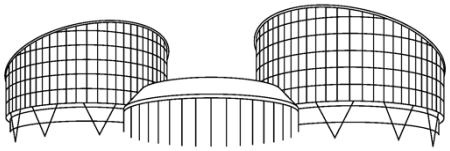

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF NORWEGIAN CONFEDERATION OF TRADE UNIONS (LO) AND NORWEGIAN TRANSPORT WORKERS' UNION (NTF) v. NORWAY

(Application no. 45487/17)

JUDGMENT

STRASBOURG

10 June 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Síofra O'Leary, *President,*
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Lətif Hüseynov,
Jovan Ilievski,
Ivana Jelić, *judges,*
Anne Grøstad, *ad hoc judge,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Norwegian associations, the Norwegian Confederation of Trade Unions (*Landsorganisasjonen i Norge* ("LO")) and the Norwegian Transport Workers' Union (*Norsk transportarbeiderforbund* ("NTF")) ("the applicant unions"), on 15 June 2017;

the withdrawal of Arnfinn Bårdsen, the judge elected in respect of Norway, from sitting in the case (Rule 28 § 3 of the Rules of Court) and the decision of the President of the Section to appoint Anne Grøstad to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1(a));

the decision to give notice to the Norwegian Government ("the Government") of the complaint concerning Article 11 of the Convention and to declare inadmissible the remainder of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by the European Trade Union Confederation (ETUC), which was granted leave to intervene by the President of the Section;

Having deliberated in private on 18 May 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the alleged violation of Article 11 of the Convention in relation to a decision by the Norwegian Supreme Court to declare unlawful an announced boycott by a trade union which was planned in order to pressure a Norwegian subsidiary of a Danish company to enter into a Norwegian collective agreement applicable to dockworkers.

THE FACTS

2. The first applicant union, the Norwegian Transport Workers' Union (NTF), is a member of the Norwegian Confederation of Trade Unions (LO), the second applicant union. They were represented before the Court by Mr H. Angell, a lawyer practising in Oslo, assisted by Mr L. Nagelhus and Mr. H.P. Graver, advocates.

3. The Government were represented by Mr M. Emberland of the Attorney General's Office (Civil Matters) as their Agent, assisted by Ms H. Ruus and L. Tvedt, advocates at the same office.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND

5. The applicant trade unions, NTF and LO, entered into a collective framework agreement with the Confederation of Norwegian Enterprise (Næringslivets hovedorganisasjon ("NHO")), the largest employer organisation in Norway, and the Norwegian Logistics and Freight Association (NHO logistikk og transport), in respect of a fixed pay scheme for dockworkers at many of the major ports in Norway, including the port of Drammen (*Rammeavtale om fastlønnssystem for losse- og lastearbeidere* "the Framework Agreement").

6. The Framework Agreement was entered into in the 1970s and then renewed biannually. It secured for Norwegian dockworkers the benefits of ILO Convention No. 137 (see further below), including the right to permanent employment and better pay. It had provisions on pay and working hours, and also included the following clause (clause 2(1)):

> "For vessels of 50 tonnes dwt [deadweight tonnes] and more sailing from a Norwegian port to a foreign port or vice versa, the unloading and loading work shall be carried out by dockworkers ..., [s]save for all unloading and loading at [a] company's own facilities, where the company's own people are used for unloading and loading."

7. In accordance with another clause (clause 3) of the Framework Agreement, an office for dock work was established in the port of Drammen (the Administration Office for Dock Work in Drammen (*Administrasjonskontoret for havnearbeid i Drammen* ("the Administration Office")). This was an entity which ran at cost and had a board of directors consisting of three representatives of users of the port and two representatives of dockworkers. Its purpose was to manage dockworkers and ensure that an appropriate number of such workers were affiliated with it. All permanently employed dockworkers in the Drammen port were thus employed by the Administration Office. The Framework Agreement applied

from ship to quay and vice versa with the result that the handling of goods outside the port was unaffected by its requirements.

8. Holship Norge AS ("Holship") was a wholly-owned Norwegian subsidiary of the Danish freight forwarding group Holship Holding A/S. Holship established itself in Norway in 1996 and was based in Drammen. It was not a member of NHO or the Norwegian Logistics and Freight Association and was not party to the Framework Agreement. Until 2013 Holship used the services of the Administration Office when the company needed loading or unloading services in the port of Drammen. In 2013 it employed four persons in the port who, in addition to performing other tasks as employees for Holship, carried out loading and unloading operations for their employer.

9. In a letter to Holship dated 10 April 2013, NTF demanded that a collective agreement be entered into and that Holship accept the Framework Agreement. Holship did not respond.

10. On 11 June 2013, following further letters and voluntary mediation proceedings at the office of the National Mediator of Norway (*Riksmekleren*), NTF sent a letter with a notice of boycott. Part of the letter reads as follows:

> "The Norwegian Transport Workers' Union maintains its demand for a collective agreement and encloses the Framework Agreement as input for the negotiations. Among other things, the agreement means that Holship must book dockworkers from the Administration Office for dock work in Drammen. We emphasise that this applies to ships engaged in both coastal and international shipping. As is the case for the ordinary Framework Agreement in ports, the Framework Agreement with Holship will have to be supplemented by an adaptation agreement for the port of Drammen.
>
> The Norwegian Transport Workers' Union emphasises at the same time that the union is also willing to negotiate reasonable solutions to ensure that the negative effects for other employees of meeting the Norwegian Transport Workers' Union's demand for a collective agreement will be kept to a minimum.
>
> Since Holship has rejected all demands for a collective agreement which have been made by the Norwegian Transport Workers' Union, we reiterate our notification regarding a blockade in respect of calls by ships at the port of Drammen where Holship is involved in unloading and/or loading work. The purpose of the blockade is to secure a collective agreement [and] enshrine in a collective agreement the principles concerning priority of engagement set out in clause 2(1) of the Framework Agreement in relation to Holship's unloading and loading activity in the port of Drammen. As regards the lawfulness of a blockade in such cases, reference is made to the Supreme Court's decision in the port of Sola case; see Rt. 1997 page [334, 337]."

II. PROCEEDINGS BEFORE THE DRAMMEN CITY COURT

11. On 12 June 2013 NTF brought the case before the Drammen City Court (*tingrett*). In accordance with section 3 of the Boycott Act (see paragraph 60 below), it applied for an advance declaratory judgment that the announced boycott would not be unlawful.

12. On 19 March 2014 the Drammen City Court ruled that the announced boycott would be lawful.

13. In its judgment, the Drammen City Court found that there was no unlawful purpose (*rettsstridig formål*) behind giving notice of a boycott in order to compel an enterprise to enter into a collective agreement that would give dockworkers the protection which the Framework Agreement intended to provide, or to secure such an agreement. It stated that the matter did not concern an attempt to achieve a trade union organisation of employees, and the fact that there was a high degree of organisation in this regard was not a point in itself. As regards the dockworkers, each individual employee had a choice as to whether it was in his best interests to be a member of NTF.

14. Furthermore, the Drammen City Court noted that the Framework Agreement only specified priority of engagement, and that Holship was entitled to use its own employees to carry out the relevant work if the Administration Office did not have the personnel available. It observed, moreover, that the boycott could have implications for Holship and its staff, but stated that this would be a consequence of the conflicting interests at stake, and thus a matter not particular to boycotts – similarly, this would be the effect of a strike or a lockout, which were also recognised forms of industrial action. The Drammen City Court observed that Holship had chosen to take a risk in employing staff to do unloading and loading work in the port.

15. The Drammen City Court considered that the boycott would not harm important public interests. Instead, the court found that there were important public interests in loading and unloading work being carried out by competent personnel who were given continuous training. The point of the Framework Agreement had been to secure work for dockworkers for different forwarding companies, and to prevent unqualified labour from being used and casual workers from performing work on unbalanced terms. In that context, the Drammen City Court also noted that Norway had accepted the special position of dockworkers by ratifying ILO Convention No. 137 (see paragraph 70 below) and stated that the system in question constituted a long-standing customary practice. The Drammen City Court recognised that it was important to avoid a situation where a dominant position would distort competition and be an obstacle to freedom of establishment. However, neither of those consequences would be the result of safeguarding dockworkers' rights in the manner intended by the Framework Agreement.

