

The right to strike in Europe

By Carmen La Macchia

Presentations of the archive

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We published in this archive in English and Italian version, the result of the research The Right to Strike in the EU, The complexity of the norms and safeguarding efficacy in nine European countries: Bulgaria, France, Germany, United Kingdom, Italy, Poland, Romania, Spain, and Sweden (*edited by Carmen La Macchia*).

The time has been ripe for some time for a comparative study on the right to strike, for many reasons: the progressive reduction of the right and its aims – common to all European countries – to the dearth of studies focusing on this topic. The new issues raised by the EU Court of Justice decisions on the Viking and Laval cases have made it even a more appropriate and timely initiative. On this basis, for each of the countries concerned, we instigated a thorough and detailed investigation of the laws governing the exercise of the right to strike, giving special attention also to countries that have recently joined the European Union.

A thorough study has been devoted to both the national case law (departing from constitutional law) and the Community case law and the relationship between national and supranational jurisdictions, in order to examine the problematic issue of the guarantee of trade union rights in the European zone and scrutinize the circumstances in which the strike – in most member countries classed as a right – can come into conflict with the freedoms of establishment and movement.

This study therefore aimed at uniting descriptive and reconstructive aims with proactive intentions able to translate into the configuration of viable scenarios for application on the part of national and European trade unions.

The project, headquartered in the CGIL departments directed by the confederal Fabrizio Solari, obtained the support of the ETUC (European Trade Union Confederation), and the adhesion, as partners, of the trade union CGT (Confédération Générale du Travail, France), CCOO (Confederación Sindical de Comisiones Obreras, Spain), and Lo-S (Landsorganisationen i Sverige, Sweden). The following trade unions of other countries interested in the research and participant in the work include: Podkrepa (Confederation of Labour, Bulgaria); DGB (Deutscher Gewerkschaftsbund, Germany); Ver.di (Vereinte Dienstleistungs-Gewerkschaft, Germany); TUC (Trade Union Confederation, Great Britain); OPZZ (All-Poland Alliance of Trade Unions, Poland),

Cartel Alfa (National Trade Union Confederation, Romania).

The representatives of trade union partners and participants, whom we warmly thank, are listed in the index. The European Commission approved the research and provided financial support within the Social Dialogue and Industrial Relations projects. The contribution of the Commission was particularly important and significant, especially considering the fact that the initiative falls outside the usual patterns of this type of research, both for its scientific profile, and for the composition of the steering committee and the large group of participants, which unites legal and labor competencies.

The method and the phases of the research

In the preliminary and preparatory phases of project, we were fortunate to have the collaboration of a talented group of experienced teachers of labor law and labor relations, which served as the scientific research committee, including Plamenka Markova (Bulgaria), Antoine Lyon-Caen (France), Eva Kocher (Germany), Keith Ewing (Great Britain), Giuseppe Ferraro (Italy), Andrzej Swiatkowski (Poland), Alexandru Ticlea (Romania), Antonio Baylos Grau (Spain), Laura Carlson (Sweden) and Carmen La Macchia (Italy), who then had the task of coordinating the scientific research and the steering committee. The union leaders of the partner countries in the project were Renata Tretiakova and Anais Ferrer (CGT), Begona Del Castillo e Francisco González Moreno (CCOO) and Claes-Mikael Jonsson (Lo-S), who were integrated in the steering committee. A group of collaborators of the legal experts including Daniel Blackburn (UK), Nunzia Castelli (Spain), Sudhof Clemens (Germany), Marcin Wujczyk (Poland), and Tiberiu Ticlea (Romania), also provided valuable assistance throughout the duration of the initiative.

In the implementation phase of the project, we were immediately faced with the difficulties incurred by the substantial differences in the regulations of various countries, both within the historic core of the Community – with France, Italy and Spain on the one hand, and Germany and the Northern European countries on the other, and Great Britain in an unconventional position – and with respect to newer Member Countries, those recently released from totalitarian systems. The realization that the heterogeneity of the systems would be no small impediment given the comparative nature of the research, led the steering-group to draft a schema for the preparation of the national reports. A first draft was approved during an early meeting (Rome, November 2010), and subsequently the schema was expanded and refined in light of the initial results (Madrid, January 2011), resulting in a quasi final version, which became the index of the national reports presented here, except for the general regulation on labour law in individual countries that was excluded from the publication. The general content of the work therefore concerns the regulation of the

strike from the constitutional framework (if any), the relationship between trade unions and strikes, modalities of adherence to the strike by individual employees, the position of employers during the strike, external elements (if any) linked to the effectiveness of the strike, and alternative means of conflict resolution. The complexity and breadth of the research also led to the realization – in addition to the full reports – of a summary report for each country, which is published in this volume.

