INTERNATIONAL / TRANSNATIONAL PRIMARY AND SECONDARY COLLECTIVE ACTION

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An overview of international, European and national legislation

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1. Introduction

The ETUC's call to incorporate into the Treaty transnational trade union rights, including the right to (international) sympathy action, represents a longstanding demand. The demand for this fundamental right has been a crucial element throughout the several ETUC campaigns for more and better fundamental rights. Reference can be made to the 1995 ETUC Congress Resolution "For a strong, democratic and open European Union built on solidarity", to ETUC resolutions and proposals for the 1996 IGC, to the resolutions of the 1999 ETUC Congress, as well as to several important contributions to the drafting process of the EU Charter of Fundamental Rights adopted in December 2000 at Nice.

Recently, a further discussion was held at the ETUC Steering Committee of 14 February 2001, triggering the ETUI to conduct some initially exploratory and limited research on the regulation of international collective action, in particular strike action. The research looked into the international, European (EU and Council of Europe) and national regulation of the issue, examining the issues of both international **primary** and **secondary** collective action.

It must be pointed out from the outset that, in relation to international industrial action, the same fundamental distinction has to be made as in the case of national industrial action: collective action can be either primary or secondary. International industrial action is primary if in different countries a collective action takes place at the same time (e.g. concerted action in a cross-border context to support demands on a European level). The action is, on the other hand, to be regarded as secondary if, in one or more countries, action – referred to as sympathy or solidarity action – is taken in support of initial primary action in another country (e.g. conflicts within large international groups of companies where decisions on major changes concerning plants, production, etc. might be contested – e.g. the Renault "Euro-strike" in support of the workers of the Vilvoorde plant in Belgium).[1] Throughout this report, this distinction will be stressed and maintained.

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2. The international level

The **International Covenant of Economic, Social and Cultural Rights** (1966) states in its article 8 that the States Parties to the present Covenant undertake to ensure that: "(d) (everyone has) the right to strike, provided that it is exercised in conformity with the laws of the particular country."[2] Not only is there thus a restriction in the article as such but furthermore it is stated in article 4 that "the States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be

[1] For another possible and more detailed typology, see Bruun and Veneziani (1999). For a definition of "solidarity strike" and "sympathy strike", see Betten (1985 : 149-150).

[2] Observe that this right is thus formulated as an individual right, prompting Craven to argue that the individual should, in particular, be protected from dismissal on this ground.

compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". It thus appears to be the case that this also applies to international primary and secondary action and that it is thus considered that it can be undertaken only to the extent allowed by national legislations. In particular, the reference in the article to "laws of the particular country" could pose serious limitations on the right to take secondary action, especially with respect to ascertaining with reference to which national legislation the action has to be considered lawful. For the impact of these legislations, see below. This argumentation seems to be confirmed by Craven (1995) who begins by arguing that article 8 does not allow a general prohibition on the right to strike since certain members of the controlling Committee of the Covenant stressed the fact that the right to strike was central to the ability of trade unions to conduct collective bargaining.[3] He furthermore admits that this Committee has yet to establish an understanding of what form of action is protected by Article 8 (1)d and states that "in addition to the traditional forms of strike (characterised by complete stoppage of work) and its variants (such as the wildcat and **sympathy strikes**), there are several other forms of industrial action that might also be included in the definition, such as partial stoppage of work, the go-slow, the work to rule, the sit-down strike and the repeated walk-out". He therefore recommends that a broad definition be adopted but that a certain flexibility be given to the States as to the restrictions imposed on various forms, with the fundamental consideration being whether or not the action taken is in pursuit of the economic and social interests of the workers concerned. He seems to suggest that the basic guideline of interpretation should be the rule and case law on ILO convention n° 87 as he states further on in the article that "for those states that are party to ILO convention N° 87, the terms of article 8(1)d have to be read in conformity with the provisions of the convention" (Craven 1995).

As for its "political and civil" counterpart, the author tends to agree with Betten (1985) that article 22 of the **International Covenant for Political and Civil Rights (1966)**, and the lack of specific interpretation by the Human Rights Committee, does not allow any general conclusion that this article would cover the right to (international or national) strike.

The fundamental **Convention n° 87 of the International Labour Organisation (ILO)** contains no explicit provisions concerning national and international primary and secondary industrial action.[4] On the basis of this Convention, however, the Supervisory Bodies of the ILO , i.e. the

[3] Craven (1995), referring to "e.g. Konate, E/C/12/1990/SR. II, at 6, para 37. As well as to member Sparsis who asserted that the possibility of conducting meaningful collective bargaining without the right to strike was "an exercise in futility". (Sparsis, E/C. 12/1988/SR.4,at 6, para. 32.)

[4] In fact this is the case for all instruments of the ILO relating to trade union rights, such as Recommendation n° 92 concerning Voluntary Conciliation and Arbitration (1951). Betten (1993) describes how mainly employers' organisations but also some governments in the ILO conferences used this argument to contest the huge bulk of case law on the right to strike. They argue that there is no legitimate basis for such an assumption and that the right to strike was never meant to be implicit in Convention n° 87. In a resolution submitted at the 1992 ILO conference, they even called upon the Conference to promote efficient voluntary mechanisms to settle industrial disputes and to consider this issue at a subsequent meeting of the ILO Conference because they stressed that "the basic instruments of the ILO on freedom of association and industrial relations do not address problems related to equitable settlement of industrial disputes". (ILC, Provisional Record 1992, at. p.1/2) The American employer organisation even came up with the argument in 1992 (so after the existing case law on the right to strike was already well established) that in the meantime a lot of countries had ratified the convention unaware that the right to strike was involved. Other speakers, according to Betten, pointed out that the violation of the Committee of Experts' interpretation of Convention n° 87 was against the Vienna Convention on the Law of Treaties which requires prior agreement regarding the interpretation of a treaty or the application of its provisions between parties and prior practice followed in the application of that treaty. Based on a very detailed study of the legislative history of the Convention n° 97, Ben-Israel (1987) proves that the issue of the right to strike was

Freedom of Association Committee and the Committee of Experts (CEACR), have established, based on Article 3.1 of the Convention, a considerable and comprehensive case law on the right to strike as well as on other forms of collective action[5]. So far, these Committees have expressed themselves only on cases concerning national secondary action. However, it may be considered that the international dimension of this form of industrial action could also be covered, given the line of argument taken by the Committee.

Concerning secondary/sympathy action, the ILO argues along the following lines. In its General Survey of 1983, the Committee of Freedom of Association (CFA) defined sympathy strikes ("where workers come out in support of another strike") and determined that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action provided that the initial strike they are supporting is in itself lawful.[6] The CFA then took up this principle in 1987 when it examined a Decree that did not ban sympathy strikes but merely regulated them by limiting the possibilities of recourse to this type of action. In the Committee's opinion, although several provisions in the Decree might be justified by the need to respect various procedures (e.g. notification of strike to labour authorities) or to guarantee security within the undertaking (e.g. the prevention of agitators and strike-breakers from entering the workplace), others, however, such as **geographical** or sectoral restrictions placed on sympathy strikes – which therefore exclude general strikes of this nature – or restrictions on their duration and frequency, constitute a serious obstacle to the calling of such strikes.[7] Some important cases have lately confirmed this case law. In case n° 1963 on Australia (regarding a dock workers' conflict), the CFA recommended in March 2000 in §241 that "the Committee request the Government to take the necessary measures, including amending the Trade Practices Act, to ensure that workers are able to take sympathy action provided the initial strike they are supporting is lawful". Furthermore there is case n° 1865 on South Korea, dealt with at the same meeting, and where the CFA recommends in §530 that it recalls "that workers should have the right to carry out strikes on economic and social issues as well as protest and sympathy strikes (…)". In 1994, the CEACR made a statement along similar lines: "sympathy strikes, which are recognised as lawful in some countries, are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalisation of the economy and the delocalisation of work centres. While pointing out that a number of distinctions need to be drawn (such as exact definition of the concept of a sympathy strike; a relationship justifying recourse to this type of action, etc.), the Committee considers that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful".[8]

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indeed considered but that the main reasons why it was not explicitly mentioned relates more to procedural difficulties, political differences, the feeling that specific elaboration was unnecessary, and the workers' fears that specifying a right to strike would also lead to its restriction. Betten in any case recommends that since the employers' refusal to any longer accept the interpretations on this issue would create serious problems, the question needs to be addressed explicitly. In relation to the issue of this paper, the detailed description by Ben-Israel of the legislative history of Convention n° 87 provides no real arguments that the international dimension of strike was guaranteed, let alone considered.

5 See ILO (1994) and ILO (1996)

6 ILO (1983: para. 217)

7 ILO (1987) (Case 1381, paras. 417 and 418) which stipulates that the provisions of the Decree stipulated that solidarity strikes were limited to five days and that they could be not be called more than twice in one year by workers in the same undertaking); the same can be found later on in 277th report, Case N° 1549, para. 449.

