysis of Minimum Rights and their Evolution under the Insolvency Directive' (2015) 4 *Europäische Zeitschrift für Arbeitsrecht* pp 416-432.
[14] See further C Barnard, EU Employment Law (4th ed; 2012), pp. 615-619.
[15] OJ C 67/84.

consultation and 'balanced participation' in the handling of issues related to health and safety in the workplace, as well as a 'right to initiative', that is a right to make proposals for the handling of issues related to health and safety in the workplace.

The introduction, by the SEA, of article 118B EEC (now contained in articles 154-155 TFEU) led to the expansion of EU legal competence in the field of social policy and an increase in the areas in which measures could be adopted by qualified majority voting.[16] It eventually led to the adoption of the following Directives: the European Works Council Directive 94/45/EC (now recast Directive 2009/38); Directive 2002/14/EC on national-level information and consultation; and Directive 2001/86/EC on worker participation in the European Company (similar provisions were also introduced for the European Cooperative Society by Directive 2003/72/EC and in Directive 2005/56/EC on cross-border mergers of limited liability companies). These Directives all follow a similar basic template: namely, the requirement for employers, when requested by their staff, to set up a mechanism for regular dialogue with employee representatives on a broad range of topics, with a minimum fall-back option contained in the relevant Directive.

ii. General rights to information and consultation

Attempts to introduce general, transnational rights to information and consultation for workers had first been made in the 1970s when the European commissioner, Henk Vredeling, sought to introduce general information and consultation rights for employees in Community-scale enterprises. The proposals failed initially due to opposition of some Member States (principally the UK), employers' organisations, and a lack of unanimity within the European trade unions.[17] In 1993, following the expansion of legal competence in the social policy field, the European Commimssion proposed a first Directive to create transnational information and consultation structures. This eventually became the European Works Council Directive 94/45/EC (now recast as Directive 2009/38).[18]

The European Works Council Directive facilitates transnational dialogue between workers and employers within Community-scale undertakings or Community-scale groups of undertakings through a body (the European works council) composed of worker representatives (art.2). The Directive places emphasis on cooperation and encourages workers and their employers to reach an agreement on what form worker participation should take. Pre-existing structures for information and consultation can be retained provided they fulfil the Directive's minimum criteria on information and consultation. The Directive also contains a fall-back option. The overarching expectation, in common with that contained in other collective rights Directives, is that workers on European works councils be informed and consulted on transnational matters which concern them 'in good time' (Preamble to Directive 2009/38).[19]

[16] See generally J Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Hart Publishing 2003).
[17] See further M Gold and M Hall, 'Statutory European Works Councils: The Final Countdown' (1994) 25 *Industrial Relations Journal* 177.
[18] On the Recast Directive see S Sciarra, 'Notions of Solidarity in Times of Economic Uncertainty' (2010) 39 *Industrial Law Journal* 280.
[19] See further T Jaspers, F Pennings and S Peters, *European Labour Law* (Intersentia, 2019), chapter 7.

The European Works Council Directive also provided the model upon which worker participation in European companies could be built; contained in Regulation 2157/2001 and its accompanying Directive 2001/86/EC.[20] Collective rights are enshrined in the Statute for a European Company (Societas Europaea (SE))) in two ways: first, and at a minimum, employees must be informed and consulted through a representative body (similar to the European works council). Second, going beyond the requirements of the European Works Council Directive, employee representatives may have a role in electing or appointing the members of the SE's board.[21] While there is therefore scope within the SE Directive's provisions for worker participation in company decision-making, going beyond information and consultation, the aim of the SE Directive is not to promote board-level participation in all SEs. The SE Directive also does not seek to harmonise national laws or to provide minimum levels of protection for workers under EU law. The SE Directive uses the 'before-and-after'-principle to extend national provisions to the European level. The minimum requirement mandated by the Directive is thus the preservation of those rights to worker involvement which existed in the companies which are setting up the SE (and which are set by national law in individual Member States). This approach intends to guard against EU law being used to circumvent national-level provisions on worker participation rather than creating an EU-wide right to board-level involvement.[22] However, the 'before-and-after principle' has been criticised for cementing unequal treatment of workers by allowing companies to use the SE Directive to evade national provisions on board-level participation.[23] The SE Directive's approach has been the model for Directive 2003/72/EC establishing the European Cooperative Society, and Directive 2005/56/EC on cross-border mergers of limited liability companies as amended by Directive 2017/1132 and now incorporated in Directive 2019/2121 on cross-border conversions, mergers and divisions (to be implemented by January 2023).

