Application no. 45487/17

NORWEGIAN CONFEDERATION OF TRADE UNIONS (LO) AND NORWEGIAN TRANSPORT WORKERS' UNION (NTF)

against Norway

Submission by

the European Trade Union Confederation (ETUC) under Rule 44(5)

(30/09/2019)

I. Introduction

1 The European Trade Union Confederation (ETUC) is honoured to be able to submit observations in this very important case. The Registry informed ETUC by a letter dated 2 September 2019 that the President of Section has granted leave, under Rule 44§3 of the Rules of Court, for ETUC to make written submissions to the Court by 30 September.

2 The application concerns a boycott that was declared unlawful by the Norwegian Supreme Court. The applicant organisations maintain that the Supreme Court's judgment contravened their rights in particular under Article 11 of the Convention.

II. Relevant international law and material

3 The application describes in detail the Norwegian domestic regulatory framework (mainly settled via National Framework agreements and the Framework Agreement on Fixed Pay Scheme for Dockworkers) as well as the content of the respective rulings of the different domestic and the EFTA Court and their consequences on the right to collective bargaining and the right to strike. The ETUC would via this submission like to inform the Court on the relevant legal framework by adding the pertinent references to international (case) law and other relevant material.

4 Before doing so, the ETUC would like to recall the principle laid down in the Court judgement in *Demir and Baykara v. Turkey* that the Court 'can and must take elements of international law other than the Convention, the interpretation of such elements by competent organs'.[1] That is why it attributes specific importance to these references to international (case) law and other material.[2]

A. United Nations (UN)

5 Within the general UN framework, reference should in first instance be made to the **International Covenant of Economic, Social and Cultural Rights** (ICESCR), ratified by Norway in 1972, and more in particular its Article 8 which guarantees **the right of everyone to form trade unions and join the trade union of his choice**, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. **No restrictions may be placed** on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others. It also guarantees the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others. And guarantees finally also the **right to strike,** provided that it is exercised in conformity with the laws of the particular country. Furthermore it is to be noted that "nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention."

6 Secondly, reference is to be made to the **International Covenant of Civil Political and Cultural Rights,** also ratified by Norway in 1972, and more in particular its Article 22 which states which also states that everyone shall have the **right to freedom of association with others, including the right to form and join trade unions for the protection of his interests** and provides for paragraphs on restrictions guarantees as the ones provided in the ICESCR. (see para. 5 above)

[1] ECtHR (GC), 12.11.2008, No. 34503/97, *Demir and Baykara v. Turkey*, ECHR 2008-V, pp. 395 ff, § 85.

[2] For the Courts' information: emphasis in bold in the different quotations in these observations are added by ETUC, emphasis in bold italics refer to emphasises as they figured in the original quotation.

B. International Labour Organisation (ILO)

1. Relevant instruments

a) Freedom of association, right to collective bargaining and collective action

7 Within the framework of the ILO, and for the **areas of freedom of association and the right to collective bargaining and collective action**, the following Conventions of the ILO have to be particularly taken into consideration:

1) **Convention concerning Freedom of Association and Protection of the Right to Organise (1948, No. 87)**3, ratified by Norway on 4 July 1949, and which provides in Article 11 that each ILO member must take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise;

2) **Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949, No. 98)[4],** ratified by Norway on 17 February 1955, and which provides in its Article 4 that "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements";

3) **Convention concerning the Promotion of Collective Bargaining (1981, No. 154)[5],** ratified by Norway on 22 June 1982, which defines in its Article 2 collective bargaining as "**all negotiations** which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, **for (a) determining working conditions and terms of employment**; (…)". Article 5 provides an obligation for states to take measures adapted to national conditions to promote collective bargaining and that the aim of these measures should amongst others that "**collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention" and that** collective bargaining should be progressively extended to all matters covered by amongst others Article 2(a) of the Convention, Furthermore, Article 8 specifiies that "the measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining".

