**The protection of the strike in the internal national legal systems**

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*1. Introduction*

In this introductory essay a careful consideration will be offered of the laws related to the strike in the nine countries of the European Union (hereafter EU) to clarify the differences between trade union systems and the issues that EU membership has brought to the system of industrial relations, and whether these problems tend to require answers valid for the entire European territory. Reports drawn up by lawyers and academics at universities in all the countries surveyed here describe each national experience and its reaction to the innovations brought about by the European legislation and jurisprudence, in support of the large market zone created by the Treaties.

The methodological perspective utilized here is unusual. Numerous, in fact, are the documents that deal with labor laws in Europe as Communitary labor law. Instead, those that consider the reverse route are far less frequent.

This precise methodological choice has a well thought-out motivation that arises from the unions' concern after the Viking, Laval and Ruffert decisions, which have appeared not only to union representatives but also to many researchers as signs of the pathology of the expanded system, with a tendency to negatively impact the national systems.

In their abstractness and general uniformity, European laws break into the national systems, which are historical structures created out of a long sequence of events during which the single institutions, including unions, found their niches and stability, each legitimizing the other.

As is known, the ties accepted by the States with the signing of the Treaties are suitable not only for establishing mutual obligations between the contracting States but also for conferring rights and obligations to private parties. The incorporation of the European laws within internal law systems is potentially destabilizing for the previously attained balance within each established social and political structure.

In this regard, the material presented in the English report is impressively

The protection of the strike in the internal national legal systems

eloquent (see English report). A methodology is therefore needed to study the internal systems in which the European law must find hospitality.

Moreover, with regard to collective action, the methodological choice of taking the national systems as a starting point of the analysis is almost obligatory.

The referral of powers from the national States to the European dimension affects only certain subjects, all of which are related to the need to create a single European market.

The strike is a matter excluded from EU competence, and therefore methodologically requires that research in this area be conducted in a comparative manner, particularly bearing in mind the significant differences between civil law and common law. Studying the internal rights in the phase leading up to the introduction of European law also means examining how the «uniform» law has been, and is being, revised and adapted to the specificity of each single legal system, a profile that has been overlooked, as is evident in the wording of art. 6 TUE, 288 TFUE and 28 CdfUE, by the same law of Community origin.
The process of European integration involves the abandonment of the semantics of national rights in the name of a new common language that is completed in the next stages, from the basic statement at the European level to the operational and sometimes specifying phases of the legislation of the individual nations. And yet, promulgation of this law does not guarantee a full correspondence between the start and finish, nor implicates an effort to detect if the final effects have produced new differences between countries.
A study of the internal systems of trade unions is the best way to investigate these «final effects». Such a study necessarily begins with a careful survey of the national disciplines, the essential basis for any activities of interpretation and hermeneutics, which can subsequently favor processes of reconceptualization and generalization. Other international sources (OIL, CEDU, European Council) that dictate a common feeling in the safeguarding of the strike, contribute to an enrichment of the complex situation. Even with respect to this kind of law, the «final effects» are poorly investigated and, as we shall see, the internal implementations of the protective laws show profound differences, so that, in some jurisdictions the international law remains in the dusty book of good intentions.
Almost all the internal systems have a dual model of transposition of Community and international laws. Thus, they require that to make international laws mandatory in international relations, a formal act of receipt be realized according to the methods of national legislative production. Collective agreements, however, at least among the nations surveyed, do not seem to play an important role in the implementation operation of Community and international laws.
The effect of the dual model is an implementation of the international and community laws with many different velocities. It can readily be supposed that the mediation of the states will not ensure full consistency, completeness and implementation of the law.
The supposition is corroborated, for example, by the report on the evaluation of the United Kingdom’s compliance with the labor provisions set forth in the European Social Charter, submitted on December 16, 2010 by the Committee of experts of ILO, which ascertained a difference in ten out of the 13 provisions examined.
Indeed, we cannot know the degree of implementation of the Community

laws in the internal judiciary systems, considering that there is no controlling institution for the effectiveness of the laws.
The direct efficacy of the Community laws is, therefore only a presumption (or rather an aspiration), and is something that can only be ascertained by the European courts and only where the issue of conformity is brought up for their examination.
In the European imagination the aim of the individual states' yielding of sovereignty in favor of the EU should be the building of a «uniform rule». This utopian image ignores the fact that between Community law and internal law the channels of communication are constituted by the sources (in a traditional sense) by the Community and national jurisprudence and legal culture which do not intersect in a logically ordered manner, but simply because they co-exist.
It is surprising that this knot of laws and implementation procedures does not attract the attention and concern of those involved in Community law, that is the European political authorities, legislators, and magistrates.

## *2. General remarks*

### *2.1 Contextualization of the strike in the hierarchy of internal sources*

Freedom of association in reality comprises three freedoms: the freedom of coalition (i.e., of association), freedom of contract, and freedom of trade union action. These are the three pillars of the union: organization, collective contract and direct action (mainly strikes).
It is useful to remember that historically, freedom of association is a product of the most mature liberal political regimes, those that by the end of 19th century saw freedom of association as a mandatory requirement for a regime respectful of liberal principles. «The freedom to negotiate would be reduced to the right of the principal to starve its labor if the latter were deprived of freedom of association», as a member of Parliament in the newly united Italy affirmed.
Without the right to strike, collective bargaining for the union would be reduced to a mere collective «begging», as the German Federal Labour Court explains (BAG (GS) 10/06/1980, AP No. 64 und (GE).
The union systems examined here bear the mark of this itinerary in the history of ideas in their constitutions and in the laws for the implementation of constitutional principles.
All the countries surveyed in this study are long-time adherents of the European Council, of the ILO, and the international norms dictated by the latter, though naturally with different schedules of ratification of the international laws into their own internal legal systems.
But even prior to the accession to the European Union of the states formerly occupied by the Soviet Union, Community legislation had at least partially penetrated the internal judiciary systems of these countries, through bilateral agreements.

In the majority of the countries surveyed, striking is a constitutional right. The constitutional status of the strike is defined in several ways. It is explicit in some countries (Bulgaria, Romania, Italy, France, Spain) even if it has been agreed that the law may limit the exercise of the right to strike to ensure the constitutional rights of others with whom it may be in conflict (Italy, France, Spain). As is well known, the exception among countries that were the earliest to join the EU is the United Kingdom, where the strike is not a fundamental right, but rather a freedom supported by a number of exceptions to the common principles of contract and civil offence. In Poland, a law of 1982 replaced by an act of 1991, still maintains the ambiguous legal status of the strike between that of a freedom and that of a right.

In the countries of the former Communist Bloc, the constitutional changes that occurred following the changes in political structure in 1989 struggle to achieve correspondence in specific laws and are still in a phase of transition towards the establishing of models of industrial relationships inspired by the freedom of contract. In Romania, it was only in May of 2011 that a law provided for the abrogation of much of the previous system.

In Bulgaria, for example, industrial relations are conducted mainly in a trilateral form and in national negotiations. In Poland it is only since 1991 that the employers' representation is no longer exclusively entrusted to the organs of government, and that private employers enjoy freedom of association in industrial organizations.

The constitutionalization process has started, but still has difficulty establishing itself, while the totalitarian forms of state decline. The main reason is that, after a long tradition of central control and given the difficulties of the transition process, the government has preferred to keep the economic and social reforms under control, while waiting for the creation of strong associations of employers. However, the strike enjoys constitutional protection in both Romania and Poland. It should also be remembered that in Poland the extraordinary story of the trade union Solidarnosc forced the recognition of the right to strike in 1982. In Bulgaria the Constitutional Court has recognized the social function of the strike as «a constitutional guarantee of the wish of Bulgaria to take its place as a democratic state and society».

The systems differ by being either heteronomously regulated or by favoring the independence of laws established by collective autonomy. The two representative extremes are Italy and France.

In France the *Code du Travail*, in fact, analytically regulates the procedures for the formation of representative institutions of workers, identifies the persons authorized to accede to negotiations for the specifications of collective bargaining, and dictates the rules of validity and effectiveness of the collective agreement. More recently, Law No. 2008-789 of August 20, 2008 *«portant rénovation*

*de la démocratie sociale et réforme du temps de travail»*, has profoundly innovated the system.
The power resulting from the constitutional recognition of the right to strike is sometimes obstructed by lower-ranked legislation enacted prior to the implementation of the Constitution. In Spain, for instance, regulation of the right to strike goes back to a royal decree of 1977 kept alive by the interpretation of constitutional law and pending the ratification of a law for inclusion in the constitution.
The strike receives indirect constitutional protection under judiciaries in which it is instrumental for the exercise of freedom of association. This lack of autonomy of the strike with respect to other rights has important effects in the differentiation of national regulations, particularly with regard to the entitlement of rights.

*2.1.1 Parties authorized to proclaim a strike*
In countries where the strike is not functional for collective bargaining, the entitlement of this right lies with the worker as an individual right, even though its exercise is collective. This means that a worker may join a proclaimed strike even if it does not involve his own workplace, or may join a spontaneous strike (Italy).
In Romania, the action of calling a strike is the prerogative of representative trade unions, as well as of coalitions of workers that demonstrate a specific numerical consistency of members or workers, respectively.
In Bulgaria, strikes can be declared by a spontaneous coalition, but only if the coalition itself has a 50% adhesion to the strike proposal among the employees.
In countries where collective action is instrumental for union freedom, as a right to associate, to have an independent representation for the defense of the workers' interests the strike is a union prerogative.
In Sweden, the right to undertake union action is protected by the Constitution, but it is a collectively entitled right available to trade unions as well as to single employers and associations of employers. The strike of a workers coalition is therefore not permitted.
In Germany, the right to strike is not expressly stated in the Constitution. Constitutional law has defined it as instrumental to the freedom of association and to the right of every citizen to form and join a trade union. The strike, therefore, is a collective prerogative. Proclamation of a strike, in fact, is the act of a trade union with sufficient bargaining power, for instance demonstrated by the number of its members. Spontaneous strikes are therefore illegitimate. This peculiarity of the German system stems from the close link between strike and collective bargaining that links the strike to a specific dispute. Strikes can only be called with the aim of obtaining a collective agreement. Due to this profile, in 2010 the European Committee of Social Rights (Conclusions XIX-3 2010 Germany) of December 2010 declared the German system incongruent with art.

6 c. 4 of the European Social Charter.
In this regard, the English judiciary holds a position of absolutely originality. According to British law, the strike is not a fundamental right, but a freedom supported by a number of exceptions to the common principles of contract and tort. The strike is therefore the prerogative of the unions.
Only a formally organized action by the union in accordance with the procedures prescribed by law makes the union immune to being held liable for damages.
Only employees and workers can invoke the right to strike under Polish law.
A strike is lawful when it is organized by a local or national union. No other organization or institution chosen by the workers has the right to organize a legal strike (Poland).
In the constitutions of some countries, including Sweden and Poland, entitlement to the right to strike is reserved a priori, to trade unions. In the English judiciary, collective entitlement is deduced from the procedures relieving the strike from the consequences of civil action.

*2.1.2 Definition of the strike*

The constitutional characterization of the strike as an instrumental right or a right that is autonomous from the freedom of association or from collective bargaining does not appear to affect its definition, which assumes broader or narrower meanings depending on variables constituted by the features of the legal systems of each country.
Thus in some countries the strike is generically defined as «any form of collective and voluntary interruption of work in a business enterprise» (Romania) or as «an act of disturbance carried out in a peaceful and nonviolent way by a group of workers to demand improvements in financial or general working conditions» (Spain).
In other countries the definition of a strike is more precise and restricted. In Poland, the strike consists in «abstaining from work in order to resolve labor disputes regarding the terms and conditions of employment, wages, benefits and trade union rights and the freedom of workers and employees who enjoy the freedom of association in trade unions». In France, the strike is an abstention «organized to support professional claims».
The definition of strike is in any case a jurisprudential formulation in all the countries surveyed with the exception of Romania, where it is regulated by a specific law.

*2.2 Formation of the union delegation*

The formation of trade union representation undoubtedly has a remarkable influence on the effectiveness of collective action. The distinction is clear between the systems covered by law and those regulated by collective autonomy,

whose core is the relationship between the association and subscribing member (Italy).
A secondary distinction concerns systems in which the law aims to regulate collective bargaining and those in which the law regulates trade union rights, including the strike action.
The United Kingdom, for example, adheres to the second type of system.
Unions seeking recognition acquire a «certificate of independence», a series of administrative, fiscal, and civil benefits and safeguards for the union name.
They are also required annually to comply with a number of requirements concerning certification of their members and budgets.
The recognized unions have the right to appoint their own representatives in the workplace, who also enjoy authorization for time off to perform their union duties and leaves of absence paid by the employer through the union.
Representation of the labor union as a function of union association must be distinguished from union representation as a function of the signing of collective bargaining agreements. Not all trade unions representatives are indeed entitled to underwrite collective contract agreements. The procedures for appointing representatives (elective or through association) is not indicative itself of the right to underwrite collective agreements. There are mixed systems of representation: electoral and associative, with differing competencies. In Germany, company management councils are assigned co-administrative powers. In Spain as well there are two types of representative bodies of workers in the workplace:
a) the collective and unitary representative body created by law (the company management council and delegates of the employees);
b) representatives of unions (union branches and delegates engaged in union activity in the workplace). Differently from Germany, however, in Spain strike action can be proclaimed by both bodies, which creates contradictions and the overlapping of competencies.
In some countries trade union negotiating teams are composed on an informal basis, and decisional power is left to the union organization (Germany) and can be supplemented by experts (lawyers, economists, etc.) (Romania).
For some unions, the act of joining the union creates a strong link between the association and its members (Germany) with external effects of selection by organizations. In Bulgaria, the union organizations that are representative at a national level are evaluated according to the number of their enrolled members and their presence nationwide. Approval must be granted by an administrative authority. The union organizations are enabled to assist their members in courts of law (Bulgaria).
More recently, we see a widespread proliferation of trade unions that represent specific occupations with strong negotiating power due to the role played

by their members in the organization of production (Germany, Bulgaria).
Trade union pluralism strengthens union bargaining power when several political and ideological options coexist in the same organization, as happens in Poland, Germany, Sweden and the United Kingdom.
In Sweden, there are about 60 unions and 50 employer associations. Overall, there are over 100 contracting parties in the Swedish labor market, amounting to over 650 collective bargaining agreements. In Sweden, the LO is the umbrella organization for almost all the national unions. The largest and most representative trade unions in Germany are associated within the same organization, the Confederation of German Trade Unions (DGB), which has a strong categorial character. Thus, a contract signed by this union becomes *erga omnes* effective.