8 ILO (1994), para. 168.

Although there is thus no explicit recognition of the right to international secondary action, it could, on the basis, as mentioned, of the Committee's argument and in particular the prohibition of "geographical restrictions", be presumed that this case law could thus apply to international secondary action. An argumentation could however be built up on the basis of the CEARC report of 1989 reporting on a case in relation to the United Kingdom on the restrictions on the taking of sympathy actions against the apartheid regime in South Africa. It is mentioned there that "workers have the right to resort to sympathy actions in order to safeguard their social and economic interests (more in particular governments' policy in the respective issue) and that it is lawful to strike : a) if the workers are affected either only in the country of origin or in both countries, i.e. if the country in which the sympathy action is resorted to, as well as b) the strike actions in both countries not being unlawful themselves."[9] This brings Ulf Edström (2001) to the tentative conclusion that the ILO clearly supports the right to resort to trade union sympathy action at national level and that, moreover and based on the case against the UK, it is recognised that sympathy actions are related to the issue of globalisation. He regrets of course that the right to resort to cross-border sympathy action, under certain conditions, is expressed in such vague terms.

Finally, mention should also be made of **the ILO Declaration on Fundamental Principles and Rights at Work,** adopted in June 1998 which urges the Member countries, even if they have not ratified the Conventions in question, to respect, promote and realise the principles concerning the fundamental rights which are the subject of those Conventions including the freedom of association and the effective recognition of the right to collective bargaining. The linking of this demand with the right to (international primary and secondary) strike can be argued on the basis of explicit and clear references to the relevant Conventions and the principles derived there from.

3. European level

3.1. Council of Europe

The European **Convention for the Protection of Human Rights and Fundamental Freedoms** refers in its article 11 to the individual's "right to form and to join trade unions for the protection of his interests". According to Advocate General Jacobs in his opinion on the Albany case[10], the European Court of Human Rights relied on the phrase "for the protection of his interests" in holding that freedom of association included the rights that were "indispensable for the effective employment" or "necessarily inherent elements" of trade union freedom.[11] Further, Article 11 therefore also "safeguards the 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."[12] However, for the concrete interpretation of this, Jacobs refers to the limited case law on this article that apparently recognised only the right to be heard by the State and which thus does not, according to Jacobs, imply a right to strike. Betten (1985 and 1993) takes a slightly different approach. Referring to the Schimdt and Dahlstrom case[13], she

[9] Report of the Committee of Experts in 1989 on United Kingdom, p. 239.

[10] C- 67/96 *Albany International*, C-115-117/97 *Brentjens*, C- 219/*97 Drijvende Bokken* Opinion of Advocate General *F.G. Jacobs* delivered on 28 January 1999, see Curia home Page http://europa.eu.int/cj/index.htm

[11] National Union of Belgian Police v. Belgium, 27 October 1975, Eur. Court HR Rep., Series A, 19 (1975), paragraph 39

[12] National Union of Belgian Police v. Belgium, 27 October 1975, Eur. Court HR Rep., Series A, 19 (1975), cited in note 68, paragraph 40

[13] Schmidt and Dahlstrom, Publ. ECHR, Series A, Vol. 21 (1976)

argues that the fact that the ECHR went no further than to say that "a right to strike represents without any doubt one of the most important means to protect [trade union members'] interests, but there are others", may suggest that the right to strike is covered by article 11. Betten furthermore refers to a not so frequently reported case "X v. Ireland" where the ECHR expressed the opinion that, in interpreting the meaning and scope of Article 11 in relation to trade unions, regard should be had for the interpretation given to ILO Conventions Nos. 87 and 98.[14] This case was however declared inadmissible, so the Court's opinion on this relation could not be given, nor did it take up this point in later cases. Given this restricted interpretation it is thus very doubtful that one can argue, on the basis of these clauses, for a right to take international primary and secondary action. The opinion in the case "X. v. Ireland" could open up some, albeit very meagre, routes of interpretation in favour of international primary and secondary strike by the ECHR.

Although the **Social Charter of 1961 (article 6, §4) and the Revised Social Charter of 1996 (idem)** both contain an explicit recognition of the right to collective action, including the right to strike, the Council of Europe, via its Committee of Experts (now European Committee of Social Rights (ECSR)), has so far expressed itself explicitly only about secondary action. In several conclusions the Committee referred to the information in the national reports on secondary action.[15] The most interesting (repeated) reference is actually the one to the United Kingdom where the Committee argued that the illegality of all secondary action in the UK, as then laid down in the Act of 1992, was to be regarded as a breach of the Charter. In addition, the ECSR criticised at several occasions that the German national legislation on strikes was not in conformity with the Charter since it states that all strikes not aimed at achieving a collective agreement are banned.[16] Article 6, § 4, does indeed provide a double limitation by referring to the right to take collective action "subject to obligations that might arise out of collective agreements previously entered into" and when the actions are entered into "in case of conflict interest". In agreement with this, Harris and Darcy state (2001) that it places severe restrictions on the right to collective action, including strike. Nevertheless, based on the observations of the Committee, as explained above, it could thus be considered as an argument that the right of action in the Charter and the implementing national legislation should also cover and allow national secondary action. Betten (1993) on the other hand sees a serious problem in this regard in the fact that the ECSR has not yet defined the term "workers' interests" and that it is, for instance, not clear whether sympathy strikes or strikes aimed at a socio-economic policy of a government, are covered by Article 6, § 4. In any case, all this does not, allow any argumentation in favour of the fact that Article 6 §4 also covers international secondary or even primary action. Nevertheless, the bodies of the Council of Europe must be aware of the importance and relevance of extending the

[14] X. v. Ireland, Yearbook ECHR XIV (1971)

[15] Conclusions XIII-1 (UK) and XIII-2 (Malta), Conclusions XIV-1 (UK), Conclusions XV-1 Vol 1 and 2 (Sweden, UK, Finland and Spain) and the Addendum to Conclusions XV-2 (Slovakia)

[16] This led even to a Recommendation by the Committee of Ministers (Recommendation N° R ChS. (98) 2. When this item was discussed again at the 97th Governmental Committee (14-18 May 2001), the report on Article 6 § 4 mentioned that the ETUC explained, following a question by the French governmental representative on the position of the German trade unions, that these trade unions favour protection of the right to strike also for other purposes than the conclusion of a collective agreement. In the official report by the European Committee of Social Rights, reference was made to a judgment of the labour court of Gelsenkirchen (in first instance) of 13 March 1998 relating to the dismissal of a worker following a strike action found reason which expressed doubts that the national law with respect to strikes not aimed at a collective agreement and not let by a trade union is compatible with Germany's international obligations, notably under Article 6,§ 4 of the Charter. It further stated its expectation that strikes not relating to the conclusion of collective agreements will become more frequent in the future and that the question of their legality will therefore grow in importance.

recognition of the right to strike in article 6, §4 to international forms of industrial action, since Jacobs (1978) refers to a working paper by a Professor Zacher, presented at a symposium of the Council of Europe, on the European Social Charter and European Social Policy, in which he expressed this desirability.

3.2. European Union

When describing the situation of the right to take industrial action, including the right to strike, in the European Union, a clear distinction must be drawn between legally binding provisions on the one hand and political declarations on the other. However, the picture is somehow obscured by the fact that the fundamental rights are already enshrined in the Treaty itself – albeit by means of a reference technique in which the European Convention on Human Rights retains a predominant place. Despite that fact, there can be no doubt of the fact that fundamental rights, including trade union rights, form part of the general principles of Community law, which are then interpreted on a case-by-case basis by the European Court of Justice.

3.2.1. Legally binding provisions

The Treaty

In the first instance, reference should be made to the **Article 137, §6 of the Amsterdam Treaty** which states that " the provisions of this article shall not apply to pay, right of association, the right to strike or the right to impose lock-outs." The ETUC was confronted with the restrictive interpretation given to this article when negotiating with the European employers UNICE and CEEP a framework agreement on temporary agency work. At the request of the negotiating parties, the Legal Service of the Commission affirmed in an oral statement that no European framework agreement could explicitly mention the right to strike or regulate its modalities.[17] It is thus for the moment impossible to have any legally binding provision within the EU Social Dialogue on the right to strike and the terms of its exercise, including for international primary and secondary action.

"Posting – directive"

The Preamble of the Directive[18] sets out in its Recital No. 22: "Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions". According to Sulkunen, the origin of this Recital is the joint amendment of Denmark and Sweden, i.e. those Nordic Members States where collective agreements do not have any *"erga omnes"* effect. Through this amendment those Governments aimed to establish safeguards to their industrial relations system where foreign employers sign a special collective agreement ("*hängavtal*") with local trade unions whereby they commit themselves to observe similar conditions with regard to their employees as provided for by the appropriate national collective agreement and that unions have the legal right to support their claims for such agreements when necessary by an industrial action which thus does not violate the obligation of industrial peace obligation otherwise deriving from the national collective agreement. Sulkunen (1999-2000) considers, therefore, that while the Directive itself emerges from the (transnational) provision of services, the recital is of an exclusively national character and without transnational effect.

[17] The reason for this request for opinion of the legal service was UNICE's refusal to integrate into the framework agreement a provision which prohibiting the replacement of striking workers by temporary agency workers.

[18] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal L 018 , 21/01/1997 p. 0001 – 0006.