8 So, freedom of association, the right to collective bargaining and the right to collective action/strike belong to the 'hard core' of the human rights Conventions within the framework of the ILO. These rights are derived from the founding principles for the **ILO Constitution** which in its preamble refers to the "recognition of the principle of freedom of association" as enshrined in the **Declaration of Philadelphia of 1944**.[6] Moreover, the International Labour Conference 1998 adopted the "**ILO Declaration on fundamental principles and rights at work**"[7]. Among the four main subjects of human rights in the labour field the first is defined as "freedom of association and the effective right to collective bargaining". This was reaffirmed by the **"ILO Declaration on Social Justice for a Fair Globalization"** (2008)[8] and more recently in the so-

[3] Convention concerning Freedom of Association and Protection of the Right to Organise (1948, No. 87).
[4] Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949, No. 98)
[5] Convention concerning the Promotion of Collective Bargaining (1981, No. 154) which is complemented with the Collective Bargaining Recommendation (1981, No. 163).
[6] More specifically, Article 1(1) of the ILO Constitution and Article I of the 1944 Declaration of Philadelphia.
[7] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.
[8] ILO Declaration on Social Justice for a Fair Globalization, adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008. The Declaration provides that amongst others that "all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) **freedom of association and the effective recognition of the right to collective**

called Centenary Declaration **'ILO Centenary Declaration for the Future of Work**" adopted by the International Labour Conference 2019[9] which recalls amongst others that "Social dialogue, including collective bargaining and tripartite cooperation, provides an essential foundation of all ILO action and contributes to successful policy and decision making in its member States." Furthermore, freedom of association is the only subject dealt with and supervised by a special (tripartite) body, the Committee on Freedom of Association (CFA). This underlines even more the utmost importance the ILO attaches to this subject.

b) Protection of Dockworkers

9 In addition, given the group of workers concerned in the application (i.e. dockworkers), the **Convention concerning the Social Repercussions of New Methods of Cargo Handling in Docks (Dock Work Convention, 1973 (No. 137))** is of particular importance[10]. Norway has ratified the Convention in 1974.

10 Like Norway, a number of countries have ratified the ILO-Convention No. 137.[11] To our knowledge, in several of these countries dock work is largely organized as in Norway, with work pools or administration offices for loading and unloading operations. This is the case in Belgium, Denmark, Finland, France, Portugal, Spain and Sweden.

11 The **objective** of ILO-Convention No. 137 is to provide dock workers with special protection against the social consequences of new methods of cargo handling in the ports and to ensure "regularisation of employment and stabilisation of income" for dock workers through priority of engagement for dock work.

12 The Convention **applies** to persons who are regularly available for work as dock workers and who depend on such work for their main annual income (Article 1(2)). As an essential means to make the objective of the Convention work in practice, Article 3(1) requires registers to be established and maintained for all occupational categories of dock workers, in a manner to be determined by national law or practice. Para. (2) of Article 3 requires that registered dock workers shall have priority of engagement for dock work and para. (3) requires registered dockworkers to be available for work in a manner to be determined by national or practice.

13 As explained in detail in the application, in Norway, the Convention is implemented and made effective by means of collective agreements that cover dock work.

14 To note also is that in 2002 a General Survey concerning Convention No. 137 and Recommendation No. 145 by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) was discussed at International Labour Conference in Geneva. In line with the CEACR's recommendations, proposals to review the instruments were rejected by the Conference. To the contrary, their relevance in general, being the only instruments addressing the questions of employment and conditions of work of dock workers in detail, and the relevance of the three major principles embedded in the Convention, i.e. the principle of permanent or regular employment, of a minimum income and the system of registration, were confirmed.[12]

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bargaining; (…)" and it also "s**tresses that labour standards should not be used for protectionist trade purposes**, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; (…)".

[9] ILO Centenary Declaration for the Future of Work, adopted by the Conference at its 108th Session, Geneva, 21 June 2019.

[10] Convention concerning the Social Repercussions of New Methods of Cargo Handling in Docks (Dock Work Convention, 1973 (No. 137)), the Convention is complemented by the Dock Work Recommendation No. 145 of 1973.