The final attempt at providing for collective rights to information and consultation by the EU legislature can be found in Directive 2002/14/EC on information and consultation. The Directive provides a framework which enables employees to request that their employer set up information and consultation procedures. Member States are given a wide margin of discretion as to how to implement the obligations with the Directive specifying a minimum fall-back position (article 4) which requires information on economic/strategic matters; and information and consultation on employment trends and specific decisions concerning work relations.

Trade union rights

[20] See further C Villiers, 'The Directive on Employee Involvement in the European Company' (2006) 22 *IJCLLIR* 183.
[21] See further P Davies, 'Workers on the Board of the European Company?' (2003) 32 *Industrial Law Journal* 75.
[22] See further V Edwards, 'The European Company – Essential Tool or Eviscerated Dream?' (2003) 40 *CMLR* 443.
[23] See further W Kowalsky, 'From undefined 'Social Europe' to 'more democracy at work' – new trends, new paradigms?' in J Kubera and T Morozowski, *A 'Social Turn' in the European Union?* (Routledge, 2020) or W. Kowalsky, '"More democracy at work" or "more power for big corporations" – which is the new paradigm?' in P Scherrer et al, *The future of Europe* (ETUI, 2019).

Collective rights also find expression through trade union rights. Trade union rights are largely regulated at a national level by the Member States and EU legislative competence is limited (article 153(5) TFEU). Yet this does not mean that EU law does not influence trade union rights. In addition to the provisions on information and consultation, trade unions have been involved in law-making at an EU level through the social dialogue.

The case law of the Court of Justice in the field of competition law and economic freedoms has also had an effect on collective bargaining and collective action.

The remainder of this section provides a brief overview of the law-making process contained in the social dialogue. The case law of the Court of Justice is reviewed in the next section.

i. Social dialogue

The social dialogue formally involves the social partners – employer and worker representatives – in a complex process of law-making. Trade unions and employer organisations had been engaged in discussions at a sectoral level since the 1960s.[24] Plans for a European social dialogue which aimed at concluding Europe-wide binding agreements between the social partners, emerged at the *Val Duchesse* talks between 1985 and 1987 and were institutionalized in Article 118B EEC by the Single European Act.[25]

Article 118B required the Commission to develop the dialogue between management and labour at European level. It led to a relaunch of talks between the social partners which resulted in the Protocol and Agreement on Social Policy of the Treaty on European Union. As a result of British opposition, the Agreement could not be inserted into the Maastricht Treaty but was given legal effect among the eleven member-states that agreed to it. Following the UK's signature of the Agreement in 1997, it was inserted into a revised Social Chapter of the EC Treaty by the Treaty of Amsterdam (now contained in Title X Social Policy of the TFEU).

The Agreement on Social Policy required the Commission to consult the social partners before taking action in the social policy field and to involve the partners in the content of any legislative proposals.[26] It also allowed for the social partners to negotiate a proposal which, if agreement were to be reached, could be given *erga omnes* effects by a Council decision (now contained in articles 154-155 TFEU).[27]

The social dialogue has resulted in co-lawmaking between the social partners at sectoral and inter-sectoral level, as well as collective bargaining on the multi-enterprise level. It resulted in three framework agreements at cross-industry level which provide general principles to be implemented by the Member States:

[24] C Barnard, *EU Employment Law*, (4th ed) (OUP, 2012), pp. 711-712.
[25] On social dialogue see Jean Lapeyre, *The European Social Dialogue. The History of a Social Innovation (1985–2003)* (ETUI, 2018).
[26] Contained in article 154 TFEU. Criteria to determine the representativeness of the social partners were developed in Case T-135/96 *UEAPME*.
[27] See further B Veneziani, 'The Role of the Social Partners in the Lisbon Treaty' in N Bruun et al (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing, 2012).

- the European Framework Agreement on parental leave of 14 December 1995 (implemented by Directive 96/34/EC), revised by the Framework agreement of 18 June 2009 (implemented by Directive 2010/18/EU);
- the European Framework Agreement on part-time work of 6 June 1997 (implemented by Directive 97/81/EC);
- the European Framework Agreement on fixed-term work of 18 March 1999 (implemented by Directive 1999/70/EC).

