The judicialisation of European Trade Union Confederation action

From the Viking and Laval cases to defending fundamental social rights

Julien Louis

Working Paper 2022.13

etui.

The judicialisation of European Trade Union Confederation action

From the Viking and Laval cases to defending fundamental social rights

Julien Louis

Working Paper 2022.13
european trade union institute

Julien Louis, PhD in political science, SAGE Laboratory, University of Strasbourg.
Contact: julien.louis@unistra.fr

Brussels, 2022

Print: ETUI Printshop, Brussels

D/2022/10.574/26
ISSN 1994-4446 (print version)
ISSN 1994-4454 (electronic version)

The ETUI is co-funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the ETUI. Neither the European Union nor the ETUI can be held responsible for them.

Contents

Abstract

This study examines the development and implementation of judicial strategies by the European Trade Union Confederation (ETUC) over the last fifteen years. Firstly, the author shows that this strategy was born in the wake of the Viking and Laval cases, with the aim of using the standards and complaint mechanisms of the Council of Europe and the International Labour Organisation to overturn those case laws. Secondly, the author highlights the normalisation and diversification of the objectives pursued by the ETUC's judicial strategy, as well as the limits of this strategy before the Court of Justice of the European Union. Finally, the author analyses the ETUC's activities in support of fundamental social rights in the Council of Europe before the European Court of Human Rights and the European Committee of Social Rights.

1. Introduction

At its October 2020 Executive Committee, the European Trade Union Confederation (ETUC) adopted a resolution 'on ETUC human rights, legal and strategic litigation' (ETUC 2020). In line with the action programme adopted in 2019 at the Vienna Congress, this resolution re-affirms the importance of legal and judicial action as one of a wide array of tools available to the ETUC in its advocacy work. In addition to providing legal advice to its members and building European trade union expertise on the law, the Confederation's objective is to 'foster a coordinated strategic litigation approach' with a view to 'influencing European and international case law' in support of social and trade union rights.

At first glance, such objectives seem self-evident, given that legal action has long been part of national trade union strategies, for example in France (Narritsens and Pigenet 2014), and even in the United Kingdom (Latta and Lewis 1974; Colling 2006; Guillaume 2018), despite having been historically marked by the 'collective laissez-faire' model of labour relations. Moreover, given that the international trade union movement has been engaged in the construction of international social rights, particularly within the International Labour Organisation (ILO) (Kott and Droux 2013) since the early 20th century, the ETUC's recourse to law and justice should seem all the more self-evident.

Yet, despite the creation of legal networks and tools in the mid-1990s by the ETUC (Clauwaert 1996), the formalisation and effective implementation of the ETUC's judicial strategy only date from the late 2000s. The Confederation's late investment in this form of action may come as a surprise given the previously established trade union practices in the field of law and justice in national and international spaces. It is even more surprising considering the profoundly legal nature of European integration, which since the 1950s has been structured as a 'community of law' (Vauchez 2018), with a powerful and pro-integrationist Court of Justice (Alter 2009; Stone Sweet 2005), whose legal precedents in the social sphere have long been established and confirmed in recent years (Sindbjerg Martinsen 2015).

This study thus aims to shed light on the judicialisation of the ETUC's action by looking at the genesis and development of trade union judicial strategy on a European scale. Why did the Confederation invest in judicial action in the late 2000s and what have since been the main features of that strategy?

The first part of this study shows that the ETUC's judicial strategy resulted from its seminal mobilisation in the Viking and Laval cases, decided in 2007 by the

Court of Justice of the European Union (CJEU). The initial objective of the ETUC's judicial strategy was to counteract the effects of this case law by using international social law. The second part then looks at the ETUC's process of standardising its judicial strategy and diversifying its objectives in the 2010s. As we stress, however, offensive legal action at the CJEU remains hampered by several obstacles. The third and final part highlights the ETUC's development of a strategy over the last decade for defending fundamental social rights at the Council of Europe. By increasingly turning to the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR), the ETUC seeks to reconcile social Europe with the Europe of human rights.

This study is based on a doctoral research work (Louis 2019) and employs several types of empirical data. The first are interviews conducted with current and former members of the ETUC Secretariat involved in legal issues. The second is a corpus of documents from the ETUC, the EU institutions, the Council of Europe and the ILO. Finally, for the statistical analysis of the role of trade unions in collective complaints at the ECSR carried out in the final section, our results come from a collective complaints database that we assembled, in which we coded all collective claims decided by the ECSR through February 2022 (n=149).

2. The origin of the ETUC's judicial strategy

Although reflection on the ETUC's legal and judicial means of action began as early as the 1990s (Clauwaert 1996), an effective and offensive judicial strategy wasn't put into place until the 2000s. This strategy specifically took shape following the ETUC's seminal response to the Viking and Laval cases in 2005-2006. While initially limited to fighting this CJEU case law that was harmful to trade union rights, it ultimately led European trade unionists to reinvest in ILO and Council of Europe law, which played a decisive role in diversifying the objectives of their judicial strategy, as we shall see in the final part of this study.

2.1 Groundbreaking judicial action: the Viking and Laval cases

The ETUC's implementation of a European judicial strategy cannot be understood without studying its mobilisation in the Viking and Laval cases[1]. Indeed, it was the first time in the Confederation's history that it became directly involved in European legal disputes. Until then, European litigation was handled by the national trade union organisations affected by the cases before the Court of Justice. A brief review of the ETUC's seminal involvement in these cases is therefore necessary for understanding the judicial strategy that it set up at the end of the 2000s, as it establishes both the means and the initial objectives of this strategy.

The ETUC's involvement in the Viking and Laval cases can be explained both by the legal implications of the two trials as well as by the European political context of the time. The Viking case pitted Finnish shipowner Viking Line against the Finnish Seafarers' Union (FSU). Supported by the International Transport Workers' Federation (ITF), the FSU opposed the shipowner's attempts to register a ferry under the Estonian flag. In the Laval case, the Swedish Construction Union launched a boycott of the Latvian construction company Laval un Partneri to ensure that Latvian posted workers employed on a construction site in Sweden would be paid at Swedish levels. In both cases, the employers invoked internal market law, namely freedom of establishment and free movement of services, to defeat trade union collective action. Both cases were referred to the EU Court of Justice in autumn 2005. (For legal literature on the two cases, see in particular: Bücker and Warneck 2011; Freedland and Prassl 2016.)

---

1. CJEU (Grand Chamber), Case C-438/05, ITF and FSU v. Viking line, Judgement of 11 December 2007; CJEU (Grand Chamber), Case C-341/05, Laval un Partneri v. Byggnads and others, Judgement of 18 December 2007.

These two preliminary rulings raised questions about the definition of the right to transnational collective action within the EU, the interpretation of the Posting of Workers Directive (Directive 96/71/EC) and, more broadly, the relationship between fundamental social rights and the economic freedoms of the internal market. ETUC leadership believed these issues to be of interest to the whole European trade union movement rather than being limited to the national unions (and the ITF) formally involved in the disputes. This perception explains the ETUC Secretariat's unprecedented involvement in both trials (for a detailed analysis: Louis 2022). The Europe-wide implications were all the more evident to ETUC leaders because of the European political context of the time: the mid-2000s were marked by the enlargement of the EU to Central and Eastern European countries, the debates on the draft Constitutional Treaty, the controversies over the lifting of transitional measures restricting the free movement of workers from the new Member States, and the first evaluation of the Posting of Workers Directive by the European Commission.

The issues at stake in the Viking and Laval cases had implications for all of these larger questions as they involve the scope and limits of the social dimension of European integration and the degree of protection afforded to workers within the internal market. Finally, from 2004 to 2006, the issue of 'social dumping' was at the top of the European political agenda due to the negotiations of the proposed 'Bolkestein' Directive on services (Directive 2006/123/EC). The ETUC and its members strongly opposed the provisions of the initial draft directive (in particular the 'country of origin principle'[2]), as they feared generalised worker competition in Europe and a 'race to the bottom' in terms of Member State labour laws (Crespy 2012).

Finally, a more circumstantial factor contributed to ETUC leaders' decision to become directly involved in the Viking and Laval cases: statements made by Charlie McCreevy, Internal Market Commissioner and as such the lead negotiator of the Services Directive. In Stockholm in October 2005, he unexpectedly announced that the Commission would support Laval un Partneri before the CJEU against the Swedish unions. This provoked a strong reaction from trade union circles and prompted ETUC leadership to become actively involved in the trials. In October 2005, at an Executive Committee item on the Viking and Laval cases, John Monks (ETUC General Secretary from 2003 to 2011) alerted other trade union leaders to 'the possibility of single market legislation that damages national industrial relations becoming a major problem' (CES 2005a). The following month, John Monks decided to set up a working group to examine 'how to win these cases in the Court of Justice' (CES 2005b).

Known as the Viking-Laval Task Force, the group was responsible for coordinating the Finnish, Swedish and ITF legal teams involved in the two preliminary references. The group was led and coordinated by the ETUC Secretariat, in particular by Catelene Passchier (ETUC Confederal Secretary from 2003 to 2010)

2. In the directive's proposal, the 'country of origin principle' implied that the labour law of the home country would have been apply to workers sent in the host country, thus creating a unequal treatment of workers in the same territory.

at the political level, and by Claes-Mikael Stahl (Swedish trade union lawyer seconded to the ETUC Secretariat in 2005-2006, and ETUC Deputy General Secretary since 2021) at the technical level. The group brought together leaders and lawyers from the Swedish, Finnish, ITF and ETUC secretariats, their attorneys, and labour law professors from the Transnational Trade Union Rights (TTUR) research network attached to the European Trade Union Institute (such as Brian Bercusson, the founder of this network in 1996; on the history of the TTUR, see Louis and Rocca 2020)[3]. The creation of this Task Force was unprecedented in the history of the European trade union movement, as it represents the first time that a transnational judicial coordination under the umbrella of the ETUC was set up in European trade union cases.

Without going into the details of the strategy pursued by the Task Force, it can generally be said that it involved influencing the observations submitted by the European Commission and national governments to the Court of Justice. The aim was for as many of these submissions as possible to support the compliance of the Finnish and Swedish trade unions' collective action with EU law before the courts. To do this, the Task Force engaged in what could be called 'judicial lobbying' towards the Commission and the governments. In concrete terms, the Task Force developed joint arguments in favour of the trade unions and then disseminated them to the various European decision-makers. In addition to the use of written means of communication (press releases, media, letters, etc.), these arguments were promoted through numerous meetings between the members of the Task Force and agents of the Commission's Directorates-General (DG) Employment, Internal Market and Transport, European Commissioners (or their cabinets), and governments (ministers, cabinets, officials of the Ministries of Labour or Foreign Affairs, social attachés of the Permanent Representations, agents at the CJEU).

These efforts bore fruit when fifteen States submitted observations to the CJEU in the Viking case and seventeen in the Laval case, which represents an unusually high number of observations. Moreover, the European Commission, whose opinion is deemed to be influential in the Court, provided observations in which neither the Nordic social model was called into question, nor the legitimacy of trade unions to resort to collective action, two essential points for the trade unions. The CJEU, however, did not rule in their favour: its rulings are in fact interpreted by both the trade union movement and social law experts as a liberal interpretation of the Posting Directive, and more broadly as a subordination of fundamental social rights to the economic freedoms of the market (Louis 2021). We would now like to show that although the ETUC's groundbreaking judicial strategy ended in failure, it nonetheless laid the groundwork for the subsequent judicial strategies developed and conducted by the ETUC.

3. https://www.etui.org/fr/transnational-trade-union-rights-experts-network-ttur (link verified on 02/05/22).

2.2 Countering Viking-Laval through international law

In response to the Viking and Laval judgements, the ETUC took action to limit their effects. Revising the Posting of Workers Directive, for example, became a key objective of the ETUC (CES 2008a and 2010a), which was ultimately achieved in 2018 (EU Directive 2018/957). The ETUC also drew up a 'social progress protocol', which it pushed to include in European treaties in order to reaffirm the primacy of fundamental social rights over economic freedoms (CES 2008b). However, the ETUC's most original response to the judgements was the creation of the Litigation Network by the ETUC Secretariat in 2009, which marked the lasting inclusion of a judicial approach in the activities of European trade unionism. This sub-section looks back at the creation of the network and its objectives, which were designed to counteract the Viking and Laval judgements.