[11] Out of the total of 25 ratifications 10 EU/EEA Member States have ratified the Convention: Finland, France, Italy, Netherlands (but denounced it in 2006), **Norway**, Poland, Portugal, Romania, Spain and Sweden. From a Council of Europe' perspective it is to note that also the Russian Federation ratified this Convention.

[12] CEACR General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973, 2002, para. 235.

2. Relevant case law

a) General principles

(1) Right to strike

15 Concerning the right to strike, the CEACR has in the past recognised this right as deriving from Convention No. 87 and reaffirmed this in its most recent General Survey of 2012 by stressing that:

> 117. ***Strikes are essential means available to workers and their organizations to protect their interests*****,** (…)
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> 119. The Committee reaffirms that **the right to strike derives from the Convention**. (…) Indeed, the principles developed by the supervisory bodies have the sole objective of ensuring that **this right does not remain a theoretical instrument, but is duly recognized and respected in practice**. (…)
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> 127. **The right to strike** is not absolute and **may be restricted in exceptional circumstances**, or even prohibited. Over and above the armed forces and the police, the members of which may be excluded from the scope of the Convention in general, other restrictions on the right to strike may relate to: (i) certain categories of public servants; (ii) essential services in the strict sense of the term; and (iii) situations of acute national or local crisis, although only for a limited period and solely to the extent necessary to meet the requirements of the situation. In these cases, compensatory guarantees should be provided for the workers who are thus deprived of the right to strike.
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> 128. In this context, the **Committee has noted with concern** the potential impact of the recent case law of the Court of Justice of the European Communities (CJEC) concerning the exercise of the right to strike, and particularly the fact that in recent rulings the Court [i.a. the cases Laval, Viking Line as referred to in the application] has found **that the right to strike could be subject to restrictions where its effects may disproportionately impede an employer's freedom of establishment or freedom to provide services**. (…) [13]

16 Furthermore, in reaction to a rather similar situation, as the one at stake in this application, in Sweden on restrictions of the right to collective action in the light of the freedom of establishment or freedom of services, the CEACR, in its 2013 report, denies the need for a 'principle of proportionality' as a permissible restriction of the right to strike:

> As a general matter, the Committee recalls that when **drafting its position in relation to the permissible restrictions that may be placed upon the right to strike**, this **never included** the **need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services**. (…) [14]

17 Commenting in relation to the so-called *BALPA* case in the UK on the negative impact of the mentioned CJEU *Viking and Laval* cases, the CEACR reiterated this denial of the need for a 'principle of proportionality' and expressed serious concern on their significant restrictive effect on the exercise of the right to strike:

> The Committee observes with ***serious concern*** the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. (…)The Committee would observe in this regard that, in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating. The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is

[13] CEACR General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, adopted at the International Labour Conference, 101st Session, 2012.

[14] *ILO*, International Labour Conference, 102nd Session, 2013, Report of the Committee of Experts on the Application of Conventions and Recommendations - Report III (Part 1 A), p. 177-179.

likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention. (…)[15]

(2) Promotion of collective bargaining

18 In its General Survey (2012), the CEACR has (again) clarified certain principles pertaining to Article 4 of Convention No. 98. As **a general principle**, the CEACR General Survey (2012) confirms that **collective bargaining is a fundamental right** accepted by Member States from the very fact of their membership in the ILO, and which they have an obligation to respect, to promote and to realize in good faith and that the **agreements so concluded must be respected and must be able** to establish **conditions of work more favourable** than those envisaged in law: indeed, if this were not so, there would be no reason for engaging in collective bargaining.[16]

19 Regarding the **free and voluntary nature of negotiations and the autonomy of the parties**, the CEACR General Survey (2012) continues that **collective bargaining must be free and voluntary and respect the principle of the autonomy of the parties**.[17]

20 As for the **workers to be covered by collective bargaining**, the CEACR General Survey (2012) stresses that, with the exception of organizations representing categories of workers which may be excluded from the scope of the Convention, namely the armed forces, the police and public servants engaged in the administration of the State, **recognition of the right to collective bargaining is general in scope and all other organizations of workers in the public and private sectors must benefit from it** and that right to collective bargaining should also cover organizations representing **dockworkers.**[18]