Negotiations on other measures, such as on temporary agency work, at cross-industry level have failed to lead to agreements.[28]

Social dialogue between management and labour continues but the agreements reached hitherto at either cross-industry or sectoral level lack EU law status and their legal effect and their implementation depends on national practices (article 155(2) TFEU). There has also been an increase in the adoption of joint texts such as guidelines, codes of conduct and frameworks of action which disseminate good practice. Examples of such voluntary agreements are:

Cross-industry framework agreements:

- Framework Agreement on Telework of 16 July 2002
- Framework Agreement on Work-Related Stress of 8 October 2004
- Framework Agreement on Harassment and Violence at Work of 26 April 2007
- European Framework Agreement on inclusive labour markets of 25 March 2010
- Framework Agreement on Active Ageing and an Intergenerational Approach (2017)
- Framework Agreement on Digitalisation (2020)

Sectoral agreements:

- Agreement on training in agriculture (2002)
- Agreement on crystalline silica (2006)
- Agreement on hairdressing certificates (2009)

Joint texts:

- Framework of action for the lifelong development of competences and qualifications (2002)
- Framework of action on gender equality (2005)
- Framework of action on youth employment (2013)

Overall, the social dialogue has broadened the legislative process at EU level. It has the potential to afford the social partners significant influence at EU level which in turn could strengthen collective bargaining at a national level. The European Pillar of Social Rights launched in 2017 reiterates the importance of social dialogue and the involvement of workers in enterprise decision-making in order to encourage economic and social progress (principle 8). To that end, the most recent proposal for a Directive on adequate minimum wages to be issued under the Pillar by the Commission (October 2020) includes promotion of adequate levels of collective bargaining across all Member

[28] For a more detailed discussion of the social dialogue see further T Jaspers, 'Collective Bargaining in EU Law' in T Jaspers, F Pennings and S Peters, *European Labour Law* (Intersentia, 2019) and B Bercusson, *European Labour Law* (2nd ed) (CUP, 2009), chapters 5; 17-19.

States.[29] A Report on Strengthening Social Dialogue, requested by the Commissioner for Jobs and Social Rights, containing a number of recommendations and initiatives to strengthen and promote collective bargaining and social dialogue within the EU, was published in February 2021.[30]

A review of important Court cases where the regime was applied in action shall follow:

The Court of Justice has played an active role in expanding the reach of EU law in the sphere of collective rights by considering the balance to be struck (i) between collective agreements and competition law; and (ii) between the right to strike and the economic freedoms contained in the EU Treaty, in particular freedom of establishment and free movement of services.

i. Collective agreements and competition law

The Court of Justice has been asked, on a number of occasions, to adjudicate on conflicts between competition law and collective agreements and collective bargaining. Competition law prohibits agreements between undertakings that may affect trade and which have as their object or effect the prevention, restriction or distortion of competition within the market. Collective bargaining and the resulting collective agreements fix the price of labour in order to avoid competition on employment conditions; thereby having a potential affect on trade.

In Case C-67/96 *Albany* the Court of Justice found that "agreements concluded in the context of collective negotiations between management and labour in pursuit of social policy objectives such as the improvement of conditions of work and employment" fall outside the scope of competition law (para 60 of the Judgment). This so-called "immunity rule" which excludes certain aspects of trade union rights from the scope of EU internal market law was confirmed and applied in the subsequent cases of Case C-115/97-117/97 *Brentjes,* Case C-219/97 *Drijvende Bokken*, Case C-180/98-184/98 *Pavlov* and Case C-222/98 *Van der Woude*.[31]

The limits of this approach were tested by the Court in Case C-413/13 *FNV Kiem* which concerned an agreement between an employers' association and a trade union representing self-employed musicians. The case turned on the nature of the agreement reached between the parties. If the musicians were classified as workers under EU law then *Albany* would apply. If the musicians were considered entrepreneurs then *Albany* would not apply. The Court thus confirmed that immunity from competition law would only be granted to agreements between representatives of management and labour; not to agreements between two businesses.[32]

ii. Collective action and economic freedoms

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[29] Proposal for a Directive on adequate minimum wages in the European Union COM(2020) 682 final.

[30] A Nahles, *Report on strengthening EU social dialogue* (Publications Office of the EU, 2021) available at https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8372&furtherPubs=yes.