*2.2.1 Associative, elective and mixed models*

In the history of the trade union movement, representatives are selected either through association or election. In the countries surveyed here, these models are neatly distinguished relative to the form of union representation at the national level. In the context of the workplace, representation takes hybrid forms, and models prevail in which associative and elective forms are copresent. Each classification holds margins of agency, which can be useful in creating order under various circumstances. For this reason, even for those countries with mixed characteristics this form of representation has been considered a firm association with one or the other model, taking as a nullifying criterion the prevalence of elements belonging to one of the models, or the historical legacy from which the form of the unions in a specific country originated.

*2.2.2 The associative model*

In the associative model, representation is characterized by the associative bond deriving from the act of enrollment by the worker in the trade union association (Italy).
The United Kingdom, birthplace of the labor union, exported the associative model based on union enrollment throughout the world. In recent history, as discussed below, this model has been significantly downsized, maintaining, however, the strong sense of the fundamental relationship between the worker and the union. This means, for example, that employees can subscribe to a union even if the latter is not represented in the member's workplace.
In such circumstances (which British trade unions do not favor because of the relatively high cost of assistance to members), the union can interact with the employer, assisting the worker in legal or disciplinary proceedings, but cannot have other relations with the employer either with regard to the contract or for trade union activity.

Since June 6, 2000 a statutory recognition procedure is in force.[1] The procedure applies to workplaces with 21 or more workers (i.e., not applied to small workplaces), in the event that the employer refuses to deal with a union.
If a union is able to demonstrate the support of at least 40 percent of participants (in the form of occasional petition signatures or union membership) in the bargaining unit,[2] an independent body, the Central Arbitration Committee (CAC), automatically grants legal recognition. This allows the union to appoint its representatives in the workplace and to enjoy trade union rights and the right to negotiate wages with the employer.
To gain legal recognition, unions that are unable to show the required percentage may, as an alternative, show the favorable vote of at least 40 percent of the employees in the bargaining unit. This double threshold means that a high mark in favor of the union may be insufficient to obtain recognition if, for example, the turnout is low. If it fails to achieve this quorum, the union seeking recognition loses the right to present itself again for three years.
The associative model is also present in Germany. Here only a union able to impose a collective agreement with normative value according to the law on collective bargaining (*Tarifvertragsgesetz, TV*G) is considered a *Gewerkschaft* (union) in the strict sense of the word.
In the German model, however, trade union representation expresses a dual model in workplaces: trade union representation as an expression of its membership (associative model), and works councils as an expression of both workers who are enrolled and those not enrolled in the company (elective model). Both systems are regulated by law.
The negotiating team is elected by union members. Usually a company has only one trade union party (the union member of the DGB). In this way German unions that belong to the DGB (confederations of trade unions responsible for union politics and support more than for negotiations) avoid competition and conflicts of interest with the others. Collective bargaining is the responsibility of trade unions, and collective action as well can only be proclaimed by the union.
The representation of works councils is not based on voluntary association, but is an elective representation regulated by law. Council members are elected by all employees of the company.
The current law of 1972 related to the establishment of works councils requires the election every 4 years of works councils in all companies employing at least 5 employees.
These have the right to collective negotiation in all areas in which they are entitled to co-management (Sec. 87 of the Act on Company Councils): disciplinary sanctions, working hours, control systems of workers, industrial planning, etc. These collective agreements at the workplace or company level are binding

for all employees of the employer.
The law of company councils also regulates the relationships between collective agreements of works councils and collective agreements between the unions and the employers or their associations. The latter agreements take precedence over those produced by the works council. In fact, since they are less influenced by economic pressures and by the constraints of the company's size, these agreements are the most genuine expression of freedom of association guaranteed by the Constitution (art. 9 par. 3).
In relation to the employer, works councils have rights derived from law. The Works Council Act of 1972 not only requires that the employer finance the activities of the work council, but also it authorizes the councils to acquire rights to require information and consultation, and to impose co-determination. In a certain number of fields the employer cannot make a decision without the consent of the works councils. The works council must report its own activities to the employees four times a year, but is not subject to dismissal.
The works council furthermore cannot declare a strike even if the majority of the members of the works council are also union members and therefore have the right to participate in a legal strike.
In the negotiations the unions employ specialist lawyers to assist their members in any legal conflict with their employers and can represent their members in civil proceedings. This service is usually free, with legal expenses (including the opponent's lawyer, in the case of loss) covered by the union.
Members of the union are thus greatly shielded, since they are able to open a legal dispute with their employers without assuming the relative financial burden.
In Poland, «representative» union legal status is granted only to historical workers organizations, such as: All National Organization of Trade Unions - OPPZ, the National Commission of independent self-governing Trade Union «Solidarity», which have the right to take part in activities of the three-party Commission for Social Affairs, regulated by a law of July 6, 2001. Other unions may be considered representative only if they prove to be at least 10 percent of the workforce or no less than ten thousand people comprising both workers and employees. In Poland, however, it only requires ten workers to form a union.
In Bulgaria, the criteria for determining an association's representativeness are dictated by law.
To be representative, an organization must meet the following requirements:
1. at least 50,000 members;
2. present in at least 50 companies each with at least 5 employees;
3. local representatives in more than half of the municipalities in the country and a nation-wide body;
4. status as a legal entity, acquired pursuant to art. 49 of the LC.
The union organizations have the right to represent their members in legal

proceedings regarding individual labor disputes. They cannot conclude agreements related to claims or rights of workers without the consent of the workers.
Some unions are organized on the basis of the trade or professional qualification, e.g., Free Trade Union Aviation, which mainly organizes ground workers in the aviation field.
Art. 7 of the 1986 Labour Code provides for bodies representing the workers, which are elected in the workplace with more than a two-thirds majority of the assembly. Such entities are not responsible for negotiations, but can assist workers in specific disputes that have arisen in the handling of the employment relationship.

*2.2.3 The elective model*

The elective model is that in which representation of the trade union is constituted as expression of the will of the workers manifested through voting.
In Spain, art. 28. 1 of the Constitution and the Ley Orgánica 11/1985 establish that the general representation of workers interests is entrusted to the representative trade unions.
The degree of representativeness is reflected by the number of votes received by the trade union in the elections (in the workplace) of the works council representatives.
The law distinguishes between three types of union representation:
a) Trade unions that have received at least 10 percent of the votes in the civil service workers elections at national level.
b) The representatives of the Autonomous Communities (Basque Country and Galicia), unions that have obtained at least 15 percent of the vote in the workplace elections of works councils.
c) The basic representation is accorded to the unions that have obtained in a specific geographical area or trade sector, at least 10% of the members elected by representative bodies of employees in a firm, or in public administration.
These unions enjoy the general representation of interests in public institutions, and may enter into collective agreements with general effectiveness.
In Spain, the dual organizational model (associative and elective) for representation in the workplace, partially inherited from the Franco period, comprises two structures, the first known as the «works council» (elective), and the second, the union representation (associative) denominated «union section».
The lack of clear rules of jurisdiction raises issues of coordination and competition between the two structures.
In France, the system of worker representation is regulated by the law that selects the representative unions on the basis of seven criteria: independence (meaning union action free from conditioning by the employer), the number of members and union contributions, seniority (minimum two years in the professional

field or geographical area corresponding to the negotiation level) and leverage, characterized chiefly by activity and experience, respect for republican values, financial transparency and the voting results.
To obtain representative recognition, the unions must meet the above requirements and at the various negotiating levels, receive a certain number of votes in specific elections organized for the constitution of the employees' representation.
That is, they should obtain at least 10% of the votes cast in the first round of the most recent elections of members of the works council, or of the single extant trade union delegation of employees or, failing that, of the employees' delegates, whatever the number of voters.
In workplaces in France representation is articulated according to the dual model: entities composed of members elected by the workers (whose election results, as we have seen, become significant for the identification of representative unions) and bodies whose members are appointed directly by the unions.
In principle, the elective bodies do not have the power to negotiate collective agreements even if they represent the interests of the whole community. They do, however, have a limited ability to negotiate in firms with fewer than 200 employees in which there are no trade union delegates, and only for measures whose implementation is subject by law to a collective agreement. The negotiation is subject to the approval of a joint committee set up at the productive unit.

*2.3 Regulation of the Collective Agreement*
The function of the strike in the definition of the collective agreement is well known.
The common denominator of all the manifestations of self-defense is the exercise of economic pressure in defense of collective interests. This pressure is usually aimed at the counterparty in a trade union dispute. Regulation of collective bargaining is therefore an essential part in the understanding of the procedures that mark the dates, parties, and contents of the strike event.
The regulation of collective bargaining has to do essentially with the *erga omnes* efficacy and the selection of persons responsible for negotiating and if necessary, empowered to take the bargaining beyond the sphere of the union's membership.
Collective bargaining is regulated by law in most of the countries surveyed (i.e., Bulgaria, France, Germany, Poland, Romania, Spain, United Kingdom). The procedures for defining it differ in reference to the instruments considered valid for reaching the agreements. These instruments are an expression of the will of the workers when the validity of agreements is subject, entirely or in part, to discussion by the workers. They are an expression of the will of the members when the validity of agreements is subject to judgment by the union representation.

*2.3.1 Use of referendum for subscribing collective agreements*

In Bulgaria, only the effects of collective bargaining are regulated by law. Trade union pluralism bows only to the necessity of ensuring a uniform and reliable regulation of labor relations within the workplace. Thus, if the unions are unable to present a joint proposal, the employer is obliged to deal with the union whose project was previously approved by the employees' general assembly by a majority of more than 50%. The Minister with the relative competency may extend the collective agreement *erga omnes*, if the parties so request (Bulgaria).

In France, a minority of workers is sufficient for validity of agreement. The agreement, in fact, is valid if signed by one or more representative trade unions that have received at least 30% of the total votes cast in favor of unions recognized as representative. One or more representative trade unions that received the majority of the votes in the elections for recognition of union representativity can request that the agreement be declared invalid.

The agreement can be temporary or permanent and has continuing validity until the validation of a new agreement. All individual employment contracts with signatory employers who adhere to the organization of signatory employers are regulated by the provisions of the agreement. *Erga omnes* effectiveness can be acquired by means of a decree by the Minister of Labour after a procedure established by law (Extension Order). The decree may extend the terms of the agreement to all firms in the commodity sector related to the said agreement thus validated by the Minister, and sometimes even make it applicable to related sectors where collective bargaining is absent (decree extension).

In Spain, the bargaining is regulated by a law establishing requisites to ensure trade union representativeness for purposes of the definition of a collective agreement and, in institutional settings, representation of the interests. The priority requirement for selection, however, is constituted by the number of votes received by each union in workplace elections. The collective agreement entered into in respect of the procedings of the law, has *erga omnes* validity.

*2.3.2 Collective agreement and the will of the membership*

In Romania, the power to negotiate and sign collective agreements or to join tripartite bodies representing the interests of workers is regulated by law. The lower levels of bargaining may not introduce pejorative clauses with respect to the clauses of the higher levels. The law requiring the employer to respect the stipulated collective agreements extends the agreements *erga omnes*. Both the trade unions and the employers can be held responsible for the violation of collective agreements.

At a national level in Romania, to acquire representative status, a union must meet three fundamental conditions. That is, it must have 1) the legal status of confederation; 2) a membership equal to at least 5% of the labor force employed in the state-controlled national economy; and 3) local union offices in at

least half of the regions of Romania, including the cities in the municipality of Bucharest. At the corporate level the union must be able to prove that its membership comprises at least half plus one the total number of employees.
In Romania, collective bargaining is mandatory only for production units with more than 20 employees. The delegation is appointed directly by the union. The delegation may be supplemented by experts (lawyers, economists, experts, etc.) whose purpose is the technical assistance of the trade union delegation. The signing of collective agreements is the responsibility of union leaders who participate in collective bargaining, and it has *erga omnes* effectiveness.
In the United Kingdom, too, regulation of collective bargaining has been made law. The employer is obligated to bargain with the union that can show it has majority support (i.e., 40 percent membership in the form of both occasional signers and subscribers). Otherwise it must proceed to a consultation of workers, and receive a favorable vote of at least 40 per cent of all employees in the production unit. An independent body certifies the recognition. Most of the collective agreements are still signed, however, using the older system of free recognition between parties.
Also, collective agreements in the United Kingdom are the product of collective autonomy expressed in the form of association. The British system does not have mechanisms of *erga omnes* extension for collective agreements. Negotiative legal norms and principles of case law coexist, however, and create a large set of minimum standards for a wide range of matters (e.g., minimum wage, working hours, health and safety, discrimination, dismissal, etc.) which can not be waived.
In Poland, the employer has an obligation to negotiate with the unions on specific subjects, and any negotiated contracts will apply to all workers, regardless of union membership. Contract and union negotiations for state-owned enterprises maintain an authoritarian character typical of the historical statecontrolled practice. The negotiating parties are the union and the Minister or the local administrative structure, depending on the level of the bargaining. For every state enterprise, the administrative authority submits a proposal to the workers councils. This shows that the employer associations have no real power in the negotiation or finalization of collective agreements.
Collective agreements are stipulated for an indeterminate period of time, though fixed-term contracts are also possible. In the latter case, an agreement automatically expires at the end of its established term. Regardless of its term, fixed or not, an agreement may be terminated at any time with the consent of all parties or unilaterally with notice (three months). In the private sector, similar collective bargaining practices exist.
It should be noted that in the countries surveyed, the use of the referendum on the draft agreement reached by the parties in collective bargaining is an instrument

that is rarely used and always voluntary (Italy).
In Germany, the law does not intervene on the composition of the representation, nor does it regulate legal requirements, validity, or the effects of collective agreements between «unions» and employers or associations of employers.
Collective agreements have a direct effect on an individual's terms of employment only if the employee is a member of the signatory union, and the employer is a member of the signatory association of employers, or part of the collective agreement itself. Both social partners: employers and unions, can ask the government to extend collective agreements *erga omnes*.
Similarly, in Sweden there is no legal regulation of collective agreements, which are legally binding for both parties to the agreement, and for the members of organizations that have reached such agreements. There are no procedures for extension of collective agreements with *erga omnes* effectiveness.
Collective bargaining in Sweden is regulated by the agreement between parties, and is structured on three levels and arranged through a referral from one level to another.