16. Moreover, in the Drammen City Court's view, some weight should be given to the fact that the intention had also been to ensure the satisfactory handling of goods in ports, an intention that had perhaps not been particularly emphasised. In the Drammen City Court's assessment, the Framework Agreement accordingly served public interests and created predictability for those who performed the work and for users of the port.

III. PROCEEDINGS BEFORE THE BORGARTING HIGH COURT

17. Holship appealed against the Drammen City Court's judgment, and on 8 September 2014 the Borgarting High Court (*lagmannsrett*) rendered a judgment in which it, like the Drammen City Court, concluded that the boycott would be lawful.

18. The Borgarting High Court stated that, in principle, there was no unlawful purpose behind using a boycott to secure a collective agreement. Furthermore, it referred to a judgment by the Supreme Court (*Høyesterett*) of 5 March 1997 in a case concerning a similar situation in the port of Sola, Stavanger (*Rt*-1997-334), in which it had been stated that the Framework Agreement, with its provision in clause 2(1), was a generally recognised collective agreement established by tradition in ports. In that case, the Supreme Court had noted that the agreement had its background in the special conditions of dockworkers, who had originally been casual workers without security for work or pay. Furthermore, the Supreme Court had observed that the provision in clause 2(1) of the Framework Agreement had been regarded as part of the fulfilment of Norway's obligations under ILO Convention No. 137, and it followed from Article 3 of that Convention that registered dockworkers should have priority of engagement for dock work (see paragraph 70 below). The Borgarting High Court could not see that any circumstances existed in the present case that could lead to a different outcome from that in the Supreme Court's judgment of 1997, in which it had been concluded that the boycott in question in that case was lawful.

19. Furthermore, in response to an argument by Holship to the effect that its own dockworkers, who were also trade union members, would risk losing their work if the loading and unloading work was taken over by the Administration Office, since Holship would then have to terminate their employment contracts, the Borgarting High Court stated that it could not see that this situation was covered by the "breach of the law" scenario in the Boycott Act (see paragraph 60 below). Downsizing as a result of operational cutbacks would not necessarily constitute a breach of the law in relation to the person who was made redundant, since operational cutbacks could constitute reasonable grounds for dismissal. Moreover, the Borgarting High Court took note that NTF had repeatedly expressed its willingness to negotiate:

> "reasonable solutions to ensure that the negative effects for other employees of meeting the Norwegian Transport Workers' Union's demand for a collective agreement will be kept to a minimum".

This willingness to negotiate had also been reiterated during the appeal hearing. No such negotiations had taken place, but the Borgarting High Court assumed that they would take place in the event that a collective agreement (the Framework Agreement) was entered into. On this point,

reference was made to the above judgment of the Supreme Court, in which a similar argument had been assessed and rejected.

20. Under the heading "closed shop", the Borgarting High Court went on to state that freedom of association was enshrined in Article 11 of the Convention, and that it was undisputed between the parties before the Borgarting High Court that that freedom included the right to choose not to join organisations ("negative freedom of association"). However, the Borgarting High Court did not find that there was evidence to support Holship's claim that NTF's demand for a collective agreement would impinge on the negative freedom of association. Although the employees at the Administration Office were in fact members of the Dockworkers' Union (an association that came under the Portworkers' Union, which was a division under NTF) at the time, on the basis of the evidence presented to it, the Borgarting High Court concluded that the parties to the case were well aware that it was not permitted to require employees to be members of a union, and also pointed to witnesses' testimony to illustrate that such membership had in fact not been required.

21. Before the Borgarting High Court, Holship had also argued that the Administration Office was, in reality, a temporary work agency that hired out labour contrary to provisions of domestic labour law. In response, the Borgarting High Court stated that the Administration Office had to be considered in the light of its special origin and distinctive objective; it had come about as a result of cooperation between social partners to secure the pay and working conditions of dockworkers, and the authorities had considered the Framework Agreement a fulfilment of Norway's international obligations under ILO Convention No. 137. The court pointed out that Article 3 of the ILO Convention required member States to establish and maintain registers of dockworkers and stated that registered dockworkers should have priority of engagement for dock work (see paragraph 70 below). The Borgarting High Court therefore found that the distinctive activities of the Administration Office were not in conflict with general domestic regulations on the hiring of labour.

22. Nor did the Borgarting High Court find that the announced boycott would be unlawful in terms of contravening provisions of competition law because it would harm important public interests or have an unwarranted effect, or because the interests pursued through it would be incommensurate with the harm it would cause. As to that last point, the Borgarting High Court stated that a boycott would, by its very nature, have negative consequences for the affected parties. In the instant case, it could not see that the negative consequences for Holship would exceed what had to be expected in a situation of that kind. Creating difficulties for the company in respect of loading and unloading, and possible negative financial consequences, would be an important point of the boycott.

23. At the same time, the Borgarting High Court found that it was very important to the dockworkers that priority of engagement be maintained, in the absence of any agreement about an alternative way of organising dock work that would safeguard their need for a permanent and secure workplace. The Borgarting High Court stated that a boycott was the only form of industrial action at their disposal.

24. Furthermore, the Borgarting High Court found that the dockworkers' interests in having their demand for a collective agreement accepted had to be weighed against the consequences for Holship's employees. It had been stated before the Borgarting High Court that if Holship could not carry out its own loading and unloading work, two or three employees might have to be made redundant. However, in the Borgarting High Court's view, it was a key element in that balancing of interests that NTF had expressed a willingness to find solutions for Holship's employees through negotiations.

IV. PROCEEDINGS BEFORE THE SUPREME COURT

25. Holship appealed against the Borgarting High Court's judgment to the Supreme Court. The Supreme Court's Appeals Committee (*Høyesteretts ankeutvalg*) granted leave to appeal, and in a subsequent decision of 25 May 2016 it decided that the proceedings should, for the time being, be limited to issues of: the applicability of competition law to collective agreements; whether the boycott was unlawful, owing to the right of Holship to freedom of establishment under Article 31 of the EEA Agreement and the relationship between that provision and ILO Convention No. 137; and whether, if the boycott was contrary to freedom of establishment, that part of the EEA Agreement (*denne delen av EØS-avtalen*) conflicted with Article 101 of the Constitution or Article 11 of the Convention, and if the latter provisions had to be given precedence if that was the case.

26. During the proceedings the Supreme Court applied for an advisory opinion by the Court of Justice of the European Free Trade Association (EFTA) States (the EFTA Court). The EFTA Court gave its opinion in a judgment of 19 April 2016 (E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund*), part of which reads as follows:

> "49. It follows from the request that NTF participates in the management of the AO. It is in NTF's and the AO's common interest to preserve the market position of the AO. This combination of a business objective with NTF's core tasks as a trade union becomes possible when a trade union engages in the management of an undertaking, such as it turns out in the present case. ...
>
> 50. The effects of the priority clause and the creation of the AO appear therefore not to be limited to the establishment or improvement of working conditions of the workers of the AO and go beyond the core object and elements of collective bargaining and its inherent effects on competition ...
>
> 51. Moreover, the Court notes that the AO system in the present case protects only a limited group of workers to the detriment of other workers, independently of the level

of protection granted to those other workers. In particular, boycotts, such as the one at issue, detrimentally affect their situation. They are barred from performing the unloading and loading services and may even lose their employment if their employer affiliates to the Framework Agreement.

...

123. Fundamental rights form part of the unwritten principles of EEA law. ... The fundamental rights guaranteed in the EEA legal order are applicable in all situations governed by EEA law. Where overriding reasons in the public interest are invoked in order to justify measures which are liable to obstruct the exercise of the right of establishment, such justification, provided for by EEA law, must be interpreted in the light of the general principles of EEA law, in particular fundamental rights. ...