"Monti regulation"

On 7 December 1998, the European Council adopted Regulation (EC) No 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States, or the so-called **"Monti regulation**", the purpose of which is to prevent the free movement of goods from being obstructed by actions of private individuals. This measure was considered necessary after the roadblocks by French farmers which obstructed all movement of vegetables and fruits to, from and through France[19] and which were later followed by roadblocks of French lorry drivers[20]. It was envisaged from the outset that this regulation would endanger the right to collective action, including strike. In the first proposal of 18 November 1998, the measure was extremely far-reaching. In fact, the Commission wanted to see itself empowered to be able to take a rapid decision in the event of grave and unmistakable obstacles to the free movement of goods which caused serious loss to the individuals affected and required immediate intervention. This would be a rapid and effective alternative but also complementary mechanism enabling individuals to defend their rights before national or European courts. In the first proposals, there was in the hard-core provisions no mention of, or even safeguard for, the right to collective action, including strikes. The explanatory statement and the related press release mentioned only that the Commission certainly did not aim to undermine the exercise of basic rights, such as the right to strike. Its wish was to ensure via article 1 that the proposal would not "adversely affect the exercise of fundamental rights recognised under national law".

In a first reaction to Commissioners Monti and Flynn of 26 February 1998, the ETUC stressed that the proposal submitted by the Commission was deeply worrying with respect to its possible consequences for the safeguarding of the fundamental right to strike/industrial action. The ETUC (1998b) was therefore firmly opposed to the proposal submitted, which it urged the Commission to withdraw in its current form. It also strongly urged – assuming that the debate would continue – that the Commission consult the social partners prior to submitting a new or revised proposal. Furthermore, the guarantee offered by Article 1 was considered far from sufficient. The ETUC identified, after an in-depth analysis in cooperation with its legal experts network NETLEX, several major problems in the text of the proposal as it then stood. The most important point raised by the ETUC was that, though the proposal included the reference "without adversely affecting the exercise of fundamental rights recognised under national law", the Commission had made it clear in different ways that, to the contrary, it considered that there could very well be situations which presented a disproportion between the right to strike and the consequences thereof for the freedom of movement of goods. At the same time, the Commission admitted such situations had to be dealt with case by case (by the Commission), and also that it would be difficult (for the Commission) to define whether a (industrial action) situation fell within the scope of "fundamental rights" and whether it was proportionate or not and thereby acceptable from the point of view of the Commission. It was also known that the Commission was even considering how one could have an arrangement to reduce negative implications of strikes for the free movement of goods (e.g. through establishment of transport corridors neutralising the industrial action). One of the clear-cut consequences of the proposed intervention mechanism

[19] For which the French government was condemned by the European Court of Justice for not having taken all necessary and appropriate measures in order to prevent the free movement of fruit and vegetables from being obstructed by private individuals and thus failed to fulfil its obligations under Article 30 of the EC Treaty, in conjunction with Article 5 of that Treaty. (ECJ, C-265/95, 9 December 1997)

[20] For a description of a similar case in Austria, the so-called "Brennerblockade", see: Kirst, Richard (1999), Rechtliche Aspekte der Brennerblockade- Versammlungsfreiheit contra Freiheit des Warenverkehrs, in Osterreichische Juristen Zeitung, Nr. 7 (1999), p. 241-250.

would have been, according to the ETUC, that the Commission becomes empowered to decide 1) whether or not a strike/industrial action is within the scope of "fundamental rights under national law" and 2) whether or not is should be considered proportionate. This would mean that actions, which were perfectly lawful in a Member State, might become unlawful – through the intervention of the Commission – if they obstructed the free movement of goods.

Despite strong negative advice from the Legal Service of the European Council which considered that to empower the Commission with such competences a Treaty revision rather than a Council Regulation was required, further proposals were submitted, albeit specifying a clearer protection of the right to collective action, including strike. These amendments are reflected in the final text of the Regulation. The protection is in fact twofold. Firstly, the fourth consideration includes the mention: "Whereas such measures must not affect the exercise of fundamental rights, including the right or freedom to strike". Secondly, there is the explicit protection in the hardcore provisions since Article 2 specifies, "this Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States." Furthermore, Article 5, para. 2 states that "in reaching its conclusion, the Commission shall have regard to Article 2"; [i.e. when the Commission considers whether an obstacle within the meaning of the Regulation is occurring in a Member State].

Generally speaking, the strong criticisms and demands for basic changes in the initial proposal from the side of the ETUC had thus been addressed in the final version of the Regulation. In a circular to its affiliated organisations the ETUC (1998c) clarified that, as a result, its reservations, in particular concerning the right to strike, had been lifted on the following grounds:

- it has been explicitly stated that the enacting of recognised fundamental rights cannot be considered an obstacle within the meaning of the Regulation, applying a broad definition (including "other actions") in order to cope with the diversity of the national legal situations and with an extensive safeguarding ("may not be interpreted as affecting in any way….");
- Whereas the initial proposal could result in national legal strikes / industrial actions being ruled non-legal at EU level, the now politically agreed Regulation does not entail this potential risk;
- Whereas the respect for the fundamental rights to strike / take industrial action have not been explicitly recognised in a binding manner at EU level so far, the Regulation constitutes a positive step in this direction and, as a clear improvement on the present situation, at least remedies possible existing uncertainties in this respect. This will also be of importance in possible future cases for the European Court of Justice.
- The agreed text implies no changes to the present as regards the national competence on fundamental rights, etc., nor a weakening of the rights themselves. (Consequently, however, possible national shortcomings in this respect will neither be remedied nor aggravated by the new Regulation. Whether strikes / industrial actions will be legal or not at national level will remain unchanged.)
- Against the background of the approach as well as the specific provisions of the Regulation, the question of the legality of a given trade union action remains, as stated, a national competence; in practice this means that until a final clarification has been reached in the national proceedings, a stand-still situation exists as regards whether the incident is to be considered an obstacle within or without the meaning of the Regulation. Art 5, para. 2, further underpins this.

The ETUC furthermore underlined that the initiative of the Commission highlighted the existing shortcomings, lacking an explicit and binding recognition of the trade union rights at EU level; shortcomings which were not remedied by the new Amsterdam Treaty.

As mentioned, this regulation was considered necessary after national actions with which nonetheless entailed international consequences. Though not explicitly mentioned, it can be presumed – on the basis of the broad definition of collective actions – that it could apply to international primary and secondary action, in particular since the text contains no geographical restriction. The real restriction lies of course in the words "covered by specific industrial relations systems in Member States". For the consequences of this phrase, we refer to the description of the national systems on international primary and secondary action.

It should furthermore be mentioned that this Regulation was complemented by a Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the free movement of goods. Of importance here is the ninth indent that emphasises "that there is no question of interventions (by the Commission) that might restrict or adversely affect the exercise of fundamental rights, including the right or freedom to strike as recognised in the Member States." This Resolution invites amongst others the Commission to submit a report on the application of the Regulation two years after the entry into force thereof.

This Report, COM (2001) 160 final, was presented in March 2001. The Commission mentions, 22 times in total, that in 1999 and 2000 the information exchange system, as enshrined in the Regulation and the Resolution, has on the whole functioned fairly well over the last two years. However, there are doubts about the real effectiveness of these two legal instruments in preventing or eliminating obstacles. The only thing that can be established is the existence of short-lived obstacles. With a view to resolving the weaknesses of the regulation, the Commission suggests three possible scenarios:

- maintaining the status quo: the Commission feels that the existing legal framework requires genuine cooperation with the Member States at several levels;
- a more dynamic approach in applying the Regulation and compliance with the Resolution (for example, adoption of a vade-mecum intended for the Member States and economic operators, an ad hoc system of regular information for the Council and the European Parliament on the course of each case of application of the Regulation);
- amendment of the Regulation to extend and improve its scope (for example, elimination of any ambiguity in the definition of obstacles requiring rapid intervention under the Regulation, illustrative list of the necessary and proportionate supporting measures to restore as soon as possible the free movement of goods in the territory of the Member States, an extension of the scope of the Regulation to include situations not currently covered, the introduction of an accelerated procedure for bringing proceedings before the Court of Justice in the absence of a reply from a Member State, the insertion of a provision in the Regulation requiring Member States to adopt swift and effective ways and means of compensating individuals damaged by an obstacle).

In relation to its own limits to intervene, which the Commission considers a weakness of the Regulation, the Commission however recognises that in this context considerations of the maintenance of public order, safeguarding of internal security and the exercise of fundamental rights play a crucial role. Speaking of fundamental rights, the Commission refers in a footnote to the EU Charter of Fundamental Rights article 28 of which "recognises the right of workers and

employers, in accordance with Community law and national legislation, to take collective action in defence of their interests, including the right to strike". (European Commission 2001:12)

The relationship between freedom of movement and the strike weapon

The previous two sections showed how the concept of freedom of movement, as a recognised pillar of the European Community, could form a real threat to the right of (international) strike. This is not the first such occurrence in the Union's history. Betten (1985) already reported on famous cases, like the "Hertz" and "Herséant" cases, which triggered discussions in the European Parliament, mainly because they concerned the import of workers from abroad to break a strike or the export of activities abroad from enterprises hit by strikes. Betten – rightly – stresses that recourse to of this freedom can undermine the right to strike. She therefore calls for the adoption of legislation at Community level, in particular international solidarity actions, international blacklegging and diversion of production in cases of strikes. She moulds these ideas into a proposal for a Regulation "concerning the prohibition of cross-border blacklegging and diversion of goods and services within the Community in the course of an industrial conflict" and a proposal for a Directive "with regard to the Harmonisation of Laws concerning Solidarity Strikes" at the end of the publication. In relation to solidarity strikes, the proposal refers to both the right of workers and trade unions to organise international solidarity strikes whereby the strike in support is in principle lawful as long as it is not judged unlawful in court. She also doubts, however, whether legislation will by itself suffice, and suggests that workers prevent it by coordinating their actions across national borders. It is interesting that in this sense she refers to international collective bargaining in multinational enterprises which should be coordinated. This can then lead to coordinated strike action in cases where negotiations fail. This may, however, be hampered by national differences in the rules on collective bargaining and strike.