*2.3.3 Recent tendencies in industrial relations*
Warning signals of the deterioration of solidarity between the professional categories are indicated in several national reports.
The German report notes that recently a highly aggressive trade unionism has appeared in the union panorama. Strikes by these organizations are greatly feared by employers, and can result in extremely advantageous collective agreements for these unions and their membership. The phenomenon has sparked debate regarding the respect for the principle of proportionality in relation to the equality of the parties in conflict. The question over whether proportionality is actually respected is raised when, for example, a strike by a small group of workers brings the entire nation to a standstill. A part of the juridical literature has considered such strikes as lacking the requisites of proportionality. They are, in fact, proclaimed to gain benefits for a small group, against the loss of the many.
Another disquieting phenomenon is that of the change in the hierarchy of the levels of collective bargaining in the direction of a greater and more extensive role of enterprise bargaining (Italy).
In Romania, the law has recently abolished national-level bargaining. Only the corporate, group level still exists, for the business sector and it is compulsory only for firms with more than 20 employees. In the United Kingdom, too, bargaining is highly decentralized.
In Germany as well, in recent years we have witnessed the proliferation of trade unions and collective agreements, which are the effect of a law that promotes collective enterprise bargaining. In fact, in some cases this legislation

permits exemption clauses in the terms of pay and conditions required in collective agreements, but prohibits that such waivers are introduced directly into the individual contracts. This encourages employers to stipulate collective agreements. In recent years, in fact, collective agreements at the corporate level have multiplied (Tarifvertrag). Thus, in order to facilitate the stipulation of corporate contracts, employers are induced to abandon their associations, to the point that some of these associations have begun to offer employers membership «without respecting the collective agreements» stipulated by the associations, thus forcing the unions to bargain individually with the corporations.
The proliferation of contracts also generates another phenomenon.
It can happen that an employer is obligated to respect more than one collective agreement in relation even to different categories of employees (collective plurality). The Federal Labor Court has ruled on the issue of competition or conflict between collective agreements, determining that the employer must be bound to a single collective agreement («Tarifeinheit», collective unity), and that the choice between agreements is regulated by the principle of *lex specialis* (cf., for instance, BAG 11.8. 1992, AP n. 124. zuArt. 9 Arbeitskampf GG) according to which the contract that is closest to the situation in need of regulation is that which prevails.
To prevent that the proliferation of collective agreements at the establishment level, which prevail over the national contract due to the specific context of their regulatory power, should weaken the hegemony of the collective agreements stipulated by the most representative trade unions, in June 2010 the German Confederation of Trade Unions (Deutscher Gewerkschaftsbund, DGB) and the Confederation of German Employers *(Bundesvereinigung Arbeitgeberverband der Deutschen, BDA)* came to an agreement on collective autonomy and bargaining units. This agreement has been much contested since it amends the law on collective agreements (TVG) and, in the case of competition/ conflict between collective contracts, gives the priority to the collective agreement stipulated with the union subscribing the greatest number of employees in that company. If this agreement between the Confederation of Trade Unions (DGB) and the Association of Employers (BDA) were to be transposed into law, it would have important consequences on the regulation of the strike. Union organizations with less representation would be inhibited from striking if there was a collective agreement in force with a «representative» union, within the firm concerned. The law implementing the agreement, in fact, would make it possible to extend the obligation of accord contained in the agreement signed with the most representative union, to all other unions present in the firm.
We are witnessing, then, a strengthening of the role of enterprise bargaining.
In Romania, the law has recently abolished national-level bargaining. There is only the enterprise level, by group, for business sector and is compulsory only

in firms with more than 20 employees.

*2.4 The cases Viking, Laval, Ruffert*

*2.4.1 Complexity of the case analysis*

The Viking, Laval and Ruffert decisions have raised a dual problem: the conflict between the economic freedoms and social rights stipulated in the EU Treaties, and the conflict between Community law and domestic law in relation to national constitutional rights.

The second aspect opens strong tensions, since it invests the national assets of government in the conflict between economic freedoms and historically determined social rights.

A third aspect concerns the problem of the possible conflict between international laws (European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Conventions issued by the International Organization of Labour in the ONU) and Community laws in relation to social rights.

To methodically analyze these matters, it will be useful to briefly summarize the cases in which the Court of Justice has ruled.

*1) Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line (Judgment, 11 December 2007)*

Viking, a Finnish company that operates the route between Tallinn (Estonia) and Helsinki (Finland), to beat the Estonian competition decides to change flags, and register its ship in Estonia with the aim of stipulating a new collective agreement with an Estonian union. It communicates its decision to the FSU, the Finnish seamen's union, in which the members of the crew are enrolled.

The FSU calls the strike while the international trade union (ITF) to which it is affiliated orders its members not to engage in negotiations with Viking, which turned to the national court asking for the withdrawal of the ITF circular and cessation of any FSU behavior impeding the exercise of the rights which Viking enjoys under article 43 EC. The judge rules in favor of the request of the Viking and condemns the behavior of the organization as an unlawful restriction of the freedom of movement of the workers and of their freedom to provide services under articles 39 EC and 49 EC.

The dispute before the Luxembourg justices has two aspects: 1) whether article 43 EC has a direct horizontal effect, giving a private company rights to be invoked against another private party, in this case against a collective action proclaimed by a union; 2) if the collective action of a union, in the case it should constitute a directly discriminatory restriction according to art. 43 EC, can in principle be justified on the basis of the exception to public order under art. 46

EC: a) taking a collective action (including strike action) is a fundamental right protected by Community law and/or b) because it involves the protection of workers.
On the one hand the Viking ruling says that the provisions of the Treaty are formally addressed to the Member States but that they also confer rights to the parties in compliance with the obligations to which the States are bound. In addition, the prohibition on violating a fundamental freedom provided for by a provision of the Treaty with an imperative nature also applies to all agreements regulating the employment in a collective way (see, to that effect, Judgment April 8, 1976, Case 43/75 Defrenne ECR. 455, paragraphs 31 and 39). Therefore, it admits the horizontal effect of the rules referred to in art. 39 and 49 EC.
Regarding the second aspect, for any assessment it refers to the national Court, which must consider the applicable national and contractual legislation, and ascertain whether the FSU had any other way, less restrictive of the freedom of the company (stabilimento), to bring about the successful conclusion of the collective negotiations underway with Viking, and if that trade union had exhausted all possible courses of action to avoid a collective (strike) action.

*2) Case C-341/05 Laval v Svenska Byggnadsarbetareförbundet (Judgment 18 December 2007)*
The Laval, a Latvian company, posts 35 workers at the L&P Baltic Bygg AB (hereafter the «Baltic»), a nominal Swedish company 100% incorporated by Laval, to carry out construction work on a school building in Vaxholm. The terms of employment of the 35 workers are regulated by a collective agreement stipulated with the Latvian construction workers' union. The Swedish trade union Byggettan, which has no members in the Baltic, asks Laval to subscribe to the collective agreement for the construction work at the Vaxholm building site and, secondly, to guarantee the placed workers a salary equivalent to that enjoyed by the Swedish workers, and thus far superior to that provided for by the Latvian collective agreement. Moreover in subscribing the Swedish collective agreement on building trade, the Laval would be bound to respect all the clauses thereof, including those relating to pecuniary obligations with respect to the Swedish trade union (an amount equal to 1.5% of total gross wage) and the insurance company FORA (0.8% of total gross wage as a «surcharge» or «special building supplementary» and to 5.9% of total gross wage or several insurance premiums).
Laval rejected the demands and the Swedish trade union initiated its action by blockading the Vaxholm worksite (the picketing obstructing the delivery of goods to the worksite, and blocking the Latvian workers and vehicles from entering). The Laval seeks the assistance of the police, who refuse to take action since the collective action undertaken by the union was legitimate under national

law. The Swedish trade union Elektrikerna also initiates an action of solidarity, which effectively prevents Swedish companies belonging to the employers' organization of electricians to provide services to Laval. The Baltic, unable to meet its commitments for the construction of the school, is forced to submit to the termination of the contract with the town of Vaxholm, and declares bankruptcy. The Laval turns to the Swedish Court, which in turn refers to the Community Court with the following queries:

– If the collective action exercised in the form of blockading, with the purpose of inducing a foreign services provider to sign a collective agreement in the host country is compatible with EC Treaty rules (articles 12 and 49 EC) on the freedom to provide services and the prohibition of any discrimination on grounds of nationality, as well as with Directive No. 71/1996;

– If the proscription in the Swedish legislation that prohibits a trade union from taking collective action to break a collective agreement stipulated by other parties also extends to previously stipulated foreign collective agreements.

*3) Case C-346/063, Dirk Rüffert v Land Niedersachsen (Judgment 3 April 2008)*

A law in force in Lower Saxony regarding public contracts requires that in the ambit of construction works and public (passenger) transport, the contracting public institution award contracts only to companies that pay the wages established by collective agreement in the place where the work will be carried out. The Objekt und Bauregie, a German company, wins a contract for structural work for the building of the penitentiary of Göttingen-Rosdorf, and subcontract the job to a Polish company that offers the 53 workers employed on the worksite only 46.57% of the expected minimum wage. The German judge charged with ruling on this issue, turns to the Community Court to verify the compatibility of the German Land law with the provisions on freedom to provide services sanctioned by article 49 EC.

The Viking, Laval and Ruffert cases have previously been treated as very similar events. If examined with care, however, they reveal significant differences that require underlining.

In the Viking case we are talking about pure legal shopping. The company concerned does not make use of any of the freedoms provided for by the Treaties, such as freedom of establishment, since it does not even change its headquarters, or the freedom to provide services, because it does not post any of its employees. It simply changes the flag of one of its ships. In short, it finds an expedient to enable it to pay its own Finnish employees lower wages. The national and community Courts do not perceive this or else believe that they are extending the concept of «establishment» and «providing services» beyond the literal meaning, to the point that it coincides with the generic «freedom of enterprise». The Laval case effectively materializes one of the hypotheses regulated by the Directive of Services No. 71/1996.

The Ruffert case expresses a breach of the internal legislation on public contracts. The lowest common denominator among Viking, Laval, and Ruffert is in the source of the disputes, that is, an incomplete or imperfect national legislation that fails to comprehensively regulate the phenomenon of transnationality, and the consideration of the strike as an undesirable event because capable of hindering the company's aims.
To limit our comments on these decisions to the parameters of the matter being addressed in this inquiry, only the Laval case will be treated. In the other two cases, in fact, elements are present that could produce confusion in this analysis.

*2.4.2 Debatable interpretations by European Judges*
The regulatory framework in which the case can be traced back comprises in the first place the provisions of the Community.
With articles 49 and 50 EC, the Member States committed themselves to allowing a service provider established in another Member State to move about freely with all its staff in their territory in a position of absolute equality with other national service providers.
A special regulation was dictated for the freedom of establishment and freedom to provide services with regard to terms of employment (labor relations?).
Directive n. 123/2006 states that the host country will apply its own legislation with regard to the safeguarding of employment to the company exercising the right of establishment.
Directive N. 71/1996 establishes, in the interests of employers and their personnel, the terms and conditions of employment applicable to the employment relationship, in the event that a company established in one Member State posts workers temporarily in the geographical territory of another State. It is for the national legislation in compliance with the Treaty and with the general principles of Community law, to lay down a nucleus of mandatory rules for basic protection to be observed in the host country by employers who post workers.
Member States may also regulate different aspects from the list of matters covered by the directives, provided that they are provisions of public order or rules established by collective agreements (art. 3 c. 10) declared universally applicable. That is, established provisions «that must be respected by all companies located in the geographical area and in the professional or industrial category concerned» (art. 3 c. 8).
In the event that these are lacking, the States can «make use» «of collective agreements or arbitrations which are generally applicable to all similar companies in the geographical area and in the profession or industry concerned, and/or collective agreements finalized by the most representative social parties at the national level, and which are applied throughout the national territory»

(art. 3 c. 8).
The addressees of this regulation are the States, and it is quite clear from an examination of the cases that the failure of the national legislation to provide an exhaustive and precise application to the Directive has left unregulated large areas of the phenomenon of transnational provision of service.
In the absence of legal rules, to help with the relations between private parties there is a general framework contained in the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (OJ No L 266, 9. 10. 1980), which came into force on 1 April 1991 in the majority of Member States and was subsequently adopted in Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
Article 3 of that Convention provides, as a general rule, the free choice of legislation by the parties. In the absence of choice, the contract shall be regulated in accordance with article 6, paragraph 2, by the law of the Country in which the employee habitually carries out his work under the contract, even if he is temporarily employed in another country, or, the employee carries out his work in more than one country, by the low of the country in which the company's main office is located, the law of the country where the company's headquarters is found. The exception to the rule is constituted by terms of employment that have elements that are strictly linked to one country in particular, which will then determine the applicable law.
In essence, since the Swedish law had failed to apply article 10 of the Directive, Laval could have availed itself of the law provided for by the Convention of 1980 which enabled it to apply the collective agreement of the country of origin to posted workers.
The Court of Justice moves in this legislative framework but does not limit itself to the strict assessment of the proper implementation of EU rules within national law (so-called «vertical efficacy»), going beyond to tread the thorny paths of the implementation of Community law in relationships between private individuals (so-called «horizontal efficacy») and relationships between Community law and constitutional rights.
In fact, the Community Court states that «art. 49 EC. [...] confers to individuals rights that they themselves can legally enforce, and which the national courts must protect» (paragraph 97 Laval).
In broad terms, the reasoning of the Community Court is easy to follow. The provisions of the Treaties adhere to a truly consistent legal principle. To the extent that Member States devolve jurisdiction to the European Union, this right completes the national legislation. The freedom of establishment and provision of services constitute an obligation that cannot be disregarded even if it comes into conflict with the constitutional rights over which Community law has no jurisdiction.