During the course of the work, the individual studies were refined, leading up to a general seminar that closed the implementation phase of the research (Berlin, June 2011), attended by all interested parties and trade unions, some employers' unions, representatives of public administrations and a large delegation of trade unionists and experts from the host country.

On this occasion, the national reports were presented, and a comparison between them was made. A first evaluation of the results by the union side was carried out in a round table discussion on the «Exercise of the right to strike and labor relations». A significant contribution to the work was provided by representatives of the independent conciliation, administrative and monitoring authorities, who discussed their functions and activities. These valuable contributions too will be published in the on-line archive.

In the evaluation phase that ended with a meeting (Stockholm, July 2011) of union leaders and legal experts, a first comparative analysis of national reports was begun and the operative proposals were examined.

Results and Perspectives

The results of the study were significantly higher than expected thanks to the high level of the scientific and unionist analysis, the original and innovative conclusions, and the vast amount of valuable material produced and documentation collected.

From the examination of national reports there emerged – despite the great differences in regulations – a common assessment: the strike, still considered a fundamental instrument of emancipation of the workers, is not adequately protected in national legislation. In this context, European trade union policy must thus seek to ensure to strengthen the effectiveness of the strike in all member countries.

A further objective was also added to the project, one which shows its exceptional value: to offer to the national and European trade unions and legal operators, a useful instrument of knowledge, which can contribute to social dialogue and the definition of common platforms of rules and practices on the discipline of the relationship between the strike and economic freedoms, as well as the protection of the rights of workers affected by the phenomena of globalization of the markets.

Some working guidelines, analytically described in the essay by Carmen La Macchia, were then examined. For some there was a unanimous consensus, while for others different assessments were expressed, a circumstance that has contributed to the variety and richness of the topics covered.

As already mentioned, due to space limitations it has not been possible to publish more than a synthesis of the reports and a comparative examination. The complete results of the research, however, including the copious documentation will be made available in this Archive and, we hope, in an electronic magazine in project.

We hope that the conclusion of the project and the publication of the books and the Archives will be not the end of the study activities on the right to strike in Europe, but rather

the first step in a research activity to be continued in all the countries involved up to now, and to be extended to other countries in Europe and beyond.

The motivations behind the decision of the CGIL to undertake a study of regulations on strikes

Fabrizio Solari

CGIL Confederal Secretary.

These introductory pages to the volume *The right to strike in the EU: The complexity of the norms and safeguarding efficacy* are intended to explain the logical process and cultural motivations behind the decision of the CGIL to undertake a study of regulations on strikes and to publish the results of the research.

In the most recent period of its history, Italy has been subjected to the versatile and obsessive concern of the Berlusconi government to change the regulatory framework of industrial relations and labor law. This assiduous government initiative has also focused on the right to strike, threatening new restrictions aimed well beyond the ambit of essential public services, a sector currently regulated by LN 146/1990, as amended by LN 83/2000.

Almost simultaneously, decisions by the EU Court of Justice (Viking, Laval, Ruffert) have demonstrated a «European» front on the question of the strike, in a new version of the conflict between the right to collective action and the rights established by the Treaties, that is, the freedoms of establishment and of the provision of services.

The decisions of the European judges have preoccupied both national and international unions, because of the implication that new and disquieting limitations on collective action are in the making.

The idea for a comparative study on the right to strike emerged in this context, and was presented to and approved by the European Commission. It seemed in fact worthwhile that the CGIL carry out a detailed analysis of the regulations of the European Union member states on the exercise of the right to strike. For this purpose we selected a group of nine «sample» countries, balancing the choice between states with a long membership, and states that have more recently acceded to the EU. The study was conducted in collaboration with the ETUC, the trade unions of the countries involved in the research, and distinguished jurists from each state who authored the national reports.