The Litigation network was created at the beginning of 2009 under the guidance of Catelene Passchier following her involvement in the Viking-Laval Task Force. The new network's objectives were summarised by John Monks at the ETUC Steering Committee in April 2009. According to the Secretary General, the network's main objective was to develop a European judicial strategy focused on defending trade union rights in the wake of the Viking and Laval judgements:

> An internal ETUC expert group on collective action litigation strategies [...] has been set up to provide a forward-looking dimension to the ETUC litigation network [...]. The group is composed of trade union and academic experts and met for the first time on the morning of 15 April [2009]. The expert group discussed the strategic issues arising from the Viking and Laval cases, which are increasingly problematic for trade unions wishing to take collective action in cases with transnational dimensions. (CES 2009a)

Thus, the Litigation Network was first and foremost created in response to the Viking-Laval case law. Its main objective was to identify judicial means of limiting and even reversing decisions that are detrimental to trade union (and workers') rights. The agenda of the network's first meeting, held in April 2009, prioritised 'identifying legal flaws in the four judgements [Viking, Laval, Rüffert, Commission v. Luxembourg] that can be exploited in future litigation' (ETUC 2009)[4].

The centrality of the Viking and Laval judgements to the network's objectives is further reflected in its composition. Many of the people who were involved in the Task Force were also present at the network's initial meetings. Catelene Passchier was one, as were the lawyer for the Swedish trade unions in the Laval case (mandated by the European Federation of Building and Woodworkers), the

4. The Viking and Laval judgements were followed in 2008 by two other CJEU judgements which concerned the role of collective bargaining in the standards applicable to posted workers on the one hand, and the interpretation of the Posting of Workers Directive on the other. These are the 'Rüffert' (CJEU, case C-346/06, judgement of 3 April 2008) and 'Commission v. Luxembourg' (CJEU, Case C-319/06, judgement of 19 June 2008) judgements, which the ETUC deemed to be equally detrimental as the Viking and Laval judgements.

head of the legal service common to the three Swedish confederations (LO, TCO, SACO), a lawyer from the Central Organisation of Finnish Trade Unions (SAK), and the head of the ITF's legal services. Given its composition, the Litigation Network initially appeared to be a continuation of the Viking-Laval Task Force. The other participants (about 20 at each meeting) were trade union lawyers with expertise and experience in European law. Many were active members of Netlex, the network of European trade union lawyers established in 1996 by the ETUC. One of these was Esther Lynch, then in charge of social legislation at the Irish Trade Union Congress (ICTU), who later became a member of the ETUC's executive team (Confederal Secretary from 2015 to 2019, and since 2019 Deputy General Secretary).

In 2009, members of the network developed an original strategy to counter the Viking-Laval case law of the Court of Justice. Believing a spontaneous reversal of the CJEU case law to be unlikely, they decided to use international social law to influence the primacy given to economic freedoms in EU law. Specifically, network members looked to the standards of the Council of Europe and the ILO, both of which were seen by European trade unionists as more favourable to social rights. The Council of Europe protects trade union freedoms via two treaties: the European Convention on Human Rights of 1950 (Article 11 on freedom of association) and the European Social Charter of 1961 and its revised version of 1996 (Articles 5 and 6 on freedom of association, the right to collective bargaining and the right to strike). Both treaties are ratified by all EU Member States[5] and protected by the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR).

The priority given to trade union rights is even more evident in the ILO, as freedom of association has been enshrined in the very constitution of the tripartite organisation since its creation in 1919. This freedom is also guaranteed by Convention No. 87 (adopted in 1948), while Convention No. 98 (1949) protects the right to collective bargaining. Both conventions have been ratified by all EU Member States. In addition to the Governing Body, three main bodies at the ILO are responsible for protecting freedom of association and these two Conventions, namely the Committee on Freedom of Association (CFA), the Committee of Experts on the Application of Conventions and Recommendations (CEACR), and the Committee on the Application of Standards (CAS), which meets annually at the International Labour Conference (ILC) in Geneva.

In summary, the strategy developed by the network in 2009 entails the use of these bodies of the ILO and Council of Europe to build a body of case law or soft law that would allow for a shift in the case law of the EU Court of Justice when cases similar to Viking and Laval are heard in Luxembourg. In other words, the ETUC's judicial strategy of turning to international law was not so much intended to obtain a direct and immediate reversal of the Viking and Laval rulings as to shape international labour standards and fundamental international social rights

5. However, it should be noted that some EU Member States have not ratified all the provisions of the articles 5 and 6. It is still the case for Austria, Luxembourg and Poland. Cf. https://rm.coe.int/country-by-country-table-of-accepted-provisions/1680630742.

in a way that is favourable to trade union rights over the long term, with a view to influencing subsequent decisions by the CJEU.

This strategy is already evident in the minutes of the network's initial meetings. For example, one of the trade union lawyers present at the first meeting in April 2009 emphasised the importance of the ECtHR: 'Until now, the Strasbourg court has never been explicit on the right to strike. Now is the time to bring a case to the ECtHR' (ETUC 2009a). For this lawyer, the strategy was to take the case to the ECtHR in order to 'make the ECJ accountable to other bodies'. Similarly, another ETUC Secretariat's lawyer suggested using the collective complaints procedure ('We've been trying to encourage the use of collective complaints for 10 years'). A professor of labour law close to the trade union movement who was invited to the meetings described a two-stage strategy. Firstly, recourse to the ILO and Council of Europe bodies would make it possible to build up a body of international decisions favourable to trade union rights. These decisions could then be used to challenge the case law of the Court of Justice of the EU:

> [We need to] challenge the ECJ by proactive means through other forums: ILO, CoE, ECtHR. Our task would be to build a body of case law which can be relied upon when the time comes before the ECJ. [...] ECJ has to be made accountable to other forums. (*Ibid.*)

However, the members of the Litigation Network were under no illusion as to the extent that these international bodies could exert pressure on the CJEU. In the eyes of the trade union lawyers, the only body capable of competing with the Court in Luxembourg was its counterpart in Strasbourg. European trade unionists and their lawyers thus developed a multi-pronged strategy. In order to change the case law of the CJEU, the ECtHR's approach to trade union rights – which have historically been excluded from the scope of the Convention, with the exception of freedom of association[6] – needed to be modified. This would require using other sources of international social law (the European Social Charter and the ILO Conventions) and interpretation of that law by supervisory bodies (such as the ECSR and the CEACR) to influence the ECtHR.

While the interpretative authority of these various bodies is important, they are not courts. The members of the Litigation Network thus saw these committees as a means of influencing the rulings of the ECtHR on trade union rights, which could then influence the case law of the CJEU (ETUC 2009b). In addition to these tactical considerations on the order of activation of the different international complaint mechanisms, certain practical realities came into play: the ILO (CAS and CEACR) and Council of Europe (ECSR) committees are more accessible to trade unions and offer them greater chances of success (see section 4.2 of this

6. Indeed, only Article 11 of the Convention protects the freedom of trade union association. Historically, the ECtHR excluded the right to strike and the right to collective bargaining from this article. Cf. ECtHR, Swedish Union of Locomotive Engineers v. Sweden, Case No. 5614/72, Judgement of 6 February 1976 and Wilson and National Union of Journalists and others v. United Kingdom, Cases No. 30668/96, 30671/93, 30678/96, Judgement of 2 July 2002.

study) than the ECtHR or the CJEU. It was therefore easier (as well as cheaper and quicker) for members of the Litigation Network to begin in these quasi-judicial arenas before pursuing their strategy in the European courts (on this point, see in particular Hendy 2013: 65-68).

The judicial strategy developed by the Litigation Network in 2009 was thus highly complex, uncertain and long term. Several of its steps have been implemented, which we will now look at.

2.3 Using the ILO and the Council of Europe against the CJEU

2.3.1 Coordinating trade union comments in reporting procedures

ETUC leadership was quick to endorse the strategy developed by trade union lawyers within the Litigation Network. The strategy had already been mentioned in April 2009 by John Monks: 'The group of experts will meet again in June 2009 to further discuss responses [to the Viking and Laval cases], such as questioning the compatibility of ECJ case law with other international standards (ILO, Council of Europe)' (CES 2009a). In July 2009, the Secretary General asked the Executive Committee to validate the use of international complaint mechanisms:

> The ETUC Litigation Expert Group proposes using international supervisory bodies, including the ILO Committee of Experts on the Application of Conventions, to denounce the negative effects of ECJ judgements. Trade unions can contact this body to have the implications of the four judgements on national industrial relations systems examined and denounced. (CES 2009b)

For the ILO, the procedure is as follows. Each year, the Committee of Experts (CEACR) examines the reports submitted by governments on their compliance with the ILO conventions they have ratified. It then draws up a report on the conformity of state practices, legislation and case law with international labour standards. In the event of non-compliance, the experts issue 'observations' against the countries, i.e. criticisms and recommendations. The report is then submitted to the ILO's International Labour Conference in the tripartite Committee on the Application of Standards (CAS). Trade unions are involved in the monitoring process at the Conference, but they also have the opportunity to make their views known further upstream. Article 23 of the ILO Constitution allows them to submit comments – of a legal or factual nature – on reports sent by governments, in order to alert CEACR members to cases of serious concern.

To this end, in the summer of 2009, the ETUC invited its members to submit comments to the ILO experts on the basis of a set of arguments drawn up by the Litigation Network. The intention of the roughly twenty-page document was to demonstrate a violation of ILO Convention 87 (freedom of association)

and Convention 98 (collective bargaining) by the case law of the CJEU, through its application by the States. The legal reasoning criticised on the one hand the hierarchy between social and economic rights established by the CJEU, and on the other hand the proportionality test to which the CJEU subjects the right to collective action (CES 2009c).

According to the ETUC Secretariat, a total of sixteen ETUC member unions submitted comments to the ILO Committee of Experts in the summer of 2009. In parallel, ETUC leadership proposed undertaking 'similar action in relation to the Revised Social Charter of the Council of Europe' (CES 2009d) in order to exert maximum pressure against the Court of Justice rulings. The supervisory system of the Charter is partly inspired by the ILO, although the role played by trade unions is less significant since the procedure is not tripartite. Each year, governments submit reports to the European Committee of Social Rights (ECSR) on their compliance with the rights contained in the Charter. The latter issues conclusions which are then examined and discussed by national officials in a Governmental Committee, in order to prepare the decisions of the Committee of Ministers (resolutions or recommendations).

Unlike the CAS at the ILO, trade unions are represented, via the ETUC, by only two observers without voting rights (but with full speaking rights) in the Governmental Committee's discussions. However, national trade unions can submit comments on government reports sent to the ECSR, as is the case in Geneva. With this in mind, a new document was drawn up by the lawyers of the Litigation Network. The comments focused on paragraphs 2 (collective bargaining) and 4 (right to strike) of Article 6 of the (revised) Social Charter. Similar in terms and structure to the paper prepared for the ILO, the comments to the ECSR demonstrated that the ECJ's judgements have effects on the national law of EU states that are contrary to the trade union rights guaranteed by the Charter (CES 2009e).

This important work of coordinating comments made by national trade unions in the ILO and Council of Europe reporting system was, however, quickly overshadowed by two trade union actions at the two international organisations.

2.3.2 The 'BALPA' case: ILO experts against the Viking ruling

The comments submitted by European trade unions to the ILO Committee of Experts (CEACR) were overshadowed by the turmoil of the so-called 'BALPA' case, resulting from comments made by the British Airline Pilots' Association (BALPA) to CEACR in autumn 2008. This followed a dispute with British Airways, in which the airline's lawyers succeeded in preventing a pilots' strike by referring to the Viking case law before UK courts. In the wake of this failure, BALPA leadership turned to the ILO (BALPA 2008a). Though BALPA was not a member of the ITF at the time, the ITF chose nonetheless to support it[7], as did UNITE the Union, one of the main British centers affiliated to the Trade Union Congress (TUC), a

7. The ITF's support led BALPA to become a member in 2012.

member of the ETUC. Indeed, beyond the specific issues at stake in the BALPA-British Airways dispute, the case was an opportunity for European trade unions to challenge the CJEU rulings at the ILO, in line with the Litigation Network's strategy.