3.2.2. Political Declarations

The issue of the protection of fundamental rights, including social and trade union rights, in the European Community is in effect as old as the Community itself, so that the list of efforts to move towards these fundamental rights is quite impressive. A first major breakthrough was achieved, however, in 1989 with the adoption by eleven of the then twelve Member States of the **Community Charter of Fundamental Social Rights of Workers,** a solemn political declaration without any legal weight but which was however subsequently accompanied by a social action programme through which it came, at least, to form a basis for European social policy in the 1990s.

This Charter specifies in its Article 13 that "the right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements. (…)" It could be argued that this provision also covers international primary and secondary action but this optimistic interpretation is largely restricted by the fact that the right to strike is here made subject to the obligations arising under national regulations and collective agreements. To evaluate the impact of this restriction we again refer to the section "National level".

The second important political declaration is of course the **European Union Charter of Fundamental Rights** adopted at the Nice Summit in December 2000. In its final version, article 28 provides that "workers and employers, or their respective organisations, have, in accordance with Community law and national law 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." (and thus not to the right to

strike)[21] Despite the promising wording of some draft versions of the text and despite continuous pressure from the ETUC and the European Parliament, the text does not refer explicitly to the European level in relation to collective action. In fact it only refers in relation to the right to collective bargaining to "the appropriate level". The explanation in Convent 49, referring to the explanation in article 27 on information and consultation, mentions that "appropriate level refers to "the levels laid down by Community law or by national laws and practices, which might include the European level when Community legislation so provides". Again, to note is that the terms "appropriate level" do not, according to the author's reading, refer or link to the right to collective action, only to the right to negotiate and conclude collective agreements. Apparently, in a letter of 3 January 2001 from the Swedish Minister of Foreign Affairs, Mrs. Anna Lindh, to the Presidents of LO, TCO and SACO, the Swedish Government asserts that the coverage on European level also applies to the right to collective action as the letter says "*We have nevertheless achieved that Article 28 now clearly states that the right to negotiate and the right to take collective action apply "at the European level."* According to a letter to the ETUC, the Danish government representative, participating in the EU working party on the Charter, had however another interpretation claiming that the European level is not included. The main reason was apparently that a compromise was reached within the Convention to leave out the "European level" but to delete the reference in the text of the Charter and its explanatory guide to the negative freedom of association. One also has to remain content with the explanatory notes provided in the so-called Convent 49 in relation to strike action which mentions strike as a collective action which is limited to as it emerges from national legislation and practice, including the question to know whether these actions can be taken in different member states in parallel. This thus places a tremendous restriction on cross-border strikes and sympathy actions, as these are not or not effectively regulated by national legislations.

3.2.3. A legislative attempt by the European Parliament

Already in 1974, the European Parliament (1974) raised, in a debate on a Communication from the Commission to the Council on multinational undertakings and Community Regulations, the issue of international solidarity strikes by tabling an amendment by the Communist Member Carpentier, the purpose of which was to ensure that any European legislation should eliminate the obstacles in certain countries to manifestations of solidarity between trade unions, in particular those taking the form of sympathy strikes. Later on, however, the amendment was rejected.

On the basis of a piece of own-initiative research conducted by Professor Brian Bercusson[22], the Social Affairs Committee of the European Parliament took the lead in trying to legislate transnational trade union rights. On 14 January 1997, Rapporteur Mrs. Oomen-Ruyten submitted her first draft report on trade union rights. The initiative was mainly seen as the implementation of the 1989 Community Charter as part of the *acquis communautaire* by means of the inclusion of the proposed articles in the Treaty of the European Union.

From the outset the Committee highlighted the contradiction which existed between the 1989 Community Charter, which sought recognition of the right of association (and collective action) at European level, and then Article 2(6) of the Agreement on Social Policy (now article 137(6)),

[21] Sulkunen (1999-2000) considers however that the word "right" in the beginning of the phrase refers to the collective action as well and thus also to the phrase "strike action". He agrees however that the fact that the right to strike is not specifically mentioned is of course a defect, in particular in comparison to Art. 6(4) of the European Social Charter.

[22] European Parliament (1997b)

which excludes the right of association (and the right to strike) from the powers and responsibilities of the EU. The Committee therefore recommended repealing article 137(6) at the next review of the Treaty.

The Committee considered furthermore that the ILO conventions 87 and 98 had to be extended to apply to Community level.

In concrete terms, the report provided, next to provisions relating to the transnational right of association and collective bargaining, the following text concerning the right to collective action:

> *"The right to resort to collective action in the event of a conflict of interests shall include the right to strike at national and transnational level, in particular when transfrontier workers are affected by employment policies pursued by the undertaking where they are employed.*
>
> *In order to facilitate the settlement of transnational industrial disputes the establishment and utilisation at the appropriate levels of conciliation, mediation and arbitration procedures should be encouraged."*

In the explanatory statement, the Rapporteur considered the right to collective action as a necessary corollary to the right to collective bargaining. She highlighted however that collective action is permissible in some European countries only in respect of national bargaining on working conditions. To prevent the trade union movement in particular from having to conduct European bargaining without any appropriate instruments, the right to collective action had to be enshrined in the Treaty. This right should extend to collective action in the case of (a) bargaining at European level, and (b) in case of bargaining at national level in order to implement European agreements in the form of national agreements.

Member States and the Community institutions were obliged to take all necessary and appropriate measures to ensure that trade unions, workers and employers could freely exercise these rights.

The Committee called however also on the EU social partners to address the problem of establishing a European arrangement governing trade union rights as part of the social dialogue and to lay down negotiating rules and principles in that connection, mainly because it considered that it is the primary responsibility of these partners to establish trade union rights.

It should be noted that the enlargement process was seen as one of the necessary conditions to regulate these rights, whereby it was hoped that the applicant countries would fulfil all the conditions mentioned in the European Convention on Human Rights and the European Social Charter. This was mainly argued by the fact that there were and are differences not only in the EU member states but also in the applicant countries on the approach to trade union rights and that not all countries have a tradition in which such rights are respected.

In a first reaction to the proposal, the ETUC reiterated its regret that fundamental transnational trade union rights, including the right to strike, were not enshrined in the Amsterdam Treaty and ensured that this would continue to form one of its priorities. Also the fact that article 137(6) was not repealed was considered a missed opportunity. The ETUC was, as a matter of principal, firmly opposed to the idea that trade union rights should be considered a topic for negotiations between the social partners.

In subsequent versions, the content of and the argumentation concerning the right to collective action were not significantly amended. (European Parliament 1997 a-b and 1998 a-b) The EP Committee on Employment and Social Affairs adopted the report and the related proposal for a resolution on 3 March 1998 with 17 votes to 4 and 2 abstentions. Following this adoption, the EP adopted on 2 July 1998 a Resolution on transnational trade union rights in the European Union. The EP reiterated its demands for establishment and implementation at the appropriate level of conciliation, mediation and voluntary arbitration procedures in order to facilitate the resolution of transnational conflicts. Secondly, it urged again to repeal at the next review of the Treaty the content of Article 137(6), in particular regarding the right of association and the right to strike. It furthermore demanded that the Commission in its annual report on the implementation of the objectives of Article 136 of the Treaty of Amsterdam should pay explicit attention to the securing of an arrangement governing trade union rights at European level.

3.2.4. The Commission's position

The Commission has consistently held, in replying to MEP's questions, that the regulation of the right to strike falls within the competence of Member States. The following short and pithy statement can be extended to other fundamental economic freedoms as well: "The principle of the right to freedom of establishment does not affect the right to strike and the right to strike does not affect it." [23] In similar cases of industrial action and alleged violations of trade union rights the Commission has consistently replied that it has no competence in these matters. [24]

3.2.5. Case Law of the ECJ

In the cases *Albany, Brentjens* and *Drijvende Bokken*[25] as well as later in *Pavlov*[26] and *van der Woude*[27] collective agreements were sheltered from competition rules. Transnational aspects of the right to strike were not directly involved in these decisions, although Advocate-General *F.G. Jacobs* in *Albany* etc. raised the issue of the right to strike in Community law in general in his opinion. Based on his own analysis of the international and European instruments on fundamental (social) rights, he considers in paragraph 159 of this opinion that the right to take collective action in order to protect occupational interests, insofar as it is indispensable for the enjoyment of freedom of association, is also protected by Community law and that this is the case despite the fact that there exists no legal basis except for the exclusion-clause in article 137 § 6. This reasoning under the best circumstances could be used to argue that a right to strike, including international primary and secondary action, is protected by Community law. Furthermore, it could be argued in line with Sulkunen that although there is no explicit mention of the right to strike in the text of the final judgment, the wording of the Albany judgment refers not only to the already existing and valid collective agreements but also to the whole bargaining process which is sheltered from competition rules which could have some relevance in the light of a three-dimensional concept of trade union rights, i.e. right to organise, to collective

[23] Reply to MEP Goutmann's question about the plans of the Publishing House *Herséant* to move the printing of French papers (*Figaro, France-Soir* and *Nord-Eclair*) to Belgium, near the French border , due to a strike taken against the Publisher, OJ C 214/18, 7.9.1977.

