

# **Collective social rights under the strain of monetary union**

**Can Article 28 of the EU Charter of  
Fundamental Rights offer protection?**

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Florian Rödl and Raphaël Callsen

**etui.**



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## Foreword

This report examines in depth the legality of the measures taken by the European Union, alongside the European Central Bank (ECB) and the International Monetary Fund (IMF), in the wake of the financial and debt crisis. Beginning with a factual presentation of the European Union's post-crisis agenda, which has focused on a flexible, productivity-based wage policy, the authors then establish in which areas the EU's demands have interfered with existing collective bargaining systems, i.e. with autonomy in collective bargaining. These measures are assessed in the light of the Charter of Fundamental Rights of the European Union, with specific regard to the right of collective bargaining enshrined in Article 28 of the Charter. In some instances, this interference will consequently prove to be unlawful, in particular owing to the violation of the principle of proportionality. Where this is the case, various options for judicial remedy are suggested.

By placing the post-crisis policy squarely within the context of collective labour law and assessing its legality, the report establishes standards that should be observed not only in scholarly debate but also in the setting of the European Union's future political agenda.

The report was published first within the Book series of Hugo-Sinzheimer-Institut Frankfurt in 2015. Due to the Europe-wide relevance of the subject, the ETUI decided to translate and publish this English translation in its own publication series.

With our best wishes for stimulating reading.

**Maria Jepsen**, Director of the Research Department, ETUI

**Thomas Klebe**, co-Director of the HSI



## **A. The question**

The financial and debt crisis has resulted in drastic changes to collective bargaining systems in many European countries. The EU has played a leading role in this regard. Outside the framework of EU law, ‘bailouts’ have been agreed. Acting alongside the European Central Bank (ECB) and the International Monetary Fund (IMF), the European Commission has, in so-called memoranda of understanding (MoUs) concluded with individual Member States under international law, agreed reforms to national collective bargaining systems that must be undertaken as a condition of financial assistance. At the same time, the EU has established a new system of ‘economic governance’ comprised of a package of regulations and directives and accompanying international agreements. The Commission thereby issues ‘recommendations’ to EU Member States that include reforms to collective bargaining systems and may give rise to financial sanctions in the event of non-compliance. In this way, the means employed to stabilise the monetary union serve as a basis for interference with the legal frameworks governing industrial relations in the Member States. This raises the question of whether the right of collective bargaining laid down in Article 28 of the Charter of Fundamental Rights of the European Union (‘the Charter’) can act as a counterweight, setting legal boundaries with regard to the measures taken by the EU.



## B. Main findings

The main findings of this study are as follows:<sup>1</sup>

- Council recommendations to take preventive and corrective action issued under the macroeconomic surveillance procedure (Articles 6 and 7 et seq. of Regulation No 1176/2011 in conjunction with Article 3 of Regulation No 1174/2011) and the Commission's decisive involvement in the agreement of memoranda of understanding (MoUs) pursuant to the Treaty establishing the European Stability Mechanism (Article 13(3) and (4) of the ESM Treaty) fall within the scope of the EU Charter of Fundamental Rights.
- The right of collective bargaining enshrined in Article 28 of the Charter represents a genuine fundamental right on the same footing as the provisions of primary law and permits limitations in the general interest only in accordance with Article 52(1) of the Charter.
- Article 28 of the Charter is being limited both by national requirements regarding the content of collective agreements and by states' failure to meet the obligation to promote this fundamental right, which entails providing a legal framework for the effective exercise of the right of collective bargaining.
- Some of the Council recommendations issued in response to the euro stability crisis would, if they were adopted under the new Macroeconomic Imbalance Procedure, constitute a violation of the right of collective bargaining laid down in Article 28 of the Charter, regardless of the need to transpose them into national law.

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1. A detailed account of the findings is found in part D.VII.

- In any case, the Commission’s decisive role in defining the conditions of MoUs drawn up on behalf of the ESM also represents, in numerous instances, a limitation of the right of collective bargaining as laid down in Article 28 of the Charter, again regardless of the need for these conditions to be implemented by the Member State seeking assistance.
  
- Many of these limitations cannot be justified in the light of the principle of proportionality pursuant to Article 52(1) of the Charter, as they are neither necessary nor proportionate in the narrow sense of the term. The Council recommendations in question and the Commission’s involvement are therefore unlawful, being in violation of Article 28 of the Charter.
  
- The Member States concerned and the parties to collective bargaining can seek judicial remedy against Council recommendations for corrective action and the Commission’s decisive involvement in the agreement of MoUs by means of an action for annulment pursuant to Article 263 of the Treaty on the Functioning of the European Union (TFEU). National provisions implementing recommendations for corrective action and MoU conditions can be reviewed in the light of their compatibility with Article 28 of the Charter in a preliminary ruling issued pursuant to Article 267 TFEU.

## C. Economic background and legal framework

The financial and debt crisis has resulted in drastic changes to collective bargaining systems in many European countries.<sup>2</sup> This study sets out to examine, by way of examples, the compatibility with Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter') of measures taken within the monetary union as it currently operates that are changing the face of national collective bargaining systems.

The analysis focuses on two instruments.<sup>3</sup> Alongside the European Central Bank (ECB) and the International Monetary Fund (IMF), the Commission now negotiates so-called memoranda of understanding (MoUs) with individual Member States under international law, which stipulate reforms to national collective bargaining systems as a condition of financial assistance. At the same time, under the new system of 'economic governance', which consists of a package of regulations and directives, the EU issues recommendations to EU Member States that include reforms to collective bargaining systems.

In this section, we shall begin by looking at why wage structures have become the focus of the EU's policy on crisis and crisis prevention and at the changes to national collective bargaining systems called for in consequence.

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2. An impressive overview of reforms to the collective bargaining systems of Greece, Italy, Portugal and Spain – including those that are not a direct consequence of European and international requirements – can be found in Busch *et al.* (2012: 12 f.); for a more general account, see Clauwaert and Schömann (2012). See also Escande *et al.* (2012), in particular p. 150 ff (Spain), p. 213 f. (Greece), p. 268 ff (Italy), p. 287 (Poland) and p. 358 ff (a general survey of the countries affected); Waas (2013: 38).
  3. Requirements imposed on individual governments by the ECB, for instance, are not considered here. See, for instance Nogler (2014: 58 ff).