The ITF and UNITE thus joined the comments submitted by BALPA to the CEACR in October 2008 for the UK government's non-compliance with Convention 87. Without going into detail on the legal reasoning, it should be noted that it directly challenged CJEU case law, even though it is not the role of ILO experts to review the conformity of EU law with ILO conventions. The document contains a detailed analysis of the Viking and Laval rulings and explains that they are contrary to ILO standards on the right to strike. The document criticises in particular the principle of proportionality imposed by the CJEU, as well as the possibility of claiming unlimited damages from UK trade unions in the event that a strike is contrary to EU law. The trade union commentators concluded that the UK was violating ILO standards on the right to strike by applying the case law of the CJEU (BALPA 2008b).

However, since the comments were submitted in October 2008, they were too late to be included in the 2008-2009 standards monitoring cycle. It wasn't until spring 2010 that the ILO Committee of Experts submitted its report on the matter. In their comments, the experts were careful to point out that their 'task is not to judge the correctness of the ECJ's holdings in Viking and Laval [...] but rather to examine whether the impact of these decisions at national level are such as to deny workers' freedom of association rights.' However, this precaution did not prevent them from explicitly distancing themselves from the reasoning of the judges in Luxembourg, by stressing that subjecting the right to strike to a proportionality test with regard to economic freedoms is nonsensical in terms of international labour law. The conclusions drawn by the members of the CEACR were thus very severe in relation to the case law of the Court of Justice:

> The Committee observes with *serious concern* the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. [...] The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention. (CEACR 2010)

The BALPA case thus became an opportunity for European trade unions to use international labour law to challenge the case law of the CJEU. In this respect, the conclusions reached by the ILO represent the first success of the Litigation Network's strategy.

2.3.3 Swedish complaints to the ILO and the Council of Europe against the Laval judgement

Following BALPA, Swedish trade unions also turned to the ILO and the Council of Europe. In the summer of 2010, the ETUC was informed that 'LO-Sweden is

considering pursuing the Laval case as a separate case at the ILO' (CES 2010b). The Swedish Trade Union Confederation (LO) and the Confederation of Professional Employees (TCO) filed comments with the Committee of Experts alleging a violation of Conventions No. 87 and No. 98 by the Swedish legislation adopted pursuant to the Laval judgement. The final conclusions of the ILO experts were issued in spring 2013, and partly echoed those of the BALPA case. Among other things, the Committee of Experts wrote that it was 'extremely concerned' about the restrictions on collective bargaining and collective action introduced by the amendments to the Swedish co-determination legislation in 2010, following the judgement of the Court of Justice (CEACR 2013). As with the BALPA case, the Swedish trade unions' recourse to the ILO was another successful initial step in the Litigation Network's strategy.

In parallel to the ILO, Swedish trade unions filed a collective complaint with the European Committee of Social Rights (ECSR) of the Council of Europe in June 2012. It alleged a violation of Articles 4 (right to fair remuneration), 6 (right to collective bargaining and to strike) and 19(4) (equal treatment of migrant workers) of the European Social Charter (revised) by the Swedish co-determination legislation, as amended after the Laval judgement. The complaint was supported by the ETUC, which filed observations in support of its Swedish members. The ECSR adopted its decision in July 2013 and concluded unanimously that there had been a violation of Article 19§4, and 13 votes to 1 that Sweden had violated Articles 6§2 and 6§4 of the Charter. Most importantly, the Committee was highly critical of EU law and the case law of the CJEU. In a section entitled 'Introductory remarks on the relationship between the Charter and EU legislation', the experts point out that states must respect their commitments to the Social Charter when implementing a directive or a ruling of the CJEU. The Committee also stated that it must monitor the compatibility of national measures taken under EU law with the provisions of the Charter on a case-by-case basis. Indeed, rather than presuming that European legislation *a priori* complied with the provisions of the Charter, the experts instead established a 'presumption of non-conformity[8]':

> [For the ECSR], neither the current position of social rights in the EU legal order nor the content and process of its law-making seem to justify a general assumption that EU legal texts are in line with the European Social Charter. (ECSR 2013)

The ECSR's decision caused a stir in trade union circles. The LO (2013) believed that, in light of the decision, the Swedish government should change the law it adopted following the Laval ruling. As far as the ETUC was concerned, the ECSR decision was a valuable legal resource in the Litigation Network's strategy to change the case law of the CJEU. In a press release (CES 2013), Bernadette Ségol (General Secretary of the ETUC from 2011 to 2015) welcomed the 'criticism' addressed 'indirectly' to the 'case law of the Court of Justice for not taking sufficient account of social rights'. She added that the 'Court of Justice must now

8. This is a reference to the case law of the ECtHR, which considers EU law to be *a priori* in line with the Convention. See ECtHR (Grand Chamber), Bosphorus v. Ireland, Case No. 45036/98, Judgement of 30 June 2005.

amend it and give trade unions all the collective rights they need to effectively protect posted workers'. The ECSR's criticisms of the CJEU also attracted the attention of academics specialising in European social law, who helped popularise the decision (Chatzilaou 2014; Moizard 2015; Rocca 2013). More generally, the decision established the legal credibility of the ECSR, which in the eyes of many European trade unions and legal scholars, became the true 'guardian' of social Europe (Nivard 2014; Supiot 2016).

2.3.4 A partial success: the ECtHR and the Holship case

The final twist in the legal strategy developed by the Litigation Network in 2009 to counter the Viking and Laval cases through international social law was the 'Holship' case, which was heard by the ECtHR in June 2021[9]. Before discussing this case in more detail, it should be noted that the path to developing this legal strategy was anything but straightforward and there were many setbacks along the way. One example was a Swedish case that would have questioned the merits of the Viking-Laval case law before the ECtHR but was ruled to be inadmissible in December 2016 (Ewing and Hendy 2017).

The Holship case is named for a shipping company with a parent company in Denmark. One of its business locations is the port of Drammen, located in Norway. To load and unload its ships, the company used dockers registered with the port's employment agency, in accordance with the collective agreement in force. This agreement was concluded in 1976 between the Norwegian Confederation of Trade Unions (LO-N) and the Norwegian Transport Workers' Union (NTF) on the one hand, and the Confederation of Norwegian Enterprise (NHO) and the Norwegian Logistics and Freight Association on the other. The agreement also provided for dockworkers to be hired at a certain wage level and under certain working conditions. Such protective measures have their origin in ILO Convention 137 on work in ports, adopted in 1973 and ratified by Norway in 1974 with the aim of protecting dockworkers from the negative social consequences of the discontinuous nature of their work.

Holship had applied this agreement since 2000 but stop doing so at the beginning of 2013. Its managers wanted to use their own employees to load and unload their ships. In response, the Norwegian Transport Workers' Union (NTF) asked Holship in April 2013 to respect the dockers' agreement at the port of Drammen. In the absence of a response from the shipowner, the NTF - which organises about 80% of Norway's dockworkers - announced its intention to organise a boycott of Holship's ships. At the same time, in order to protect itself from legal risks, the NTF preemptively brought the case before the local district court to establish the legality of the boycott. Its legality was established in March 2014 by the court and confirmed on appeal in September 2014.

9. ECtHR, LO and NTF v. Norway, Case No. 45487/17, Judgement of 10 June 2021.

In return, Holship's lawyers took the case to the Norwegian Supreme Court in June 2015. Their strategy was based on European law: the lawyers argued that the union boycott was contrary to the freedom of establishment and competition law guaranteed by the European Economic Area (EEA) agreement, of which Norway is a member. This led the Norwegian Supreme Court to refer the matter to the European Free Trade Association (EFTA) Court of Justice, which issued its opinion in April 2016[10]. The EFTA Court of Justice ruled in favour of Holship, based to a large extent on the Viking case law of the CJEU. In summary, the EFTA Court found that the collective agreement is not exempt from European competition law and that the union boycott to enforce the agreement constitutes a restriction on the freedom of establishment. However, it left it to the Norwegian Supreme Court to determine whether the restriction was justified and proportionate. The court delivered its judgement on 16 December 2016. By ten votes to seven, the judges found in favour of Holship: the boycott was unlawful because it constituted a restriction on the freedom of establishment protected by the EEA Agreement, a restriction which was neither justified nor proportionate. The judgement broadly followed the EFTA Court's judgement, with the Viking and Laval judgements being extensively cited as grounds.

However, the case did not end there. The LO-N and NTF filed an application with the ECtHR in June 2017 for violation of Article 11 of the European Convention. In this case, legal and trade union communities set their sites beyond the Norwegian context (Hendy and Novitz 2018). In fact, the Holship case included all of the features of the test case imagined ten years earlier within the ETUC Litigation network to counter the Viking and Laval cases. The application filed in Strasbourg was intended to lead the ECtHR to rule on the conformity of the EFTA Court's opinion with the European Convention on Human Rights, and thus on the Viking-Laval case law. The ETUC submitted observations in the case, in which it stressed the importance of international legal standards on social and trade union rights. These observations highlight ILO and Council of Europe standards, in particular the CEACR's comments in the BALPA case, as well as the ECSR decision in the LO-S and TCO complaint (ETUC 2019a). The strategy devised in 2009 by European trade union lawyers to counter the Viking-Laval case law by using the ECtHR seemed to be on the verge of success.

However, the trade unions' hopes were partially dashed by the ECtHR judgement, which was handed down on 10 June 2021 and became final on 20 September 2021 in the absence of an appeal to the Grand Chamber. On the one hand, the judges in Strasbourg (unanimously) ruled that the freedom of establishment within the internal market does not constitute a fundamental right equivalent to the freedom of association guaranteed by Article 11 of the Convention, thus giving priority to fundamental rights over economic freedoms. On the other hand, the ECtHR judged that the Norwegian Supreme Court did not violate Article 11 of the Convention in the Holship case, because of the degree of discretion it has in applying the Article. Faced with this ambiguous ruling, European trade unions have tended to

10. EFTA Court, Holship Norge AS v. Norsk Transportarbeiderforbund, Case E-14/15, Judgement of 19 April 2016.

focus more on the general scope of the judgement than on the specific findings of the case. The ETUC thus welcomed the fact that the ECtHR established a 'clear hierarchy' between economic and trade union rights, in contradiction with the Viking-Laval case law of the CJEU (ETUC 2021a). This positive interpretation of the judgement is also the one promoted by LO-N (2021) and ETF (2021), as well as by doctrine (Graver 2022; however, other authors are more critical: Chatzilaou 2021).

In the end, despite the mixed results produced by the Litigation Network's 2009 strategy to counter the Viking-Laval case law, it has made recourse to the courts a permanent part of the ETUC's advocacy strategies. Indeed, the objectives of a European trade union judicial strategy have gradually diversified towards a more general defence of workers' rights in Europe.

3. The standardisation and limits of the ETUC's judicial strategy

While the judicial strategy developed by the ETUC was initially focused on the Viking and Laval judgements, this next part shows that the trade union objectives diversified during the 2010s. However, these objectives differ depending on the systems of standards and jurisdictions that trade unions face. Thus, with regard to EU law and its Court of Justice, the ETUC's actions are essentially defensive. In contrast, with the Council of Europe, European trade union action has a more offensive dimension, particularly in the area of fundamental social rights, as we shall see in the final section.

3.1 Diversification of the Litigation Network's objectives

Over the years, the activities of the Litigation Network have gradually shifted away from their original focus on the Viking and Laval cases. A study of the agendas of the network's various meetings, usually held two to four times a year, reveals a gradual diversification of the issues addressed by the trade union lawyers as they meet. Between each meeting, network members communicate via a secure electronic platform with restricted access. The majority of meeting agendas include remarks by lawyers and confederal secretaries of the ETUC Secretariat intended to inform participants in the network of current legal issues of interest to the ETUC and its members. This often included proposals for directives with a direct or indirect impact on European social law. Another item that almost always appears on the agenda is the monitoring of Council of Europe activities. The Litigation Network carries out a follow-up of cases under consideration by the ECtHR that may be relevant to trade unions and provides information on the latest developments concerning the European Social Charter, both in the reporting procedure and in collective complaints.

In addition, meetings are always punctuated by a round table discussion where trade union lawyers exchange information on recent cases in their respective countries that may have an impact at the European level. Most of the time, two or three preliminary ruling cases pending before or recently decided by the CJEU are presented and discussed in more detail. In some cases, a national trade union is involved in the legal action (or supports the applicant in the background). Other cases may simply have important consequences for European workers or for a particular country, even if a trade union is not directly involved.