21 As for the **content of collective bargaining**, the CEACR General Survey (2012) states amongst others that Conventions Nos. 98, 151 and 154 and Recommendation No. 91 focus the content of collective bargaining on the terms and conditions of work and employment, and that the **concept of "conditions of work" covers not only traditional working conditions** (the working day, additional hours, rest periods, wages, etc.), but also subjects that the parties decide freely to address, including those that are normally included in the field of terms and conditions of employment in the strict sense (promotion, transfer, dismissal without notice, etc.). [19]

C. Council of Europe (CoE)

1. Relevant instruments

22 The first recognition of the 'freedom of association' within the Council of Europe was in **Article 11 of the European Convention on Human Rights** (ECHR) the interpretation and application of which is at stake in the present case.'

23 Next to the ECHR (Article 11), the main relevant Council of Europe treaty for this case is the **European Social Charter** (ESC)**,** of which the revised 1996 version was ratified by Norway on 7 May 2001[20] and in particular its Article 6 (on the right to bargain collectively) provides that all workers should have the right to bargaining collectively (Part I), states must promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements (Article 6§2) and should recognise

[15] *ILO*, International Labour Conference, 99th Session, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations - Report III (Part 1 A); United Kingdom - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), p. 208-209.
[16] *ILO*, CEACR General Survey 2012, § 198.
[17] *ILO*, CEACR General Survey 2012, § 200.
[18] *ILO*, CEACR General Survey 2012, § 209 (incl. fn 505).
[19] *ILO*, CEACR Report 2013, see note 14, p. 180.
[20] European Social Charter, to note is that Norway has also ratified the 1995 Additional Protocol providing for a Collective Complaints Procedure on 20 March 1997. For relevant Decisions to this application by the European Committee of Social Rights (ECSR), see below paras. 30-33.

the **right of workers and employers to collective action in cases of conflicts of interest, including the right to strike** (Article 6§4)**.**

24 The Appendix to the Charter, Part II, Article 6§4, stipulates that States may **regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G**. Article G of the Charter (on 'Restrictions') provides that the rights and principles [set in the Charter] "**shall not be subject to any restrictions or limitations not specified in those parts, except such** as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals" and that "the restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

2. Relevant case law

a) European Convention of Human Rights

25 The ECtHR has recognised that Art. 11 ECHR covers the right to collective bargaining and the right to strike. The most important judgment was delivered unanimously by the Grand Chamber in the *Demir and Baykara*[21] case which reversed the Court's previous jurisprudence by recognising for the first time the right to collective bargaining as being enshrined in the protection of freedom of association guaranteed by Article 11 ECHR. Based on this judgment the Court has also recognised in *Enerji Yapi-Yol Sen*[22] the right to strike as an aspect of the same human right. This was followed by a series of further judgments[23].

26 In their application, the applicants refer to relevant CJEU judgments in the cases *Laval and Viking* (respectively C-341/05 of 18 December 2007 and C-438/05 of 11 December 2007) and which relate to similar situations of using collective action as an appropriate means to achieve the application of collective agreements. Even if the ECtHR has not yet pronounced itself on the *Laval* issue, scientific research has shown that the CJEU's judgments, in particular *Viking* and *Laval* are not consistent with the ECtHR jurisprudence[24]. Moreover, the ILO (freedom of association) standards and respective case-law to which the ECtHR attaches specific