## **I. National collective bargaining systems as the focal point of European crisis and crisis prevention policy**

European economic and, particularly, monetary union requires competitiveness in the respective Member States to increase at an even pace.<sup>4</sup> The huge difficulty in meeting this condition is a major cause of instability in the euro area and, consequently, of the present euro crisis. As far as the main EU institutions and most Member State governments are concerned, a vital tool for achieving balanced competitiveness is wage adjustment. This view is not without merit, as monetary union has seen the individual Member States lose the macroeconomic instruments of monetary policy, interest policy and (expansionary) budgetary policy that were previously available to them as alternative control mechanisms.

Many influential political actors and policy advisors therefore consider wage flexibility to be key to the long-term success of the euro area: only when there is sufficient flexibility can labour costs fulfil their role as an important economic adjustment factor, a role that has increased structurally as a result of monetary union. In view, however, of the EU Member States' poor growth in comparison to their past performance and to other regions of the global economy, the emphasis is largely on 'downward' flexibility.

The role of labour costs as a key economic adjustment factor within monetary union naturally comes into conflict with collective bargaining autonomy and collective bargaining systems in the Member States. Collective wage formation on the basis of stable and inclusive collective bargaining systems is the very reverse of macroeconomic wage flexibility, let alone 'downward' flexibility. Consequently, a key focus of European crisis policy, both in the short and long term, is flexible wage formation in the Member States.

It so happens that the structural problems of monetary union have manifested themselves primarily in the level of public debt accrued in less competitive Member States. In view of the aforementioned

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4. Scharpf (2012: 163 ff); Streeck (2012: 61 ff); Höpner (2013); see also Rödl (2012).

structural requirement, a key aspect of the crisis strategy for these countries (alongside a reduction in social contributions paid by the State and social insurance providers) is therefore to restrain or even reverse wage growth. However, it is not possible in any Member State, and certainly not at EU level, simply to determine the general wage level by political decree. Direct political control can be exercised only in the setting of the legal minimum wage level and the fixing of public sector pay. For that reason, the main option left for exerting influence is deregulatory interference with national collective bargaining systems, above all by weakening trade union rights and restricting the scope of collective agreements.

Since 2011, a complex web of corrective and control mechanisms has developed,<sup>5</sup> under which a growing and more or less binding influence is exerted on national economic policy (section II) and various measures to reform national collective bargaining systems (section III) are proposed and implemented.

## **II. EU mechanisms for controlling national economic policy**

### **1. The basic structure of economic and monetary union**

An important objective for the EU is to establish an economic and monetary union with the euro as its currency (Article 3(4) of the Treaty on European Union). For 17 of the 28 EU Member States, this objective has already been achieved, with 11 Member States yet to introduce the euro.<sup>6</sup> Accordingly, European economic and monetary policy, as laid down chiefly in Title VIII, Article 119 TFEU et seq., is characterised by a tiered system of preventive and corrective measures, whereby euro-area members are subject to tighter constraints than countries outside the euro.

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5. See also de Sadeleer (2012).

6. Denmark and the United Kingdom are not required to join the monetary union; see Protocols No 15 and 16 to the TEU and TFEU, OJ C 326, 26.10.2012, p. 284 ff.

Under European economic policy, the respective economic policies of all EU Member States are subject to ‘coordination’ (Article 119(1) and Article 121 TFEU), including through the recommendation of broad economic policy guidelines, compliance with which is monitored by the Council. Member States submit reports, which are examined by the Council and in response to which it makes recommendations where necessary. In order to exert official pressure to follow the recommendations, the Council can choose to make them public. Particular importance is attached to the avoidance or, where one already exists, correction of excessive government deficits (Article 126 TFEU). Where the Council considers that an excessive government deficit exists, it addresses recommendations for corrective action to the Member State concerned (paragraphs 6 and 7). If no action is taken, the Council may make its recommendations public (paragraph 8) and decide, as a further step, to give the Member State in question notice to take particular measures within a specified time limit (paragraph 9).

The European institutions’ powers are greater still with regard to euro-area Member States (Article 136(1) TFEU). This is evident in the fact that the Council not only recommends economic policy guidelines but ‘adopts measures’ to set out these guidelines for euro-area countries (Article 136(1)(b) TFEU). Furthermore, only euro-area states are liable for sanctions culminating in fines, which are imposed by the Council when it establishes that an excessive government deficit exists and the Member State in question has failed to comply with a recommendation for corrective action (Article 126(9) and (11) in conjunction with Article 139(2)(b) TFEU).

The procedures to be followed in this regard had already been extended, on the basis of the 1997 Stability and Growth Pact,<sup>7</sup> with the adoption of Regulations Nos 1466/97 and 1467/97<sup>8</sup>. Regulation No 1466/97 introduced a requirement for Member States to submit an annual stability programme (in the case of countries participating in the euro) or convergence

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7. Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact, Amsterdam, OJ C 236, 2.8.1997, p. 1.

8. Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 209, 2.8.1997, p. 1; Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 209, 2.8.1997, p. 6.

programme (in the case of countries remaining outside the euro). It also brought a tightening of rules compared with the Treaties, as the recommendation of corrective action and application of sanctions ceased to be merely a possible consequence (see the use of ‘may’ in Article 126(9) and (11) TFEU) of non-compliance with the broad economic policy guidelines or with recommendations for corrective action, but instead became the rule.<sup>9</sup>

Nevertheless, these control and correction mechanisms were not able to prevent the financial and debt crises such as occurred in Greece, Ireland and Portugal. On the one hand, the response to the crises ongoing since 2009 has involved detailed demands for corrective action on the basis of the mechanisms described above and alongside the granting of financial assistance to individual Member States, subject to compliance with more rigorous budgetary conditions (subsection 2). At the same time, budgetary surveillance for EU Member States in general and euro-area states in particular has been successively tightened and extended (subsection 3).

## 2. Conditions imposed on countries in crisis, in particular in memoranda of understanding

### a) Recommendations and financial assistance for Greece (from 2009)

In Greece’s case, a two-pronged approach was taken in order to carry out far-reaching reforms.

The Council first established on 27 April 2009 that an excessive government deficit existed and, on 16 February 2010, judging that it had failed to take effective action, gave Greece notice pursuant to Article 126(9) and Article 136 TFEU to take measures to reduce the deficit.<sup>10</sup> The decision itself laid down detailed requirements, including cuts to public sector wage costs (Article 2(A) (a) to (c)). In subsequent

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9. Stability and Growth Pact (see footnote 7), paragraphs 1-6 under the heading ‘The Council’.