In its attempts to influence cases before the CJEU, the Litigation Network employs the tactics used in the Viking and Laval cases, particularly the techniques of judicial lobbying. The ETUC Secretariat uses the knowledge it acquired in its response to the Viking and Laval cases in order to regularly take action to influence the observations submitted to Luxembourg by governments or the European Commission in cases where the issues are of interest to trade unions. The Litigation Network provides advices for selecting the cases in which the ETUC gets involved. The network serves as a forum for discussing the arguments sent to the Permanent Representation of those States deemed receptive to trade union interests.

One example of a case of concern for Litigation Network members was the 'Omalet' case of 2009, a preliminary question in which the Belgian National Social Security Office ordered a Belgian contractor to pay the social security contributions of one of its Belgian subcontractors who has gone bankrupt. The company disputed that it has to pay this amount, arguing that it constituted a restriction on the free movement of services as well as discrimination. Its arguments were based on the fact that Belgian law, which makes the main contractor and its subcontractors jointly and severally liable for the payment of social security contributions in the event of the latter's bankruptcy, does not apply if the subcontractor is established abroad. Therefore, according to the claimant, Belgian legislation should not impose obligations on Belgian companies vis-à-vis Belgian subcontractors since these obligations do not apply to foreign subcontractors. The originality of this case lies in the fact that an internal market freedom and the principle of non-discrimination are invoked in a purely national dispute to challenge Belgian social security law.

The ETUC was alerted to this case by the Belgian General Federation of Labour (FGTB) and the case was discussed several times within the Litigation Network. The members of the network agreed to send letters to several governments to alert them to the potential consequences of this preliminary question and to encourage them to submit observations to the CJEU. In its judgement of 22 December 2010, the Court of Justice ruled that the reference was inadmissible[11]. It is very difficult to establish with certainty the influence of the steps taken by the ETUC on the governmental observations and *in fine* on the final decision of the CJEU. However, it can be noted that in the Omalet case, the ETUC's letter seems to have had a real impact as the Confederation's Secretariat informed the members of the Executive Committee that 'Denmark and Austria have reacted positively' (CES 2009d).

However, it should be noted that European trade unionists do not use these legal lobbying techniques so frequently. The ETUC's activity report (CES 2015a: 68) for the period 2011-2015 indicates that only three cases gave rise to such steps. While few in numbers, these cases are carefully selected by members of the Litigation Network. The first of these three cases (C-533/13) concerns a preliminary ruling on the new version of the Temporary Agency Work Directive (2008/104/EC). This

11. CJEU, Omalet NV v. Rijksdienst voor Sociale Zekerheid, Case C-245/09, Judgement of 22 December 2010.

case is of particular importance for trade unions, as it is the first interpretation of the Directive by the CJEU. Moreover, the ETUC's involvement was facilitated by the fact that the Central Organisation of Finnish Trade Unions (SAK) is a stakeholder in the procedure. The second case is also a Finnish preliminary ruling, the 'Elektrobudowa' case (C-396/13), which concerns the posting of workers. This case was also led by SAK lawyers, who represented the Finnish electricians' union involved in the appeal. Known as 'RegioPost' (C-115/14), the third and final case concerns a preliminary question from Germany on the relationship between the posting of workers and public contracts. These three cases were the subject of ETUC advocacy with governments and were discussed within the network. The first two are considered successes by the ETUC and reinforce the idea that it is possible to achieve progress for European social law through the courts (CES 2015b and 2015c).

Finally, another of the ETUC's activities vis-à-vis the CJEU concerns cases involving the interpretation of directives resulting from framework agreements concluded within the European social dialogue. All of these directives contain a clause stipulating that the European Commission must seek the opinion of the organisations that have signed the agreement whenever its interpretation at European level is at issue. For years, this duty to consult went unheeded. The situation changed in 2010 when, in a case involving the interpretation of the Parental Leave Directive, resulting from the first European framework agreement signed by the social partners, the European judges questioned the members of the European Commission's legal service at the hearing on compliance with this obligation[12]. Since then, ETUC lawyers have regularly responded to requests from the Commission on this subject. The activity report for the period 2011-2015 indicates that the ETUC gave its opinion in eleven cases concerning a directive resulting from a framework agreement (CES 2015a).

3.2 Obstacles to an ETUC offensive strategy at the CJEU

As we have seen above, the primary function of the Litigation Network was to provide a formalised and permanent forum for ETUC members to discuss current European legal and judicial issues. However, some trade union actors regretted that the network tended to be limited to the exchange of information, and to occasional judicial lobbying. One such person was Esther Lynch, an Irish member of the network since its creation. When she became ETUC Confederal Secretary in 2015, one of her responsibilities was to manage the network. In a 2018 interview, the union leader explained that she wanted to develop more offensive strategies.

Under the leadership of Esther Lynch, the Litigation Network was given a new impetus in December 2015, when it was renamed the Fundamental Rights and Litigation Advisory Group. While symbolic on its face, this change of name showed

12. CJEU, Zoi Chatzi v. Ypourgos Oikonomikon, Case C-149/10, Judgement of 16 Septembre 2010, paragraph 23.

that the committee had become an important part of the ETUC, and by extension legitimised the use of legal action as a means of European trade union action. The document adopted by the ETUC Executive Committee in December 2015 assigns the following tasks to the network:

> The ETUC plans to reorient the existing Litigation Group, established almost 10 years ago to accompany the work on the Viking and Laval and similar cases, so that it better supports the ETUC and our affiliates to respond to the current challenges in the legal and human rights supervisory arenas. [...] The Advisory Group will provide support to ETUC in our actions to protect fundamental human rights, in particular trade union rights. The role of the Group is primarily to support ETUC's and affiliates' work on engagement with the various supervisory mechanisms at European level. (CES 2015d)

While the network's informative function was reaffirmed (analysis of European judicial issues and circulation of legal expertise among ETUC members), the document assigns it a new strategic action function. The network's new role included contributing to 'developing general strategies and arguments to be used by affiliates in their cases at national level also in view of (future) European litigation.' In addition to the CJEU, the ETUC Executive Committee instructs the group to focus on the Council of Europe (ECtHR, ECSR) and to support national trade unions in their actions (complaints, standards development) at the ILO and the UN.

This orientation was confirmed on several subsequent occasions, in particular by the action programme of the Vienna Congress (CES 2019b: 41), and by the 2020 ETUC Executive Committee resolution cited in the introduction to this study (CES 2020). This resolution, under the leadership of Isabelle Schömann (ETUC Confederal Secretary since 2019), brings together the various existing ETUC legal networks and working groups in a new structure called 'ETUCLEX'. In addition, an internal note drawn up by the Secretariat and circulated to ETUCLEX members sets out the precise details of this judicial strategy for fundamental trade union and social rights (ETUC 2021b). Finally, it may be noted that other reflections on the appropriateness of judicial strategies were initiated at the same time in particular areas. One example is the reflection undertaken by the ETUC with the European Trade Union Institute on judicial action in favour of workers' health and safety rights[13].

Thus, since 2009, the ETUC has developed significant activities in the field of judicial action, first through the Litigation network, then within the Fundamental Rights Group, and now with the ETUCLEX network. Currently, among the six elected members of the ETUC secretariat, four are lawyers or have a legal background (Esther Lynch, Claes-Mikael Stahl, Isabelle Schömann, Liina Carr). They are assisted by three lawyers (Stefan Clauwaert, Joakim Smedman, Thomas Taylor Di Pietro). However, this dynamism should not be overestimated.

---

13. See in particular the three conferences organised by the European Trade Union Institute on this subject in Brussels on 15-16 January 2020, 24-25 February 2021 and 30-31 May 2022.

Firstly, recourse to the courts is only one of the Confederation's methods of action. It uses other tools for advocacy, including lobbying, European social dialogue and communication. Secondly and most importantly, despite its desire to develop trade union litigation at European level, the ETUC has never brought an action in its own name before the EU Court of Justice, nor has it formally taken part in a case in Luxembourg. This lack of offensive litigation activity on the part of the ETUC can be explained by a combination of political, material and legal reasons.

Firstly, not all of the current or former ETUC leaders we interviewed for our doctorate share the idea that the EU Court of Justice is a relevant venue for European trade union action. Some believe that the place of trade unions is at the negotiating table (in social dialogue committees, for example) rather than in the courtroom, and that their actions should entail the mobilisation of workers (through demonstrations or strikes) rather than the use of law and the courts. Secondly, several of the trade union actors interviewed emphasised the significant financial cost of Court proceedings. This cost is compounded by the fact that proceedings can be appealed (direct actions to the EU General Court can be referred to the Court of Justice at a later stage), and that trade unions can be ordered to pay the other side's legal costs by the judges.

Thirdly, there are legal obstacles to direct action by the ETUC at the CJEU, of both a procedural and material nature. Firstly, procedural, as the conditions for accessing the Court of Justice are very restrictive outside the preliminary ruling procedure. Direct actions (annulment or failure to act) are indeed subject to a very strict admissibility test, where applicants must prove their interest in acting. Indeed, only the institutions of the EU institutional triangle (Commission, Parliament, Council) and the Member States have the status of 'privileged applicant'. This status gives them the right to act or intervene in all cases considered by the European judges without having to show an interest in the case[14]. Conversely, any private or legal person bringing an action must demonstrate a 'direct and individual interest' for doing so, i.e. prove that the contested European decision (in the case of an action for annulment) or the absence of a decision (in the case of an action for failure to act) directly and personally harms them. This rule also applies to third-party interventions in preliminary questions, which could have been a way for the ETUC to develop direct and formal action before the Court of Justice[15]. These rules of admissibility make the CJEU very difficult to access for civil society organisations. Unlike many national supreme courts (Krishnan 2001-2002), the CJEU is ultimately not conducive to what Anglo-Saxon lawyers refer to as public interest litigation (Harlow 1992), and limits trade unions to essentially defensive legal actions.

14. Privileged claimants are defined by Article 263 TFEU. The same article specifies that the European Central Bank, the Court of Auditors and the Committee of the Regions may also make appeals to safeguard their own prerogatives. They are referred to as 'semi-privileged applicants'.

15. The intervention procedure is codified in Chapter 4 of the Rules of Procedure of the Court of Justice (consolidated version of 25/09/12).

From this perspective, and contrary to many national trade unions in Europe[16], most of the trade union lawyers we interviewed consider it highly unlikely that the CJEU would grant the ETUC the right to bring an action to defend European workers whose interests have been undermined by a European measure. The few direct trade union appeals lodged in Luxembourg also tend to confirm the difficulty for trade unions to overcome these conditions of admissibility. For example, the action for annulment brought by the Greek Civil Servants' Confederation (ADEDY) in November 2010 against a Council decision imposing a series of austerity measures on Greece was ruled inadmissible by the General Court of the EU, the latter being of the opinion that the Confederation had not demonstrated that it was directly and personally concerned by the contested measures[17].

Finally, there are legal obstacles to offensive action which are of a material nature, as CJEU case law, at least in the years following the Viking and Laval judgements, is perceived to be favourable to economic freedoms and conversely hostile to social and trade union rights. Several of the ETUC Secretariat's members interviewed between 2014 and 2019 believed that it is more important to prevent the damage that may be inflicted by the Court of Justice on the European trade union movement or on social Europe (e.g. through the judicial lobbying practice described above) than to pursue a proactive strategy. Indeed, the only direct appeal initiated by a European trade union organisation to the CJEU appears to confirm these reservations. In the case brought against the European Commission by the European Federation of Public Service Unions (EPSU), which sought to establish the Commission's obligation to transform a framework agreement adopted within the social dialogue into a proposal for a directive, the General Court of the EU ruled in 2019 that the Commission had full discretion to exercise its monopoly of legislative initiative, including for texts resulting from the social dialogue[18]. This ruling was upheld on appeal by the Court of Justice in 2021, and the unions were ordered to pay the legal costs of the Commission[19].

Faced with the difficulties of mounting an offensive strategy with the CJEU, the ETUC and its members have developed actions with other international legal bodies, in particular with the Council of Europe, which we will now address.