124 Whether a restrictive measure aims at protecting workers needs to be answered in light of these considerations. When determining the aim pursued by the boycott, the national court must therefore take into account the objective pursued by the overall system established through the collective agreement in question. In that regard, the boycott cannot be viewed in isolation from the agreement of which it seeks to procure acceptance.

125 The Court notes further that it is not sufficient that a measure of industrial action resorts to the legitimate aim of protection of workers in the abstract. It must rather be assessed if the measure at issue genuinely aims at the protection of workers. The absence of such an assessment may create an environment where the measures allegedly taken with reference to the protection of workers primarily seek to prevent undertakings from lawfully establishing themselves in other EEA States (see, for comparison, AG Poiares Maduro in his Opinion in Viking Line, cited above, point 67 et. seq.).

126 It appears in the present case that the aggregate effects of the priority clause and the creation of the AO are not limited to the establishment or improvement of working conditions of the workers of the AO and go beyond the core object and elements of collective bargaining and its inherent effects on competition. The AO system protects only a limited group of workers to the detriment of other workers, independently of the level of protection granted to those other workers. In particular, boycotts, such as the one at issue, detrimentally affect their situation. They are barred from performing the unloading and loading services and may even lose their employment if their employer affiliates to the Framework Agreement.

127 ... from the information before the Court, there is nothing to suggest that some kind of labour dispute between Holship and its employees exists and that the boycott imposed aims at improving the working conditions of Holship's employees. The boycott is even to the detriment of Holship's employees and may touch upon fundamental rights of Holship, such as the negative right to freedom of association, and possibly that of its employees. ...

...

130 ... A restrictive measure must be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve that objective. ...

131 It is for the referring court to determine, having regard to all the facts and circumstances before it and the guidance provided by the Court, whether the restrictive measure at issue can be justified."

27. The Supreme Court, sitting in a plenary formation, rendered its judgment on 16 December 2016. By ten votes to seven, it ruled that the boycott would be unlawful.

28. The Supreme Court's majority firstly recognised that the Supreme Court had declared a similar boycott lawful in the Port of Sola case which it had adjudicated on in 1997 (see paragraph 18 above). In that case, however, it had not been submitted that the right to priority of engagement conflicted with freedom of establishment under Article 31 of the EEA Agreement, and the Supreme Court had therefore not considered that issue. In the instant case, that argument had been raised, and the EFTA Court had been asked for an advisory opinion, in which it had stated that the system of priority enshrined in the Framework Agreement was likely to constitute a restriction of freedom of establishment (see paragraph 26 above).

29. The Supreme Court did not find it necessary to conclude whether Article 101 of the Constitution (see paragraph 59 below) or Article 11 of the Convention would be applicable to the boycott. It stated that in the event that Article 101 applied, the question for the Supreme Court was whether the interference with a possible right to boycott was proportionate.

30. According to the Supreme Court, the right to freedom of establishment was a fundamental right in the context of EEA cooperation. For that reason, it concluded that the case concerned a balancing of the right possibly vested in the applicants under Article 11 of the Convention against Holship's right to freedom of establishment under the EEA Agreement. In this context, the majority considered that this weighing up of interests was similar in nature to the procedure carried out when restrictions were imposed on freedom of establishment as a result of basic rights forming part of EU and EEA law: just as rights under the EEA Agreement could justify restrictions of constitutional or Convention-based human rights, constitutional or Convention-based human rights could justify restrictions of rights under the EEA Agreement.

31. The Supreme Court considered that if one used either the Constitution as one's starting point, weighing the rights under it against the rights under the EEA Agreement, or the EEA Agreement, weighing the rights under it against those under the Constitution, one had to try to strike a fair balance between the rights in question. In the majority's view, the outcome of weighing freedom of assembly against freedom of establishment should not depend on the set of rules which one used as one's starting point. In a similar vein, it was stated that weighing freedom of association under the first paragraph of Article 101 of the Constitution against freedom of establishment under the EEA Agreement had to lead to the same result. The majority therefore moved on to address the issue of whether the announced boycott constituted a restriction on freedom of establishment under Article 31 of the EEA Agreement.

32. In carrying out that assessment, there was, in the majority's view, no doubt that the right to priority of engagement for loading and unloading operations for dockworkers registered with the Administration Office at the port of Drammen, which NTF was attempting to make Holship accept, constituted a restriction on freedom of establishment under Article 31 of the EEA Agreement. The issue for the majority thus became whether the right to priority of engagement could be justified by the exemptions that applied to that freedom.

33. In that context, the Supreme Court's majority stated that the practice of the Court of Justice of the European Union (CJEU) had been consistent in its application of the equivalent provision of Article 49 of the Treaty on the Functioning of the European Union (TFEU); restrictions on freedom of establishment which were applicable without discrimination on grounds of nationality could be justified by overriding reasons of general interest, provided that such restrictions were appropriate for achieving the objective pursued and did not go beyond what was necessary to achieve that objective. It was generally accepted law to interpret freedom of establishment under Article 31 of the EEA Agreement as being subject to the same limitation.

34. The Supreme Court held that regardless of how far the protection of the right to boycott extended as a fundamental right under EU and EEA law, it had been established that the protection of workers was recognised as an overriding reason of general interest that could justify restrictions on freedom of establishment. However, a specific assessment of the measure at issue was required.

35. Turning then to whether the announced boycott had to be considered lawful because it aimed to protect the interests of workers, the Supreme Court's majority found that NTF's ultimate objective in demanding the collective agreement was to protect such interests. However, this was not sufficient to justify the restriction on freedom of establishment. Reference was made to the case-law of the CJEU (*International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, § 81, 11 December 2007), where it had been stated that while a collective action "could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat".

36. Moreover, the Supreme Court's majority stated that the Administration Office was a separate legal person, and that the type of collective agreement provision demanded by NTF was irregular in nature. The protection of working and pay conditions provided by the right to priority of engagement was, in its view, relatively indirect. Priority of engagement for loading and unloading operations for dockworkers

registered with the Administration Office would limit access to that market for other operators, in effect regulating the market. Jobs were protected by the company (*bedriften*) being effectively shielded from outside competition.

37. The majority considered that although the Administration Office was a not-for-profit entity, it engaged in business activities in a market to which other operators wanted access. The dockworkers were employed by the office, and the activities of the office were financed by fees imposed on loading and unloading operations, which were paid by the port's users. Priority of engagement for Administration Office employees for loading and unloading operations at the port of Drammen limited the access of other operators to this market. It favoured Administration Office personnel over other personnel, and through the right to priority of engagement, the Administration Office was shielded from competition from other entities.

38. In the view of the majority of the Supreme Court, the primary effect of the announced boycott would be Holship being denied access to a market it wanted to enter. As such, the action differed from other collective actions whose purpose was to pressure an employer to improve pay and working conditions for its employees or prevent an employer from terminating its employees' employment. As had been emphasised by the CJEU, the wish to safeguard an undertaking's survival or shield a member State's undertaking from competition was not sufficient to justify restrictions on freedom of movement within the EEA.

39. The Supreme Court's majority thus concluded that while the objective of the announced boycott was to protect the interests of workers, it could not be recognised as an overriding reason for restricting freedom of establishment.

40. The majority then went on to consider the issue of whether the announced boycott was protected as a fundamental right under EU and EEA law, and, if so, whether it took precedence over freedom of establishment.

41. The Supreme Court stated that one of the fundamental rights under EU and EEA law, which could be derived, *inter alia*, from freedom of assembly under Article 11 of the Convention, was the right to collective bargaining and collective action. Article 28 of the EU Charter explicitly established the right of collective bargaining and action.

42. The right of collective action, however, was not absolute, but "subject to a restriction of proportionality". For EU and EEA law, this followed from, *inter alia*, the judgments in *Viking*, cited above, and *Laval* of the CJEU (*Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809, 18 December 2007). It had been established in those judgments that fundamental rights had to be weighed against and reconciled with the requirements under EU and EEA law, and be in accordance with the principle of proportionality.