10. Council Decision 2010/182/EU of 16 February 2010 giving notice to Greece to take measures for the deficit reduction judged necessary in order to remedy the situation of excessive deficit, OJ L 83, 30.3.2010, p. 13.

decisions, also based on Article 126(9) and Article 136 TFEU and taken in response to the developing situation, these requirements were retained and made still more specific.<sup>11</sup>

Alongside these measures taken on the basis of the TFEU, the Eurogroup countries, acting outside the European legal framework, launched the first assistance fund for Greece in May 2010 – the Greek Loan Facility or First Economic Adjustment Programme – the administration and disbursement of which was entrusted to the European Commission.<sup>12</sup> Representatives of the Commission, European Central Bank (ECB) and International Monetary Fund (IMF), known as the Troika, agreed with Greece, in the course of regular visits made every few months, the conditions for the joint allocation of funding by the euro-area Member States and the IMF, which were laid down in a Memorandum of Understanding. These included detailed requirements that went beyond the aforementioned Council decisions taken on the basis of Article 126(9) TFEU and related to the introduction of wage and benefit cuts, as well as referring, *inter alia*, to the reform of collective bargaining systems (covered in more depth in section III.).

#### **b) The European Financial Stabilisation Mechanism (EFSM) (2010–2012)**

In May 2010, at more or less the same time as the first assistance was granted to Greece, the European Financial Stabilisation Mechanism (EFSM) was set up.<sup>13</sup> In contrast to the first loan to Greece awarded by the euro-area countries, this was a mechanism established under EU law, namely Regulation No 407/2010, with the EU itself acting as lender. Ireland and Portugal have received support under this

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11. See, for instance, Council Decision 2010/320/EU of 8 June 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, OJ L 145, 11.6.2010, p. 6; and Council Decision 2011/734/EU of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, OJ L 296, 15.11.2011, p. 38. For a critical view of the scrutiny of implementing measures by the Greek Supreme Administrative Court, see Yannakopoulos (2013: 147, under point b).

12. See [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm)

13. Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118, 12.5.2010, p. 1.

arrangement. As with Greece, assistance was subject to detailed conditions,<sup>14</sup> the specifics of which were agreed in a memorandum of understanding between the Commission and the Member State in question.

However, this approach attracted criticism. Some observers questioned whether Article 122(2) TFEU, which provides for the granting of financial assistance in the event of natural disasters or other ‘exceptional occurrences’, also served as a suitable legal basis in the case of financial crises, particularly in view of the stipulation in Article 125 TFEU that the Union is not liable for the commitments of Member States (the no-bailout clause).<sup>15</sup> Most likely as a result of similar concerns, this approach was not developed further; instead, other bailouts were granted outside the framework of EU law.

### **c) The European Financial Stability Facility (EFSF) (2010–2012)**

In June 2010, the European Financial Stability Facility (EFSF) was established by the euro-area countries, alongside the EFSM, as a limited liability company under Luxembourg law. It was under this mechanism that financial assistance for Greece (Second Economic Adjustment Programme), Ireland and Portugal was continued. The EFSF was set up as a temporary bailout vehicle. It has not entered into any new commitments since 1 July 2013 and has concerned itself solely with winding up existing programmes,<sup>16</sup> its previous functions having been transferred to the newly-founded European Stability Mechanism.<sup>17</sup>

### **d) The European Stability Mechanism (ESM) (2012 onwards)**

The European Stability Mechanism (ESM) was set up in October 2012 as a permanent financial institution to provide financial assistance aimed at stabilising the euro area. This financial institution was

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14. See, for instance, Article 3(5) and (6) of Council Implementing Decision 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal, OJ L 159, 17.6.2011, p. 88; and Council Implementing Decision 2011/77/EU of 7 December 2010 on granting Union financial assistance to Ireland, OJ L 30, 4.2.2011, p. 34.

15. See Hoffmann and Krajewski (2012: 2 and 9), with further references.

16. See [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/intergovernmental\\_support/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/intergovernmental_support/index_en.htm) and <http://www.efsf.europa.eu/about/index.htm>.

17. See <http://www.efsf.europa.eu/about/organisation/index.htm>

established by an international treaty signed by the euro-area countries,<sup>18</sup> in order to assume the tasks of the EFSM and EFSF (recital 1 of the Treaty establishing the European Stability Mechanism (ESM Treaty)). In order to ward off fresh concerns about the admissibility of this entity under EU law, Article 136 TFEU was amended especially, with a newly-inserted paragraph 3 that reads as follows:

‘(3) The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.’

The ESM is an autonomous international organisation and, as such, operates independently of the EU and EU law. Decisions to grant financial assistance are taken by the Board of Governors or Board of Directors of the ESM, i.e. the euro-area states as brought together within the ESM. However, the ESM Treaty also entrusts the European Commission with certain tasks. Thus, the Commission is responsible, in particular, for carrying out a risk assessment when a euro-area Member State requests stability support (Article 13(1) of the ESM Treaty) and, in the event of a favourable decision by the Board of Governors, negotiates a memorandum of understanding detailing the ‘conditionality’ attached to the financial assistance (Article 13(3) of the ESM Treaty). The Commission signs this memorandum of understanding on behalf of the ESM (Article 13(4) of the ESM Treaty) and monitors compliance with the conditionality (Article 13(7) of the ESM Treaty). In spite of criticism from unions and from a constitutional point of view, the creation of this institution was approved by both the Court of Justice of the European Union<sup>19</sup> and the German Federal Constitutional Court.<sup>20</sup>

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18. Treaty of 2 February 2012 establishing the European Stability Mechanism (ESM Treaty), *Bundesgesetzblatt* (BGBl.) [German Federal Law Gazette] 2012 II, p. 981, which entered into force on 27 September 2012, BGBl. 2012 II, p. 1086. See, on this subject, Kube (2012: 245 ff).
  19. Judgment of the CJEU (Full Court) of 27 November 2012 in Case C-370/12 *Pringle*. See, on this subject, Martucci (2013).
  20. Judgment of the Bundesverfassungsgericht (BVerfG.) [German Federal Constitutional Court] of 12 September 2012 – 2 BvE 6/12 *inter alia* (ESM Treaty, Fiscal Compact), juris, marginal number 231 et seq., BVerfGE [Decisions of the Federal Constitutional Court] 132, p. 195.