Economic freedoms and the right to strike must necessarily be coordinated (not balanced), using as a regulating criterion the principle of proportionality.
In other words, the Community Court states that the holders of the rights of freedom in the provision of services and establishment can act against anyone (be they public or private parties) who impedes their freedom.
Any conflict between economic freedoms and constitutional rights must be resolved by applying the assessment of proportionality.
This approach of the Community Court raises several concerns of an hermeneutic order.
The judgments seem, in fact, to ignore the goals of trade union action, safeguarded by many European national constitutions. Indeed, with great clarity,
the judge of the Laval case states that a Member State's trade unions' exercise of the right to take collective action to induce transnational companies to sign a collective agreement (the clauses of which differ from the laws establishing terms and conditions of employment that are more favorable with regard to the matters listed in article 3, No 1, first paragraph of article. a)-g) of Directive 96/71, while others relate to matters not covered by that provision) can discourage or make it more difficult for these companies to carry out «productive activities », and that it therefore «constitutes a restriction on the freedom to provide services pursuant to art. 49 EC» (paragraph 9).
This conclusion has provoked great alarm in the trade unions and among academics. The strike is by definition a collective abstention from work in order to put economic pressure on the employer. In describing the strike as a collective action that can «discourage or make more difficult», the Community Court tautologically echoes the definition itself of the term strike, which in its legal sense (national, supranational, and international) is safeguarded with defenses of a high order. And yet, quite dismissively the Luxembourg Court demotes the strike from its rank assigned by the system of values consolidated in Western legal systems, reducing it to a mere «restriction of the freedom to provide services pursuant to art. 49 EC».
The Community judge's statement is both disconcerting and intimidating in its crude inaccuracy. Regarded with calm detachment, it appears radically flawed.
The Community Court, in essence, seems to claim that the regulation of the employment of posted workers is authoritatively provided for by the national law implementing the Directive, and that any action aimed at calling that level into question violates the pactorial laws. The argument, however, is not consistent.
The States have the obligation to ensure the freedom to provide services.
They are thus prohibited from discriminating between domestic and foreign companies. The Directive of Service provides basic safeguarding of working conditions. These basics are not the last threshold of conditions applicable to posted workers. Member States, in fact, can not prevent hosted companies from

contracting obligations with private parties that are more onerous than those required by law. In other words, if using the proper means of collective autonomy the unions succeed in obtaining more favorable terms with the consent of the employer, this cannot be considered a violation of the Treaties.
A conclusion to the contrary would lead to a negation of the very roots of the freedom of collective action, and even of the freedom of competition. It would, in fact, create situations of discrimination against domestic companies, which alone would remain exposed to the collective action. This consideration, which is obvious at the political level, is useful in any case to shed light on the legal implications. Because the content of the State's obligations can never be extended to include a commitment to create a condition of immunity from collective action for the exclusive benefit of the transnational enterprises, the conclusions of the Community judge are in error, being unsupported by the dictate of the legislative Directive n. 71/1996.
The obligation of the State, as well as of all the parties required to comply with the pactorial laws ends after guaranteeing all companies the same conditions and therefore the same exposure to collective action. The differences between systems of industrial relations is unquestionably one of the parameters used by companies to evaluate the costs of investment. This evaluation takes place in a dimension of relations characterized by the greatest contractual freedom of private parties.
It should be stressed, therefore, that the special legislation on the safeguarding of working conditions in transnational companies, aims at identifying a level of minimum guarantee to avoid the «regulatory shopping» allowed by the Rome Convention, but does not allow transnational companies in the host country to enjoy a privileged position compared to domestic companies.

*2.4.3 Economic freedoms and constitutional rights*

In the early '70s, this theme was the focus of the Constitutional courts, especially those of Germany and Italy, which had assumed the prerogative of exercising an association of compatibility of the Community legislation with internal constitutional principles. A repeatedly declared adherence of the Community legal system to national constitutional principles and the principles contained in international charters of human rights has, over the years, reassured the national Courts.
The Viking, Laval and Ruffert decisions have once again raised the question of the relationship between economic freedoms and constitutional rights in a regulatory framework that is much changed with respect to the 1970s.
In reality, there is ample recognition in the decisions under examination of the collective autonomy and its rights, and it therefore seems excessive to build a barricade to defend the right to strike.

The acknowledgement, reiterated even in the sentences under consideration, of the right to take collective action as a «fundamental right which is part of the general principles of Community law for which the Court guarantees respect» (paragraph 91 Laval) is sufficient reassurance.
New values, however, have found their way into the Community judiciary, including the freedom to provide services and the freedom of establishment. The Community Court states proudly that restrictions on such freedoms are only admissible where such restrictions pursue a «legitimate objective compatible with the Treaty» and are justified by «overriding reasons of general interest, provided that they are necessary to ensure the realization of the aim, and do not go beyond what is necessary to achieve it».
Thus, the European Union has its own value system, which only partially corresponds with the internal value systems of the States; it cannot, however, overlap these.
The affirmation of the Community judge, according to which in the absence of provisions that fully activate the directive for safeguarding the national industrial relations systems, economic freedoms prevail over national constitutional rights, thus appears excessive.
This conclusion is questionable not so much in terms of the «ethical» values that inspire the EU, but rather because the States have not wanted to establish a hierarchy between the Constitutional law and the Community law. The concerns raised by the constitutional courts, especially those of Italy and Germany, have been overcome only by virtue of the explicit adhesion of the Community legislation and its judges to the respect for fundamental rights. The surreptitious affirmation of a hierarchy between economic freedoms and constitutional rights could raise new objections by national constitutional courts.
A fairer and more balanced solution to a conflict between jurisdictions could be found by abandoning unconvincing hierarchical criteria pulled from the sources, and instead, making better use of the parameters established by the rules regulating the application of the Charter of Fundamental Rights of the European Union.
First of all, this means that such a conflict has to pertain to matters within the competences of the European Union.
The competence rules are found in the provisions relating to the interpretation and application of the Charter.
The first rule is set forth in art. 28. It reaffirms the general principle of national legal systems that give full autonomy to collective parties, and the freedom to negotiate and stipulate agreements. The rules regulating collective bargaining and contracts must in principle reflect the freedom of collective parties.
The first parameter is, therefore, the respect of the collective individual autonomy.

Among possible ways to resolve the conflict between legal systems, solutions that guarantee the lowest level of compromise of the autonomy of collective parties should be chosen. To this end the States could greatly contribute with legislation regulating the phenomenon of transnationality, more attentive to safeguarding internal systems of industrial relations.
The second parameter is specified in article 51, requiring the principle of subsidiarity in the application of the Charter. The third parameter (art. 52). prescribes two precautions in the introduction of limitations to the exercise of the rights recognized by the Charter: the respect for the «essence» of those rights and the principle of proportionality. These limitations should be functional to the protection of «objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others» (art. 52 c. 1).
Finally, the fourth parameter directly binds the Community authorities and the courts to interpret the provisions of the Charter in harmony with the «constitutional traditions common to the Member States» (paragraph 4 of Rule 521).
In the Laval case, the judge had make a decision using the Community legislative elements at his disposal, and hence with the rules of Community law.
With the Treaty of Lisbon, the Charter of Fundamental Rights takes on the same legal value as the Treaties. Thus, if cases similar to those of Viking, Laval, and Ruffert should re-present themselves, the Luxembourg Court may make decisions different than those adopted. It must, however, be stressed that in Community law the right to strike does not prevail over economic freedoms.
The new connotation of the Charter in the Community legislation may, however, affect a very significant aspect for guaranteeing the right to strike. Implementation of the Charter can, in fact, inhibit the direct (horizontal) effectiveness of pactional laws when they are in conflict with constitutional rights. The parameters of competence required by the Charter, in fact, make it difficult to configure a horizontal effect of the pactional laws on matters affecting the right to strike.
It is opportune to premise this by observing that for matters within their exclusive competence, the Member States are free to determine how to exercise their rights although they are «obliged» to respect Communitary law. Therefore, as both internal legislation and European law (article 281 of the Charter of Fundamental Rights) provide, the right to strike can be subject to restrictions in relation to the «conformity» of the right to collective action with the need to safeguard the rights protected by the Treaty.
Similarly, Community case law can also dictate the parameters of «conformity » by referring to those already formulated in the Viking, Laval, Ruffert cases. Economic freedoms, in essence, are subject to limitations justified on the grounds of the protection of workers, «provided it is ascertained that» such restrictions are «necessary to ensure the realization of the legitimate purposes

pursued» and do not go «beyond what is necessary to achieve that goal» (Viking), in accordance with the principle of proportionality.
Such an assessment is the exclusive competency of the Community Court.
The national court has a more limited horizon of investigation, and is unsuited to rule on matters of an indefinite nature that affect both the domestic and community populations.
The Community judge is required, as previously stated, to respect the parameters for implementing the provisions of the Charter, which allows him to assess the collective action and its effects on economic freedoms, while also considering the regulations set forth in art. 28 in the Charter. What is extremely debatable, on the other hand, is assigning a Community judge with a specific competence directed at defining limitations on the rights sanctioned in national constitutions. Even more unlikely is the hypothesis that the enterprise can directly oppose the trade union action (contrary to what the judge of the Viking case states) in order to obtain effective compensation pronouncements in regard to subjects for which the judge has no competence.
It should in fact be reaffirmed, that the European institutions, while giving wide recognition to social freedoms, have very limited competency on the regulation of national industrial relations.
This does not mean that in matters regarding the strike, if economic freedoms are involved the Community judge must abstain, but rather that in his assessment he must respect the regulatory and industrial relations context in which the episode occurs. It is also evident that the dispute over the posting of workers will be posed in terms that can differ completely depending on the specific internal union system context that gave rise to the issue. It is illuminating if we examine several of these contexts.
For example, in Romania (see the report) it would be illegal to call a strike against a transnational company that changes its ship's name, as in the Viking case, in order to pay the employees less. The law in Romania allows only unions that are already parties to a collective agreement to proclaim strikes. On the contrary with reference to the Laval case, the Romanian law n. 344/2006, which accommodated Directive No 96/71/EC, extends to «posted workers, [...] working conditions established by the Romanian law and/or the collective labor agreement at the national and industry level». In essence, in Romania the law provides posted workers greater protection than that required by the either the Directive or Swedish legislation.
And Bulgaria too provides for minimum wages and working conditions directly established by law, even if negotiated with the social partners.
These two briefly described examples serve to demonstrate that the Community judge has important limitations in attempting to find solutions that allow restrictions on the right to strike in the application of the principle of proportionality,

which can not be separated from consideration of elements closely linked to the arrangement of national industrial relations systems, over which the individual states have the exclusive jurisdiction. Even assuming that, in his examination of the strike event, the Community judge wanted to be respectful of the historical and social dynamics of the various internal systems, the risk of altering sensitive national institutional scenarios could not be avoided.

The decisions of the Court of Justice on the Viking, Laval and Ruffert cases have, in fact, produced sometimes disruptive effects on the domestic law. In the UK the strike, as is known, is not a constitutional right. The threat of massive damage compensations in the event of a judicial decision of the Court of Justice that qualifies the strike as a violation of the freedoms guaranteed by the Treaties, can force the union to withdraw from the action even if it is legitimate under English law.

Potentially, however, the effects of these decisions can affect all countries, even those in which the strike is a constitutional right. The economic freedoms provided for by the Treaties can, in fact, as is clear from the decision of the Court of Justice, configure themselves as additional limitations to the right to strike. Furthermore, the competency and proportionality criteria as a measurement of the legitimacy of the strike risk handing over the collective action to the discretion of governments and to judicial interpretation.

Also resulting from the Viking, Laval and Ruffert case decisions, is the fact that Sweden was forced to «correct» its own legislation. The Community judge (in 2007) and then the national judge (in 2009) both affirmed the need to limit collective action by restricting its legitimacy to questions on the fundamental aspects of the employment relationship (wages, working hours, discrimination and workplace). Two paragraphs were added to the law that implemented Directive of services N. 678/1999, in which it is asserted that the strike action intended to force the employer to conclude a collective agreement is legitimate only if it is intended to equalize the terms of the work relationship and the terms of the collective national industry contract relative to minimum wage and other basic conditions, and that the demands of the unions must be controlled by an administrative authority.

All the foregoing examples demonstrate that the intervention of Community judges on matters related to the strike meets with serious difficulties, given the constraints placed by the parameters on the interpretation sanctioned by the Charter.

The foregoing observations also lead to the conclusion that the Lisbon Treaty has clarified the correct dynamic between judiciaries regarding economic freedoms and social rights. In the absence of an express hierarchy between Community rules and constitutional provisions, the Community judge, when responsible for examining disputes arising from the exercise of the strike, is only able to condemn the state for the non-implementation of Community law if it is shown that

the prejudicial effect of the right of establishment or of provision of services is the direct cause of the collective action and, therefore, of the failure of the legislator who did not effectively protect economic freedoms. The law applicable to transnational companies depends, in fact, on the modalities in which the domestic laws have incorporated the principles contained in the Directive. The Community judge may, therefore, contest the State that did not fully implement art. 3 c. 10 of the Directive, for not having permitted the transnational companies to evaluate the expediency of the posting operation, and thus for having negatively affected the companies' exercise of the freedoms guaranteed by the Treaties.

*2.4.4 Multi-level safeguarding of the strike*

The strike is protected at multiple levels: national, Community, international. The norms regulating these safeguards not homogeneous. Not surprisingly, then, conflicts may arise between the rules and the decisions related to the different levels.

The European Union member countries belong simultaneously to all levels of the production of law in Europe (national, supranational, and international); a circularity in the effects of decisions taken by the various international bodies is thus physiological.

A typical example of multi-level effects induced by the decisions of the judges of Luxembourg is that of the BALPA case: the strike called by the BALPA (British Airline Pilots Association) against British Airways (BA) and immediately called off after a formal notice was filed by the airline that threatened (recalling the Viking and Laval rulings) a compensation of 100 million pounds a day if the strike were to be ruled illegitimate. Despite having exhausted all the procedures under British law, the BALPA was forced to give up the strike action.

Requested in 2010 for a report on the implementation of Convention n. 87, the ILO committee of experts expressed an opinion on the conformity of restrictions on the right to strike introduced by case law in the Viking and Laval decisions to Convention n. 87, with specific reference to the BALPA case. While refraining from judgments on the merits of unions, the ILO considered the concerns of the BALPA as not unfounded, recognizing that those judgments have created a serious obstacle to the exercise of the rights provided for by Convention n. 87. Of particular significance is the reference of the Committee to the different scale of values employed by the ILO with respect to those invoked by the EU. In the first there is no consideration of economic freedoms as limitations of the exercise of the right to strike.