43. It had been established by the Court in its judgment in the case of *Enerji Yapı-Yol Sen v. Turkey* (no. 68959/01, § 24, 21 April 2009) that the right to strike was protected by Article 11 of the Convention. The Supreme Court's majority stated that it had not, however, been determined whether the right to boycott under circumstances not related to a strike was protected under that provision. Whereas a strike normally entailed a financial burden for the party initiating the action, a boycott did not normally entail any financial burden on the party encouraging the boycott, and did not necessarily entail a financial burden on the party initiating it. Collective action in the form of boycotts therefore did not necessarily enjoy the same protection as the right to strike.

44. The Supreme Court's majority went on to state that it was unnecessary to consider whether there was a "right to boycott" protected by Article 11 of the Convention, and that even if that provision had to be construed so as to protect a right to boycott, "this right [was] subject to the same restriction of proportionality as other rights protected by this provision".

45. In arguing that the announced boycott was lawful, NTF, with the support of LO, had submitted before the Supreme Court that the right to boycott was protected by the European Social Charter (revised), ILO Convention No. 87 concerning Freedom to Associate and Protection of the Right to Organise, and ILO Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. The Supreme Court stated in reply that, in so far as those Conventions did protect the right to boycott, they could not be interpreted as granting trade unions an unrestricted right to use boycotting as a means of collective action. In the Supreme Court's majority's view, those Conventions also had to allow for specific considerations similar to those required for rights under Article 11 § 2 of the Convention.

46. The Supreme Court held that in considering whether a boycott satisfied the requirements for proportionality pursuant to the above international instruments, among other things, the boycott had to be reconciled with the rights under the EEA Agreement, of which freedom of establishment was a cornerstone.

47. Moreover, in the case before it the boycott was being used as a means to compel Holship to accept the Administration Office's workers' right to priority of engagement for loading and unloading operations at the port of Drammen. The principal, and desired, effect would be to limit the access of other operators to the market for loading and unloading services. As such, the boycott would impose considerable restrictions on freedom of establishment and also conflict with the interests of other workers. If Holship were to be allowed to carry out loading and unloading operations at the port of Drammen, this would generate jobs within Holship. From a human rights perspective, it was hard to argue that those jobs carried less

weight than jobs at the Administration Office, and the aims that the right to priority of engagement intended to protect could also be protected by other means.

48. The Supreme Court's majority concluded that priority of engagement as demanded by NTF was not sufficiently justified and did not satisfy the requirement to strike a fair balance between freedom of establishment and the possible fundamental right to boycott.

49. Before the Supreme Court, NTF, with the support of LO, had strongly emphasised that priority of engagement for dockworkers for loading and unloading operations was in accordance with ILO Convention No. 137, and that formalisation of the priority clause had been Norway's way of fulfilling its obligations under that Convention.

50. According to the Supreme Court's majority, it was, however, unclear how that provision was to be interpreted. To the majority, the purpose of ILO Convention No. 137 seemed to be orderly working and pay conditions for dockworkers. In the Supreme Court's assessment, these considerations could be fulfilled by means other than granting priority of engagement for loading and unloading work to one group of workers: in accordance with the domestic labour legislation, appointments should, as a general rule, be on a permanent basis; satisfactory wage conditions could be negotiated by collective agreements; and safety requirements could be met by the training and certification of workers. In any event, regardless of how Article 3 of the ILO Convention was to be interpreted, pursuant to the EEA Act, that Convention had to give precedence to freedom of establishment under Article 31 of the EEA Agreement.

51. The announced boycott thus had an unlawful purpose, as it violated freedom of establishment under Article 31 of the EEA Agreement and was therefore unlawful within the meaning of that term under section 2(a) of the Boycott Act (see paragraph 60 below).

52. In contrast, the seven-judge minority found, firstly, that competition law did not apply to the collective agreement which the announced boycott sought to enforce. It then went to on to examine whether the boycott could be justified as a restriction on the right to freedom of establishment under Article 31 of the EEA Agreement.

53. In that context, the minority noted that collective bargaining and action were acknowledged as fundamental rights in EEA law, and the protection of workers could thus constitute a compelling reason to accept restrictions on freedom of establishment. It then pointed to the EFTA Court's having, in the minority's view, misunderstood the purpose of the Administration Office in finding that it served a business purpose going beyond preserving pay and working conditions for its employees. The minority found it clear that preserving such conditions was the only purpose of the Administration Office. Nor did the minority agree with the majority

that the impact that the boycott would have on the pay and working conditions of employees at the Administration Office would be indirect.

54. Moreover, taking into account the development since the CJEU's judgments in the cases of *Viking* and *Laval*, including that the European Parliament had twice rejected proposals for EU directives that would have limited rights to priority of engagement for dockworkers, the provisions of ILO Convention No. 137, and the fact that many EU Member States had systems of priority for registered dockworkers, the minority concluded that the boycott, whose purpose was to enforce the collective agreement in question, served a legitimate aim.

55. Thereafter, the minority examined the issue of proportionality: whether the boycott was an adequate measure, and whether forcing Holship to accept the priority right by joining the Framework Agreement would entail going further than necessary to achieve the protection of workers. It concluded that a boycott was the only means of enforcing the agreement, and that nothing indicated that the Framework Agreement was inappropriate for ensuring the pay and working conditions of the dockworkers who enjoyed the priority right. In assessing whether the agreement went too far, the minority observed that dock work and shipping had developed, but on two occasions the EU Parliament had nevertheless not supported proposed EU Directives that would limit dockworkers' priority rights. Reference was also made to considerations of the ILO Expert Committee about the relevance of the registration system.

56. The minority concluded that at the time there were no good alternatives to the priority system in the Framework Agreement, and took note that the CJEU, in *European Commission v. Kingdom of Spain* (EU:C:2014:2430, § 41, 11 December 2014), had indicated that an arrangement resembling that in the Framework Agreement would ensure the rights under ILO Convention No. 137 without violating freedom of establishment. They concluded that "the employment situation for the permanently employed dockworkers with the Administration Office would become a lot less secure if the priority clause were not observed. The basis for permanent employment may disappear".

57. In conclusion, the minority found that in the circumstances of this case any restriction to which the announced boycott would give rise for the freedom of establishment was justified.

58. The minority lastly stated that Holship had argued that the boycott ran counter to the negative freedom of association under Articles 101 of the Constitution and 11 of the Convention, but this was not the case. On this point, the minority simply stated that it was sufficient to point to the Borgarting High Court's reasoning (see paragraph 20 above), with which it agreed.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LEGISLATION AND COLLECTIVE AGREEMENTS

59. Article 101 of the Norwegian Constitution of 17 May 1814 (*Grunnloven*), as revised in 2014, reads:

Article 101

"Everyone has the right to form, join and leave associations, including trade unions and political parties.

All people may meet in peaceful assemblies and demonstrations.

The Government is not entitled to employ military force against citizens of the State, except in accordance with the law, unless an assembly disturbs the public peace and does not immediately disperse after the Articles of the statute book relating to riots have been read out clearly three times by the civil authority."

60. Sections 2 and 3 of the Act of 5 December 1947 concerning boycotts (*boikottloven*) read:

Section 2

"A boycott is unlawful:

(a) when it serves an unlawful purpose or cannot achieve its goal without causing a breach of the law;

(b) when it is executed or maintained by unlawful means or in an unnecessarily provocative or offensive manner, or on the basis of false or misleading information;

(c) when it will harm important public interests or have an unwarranted effect, or when the interest pursued through the boycott is incommensurate with the harm it will cause;

(d) when it is executed without the party against whom it is aimed having been given reasonable notice, or when this party and those who are encouraged to participate in the boycott have not been sufficiently informed in advance of the grounds for the boycott."

Section 3

"If notification has been given of a boycott, a legal action may be brought to decide whether it is lawful.

Conciliation proceedings before a Conciliation Board are not necessary in cases concerning the lawfulness of a boycott or ... compensatory damages for losses caused by a boycott.

If a boycott has been executed or announced, a court may, at the request of the person against whom the boycott is directed, issue a temporary injunction prohibiting the boycott until it has been decided whether it is lawful."

61. Sections 1 and 2 of the EEA Act of 27 November 1992 (*Eøs-loven*) read as follows:

Section 1

"The provisions in the Main Part of the Agreement on the European Economic Area shall apply as Norwegian law ..."