### e) **A common modus operandi**

Notwithstanding the various organisational arrangements for granting financial assistance to countries in crisis, a common modus operandi is apparent. That is unsurprising, given that the funding has been provided in close cooperation with the IMF, which has many years of experience in this area.<sup>21</sup> The financial assistance granted to euro-area countries is based on this experience.<sup>22</sup> In terms of the European crisis response, two characteristics should be noted. Firstly, the granting of financial assistance is contingent on compliance with detailed conditions that go far beyond the ‘broad economic policy guidelines’ referred to in relation to the economic policy coordination laid down in the TFEU. Secondly, compliance with the conditionality is monitored at frequent intervals, in reporting cycles generally lasting less than six months, with the disbursement of the next tranche of financial assistance dependent on a positive assessment. This modus operandi, which has emerged in the response to the euro crisis, has also been adopted, in diluted form, in the general economic and budgetary surveillance of EU Member States by the European institutions. With the strengthening of European monitoring and constraints, the now decisive influence the EU institutions exert on national economic and budgetary policy has become very apparent, as fittingly reflected in the ubiquitous term favoured by the Commission, ‘economic governance’.

### 3. ‘Recommendations’ under the new system of ‘economic governance’

The genuinely European surveillance of national economic and budgetary policy evolved through a number of steps taken in 2011 and 2013.

#### a) **‘Six-Pack’ (2011)**

The ‘Six-Pack’ is a package of five EU Regulations and one EU Directive that entered into force on 13 December 2011.<sup>23</sup>

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21. See Hoffmann and Krajewski (2012: 2 and 3 ff); Goldmann (2014).

22. Hoffmann and Krajewski (2012: 2 and 7 ff); Ioannidis (2014: 61 and 66 ff).

23. As explained in detail in Antpöhler (2012).

With regard to the prevention and correction of excessive deficits as referred to in Article 126 TFEU, Regulation No 1177/2011<sup>24</sup> tightens the excessive deficit procedure laid down in Article 126 and set out in greater detail in Regulation No 1467/97. Directive 2011/85/EU<sup>25</sup> backs this up with procedural and methodological requirements for national fiscal planning.

Significant changes have been made in respect of the coordination of economic policies as laid down in Article 121 TFEU, with the following three points worthy of attention.

Firstly, the new category of ‘excessive macroeconomic imbalance’ was introduced by Regulation No 1176/2011 as the stage prior to an ‘excessive deficit’. The procedure for identifying and correcting this situation is based on the excessive deficit procedure laid down in Article 126 TFEU. In order to establish whether an excessive macroeconomic imbalance exists, the Commission uses a ‘scoreboard’, for which wage growth has been explicitly named as an important indicator.<sup>26</sup> If the circumstances render it necessary, an in-depth review of individual Member States is carried out (Article 5), the outcome of which is the recommendation of specific preventive measures (Article 6, in the case of macroeconomic imbalances) or a request to draw up a corrective action plan (Article 7 et seq., in the case of *excessive* macroeconomic imbalances). The latter procedure has yet to have any practical significance. Although five cases of excessive macroeconomic imbalances were identified in 2013 and 2014, the Commission, possibly for reasons of political expediency, has so far refrained from opening a procedure under Article 7 of Regulation No 1176/2011.<sup>27</sup>

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24. Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 306, 23.11.2011, p. 33.

25. Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ L 306, 23.11.2011, p. 41.

26. Changes in nominal unit labour costs over the last three or 10 years are entered respectively as indicators or additional indicators in the scoreboard drawn up by the Commission (in accordance with Article 4 of Regulation (EU) No 1176/2011); thresholds were set at a change of +9% in the euro area and +12% in the non-euro area. See the Commission document ‘Alert Mechanism Report 2013’, COM(2012) 751 final, p. 23 ff, tables A1 and A2 (sixth column from the left) and table A3 (sixth column from the right).

27. COM(2014) 905 final, p. 8 f.

Secondly, Regulation No 1175/2011<sup>28</sup> bolstered the budgetary surveillance laid down in Regulation No 1466/97 with the introduction of an approximately six-month-long reporting cycle known as the ‘European Semester for Economic Policy Coordination’. This reporting cycle now covers not only the implementation of the economic policy guidelines in accordance with Article 121(2) TFEU and the stability and convergence programmes to be drawn up on the basis of Regulation No 1466/97, but also the information required for the identification of (excessive) macroeconomic imbalances, and compliance with the employment policy guidelines established pursuant to Article 148(2) TFEU and the national reform programmes supporting the strategy for growth and jobs.<sup>29</sup> The cycle begins with the Commission’s presentation of the annual growth report towards the end of the year, with the Member States required to submit the aforementioned reports and programmes by the end of the following April. On that basis, the Commission drafts country-specific recommendations (CSR), which are finally adopted by the Council in July in amended form.

Thirdly, a system of sanctions was introduced for euro-area countries in the event of non-compliance with recommendations issued pursuant to Article 121 TFEU. While this stands in contradiction to the provision stating that the consequence of non-compliance is merely the publication of the recommendations, it was adopted by the European Parliament with reference to Article 136 TFEU, according to which further measures specific to euro-area countries may apparently be adopted. Under Regulation No 1173/2011,<sup>30</sup> failure to comply with recommendations given pursuant to Article 121(4) TFEU, aimed at ensuring that the broad economic policy guidelines are followed, results in the compulsory lodgement of an interest-bearing deposit (Article 4). If an excessive deficit is subsequently identified in accordance with Article 126(6) TFEU, this may be converted into a non-interest-bearing deposit (Article 5) and, in the event of failure to take the necessary

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28. Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 306, 23.11.2011, p. 12.

29. Article 2-a of Regulation (EC) No 1466/97 as amended by Regulation (EU) No 1175/2011.

30. Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, 23.11.2011, p. 1.

corrective action, into a fine (Article 6). Regulation No 1174/2011<sup>31</sup> in turn provides for an annual fine to be imposed in respect of non-compliance with the corrective requirements of Regulation No 1176/2011, if, following the identification of excessive macroeconomic imbalances, an insufficient corrective action plan is submitted or a corrective action plan is not implemented.