It must be stressed, however, that the application of conditions that are inferior to those already established by collective bargaining constitutes a serious violation of the traditional trust in the negotiative freedom of the parties in British industrial relations. A recent controversy at the East Lindsey oil refinery[3]

has clearly demonstrated the strength of this tradition, and that it even applies to employers who post workers in Great Britain. In such cases, spontaneous strikes have forced employers to accept the terms required by the situation. Strong conflicts, could arise, however, between the Community and national levels in the countries in which the definition procedures of the collective agreement is established by law, and minimum wage is authoritatively fixed for all employers.

In France on the basis of the work code, a foreign employer would in any case be held to respect wage minimums even if this may not be correct with respect to Community obligations. Art. 18 § 1 of the Work Code clearly establishes that the clauses of an individual work contract, even in the case of a contract underwritten in another country, cannot be less advantageous for the worker with respect to what is indicated in the collective agreements.

The French judges, however, would have difficulty agreeing with the position of the European judges who ruled in the Viking and Laval cases. The constitutional right to strike establishes, in fact, that the State should abstain from any evaluation of «reasonableness» of the motives. In Poland too, State authorities define minimum wage. The statute that regulates minimum wage, approved October 10 2002, allows for the negotiation of the annual minimum wage. The Council of Ministers prepares the draft agreement that functions as the basis of negotiations, which are then communicated to the three-part Commission (Government, and the social partners).

In Sweden the Laval case provoked special concern because no procedure exists there for the *erga omnes* extension of collective contracts, nor is there any legislation on minimum wage. Collective agreements determine salaries fixed according to category, but these agreements are not declared to be generally applicative.

German law is applied to all enterprises in the country, irrespective of the owner's nationality. The unions could legitimately proclaim a strike against a foreign enterprise operating in Germany. In a case of conflict between collective action and the freedoms established by the treaties, the Constitutional court could overrule any European act or provision. The unions could theoretically demand that the federal Constitutional court declare decisions by the Court of Justice null and void, on the basis of insufficient competency.

The BALPA case well explains the prismatic effect of the protection of the strike at the international level, and the difficulty of identifying possible convergences.

When the European Union accedes to the ECHR, several legal knots could well be resolved. By acceding to the ECHR, the EU accepts its rules and also its jurisdiction, and can therefore be held responsible for compliance with the standards to which it is bound in the relevant fora.

Until then, the situation is more fluid. The legislature and the judges of the European Union must take into account the rules of the ECHR, but are not

bound to their strict adherence.
In the Charter, however, a principle is affirmed that would regulate any conflict between multi-level laws. Art. 53 provides that between domestic law, ECHR law and EU law, the provision most favorable to the worker must prevail. In other words, the national judges and even the judges of Luxembourg are also obliged to assess the various regulatory contents and choose, in the case of a hypothetical introduction of limitation on the right to strike, the «less restrictive » solution as possible.

*3. Exercising collective action: the rules*
In the legal systems examined, the strike meets procedural limitations and limitations that result in restrictions on the freedom of trade union action. These restrictions do not always coincide with the type developed from the doctrine of the internal and external limitations to the right to strike, a type which being still valid, has been adopted here to simplify the exposition.
A clear distinction must be made between countries where the freedom to strike is compressed in order to guarantee equal constitutional rights, and countries in which it meets limitations in reference to the conflict with simple private interests (Bulgaria, Romania).

*3.1 Formal and Procedural requirements (immunity, referendum)*
In all systems, the strike meets procedural limits of various kinds, sources, and intensities. The most widespread obligation is that of giving notification.
In some countries (Italy, Spain, France) the law lays down special rules for essential services.
There are no legal limitations to the right to strike in Germany and Sweden and France. Work councils may proclaim a strike if the majority of its members decides in favor.
In some countries the proclamation of a strike is subject to consultation.
In Germany there are no particular restrictions on the right to strike, except for the observance of the principle of proportionality, which is the key criterion for assessing the legitimacy of any type of strike. The social partners themselves, with the collective contract, determine rules of the strike.
In essential public services such as hospitals, a minimum of service is supposed to be maintained. The same holds true for the field of communications.
Strike action cannot be exercised during the term of a contract and relating to the matters regulated by it, or regarding the interpretation of the collective agreement. The Court may intervene to force the union to stop the strike in the case of a serious violation of the principle of proportionality.
In Sweden, social partners independently agree on the restrictions placed on the right to collective action. The most important of these agreements is the

Framework Agreement concluded in 1938 by the SAFe LO. The agreement contains provisions, among other things, for the avoidance of labor conflicts with devastating effects on socially relevant services. The Swedish Parliament also has the power, provided for in the Swedish Constitution, to terminate a labor conflict that threatens the society. This type of intervention occurred only once, in 1971. The government, however, cannot limit the rights of the parties to undertake collective actions. It can receive this power only through an act of the Riksdag (Swedish Parliament), the only entity competent to adopt legislation restricting the right to strike.

In Sweden the union proclaiming the strike must announce the action at least seven days prior to its effectuation, to the employer and to the national office of mediation. The notification, even when the parties are linked by a collective contract, is not obligatory if a strike is called for the failure or delay in the payment of wages. Nor is the disclosure obligation due in the case of legitimate impediment, that is, when the communication would nullify the efficacy of the union's collective action.

The law regulates the strike in Romania, Poland, Bulgaria, United Kingdom, and Spain.

In Romania strikes are proclaimed by representative trade unions, with the written consent of at least half the number of its members, or alternatively, by a spontaneously formed group of workers who have acquired, with regard to the proclamation of the strike, the adherence in writing of at least a quarter of the total number of employees present in the affected production unit. Moreover, the legality of the strike is also affected by a mandatory procedure of conciliation between the parties, which takes place in the facilities of the Ministry of Labor.

In Bulgaria, the party promoting the action must exhaust all possibilities of negotiation, before going on strike. In addition, in order for a strike to be considered legal, several conditions must be complied with: a referendum on the action, in which the strike proposal receives a favorable vote of at least 50% of employees of the company affected by the strike; and a written notice to the employer at least seven days before the strike. During the abstention from work, the strikers must in any case stay on the workplace premises.

Workers can hold warning strikes lasting, in certain cases, for one hour, without prior notice to the employer. In other cases, the strike must be communicated to the employer with at least seven days notice.

In accordance with the law on the conciliation of labor disputes (ASCLD), in Bulgaria the right to strike is guaranteed in all sectors of the economy, but the negotiating parties are obliged to conclude a written agreement at least three days before the action of the strike about the guarantee of basic services.

The agreement must provide that, during the strike, workers and employees will ensure the conditions for the conduct of those activities which failure to

perform could threaten or cause irreparable damage in the following areas: a) the life and health of persons in need of urgent medical care, or who are hospitalized for medical treatment; b) the production, distribution and supply of gas, electricity, heating, utility organizations and public transport services, television and radio or telephone services; c) public, private or environmental property; d) public order.

If an agreement cannot be reached, either party may ask the National Institute for Conciliation and Arbitration to resolve the matter using a sole arbitrator or an arbitration committee.

In Poland, the strike must be preceded by negotiations. The Law on the resolution of labor disputes requires the employer to respond immediately to the trade requests related to clauses, working conditions, wages, benefits and trade union rights and freedoms. The labor conflict can start the third business day following the submission of the requests to the employer, unless the latter begins the negotiations.

A strike that does not observe the procedures is considered illegal. These procedures include: a union structure competent to decide on the declaration of a strike; the exhaustion of negotiations, mediation procedures, and possibly any arbitration procedures; the support of the majority of workers (a vote favorable to strike with at least 50% plus one of all the voting workers); presentation of proper notification of the decision to strike to the employer at least five days before the strike.

It is possible to hold a warning strike, but only once and for no more than two hours. In the United Kingdom the strike does not have to observe special formalities, but if the workers want to protect themselves from a possible legal action by the employer, they must observe a procedure required by law, the first step of which is a referendum on the proposal to go on strike.

The consultation aimed at members of the union that is promoting the strike and not generically to all employees affected, must observe the following steps: Notice to the employer seven days before the vote, with information about the content of the consultation. The union must provide a list of categories of employees involved in the consultation and their workplaces (TULRCA 1992, s 226 aa). In the case of a national strike the notice for the employer may consist in a document of several hundred pages, given the large number of individual workplaces. The information provided should be as accurate as may be reasonably asked, compared to the information available to the union. The union must also provide «an explanation» (TULRCA 1992, s 226 (2B) of the numbers indicated.

At least three days before the referendum, the union must submit a written notice to the workers involved, and give the employer a copy of the ballot. The law also provides for the appointment of a Technical Coach qualified for the

ballot scrutiny if the number of workers involved is more than 50. The scrutineer has to produce a report on the conduction of the vote.
After the consultation, the union must inform the members of the union and the employer of the election results and make known the results (number of votes cast, number of those in favor, those against and the abstentions). Communication must be timely.
If a majority of members have expressed a favorable opinion the employer must be notified at least seven days before the strike in a communication indicating the starting date if the strike is of indefinite length, or indicating the beginning and end date if it has fixed terms.
The strike must begin within four weeks from the vote (eight weeks if a collective agreement in force in the company). The ballot scrutiny is a complex and expensive task for the unions. A strong electoral result can convince an employer to grant the request without waiting for the strike, but the complexity of the current system and the burden of communication are an objective limitation on the exercise of the strike.
The procedure is not mandatory but the union that does not use it does not enjoy immunity from legal action and may be subject to a compensation for damages. The employer may then apply to the High Court (the ordinary civil court) for an interim injunction to block the action.
Injunctions have devastating effects on collective action because the successive application requires a period of time that definitely affects the action. The mere non-ascertainment evidence of a violation in fact produces the repeal of all rights and immunities.
Moreover, these injunctions are granted quite easily even for small procedural mistakes (for example, a slight delay in communicating the results to the employer, or incomplete data communication).
If a union chooses to ignore the order, it may incur in criminal penalties (fines or even imprisonment) or even be persecuted for contempt of court. This action is not, however, in practice, a feature of modern industrial relations in the UK.
The interest of third parties also affects the granting of the injunction on the basis of a simple presumption of harm. The pinch is that the measure comes when the procedure of a referendum, which has a significant cost for the union (independent scrutineer, postal communications to the workers and to the employer) has taken place and also been successful.
In Spain the strike is subject to formal and procedural restrictions.
The strike must be declared in written form within five days before (ten days in the case of essential services) its implementation. The notice must contain the objectives of the strike, the attempts to resolve the differences, the date of commencement of the strike and the settlement of the strike committee, a body

representing the strikers imposed by law (maximum twelve people).
This atypical representative body is also responsible for ensuring the safety of persons and equipment, and of concurring with the employer for the designation of workers who must perform these services, which are not the same as those foreseen in the essential services.
Notification is not required in case of general strikes.

*3.2 Internal limits*

In France the legal system negates the legitimacy of the political strike, since such a strike does not concern questions relative to the improvement of wages or working conditions, but rather represents a protest aimed at governmental policies and, therefore is considered an abuse of the right to strike.
Political strikes are, however, justified in the case in which the State is the employer. Recently, the legal system has also considered with greater tolerance collective actions proclaimed in the private sector to protest against, for instance, a specific socio-economic policy. Strikes of solidarity for political reasons automatically constitute a case of abuse.
Collective actions alternative to strikes are reserved a more controversial legal treatment in the countries surveyed.
In several countries there is a certain freedom in the forms (permanent assemblies, abstention from overtime…) (Germany, United Kingdom, Poland). In Germany, the slowing down of activity is prohibited, while boycotts are permitted (the later completely forbidden in France). The work council may in fact put pressure on the employer so that he will select companies that apply collective agreements. Forms of boycott have been put into practise through text messages communications to the clients of some companies. And communication via internet is, in the most recent period, an instrument widely used by unions to denounce the anti-union behaviour of firms.
The function of the union has never been historically contained strictly within the limits of the contract, even if the political function of the union is now more complex and versatile than ever before. One should recall in the past the covenant of unity of action between the Confederation of Labour and Socialist Party but also the example of British Trade Unions, whose links with the Labour party are notoriously tight. For the current moment it is sufficient to refer to the experience of the trilateral negotiations and the role of social partners within the community system.
The political strike is strictly opposed in France, Bulgaria, Romania, and Germany, but while political strikes are declared illegal they have been tolerated, in fact, when they covered vast areas of workers. Spontaneous political and solidarity strikes are allowed in Spain and Italy.
More tolerated is the sympathy strike (Bulgaria). In Romania, forms of the

strike that do not consist in an actual work stoppage are not legitimate. The strike of solidarity is permitted but must be limited in time, to a working day, and the employer must be given advance warning at least two days before the date of the strike.
In France, the law denies the legitimacy of the political strike, since as it does not pertain to issues related to improvements in wages or working conditions, and has determined that this case lacks the character of an act in support of professional or work requests, but when it is a protest against government policy. This is considered an abuse of the right to strike, and a serious crime of the strikers. But strikes against the state are justified where the state is the employer. For a long time, collective actions organized in the private sector to protest against, for example, a certain economic social policy have been considered an abuse of the right to strike, but now they are justified. Sympathy strikes for political reasons automatically constitute a case of misuse.
In Sweden, a strike that was not foreseen at the conclusion of a collective contract is illegal even when it originates from the violation of terms of the collective agreement. Therefore, even political strikes not formally prohibited may run up against the limitations set up for the protection of the business activity. Recently, a case law less restrictive for solidarity strikes has been established. The virtual strike consisting in obliging the employer to pay the salary for the work day regularly provided, as well as an equivalent amount also paid by the employer to a charity institution, seems to be a completely Italian invention. It is an institution quite unknown in the laws examined.

*3.3 External limits*

All the union systems examined exclude certain categories of workers from the strike, in general these being police personnel, the staff of the Judiciary, and the Armed Forces (Germany, Spain, France, Bulgaria and Sweden). Civil servants suffer unjustified restrictions on the right to strike. In Bulgaria and Poland, public employees have the right to declare symbolic strikes only. Even in Sweden, the civil service law contains some provisions restricting the collective actions of officials exercising public powers. Germany takes a very restrictive position quite unusual among the founding countries of the European Community. The *Beamten* (about a quarter of German civil servants), unlike the workers and employees, have no right to strike. The restriction is anchored on the provisions of the Constitution under which the work of the *Beamten* is one of service and loyalty to public law (art. 33, fourth paragraph, of the Constitution). This argument raises doubts because it extends in an exaggerated way the content of a provision that, as drafted, does not seem to justify the sacrifice of a fundamental right, the right to strike, an integral part of freedom of association (art. 9, third paragraph of the Constitution).