[24] E.g. OJ No. C 25/53, 28.1.1994, Q E-1835/93 (injunction imposed by a local court in Elefsna Dockyards).

[25] C- 67/96 *Albany International,* C-115-117/97 *Brentjens,* C- 219/*97 Drijvende Bokken* Opinion of Advocate General *F.G. Jacobs* delivered on 28 January 1999, see Curia home Page http://europa.eu.int/cj/index.htm

[26] C-180-184/98 *Pavlov*,

[27] C-222/98 *Van der Woude*; *Bruun, Niklas & Hellsten, Jari (2000);* Sulkunen, Olavi (1999/2000)

bargaining and to strike. However to conclude that this would have also an impact on international collective action would need an imaginative argumentation.

Earlier cases give rise to only fragmentary and tentative conclusions regarding the relationship of the right to strike and other economic freedoms in EC law. The reason probably lies in the fact that national courts have held that the regulation of industrial action falls beyond the competence of the EC institutions and, therefore, they have not even considered it necessary to clarify the situation in their formulation of questions for preliminary rulings.[28]

*Danske Slagterie*r[29] gives ground for an indirect conclusion that the law of the State where industrial action is taken and/or where it has been announced to take place determines the legality of a strike. Secondly, the strike notice annuls the criteria applied by the ECJ regarding the assessment of *force majeure* in commercial transactions, i.e. the unforeseeability, unusuality and uncontrollability. From this case the principle can be derived according to which also broader attention should be paid to the methods and practices of industrial action in the branch and country concerned. Hence, no definite conclusions about the right to transnational industrial action can be drawn from this case. However, the case has some relevance in the interpretation of the Monti-agreement insofar as transnational aspects of the right to strike are concerned in the sense that the lawfulness of primary action in one Member country and secondary action in another should be assessed according to the principle of *lex locus actus* in both countries.

4. National level

It must be noted from the outset that the legal prerequisites of international secondary action usually correspond with those of national secondary action. Aaltonen rightly states that the systems of most member states thus constitute a "pyramid" with international secondary action and its legal conditions at the top, but that this action should also meet the legal conditions for national primary and secondary action, being located at a lower level of the pyramid.

4.1. International primary collective action

In a questionnaire to its trade union legal experts network, NETLEX, the ETUC put the following question: "*With the emergence of more European wide agreements, the following must be considered. What if such a European wide agreement were to be violated and the signatory trade union structures, coming from different countries, were to consider organising a common European action taking place simultaneously in their respective country? This would mean that there is only a primary - albeit transnational - action. But what would - from your point of view - then be the legal constraints and/or needs on both EU level and national level?" (ETUC/ETUI NETLEX 1998) A selection of the relevant answers showed the following:*

In **Belgium,** such a situation would not pose any problem.

For **Denmark** it was argued that it would be a basic demand that the international industrial agreement allow the use of strike as a sanction against infringement, but even in such a case it is uncertain that the strike would be legal according to Danish labour law case law. This is mainly because the use of the strike weapon is limited to only a few situations. But for the purpose of

[28] See, e.g. C-179/90 *Merci v Siderurgica* [1991] ECR I-5889.

[29] C-338/89 *Organisationen Danske Slagterie*r [1991] ECR I-2315.

obtaining a transnational agreement between unions and employers, a strike can legally be used as a measure whether or not other countries participate in this primary conflict.

Though recognising the hypothetical nature of the question, the respondent from **Finland** stated that Finnish law would apply. If the European-wide agreement has been duly transformed and forms part of a national collective agreement, the obligation of industrial peace would, however, prevail, thus limiting the use of strike to resolve the dispute. If no transformation took place, or if the employer to the European-level agreement were alone in breach of the agreement, then industrial action taken in Finland to support the European initiative for its defence might be considered to fall under the rules on secondary strikes as regulated by national law and case law.

For **France,** the CFTC representative considered that, if the European trade union organisations were to organise an action following the violation of a European agreement, it would need to ensure that they call only for a strike by the employees affected by the violation of the agreement and that they fulfil all formalities to issue a call for action as laid down by law.

Under **UK** legislation, there would essentially be a separate trade dispute between the UK workers and their own employer relating to their own terms and conditions. Provided this industrial action was authorised by a properly conducted strike ballot, the action could be co-ordinated with action of other unions across Europe. There are two points worth mentioning: (a) the requirement for a pre-strike ballot and specific provisions for notice to employers does mean a delay before industrial action in the UK can be commenced, and (b) if the employer in the UK chose to resolve the dispute with its own workforce, the workforce would not be able to continue the action in support of their European colleagues.

4.2. International secondary action

Here, two introductory remarks have to be made. On the one hand the conditions or circumstances under which national secondary action can take place largely depends on the criteria set for national primary collective action. Secondly, the conditions to be fulfilled to conduct international secondary action often largely depend on the conditions set in national legislation to conduct secondary action in the national context.

Examples of transnational action that are envisaged are :

- work stoppage in sympathy for employees in the concerned country by employees of your country working in plants of the same and/or other company.
- “blacking”, i.e. refuse to handle products or production transferred to your country by the plants affected by the primary action.

Analysis of the answers to that same ETUC questionnaire and of relevant literature revealed the following:

In **Austria** there is no specific legislation on strikes or definition of different forms of industrial action. Furthermore, the Austrian legislation makes no distinction between primary and secondary industrial action which means that the lawfulness of both is settled in the same way. The lawfulness of secondary action thus has to be examined on the basis of the requirements of national restrictions on industrial action. A guiding rule thereby is that the action should not run counter to good practice and that the action and objectives should be in a reasonable proportion to each other. In general this could mean that the lawfulness of secondary action is the more improbable the more remote secondary action is from the centre of the dispute, since it will in

that case be still more difficult to prove any reasonable connection with the dispute itself. Following Aaltonen, it can be presumed that international secondary action has to fulfil the same conditions as national secondary action.

In **Belgium,** there exists no framework regulation as regards collective action. In some cases, however, collective agreements contain procedural provisions that have to be respected in case of a collective dispute. A condition for any strike is that the peace obligation resulting from a collective agreement has to be respected although this obligation is considered to be relative and only morally binding. Community of interest or the lawfulness of the primary action are in principle not required but if they exist this of course constitutes an advantage to have the action. This means that secondary actions in Belgium are generally permitted and that, as a consequence, international secondary actions are also generally permitted.

In **Denmark,** this issue is not regulated by national legislation but by agreement between the confederations of employees (LO) and employers (DA) and by very scant case law. National sympathy action can be taken according to the Danish agreement and Danish case law but only under certain conditions. Firstly, the duties of advance notice specified under the agreement applicable have to be observed, although some specific arrangements have been settled for secondary action. Secondly, the primary conflict must be legal and have already started. It is uncertain whether the primary action has to be legal according to Danish law, or according to the law that applies in the country where the primary action takes place. Aaltonen states, however, that the lawfulness of the foreign primary dispute is considered according to both foreign and Danish legislation. The exception to this rule is however where the rules of foreign labour law are contrary to the fundamental principles of Danish labour law or where the clarification of the contents of foreign labour law is impossible or extremely difficult. The second condition that must be fulfilled is that there has to be a community of interest of the secondary action participants with the primary dispute. The existence of such a community of interest is considered on a case-by-case basis. As for international secondary action, the same conditions apply. Concerning “blacking”, it should be mentioned that the basic principles of Danish labour law do not oblige employees to carry out blacked work. Refusal of work exported from a company on strike to Denmark is likely not to be considered as work-refusal or breach of contract as such on the condition that this measure is taken only if the primary dispute is a legal strike and has actually started.

In **Finland,** an employer and worker party bound by a collective agreement may not initiate a labour dispute affecting the collective agreement as a whole or one of its provisions whilst it is in force. The peace obligation is relative in the sense that if an industrial action has nothing to do with a collective agreement, it does not violate the peace obligation connected with that agreement. Under certain conditions, sympathy strikes are recognized as lawful in Finland. According to the Finnish regulation and case-law, a national sympathy action is an industrial action instituted for the benefit of workers other than those engaged in the action. To qualify for this exemption from the peace obligation, the action must be purely sympathetic. Firstly, this entails according to the Finnish case law that the action, even if successful, must in no way affect the employment terms of the participants. (It has in other words to be “genuine”). When the action is over, their employment terms must remain the same as they were before the action. Secondly, the primary industrial action may not be contrary to the legal criteria set by the Finnish Collective Agreements Act of 1946. Thirdly, the secondary action may not be so extensive that the collective agreement of the participants has, due to the action, essentially lost its significance as a guarantor of industrial peace. Fourthly, the secondary action may not be permanent. Aaltonen (1998) sees no reason for applying these restrictions in a different way depending on

whether the secondary action is national or international. However, until now there has been no case in the Labour Court where the industrial action had taken place abroad and the sympathy strike in Finland. Accordingly, it is not quite clear whether it is absolutely required also that the initial industrial action in another country for which support is being offered should in itself be lawful. The General Agreement of 1997 between SAK and TT (Confederation of Finnish Industry and Employers) requires the worker party (the local units shop steward) to give notice ("as far as possible") of their intention to wage a sympathy strike (relates also to political strikes) to a conciliator and to the relevant employer and worker organisations.[30] The notice period is at least four days. Although, in principle, all employees may take sympathetic action, the STTK representative mentioned that most employees in the public sector do not have the right to conduct solidarity actions. The same criteria are applied for blacking. Furthermore, blacking falls outside the scope of the notice obligation set forth by the Act respecting mediation in labour disputes since it covers only work stoppages. This is very important in the transport sector, particularly in the shipping industry. Generally, transport unions are excluded from the new general agreement. Also to be noted is that in its Conclusions XV-1 (reference period 1997-1998), the ESCR of the Council of Europe Social Charter noted that apparently sympathy strikes cannot in practice be legal under the system of collective agreements for state civil servants and municipal civil servants. The Committee asked for more clarification on this for the next report which will be reviewed in 2002.