## **b) 'Two-Pack' (2013)**

The 'Two-Pack', which entered into force on 30 May 2013 and applies exclusively to euro-area Member States, represents the current apogee in the development of budgetary and economic surveillance.<sup>32</sup>

While it is based on Article 121(6) and Article 136 TFEU, Regulation No 473/2013<sup>33</sup> is concerned, in terms of its title and substance, with the correction of excessive deficits as defined in Article 126 TFEU. In addition to setting out harmonised rules for budgetary planning and surveillance,<sup>34</sup> it stipulates that, if an excessive government deficit is identified in accordance with Article 126(6) TFEU, an economic partnership programme must be drawn up which describes the policy measures and structural reforms to be taken to correct the deficit (Article 9); this programme may be replaced by a corrective action plan established pursuant to Regulation No 1176/2011 to address excessive macroeconomic imbalances (Article 9(5)).

Also based on Article 121(6) and Article 136 TFEU, Regulation No 472/2013,<sup>35</sup> meanwhile, strengthens the budgetary surveillance referred to in Article 121 TFEU. It is particularly noteworthy that this piece of

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31. Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306, 23.11.2011, p. 8.

32. For a detailed account, see Ioannidis (2014: 61 ff).

33. Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ L 140, 27.5.2013, p. 11.

34. A common budgetary timeline (Article 4), independent bodies monitoring compliance with fiscal rules (Article 5), detailed monitoring requirements (Article 6) and the assessment of national budgetary plans by the Commission (Article 7).

35. Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ L 140, 27.5.2013, p. 1.

legislation establishes a link with the mechanisms for financial assistance set up outside EU law. Regulation No 472/2013 applies, in part, to euro-area Member States that ‘experience or are threatened with serious difficulties with respect to their financial stability or to the sustainability of their public finances, leading to potential adverse spill-over effects on other Member States’ (Article 1(1)(a)). The existence of these serious difficulties is to be determined by means of the alert mechanism established in accordance with Regulation No 1176/2011 for the purpose of identifying excessive macroeconomic imbalances, and based on the consideration of additional parameters (Article 2(1)). ‘Serious difficulties with possible spill-over effects’ therefore constitutes a further category, alongside that of ‘excessive economic imbalance’. At the same time, Regulation No 472/2013 covers euro-area countries that ‘request or receive financial assistance from one or several other Member States or third countries, the European Financial Stabilisation Mechanism (EFSM), the European Stability Mechanism (ESM), the European Financial Stability Facility (EFSF), or another relevant international financial institution such as the International Monetary Fund (IMF)’ (Article 1(1)(b)).

These countries are subject to the following requirements, among others: if the Commission decides, in accordance with Article 2 of the Regulation, to place them under enhanced surveillance, they must, in particular, adhere to additional reporting obligations and carry out certain ‘stress tests’ (Article 3). This form of enhanced surveillance is optional<sup>36</sup> for the former category of euro-area Member States, i.e. those undergoing serious difficulties with possible spill-over effects. It is compulsory,<sup>37</sup> however, for the second category of euro-area countries if they are receiving financial assistance *on a precautionary basis*.

Furthermore, euro-area countries that request, and receive, financial assistance must draft a macroeconomic adjustment programme (Article 7(1), fifth subparagraph). Exempt from this requirement are countries in receipt of financial assistance on a precautionary basis (although they are subject to enhanced surveillance – see above), loans made for the recapitalisation of financial institutions or financing for

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36. ‘The Commission may decide to subject...’, Article 2(1) of Regulation No 472/2013.

37. ‘The Commission shall subject...’, Article 2(3) of Regulation No 472/2013.

which the ESM rules do not provide for a macroeconomic adjustment programme (Article 7(12)). Where a macroeconomic adjustment programme has been drawn up, the Commission must ensure that the memorandum of understanding it concludes on behalf of the ESM is consistent with this programme (Article 7(2)). Every three months, the Commission reports to the Economic and Financial Committee on compliance with the programme (Article 7(4), second subparagraph). The Regulation also provides for the institution to play a direct advisory role as regards the application of national measures. If a Member State does not have the capacity to implement the adjustment programme or is experiencing problems in this respect, it is obliged by the Regulation to seek technical assistance. In response, the Commission may set up a group of experts and, if need be, appoint a representative and support staff based in the country in question. It may be interpreted as a limitation of the Commission's powers in this regard that the members of the group of experts must come from 'other' Union institutions and that the group cannot, therefore, be composed of Commission officials (Article 7(8)).

For the time being, only Article 7 of Regulation No 472/2013 has had any practical significance. As of mid-May 2015, the Commission had yet to decide to subject any euro-area Member State to enhanced surveillance.<sup>38</sup> However, Article 16 of the Regulation stipulates that it applies automatically to Member States in receipt of financial assistance on 30 May 2013. That means only those countries that were already following a macroeconomic adjustment programme at that point, i.e. Greece, Ireland, Portugal and Cyprus.<sup>39</sup> Spain has been granted financial assistance but for the recapitalisation of financial institutions, meaning that it is exempt from the provisions of Article 7(12). In the case of Ireland, Portugal and Cyprus, decisions approving macroeconomic adjustment programmes have already been taken pursuant to Article 7 of

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38. See COM(2014) 61 final, p. 3, under heading 2.1. (applicable as at February 2014); and COM(2014) 905 final, p. 10, (applicable as at November 2014); nevertheless, excessive imbalances have been identified in the case of five Member States, including France, albeit without yet requiring an excessive imbalance procedure to be opened, but merely 'specific monitoring and decisive policy action'.

39. COM(2014) 61 final, p. 3, under heading 2.1.

the Regulation, although they are largely concerned with confirming earlier programmes adopted on the basis of other legislative provisions.<sup>40</sup>

Otherwise, Regulation No 472/2013 does not provide for specific sanctions in the event of non-compliance with the requirements laid down therein, which, given that the countries concerned are subject to enhanced surveillance and, accordingly, also the regular possibility of sanctions under Regulation 1174/2011, or the financial consequences arising from arrangements governing financial assistance, would, admittedly, be superfluous.

#### 4. Additional international and intergovernmental arrangements

Further, reinforcing measures can be found at other levels. For instance, in 2012 the euro-area countries concluded a Fiscal Compact,<sup>41</sup> an international treaty eventually opened up to other Member States, which provides, *inter alia*, for the inclusion of a debt-brake rule in national constitutions. In addition, the Heads of State or Government of the euro-area Member States reached an intergovernmental agreement back in 2011 with the adoption of the Euro-Plus Pact,<sup>42</sup> whereby each year, alongside the European surveillance mechanisms, common objectives would be set and progress towards meeting them monitored.