France with the same determination as Germany for *Beamten*, in the name of the purity of the concept of «subordination» excludes all self-employed workers (even if financially dependent).
In the UK, the only categories excluded from the strike are the police and the armed forces. An exception to this rule concerns the prison officers on which the government is reaching an agreement.
In many countries the exercise of the right to strike is given a special regulation on essential services.
In France, a law of 2007 has introduced procedural limits to the right to strike in relation to the public transport of passengers. In the public transport service on the ground, there must be a plan for guaranteeing services during the strike that is made public by the companies in charge of public services. The *quantum* of service is commensurate with the size of collective action. The determination
of the mode of service and the contingent of personnel exempted
from the strike is defined by a union agreement.
Before a strike is declared, the unions are required to attempt a reconciliation. Finally, the workers concerned are required, no later than 48 hours before the strike, to communicate their adherence to the strike.
In Romania, the strike has limits for the staff of any type of transportation, and for the staff employed in essential services, i.e., health care, telecommunications, radio and public television, municipalities and services for the public hygiene, gas, electricity and water. The strike is allowed for these services with the guarantee of the functioning of at least one third of normal activity.
In Italy, the law individuates the essential services for which certain rules must be respected by the exercise of the right to strike: the notification (ten days), the predetermination of the length of the strike, an interval between strike actions, the use of cooling and conciliation procedures, the guarantee of minimal services. These minimums are defined through an agreement between the social partners, or if this is lacking, by an administrative act by an independent Authority.
In Spain the Government has the right to identify the essential services and the extent of the service. Appeals to the court to dispute the decisions of public authorities is allowed. The public services were individuated include: health and social security, public transportation, communications (postal, telephone, internet access, television and radio, both public and private), energy, administration and social welfare, administration of justice, prison administration, higher education, public finance (Bank of Spain, FNMT, Customs), public works and traffic, organs of state administration and self-employment, social welfare. In these services the public authority imposes a minimum service guarantee during the strike identified on the basis of the following criteria: duration of the strike,

personal and geographical area involved in the strike, and the possibility of alternative services.
Strike rules in Spain observe guiding criteria that deserve to be highlighted here.
First of all, restrictions on the right to strike in Spain are justified only if the abstention involves other fundamental rights. The impact of the strike on the effective exercise of other fundamental rights is also measured, both for the temporal duration of the strike and in respect to the principle of proportionality of the sacrifices.
In other words, the government authority, in the definition of essential services must choose, as far as this is as possible, the solution which is least restrictive of the right to strike and to evaluate whether there are alternative forms for the protection of fundamental rights that create less disturbance for the right to strike.

*3.4 Features of national legal systems*
The formula «arrangement limitations» is intended to indicate the restrictions to strike related to specific features of the different legal systems. The principle of freedom to associate, in fact, assumes forms and content in relation to the concrete political, economic and historical characteristics of each country. The most significant characteristic of some of these contexts concerns the evaluation of the legitimacy of the strike in relation to its motivations, in particular, to its close connection to collective bargaining (Germany, the UK, Sweden, Romania).
In the UK the present law, introduced by a Labourist government in 1974, heavily modified by the Thatcher government and inserted into the Trade Union and Labour Relations (Consolidation) Act 1992, has been modified by the Major government in 1993 and revised (largely unsuccessfully) by the Blair government in 1999 and 2004. Even with all the changes in the law of 1992, the strike still does not acquire the status of a right, but enjoys only a sort of «immunity » for union organizations from a liability action on the part of the employer.
The strike receives greater protection only if the unions subordinate the strike call to the consultation of workers as provided by TULRCA (see above). TULRCA 1992, art. 219, however, provides that collective action is not subject to civil liability only if it is carried out during a collective dispute (trade dispute). Art. 244 rigidly defines «trade dispute» as a dispute between workers and their employers, exclusively or mainly regarding one or more of the following arguments:
(A) terms and conditions of employment,
(B) tasks, termination or suspension from work,
(C) the sharing of work or functions between workers or groups of workers,

(D) disciplinary sanctions,
(E) membership in the union,
(F) privileges for union representatives and union activities.
This restricted ambit in which the immunity operates is a serious limitation for a collective action. In fact, if a dispute arises against a holding company that controls a certain number of subsidiaries, each of these is regarded as the employer against whom the action is directed.
This limited definition prevents the extension of immunity to political strikes and sympathy strikes (the latter is admissible only if it concerns the same employer).
A turnaround has been felt recently with the Court of Appeal decision in RMT v. Serco Ltd and ASLEF v. London and Birmingham Railway Ltd, which has recognized the shortcomings of the English system that actually «does not confer any right to strike» but also the importance of international laws that explicitly recognize the right to strike. The English court has expressly recalled the rulings of the European Court of Human Rights in Strasbourg that claim the right to strike as part of the right to freedom of association provided by from art. 11 of the European Convention on Human Rights.
The principle of proportionality in assessing the legality of the strike is the balance to ensure equality between the parties in the conflict. Several legal systems take inspiration from this principle (Germany and Sweden).
In Sweden, the discipline of strike hinges on the principle of proportionality, of which the strike as the last resort is one aspect.
Case law has dictated some guidelines to prevent the strike from providing irreversible damage to the company or the public (protection of machinery and equipment, precautions to prevent a damage disproportionate to the employer or others, etc).
If the strike does not respect the principle of proportionality, the Labour Court may take action to prohibit the strike. The illegal strike may be subject to claims for damages. Even in Germany collective action must respect the principle of proportionality.
In the countries of the former Communist Bloc, the previous regime's aspiration to cooperation between employer and employee remains in the current legislation and constrains the strikers, for example in Poland, to collaborate in the preparation of measures for the maintenance of the enterprise. In Bulgaria for the duration of a strike, the workers are obliged to be present in the facilities of the company if it coincides with their time of ordinary service.

*3.5 No-strike clauses*

Peace clauses as an obligation to refrain from striking during the period when the collective agreement is in force and in respect to matters covered by the agreement, are found in many countries. These strengthen the bond between the

contracting parties, and are particularly valued in those jurisdictions in which the relationship between association and member is strong (Sweden and Germany).
A union system regulated by law does not seem to constitute a prerequisite for the introduction of such clauses. In France, the law does not impose an obligation to agreement. To limit collective actions, they refer to a provision of the Labour Code which states that the signatories of an agreement are required to do nothing that might compromise the agreed upon services (art. L2262-4 of the Labor Code), although this is a norm without efficacy. The same is true for Poland. Nor is the UK an exception, because the peace clauses do not exist since the collective agreements do not have legal validity.
With respect to the truce clause, we must also refer to the duty to refrain from those strikes that are set to alter the stipulations of a collective agreement during its validity. Exceptions are permissible with regard to the interpretation or claims that do not change the agreement or even in case of violation by the employer of the existing agreements (Spain).
In Poland, the peace clauses are not mandatory but indirectly the law requiring compliance with the covenants forces the parties not to declare strike on the contents covered by the agreement. The individual worker is not bound by the peace clause obligation if he does not belong to a union and he is not obliged to respect the union discipline. Nor is it binding on workers who are members of the union. In the Polish trade union system, with his registration a worker does not automatically give the union a mandate to represent him. The union, in fact, has the power to act on behalf of its members and the obligation to negotiate terms and conditions of employment on equal conditions for all workers, regardless of their union membership.
In Sweden, strike action aimed at changing the terms of a collective agreement is illegal. The obligation to maintain social peace is not only related to what is explicitly regulated in the collective agreement, but also to the integrative collective contract. The peace obligation persists throughout the term of the contract.

*3.6 Employers reaction during a strike*

The anti-union conduct, that is, the behavior of the employer intended to prevent or limit the exercise of trade union freedom is very differently evaluated by the observed union systems.
In Germany, the reaction of the employer to the strike enjoys a certain level of protection: he can use temporary workers to replace strikers or pay an incentive to convince them not to strike. However, collective agreements may provide terms against retaliation. In Sweden, both sides are free to take industrial action and so to react to the strike.
In France, the employer may redistribute the workload among the various production facilities or hire out new workers. The law, however, prohibits the

hiring out with long-term contracts and the use of temporary workers to replace strikers.
In the United Kingdom as well, during a strike, the employer cannot hire out new workers to replace strikers through an employment agency. He cannot turn to an agency to replace workers during a strike. This is considered a crime, for which the agency would be punishable with a fine of up to £ 5000. But the employer can directly recruit temporary staff or may use managers, etc. to cover the tasks of workers on strike.
The attitude towards anti-union conduct is more severe in other countries. In Romania, the employer cannot hire out other workers to replace strikers and he cannot take anti-union actions.
In Spain, retaliation for the strike action is banned. The employer may neither replace workers on strike by hiring other workers, nor he can use mobility actions to replace striking workers either within the same production unit or in the same geographic area.

*3.7 The lock-out*

The systems are differentiated in their attitudes towards lock-outs as a suspension of activity by the employer, defined by Swedish law as «in order to convince the striking workers to accept certain working conditions». In 1947 Luigi Einaudi, the second President of the Italian Republic, argued that «the right to strike and the right to impose lock-outs are two factors or conditions of an economic system that is based on freedom». Giuseppe Di Vittorio, general secretary of the CGIL in 1945, replied by referring to the arguments of the distinguished late 19th century jurist Francesco Carrara, namely,
1) that the strike is meant to bring about a redistribution of wealth and lockouts are meant to concentrate it further in few pockets;
2) the ability of the strikers to resist is limited by the material necessities of life, while the resistance of the employer in the lock-out is unlimited;
3) there can be an misuse of lock-outs for speculative gains;
4) the strike is the only weapon in the struggle of the working class, while capital certainly has no need of the lock-outs to maintain its social dominance.
Di Vittorio's argument prevailed.

In many countries, the lock-out is not considered a right. Romania and Poland allow for the legitimacy of this action only in situations when productive activity has been seriously compromised. In Spain lock-outs are allowed as a reaction to a collective action that endangers persons or property.
In France, the employer cannot close the company, in retaliation. The law, however, allows an employer to proceed with the closure of the company or organization,

during a strike, at least when there is an obvious inability to guarantee the commercial or factory operations.
Sweden and the United Kingdom, however, consider the lock-out a legitimate reaction to the strike. In Sweden, the lock-out is not commonly applied by employers, despite the absence of any legal prohibition.
In Germany, the case law builds on the principle of «equality in the conflict», or on the possibility of equality, to recognize the right of collective action to the unions and to the employers as well.
A particular modality of lock-out realized by the employer is that of extending the collective labor dispute to employees who were not involved in the unions. This particular interest in the lock-out by organizations of German employers is justified by the fact that unions in Germany are not only referred to strikers, but also to workers affected by the lockout, a dispute subsidy.
This dispute subsidy usually comes to about two-thirds of monthly salary. In this way any enlarged collective dispute becomes a financial conflict. Extending the number of workers involved in the conflict who must be supported by the unions themselves, employers are able to weaken the economy of the trade unions and thus sap their vital force for the struggle.

*3.8 Effects of the strike on the employment relationship*
The strike thus causes the suspension of the contract and is therefore not grounds for dismissal. It follows that the employer is exempt from the payment of wages during the period of the strike. This rule, the legal basis of all systems, has many nuances. The loss of wages is partly compensated in some countries. In Bulgaria and Poland, the striking workers do not receive remuneration but are covered by social security. In Sweden and Germany the union coffers provide.
In France the strike suspends the execution of the contract and cannot justify the dismissal or other sanctions. It involves the suspension of work which in turn causes the loss of wages. This deprivation must be strictly proportional to the duration of the interruption. If the strike ends with the signing of a collective agreement any clauses can be identified for the payment of the salary lost during the strike. When the strike is legal, but is accompanied by unlawful acts, the constitutional protection remains but the workers who have personally committed a serious error can be fired. Misuse of the strike is a concept used to justify the lock-out by the employer and the suspension of payment of the salaries of non-striker workers. An orientation that prevails in legal systems should be noted, namely that a loss of wages is not envisioned when the strike originated because of the malpractice of the employer; must involve a violation: that is was an intentional and serious breach of his obligations, and that it affected fundamental rights.
In English law the right of the striking worker to abstain from the work is not

recognized, and he is therefore exposed to all the consequences of the employment contract: suspension of pay, compensation for damage, and dismissal.
Not admitting the principle of the suspension of the contract, for English law the strike is a violation of the work contract. The worker thus does not have the right to lose wages equivalent to the duration of the strike; often, in fact, employers withhold more of the salary than was warranted by the actual duration of the action.
With the Employment Relations Act 1999 there has been a significant extension of protection on an individual level, however; this act recognizes as unjustified a firing due to a worker's participation in a collective action protected by the immunity procedure, if the dismissal occurs within twelve weeks of the strike.
In the case of the industrial action that is not protected by immunity, the employees have no protection and can be fired if they participate in trade union action unless the employer discriminated, firing only some and not all strikers.
The English law does not recognize the principle of suspension of the contract in case of strike. The strike is considered a breach of the employment contract. Therefore, the worker has no right to lose the salary equivalent to the duration of the strike. Employers, in fact, often retain the salary in excess of this duration.
In Spain the strike suspends the labor contract and, therefore, the mutual obligations. Workers during the strike enjoy unemployment benefits.
In Bulgaria, the evaluation of the strike is referred to judicial decision, which ends within ten days. For the duration of the strike the workers are required to be at the workplace during their working hours. Participation in a legal strike is not a legitimate reason for dismissal. The workers do not receive payment during the strike but are compensated through a specially created fund.
In Poland, the strike does not constitute legal ground for the imposition of the dismissal or disciplinary action. During a legal strike the support of the economic burden falls solely on the workers union. Workers who abstain from work illegally may be subject to disciplinary sanctions.
In Sweden during a legitimate strike, the terms of work are suspended. The actions of an illegal strike may be subject to civil liability.

*3.9 The non-striking employees during a strike*

In general, if during a strike the employer cannot continue or maintain production activity, he is exonerated from his obligations with regard to non strikers.
In Bulgaria, the worker who did not participate in a strike, but is unable to perform his duties because of other workers on strike, is paid as a case of suspension from work due to *force majeure*. In any event, workers not striking cannot be paid less than the minimum monthly wage established by law. In Romania, the workers who do not participate in a strike are entitled to receive

75% of their wage, since it is a temporary cessation of the activities of the employer. In Sweden, the employer cannot refuse to pay wages due to the strike, and the same is substantially true also in the United Kingdom.
In France the employer must pay the non-striking workers, but is free of this requirement if the circumstances make it impossible for the continuation or maintenance of the activity.