A solidarity strike is in **France** seldom considered acceptable ("*licite*"), but this depends on the appreciation given by the courts that differs depending on the case. An "internal" solidarity strike (i.e. within the same enterprise) is in most cases accepted, provided that the primary action is legal.[31] Nevertheless, the courts held that workers must justify a personal interest and have a general demand. The solidarity strike will also be considered lawful when its reason lies in an unlawful act of the employer (e.g. an abusive dismissal of an employee). In case of external solidarity action (i.e. to support employees of another enterprise), not only must the primary action be legal, but there must also be a community of interests between participants in the secondary and primary action. The courts, according to Professor Christophe Vigneau (University of Avignon – France), do not regard such strikes as solidarity strikes mainly because they consider that any single worker has a personal interest in the general demands that sustain the collective action. This can explain why – in general – French courts are quite tolerant towards solidarity strikes. In relation to transnational solidarity strikes, French regulation does not draw any geographical distinction in terms of the lawfulness of secondary action. In fact, since the French courts have not yet had occasion to decide on such a case, it is presumed that the same rules for national "internal" and "external" secondary action will apply to the international secondary action. The so-called "blacking" (or refusal to handle products from a company on strike) could be considered as "*une faute*" and would give causes to disciplinary sanctions.

[30] The practical significance of the general agreement is rather small because agreements concluded by the SAK are not directly binding on its member organisations. In order to be binding the general agreement has to be confirmed by the collective agreements of the member organisations. (Aaltonen 1998). On this point Sulkunen disagrees with Aaltonen since, with the exception of Paper and Seamen, all other SAK member unions have committed themselves to the General Agreement or adopted similar rules between themselves. Aaltonen's point is that practically all those unions which make frequent use of the secondary action are out, but Sulkunen on the contrary refers to the Transport Workers' Union AKT, which is in fact bound by a previous general agreement setting out similar rules which are in the form of recommendation both in old and new General Agreements.

[31] The distinction between "internal" and "external" solidarity strikes has mainly been developed by legal doctrine. For further information, see Betten (1985: 156-157)

According to Aaltonen (1998), in **Germany**, the lawfulness of secondary action was settled by a *Bundesarbeitsgericht* decision of 1985, and confirmed in 1986. The conditions for secondary action are that (a) the primary strike is legal, (b) it is carried out in order to promote only the interests of the participants of the primary action, (c) the secondary action is capable of influencing a party to the primary dispute, and (d) that the secondary action, as the primary action, is necessary, fair and reasonable in relation to the interests pursued. It must be pointed out that in these two cases also the position of the employer played a crucial role, namely that in the first case it concerned a form of "blacking" and in the second the court judged that both employers formed an economic entity. Concerning international secondary action, it is presumed that it can take place under the same conditions as national secondary action.

Greece is one of two countries in the EU that explicitly mentions international secondary action in its legislation. Law 1264 of 1982 permits solidarity or sympathy action by unionised workers in support of others abroad, provided both groups of workers are employed in enterprises controlled by the same multinational, and that the outcome of the dispute abroad will have direct consequences for the interests of the Greek workers involved. In addition, the Greek action must have the approval of the relevant national labour confederation. The last condition has in legal literature been criticised as unconstitutional. Since the condition for the lawfulness of action is its direct impact on the secondary action participants' own interests, so-called genuine secondary action is always illegal.

In **Ireland,** the 1990 Act defines both primary and secondary industrial action in the same sections. Secondary action is "to aid other workers in compelling their employer to accept or not to accept terms or conditions affecting employment". Furthermore the judgement of the Supreme Court in 1994[32] stated that secondary action could be legal. Concerning international secondary action, Aaltonen (1998) considers that, since the Irish system is based on the immunity principle instead of an explicit right to strike, it is natural that there are no physical or geographical restrictions on legal strikes. This means that the restrictions on national industrial action (such as procedural rules) apply to international disputes as well.

In **Italy,** almost no legal distinction is made between primary and secondary action. The only practical difference between the two is due to a Supreme Court decision of 1979 that stated that "a strike in order to secure the interests of other workers" could be legal. This was later on confirmed by a decision by the Constitutional Court in 1982. The precondition for the legality of a secondary action is that there is sufficient common interest of the workers taking primary action and those taking secondary action. A secondary action can in Italy be defined as a complete cessation of work to further the interests of other workers in a situation where there is a sufficient connection between the interests of the primary and secondary action participants. Given this limited definition, blacking of products is not a legal secondary action. Although there is no explicit legislation or case law on international secondary action, it can be presumed that the conditions applying to national secondary action also apply to international secondary action. This requires thus a complete cessation of work and a community of interest. The question of how the lawfulness of foreign primary action affects the lawfulness of secondary action is not settled in Italy.

Although there are no regulations on the lawfulness of secondary action in statutory law in **Luxembourg**, secondary action is always assumed to be illegal. According to Aaltonen (1998), this is probably due to the fact that one of the prerequisites for the lawfulness of industrial action

[32] Nolan Transport (Oaklands) Ltd versus Halligan

has been that the dispute should concern matters between the parties concerned. On the other hand, it could be presumed, due to the lack of legislation and case law in Luxembourg, that international secondary action is neither prevented nor explicitly permitted.

In the **Netherlands** there exists no legislation on industrial action. Possibilities and constraints are developed via case law on the basis of article 6 of the European Social Charter of the Council of Europe, which is not restricted by national borders. After the so-called "Panhonlibco" case before the Supreme Court (1960), several attempts were made to regulate the lawfulness of strikes. According to the doctrine based on the Panhonlibco decision, industrial action, and thus above all secondary action, is generally illegal. Actions become legal if those taking action are able to prove that under prevailing conditions it was unreasonable to require the employees to continue work. The Supreme Court did not, however, specify under what type of conditions the requirement of the employees to continue work may be considered unreasonable. Although the doctrine has already been largely superseded, this court decision is still considered to constitute a "secondary action law". This situation thus makes it very difficult to work out whether an international secondary action is legal or not. It will be the Court which, in the end, decides on the lawfulness.

In **Norway,** sympathy or solidarity action plays a limited role in industrial relations. It has never been a major feature as a means of industrial action. Sympathy/solidarity action will in Norway typically take place in the transport sector in support of a primary industrial dispute taking place in a foreign country, or e.g. in an ITF instigated sympathy action in a Norwegian port against a ship sailing under a flag of convenience. Sympathy/solidarity action is generally not in violation of the obligation to observe peace (when there exists a collective agreement in force), according to the Norwegian Act Relating to Labour Disputes. To be regarded as a sympathy action, the participant's true purpose must not be to influence the terms of employment and wages established in their own collective agreement. Another prerequisite for lawfulness will be the observation of the rules on giving notice to cease work. In the Main Agreement in the private sector, other restrictions on the use of sympathy action exist as well. However, this main collective agreement does not apply to sympathy action where the primary dispute originates in a foreign country. Concerning "blacking", workers in Norway can, on an individual basis, lawfully refuse to handle goods from enterprises involved in industrial action in other countries. Such blacking can nonetheless be construed as a breach of duty that may warrant dismissal. It is unclear whether lawful blacking has as a prerequisite that the primary industrial action in a foreign country be in itself lawful. In Norway, blacking will, in terms of collective labour law, also be construed as a conditional sympathy strike. It is not perfectly clear whether a conditional sympathy strike in support of an industrial dispute in another country requires observation of the rules of the Labour Dispute Act that demands notice to cease work as a prerequisite for lawful action. In practice, it is not customary to give formal notice to cease work in a case of blacking.

In **Portugal,** solidarity strikes are allowed by law but they are subject to the same restrictions and regulations as primary action. The legality of any secondary strike action depends on the legitimacy of the workers' interests and on the degree of connection between the interests of the strikers in the primary strike and those of the solidarity strikers. Apparently, the geographical extent of industrial action is of no importance in Portugal. According to the trade unions, the practical importance of (international) secondary actions, as well for primary action, is constrained by the non-existence of strike funds.