In the present reform debate, moreover, there are still repeated calls for a ‘supranational, democratically-elected economic government for the

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40. See Council Implementing Decision 2013/373/EU of 9 July 2013 approving the update of the macroeconomic adjustment programme of Ireland, OJ L 191, 12.7.2013, p. 10; Council Implementing Decision 2013/375/EU of 9 July 2013 approving the update of the macroeconomic adjustment programme of Portugal, OJ L 192, 13.7.2013, p. 74; Council Implementing Decision 2013/704/EU of 19 November 2013 approving the update of the macroeconomic adjustment programme of Portugal, OJ L 322, 3.12.2013, p. 38; Council Implementing Decision 2013/463/EU of 13 September 2013 on approving the macroeconomic adjustment programme for Cyprus and repealing Decision 2013/236/EU, OJ L 250, 20.09.2013, p. 40.
41. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, BGBl. II 2012, p. 1008. See, on this subject, Herzmann (2012); and Fischer-Lescano and Oberndorfer (2013).
42. Conclusions of the Heads of State or Government of the euro area of 11 March 2011, ‘Annex 1: A pact for the euro. Stronger economic policy coordination for competitiveness and convergence’, [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/119809.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119809.pdf)

euro area'.<sup>43</sup> However, conceptions as to how it might look remain as vague as ever. The main alternative advocated is a yet more robust and directly binding oversight of national policy.<sup>44</sup> Economic policy objectives that are permitted, time and again, to bring about a weakening of collective industrial relations, should apparently be mandatory for all euro-area Member States, irrespective of whether they are affected by an excessive budget deficit or excessive macro-economic imbalances.<sup>45</sup>

## 5. Preliminary conclusion and key areas for examination

In recent years, budgetary and economic policy surveillance of the EU Member States has been stepped up in two regards. On the one hand, reporting cycles have been introduced that are characterised by three features: a broader scope, a stronger country-specific focus and more rigorous deadlines, with the latter potentially subject to further tightening in the event of enhanced surveillance. On the other hand, the creation of the new category of macroeconomic imbalance, which does not appear in the EU Treaties, has extended the areas covered by economic policy surveillance. At the same time, economic surveillance has intensified with the possibility of issuing increasingly detailed recommendations for action. With the availability of new options for imposing sanctions, which have, admittedly, yet to be applied in practice, there are immediate implications for the euro-area Member States first and foremost.

Alongside the more established practice of Council recommendations, accompanied by possible sanctions, under the deficit procedure laid down in Article 126(9) and (11) in conjunction with Article 139 TFEU, the following instruments consequently require closer examination:

1. MoUs that, on the basis of the ESM Treaty, set out the conditions for the disbursement of financial assistance, along with the corresponding macroeconomic adjustment programmes drawn up pursuant to Article 7 of Regulation No 472/2013.

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43. Busch K. *et al.* (2012: 32).

44. Glienicker Gruppe (2013).

45. van Rompuy (2012); see also the speech given by the German Federal Chancellor (Merkel 2013).

2. Country-specific recommendations adopted by the Council in connection with the surveillance of macroeconomic imbalances, which may be issued as recommendations for preventive or corrective action (subject to penalties) on the basis, respectively, of Article 6 of Regulation No 1176/2011 or Article 7 et seq. of Regulation No 1176/2011 in conjunction with Regulation No 1174/2011.

The current system of surveillance and sanctions is more clearly illustrated in the following diagram:

	Economic policy coordination (Art. 121 TFEU)		Prevention and correction of excessive deficits (Art. 126 TFEU)		Financial assistance
All EU Member States	Economic policy surveillance Reg. 1466/97		Procedure Reg. 1467/97		- Bilateral (GR)
	Tightening and extension (European Semester) Reg. 1175/2011	Prevention and correction of <b>excessive macroeconomic imbalances</b> Reg. 1176/2011	Tightening Reg. 1177/2011	Budgetary frameworks Directive 2011/85/EU	-EFSM Reg. 407/2010 (PT, IR)
Euro-area countries (Art. 136 TFEU)	Enforcement/sanctions Reg. 1173/2011	Enforcement/sanctions Reg. 1174/2011	Enforcement/sanctions Art. 126(9) and (11) with Art. 139(2)(b) TFEU		-EFSF Lux., LLC (GR, PT, IR)
	Strengthened surveillance in the case of <b>'serious difficulties'</b> re financial stability or budget	<b>Beneficiaries of financial assistance:</b> macroeconomic adjustment programme	<b>Reg. 473/2013 economic partnership programme – excessive deficit</b>		From 10/2012 -ESM, international treaty
	<b>Reg. 472/2013</b>				- MoU-

### III. Reform of national collective bargaining systems

The developments in the legislation governing monetary union outlined above demonstrate that the differences between the procedures laid down in Articles 121 und 126 TFEU are, following the extension under secondary law of the applicability of sanctions to Article 121 TFEU, now just a question of degree.

This is reflected in terms of official presentation. Differences between recommendations issued in respect of compliance with broad economic policy guidelines and recommendations for the prevention or correction of macroeconomic imbalances are not immediately obvious. After all, they are set out together in one document and can be distinguished from each other only, perhaps, in the degree of detail with which they are formulated. Determining which recommendation has been made on the basis of what legislative provision is possible solely by checking the legal basis referred to at the beginning of the citations and, if several are mentioned, by looking at the penultimate recital, which indicates the legal basis to which the individual recommendation corresponds.<sup>46</sup>

Also fluid now are the boundaries between economic and budgetary surveillance and the setting of conditions for financial assistance, which are officially established outside the EU's legal framework.

We are forced to conclude, then, that, generally speaking, any measure that has already arisen in one context or other, in particular in MoUs, and which could have an impact on collective bargaining systems, may sooner or later become the subject of a recommendation. We shall begin, therefore, by demonstrating, through various examples, the European executive's policy position on wage-setting structures (subsection 1), before examining specific measures relating to the organisation of collective bargaining systems that have been taken as part of the effort to stabilise the euro (subsections 2 to 8).