The primary aim of the study was to assemble a thorough informational basis regarding the legislation and jurisprudence on the strike issue, to provide national and European trade unions and the involved legal experts with an instrument of knowledge for establishing common platforms in the wider European and international context, in order to guarantee trade union rights in strike action.

The experts' reports carefully and thoroughly illustrate the current status of

the right to strike in nine EU member states, giving a comprehensive, and in many ways original and interesting overview of regulations and issues. We can thus be well satisfied with the work carried out. With regard to an understanding of the various legislative norms, the project has also provided the needed answers. Our aim now is to create common initiatives in the wider European and international context to guarantee the right to strike that we consider essential for the overall protection of the rights and interests of the most vulnerable party in the employment relationship.

Indeed, a great number of concerns about the «health» of the right to strike have been raised here. The national reports and the meetings between the unions have brought to light the dissimilarities between the national regulations, a general problem for ensuring efficacious protection for the exercise of collective action both in countries that constitute the historic core of the EU, and in those of more recent accession. The impairment of this right is the result of multiple factors ranging from a decrease in unionization rates, the prevalence of freemarket policies, and the manipulation of the safeguarding of strikers' rights, in itself a fair and shareable concern, but one which is too often used as a pretext to limit the exercise of the collective action. It is baffling, for example, that in the event of a strike in the United Kingdom, the cradle of trade unionism, the TUC can be called to compensate for damages provoked by the employer on the simple premise of failures in the strike proclamation procedure. Also a matter of great concern is the condition of the new member states: although the right to strike is safeguarded in their new Constitutions, it is unsupported by legislation, and collective bargaining meets with numerous obstacles in its struggle to gain a foothold, also due to the complex social, political and economic scenarios in those countries.

To summarize, the study shows that in practice, at the national level the right to strike faces imbalanced and complex conditions. At the supranational level, moreover, a dark shadow has been extended by the decisions of the EU Court of Justice, exacerbating tensions and fueling new conflicts between national systems, which differ in their own trade union histories and in the standards of protection enjoyed by collective action.

The issues raised by the Viking, Laval, Ruffert decisions are still calling for attention and resolution. The trade unions are alarmed but remain anchored to a perspective still far more rooted in a national rather than a European dimension. The new level of conflict reflected in the decisions, which pit employers against workers, and workers against workers from other unions, does not end nor is resolvable at the national level.

The European Court's solution treats the conflict by invoking «the general interest» that should prevail over the opposing special interests of workers and employers.

Both history and labor law teach, however, that the «general interest» is a meaningless concept unless contextualized in specific and tangible interests. National and international labor unions have all already accepted limitations to the right to strike for the protection of the concrete and fundamental rights and interests of persons (i.e., health, basic needs, security). They do not, therefore, fear comparison with the various other interests protected by the Treaties.

These interests must, however, be specified, exposed, and investigated in their real, manifested dynamics, and not only as they appear in the rarefied spaces of legal decisions and laws.

These are our motivations for including studies of both the data of experience and the data of jurisprudence in the research presented here. The results of the analysis of the information collected advocate for the necessity of resolution of the issues posed by the processes of economic integration, a resolution that must be found in the international fora of the industrial relations system, without wishfully resorting to the formula of an abstract correction of a subject that is still «amorphous», but rather with the willingness to agree upon a rule only after a careful examination of the circumstances characterizing the individual case.

It is in fact clear that the answers and the solutions to the problems posed by the freedoms enshrined in the Treaties must be found in negotiations at a European level. The «import» of new restrictions on the right to strike handed down by the Community jurisprudence, however, is not acceptable. Collective action is a fundamental right in the Italian Constitution and in the constitutions of many other member states, as well as in the European Charter of Fundamental Rights, which cannot be sacrificed to economic interests that express the freedom of establishment and freedom to provide services.

The ETUC's proposed solution for amending the Treaty with the introduction of a clause to prohibit Community institutions from interfering with the right to strike protected at the national level, is a goal to be pursued. In the immediate future, however, it does not seem one that will be easy to actualize. While waiting for a response from supranational policy that will deal equitably, it is hoped, with the interaction of social rights and economic freedoms, we certainly cannot allow that issues of overriding importance such as the right to strike be regulated by the occasional rulings of the Court of Justice or by the national courts. It is necessary that the unions belonging to the ETUC find occasion to meet in order to define common strategies that can also be effective at the national level.