Under **Spanish** legislation, industrial action in solidarity is perfectly legal, as stated in the Constitutional Court's ruling of 8 April 1981 which interpreted the Labour Relations Act 17/1977 of 4 March which, after publication of the Constitution in 1978, was examined on its

constitutionality. The Constitutional court stated that "the very fact of trade union industrial action necessarily implies recognizing a strike called by a trade union in support of demands it considers crucial at a given time, and this may include solidarity among the members of the union". It furthermore confirmed that it is not necessary that the interest of the workers initiating the secondary action be directly affected by the primary action; an indirect effect is sufficient. According to Aaltonen (1998), it is thus clear that, firstly, the primary action must be lawful and, secondly, that industrial action in solidarity is unlawful only in the event of it being unrelated to workers' interests. The settlement of the sufficient community of interest is, however, complicated and not regulated. In the first instance, it will be the workers themselves and their representatives who decide whether a strike is or is not related to their interests, without prejudice of course of a contrary ruling by a court. It is also clear that the objective of the secondary strike must not be to change one's own valid collective agreement. According to Professor Antonio Ojeda Avilés (University of Seville – Spain) however, the scope of the relevant provisions of the law is much wider than secondary action. He cites the example of the general strikes against a draft statute that have occurred since 1988. Concrete examples are general strikes against the Parliament when debating a draft on stricter terms of entitlement to retirement benefits, or to ease the labour rights of young workers in their first job, etc. The Constitutional Court has ruled that these "political-economical" strikes, when targeted against a labour matter, and thus not purely political, are valid. So, in many cases the strikers are in reality engaging in a solidarity strike, because they are not going to enjoy any positive outcome, for instance because they are no longer young workers. In that sense, the solidarity strike can be valid even if the primary action conducted by those directly concerned is unlawful or does not even exist. According to Ojeda Avilés, the only prerequisite required by the Act is thus to have some concern in the question, in addition of course to the other normal prerequisites set by Spanish legislation for every strike. Concerning international secondary action, Ojeda Avilés believes that article 11 of this law, as interpreted by the Constitutional Court, now also allows for transnational solidarity action. Following Aaltonen (1998), it should furthermore be mentioned that the possibility to take secondary action is in Spain considerably restricted by the fact that the only permitted form of industrial action is strike. This would mean that blacking of products, for example, is not legal. Ojeda Avilés, again, has his doubts about this argumentation and refers to the two constitutional articles related to industrial action. Paragraph 37.2 of the Constitution lays down the right for workers and employers to take industrial action whereby it will be the law that lays down the limitations in order to guarantee the essential community services. The right to strike is specifically protected in paragraph 28.2 of the Constitution. Many scholars and even courts use paragraph 37.2 to declare forms of industrial action other than strike to be valid.

In **Sweden,** the law does regulate the right to industrial action but does not define either primary or secondary industrial action. National sympathy actions are allowed if two requirements are fulfilled. Firstly, the primary action must be legal under the law in the state where the primary action is taking place (except when the labour law of the foreign country is contrary to the Swedish legal system). If the law in the country where the primary action is taken is constructed in a way that makes a primary action practically impossible, there is a possibility of having the primary (and thus secondary) action declared legal according to Swedish law by a reasoning of "ordre public". Secondly, the sympathy action must be purely sympathetic and may not have the objective of changing the employment conditions of the employees participating in the secondary action. (Again in other words the action must be "genuine" as is the case in Finland). Thirdly, the secondary action must be temporary. The presumption is that international secondary action is permitted according to the same criteria as for national secondary action with the clarification that the lawfulness of the primary dispute is settled according to the legislation of the country where it takes place. The latter is however not an absolute requirement since the "ordre public"

principle is sometimes applied. This means that primary action that is forbidden according to the legislation of the primary country does not make secondary action illegal, if there is a clear disproportion between the legislation of the country concerned and the Swedish labour law. Furthermore, it can mentioned that the same notification rules apply for secondary actions as for primary ones (7 days in advance and in writing). A breach of the rules of notification does not however make the action taken unlawful. There are no rules in Swedish law demanding demonstration of common interest and there are no ballot requirements.

Industrial action in the **United Kingdom** is protected against legal proceedings by employers and others only if it has the support of a secret postal ballot. In order for industrial action to be lawful in the UK, it must be taken in pursuance of a trade dispute, which is defined as a dispute between workers and their employer relating to one or more of a number of defined issues, including discipline, pay, etc. This means that if workers take industrial action in the UK in order to further a trade dispute in another country, as long as the outcome of the dispute is likely to affect them in one of the issues specified, e.g. pay, it will be considered a trade dispute. In other words, if the decision of a French company to increase the price of raw materials meant that a UK employer threatened to cut the wages of its workers, a dispute would exist between the UK company and its workers. However, in general when talking about secondary action, the issue is not likely to be one which could be defined as a trade dispute for the purposes of offering protection to the UK worker. Calling workers out on strike against an employer with whom there is no dispute, as defined above, is illegal. The only exception is where a worker from another company is asked not to cross a picket line. That worker would be liable to action by his or her own employer but the union in dispute would not be. Other than that, it is tortuous in UK law to organise any form of secondary action even where the aim is to disrupt the supply of goods and services to or from the employer who is party to the dispute or an associated employer of that party. In other words, secondary action is illegal unless the secondary employer's actions have a direct effect on the terms and conditions of employment of the worker, in which case the action taken will be against his or her employer, not the one who has directly taken the action which has caused the dispute. This is exactly what is regulated by the Trade Union and Labour Relations (Consolidations) Act of 1992.[33] The Act defines secondary action in relation to a trade dispute as occurring when : (a) a person induces another to break a contract of employment, or interferes with or induces to interfere with its fulfilment, (b) or threatens that a contract under which he or another is employed will be broken or its fulfilment interfered with, or that he will induce another to break a contract or to interfere with its fulfilment, (c) and the employer under the contract of employment is not the employer party to the primary dispute. This law makes no distinction between primary disputes at home or abroad. The same definition thus applies, according to Aaltonen (1998), to both national and international secondary action.

4.3. And what about the applicant countries?

A selective overview based on the replies to the ETUC questionnaire and literature shows the following:

The **Bulgarian** legislation provides a formal normative solution to the possibility that employees from a certain enterprise develop a sympathy action with employees from another enterprise.

[33] For a description of the previous Trade Union Acts, see Betten (1985: 168-170).

Transnational sympathy actions have so far not taken place in Bulgaria; the same goes for "blacking".

There are no legal constraints on workers or their trade unions developing any kind of transnational industrial action in **Cyprus**.

The legislation of the **Czech Republic** does not allow employees to participate in transnational industrial action. Solidarity action is lawful only in conflicts concerning the conclusion of a collective agreement where the employer is subject to Czech law. Similarly, the law does not make it possible for Czech workers to lawfully refuse to handle goods from establishments involved in industrial action in other countries. Refusal to perform the tasks assigned by the employer would be qualified as violation of work discipline and the employer could terminate employment relationships with the workers concerned.

In **Estonia** the right to solidarity strike was recently confirmed in a law on Freedom of Association and Trade Union Rights adopted on 14 June 2000 which states that "trade unions can organise strikes to achieve employees' demands in labour matters following a procedure prescribed by law. They can also organise sympathy and warning strikes" (Free translation from Estonian). There is no information available as to exactly what is entailed by this procedure prescribed by law. Before adoption of this law, the maximum (legal) duration of a sympathy strike was set at three days.[34]

In **Hungary,** solidarity action to support other strikes in Hungary is lawful but subject to the specific condition that it can be organised only by a trade union. Given the fact that there is to date no experience of international solidarity action, it is unclear whether this would be considered legal and if so, under what conditions. There exists no specific legislation in Hungary in relation to "blacking".

In **Latvia,** the law on strikes adopted on 23 April 1998 defines the solidarity strike as "a strike that is organised not on the basis of a collective labour dispute but on the basis of solidarity with the requirements of trade unions of other enterprises, institutions, organisations, industry or employees of other enterprises, institutions, organisations or industry to reach the implementation of raised requirements". (Free translation from Latvian). Solidarity action is thus limited in two ways. Firstly, it may not be linked to the collective agreement, and secondly solidarity action is limited to solidarity strike. It is presumed that all the restrictive measures set for primary strikes apply also to secondary or solidarity strike. However, Latvia has no tradition of this kind of action. A reason mentioned in a comparative report of the Baltic Labour Law Project[35] is the lack of solidarity and co-operation between trade unions.

In **Lithuania,** there are no rules on sympathy action and there is no case law. Although the recently submitted Draft Labour Code contains several restrictive provisions concerning strikes (which will supersede a law of 1992 on the settlement of collective disputes), no mention is made of (international) secondary or sympathy strikes.

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[34] This limit on duration can, according to the argumentation of the ILO Committee on Freedom of Association (see above), be regarded as violating ILO Convention 87.

[35] This is a project organised and financed by the Swedish Trade Unions to provide technical legal support to the trade unions in Estonia, Latvia, Lithuania, Poland and St-Petersburg (Russia). The author of this note is member of the Project and Expert Committee.

According to the Baltic Labour Law Project report, in **Poland**, the regulation on secondary action applies only to certain categories of worker, generally civil servants. For other workers it is not regulated. The maximum permitted duration of a sympathy strike is half a day and all the rules applying to the conduct of a primary strike must be observed.[36]

In the **Slovak Republic**, sympathy action is regulated by legislation. In addition, in the collective bargaining process there are some conditions that legitimate sympathy action. The legitimacy of the sympathy action depends on the legitimacy of the primary action.

4.4. Summary of national regulation of national and international secondary disputes

Table 1: The regulation of national secondary action

	Type of regulation	Legitimate if there is a community of interest	Legitimate if the primary dispute is lawful	Probably unlawful
Austria	Case law			+
Belgium	Case law		+ (1)	
Denmark	National Agreement of Social Partners		+	
Finland	National Agreement Social Partners		+	
France	Case law	+	+	
Germany	Case law	+ (2)	+	
Greece	Statute		+ (1)	
Ireland	Statute		+	
Italy	Case law	+	+	
Luxembourg	Case law			+
Netherlands	Case law			+ (3)
Portugal	Case law		+	
Spain	Case law	+	+ (4)	
Sweden	Statute and national agreement social partners	+	+	
United Kingdom	Statute			+

(Source: European Parliament, 1996 + own research results)

(1) Solidarity strikes of all kinds are in principle permissible.
(2) Germany's restrictions, established by case law, are probably the most stringent.
(3) Cfr. Panhonlibco case of 1960.
(4) Not required according to some scholars (see above).