Section 2

"Provisions of law that serve to fulfil Norway's obligations under the Agreement shall, in the event of conflict, take precedence over other provisions regulating the same matter ..."

62. Sections 2 and 3 of the Human Rights Act of 21 May 1999 (*menneskerettsloven*) read:

Section 2

"The following Conventions shall have the force of Norwegian law in so far as they are binding for Norway:

1. The Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 of 11 May 1994 to the Convention, together with the following Protocols: ..."

Section 3

"The provisions of the Conventions and Protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them."

63. Subsequent to the Supreme Court judgment in this case, NHO and LO and NTF concluded a collective agreement for ports and terminals (*Havne- og terminaloverenskomsten*), which replaced the Framework Agreement, in which there is no system with priority for registered dockworkers.

II. EEA AND EU LAW MATERIAL

64. The respondent State is a member of the European Free Trade Association (EFTA) and party to the 1992 Agreement on the European Economic Area (the EEA Agreement), entered into by three of the EFTA Member States (Iceland, Liechtenstein and Norway (the EEA EFTA States)), the European Union (EU) and the EU Member States.

65. The EEA Agreement extends the EU internal market to the EEA EFTA States by creating rules applicable to them equivalent to those applicable to the EU Member States under the EU Treaties and acts adopted in application of those treaties. Accordingly, the substantive rules in the EEA Agreement, within the areas covered by that agreement, essentially mirror the corresponding rules today found in the Treaty on the Functioning of the European Union (TFEU). They include the right to freedom of establishment provided for in Article 49 of the TFEU, the equivalent of which is found in Article 31 of the EEA Agreement.

66. Article 31 of the EEA Agreement reads as follows:

"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. Annexes VIII to XI contain specific provisions on the right of establishment."

67. The CJEU has several times given judgments in which the balancing of the fundamental right to collective action with internal market economic freedoms was at issue. In *Viking Line*, cited above, for example, it concluded that collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which were liable to deter it from exercising freedom of establishment, fell within the scope of what is currently Article 49 TFEU, and that a collective action such as that at issue in that case constituted a restriction on the freedom of establishment. It found also that that restriction could, in principle, be justified by an overriding reason of public interest, such as the protection of workers. In *Laval*, cited above, the CJEU also recognised that the right to take collective action for the protection of workers against possible social dumping may constitute a public interest objective. However, it had to be established that the restriction was suitable for ensuring the attainment of the legitimate objective pursued and did not go beyond what was necessary to achieve that objective.

68. In *Commission v. Spain* (C-576/13, EU:C:2014:2430, 11 December 2014) the CJEU held that, by obliging undertakings of other EU Member States wishing to exercise the activity of cargo-handling in Spanish ports of general interest, first, to register with the Dockers' Management Public Limited Liability Company (*Sociedad Anónima de Gestion de Estibadores Portuarios*) and, as appropriate, to hold shares in that company and, secondly, to employ as a priority workers provided by that company, including a minimum number on permanent contracts, Spain had failed to fulfil its obligations under Article 49 TFEU. However, the CJEU accepted that the port labour scheme in question was aimed at protecting workers and ensuring the regularity, continuity and quality of cargo handling, both of which were overriding reasons of general interest. The infringement in that case was based on the Spanish Government's failure to demonstrate that the impugned restrictions were necessary and proportionate, as well as acceptance of the Commission's argument to the effect that there were means less restrictive of the freedom of establishment to achieve the legitimate aims pursued (ibid., § 55).

69. The compatibility of a national dock work organisation system – which included a requirement to rely on recognised dockers to perform dock work – with several provisions of EU law, including once again those on the freedom of establishment and freedom to provide services – was also recently examined by the CJEU in *Katoen Natie Bulk Terminals NV and General Services Antwerp NV v. Belgische Staat* and *Middlegate Europe NV v. Ministerraad* (Joined cases C-407/19 and C-471/19, EU:C:2021:107, 11 February 2021). The first count of the operative part of the judgment given in that case reads as follows:

> "Articles 49 and 56 TFEU must be interpreted as not precluding national legislation which obliges persons or undertakings wishing to carry out port activities in a port area – including activities which, strictly speaking, are unrelated to the loading and unloading of ships – to have recourse only to dockers recognised as such in accordance with the conditions and arrangements laid down pursuant to that legislation, provided that those conditions and arrangements, first, are based on objective, non-discriminatory criteria known in advance and allow dockers from other Member States to prove that they satisfy, in their State of origin, requirements equivalent to those applied to national dockers and, second, do not establish a limited quota of workers eligible for such recognition."

In answer to another question referred to it by the Belgian Council of State and Constitutional Court in that case, the CJEU held, at § 78, that:

> "national provisions [such as those at issue] organising dock work are not, as such, incompatible with the freedoms enshrined in Articles 49 and 56 TFEU, but that the assessment of the compatibility with those freedoms of the regime established pursuant to such provisions requires a holistic approach, taking into consideration all the conditions and arrangements for the implementation of such a regime."

In that case the CJEU pointed out other aspects of the applicable national legislation which would fall foul of Articles 49 and 56 TFEU.

III. INTERNATIONAL AND COMPARATIVE LAW MATERIAL

70. Articles 2 and 3 of ILO Convention No. 137 concerning the Social Repercussions of New Methods of Cargo Handling in Docks, adopted in 1973 and ratified by Norway on 10 June 1974 (the Dock Work Convention) read:

Article 2

> "1. It shall be national policy to encourage all concerned to provide permanent or regular employment for dockworkers in so far as practicable.
>
> 2. In any case, dockworkers shall be assured minimum periods of employment or a minimum income, in a manner and to an extent depending on the economic and social situation of the country and port concerned."

Article 3

"1. Registers shall be established and maintained for all occupational categories of dockworkers, in a manner to be determined by national law or practice.

2. Registered dockworkers shall have priority of engagement for dock work.

3. Registered dockworkers shall be required to be available for work in a manner to be determined by national law or practice."

71. Articles 3 and 11 of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise (adopted in 1948 and ratified by Norway on 4 July 1949) provide as follows:

Article 3

"1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."

Article 11

"Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."

72. In its Digest of decisions and principles (fifth (revised) edition, 2006) the ILO Committee of Freedom of Association ("the CFA") stated among other things as follows in the sections entitled "Right of organizations freely to organize their activities and to formulate their programmes"; "Other activities of trade union organizations (protest activities, sit-ins, public demonstrations, etc.) and "Collective bargaining"; "Subjects covered by collective bargaining":

"518. The boycott is a very special form of action which, in some cases, may involve a trade union whose members continue their work and are not directly involved in the dispute with the employer against whom the boycott is imposed. In these circumstances, the prohibition of boycotts by law does not necessarily appear to involve an interference with trade union rights.

...

915. As regards the legislative ban on including secondary boycott clauses in collective agreements, the Committee has considered that restrictions on such clauses should not be included in the legislation."

73. The decision of the European Committee on Social Rights' of 3 July 2013 in the case of *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden* (Complaint No. 85/2012) includes the following:

"121. The Committee further considers that legal rules relating to the exercise of economic freedoms established by State Parties either directly through national law or

indirectly through EU law should be interpreted in such a way as to not impose disproportionate restrictions upon the exercise of labour rights as set forth by, further to the Charter, national laws, EU law, and other international binding standards. In particular, national and EU rules regulating the enjoyment of such freedoms should be interpreted and applied in a manner that recognises the fundamental importance of the right of trade unions and their members to strive both for the protection and the improvement of the living and working conditions of workers, and also to seek equal treatment of workers regardless of nationality or any other ground.

122. Consequently, the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers. In addition, any restrictions that are imposed on the enjoyment of this right should not prevent trade unions from engaging in collective action to improve the employment conditions, including wage levels, of workers irrespective of their nationality."