[21] ECtHR *Demir and Baykara*, see note 1.
[22] ECtHR 21.4.2009, no. 68959/01 *Enerji Yapi-Yol Sen v. Turkey.*
[23] ECtHR 15.9.2009, no. 30946/04 *Kaya and Seyhan v Turkey,* 15.9.2009, no. 22943/04 *Saime Özcan v. Turkey,* 13.7.2010, no. 33322/07 *Çerikci v. Turkey* (see also 27.3.2007, no. 6615/03 *Karaçay v. Turkey*).
[24] *Keith D Ewing and John Hendy*, The Dramatic Implications of *Demir and Baykara*, Ind Law J (2010) 39 (1): 2-51, 40: "But the ECtHR has since clarified the position and has certainly not recognised any limitation on the right to strike that would reflect that imposed by the ECJ in *Viking* and *Laval*."; *Filip Dorssemont*, The right to take collective action versus fundamental economic freedoms in the aftermath of Laval and Viking : foes are forever! in European Union internal market and labour law, DE VOS, M. (2009), Intersentia, p. 45 – 104; *idem*, The right to take collective action under Article 11 European Convention on Human Rights, Dorssemont/Lörcher/Schömann, The European Convention on Human Rights and the Employment Relationship (to be published in 2013)): "Inevitably, the question arises as to what extent the restrictions to the right to take collective action based on the so-called balancing operation (i.e. the proportionality test) the CJEU undertook in Viking and Laval could pass the test of Article 11 § 2 ECHR. … A proper understanding of this balancing operation leads to the conclusion that the CJEU does not just balance interests.". *Sandra Tenggren*, The Development of the Right to Strike in International Instruments - The Viking and Laval Cases Revisited (Thesis 30 points in Private Law - Stockholm Autumn 2011) "the statement is now clear that the ECJ judgment does not go in line with those guidelines from the ILO as well as the judgments from the ECtHR; rather the ECJ positioned itself in a backward corner." p. 68; *Albertine Veldman*, The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR: "Since the *Demir* and *Enerji* cases, by which the socio-economic rights of collective bargaining and strike were incorporated into the 'classical' human rights catalogue of the ECHR, it seems that the ECtHR and the ECJ are likely to head for a clash in respect of the protection of the fundamental right to strike, once the EU accedes to the ECHR."

importance[25] show the problems of conformity in respect of the '*Laval*' situation (see above paras. 15-17).

b) European Social Charter

(1) General case law

27 The rights enshrined in Article 6 §§ 2 and 4 of the Charter belong to the most important human rights guaranteed in the Charter. This is underlined by the fact that Articles 5 and 6 are contained in the so-called 'hard core' articles (Article A(1)(b)) of the Charter) and that Article 6§4 of the Charter is even more emphasised by the fact that the right to collective action is explicitly 'recognised'.

28 Moreover, it will be recalled that the ECtHR has interpreted the human right of freedom of association (Article 11 ECHR) in a consistent manner by also referring to those Articles.[26]

29 The European Committee of Social Rights (ECSR), main supervisory body to the ESC, has developed a longstanding and very important case law in relation to the right to collective bargaining and (restrictions to) the right of collective action. From the ECSR Digest of case law it becomes amongst others apparent that for the ECSR:

- The exercise of **the right to bargain collectively and the right to collective action represents an essential basis for the fulfilment of other fundamental rights** guaranteed by the Charter, including for example those relating to **just conditions of work (Article 2), safe and healthy working conditions (Article 3) and fair remuneration (Article 4);**
- whatever the procedures put in place to promote and ensure collective bargaining, **collective bargaining should remain free and voluntary.**
- **States Parties should not interfere** in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned, including the use of collective action. Trade unions must be allowed to strive for the improvement of existing living and working conditions of workers and in this area the rights of trade unions should not be limited by legislation to the attainment of minimum conditions.
- Article 6§4 guarantees the right to strike and that this right may result from statutory law or case-law. In the former case, **the Committee examines the case law of domestic courts in order to verify whether the courts do not overly restrict the right to strike and in particular if any intervention by domestic courts does not reduce the substance of the right to strike so as to render it ineffective.**[27]

(2) Case law deriving from collective complaints

30 The ETUC would also like to draw the ECtHR attention to three ECSR Decisions on the merits within the collective complaints procedure and which are relevant and/or related to this application.

31 Firstly, in its decision in **Collective Complaint *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO)* (Complaint No. 85/2012),**[28] the ECSR considered Sweden to be in violation of Articles 6§§2 and 4 based on amongst others the following arguments:

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[25] ECtHR, *Demir and Baykara*, see note1, concerning Convention No. 87: "principal instrument" § 100, "fundamental text" § 123; Convention No. 98: "one of the fundamental instruments concerning international labour standards" § 147, "the principal instrument protecting, internationally, the right for workers to bargain collectively and enter into collective agreements" § 166.