[36] This duration limit can, according to the argumentation of the ILO Committee on Freedom of Association (see above), be regarded as violating the ILO Convention 87.

Table 2: Regulation of international secondary action

Three broad guidelines can thus be distinguished when talking about international disputes on the national level:

1. the action in the "secondary" country must be lawful on its own terms under national rules and/or
2. There must be at least some community of interest in the outcome of the action between the participants in the "primary" and "secondary" action
3. If the primary action is unlawful, the "secondary" one may be unlawful too

What is not always clear in relation to the third point is under which law the lawfulness of the primary action is to be evaluated.

	By statute	Not excluded by law or practice	Unlawful Prima Facie	Community of interest required, as for all secondary action	Legitimate if primary strike is lawful
Austria		+			
Belgium		+			
Denmark		+		+	+[?]
Finland		+			+ [?]
France				+	+
Germany				+ [(2)]	+
Greece	+				
Ireland	+ [(1)]				
Italy				+	
Luxembourg		+			
Netherlands		? [(3)]	?[(3)]		
Portugal		+		+	
Spain (4)		+	+	+	
Sweden		+	+	+	+[(5)]
United Kingdom	+[(?)]				

(Source: European Parliament, 1996+ own research results)

(1) Secondary action is explicitly lawful in Ireland.

(2) By far the strictest limits are imposed in Germany, and would almost certainly require both groups to share the same employer.

(3) The Netherlands might fall into the third category, depending on the interpretation placed on the Panhonlibco case. However international strikes are effectively lawful until a court decides otherwise.

(4) Depending on the scholar the interpretation switches from "not excluded by law or practice" or "unlawful prima facie". It has to be noted that several international strikes were declared in Spain against multinationals (transports, railways, sailors), one of the latest against Renault during the Vilvoorde case, even if the French newspapers reported that the closure of the Vilvoorde plant would benefit production in the Spanish plants. None of those international strikes was declared unlawful, since there was a material or pragmatic interest for the strikers.

(5) Different views exist between scholars on this requirement.

4.5. The views of social partners on national and international secondary action

In the framework of the European Parliament report of 1996 (European Parliament 1996), the national social partners were asked for their view on whether the rules on national secondary action were too strict, about right or not strict enough.

Employer representatives in Denmark, France, Germany, the Netherlands, Portugal and the UK considered the national regulation of secondary action to be about right. So did one of the two Italian employer representatives. The second Italian employer representative and representatives from Belgium, Finland, Greece, Ireland, Spain and Sweden considered the national regulation to be not strict enough.

On the trade union side, representatives from Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and Sweden considered the national regulation of secondary action to be about right. The Irish and UK unions felt that the present restrictions on secondary action were far too strict.

	Employers	**Trade Unions**
Austria	2	2
Belgium	1	2
Denmark	2	2
Finland	1	2
France	2	2
Germany	2	2
Greece	1	2
Ireland	1	3
Italy	2	2
Luxembourg	2	3
Netherlands	2	2
Portugal	2	2
Spain	1	2
Sweden	1	2
United Kingdom	2	3

(Source : Aaltonen, 1998)

(1) not strict enough
(2) about right
(3) too strict

5. Tentative conclusion

A first observation based on this research is that there exists no explicit provision mentioning the right to international primary or secondary collective action in the relevant international instruments, such as the International Covenant of Economic, Social and Cultural Rights (UN 1966). High-level scholars plead, however, for a wide definition, which includes sympathy action, but which could however be subject to appropriate limitations set at national level. Also the relevant fundamental ILO Conventions n° 87 and 98 lack such a reference to international collective action. Case law of the ILO relating to collective action deals only with cases of national secondary action, but on the basis of the argumentations of the competent committees, such as the Committee of Freedom of Association and the Committee of Experts, it could be argued that the right to strike as respected by ILO convention n° 87 does cover the right to international or cross-border sympathy action.

On the European level, and more particularly in relation to the Council of Europe, the research revealed a very unclear situation on the right of international/ transnational primary or secondary collective action, given the lack of explicit reference in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the (Revised) Social Charter, and due to the lack of a concrete interpretation in this regard by their competent bodies.

Within the European Union, several legally binding instruments refer to the right to collective action but none explicitly refers to (international) secondary action. Optimistic interpretations could be made in relation to the so-called “Monti regulation” which adopted a wide definition of which collective action has to be protected and on the basis of which it thus could be argued that (international) primary and secondary action could be covered, in particular since this Regulation was elaborated following several national actions, albeit entailing international consequences for trade and industry. On the other hand, it is unclear whether the reference to collective action in the Preamble of the Directive 96/71 concerning the posting of workers in the framework of the provision of services, which *per se* relates to transnational activities, includes the transnational dimension of the right to collective action. Other legislative attempts by the European Parliament undertaken in 1997 did contain explicit references to transnational collective action but failed to be adopted. It only led to a European Parliament Resolution calling, among other things, for the integration of transnational trade union rights, including collective action, into the EU Treaties.

Next to the legal instruments, there are of course also political instruments such as the 1989 Community Charter of Fundamental Social Rights of Workers and the European Union Charter of Fundamental Rights (Nice, December 2000). Both recognise the right to collective action, including strike, but seriously restrict the right by making it subject to obligations or conditions set under national regulations. Regarding secondary action, this is even explicitly mentioned in the explanatory memorandum to the EU Charter of Fundamental Rights which clearly states that “strike is a collective action which is limited to as it emerges from national legislation and practice, including the question to know whether these actions can be taken in different member states in parallel.”

The real question is, however, how the references to the right of (secondary) collective action in all the abovementioned EU instruments relate to the current obscure situation whereby – even in the Nice Treaty – the freedom of association and the right to strike and impose lock-outs are still regarded as excluded fields of competence, in particular for the Social Partners. This completely inconsistent approach raises doubts about the real commitment shown by the EU to the right of (international/transnational) collective action.

Regarding the national level, and in particular the regulation or acceptance of the right to international **primary** action, the information available is very scarce and for the moment does not allow any possible conclusion to be reached. More research on this aspect is thus required. On the other hand, and mainly thanks to a report of the European Parliament (European Parliament 1996) and the study of the Finnish trade unionist Juri Aaltonen (Aaltonen 1998), the situation is clearer concerning the regulation of **secondary** action. **National** secondary action is, except in a few countries for which there exist still doubts, allowed by law, collective agreement and/or case law, whereby it is required that the primary action should be lawful and/or there should be a community of interest between the workers engaged in the primary action and the ones acting in sympathy with them and their cause. Concerning the national regulation of **international** secondary action, the tentative conclusion could be that since there apparently exists nowhere in the EU member states a law or practice which explicitly prohibits taking this action, it could be accepted in all countries. It is however clear that at least some countries require or will require for this type of international/transnational action the fulfilment of the same criteria as those laid down for national secondary action. Such a conclusion is, however, excessively tentative and unsure, and more in-depth research on this question is thus also required.

As concluding remark, and at least for the European Union, one could argue in line with Bruun and Veneziani (1999) that "a coordinated European policy to allow for transnational industrial action in all Member States is evidently necessary from the perspective of a future European industrial relations system, and could be promoted in different ways by all-European organisations". Whether the basis for that should be formed by extensive regulation of transnational collective action by the European Union, or merely by a recognition of the fundamental right to resort to transnational collective action as one among other fundamental transnational trade union rights, is at least from my point of view an open question which only the key European actors, including the social partners, can answer. In support, one could also quote Lyon-Caen (1997) who states that 'if solidarity strikes continue to be judged separately according to the law of each Member State, international industrial action will be split into as many national actions as there are Member States involved'. Or reference could even be made to Wedderburn (1972) who considers the legal right of transnational collective action for labour as the logical correlative of a freedom of transnational movement of capital. Jacobs (1978) also, thereby supporting Pankert, is in favour of a harmonisation of national law on solidarity action via a cautious own initiative of the Community institutions, whereby firstly, they should lay down the principle that international solidarity action is not to be regarded as less lawful than national action merely on the grounds that it has an international scope, and secondly, they could think of harmonising the criteria according to which national judges measure the legality of solidarity action. According to Bercusson (1995), one aspect which, in this respect, must certainly also be examined, is the possibility of protecting strikers against dismissal under EU and national law. He is convinced that the existing EU Directive on collective redundancies already offers this kind of protection and believes that the collective redundancies Directive embodies an EU policy, reflected in the European Court of Justice case law , which requires recognition of employee representatives. Derecognition is effectively contrary to EU law, so much so that workers striking to defend their representatives are protected by EU law against dismissal.

It appears, in any case, that a political discussion and decision will be necessary before the legal details of such provisions can be settled and put in place. Maybe subsequent and succesful transnational trade union action – in its different possible forms – will one day trigger this discussion?

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[37] The Baltic Labour Law Projec t (BLLP)is a project organised and financed by the Swedish trade unions and which offers on request technical legal advice to the trade unions in the three Baltic states, Poland and of the region of St. Petersburg (Russia). Stefan Clauwaert is member of the Project, Expert and Case Decision Committee of the BLLP.

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