74. In the case of *Govia GTR Railway Ltd v. The Associated Society of Locomotive Engineers and Firemen* (case no. 2016/450, [2016] EWCA Civ 1309, 12 December 2016) the Court of Appeal (Civil Division) of the United Kingdom considered an application for an interlocutory injunction brought by a railway against train drivers on the Southern Rail to prevent the train driver's union from calling strike action, on the basis of Articles 49 and 56 TFEU. The Court of Appeal did not agree that either provision had been breached, and, having reviewed the *Viking* and *Laval* cases from the CJEU as well as the EFTA Court's judgment in the *Holship* case, stated *inter alia* the following (paragraph 39):

"In our judgment, it is absolutely plain for the reasons we have given that it is the object or purpose of the industrial action and not the damage caused by the action itself which renders it potentially subject to the freedom of movement provisions. A helpful test to apply is to ask whether, if the rules were laid down by government, they would be an unlawful interference with the freedom of establishment. ..."

THE LAW

ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

75. The applicant unions complained that the decision to declare the notified boycott unlawful had violated their right to freedom of association as provided for in Article 11 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Submissions by the parties and the third party

1. The applicant unions

76. The applicant unions emphasised the importance of collective agreements for the formation of pay and working conditions in Norway. It had not previously been called into question by the domestic courts that the Framework Agreement and the priority rule in it was a condition that regulated pay and working conditions. The aim of the boycott in the instant case had been to protect rights at the very heart of trade union activity, namely the right to work and the right to stable and organised working conditions for dockworkers. Boycotts and blockades were protected by a number of instruments of international law, notably ILO Convention No. 87, the European Social Charter, and the EU Charter.

77. The applicant unions stated in their observations that the Government had referred to the issue of negative freedom of association in their observations without drawing the conclusion that it was of direct relevance. In the applicant unions' view, it was irrelevant. They stated that the Norwegian Business Association (*Bedriftsforbundet*), of which Holship was a member, had lodged a complaint about alleged "closed-shop" practices in the dock sector with the European Committee on Social Rights, which in its decision of 17 May 2016 (*Bedriftsforbundet v. Norway*, complaint no. 103/2013) had concluded that there had been no violation. The Supreme Court majority had made no mention of the issue, whereas the minority had commented on Holship's claim and had found it unfounded. First and foremost, the instant case concerned the question of whether there had been an infringement of the right of collective bargaining and the right to enter into a collective agreement.

78. In the applicant unions' view, the Supreme Court's majority had erred in so far as it had balanced a right under the Convention against a right under the EEA Agreement in a manner that would only have been appropriate had the issue been a matter of conflicting rights under the Convention. The result had been that the right of collective action had had to be justified in the light of an economic freedom, the freedom of establishment, provided under the EEA. The majority had erroneously examined whether the applicant unions' exercise of rights under Article 11 had been proportionate, whereas it should have examined whether the restriction placed on their right fulfilled the criteria set out in the second

paragraph of Article 11. Finding the boycott unlawful in the circumstances of the present case had been disproportionate. The margin of appreciation to be afforded to the domestic authorities in the present case, a case which had related to a primary and important form of industrial action, had to be narrow.

2. The Government

79. The Government submitted that EEA law provided for the protection of human rights which was similar to the protection provided for by the Convention, and that there was a presumption of compliance with the Convention which was the same as or similar to that set out in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98, ECHR 2005-VI), a case concerning the implementation of EU law. That presumption had not been rebutted in the instant case, as there had been no "manifestly deficient" protection of Convention rights.

80. Furthermore, the Government maintained that the Court's case-law left unresolved the question of whether a boycott such as the one at issue in the instant case was included in the panoply of rights protected under Article 11 of the Convention. In any event, the Government argued that if Article 11 were found to be applicable to the boycott in question, the Supreme Court's judgment of 16 December 2016, in which the boycott had been declared unlawful, complied with the criteria set out in the second paragraph of that provision.

3. The European Trade Union Confederation (ETUC)

81. The European Trade Union Confederation (ETUC) focused on the relevant legal framework and provided references to international case-law and other legal material from the United Nations, the ILO, the Council of Europe and the EU. From these, it inferred in particular that the right to collective bargaining and the right to collective action, including the right to strike, were recognised as fundamental rights that had to be guaranteed to all workers, including dock workers, and their trade unions. It furthermore submitted that any restriction on those rights had to be exclusively limited to certain conditions and situations, and that the Court, in interpreting the permissible restrictions in relation to Article 11 of the Convention, should take specific account of the competent international and European monitoring bodies mentioned above which had denied that even the need for the "principle of proportionality" was a permissible restriction on the right to strike.

B. Admissibility

1. Applicability of Article 11 of the Convention

82. As to whether the announced boycott entailed the exercise of freedom of assembly and association protected by Article 11 § 1 of the Convention, the Court notes that it has not previously rendered judgments relating to an action fully resembling the one at issue in the instant case. The collective action which was the subject of the domestic court judgments was essentially a boycott in the form of a blockade organised by NTF in order to pressure a company, Holship, to enter into a collective agreement containing a priority clause for registered dockworkers employed in the Administration Office.

83. The Court has generally held that Article 11 presents trade union freedom as one form or a special aspect of freedom of association. The provision does not guarantee trade unions, or their members, any particular treatment by the State (see, among other authorities, *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, § 134, ECHR 2013 (extracts)). The Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible (see, for example, *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 140, ECHR 2008).

84. The Court notes that in *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (no. 31045/10, § 76, 8 April 2014), as regards the applicability of Article 11 to a sympathy strike, it held that it would be inconsistent with the method of interpretation outlined in *Demir and Baykara*, cited above, § 85, for it to adopt in relation to that provision an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law (see in relation to the latter paragraphs 70-73 above). In addition, the Court notes that at issue in the case of *Gustafsson v. Sweden* (25 April 1996, *Reports of Judgments and Decisions* 1996-II) was collective action in the form of a blockade. In that case, which had been brought by the applicant business as a result of the extent of the inconvenience or damage caused by the union action to its business, the Court recognised that the measures complained of must have entailed considerable pressure on the applicant to meet the union's demand that he be bound by a collective agreement. The Court accepted in that case that, to a degree, the enjoyment of the applicant business' freedom of association was thereby affected and Article 11 was thus deemed applicable. The Court considers that given that a blockade can lead to Article 11 being deemed applicable in relation to the negative freedom of association of an applicant business or employer, it follows that the exercise of a blockade by an applicant trade union can also give rise to the applicability of Article 11 of the Convention. The Court observes that a

boycott may be the only means available to a trade union to put pressure on an employer in defense of workers' rights

85. The Court observes moreover that in one of the CJEU judgments to which the domestic court referred, the CJEU had recognised, for the first time, relying in part on the European Social Charter, that the right to collective action constituted a fundamental right under EU law. It is noteworthy that the form of collective action at issue in that case – *Laval un Partneri* – was also a blockade.

86. With regard to the proposed action in the instant case, the Court observes that its purpose was to pressure Holship to enter into a collective agreement with NTF under which registered dockworkers employed by the Administration Office would enjoy the right to priority of engagement for unloading and loading operations at the port. Leaving aside for the time being the question of whether – as the majority of the Supreme Court considered – the action pursued business aims beyond the protection of the rights and interests of workers (see paragraph 38 above) – a question which will be of relevance on the merits – it is undisputed that the impugned boycott also aimed to ensure stable and safe working conditions for dockworkers. This was recognised by both majority and minority members of the Supreme Court and by the lower courts. Furthermore, the Court observes that the priority right which was one of the rights the proposed boycott sought to defend, was based on a long-standing tradition domestically, and was provided for in ILO Convention No. 137 (see paragraph 70 above).

87. In the light of the above considerations, the Court finds that the impugned boycott which the applicant unions notified in advance in accordance with domestic law constituted a trade union action which they sought to take in order to protect, at least *inter alia*, the occupational interests of union members in a manner capable of falling within the scope of Article 11 § 1 of the Convention. It follows that this provision is applicable.

2. Conclusion on admissibility

88. The Court, having found that Article 11 of the Convention is applicable, further notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35. It must therefore be declared admissible.