*4. External elements linked to the effectiveness of the right to strike*

There are many factors «external» to the parties that can influence the course of the conflict. In particular, in the society of the image and global communication, solidarity of the public opinion can be decisive. In addition, the new media such as the Internet, of growing importance for influencing public opinion, can be used by unions in preparation for, and during a strike.
Apart from Spain, however, the media does not seem particularly interested in trade unionism. In Spain, the Constitutional Court has affirmed the duty of the media to make public the correct information with respect to the motivations underlying the conflict, and employee participation. Here, public information on the strike must be presented in a neutral manner. This signifies that the public media cannot package the information so as to reduce the incidence of the strike, or discourage participation in it. In Bulgaria, the media are usually interested in strikes, but given their dependence on certain government or corporative interests they are rarely neutral.
International solidarity between unions is an important supporting factor in the effectiveness of the strike. The Laval case in Sweden has received much international support. The United Kingdom has cultivated a strong international commitment. Much of this concerns the ties with their former colonies. The use of English in all former British colonies has also fostered a deep level of involvement. Historically the links with Australia, Canada, the Indian subcontinent and the rest of Africa were stronger than the relations with European trade unions. The activity in the Council of Europe and European Union, however, has increased the European commitment of British trade unionists.
The countries of the former Communist Bloc have been greatly assisted in building the foundations of a new labor legislation by international bodies. Technical and political assistance has been a very important element in this process.
In France, the international action of French trade unions has been very firm in some cases and in others limited to exchanges of information and somewhat formal meetings. Federations and unions of companies and works councils are active in international action in large groups, particularly across national borders. The financial strength of the union as shown by the Swedish trade union is the best means to support the strike action.

Among the factors that obstruct the strike, the threat of judicial retaliation by employers must be underlined (Germany, United Kingdom).
As the case BALPA (see below), in the face of the potential danger of having to answer to damages caused by the strike on the basis of arguments advanced by the employer, who in contrast with the European legislation sustained the inapplicability of immunity for collective action, the union was placed in a situation of intolerable difficulty.
For the effectiveness of the strike, the credibility and authority which the unions have in their national context is also of great importance.
In Germany, unions have historically been regarded with great appreciation by the German population, and have persistently high rates of sympathy in the polls. Therefore it is not always possible for employers to communicate their point of view successfully, for example through the media.

*5. Alternative dispute resolution mechanisms (arbitration, conciliation, mediation)*
The instruments of mediation and conciliation of collective conflicts are part of the history of the trade union movement. Institutions that rely on collective agreements and which are founded, therefore, by the will of the parties (with the exception of the Fascist episode in Italy, when a mandatory judicial resolution of disputes was inserted by the Mussolini government into the Labour Charter of 1926).
In the most recent period, these instruments have received special attention by the legislatures in particular with reference to the strike and the institutions of independent authorities.
The institutions of mediation and conciliation of collective disputes are voluntary in all the countries surveyed though in general they little used (see France, Sweden).
In the United Kingdom, the Trade Union and Labour Relations (Consolidation) Act, 1992 established an Advisory Conciliation and Arbitration Service (ACAS), an independent public body that has jurisdiction over collective labor disputes. Under the law, ACAS has a general duty to promote the improvement of industrial relations, and can offer advice, conciliation and arbitration services to the parties engaged in a collective dispute.
Both employers and unions tend to seek a collective conciliation when they reach a stalemate in negotiations and have a willingness to reach an agreement. ACAS offers a way out of stalemate negotiations.
Sixty-nine percent of collective disputes are brought to the attention to ACAS, which offers a completely volunteer service. In essence, both parties must agree to the request for assistance. However, ACAS can also autonomously propose itself to the parties in order to reconcile the dispute.
Instead in Romania and Italy, mandatory preventative conciliation procedures are foreseen with reference to collective action.

In Spain, the law provides that the Government, at the proposal of the Ministry of Labour (also with reference to the strikes that do not involve essential services), taking into account the duration or the consequences of the strike, the positions of the parties, and the potential serious injury to the national economy, may impose arbitration. The decision of the government to impose compulsory arbitration may be appealed in court.
Once an arbitration decision is made public, employers and workers are required to comply, and the labor authorities may impose penalties for its violation.
In Germany there is no legal requirement to use alternative dispute resolution with respect to a strike, although some *Länder* provide procedures for the conciliation of collective disputes between the parties on a voluntary basis. Some collective agreements provide mechanisms for compulsory conciliation and arbitration.
In Romania, the parties jointly may voluntarily decide to resolve the dispute by arbitration.
In France, the law provides three procedures for prevention and conflict resolution: conciliation, mediation and arbitration. All are voluntary.
In Bulgaria either party may utilize procedures for mediation and/or arbitration provided by the National Institute for Conciliation and Arbitration-NICA, which aims to promote voluntary conciliation of labor disputes between employers and collective workers. Arbitration is experienced at the written request of both the parties.
In Poland, a mediation procedure may be initiated only at the request of the union. If the conduct of the employer has made any negotiation impossible for the union, the strike may be declared immediately. The decision to make use of arbitration is the responsibility of the union. The employer does not have the power to initiate arbitration proceedings, nor to withdraw from them. The award of arbitration has two effects: it can have the value of a recommendation only, though non-binding upon the parties, unless one of them has not accepted it. In such a case it is binding if the award was accepted by the union.
In Sweden, the law provides for conciliation and arbitration, mediation or case-load. Arbitration is relatively rare. Arbitration in labor disputes within the union organization itself is very widely used. The Swedish National Mediation Office is authorized to resolve collective disputes through mediation, and in case of failure to reach a resolution, the dispute must be resolved in court. The jury that considers the matter before the Labour Court usually consists of three judges and four legal representatives appointed equally by both the parties.

## *6. Conclusion*

### *6.1 National features and safeguarding effectiveness*

It is too ambitious a task to even attempt to summarize the work that has

been carried out at international meetings, through e-mail communication, and in the national reports produced by the designated scholars from each of the nine European countries under examination.
In the following pages the attempt will be made to give form to the discussion that has filled the foregoing text, and to identify firm points within the multifaceted wealth of collected material, aspects which, among many others of great interest, imposed themselves with the greatest force on the writer's attention. These aspects are most closely related to the discourse on the method chosen for the research project, also mentioned in the introduction to this paper.

*6.2 Twenty-seven different velocities for freedom of association*

The study showed that the adherence to the principles set out in the international charters is only formal. The union systems of the nine countries examined show significant differences in the implementation of the right to strike.
These differences are not neutral. Resolved in different ways, respecting the social and historical context of national policy, however, they bring about the same result: the ineffectiveness of the collective action.
On the contrary, the legislation or the weakness of trade union system prevents or suppresses the effects of the strike.
It is distressing to see that, after checking on the effective implementation of social rights, from the freedom of association and the right to strike, to the freedom of bargaining, in many areas the nine systems tested were found to be deficient, some even widely inadequate.
Serious contradictions and severe failures show an inexcusable lack of preparation for that ideal society founded «on the values of respect for human dignity, freedom, democracy, equality» set by the TUE in article 2.
The verdict is harsh because some of the most unprepared countries are those with the longest adhesion to the European Union.
The former Communist Bloc countries are more aware of their lack and more determined to overcome it. With great courage the reports expose the hypocrisy of systems that seem to only decorate their judiciaries with the mere furnishings of European employment legislation.
In fact, despite the ostentatious diligence with which such governments import the EU directives (such as equal treatment, prohibition of discrimination in employment, etc.) and the rules of international charters of fundamental rights, even many years after the advent of the new democratic system, unions are still struggling to establish their rights as a set of rules freely negotiated by the parties in collective agreements, and these rights instead remain the product of unilateral standardization by the central government.
The Polish report points out that even though the old Polish Constitution did not guarantee to workers the right to strike or gave unions the right to organize

strikes, a decade after the adoption of the Constitution of the Republic of Poland the will to introduce fundamental reforms, individual or collective, to labor law is still missing.
Essentially all the countries analyzed present contradictions and deficiencies that only minimally respect the guarantees that the international charters provide to the strike.
In this regard the situation of the right to strike in the United Kingdom is the most difficult and demeaning with respect to international standards. Making the strike hostage of the employer means, it must be stated very clearly, to delete that right. It is no coincidence that among the EU countries the UK has the lowest percentage of its workforce covered by a collective agreement (only 35% of UK workers are covered by a collective agreement).
Other national legislations too seem far from the formulations contained in the international charters that aspire to provide «strong» protection for the strike.
Qualifying the strike as a functional element to the definition of a collective agreement (Germany) is an objective limitation on the autonomy of trade unions in the evaluation of the interests of workers to be supported, precluding for example the political or solidarity strike (Germany, Sweden, Bulgaria, Romania, United Kingdom).
It should be underlined that in these countries, however, an international strike in support of the economic policies to promote employment would be difficult to achieve. In some cases the instrumentality of the strike compresses union pluralism, giving in the final analysis an unjustified privilege to larger trade unions (Poland).
A further limitation on the autonomy of trade unions is given by the excessive restrictions of the forms of striking (Spain).
Other factors that weaken the effectiveness of the strike are: the freedom given to employers to react to collective action with lock-out or replacing striking workers (Germany, Sweden), the abnormal extension of the notion of essential services to which applies a discipline restricting the right to strike (Italy), and the prohibition of strikes by civil servants (Germany).
Authentic harassment, finally, lacking any justification, is shown by the imposition on the strikers to be present in the workplace for the duration of the abstention in Bulgaria, and the endless list of procedural constraints unions must follow in the proclamation of a strike in the United Kingdom. The overall impression is that in its implementation, the protection of the strike endorsed by European and international law meets with the barricades of national legal systems, which dampen, sometimes to the point of disabling, this protection.

It seems, therefore, that the value of the strike as an essential means of protecting

workers cannot rise to the general principle of the common European countries, since the protection is articulated and differentiated in terms of undermining the effectiveness of national rules. The governments seem to treat the trade union rights recognized in the *acquis communautaire* as if they were goods in a catalog to be selected *a quid, quomodo*, by governments to transpose into domestic law. The consequences of this technique can give rise to new social «dumping» among Member States.

*6.3 The tyranny of the majority*

An interesting aspect that clearly differentiates the systems observed is that regarding the relationship between a trade union and its members, in particular as concerns the strike call, the relationship between a trade union or even an occasional group and the audience of workers involved (Bulgaria, Poland). The situation emerges clearly in union systems in which the proclamation or effectuation of a strike is subordinated to the acquisition of impossible majorities or to the need for multiple steps before a strike can take place. It is obvious that these rules imposed on unions reduce the effectiveness of the strike and increase the bargaining power of employers.

The Polish report so pointedly emphasizes that the passage to the new Polish Constitution in 1997 was made possible thanks to the organization of strikes and other protest actions in 1981. The assemblies of spontaneous coalitions of workers with the aim to organize strikes were recognized by the employer and especially by governmental authorities. The strikes were regarded as a legitimate manifestation of workers aimed at the right demanding of their economic, social and professional interests. These demonstrations were possible in the former Popular Republic of Poland, in a system in which the strike enjoyed only weak guarantees. Today the situation is quite different. The ILO Conventions 87 and 98 as well as the European Social Charter of 1961 have been accommodated into the domestic Polish judiciary. It is indeed paradoxical to note that nowadays the events of 1981 would not be possible. By leveraging on the national legislation the Polish government could repress the strikes, declaring them illegal.

The paradox of the Polish system reported by Andrzej Swiatkowski in his national report is highly evocative and brings out a problematic issue that is on the inside of the trade union movement and which strongly characterizes the different systems. It raises, in fact, many concerns with reference to the guarantees recognized by international laws, the subordination of the strike call to the consent of the majority of workers.

The deliberation of the strike is a manifestation of will that forms in a group (whether very extensive or consisted of a few workers) and is the result of the participation of the members of such group to the stages and development of

the deliberative will. As such, therefore, the declaration of intention to strike is the final act of a process in which only a portion of workers participated. The accession – by means of vote – of those who did not participate in the formation of the strike call, is an act placed on a level of legitimacy that is extraneous to the notion of union freedom as an expression of the organization of the interests completely free from any bond.
Subordinating the strike call to the vote of a majority of workers who are affected as employees and not as members to the trade union or simply as participants in the formation of the strike call, goes beyond the aim of protection afforded by the right to freedom of association and is unacceptable.
Historically, unions started as «shop clubs», as associations of the most militant workers in the same company, which took the form of a union when organized in a dimension that goes beyond the individual company and its employees. The organization of the interest expressed by a trade union is therefore not reducible to purely and simply the employees of a company or more companies involved in the strike call. Subordinating the proclamation of the strike to vote of employees (members and non-members) is to undermine the very essence of the union and therefore, the freedom of association, which consists above all in freedom to collective action deemed more appropriate to pursue, independently, the contractual policy. The principle of freedom of association, in systems where the strike is bound to the affirmative vote of a majority, obeys to an ideological vision of the union as a carrier of the «class» of workers very different from the pluralist and democratic inspiration that is inspired by international warranty rules of the strike.
These rules, a synthesis of Weber's conceptions of the modern state, assigned a role to social groups such as unions, which are positioned between the individual pursuing individual interests and the state that seeks to act as a summary of public interests, in the production of rules for the regulation of collective interests and the promotion of substantial equality, quite peculiar to pluralistic democracies. The foreclosure vote of the strike, expressed by an indistinct majority of workers does not seem, therefore, consistent with the principles of freedom of association.