[31] See further S Vousden, 'Albany, Market Law and Social Exclusion' (2000) 29 *Industrial Law Journal* 181 and S Evju, 'Collective Agreements and Competition Law. The *Albany* puzzle and *Van der Woude*' (2001) 17 *IJCLLIR* 165.

[32] See further T Jaspers, F Pennings and S Peters, *European Labour Law* (Intersentia, 2019), pp. 288-292.

Collective action and how it interacts with primary EU law, particularly the four freedoms, was first considered by the Court of Justice in Case C-265/95 *Spanish Strawberries* and Case C-112/00 *Schmidberger*. The cases concerned blockades of the border which impeded the free movement of goods. The Court upheld the protection of the rights of freedom of expression/freedom of assembly in these cases but allowed them to be subjected to proportionate restrictions when they impair the free movement of goods.

This approach set the scene for the C-438/05 *Viking* and C-341/05 *Laval* cases where the Court was asked to decide whether collective action – in this case a strike – called by trade unions which impeded enterprises' rights, respectively, to freedom of establishment and free movement of services was permitted. The Court found that the collective action constituted a restriction on free movement which could only be justified if it pursued a legitimate interest and was proportionate. Both judgments thus set limits to the type of collective action available to trade unions in transnational scenarios. By requiring trade unions to justify the proportionality of collective action if it is to be lawful in cases where it restricts the free movement provisions, the Court in effect brought the right to strike within the regulatory sphere of the EU institutions despite its explicit exclusion from the Treaty and set limits on its exercise by reference to the economic freedoms contained in the TFEU. The *Laval* case triggered a number of legislative proposals at EU and national level, and both the *Viking* and *Laval* cases have been the subject of a vast amount of scholarly analysis (referenced in the next section).

Next, a summary of scholarly analysis on the topic shall follow:

The EU's limited competence in the field of collective rights has meant that the topic is generally analysed by scholars within a broader framework of European Labour Law.[33]

Within that context, collective rights are considered against the backdrop of the persistent asymmetry between European social and market integration which has underpinned European Labour Law since its inception. Scholars aim their criticism, which focusses predominantly on the EU's prioritisation of economic over social integration and its use of European Labour Law to soften the impact of the creation of the single market on workers, at the EU institutions.[34] The European Commission and the Court of Justice have been criticised since the turn of the century for mirroring, and at times reinforcing, a deregulatory approach to labour law increasingly dominant in a majority of Member States resulting in limited legislative developments since 2002 and weakened support for the EU-level sectoral social dialogue. Syrpis explains that existing legislation has been interpreted in "creative ways — often against the interests of workers — by the Court of Justice" and the demands of "Eurozone (and crisis) management [resulted] in sharp

[33] See C Barnard, EU Employment Law (4th ed) (OUP, 2012); T Jaspers, F Pennings and S Peters, *European Labour Law* (Intersentia, 2019); B Bercusson, *European Labour Law* (2nd ed) (CUP, 2009); P Watson, *EU Social and Employment Law* (2nd ed) (OUP, 2014); M Rönnmar, 'Labour and equality law' in C Barnard and S Peers, *European Union Law* (3rd ed) (OUP, 2020).

[34] Overviews of the debates can be found in the contributions to A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Routledge, 2016) as well as S Sciarra, *Solidarity and Conflict* (CUP 2018); C Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 *Current Legal Problems* 199; S. Giubboni, "The rise and fall of EU labour law" (2018) 24 *European Law Journal* 7; M. Weiss, "European Labour Law in Transition from 1985 to 2010" (2010) 26 *International Journal of Comparative Labour Law & Industrial Relations* 3.

downward pressures on social standards in all Member States, in particular in those relying on EU and IMF for financial support".[35] The hope that the CFR, particularly the collective rights contained in articles 27 and 28 of the "Solidarity Chapter" would increase protection of those rights at EU level has not come to fruition.[36]

The *Viking* and *Laval* cases are a recurrent theme in the literature. The judgments have attracted substantial criticism from labour law scholars for legitimising a neoliberal (European) integration process which demands far-reaching restrictions and reforms of national welfare states under the pretence of modernisation.[37]

The majority of labour law scholars are pessimistic about the future for labour law and collective rights in Europe.[38] The last few years have seen a proliferation of (largely unrealised) reform proposals from EU labour law scholars which aim to reinvigorate the development of European Labour Law as a category of laws that aim to protect workers as the weaker party while also offering protection to collective rights.[39] More recent scholarly contributions have focussed on the potential of the Pillar of Social Rights to provide new impetus for the protection of collective rights at EU level.[40] An Action Plan to implement the Pillar of Social Rights is due to be published in early 2021.[41]