---

16. In France, for example, trade unions have the ability to take legal action before all courts to defend their interests as an organisation, the interests of their members, or the collective interests of employees in general. The situation is similar in Belgium. In Denmark, Finland or Sweden, labour courts can only be used in favour of employees by trade unions.

17. General Court of the EU, ADEDY and Others v. the Council of the EU, Case T-541/10, Order of 27 November 2012.

18. General Court of the EU, EPSU and Goudriaan v. European Commission, Case T-310/18, Judgement of 24 October 2019.

19. CJEU (Grand Chamber), EPSU v. European Commission, Case C-928/19 P, Judgement of 2 September 2021.

4. From Social Europe to the Europe of Human Rights

In this final section, we analyse the development of the ETUC's judicial activities in the Council of Europe since the late 2000s (Lörcher and Clauwaert 2017). During this period, the Viking and Laval cases symbolised the victory of market Europe over social Europe, and EU law and the CJEU were seen as deterrents to trade unions. The ETUC and its members then turned to the Council of Europe, firstly, as we have seen, to counter the case law of the CJEU, and secondly, with the more general objective of reconciling social Europe with the Europe of human rights. This reconciliation is the subject of the final section of this study.

4.1 The ETUC before the European Court of Human Rights

This sub-section analyses the reasons that led trade unionists and ETUC lawyers to invest in the ECtHR in the late 2000s, and the strategy that they pursued. We show that this investment was the result of a reversal of ECtHR case law in which it enshrined the rights to collective bargaining and to strike. This case law appears to be the antithesis of the Viking and Laval judgements, thus reinforcing the appeal of the Strasbourg Court for the European trade union movement. These developments in case law are leading the ETUC to develop the practice of third-party intervention in order to steer the outcome of certain cases examined in Strasbourg in a direction more favourable to social rights (Dorssemont, Lörcher and Schömann 2013).

4.1.1 An anti-case law Viking-Laval? Trade Union Rights and the ECtHR

ETUC lawyers' renewed interest in the ECtHR was primarily due to two successive reversals of case law in 2008 and 2009 in cases brought by Turkish trade unions (non-members of the ETUC). For the first time in its history, the court in Strasbourg recognised the rights to collective bargaining and to strike as being an integral part of Article 11 of the European Convention on Human Rights, i.e. the freedom of trade union association. The recognition of the right to collective bargaining is established by the 'Demir and Baykara' judgement, delivered on 12 November 2008 against Turkey. This Grand Chamber judgement was unanimously adopted,

giving it strong authority[20]. In the second case ('Enerji Yapi-Yol Sen'), by a judgement of 21 April 2009, the ECtHR established that 'the strike, which enabled the trade union to make its voice heard, was an important factor in enabling the trade-union members to protect their interests' and that its prohibition by the Turkish State on all civil servants thus violated Article 11 of Convention[21]. In doing so, the judges enshrined the right to strike in their case law for the first time in their history.

These two judgements have had a significant impact on academic and trade union circles. In order to understand this, it is necessary to place these rulings in their context: issued a few months after the CJEU rulings, the ECtHR rulings appear to European trade unionists, as well as to many legal scholars (Barrow 2010; Dorssemont 2011; Ewing and Hendy 2010; Marguenaud and Mouly 2009), to be the antithesis of the Viking-Laval case law. The ETUC communiqué (CES 2009f) in reaction to the 'Enerji' judgement calls on the CJEU to 'urgently adapt its case law on the right to take collective action in order to bring it into line with fundamental human rights requirements'. The ECtHR case law also supports trade union lawyers in their use of both Council of Europe and ILO law to counter the Viking and Laval rulings, as the court in Strasbourg largely bases its rulings on the European Social Charter and ILO Convention No. 87. Therefore, according to ETUC lawyers, the new ECtHR case law is a major step forward for trade union rights, not only because they are enshrined by the judges in the Convention, but also because the Court reinforced the interdependence of different international sources of fundamental social rights (Lörcher 2013).

4.1.2 The ETUC as 'friend of the Court': the practice of third-party interventions

The renewed attention that the ETUC placed on the ECtHR following the 2008 and 2009 judgements was reflected in two ways. On the one hand, ETUC lawyers developed a practice of third-party intervention (*amicus curiae*) before the Court in cases likely to impact labour law and trade union freedoms. On the other hand, they invested in the issue of the EU's accession to the European Convention on Human Rights.

The possibility of filing third-party interventions was made possible by Article 36 of the European Convention (Burgorgue-Larsen 2011). Civil society, however, was late to use this option, and it is thanks to the British trade unions that this procedural avenue was opened. The first third party intervention in the history of the ECtHR was made in 1981 by the TUC in the 'Young, James and Webster' case. This test case was supported by The Freedom Association, a British organisation known for its judicial activism against trade unions, in particular against the closed shop system (Harlow and Rawlings 1992: 144). In this case, the three

20. ECtHR (Grand Chamber), Demir and Baykara v. Turkey, Case No. 34503/97, Judgement of 12 November 2008.

21. ECtHR, Enerji Yapi-Yol Sen v. Turkey, Case No. 68959/01, Judgement of 21 April 2009, paragraph 24.

applicants were railway workers dismissed from *British Railways* for refusing to join a union and thus participating in this closed shop system. Filed in 1976-1977 for violation of the 'negative' right of association, the applications were examined by the ECtHR in 1980-1981. However, in 1979, Margaret Thatcher came to power and the TUC feared that the applicants and the British government would join forces in Strasbourg against the unions. In order to defend a trade union position, the TUC's lawyer, Labour law professor Bill Wedderburn, asked the ECtHR for permission to intervene in the proceedings on the basis of Article 36 of the Convention, which the judges granted for the first time in their history.

The TUC was not entirely satisfied with the final judgement. While the ECtHR did not rule on the general conformity of the closed shop systems with the Convention, it found a violation of Article 11 in this case[22]. As a result, however, trade unions and civil society have since been able to intervene at the ECtHR via the third party intervention procedure. Initially, the frequency of third-party interventions remained modest, since according to the count carried out by Laura Van den Eynde (2013), their number for the year 2010 alone was greater than for the entire period from 1985 to 1996 (about thirty). Laure Van den Eynde counted a total of 294 third-party interventions filed in Strasbourg up to 2013, equalling about one in a hundred judgements, but one in five in Grand Chamber cases. Initially, third party interventions were mainly carried out by human rights NGOs, particularly British ones (Liberty, Amnesty and Interights were among the most active associations in Strasbourg). On the trade union side, the practice of third-party interventions at the ECtHR intensified in the 2000s, under the impetus of a small group of British trade union lawyers.

In the 1990s, the 'Wilson and Palmer'[23] case represents the true beginning of the development of this practice by the English unions. The case was brought by the National Union of Journalists (NUJ) and the National Union of Rail Maritime and Transport Workers (RMT), and several of their members. Its objective was to have employment contracts declared not in conformity with Article 11 of the Convention if within them employers make the granting of certain salary benefits and career progression conditional on employees renouncing trade union representation. In these cases, the TUC filed a ten-page brief in support of the applicants jointly with the NGO Liberty, one of the most active NGOs at the ECtHR (22 interventions according to Laure Van den Eynde). The unions and their legal advisors in the Wilson and Palmer ruling, in which the British unions were victorious, inspired a significant number of trade union appeals in the 2000s (see Table 1).

It is therefore no coincidence that the first two third party interventions by the ETUC at the ECtHR occurred in cases brought by UK trade unions in the early 2010s. Likely at the request of these unions' lawyer[24], the Confederation submitted

---

22. ECtHR (Plenary), Case of Young, James and Webster v. United Kingdom, Cases No. 7601/76 and No. 7806/77, Judgement of 13 August 1981.

23. ECtHR, Case of Wilson, National Union of Journalists and others v. United Kingdom, Cases No. 30668/96, 30671/96 and 30678/96, Judgement of 2 July 2002.

24. This is largely thanks to barrister John Hendy, who is very experienced in trade union appeals to the ECtHR and is responsible for a dozen cases. Hendy supports the union practice of *amicus curiae* (Hendy 2013: 87).

Table 1 **Third-party interventions by the ETUC at the ECtHR***

Case	Participant(s)	Date of ruling	Article	Result	Summary
POA and others v. United Kingdom	ETUC & TUC	21/05/13	Article 11 (right to strike)	Inadmissible	Prison guards' strike
RMT v. United Kingdom	ETUC & TUC & Liberty	08/04/14	Article 11 (right to strike)	Non-violation	Strike conditions and solidarity strikes
Veniamin Tymoshenko and others v. Ukraine	ETUC	02/10/14	Article 11 (right to strike)	Violation	Notion of 'essential services' and air staff strike
Belane Nagy v. Hungary (Grand Chamber)	ETUC	13/12/16	Article 1 of Protocol 1 (property rights)	Violation	Reduction of a disability pension
Mircea Pop v. Romania	ETUC	16/07/16	Article 2 (right to life)	Violation	Work accident
Barulescu v. Romania (Grand Chamber)	ETUC	05/09/17	Article 8 (right to privacy)	Violation	Protection of personal electronic correspondence at work
Fabian v. Hungary (Grand Chamber)	ETUC	05/09/17	Article 1 of Protocol 1 (right to property)	Non-violation	Reduction of a retirement pension
Tibet Mentes and others v. Turkey	ETUC	24/10/17	Article 6 (right to a fair trial)	Non-violation	Possibility of claiming overtime in court
Lopez Ribalda and others v. Spain	ETUC	17/10/19	Article 8 (right to privacy)	Violation	Dismissal via hidden video surveillance of the employer
LO and NTF v. Norway	ETUC	10/06/21	Article 11 (right to collective action)	Non-violation	Prohibition of a trade union boycott in the name of freedom of establishment
Humpert and others v. Germany	ETUC	Pending	Articles 11 & 14 (right to strike)	Pending	Right to strike for civil servants (teachers)
Gostev v. Russia	ETUC & ITUC	Pending	Articles 10 & 11 (freedom of trade union expression)	Pending	Dismissal of a trade union leader speaking to the press
Other third-party interventions by trade unions at the ECtHR					
Young, James and Webster v. United Kingdom	TUC	13/08/81	Article 11 (freedom of association)	Violation	Closed shop and 'negative' freedom of association
Wilson and others v. United Kingdom	TUC & Liberty	02/07/02	Article 11 (freedom of association)	Violation	Contracts obliging employees to waive trade union representation
Sorensen and Ramussen v. Denmark	LO-D	11/01/06	Article 11 (freedom of association)	Violation	Closed shop and 'negative' freedom of association
Mangouras v. Spain	ITF	28/09/10	Article 5 (right to freedom)	Non-violation	Amount of the bond for the captain of the Prestige
Heinisch v. Germany	Ver.di	21/07/11	Article 10 (freedom of expression)	Violation	Dismissal of a nurse who denounced her employer's mistreatment of patients
Hellgren v. Finland	Finnish Post and Logistics Union	Pending	Articles 11 & 14 (right to strike)	Pending	Refusal to train agency workers recruited to break a strike

* Based on a review of the HUDOC database, up until February 2022: https://hudoc.echr.coe.int/

the first two third-party observations in its history in two cases involving the British Transport Union and the British Prison Guards' Union[25]. These first two third-party interventions led the ETUC to submit observations to the ECtHR in ten other cases. In total, the ETUC has intervened in 12 cases before the ECtHR since the beginning of the 2010s (see Table 1). While seemingly modest, this number places the ETUC among the ten most active organisations at the Court (Van den Eynde 2013).

In half of the cases in which the ETUC intervenes, it is Article 11 (freedom of association and, since 2008-2009, the right to collective bargaining and the right to strike) that is at issue. The remaining interventions are distributed amongst applications concerning the right to life (Article 2 of the Convention), the right to a fair trial (Article 6), the right to privacy (Article 8), and the right to property (Article 1 of Protocol No. 1 of the Convention). This strategy employed by the ETUC at the ECtHR has met with some success. Of course it is difficult, if not impossible, to establish exactly how much influence *amici curiae* has had on judges' rulings. However, it can be noted that in the 12 cases in which the ETUC has intervened, 5 judgements out of 10 led the ECtHR to sanction a violation of the Convention (two cases are currently being examined), including two judgements taken by the Grand Chamber. Finally, in addition to these cases, there are six cases to date in which ETUC member unions are interveners. Although the ETUC does not formally appear in the proceeding, it does play a role, as the observations drawn up by the national trade unions involved in a case at the ECtHR are discussed within the Litigation Network.