C. Merits

1. Interference with the applicants' rights under Article 11 of the Convention

89. It is not contested that the Supreme Court's declaratory judgment finding the intended boycott unlawful entailed a "restriction" on the exercise of the trade unions' rights under the second paragraph of Article 11 of the Convention.

2. Lawfulness and legitimacy of the restriction

90. Turning to the requirement that the restriction be prescribed by law, the Court finds that the Supreme Court's judgment had an adequate legal basis – the 1947 Boycott Act (see paragraph 60 above).

91. The Court also finds that the decision to declare the boycott unlawful was made in order to protect the "rights and freedoms" of others, in particular the company's right to freedom of establishment as guaranteed by the EEA Agreement and incorporated in Norwegian law by the EEA Act (see paragraphs 61 and 66 above).

3. Whether the restriction was necessary in a democratic society

(a) General principles

92. The Court reiterates that the essential object of Article 11 of the Convention is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected by that provision, but that there may in addition be positive obligations on the State to secure the effective enjoyment of such rights (see, for example, *Sindicatul "Păstorul cel Bun"*, cited above, § 131, and *Demir and Baykara*, cited above, § 110).

93. As to the substance of the right of association enshrined in Article 11 of the Convention, the Court has taken the view that paragraph 1 of that Article affords members of a trade union a right, in order to protect their interests, that the trade union should be heard, but has left each State a free choice of the means to be used towards this end. The right to collective bargaining has not been interpreted as including a "right" to a collective agreement, nor does the right to strike imply a right to prevail (*National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, judgment of 8 April 2014, § 85). What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (see, for example, *Demir and Baykara*, cited above, § 141, and the references therein).

94. Furthermore, the Court has stated that the evolution of case-law on the substance of the right of association enshrined in Article 11 is marked

by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned to secure trade union freedom, subject to its margin of appreciation; and secondly, the Court does not accept restrictions that affect the essential elements of trade union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, while in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law (ibid., § 144).

95. Moreover, through its case-law, the Court has built up a non-exhaustive list of the constituent elements of the right to organise, including the right to form and join a trade union, the prohibition of closed-shop agreements, the right for a trade union to seek to persuade the employer to hear what it had to say on behalf of its members and, having regard to developments in labour relations, the right to bargain collectively with the employer which has, in principle, except in very specific cases, also become one of the essential elements of the first right listed above (see *Sindicatul "Păstorul cel Bun"*, cited above, § 135; and *Demir and Baykara,* cited above, § 145). In *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96 and 2 others, § 46, ECHR 2002-V, the Court stated:

> "[T]he essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on issues which the union believes are important for its members' interests".

96. The Court has stated that the list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In that connection, it is appropriate to remember that the Convention is a living instrument which has to be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights have to be construed restrictively, in a manner which gave practical and effective protection to human rights (*Demir and Baykara*, cited above, § 146).

97. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the high degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom and protection of the

occupational interests of union members may be secured (see, among other authorities, *Sindicatul "Păstorul cel Bun"*, cited above, § 133).

98. In cases relating to industrial actions, the Court has also stressed that its jurisdiction is limited to the Convention. It has no competence to assess a respondent State's compliance with the relevant standards of the ILO or the European Social Charter, the latter containing a more specific and exacting norm regarding industrial action. In *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (no. 31045/10, § 106, ECHR 2014), the Court emphasised, however, that the conclusion which it had reached in that case, in which it found that a ban on taking secondary industrial action against an employer not party to a labour dispute did not violate Article 11, should not be understood as calling into question the analysis effected on the basis of those standards and their purposes by the ILO Committee of Experts and the European Committee on Social Rights. The Court has also emphasised that, under the terms of Article 19 and Article 32 § 1 of the Convention, it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law or, in a case such as this, EEA law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see, in relation to Article 8 of the Convention, *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 110, 3 October 2014).

(b) Application of those principles to the present case

99. The Court considers that two issues relating to negative freedom of association and the possible existence and application of the presumption of equivalent protection need to be addressed as preliminary issues.

100. In the present case the Supreme Court declared the announced boycott unlawful as it would have amounted to an unlawful/disproportionate restriction of Holship's right to freedom of establishment as guaranteed by the EEA Agreement (see, *inter alia*, paragraph 51 above).

101. It appears that Holship, before the domestic courts, also argued that the boycott would be unlawful because it would contravene the right to "negative freedom of association" enshrined in the first paragraph of Article 11 of the Convention (see, for example, paragraphs 20 and 58 above). This argument was dismissed by the Borgarting High Court on the grounds that it had not been proved that the Administration Office was in fact a "closed shop" for NTF members (see paragraph 20 above), and the Supreme Court's majority did not discuss it. The minority, which had to take a stand on Holship's argument relating to negative freedom of association, since it concluded that Holship's arguments relating to the EEA

Agreement could not succeed, only referred to the Borgarting High Court's reasons on that point (see paragraph 58 above).

102. In the light of the above, the parties disagree on whether questions relating to "negative freedom of association" have relevance to the case now before the Court.

103. The Court notes that had it been established by the domestic courts that the announced boycott would impinge on the negative freedom of association because of the issue of a "closed shop", the case would have required a balancing of competing rights protected by the first paragraph of Article 11 of the Convention (see, for example, *Chassagnou and Others v. France* [GC], nos. 25088/94 and 2 others, § 113, ECHR 1999-III; and, with regard to the term "closed shop", *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 13, Series A no. 44). However, that was not established, and the judgment of the Supreme Court indicated only that the announced boycott would interfere with Holship's right to freedom of establishment under the EEA Agreement, and that that was why it declared it unlawful (see, *inter alia*, paragraph 51 above). That being the case, and also noting that no submissions have been made to the effect that the domestic legislation in general did not offer adequate protection of the negative freedom of association, the Court finds that its examination in the instant case must focus on the necessity of the restriction under the second paragraph of Article 11.

104. As regards the second preliminary issue, the Court reiterates that it has held that if an organisation to which a Contracting State has transferred jurisdiction is considered to protect fundamental rights in a manner which can be considered at least "equivalent" to that for which the Convention provides, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, §§ 152-153, ECHR 2005-VI, §§ 155-56 and *Konkurrenten.no AS v. Norway* (dec.), no. 47341/15, § 42, 5 November 2019).

105. In the present case, the respondent Government argued that while EU law and EEA law differ in certain respects, and even if it were decided that this difference means that EEA law, as such, does not benefit from the so-called *Bosphorus* presumption of equivalent protection, the present case concerns the application of the main part of the EEA agreement, which corresponds with EU law, and to which the presumption should therefore apply.

106. In the aforementioned *Konkurrenten.no* decision, cited above, the Court recently stated that the basis for the presumption established by *Bosphorus* is in principle lacking when it comes to the implementation of EEA law at domestic level within the framework of the EEA Agreement,

due to the specificities of the governing treaties compared to those of the European Union. For the purpose of the analysis in that decision, two distinct features were specifically highlighted. Firstly, and in contrast to EU law, there is within the framework of the EEA Agreement itself no direct effect and no supremacy. Secondly, and although the EFTA Court has expressed the view that the provisions of the EEA Agreement "are to be interpreted in the light of fundamental rights" in order to enhance coherency between EEA law and EU law (see, *inter alia*, the EFTA Court's judgment in its case E-28/15 *Yankuba Jabbi* [2016] para. 81), the EEA Agreement does not include the EU Charter of Fundamental Rights, or any reference whatsoever to other legal instruments having the same effect, such as the Convention.

107. As regards, in particular, the latter feature, the Court observes, however, as clearly stated by the EFTA court in the *Holship* case, that fundamental rights form part of the unwritten principles of EEA law (see paragraph 26 above). The respondent Government provided several examples from the EFTA court in this regard. Since this reflects the position which previously pertained under EU law, prior to successive EU Treaty amendments, according to which fundamental rights were first recognised as general principles of EU law, the Court considers that the fact that the EEA agreement does not include the EU Charter is not determinative of the question whether the *Bosphorus* presumption could apply when it comes to the implementation of EEA law, or certain parts thereof.