The entry shall end with a list of judgments and scholarly work on this entry:

Important Cases:

Case C-176/12 *Association de médiation sociale*

Case C-260/89 *ERT*

Case C-499/04 *Werhof*

Case 175/73 *Kortner*

Case C-438/05 *Viking*

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[35] P Syrpis, "The EU's Role in Labour Law: An Overview of the Rationales for EU Involvement in the Field" in A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Routledge, 2016) p.21.

[36] See the contributions on those articles in F Dorssemont, K Lörcher, S Clauwaert and M Schmitt, *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart, 2019).

[37] There is a substantial amount of literature discussing the judgments, not all of which can be mentioned here. For different views on the judgments see, for example, M Freedland and J Prassl, *Viking, Laval and Beyond* (Hart, 2004); M Rönmar (ed), *EU Industrial Relations vs National Industrial Relations. Comparative and Interdisciplinary Perspectives* (Kluwer, 2008); R Blanpain and AM Swiatkowski (eds), *The Laval and Viking Cases: freedom of services and establishment v industrial conflict in the European Economic Area and Russia* (Kluwer, 2009); and articles by A Dashwood, T Novitz, M Rönnmar, S Deakin and S Sciarra in C Barnard (ed), *Cambridge Yearbook of European Legal Studies*, (2007-2008) Vol. 10.

[38] P Syrpis, "The EU's Role in Labour Law: An Overview of the Rationales for EU Involvement in the Field" in Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Routledge, 2016) p.21.

[39] For an overview of recent reform proposals see, as a starting point, M Weiss, "The Need for More Comprehensive EU Social Minimum Standards" in R Singer and T Bazzani (eds), *European Employment Policies: Current Challenges* (Berliner Wissenschafts-Verlag, 2017); and F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press, 2017).

[40] See S Garben, 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance' (2019) 21 *Cambridge Yearbook of European Legal Studies* 101.

[41] When published, it will be available here: https://ec.europa.eu/social/main.jsp?catId=1226&langId=en.

Case C-341/05 *Laval*

Case C-383/92 *Commission v UK*

Case C-188/03 *Junk*

Case T-135/96 *UEAPME*

Case C-67/96 *Albany*

Case C-115/97-117/97 *Brentjes*

Case C-219/97 *Drijvende Bokken*

Case C-180/98-184/98 *Pavlov*

Case C-222/98 *Van der Woude*

Case C-413/13 *FNV Kiem*

Scholarly Work:

C Barnard, EU Employment Law (4th ed) (OUP, 2012)

C Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 *Current Legal Problems* 199

B Bercusson, *European Labour Law* (2nd ed) (CUP, 2009)

R Blanpain and AM Swiatkowski (eds), *The Laval and Viking Cases: freedom of services and establishment v industrial conflict in the European Economic Area and Russia* (Kluwer, 2009)

A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Routledge, 2016)

N Bruun et al (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing, 2012)

S. Giubboni, "The rise and fall of EU labour law" (2018) 24 *European Law Journal* 7

F Dorssemont, K Lörcher, S Clauwaert and M Schmitt, *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart, 2019)

M Freedland and J Prassl, *Viking, Laval and Beyond* (Hart, 2004)

T Jaspers, F Pennings and S Peters, *European Labour Law* (Intersentia, 2019)

J Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Hart Publishing 2003)

J Lapeyre, *The European Social Dialogue. The History of a Social Innovation (1985–2003)* (ETUI, 2018)

S Peers et al (eds), *The EU Charter of Fundamental Rights* (Hart Publishing, 2014)

M Rönmar (ed), *EU Industrial Relations vs National Industrial Relations. Comparative and Interdisciplinary Perspectives* (Kluwer, 2008)M Rönnmar, 'Labour and equality law' in C Barnard and S Peers, *European Union Law* (3rd ed) (OUP, 2020)

S Sciarra, *Solidarity and Conflict* (CUP 2018)

P Watson, *EU Social and Employment Law* (2nd ed) (OUP, 2014)

M. Weiss, "European Labour Law in Transition from 1985 to 2010" (2010) 26 *International Journal of Comparative Labour Law & Industrial Relations* 3