The ETUC's renewed investment in the ECtHR at the end of the 2000s continued in the Council of Europe working groups responsible for the European Convention. They are placed under the aegis of the Steering Committee for Human Rights (CDDH), which is made up of government representatives, mainly from the Ministries of Foreign Affairs and Justice. Besides all other elements of human rights protection (see below), the ETUC is particularly interested in one issue with regards to this body: the EU's accession to the European Convention. This is provided for in Article 6 of the EU Treaty (TEU), in force since December 2009. This obligation does not, however, provide any clarity on the relationship between the EU legal system and the Convention.

In 2010, the CDDH was entrusted by the Committee of Ministers of the Council of Europe with the task of drafting the accession treaty. To this end, the CDDH created a specific working group, which met several times between 2010 and 2013. The ETUC participated through its lawyers. This participation initially took the form of written contributions submitted to the CDDH, usually drafted by trade union lawyer Klaus Lörcher. The reason that the ETUC supported the accession process stems in particular from the strategy it adopted in response to the Viking and Laval judgements. As we have seen above, trade unionists now view the ECtHR as favourable to fundamental social rights (although some rulings have tempered

25. ECtHR, RMT vs United Kingdom, Application No. 31045/10, Judgement of 8 April 2014; ECtHR, POA and Others v. United Kingdom, Case No. 59253/11, Judgement of 21 2013.

this view, such as the 'RMT case': Bogg and Ewing 2014). EU accession to the European Convention is therefore seen by the ETUC as a means of subjecting the case law of the CJEU and EU law to the control of the ECtHR, and thereby restoring the supremacy of human rights (including fundamental social rights) over economic freedoms. Without detailing the ETUC's proposals, it can be noted that it submitted several legal amendments to the texts elaborated by the CDDH between 2010 and 2012 and that it politically supported accession (ETUC 2011a; 2011b; 2011c; 2012).

However, the accession process came to a major halt in 2014 with the opinion delivered by the CJEU at the request of the European Commission, concluding that the Treaty of Accession to the Convention was not in conformity with EU Treaties[26]. Such a stance can be interpreted as a desire by the judges of the CJEU to maintain the autonomy and primacy of the EU legal order - and *in fine* their own power as judicial guardians of that order - vis-à-vis the ECtHR. In any case, even if the accession process has stagnated since this opinion, it has helped to renew the ETUC's investment in the Council of Europe. In March 2012, the ETUC asked the Secretary General of the Council of Europe for official recognition within the ECtHR system (CES 2012). This approach has borne fruit, as the ETUC was admitted to the CDDH as an observer, first on an *ad hoc* basis, then on a permanent basis from 2014.

The ETUC's involvement in the work of the CDDH gradually evolved and was no longer restricted to the sole objective of the EU's accession to the Convention. Some of the working topics are of particular interest to trade unions. This is true, for example, of the study prepared by the CDDH on 'The impact of the economic crisis and austerity measures on human rights in Europe' in 2015 (Council of Europe 2016), of the work carried out by the working group on social rights (CDDH-SOC) between 2017 and 2019 (Council of Europe 2019a and 2019b), and of the work carried out by the working group on human rights and business (CDDH-CORP) between 2013 and 2016 preparing a Recommendation adopted by the Committee of Ministers[27].

In sum, the ETUC is now pursuing a general objective in the Council of Europe, both through its practice of third-party interventions at the ECtHR and its involvement in the CDDH, to orient the Convention in a more social direction. In other words, the trade union strategy now aims to reconcile social Europe with the Europe of human rights.

4.2 Trade unions before the European Committee of Social Rights

In addition to the ECtHR, the ETUC and its members' investment in the Council of Europe is particularly notable in relation to the European Committee of Social

26. CJEU (Plenary), Opinion 2/13 of 18 December 2014.
27. Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States, Human Rights and Business, 2 March 2016.

Rights (ECSR), which is responsible for monitoring the European Social Charter (Bruun et al. 2017). Long considered by the trade unions to be a treaty of little interest compared to the ILO standards and procedures, the Social Charter was given a new lease on life when it was revised in 1996 (the ETUC Secretariat having played an active part) and particularly with the creation of the collective complaints procedure.

Adopted in 1995 and entered into force in 1998, the Collective Complaints Protocol now has 16 ratifications since the accession of Spain in 2021. Alongside accredited international NGOs[28], national trade unions (and employers' organisations) play a prominent role in the process. They are the only national organisations entitled to lodge complaints with the ECSR[29]. Moreover the ETUC has a privileged role in monitoring the Charter (as do BusinessEurope and the International Organisation of Employers), since in addition to sitting ex officio on the Governmental Committee (which examines the reports submitted by governments and by the ECSR on the application of the Charter), the ETUC can lodge a collective complaint against any country that has ratified the protocol, as well as make observations in all other complaints.

Given this prominent role of trade unions in the collective complaints system, this final sub-section analyses their involvement in all the decisions issued by the ECSR since the procedure came into force, a total of 149 decisions[30]. It should be noted that the corpus of decisions studied does not take into account collective complaints declared inadmissible by the ECSR (19) and those currently being processed (36).

Of the 149 ECSR decisions studied, the first finding is that trade unions are the second largest source of collective complaints, as they represent more than a third (59) of the complaints lodged with the ECSR, compared with 87 complaints lodged by NGOs, and only 3 by employers' organisations (see Table 2 in the appendix). Their second place position is stable over time and applies to both the first decade of the procedure's operation (1998-2008) and the second (2009-2019). In addition, there was a sharp increase in the number of complaints over time, doubling between the first decade (49 complaints) and the second (100), both among trade unions (20 and 39 complaints) and among NGOs (27 and 60). This increase reflects the growing interest of claimant organisations in this procedure, since the number of States that have ratified the protocol on collective complaints (16 States to date) has remained almost stable over the period (only the Czech Republic and Spain ratified the protocol after 2008). The ETUC, the Department of the European Social Charter, and the Conference of International

28. Only international NGOs authorised by the Governmental Social Charter Committee can file a collective complaint, the main criterion being that they have Council of Europe participatory status. As of 2022, 63 international NGOs are on the list: https://www.coe.int/fr/web/european-social-charter/non-governmental-organisations-entitled-to-lodge-collective-complaints (link verified on 18/02/22).

29. Finland represents an exception as the only country that has allowed all its NGOs to refer cases to the ECSR (this possibility is provided for in the 1995 Protocol).

30. The study ends in February 2022. All of these decisions can be found at: https://www.coe.int/fr/web/european-social-charter/processed-complaints (link verified on 18/02/22).

NGOs of the Council of Europe have also played a major role in the promotion of this mechanism.

Secondly, if we focus more specifically on the type of trade union organisation filing complaints, we notice that national trade union organisations are much more active at the ECSR than their European counterparts. For example, among the collective complaints that led to an ECSR decision, 44 were brought by national trade union organisations compared with only 15 from European trade union organisations. Another interesting indicator is the distribution of trade union organisations between cross-industry confederations and sectoral federations. Among the European trade union organisations, the federations are almost alone in having lodged a complaint (15 complaints having led to an ECSR decision). The ETUC has only lodged three complaints, together with its national members[31] (but it has produced a lot of observations, see below). The situation is more balanced among the national trade union organisations, which are equally divided between the confederations (22) and the federations (22).

Table 3 **Complaints by type of claimant organisation**

Type of claimant organisation	Number of claims
National employers' confederation	2
National employers' federation	1
National trade union confederation	22
European trade union federation	15
National trade union federation	22
International NGOs	81
National NGOs	6
Total	**149**

The third finding is that the ETUC and its members (direct or indirect) are in the minority among the trade union collective complaints settled by the ECSR: of these 59 trade union collective complaints, only 26 (as opposed to 33) are the responsibility of an organisation that is directly or indirectly a member of the ETUC. Indeed, some European federations not affiliated to the ETUC are very active at the ECSR. This is the case in particular of the European Council of Police Trade Unions (CESP), which alone has 9 complaints, and to a lesser extent of Eurofedop, which has 4 collective complaints. It should be noted that these two European federations are in competition with the European Federation of Public Services (EPSU) and the European Police Confederation (EuroCOP), which are affiliated to the ETUC. It should also be noted that Eurofedop is affiliated to the European Confederation of Independent Trade Unions (CESI), a rival organisation to the ETUC at European level.

31. These are complaints No. 32/2005 (with the two Bulgarian confederations) and No. 59/2009 (with the three Belgian confederations). As these complaints have more national organisations than the ETUC, we have coded them as complaints brought by national trade union confederations. It should be noted that a third complaint was lodged in 2021 by the ETUC with its two members from the Netherlands (complaint No. 201/2021). The latter has not yet been decided by the ECSR and is therefore not part of our corpus.

Table 4 **Complaints by member and non-member organisations of the ETUC**

Type of trade union organisation	Non-member	Member
National trade union confederation	4	18
European trade union federation	14	1
National trade union federation	15	7
Total	**33**	**26**

The fourth finding is that there is an unequal distribution of complaints according to the country of origin of the claimant trade union organisations. Of the 59 trade union collective complaints on which the ECSR has ruled, it seems that 22 concern France and 11 Italy. They are followed by Greece with 9 collective trade union complaints (mostly against austerity measures) and Portugal with 6 complaints. This over-representation can be qualified by the fact that these four states had already signed the Collective Complaints Procedure Protocol in the late 1990s. In addition, France and Italy are the two States with the highest demographic weight among those that have ratified the Protocol, and they have ratified all (or almost all in the case of Italy) the provisions of the (revised) European Social Charter. Germany, the United Kingdom and Poland have not accepted the Protocol, and Spain did not ratify it until February 2021.

Table 5 **Number of trade union complaints by country**

Country	BE	BG	HR	FI	FR	EL	IE	IT	NO	PT	SE	Total
Number of complaints	2	1	1	1	22	9	4	11	1	6	1	59

Fifthly, an important factor are the results obtained by the complainant trade union organisations before the ECSR. For the sake of simplicity, we have coded the ECSR's decisions into three categories: violation (the ECSR considers that the state does not comply with all the articles of the Charter invoked by the claimant organisation), partial violation (at least one article invoked in a situation of non-compliance), and non-violation (no article). In total, of the 149 decisions handed down by the ECSR, 59 found a violation of the Social Charter (1961 or revised), 56 found a partial violation, and 34 found no violation. In other words, a complainant organisation wins its case 3 times out of 4 in full or in part, which is a very high success rate before the ECSR.

If we look at the outcome of trade union complaints alone, it is immediately clear that their success rate is lower than that of the total decisions rendered by the ECSR. Collective trade union complaints resulted in 18 findings of violation, 21 findings of partial violation and 20 findings of non-violation by the ECSR, equalling a total or partial success rate of about 2 out of 3 trade union complaints. It can be noted, however, that non-ETUC members have a total or partial success rate of 1 in 2 (6 violations, 11 partial violations, 16 non-violations), compared to a much higher success rate for direct or indirect ETUC members, with decisions of total or partial violation in more than 8 out of 10 complaints (12 violations, 10 partial violations, 4 non-violations). Finally, it appears that the success rate of complaints lodged by NGOs is also very high: 41 findings of violation, 34 of partial

violation and 12 of non-violation, amounting to a total or partial success rate in more than 8 out of 10 complaints.

Table 6 **Result of collective complaints (ECSR decision)**

Type of claimant organisation	Violation	Partial violation	Non-violation
NGO	41	34	12
Employers' organisation	0	1	2
Trade union organisation	18	21	20
Non ETUC members	6	11	16
ETUC members	12	10	4
Total	**59**	**56**	**34**

Sixthly, the actual role of the ETUC in the ECSR must be addressed. As noted above, the ETUC appears to be statistically marginal in the number of complaints, having filed only two complaints with its national affiliates (a third filed in 2021 is currently under review). However, the ETUC's role is not limited to formally associating itself with the complainant trade union organisations: on the one hand, the ETUC Secretariat's lawyers regularly advise their national counterparts when they are drafting a collective complaint, either informally or through the Litigation Network; on the other hand, the ETUC Secretariat has endeavoured since the beginning of the collective complaints procedure to intervene actively in the cases examined by the ECSR, through observations in support of or in opposition to the claimant organisation. Out of a total of 149 decisions handed down by the ECSR, the ETUC has submitted 60 observations, which makes the ETUC by far the most active organisation before the ECSR. Of these 60 submissions, 32 concern claims made by NGOs, 25 by trade unions, and 3 by employers.