*6.4 Pathology of the EU legal system*

The dissociation between the general rule and its application certainly derives from the resistance of national governments to the full realization of trade union rights, but also, in no less measure, from serious weaknesses in the legal system of international relations between Community law and domestic laws. The Viking, Laval, Ruffert decisions are the symptoms of a pathology of the legal system that, in giving priority to the rights necessaries for carrying out

the common market, is entitled to ignore the differences between domestic systems.
Community Law is preordained for the creation of a large common market.[4]
It has no jurisdiction over the strike and collective bargaining.
The European legislator and the judge are not concerned with the connections with the different national legal systems that are working towards a harmonization, but instead practice a form of law projected to overcome obstacles to the realization of economic freedom, rather than to consolidate rights. The Community Court therefore does not investigate or detect the similarities or differences between the systems, presenting them, in the prospect of the Charter of Fundamental Rights, as cornerstones of European law in progress, but limits itself to the pursuit of objectives in accordance with its competencies, aimed only at lubricating the functioning of the market rules.
Thus, matters like the freedom of establishment and the freedom of the provision of services have an objective force of law, even at the national level. The domestic judges are required to give the Community law direct application, while also observing the principles of international protection of trade union rights only to the extent and in the manner prescribed by domestic legislation.[5]
The national courts of member states, however, apply the precepts and norms of the EU, without having to await the prior removal of conflicting rules. Of immediate application too are the directives not implemented which establish rights for individuals, provided that these guidelines are sufficiently detailed and that the deadlines for transposition into national law have been exceeded. This is a direct effectiveness that, in the triangulation of relations between individuals and a state in default is no longer contained only in the vertical dimension between the individual and the state, but indirectly extends to relationships between individuals, as evidenced by the Viking e Laval decisions.
A chaotic and formless scenario of system and rules forms the background to the relationship between European law and national judiciary, and favors the spread of regulatory «shopping» by the companies always on the lookout for better market conditions, even in regard to social rights. It is advantageous to companies to be able to choose the most favorable conditions for their profits.
It is a disadvantage for the workers, since their ability to choose the most expedient of national systems is certainly limited.
The pathology of the European legal system is well exemplified in the motivations of the Viking, Laval, Ruffert decisions. The Court of Justice, in fact, does not question the right to strike, rather forcefully supporting its recognition within the EU law; however, it declares its equivalence with the freedom of establishment and freedom to provide services. These freedoms are binding on member states and are officially added to the catalog of national freedoms.
The concerned reaction of the trade unions to these decisions by the Court of

Justice reveals, however, the deficiencies in trade union policy, which is unable to provide adequate answers to the inexorable conflict between the economic integration process between member states and social protection systems that were and have remained tenaciously national. In fact the issue is not to find remedies to the downward game of the protection of workers in the European market, but the unsolved problem of redefining social rights into both the domestic and European dimensions. Starting with the legal means they already have, the trade unions have the responsibility to protect and strengthen the most advanced union rights at the European as well as the national level, and to construct juridical techniques which will enable the replacement of the generic formulations of the Treaties (inviting the states and unions to «observe social rights») with valid precepts to be observed in the definition of the implementation policies of the common market.

Indeed, the European zone originated by the Treaties only recently has made its borders receptive to fundamental rights. The main vocation of European law from its origins to the present is, in fact, the creation of an area without internal frontiers in which the principles of an open market economy with free competition dominate. The protection of competition is a general principle of Community law and has a central role in the free movement of goods and capital among European countries.

In EU law the exigencies of market regulation, therefore, continue to prevail over the promotion of the values of the individual; thus, with a certain risk it can be said that a real change in European regulations for the protection of the strike will occur when the juridical discourse regarding the person of the worker and his rights becomes European.

In short, a European legal system of the market exists, while a European legal system for labor is still only on the horizon.

Correctly said, the unions fear an approach that aims at the unification of systems through a uniform law regulating the system of national trade unions, and in this regard they agree in confirming the lack of competence of the European Union. It is also true, however, that it is useless to have a unified protective norm if it is interpreted in different ways. Union organizations must adopt a common idiom and common conceptual instruments. Only in this way, one more time, just as in other periods in labor history, will the strength of union organizations compensate for the weakness of the worker in the great European market.

### *6.5 Primacy of EU law and protection of trade union rights*

The rank assigned to the Charter of Fundamental Rights in the Treaty of Lisbon has given rise to much hope that the EU can be seen as a guarantor of a process of harmonization of trade union rights at the highest level.

It is quite likely, however, that this hope will be dashed. The European legislature and the Community judges are, in fact, very unsuitable as guarantors of trade union rights.
First of all, the Treaties do not confer any powers to the Europe government with respect to trade union rights; such rights are instead retained expressly as the exclusive jurisdiction of national laws. The Community judge, therefore, in applying the rules that guarantee economic freedom must consider the trade union rights sanctioned by the Charter, but within the limits of a process of coordination and not of the prevalence of the latter over the former.
National judges too are obliged to comply. Although the EU treaties do not regulate the primacy of European law over national law as a fundamental principle, the European Court of Justice as far back as 1964 affirmed that leadership as «the fundamental principle of Community law», and logical consequence of the quality of the member states of the European Union. The autonomy and unity of European law are a prerequisite to ensure the proper aims of the Treaties.
The paralyzing consequence of the efficacy of regulation and case law by the legislature or the national court stands in direct contrast to the pactional constraints.
Following the Treaty of Lisbon the question of primacy received a strong sanction in the Declaration 17 Final Act of the IGC 2007, although using a softer formula than that which was adopted in the European Constitution.
But even if trade union pressure at the European level should lead to greater attention from the European authorities in favor of trade union rights, this would still not be enough.
In fact, easy methods of avoiding compliance to the states' obligation to respect the European norms, are found in the European judiciary itself.
The Community judge is not empowered to substitute a national regulation, and in the case of ascertained failure to fulfill obligations established by a state, he must turn over the responsibility of applying necessary measures to the organs of the state in question. This does not mean that implementation of the Community obligations is totally turned over to the state or to the discretion of the national courts; more concretely it means that internal systems can minimize the impact of the European standard. This defensive reaction of the states obviously has easy justification with respect to matters reserved to the exclusive competence of the states.
In other words, while economic freedoms enjoy a regulatory path and an executive instrument – the principle of primacy, privileged and binding (albeit within the limits of national rules for implementation), social rights instead are left with a protection that is unfit for expansion beyond national borders, and are forced into national trenches if they belong to union systems with a strong guaranty, but remain vulnerable in trade union systems with low coverage, due to the insufficiency of the European norms in this regard.
As has happened in the Viking, Laval, Ruffert cases, the degenerative processes

of the market fall on workers and force the unions to defend themselves with national standards and inadequate means compared to the European regulatory context, and therefore can only have a very limited efficacy.
It should be acknowledged, in fact, that the EU is not yet the Federal Union imagined by Altiero Spinelli, and thus cannot function as the ideal container for all the rights and social freedoms guaranteed in the domestic judiciaries. And it is a romantic syndrome to believe, without any historical support, that the mere declamation of rights is a guarantee of their effectiveness.

*6.6 Working hypothesis*

The conclusions of this study can briefly summarized as follows.
1. Domestic regulations on the exercise of the strike differ greatly from each other, with different levels of effectiveness. The European trade union policy must therefore try to strengthen the effectiveness of the strike in all member countries. Adherence by the member countries to the principles set out in international charters is insufficient for this scope, and each country necessitates specific techniques of gauging the effectiveness of the protection.
2. In EU law, the necessity of regulating the market continues to prevail over the advancement of social rights. The aim of the EU is, in fact, the creation of an area without internal borders in which dominates the principles of an open market economy with free competition. This aim is also functional to the improvement of employment and living conditions of European workers. However a European legal perspective on individual workers and their rights is missing. The harmonizing technique, if separated from the connections with the various legal systems, can lead to «social dumping» rather than to consolidating or extending rights. It may not even reach the equalizing goal if countries interpret the «unifying» norm at different levels of intensity.
The coordination of trade unions in a networks of trade union policy on the matter of trade union rights, which goes beyond the suffocating narrowness of the European competency, can lead to greater protection of the strike in all member countries, and promote forms of collective action at an international dimension. As a famous master of legal science wrote6, international law performs its function only if it is given effectiveness, that is, if it is accepted by its target audience – the citizens of the member states – otherwise it does not exist.
The foregoing considerations lead us to the formulation of several working hypotheses.

*1) The modification of the Treaties*

The CES Committee has responded to the problems posed by the Viking, Laval, Ruffert decisions by proposing a new revision of the treaty in order to include a Social Progress Protocol.

This proposal is certainly important because it aims at strengthening the trade union rights at the European level, but in practice it does not seem realistic. 7 In any case, it would not promptly resolve the insufficient state of implementation of such rights in domestic systems, and would perhaps delay the definition of any remedy in support of the right to strike, which is instead needed in a timely manner and with a guarantee of effectiveness.
The urgency of the intervention in support of union rights becomes, however, more pressing precisely because of the severe economic crisis that has struck the world economy, which will probably be used by governments as a justification to disable the labor conflict, that is, to prevent the workers' organizations from participating in the choices involved in economic recovery. As shown by the dramatic situation in Greece, Ireland, Italy and Spain, all elements of a system (hence also the unions) are involved in the dynamics of economic integration, and are overwhelmed by the process. The economic crisis has erased any illusion unions may have had of being able to protect workers' interests, relying only on national systems of social welfare.

*2) The European agreement on the strike extended to 27 countries*

An agreement at the European level could contribute to resolving the complex issues raised by the Viking and Laval cases, Indeed, the European Commission and the French Presidency had tried to promote negotiations by inviting the social partners (ETUC/CES, BUSINESSEurope, CEEP, UEAPME) to jointly consider the consequences of Viking, Laval, Ruffert. On March 19, 2010, the parties submitted a «Report on the Joint Work of the European Social Partners on the decisions of the Court of Justice in the Viking, Laval, Ruffert and Luxembourg cases, that revealed a large distance between the relative positions of the employers' representatives and the workers' representatives. Subsequently, by order of the president of the European Commission Josè Manuel Barroso, on 2 May 2010 Mario Monti presented a report in which it is acknowledged that «both national systems of industrial relations and the exercise of the right to strike might have to adjust to fit with the economic freedoms established by the Treaty».
He stresses that the ECJ rulings pre-date the entry into force of the Lisbon Treaty, which explicitly sets out the social market economy as an objective for the Union and makes the European Charter of Fundamental Rights legally binding at Treaty level. These elements should shape a new legal context, in

with the issues and concerns raised by the unions should hopefully find an adeguate response. He defined a more reassuring juridical picture for social rights.
He holds it necessary, however, to avoid that such delicate questions are entrusted «to occasional future litigations before the ECJ, or national courts».

He therefore proposes to define «a targeted intervention to better coordinate the interaction between social rights and economic freedoms within the EU system. The issue is to guarantee adequate space of action for trade union and workers to defend their interests and protect their rights in industrial actions, without feeling unduly constrained by single market rules.
The Commission plays an arbitration role, as already happens with the regulation (CE) n. 2679/98, and can request the Member State concerned to remove the individuated obstacles to the free movement of goods by a given deadline. The proposal should be agreed upon by the social partners, which instead have very distant positions.
The study of nine domestic systems, therefore, revealed large, often surprising differences between countries. The most significant differences involve the relationship between the public authorities and the trade union in the strike call. There are common elements or in any case shared principles in the different national contexts that could form the guidelines of a European agreement on the strike of all member unions of the ETUC, who should commit, with the support of the international trade union organizations and in the fora of the European social dialogue, to rendering effective the guidelines agreed upon in the different domestic systems.
On the basis of this examination of the nine EU countries, possible points of convergence may be indicated for the following aspects:
1. Trade union freedom is the expression of three interdependent freedoms: freedom of association, freedom of contract, freedom of trade union action.
2. The strike must be effective, that is it must exercise significant economic pressure upon the overall activity and interests of the employer.
3. The procedures for the proclamation of the strike imposed by law must not reduce the effectiveness of the strike.
4. Limits to the exercise of the strike are only justified by the need to guarantee the fundamental rights of persons.
5. The possible consultation of workers before the strike call is voluntary.
6. The non-payment of wages during the strike is proportional to the duration of the abstention.
7. The more widely diffused press, radio and television stations are required to give correct information on the reasons for the strike organized by trade unions.
8. European strikes must be exonerated from observing national regulatory provisions regulating the strike.

*3) The Agency for conflict resolution between economic and social freedoms*
This study has also demonstrated that the European legal framework expresses a strong imbalance between economic and social freedoms (to the benefit of the first), an imbalance that derives from the fundamental aim of the

treaties to achieve a truly common market. It is necessary that the European judiciary finds the adequate forms to create the appropriate balance between economic and social freedoms, in order to avoid that trade union rights (better expression of the history of European legal systems) remain mere declarations in the international charters or even are subjected to impairment within domestic legal framework.

In pursuit of this goal, it may be useful to establish Authority that is independent from both the member states and EU policies, which would have the task of examining, in the specific and concrete, the occasions of conflict between these freedoms and give an authoritative evaluation. The new Authority should also have the task of promoting and supporting trade union rights, and the development of strong and effective labor relations in the European Union member countries.

A potential model for this independent body was outlined by the European Union Agency for Fundamental Rights by Council Regulation (EC) No 168/2007, established in Vienna (Council Regulation (EC) No 168/2007 of 15 February 2007).

It should be a streamlined structure comprising two bodies: a steering committee jointly appointed by the European trade unions of employers and workers, and a scientific committee appointed by the same organizations.

*6.7 Final Remarks*

The phenomenon of European integration is built on a set of rules produced by Community law and national laws. A thorough knowledge of their inner workings and their interactions is the unavoidable starting point of every view aimed at overcoming the dysfunctions that weaken social rights at a national level. With this research we have sought to provide both information and considerations to stimulate a constructive dialogue between trade unions but also among practitioners of law, in order to define joint initiatives with a view to overcoming the narrow and inadequate space of the national dimensions.

In the dialectic among the multiplicity of national judiciaries, the research unit has constantly mobile boundaries, but can record meetings and generate rules that are the expression and the guarantee of such moments.

This has been our pledge. We have not unveiled a formula to give the strike the same effectiveness in all member countries, but we have certainly gained a better awareness of the way forward. It will be the task of trade unions to not permit that in the coming years another opportunity for bringing efficacy to social rights is wasted.

**NOTES**

(For all notes see Italian version)

[1] Relations Act of 1999.
[2] The bargaining unit is determined by the union but control over the reasonableness of the option chosen belongs to the CAC.
[3] See English report.
[4] The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. (art. 3 c. 3 Treaty on European Union).
[5] Right of collective bargaining and collective actions. Workers and employers, or their respective organisations, have, in accordance with Union law and domestic laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. (Charter of fundamental rights of the european union article 28).
[6] H. Kelsen, *Introduction to the problems of legal theory*, Oxford, 1992, p. 50.
7 Historical experience shows that any extension of the European powers in social matters has found great opposition in all member countries.