## 1. The policy position: linking wages to productivity

As part of its surveillance of macroeconomic imbalances in accordance with Regulation No 1176/2011, the Commission looks, *inter alia*, at trends in unit labour costs.<sup>47</sup> The statistical size of the unit labour cost is the ratio of remuneration to productivity. The Alert Mechanism Report

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46. See, for instance, the country-specific Council recommendations of 9 July 2013, OJ C 217, 30.7.2013, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2013:217:TOC>; see also <http://www.consilium.europa.eu/special-reports/european-semester/documents-in-2013?lang=en>. On the subject of country-specific recommendations, see [http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/2014/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/2014/index_en.htm).

47. See footnote 26.

of November 2013<sup>48</sup>, which marked the start of the 2014 reporting cycle, also attributed partial responsibility for loss of competitiveness<sup>49</sup> and of export market shares<sup>50</sup> to rising unit labour costs.<sup>51</sup> Falling unit labour costs, meanwhile, are seen as contributing to a recovery in competitiveness.<sup>52</sup> In Ireland's case, the Commission welcomes the fact that falling unit labour costs 'have corrected the excesses of the boom years'.<sup>53</sup> However, the link with productivity means that an increase in unit labour costs, such as in Italy's case, is also noted and criticised when the wage level remains the same but productivity falls.<sup>54</sup> This economic viewpoint, with its focus on competitiveness, leads to demands to design collective bargaining systems in such a way as to ensure that wages are aligned with productivity at the relevant level, such as that of individual companies – ideally on an automatic basis and, in particular, in a downward direction.

#### a) Council decisions and MoUs with Greece

With regard to Greece, this demand was made clear right from the start, initially in the aim of reducing public spending. In the very first decision giving notice to Greece to take measures to reduce its deficit, taken in February 2010 in accordance with Article 126(9) TFEU, the country was called upon, by the end of 2010, i.e. within 10 months, to accomplish the following:

‘reform the wage payment system for direct public administration employees, providing unified principles in setting and planning wages; streamlining the wage grid, while aiming at reducing the wage bill; wage bill savings at local level also need to be achieved; the new

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48. Alert Mechanism Report 2014, COM(2013) 790 final of 13 November 2013.

49. Alert Mechanism Report 2014 (see footnote 48), p. 18 (Luxembourg); also Belgium (p. 12), Germany (p. 14) and Finland (p. 22).

50. Alert Mechanism Report 2014 (see footnote 48), p. 14 (Estonia), p. 17 (Croatia).

51. This trend has continued in the 2015 reporting cycle. See Alert Mechanism Report 2015, [http://ec.europa.eu/europe2020/pdf/2015/amr2015\\_en.pdf](http://ec.europa.eu/europe2020/pdf/2015/amr2015_en.pdf), and the in-depth-reviews, [http://ec.europa.eu/economy\\_finance/economic\\_governance/macroeconomic\\_imbalance\\_procedure/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/macroeconomic_imbalance_procedure/index_en.htm).

52. Alert Mechanism Report 2014 (see footnote 48), p. 15 (Ireland); similarly, in the case of Bulgaria (p. 13), Denmark (S. 13), Lithuania (p. 18), Poland (p. 21) and Slovenia (S. 21), slow wage growth or moderation in wage growth is praised.

53. Alert Mechanism Report 2014 (see footnote 48), p. 15.

54. Alert Mechanism Report 2014 (see footnote 48), p. 17.

unified public sector wage grid has to be extended, but also refined, to apply to local governments and various other agencies and also ensure that the best performers are kept in the public sector.’<sup>55</sup>

In subsequent decisions, again based on Article 126(9) and Article 136 TFEU, and taken in response to the developing situation, the objective of reforming the public-sector wage grid was retained and expressed in stricter terms.<sup>56</sup> Accordingly, Greece was required, ultimately over a three-year period, to introduce:

‘a streamlined and unified public sector wage grid to apply to the state sector, local authorities and other agencies, with remunerations reflecting productivity and tasks’.<sup>57</sup>

However, the conditionality attached to the financial assistance in the MoU at the very outset, back in May 2010, went beyond mere reform of the public-sector wage grid and extended this requirement to the private sector. Thus, the ‘Memorandum of Economic and Financial Policies’ of 3 May 2010 made the following demand, under the heading ‘Strengthening labor markets and income policies’:

‘In line with the lowering of public sector wages, private sector wages need to become more flexible to allow cost moderation for an extended period of time. Following consultation with social partners and within the frame of EU law, the government will reform the legal framework for wage bargaining in the private sector, including by eliminating asymmetry in arbitration.’<sup>58</sup>

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55. Article 2(C)(c) of Council Decision 2010/182/EU (see footnote 10).

56. Article 2(2)(d) of Council Decision 2010/320/EU of 8 June 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, OJ L 145, 11.6.2010, p. 6; Article 2(2)(c) of Council Decision 2011/734/EU of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, OJ L 296, 15.11.2011, p. 38.

57. Article 2(5)(a) of Council Decision 2010/320/EU (see footnote 11); Article 2(5)(a) of Council Decision 2011/734/EU (see footnote 11), specifying a three-year phasing-in period.

58. Memorandum of Economic and Financial Policies of 3 May 2010, section C: Structural Policies, paragraph 22, second bullet point, published in Occasional Papers 61, May 2010, p. 48.

**b) Country-specific recommendation for Belgium**

Requirements of this kind do not apply just to countries dependent on financial assistance. Indeed, they can also be found in the Council's country-specific recommendation (CSR) for preventive action issued to Belgium on 9 July 2013 in accordance with Article 6 of Regulation No 1176/2011,<sup>59</sup> recital 12 of which states the following:

‘Structural improvements to the wage-bargaining framework are still needed. These include automatic corrections in case the wage norm is not respected or where the health index increase exceeds wage increases in the main trading partners. The wage-bargaining system should ensure that wage developments follow subregional and local level productivity dynamics.’

Recommendation 3<sup>60</sup> calls on Belgium:

‘To restore competitiveness, pursue the ongoing efforts to reform the wage-setting system, including wage indexation, in particular by taking structural measures, in consultation with the social partners and in accordance with national practice, to ensure that wage setting is responsive to productivity developments, reflects subregional and local differences in productivity and labour-market conditions, and provides automatic corrections when wage evolution undermines cost-competitiveness.’

This recommendation seems designed to place conditions on the right of collective bargaining: collectively-agreed wage increases should not apply if, according to economic indicators, they are judged to be too high.

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59. Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 2012-2016, OJ C 217, 30.7.2013, p. 5.