This raises three questions: what type of complaint does the ETUC intervene in? What position does it then defend? And what is the result?

The first question arises because the ETUC intervenes in less than half of the complaints made to the ECSR. Firstly, it can be noted that in the case of trade union complaints, the ETUC intervened more frequently when the complaint was lodged by a direct or indirect member organisation (15 observations) than when it was lodged by a non-member organisation (10). Conversely, the ETUC has more often refrained from submitting observations on complaints by non-member unions (23) than on those from member unions (11). According to the ETUC Secretariat's lawyers, the ETUC refrains from intervening in the complaints of its members who do not give their consent, or when the country concerned by the complaint includes several ETUC member confederations who are not in agreement over the complaint.

Finally, as far as the employers' organisations are concerned, the ETUC has systematically intervened (in opposition) in their complaints. Regarding the complaints made by NGOs, it should be noted that out of 32 observations made by the ETUC, 15 concern the complaints made by the 'European Group of University Women' in 2016 concerning gender equality in employment, pay and career progression.

Aside from this set of 15 complaints and observations, most of the ETUC's observations in NGO complaints occurred in the early years of the collective complaints procedure. For example, the ETUC made 13 observations in NGO complaints between 1998 and 2006 (compared to 19 between 2006 and 2018, which included the above-mentioned series of 15 complaints on gender equality). According to the ETUC lawyers we interviewed, the Secretariat's initial activism in NGO complaints stemmed both from a desire to 'test' the mechanism of observations before the ECSR and to build up a reputation with the latter, at a time when trade union complaints were few in number compared to those of NGOs.

Table 7 **ETUC observations**

Type of claimant organisation	No	Yes
NGO	55	32
Employers' organisation	0	3
Trade union organisation	34	25
non-ETUC member	23	10
ETUC member	11	15
Total	**89**	**60**

What is the content of the ETUC's observations? In a very large majority of cases, the ETUC supported the complainant organisation and defended a violation of the Charter. This is the case in all the observations made by the ETUC in complaints lodged by NGOs (32), and in 22 (out of 25) complaints lodged by trade unions. Conversely, only six ETUC observations run counter to the position defended by the complainant organisation. These include, unsurprisingly, all three complaints brought by employers, as well as three trade union complaints. The ETUC's opposition to these three trade union collective complaints is possibly for political rather than legal reasons: the three (French) trade union organisations concerned are not affiliated to the ETUC. These are the French Confederation of Management – General Confederation of Executives (CFE-CGC), and the Syndicat occitan de l'éducation. The CFE-CGE is in fact affiliated to the ETUC's competitor organisation, CESI.

What is the outcome of complaints in which the ETUC submits observations? This is not an attempt to measure the objective influence of ETUC observations on the outcome of collective complaints. Indeed, our database only allows us to analyse two sets of data, without being able to establish strong correlations or causal links[32]. That being said, we can nevertheless observe that of the 60 complaints in which the ETUC filed observations, 24 ECSR decisions establish a partial violation, 21 establish a violation, and 15 establish a non-violation; in the 89 complaints in which the ETUC did not intervene, 38 establish a violation, 32 a partial violation,

32. Drawing further conclusions would require coding other factors that could influence the outcome of the claims, in order to isolate the effect of ETUC observations. These other factors include (but are not limited to): the legal quality of the claimant organisations' arguments, the state of the ECSR's case law, the choice of the rapporteur in charge of the complaint within the ECSR, the political context at the time the complaint is made, the reputation of the State concerned, the reputation of the claimant organisation, whether or not a lawyer was used, etc.

and 19 a non-violation. In other words, whether or not the ETUC intervenes in the complaints, they have the same success rate, i.e. 3 out of 4, which is the same as the overall volume of collective complaints (see Table 6 above).

The last observation concerns the articles of the Social Charter on which the ECSR has had occasion to rule in the context of collective complaints (see Tables 8, 9, 10 and 11 in the Annexes)[33]. For the sake of readability, we have adopted the ECSR typology used in the reporting procedure, which classifies the articles of the Charter into four thematic groups of articles[34]. First of all, it should be noted that not all groups of articles have been referred to with the same frequency in collective complaints: articles in groups 3 and 4 are those on which the ECSR has ruled most frequently (107 and 100 times), while articles in groups 1 and 2 have been the subject of fewer decisions (64 and 79 times). It should also be noted that the ECSR has never ruled on certain articles of the Charter in the context of a complaint, even though they are of direct interest to trade unions: this is the case for Articles 8 (protection of workers in maternity), 25 (protection of workers' claims in the event of their employer's insolvency), 28 (protection of workers' representatives) and 29 (information and consultation of workers in collective redundancy procedures).

Finally, if we focus solely on complaints lodged by trade union organisations, we note that the ECSR has most frequently ruled on articles in Group 3 (these articles appear 86 times in the ECSR's decisions concerning a collective trade union complaint), and to a lesser extent on those in group 1 (23 times), Group 2 (15 times) and Group 4 (11 times). Of the articles in Group 3, Article 6 (the right to collective bargaining and collective action) is the most frequently mentioned in trade union complaints (35 times). Article 5 (freedom of association) comes in second, with 19 mentions. Whether trade union complaints alone or collective complaints in general, Articles 5 and 6 are among the most frequently mentioned[35]: the Social Charter thus appears to be a key instrument for trade union freedoms.

33. To simplify the analysis, and although there are drafting differences between the two treaties, we have grouped together the articles under the 1961 Social Charter and those under the 1996 Revised Social Charter.

34. Group 1: Employment, training and equality of opportunity (articles 1 - 9 - 10 - 15 - 18 - 20 - 24 - 25) ; Group 2: Health, social security and social protection (articles 3 - 11 - 12 - 13 - 14 - 23 - 30) ; Group 3: Labour rights (articles 2 - 4 - 5 - 6 - 21 - 22 - 26 - 28 - 29) ; Group 4: Children, families, migrants (articles 7 - 8 - 16 - 17 - 19 - 27 - 31).

35. Article 5 is tied with Article 16 on the right of the family to social, legal and economic protection, the latter being raised 19 times by NGOs.

5. Conclusions

This study has shown that in the space of fifteen years, the ETUC has developed and standardised a new modality of action at the European level that was previously absent from the history of European trade unionism. The ETUC's judicial strategy was born out of the seminal experience of transnational judicial trade union mobilisation in the Viking and Laval cases in the mid-2000s. Far from deterring European trade unionists and their lawyers from resorting to the courts, the losses in those cases instead led them to develop sophisticated legal strategies to counter the case law of the CJEU. In our view, the most original feature of this strategy lies in the tension between international social law, both ILO and Council of Europe, and EU law and the case law of its Court.

Subsequently, during the 2010s, the ETUC's judicial strategy became both normalised and diversified: the Litigation Network (and its successive redesigns) now plays a stabilised and recognised role within the ETUC's activities, with the overall objective of defending trade union and workers' rights in Europe through litigation. In this respect, the Court of Justice of the EU remains a difficult court to access and often unfavourable to trade union interests, which is the reason why the ETUC has thus far only taken defensive action before it[36]. In contrast, the ECtHR and the ECSR appear to be more favourable to the European trade union movement, although some limits might be noted (the case law of the ECtHR is not always in favour of trade union rights, and the ECSR's decisions lack of effective implementation). One way of achieving a social Europe, and asserting it in the face of the Europe of the market, may thus lie in reconciling it with the Europe of human rights.

In conclusion, it is important to stress that this study has focused on the ETUC's judicial action as if it were an autonomous area of trade union action. In practice, however, the various forms of action that the ETUC takes are not independent but linked, particularly because they are partly carried out by the same trade union actors and have the same demands. In other words, the same demand can be made in different ways and in different arenas, as shown by the ETUC's lobbying for the revision of the Posting Directive and the inclusion of a social progress protocol in the European treaties, carried out in parallel with the Litigation Network's strategy. Legal action and other modalities of trade union action are thus not mutually exclusive but complement one another. One of the main challenges facing the ETUC is how to make coherent use of the various tools at its disposal (justice, lobbying, communication, etc.) in order to achieve its objectives.

---

36. It should be noted, however, that the ETUC is currently considering the possibility of developing more offensive litigation, particularly within the new 'ETUCLEX' network.

References

Alter K. (2009) The European Court's political power: selected essays, Oxford University Press.

BALPA (2008a) Press release - Pilots to take UK government to ILO.

BALPA (2008b) Application to the ILO Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention n°87.

Barrow C. (2010) Demir and Baykara v. Turkey: breathing life into Article 11, European Human Rights Law Review, (4), 419-423

Bogg A. and Ewing K.D. (2014) The implications of the RMT Case, Industrial Law Journal, 43 (3), 221-252.

Bruun N., Lörcher K., Schömann I. and Clauwaert S. (eds.) (2017) The European Social Charter and the employment relation, Hart Publishing.

Bücker A. and Warneck W. (eds.) (2011) Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert, Baden-Baden, Nomos.

Burgorgue-Larsen L. (2011) Les interventions éclairées devant la Cour européenne des droits de l'homme ou le rôle stratégique des amici curiae, in Collectif (ed.) La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa, Paris, Dalloz, 67-81.

CEACR (2010) Freedom of Association and Protection of the Right to Organise, Convention 1948 (No. 87), United-Kingdom, Observation adopted 2009, published 99th ILC session.

CEACR (2013) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Sweden, Observation adopted 2012, published 102nd ILC session.

Chatzilaou K. (2014) La réponse du CEDS aux arrêts Viking et Laval, Revue de droit du travail, 3, 160-167.

Chatzilaou K. (2021) L'action collective des travailleurs et les libertés économiques devant la Cour européenne des droits de l'homme, Revue de droit du travail, 9, 535-544.

Clauwaert S. (1996) ETUC NETLEX Meeting, Rome, 26-27 June 1996, Transfer, 2 (4), 797-799. https://doi.org/10.1177/102425899600200419.

Colling T. (2006) What space for unions on the floor of rights? Trade unions and the enforcement of statutory individual employment rights, Industrial Law Journal, 35 (2), 140-160. https://doi.org/10.1093/indlaw/dwl011

Council of Europe (2016) The impact of the economic crisis and austerity measures on human rights in Europe.

Council of Europe (2019b) Improving the protection of social rights in Europe. Volume 2: report identifying good practices and making proposals with a view to improving the implementation of social rights in Europe.

Crespy A. (2012) Qui a peur de Bolkestein ? Conflit, résistances et démocratie dans l'Union européenne, Paris, Economica.

CES* (2005a) Compte rendu du Comité exécutif des 19-20 octobre 2005.

CES (2005b) Compte rendu du Comité de direction du 14 novembre 2005.

CES (2008a) Réponses de la CES aux jugements de la CJUE dans les affaires Viking et Laval.

CES (2008b) Propositions pour un Protocole de « Progrès social ».