108. However, given one of the other features of EEA law identified by the Court in the *Konkurrenten.no* decision – the absence of supremacy and direct effect, added to which is the absence of the binding legal effect of advisory opinions from the EFTA Court – and given that the existence of procedural mechanisms for ensuring the protection of substantive fundamental rights guarantees is one of the two conditions for the application of the *Bosphorus* presumption, the Court leaves it to another case, where questions in relation to the procedural mechanisms under EEA law may arise, to review this issue. It therefore proceeds on the basis that for the purposes of this case the *Bosphorus* presumption does not apply to EEA law. The Court is therefore required to determine whether the restriction was necessary for the purposes of Article 11 of the Convention.

109. Having addressed those two preliminary issues, the Court turns to the heart of the present case, namely the assessment of the necessity of the restriction of the applicant trade union's Article 11 rights as a result of the Supreme Court decision to declare the announced boycott unlawful. In this context the Court observes that the particularity of the fundamental right to engage in collective action is that it too may be exercised with a view to protecting the rights of others, namely the interests of workers and the prevention of, *inter alia*, social dumping. However, in this case the Court emphasises that a majority of the Supreme Court found that the Framework

Agreement and its system involving priority for registered dockworkers had little to do with the protection of workers. It held that the collective agreement demanded by NTF was "irregular", and that the protection it afforded to members' interests in working and pay conditions was "relatively indirect" (see paragraph 36 above). As regards the Administration Office, the Supreme Court regarded it as a "company" that engaged in "business activities in a market" – the market of unloading and loading activities – to which other operators wanted access, and as regards the announced boycott, it stated that its "primary effect" would be to deny Holship access to that market, which it wished to enter (see paragraphs 37-38 above).

110. While it is true that the Supreme Court was heavily divided in relation to these findings of fact and law, the Court emphasises that it is in the first place for the domestic authorities to interpret and apply the domestic law and to establish the facts on the basis of the evidence before them (see, in relation to the right to strike under domestic law and Article 11 of the Convention, *Hrvatski liječnički sindikat v. Croatia*, no. 36701/09, § 56, 27 November 2014; and, in another context of Article 11, for example, *Jhangiryan v. Armenia*, nos. 44841/08 and 63701/09, § 114, 8 October 2020).

111. As regards the balancing exercise undertaken by the Supreme Court in the present case, the latter first pointed to the freedom of association established by the first paragraph of Article 101 of the Constitution, which had to be considered taking into account Article 11 of the Convention, before also pointing to the freedom of establishment under Article 31 of the EEA Agreement, which it referred to as a "fundamental freedom" thereunder. According to the Supreme Court:

> "these rights must be weighed against each other as part of a consideration of proportionality. This weighing of interests is similar in nature to the one carried out when restrictions are imposed on the freedom of establishment as a result of basic rights forming part of EU and EEA law. ... While the wording of the conditions for restricting human rights and rights under the EEA Agreement may differ, the nature of the considerations remain the same".

Referring to the possibility of different interpretations of the Constitution, and by the EFTA court and CJEU in this field, the reporting judge indicated that:

> "one cannot rule out that considerations of the European Court of Human Rights in weighing the freedom of assembly against the freedom of movement within the internal market may come to differ from those of the European Court of Justice and the EFTA Court. I cannot see, however, that there are any grounds on which to argue that such differences exist today".

112. As is clear from paragraphs 30 to 51 above, the Supreme Court engaged in an extensive assessment of the conflicting fundamental right to collective action relied on by the applicant unions and the fundamental

economic freedom under EEA law on which the employer relied. It indicated that the boycott must, among other things, be reconciled with the rights that follow from the EEA Agreement and that in consideration of proportionality a fair balance had to be struck between these rights.

113. It is clear from the balance struck by the domestic court that its characterisation of the boycott – that it was being used as a means to compel acceptance of a right of priority engagement and notably with the desired effect being to limit the access of other operators to the market for loading and unloading services – was central to its finding that such a fair balance had, in the particular circumstances of that case, been struck. In addition, it appeared relevant in the present case that the announced boycott targeted a third party.

114. As indicated previously (see paragraph 97), the Contracting States enjoy a wide margin of appreciation in this field, in view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the high degree of divergence between the domestic systems in this field (see, also, *Unite the Union v. the United Kingdom* (dec.), no. 65397/13, § 55, 3 May 2016). As regards the breadth of the margin, it is useful to remember that it will depend on the nature and extent of the restriction on the trade-union right in issue, the object pursued by the contested restriction, and the competing rights and interests of other individuals in society who are liable to suffer as a result of the unrestricted exercise of that right (see *Demir and Baykara*, cited above, § 86). Given the characteristics of the collective action identified by the Supreme Court (see the preceding paragraph and paragraphs 36-38 above), the breadth of the margin in the present case was clearly wide.

115. The Court also reiterates that, when exercising its supervisory function, its task is not to take the place of the national courts but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on. Where the balancing exercise has been undertaken by the national authorities in conformity in essence with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see, among many authorities, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 164, 27 June 2017). In this case, it is clear from the information available to the Court that following the Supreme Court judgment the relevant social partners negotiated and concluded a new collective agreement (see paragraph 63 above). The restriction of the application unions' Article 11 rights did not as such prevent them from engaging in further collective bargaining, the information provided by the applicant unions to the effect that the absence in the renegotiated agreement of a similar priority clause had considerable impact on the organisation of

dock work notwithstanding. Against that background, the Court does not consider that sufficiently "strong reasons" exist for it to substitute its views for that of the Supreme Court in this case.

116. Even though the Court considers, on the basis of the material before it and given the findings of fact and domestic law by the domestic court, that the latter acted within the margin of appreciation afforded to it in this area when declaring the boycott unlawful (see paragraphs 94 and 97 above), it considers it necessary, given the manner in which the domestic court expressed the balancing exercise to be effected, to note the following.

117. Firstly, the Court accepts that protecting the rights of others granted to them by way of EEA law may justify restrictions on rights under Article 11 of the Convention (see paragraph 91 above). However, it also notes that for a collective action to achieve its aim, it may have to interfere with internal market freedoms such as those at issue in the case before the Supreme Court. As noted by the Borgarting High Court in the present case, creating difficulties for the company in respect of loading and unloading, and the possible negative financial consequences flowing therefrom, would have been an important point of the boycott (see paragraph 22 above). In the same way that a right to strike does not imply a right to prevail, the degree to which a collective action risks having economic consequences cannot, therefore, in and of itself be a decisive consideration in the analysis of proportionality under Article 11, paragraph 2 of the Convention (see *Ognevenko v. Russia*, no. 44873/09, § 73, 20 November 2018). Even when implementing their obligations under EU or EEA law, the Court observes that Contracting Parties should ensure that restrictions imposed on Article 11 rights do not affect the essential elements of trade union freedom, without which that freedom would become devoid of substance.

118. Secondly, as follows from paragraphs 98 and 110 above, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU or EEA law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention. As highlighted in the submissions of the applicant unions in the present case, however, there is a risk that a domestic court which finds itself in a position such as that in which the Supreme Court found itself in the present case may balance a right under the Convention against a right under the EEA Agreement in a manner that would generally only be appropriate had the issue before it been a matter of conflicting fundamental rights under the Convention. From the perspective of Article 11 of the Convention, EEA freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality under Article 11, paragraph 2. The risk just referred to is one which, while ensuring full compliance with their obligations under EEA or EU law, domestic courts must seek to avoid.

119. However, in the present case, as stated in paragraph 113 above, central to the domestic court's finding was its characterisation of the purpose and nature of the announced boycott. While the Supreme Court did not approach the case before it strictly from the angle of the proportionality of the restriction imposed on the trade unions' exercise of rights under Article 11 of the Convention, but concentrated to a great extent on the effects of the boycott on the freedom of establishment of the company targeted, the Court considers that it nonetheless remained within its wide margin of appreciation and advanced relevant and sufficient grounds to justify its final conclusion in the particular circumstances of this case.

120. On the basis of the above considerations, the Court finds that there has been no violation of Article 11 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 11 of the Convention.

Done in English, and notified in writing on 10 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Síofra O'Leary
Registrar	President