[26] In *Demir and Baykara*, see note 1, for example: §§ 45 (Article 5 of the Charter), 49 (Article 6 of the Charter), 77 (reference to ECSR case-law), 103 (Article 5 of the Charter in the reasoning), 149 (reference to Article 6§2 of the Charter in the reasoning); in *Enerji Yapi-Yol Sen*, see note 22, § 24 (reference to the right to strike guaranteed in the Charter).

[27] Digest of the Case Law of the European Committee of Social Rights, December 2018, pp. 98-106.

[28] ECSR Decision on admissibility and merits, Collective Complaint No. 85/112, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO), 3 July 2013. The ETUC also invites the ECtHR to look at and consider the comprehensive ETUC Observations to Collective Complaint

111. (…) The Committee also considers that the **States should not interfere** in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned.

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.

32 Secondly, in its decision in **Collective Complaint No. 103/2013, *Bedriftsforbundet v. Norway*** of 17 May 2016,[29] the ECSR ruled unanimously that the existence of a consistent and long term practice in Norwegian ports requiring that employees are members of the dock workers union, the NTF, co-applicant in the present case, in order to be recruited and to be continued to be employed, was not a violation of Article 5 ESC.

33 Thirdly, in its decision in **Collective Complaint No. 123/2016, *Irish Congress of Trade Unions (ICTU) v. Ireland*** of 12 September 2018[30] on the conclusion of collective agreements (in this case for certain workers deemed self-employed) the ECSR found in first instance[31] a violation of Article 6§2 arguing amongst others the following:

38. (…) To overcome the lack of individual bargaining power the anti-cartel regulations are considered inapplicable to labour contracts and this has also been generally accepted by the CJEU (see Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, Case C-67/96, judgment of 21 September 1999). In establishing the type of collective bargaining that is protected by the Charter, (…) the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining.

(3) Other relevant Council of Europe material

34 Consideration should also be taken of the **Council of Europe Parliamentary Assembly Resolution 2033 (2015) of 28 January 2015, "Protection of the right to bargain collectively, including the right to strike**" which confirms firstly that

"the rights to organise, to bargain collectively and to strike (..) are not only democratic principles underlying modern economic processes, but fundamental rights enshrined in the European

No. 85/112, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO).

[29] All case documents relating to this complaint, including again the comprehensive ETUC observations, can be found here.

[30] All case documents relating to this case can be found here.

[31] During the proceedings, Ireland had revised its legislation whereby the situation was rectified and the ECSR considered there was no violation anymore.

Convention on Human Rights and the European Social Charter" and that "the rights to bargain collectively and to strike are crucial to ensure that workers and their organisations can effectively take part in the socio-economic process to promote their interests when it comes to wages, working conditions and social rights. (…) " [32]

D. European Union (EU)

35 The European Union primary and secondary law to be taken into consideration is as follows

- **The Treaty on European Union,** Article 6 (ex Article 6 TEU) which states that "3. Fundamental rights, as guaranteed by the **European Convention for the Protection of Human Rights and Fundamental Freedoms** and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

- **Treaty on the functionning of the European Union,** TITLE X – Social policy, Article 151 (ex Article 136 TEC) which states that "The Union and the Member States, having in mind fundamental social rights such as those set out in the **European Social Charter** signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, (…) dialogue between management and labour,(…)

- **Charter of Fundamental Rights of the European Union,** Article 28 (Right of collective bargaining and action) which states that "Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action".[33]

- **Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market which** establishes general **provisions facilitating the exercise of the freedom of establishment for service providers** but stipulates in its Article 1(7) that "This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. **Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices** which respect Community law".

36 As for relevant **CJEU case law**, ETUC invites the Court to look at and consider the relevant paragraphs of in particular the *Albany*, *Laval* and *Viking* judgments as referred to by the applicants in their application (and annexes).