CES (2009a) Communications du secrétaire général au Comité de direction de la CES.
CES (2009b) Communications du secrétaire général au Comité exécutif de la CES.
CES (2009c) Rapport sur les conséquences des arrêts de la Cour de Justice des Communautés européennes rendus dans les affaires Laval et Viking en vertu des conventions n°87 et n°98 de l'OIT.
CES (2009d) Communications du secrétaire général au Comité exécutif de la CES.
CES (2009e) Observations sur la Charte sociale européenne (révisée), conséquences des arrêts de la CJCE rendus dans les affaires Viking, Laval, Rüffert et Commission/Luxembourg.
CES (2009f) Communiqué de presse - Le droit de grève est un droit de l'homme – la CJE doit modifier sa jurisprudence.
CES (2010a) La directive sur le détachement des travailleurs : propositions de révision.
CES (2010b) Compte rendu du Comité exécutif de la CES des 1-2 juin 2010.
CES (2012) Communiqué de presse - La CES demande sa reconnaissance effective au sein du Conseil de l'Europe.
CES (2013) Communiqué de presse - Le CEDS du Conseil de l'Europe renforce les droits collectifs – La loi Laval de Suède viole la Charte sociale européenne révisée.
CES (2015a) Rapport d'activités 2011-2015 pour le 13e Congrès (Paris) de la CES.
CES (2015b) Communiqué de presse - Arrêt de la Cour de justice européenne en faveur de l'égalité salariale pour les travailleurs détachés.
CES (2015c) Communiqué de presse - La Cour de justice de l'Union européenne garantit l'autonomie des partenaires sociaux concernant la régulation du travail intérimaire au travers de conventions collectives, [Press release - The Court of Justice of the European Union guarantees the autonomy of the social partners in regulating temporary agency work through collective agreements].
CES (2015d) Réforme du Groupe « Litigation » et création du Groupe consultatif « Droits fondamentaux et litiges » [Reform of the Litigation Group and creation of the Fundamental Rights and Litigation Advisory Group].
CES (2019) Congrès de Vienne : Programme d'action 2019-2023 de la CES [Vienna Congress: ETUC Action Programme 2019-2023].
Dorssemont F. (2011) How the European Court of Human Rights gave us Enerji to cope with Laval and Viking, in Moreau M.-A. (ed.) Before and after the economic crisis: what implications for the 'European Social model'?, Edward Elgar, 217-235.
ECSR (2013) Processed complaints - No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden.
ETF (2021) Press release - The right to organise prevails over economic freedoms.
ETUC (2009a) Litigation strategy expert group, indicative list of topics.
ETUC (2009b) Minutes ETUC litigation expert group.
ETUC (2011a) Recommendations on the EU's Accession to the ECHR submitted to the CDDH-UE Working Group.
ETUC (2011b) Comments and proposals submitted to the CDDH-UE Working Group.
ETUC (2011c) Observations and proposals to the CDDH-UE Working Group.
ETUC (2012) Submission to the CDDH Ad-hoc Negotiation Group and the European Commission on the Accession of the EU to the European Convention of Human rights.

ETUC (2019) Application n°45487/17, LO and NTF v. Norway, Submission by the European Trade Union Confederation under Rule 44(5).
ETUC (2020) ETUC Resolution on ETUC human rights, legal and strategic litigation network: ETUCLEX.
ETUC (2021a) Press release - ECtHR ruling on right to strike.
ETUC (2021b) Human Rights, Legal and Strategic Litigation Support and Guidance.
Ewing K. and Hendy J. (2010) The dramatic implications of Demir and Baykara, Industrial Law Journal, 39 (1), 47-48. https://doi.org/10.1093/indlaw/dwp031
Ewing K. and Hendy J. (2017) The Strasbourg Court treats trade unionists with contempt: Svenska Transportarbetareförbundet and Seko v Sweden, Industrial Relations Journal, 46 (3), 435-443 https://doi.org/10.1093/indlaw/dwx013
Freedland R.M. and Prassl J. (eds.) (2016) Viking, Laval and beyond, Hart Publishing.
Graver H.P. (2022) The Holship ruling of the ECtHR and the protection of fundamental rights in Europe, ERA Forum, 153, 1-14. https://doi.org/10.1007/s12027-022-00701-0
Guillaume C. (2018) When trade unions turn to litigation: 'getting all the ducks in a row', Industrial Relations Journal, 49 (3), 227-241. https://doi.org/10.1111/irj.12212
Harlow C. (1992) Towards a theory of access for the European Court of Justice, Yearbook of European Law, 12 (1), 213-248. https://doi.org/10.1093/yel/12.1.213
Harlow C. and Rawlings R. (2012) Pressure through law, Routledge.
Hendy J. (2014) Procedure in the European Court of Human Rights (with a particular focus on cases concerning trade union rights), in Dorssemont F., Lörcher K. and Schömann I. (eds.) The European Convention on Human Rights and the Employment Relation, Hart Publishing, 61-91.
Hendy J. and Novitz T. (2018) The Holship Case, Industrial Law Journal, 47 (2), 315-335. https://doi.org/10.1093/indlaw/dwy009
Kott S. and Droux J. (eds.) (2013) Globalizing social rights: the International Labour Organization and beyond, Palgrave Macmillan.
Krishnan K.J. (2001) Public interest litigation in a comparative context, Buffalo Public Interest Law Journal, XX, 19-99.
Narritsens A. and Pigenet M. (eds.) (2014) Pratiques syndicales du droit : France, XXe-XXe siècles, Presses universitaires de Rennes.
Latta G. and Lewis R. (1974) Trade union legal services, British Journal of Industrial Relations, 12 (1), 56-70. https://doi.org/10.1111/j.1467-8543.1974.tb00004.x
LO-N (2021) The right to strike and the right to organize take precedence over economic freedoms, 10 June 2021.
LO-S (2013) Important decision strengthens workers' rights in Europe, Press Release, 21 November 2013.
Lörcher K. (2014) The new social dimension in the jurisprudence of the European Court of Human Rights (ECtHR): the Demir and Baykara judgment, its methodology and follow-up, in Dorssemont F., Lörcher K. et Schömann I. (eds.) The European Convention on Human Rights and the employment relation, Hart Publishing, 3-46.
Lörcher K. and Clauwaert S. (2017) Activities by European Trade Union Confederation in proceedings before the European Committee of Social Rights and the European Court of Human Rights, in DGB Rechtsschutz GmbH (ed.) 10 Jahre Gewerkschaftliches Centrum für Revision und Europäisches Recht, 50-59.

Louis J. (2019) La Confédération européenne des syndicats à l'épreuve du droit et de la justice. Genèse, usages et limites d'un mode d'action syndicale en faveur de l'Europe sociale, Thèse de Science politique, Université de Strasbourg.
Louis J. (2021) Construire sa propre défaite. Les affaires Viking et Laval : un échec judiciaire pour le syndicalisme européen, Droit et société, 107, 181-199. https://doi.org/10.3917/drs1.107.0181
Louis J. (2022) Plaider l'Europe sociale contre l'Europe du marché. Le cadrage des affaires Viking et Laval par la Confédération européenne des syndicats, Politique européenne, 1-29.
Louis J. and Rocca M. (2020) Les manifestes pour une Europe sociale : Eliane Vogel-Polsky et ses compagnons de route, e-legal, Revue de droit et de criminologie de l'ULB, 3, 1-33.
Marguénaud J.-P. and Mouly J. (2009) La Cour européenne des droits de l'homme à la conquête du droit de grève, Revue de droit du travail, 9, 499-504.
Moizard N. (2015) Le droit d'action collective en droit de l'Union après la décision LO et TCO c. Suède du Comité européen des droits sociaux, Revue trimestrielle des droits de l'homme, 103, 603-622.
Nivard C. (2014) Le comité européen des droits sociaux, gardien de l'État social en Europe ?, Civitas Europa, 33 (2), 95-109. https://doi.org/10.3917/civit.033.0095
Rocca M. (2013) A clash of kings. The ECSR on the 'Lex Laval'... and on the EU framework for the posting of workers, European Journal of Social Law, 3, 217-232.
Sindbjerg Martinsen D. (2015) An ever more powerful court? The political constraints of legal integration in the European Union, Oxford University Press.
Stone Sweet A. (2005) The judicial construction of Europe, Oxford University Press.
Supiot A. (2016) Qui garde les gardiens ? La guerre du dernier mot en droit social européen, Semaine Sociale Lamy, 1746, 4-10.
Van den Eynde L. (2013) An empirical look at the amicus curiae practice of human rights NGOs before the European Court of Human Rights, Netherlands Quarterly of Human Rights, 31 (3), 271-313. https://doi.org/10.1177/016934411303100304
Vauchez A. (2018) Brokering Europe: Euro-lawyers and the making of a transnational polity, Cambridge University Press.

* CES (Confédération européenne des syndicats) = ETUC (European Trade Union Confederation)

All links were checked on 18 May 2022.

Annexes

Table 2 **Evolution of the number of complaints over time**

	Type of claimant organisation			
Year of complaint	**NGO**	**Employer**	**Trade union**	**Total**
1998	1	0	0	1
1999	0	0	4	4
2000	2	0	2	4
2001	0	0	1	1
2002	0	1	0	1
2003	8	0	3	11
2004	1	0	3	4
2005	2	0	1	3
2006	3	1	2	6
2007	4	0	2	6
2008	6	0	2	8
Subtotal (I)	**27**	**2**	**20**	**49**
2009	1	0	4	5
2010	2	0	1	3
2011	7	0	5	12
2012	6	0	8	14
2013	10	1	3	14
2014	7	0	4	11
2015	2	0	3	5
2016	17	0	2	19
2017	6	0	8	14
2018	2	0	1	3
Subtotal (II)	**60**	**1**	**39**	**100**
Total	**87**	**3**	**59**	**149**

Table 8 **Group 1 articles (employment, training and equal opportunities) in ECSR decisions**

Type of claimant organisation				
Articles	**NGO**	**Employer**	**Trade Union**	**Total**
Article 1.1	0	0	2	2
Article 1.2	2	0	11	13
Article 9	0	0	1	1
Article 10.1	0	0	1	1
Article 10.2	0	0	1	1
Article 10.3	1	0	2	3
Article 10.5	1	0	0	1
Article 15.1	4	0	0	4
Article 15.3	1	0	0	1
Article 18	0	0	1	1
Article 18.4	0	0	1	1
Article 20	0	0	2	2
Article 20.c	15	0	0	15
Article 20.d	15	0	0	15
Article 24	2	0	1	3
Total	**41**	**0**	**23**	**64**

Table 9 **Group 2 articles (health, social security and social protection) in ECSR decisions**

Type of claimant organisation				
Articles	**NGO**	**Employer**	**Trade Union**	**Total**
Article 3.1	1	0	0	1
Article 3.2	1	0	0	1
Article 3.3	0	0	1	1
Article 11	4	0	1	5
Article 11.1	10	0	1	11
Article 11.2	4	0	0	4
Article 11.3	5	0	0	5
Article 12	0	0	2	2
Article 12.1	1	0	2	3
Article 12.3	2	0	8	10
Article 12.4	1	0	0	1
Article 13	1	0	0	1
Article 13.1	9	0	0	9
Article 13.4	3	0	0	3
Article 14.1	1	0	0	1
Article 23	5	0	0	5
Article 30	16	0	0	16
Total	**64**	**0**	**15**	**79**

Table 10 **Group 3 articles (labour rights) in ECSR decisions**

Type of claimant organisation				
Articles	**NGO**	**Employer**	**Trade Union**	**Total**
Article 2.1	0	0	9	9
Article 2.4	1	0	1	2
Article 2.5	0	0	3	3
Article 2.6	0	0	1	1
Article 4	0	0	1	1
Article 4.1	1	0	3	4
Article 4.2	0	0	12	12
Article 4.3	15	0	0	15
Article 4.4	0	0	2	2
Article 5	1	3	15	19
Article 6	0	0	3	3
Article 6.1	0	0	8	8
Article 6.2	0	0	14	14
Article 6.3	0	0	1	1
Article 6.4	0	0	9	9
Article 21	0	0	1	1
Article 22	0	0	2	2
Article 26.2	0	0	1	1
Total	**18**	**3**	**86**	**107**

Table 11 **Group 4 articles (children, families, migrants) in ECSR decisions**

Type of claimant organisation				
Articles	**NGO**	**Employer**	**Trade Union**	**Total**
Article 7.1	5	0	0	5
Article 7.2	0	0	1	1
Article 7.5	0	0	1	1
Article 7.7	0	0	2	2
Article 16	19	0	0	19
Article 17	12	0	0	12
Article 17.1	9	0	0	9
Article 17.2	7	0	0	7
Article 19	0	0	1	1
Article 19.1	1	0	0	1
Article 19.4	2	0	1	3
Article 19.8	4	0	0	4
Article 27	0	0	5	5
Article 27.1	1	0	0	1
Article 31	1	0	0	1
Article 31.1	8	0	0	8
Article 31.2	13	0	0	13
Article 31.3	7	0	0	7
Total	**89**	**0**	**11**	**100**

European
Trade Union Institute
Bd du Roi Albert II, 5
1210 Brussels
Belgium
+32 (0)2 224 04 70
etui@etui.org
www.etui.org

D/2022/10.574/26
ISSN 1994-4446 (print version)
ISSN 1994-4454 (electronic version)

etui.