It is clear to everyone, in fact, that a generalized system of rules to define a proper balance between economic freedoms and social rights is the best way of combatting social dumping initiatives among the countries.

Defining legal and political prospects that are certainly innovative to address

the problems of European economic integration is the focal point of the industrial relations in each member state, and not only. The policy of the States must also be to advance towards a shared European sovereignty and to overcome «*special interests*».

The need for more Europe [...] with growing evidence has become mandatory in a world, shaken as it is by the crisis we are currently experiencing, in which no individual European country, not even the biggest and most efficient one, can «save itself by itself» or play a significant role using its own forces alone (Speech by the President of the Italian Republic Giorgio Napolitano at the opening Ceremony of the Academic Year of the Collège d'Europe Bruges, 26/10/2011)

The economic crisis sweeping the western world, and Europe in particular, has unfortunately taught us with exceptional harshness, that it is employees, whatever their nationality, who pay the most negative consequences. Deliberation and unified action by national and international trade union organizations is the only means to prevent the degradation and repeal of rights acquired over centuries of social struggle.

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ABBREVIATIONS

ACAS Advisory Conciliation and Arbitration Service (United Kingdom)

ARAN Agenzia per la Rappresentanza Negoziale della Pubblica amministrazione (Italia)

art. /artt. article/articles

BAG Bundesarbeitsgericht (Federal Court of Labour, Germany)

BALPA British Airline Pilots Association (United Kingdom)
BetrVG Betriebsverfassungsgesetz (Act on Works Councils, Germany)
BNS National Trade Union Block (Romania)
BVerfG Bundesverfassungsgericht (Corte Costituzionale federale tedesca)
CJEU Court of Justice of European Union
EUT European Union Treaty
TFEU Treaty on the Functioning of the European Union
Cartel ALFA National Trade Union Confederation (Romania)
c. c. Civil Code (Italy)
CCNL National Collective Agreement (Italy)
CCJ Constitutional Court Judgments (Spain)
CCOO Confederacion Sindacal de Comisiones Obreras (Spain)
CE Constitución Española (Spain)
CEACR Committee of Experts on the Application of Conventions and Recommendations of ILO
CFREU Charter of Fundamental Rights of the European Union
CGIL Italian General Confederation of Work
CGS Commission for ensuring the implementation of the law on strikes in essential public services (Italy)
GT Confédération Générale du Travail (France)
CITUB Confederation of Indipendent Trade Unions of Bulgaria
CRB Costitution of Bulgarian Republic
DGB Deutscher Gewerkschaftsbund
DLRT Real Decreto-Ley de Relaciones de Trabajo (Spain)
D. L. Law decree (Italy)
D. Lgs. Legislative decree (Italy)
ECHR European Court of Human Rights
ECJ European Court of Justice
EPSU European Federation of Public Service Unions
ETUC European Trade Union Confederation
GG Grundgesetz (German Constitution)
IGBCE Mining, Chemical an Energy Industry Union (Germany)
ILO International Labour Organization
ITUC International Trade Union Confederation
L. Law (Italy)
LC Labour Code (Bulgaria)
LO-S Landsorganisationen i Sverige (Sweden)
LPL Ley de Procedimiento Laboral (Spain)
NICA National Institute for Conciliation and Arbitration (Bulgaria)
NUJ National Union of Journalists (United Kingdom)
OG Official Gazette (Romania)

OJEC Official Journal of the European community
OJEU Official Journal of the European Union
OPZZ All-Poland Alliance of Trade Unions (Poland)
Podkrepa Confederation of Labour (Bulgaria)
RSA Enterprise Trade Union (Italy)
RSU Enterprise worker's unit (Italy)
SC Spanish Constitution
SCLDA Act on Settling Collective Labour Disputes (Bulgaria)
SPD Sozialdemokratische Partei Deutschlands
SIMA Interconfederal Service of Mediation and Arbitration (Spain)
STC Sentencia Tribunal Constitucional (Spain)
SWS Self Employed Workers' Statute (Spain)
TC Tribunal Constitucional (Spain)
Trib. Ordinary Court (Italy)
TU Trade Union
TUC Trade Union Confederation (United Kingdom)
Ver.di Vereinte dienstleistungs-gewerkschaft (Germany)