37 Other **relevant documents deriving from EU institutions** include amongst others the **European Parliament Resolution of 22 October 2008 on challenges to collective agreements in the EU**[34] which amongst others**:**

- Recalls the fundamental rights nature of the right to strike,
- Emphasises that freedom to provide services does not contradict and is not superior to the fundamental right of social partners to promote social dialogue and to take industrial action, in particular since this is a constitutional right in several Member States; (…);
- Emphasises that freedom to provide services is not superior to the fundamental rights contained in the Charter of Fundamental Rights of the European Union and in particular the right of trade unions to take industrial action, in particular since this is a constitutional right in several Member States; emphasises therefore that the abovementioned ECJ rulings in Rüffert , Laval and Viking (…) should be interpreted in such a way as not to infringe upon the exercise of fundamental social rights as recognised in the Member States and by Community law, including the right to negotiate,

[32] Council of Europe Parliamentary Assembly Resolution 2033 (2015) of 28 January 2015, "Protection of the right to bargain collectively, including the right to strike.

[33] From the Explanations on this article it is clear that "this Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14)" and confirms that "the right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR." See also Articles 52(3) and 53 which explicitly refer to the ECHR as minimum standards.

[34] European Parliament Resolution of 22 October 2008 on challenges to collective agreements in the EU.

conclude and enforce collective agreements and to take collective action, and as not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers;

- Questions the introduction of a proportionality principle for actions against undertakings which, by relying on the right of establishment or the right to provide services across borders, deliberately undercut terms and conditions of employment; considers that there should be no question as to the use of industrial action to uphold equal treatment and to secure decent working conditions;
- Emphasises that the EU's economic freedoms cannot be interpreted as granting undertakings the right to evade or circumvent national social and employment laws and practices, or to impose unfair competition on wages and working conditions; considers therefore that cross border actions of undertakings which may undercut terms and conditions of employment in the host country must be proportionate and cannot automatically be justified by the EC Treaty provisions on, for example, free movement of services or freedom of establishment;

III. The law

38 From the abovementioned international and European human and social rights standards and their related case law, the ETUC notes in particular the following four specific and relevant elements that characterise the right to collective bargaining and collective action at stake in this application:

39 Firstly, the **right to collective bargaining and right to collective action, including the right to strike, are recognised as fundamental rights**. Based mainly on international law, the Court has recognised the right to collective bargaining and right to collective action, including the right to strike, as fundamental rights enshrined in Article 11 of the Convention (see in particular para. 25 above and related footnotes). Also other international and European monitoring bodies, like the ILO CEACR, the Council of Europe ECSR and even the CJEU, have confirmed the fundamental nature of these rights. (See paras. 15-21 above)

40 Secondly, **these fundamental rights must be guaranteed to all workers, including dock workers, and their trade unions**. Indeed, with certain exemptions (mainly for very specific functions of the civil servants), also the Court has followed a wide approach in guaranteeing these fundamental rights to all workers. Again, an approach also taken, supported and confirmed by other international monitoring bodies, like the CEACR and the ECSR.

41 Thirdly, that **any restrictions to these rights should be exclusively limited to certain conditions and situations**. Also according to Article 11§2, 1st sentence of the Convention, any restrictions to these rights are exclusively limited to certain conditions and situations, such as being prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. Taking in particular into account the case-law of the 'competent organs' for the application of the relevant international law (see above, in particular paras. 15-17, 24 and 31) there is no justification to limit the applicants' rights deriving from Article 11 of the Convention.

42 Fourthly, and related to the previous point, **in interpreting the permissible restrictions in relation to Article 11 ECHR, the Court should take account specifically of the international and European competent monitoring bodies denying even the need for a 'principle of proportionality' as a permissible restriction of the right to strike** and that at least the need to assess the proportionality of interests never included a notion of freedom of establishment or freedom to provide services. (see above paras. 15-16, 31)

IV. Conclusions

43 Based on all the above, the ETUC invites the Court to consider that, under the current application, Norway is in violation of Article 11 of the Convention.

Table of contents