60. Retained as recommendation 6 of the Council Recommendation of 8 July 2014 on the 2015 National Reform Programme of Belgium and delivering a Council opinion on the 2015 Stability Programme of Belgium, OJ C 247, 29.7.2014, p. 1.

### c) General recommendation for Luxembourg

In the case of Luxembourg, too, albeit on the basis of the general rules on economic surveillance, the need was identified in July 2013 to take ‘additional measures [...] to reform the wage setting system in a more permanent way,’ as reflected in the following recommendation:

‘THE COUNCIL [...] HEREBY RECOMMENDS that Luxembourg take action within the period 2013-2014 to [...]

4. Beyond the current freeze, take further structural measures, in consultation with the social partners and in accordance with national practices, to reform the wage setting system, including wage indexation, to improve its responsiveness to productivity and sectoral developments and labour market conditions and foster competitiveness.’<sup>61</sup>

This recommendation offers further evidence that a flexible, productivity-based wage policy is generally the standard policy position at European level. It explains the acceptance of the fact that measures agreed in MoUs, which are set out below, may also find their way into the recommendations made in the context of economic surveillance.

#### 2. Deterioration in working conditions as a result of in-house collective agreements

The requirement for flexibility in line with productivity is reflected in the decentralisation of collective bargaining systems in such a way as to ensure that collective agreements adopted at company level are able, contrary to the previous legal situation, to deviate downwards from the working conditions established at national or industry level.<sup>62</sup>

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61. Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Luxembourg and delivering a Council opinion on the Stability Programme of Luxembourg, 2012-2016, OJ C 217, 30.07.2013, p. 55.  
62. For a comparative law overview of decentralisation measures of this kind, see Jacobs (2014: 171 and 175 ff).

**a) The first and fifth MoUs with Greece**

The reform demands relating to the Greek collective bargaining system<sup>63</sup> were set out in the first ‘Memorandum of Understanding on Specific Economic Policy Conditionality’, also agreed on 3 May 2010, which required Greece to carry out the following reforms in the space of a few months:

‘Reform private wage bargaining system to ensure wage moderation by December 2010:

- adopts legislation to reform wage bargaining system in the private sector, including local territorial pacts to set wage growth below sectoral agreements
- introduce variable pay to link wages to productivity performance at the firm level’.<sup>64</sup>

As the crisis developed, the implementation of these measures was welcomed. However, it appeared that they were no longer enough, as stated in the fifth, more general ‘Memorandum of Understanding on Economic and Financial Policies’ of December 2011:

‘Nevertheless, with unemployment rising rapidly and productivity growth yet to take off, the government will enact additional measures to increase wage flexibility and promote employment’.<sup>65</sup>

The call for further decentralisation of collective bargaining through the involvement of non-union actors (subsection 3) and restrictions on the extension of collective agreements (subsection 4) was therefore accompanied by the temporary suspension of the ‘favourability clause’ applicable in Greek collective bargaining law:

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63. On the subject of the implementation of the following demands in Greek law, see Travlos-Tzanetatos (2011: 325 and 332 ff); Bakopoulos (2010: 323 and 327 ff).

64. Memorandum of Understanding on Specific Economic Policy Conditionality of 3 May 2010, Annex 3, published in Occasional Papers 61, May 2010, p. 79.

65. Updated Memorandum of Understanding on Economic and Financial Policies, fifth update, December 2011, paragraph 22, published in Occasional Papers 87, December 2010, p. 121.

‘Moreover, the “favourability clause” (requiring negotiations to start from the most-favourable existing contract applicable to other similar workers) will be suspended until at least end-2015, in such a manner that firm-level agreements take precedence over sectoral and occupational agreements.’<sup>66</sup>

## **b) Country-specific recommendations for Belgium and France**

Demands of this kind expressed in more general terms are also found in the aforementioned country-specific recommendations for preventive action addressed to Belgium in July 2013.<sup>67</sup> In the in-depth review of March 2014, much space is given over to a description of the Belgian wage-setting system, previous reform discussions and the need, in the Commission’s view, for decentralisation.<sup>68</sup>

In indirect terms, France is also asked in the country-specific recommendation for preventive action addressed to it in July 2013<sup>69</sup> to permit a worsening of conditions through company-level collective agreements. Recommendation 6 calls on France to ‘implement fully, without delay and in consultation with the social partners the inter-professional agreement of January 2013’. The inter-professional agreement referred to – the *Accord national interprofessionnel* (ANI) of 11 January 2013 – is an agreement that was originally negotiated autonomously by French unions and employers’ organisations and served as the basis for the Law of 14 June 2013 on job security.<sup>70</sup> The agreement provided for a form of French ‘Alliance for Jobs’ at company level, under which wage cuts could be agreed in return for a guarantee of no operational redundancies. This provision, which is now set out in Article L. 5125-1

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66. See previous footnote, as well as the Updated Memorandum of Understanding on Specific Economic Policy Conditionality, fifth update, October 2011, published in Occasional Papers 87, December 2010, p. 146. According to Konstantin Bakopoulos (2014: 323 and 328), footnote 34, the favourability clause has been suspended at national level until 1 January 2017.

67. See footnote 59.

68. European Commission (DG ECOFIN), *Macroeconomic Imbalances Belgium 2014*, European Economy – Occasional Papers 172, March 2014, pp. 20-26.

69. Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of France and delivering a Council opinion on the Stability Programme of France, 2012-2017, OJ C 217, 30.7.2013, p. 27.

70. *Loi n°2013-504 du 14 juin 2013 relative à la sécurisation de l'emploi*, Journal officiel de la République française [Official Journal of the French Republic] No 138, 16.7.2013, p. 9958.

of the French Labour Code (*Code du travail*), was extended to cover workers' claims for damages and compensation in the event of failure to honour the guarantee of no redundancies and was limited to wages more than 20% higher than the minimum wage.

Apparently as a result of this restriction, the Commission, in the in-depth review of March 2014, deemed the reforms undertaken to be unsatisfactory, in particular the qualifications introduced into the legislation, and recommended further decentralisation.<sup>71</sup> In the Commission's recommendation for a Council recommendation, France was consequently called upon to:

‘Take further action to combat labour-market rigidity, in particular take measures to reform the conditions of the “accords de maintien de l’emploi” to increase their take-up by companies facing difficulties.’<sup>72</sup>

This recommendation was accepted by the Council and addressed to France in July 2014.<sup>73</sup>

### 3. Non-union employee representatives as a party to collective bargaining

#### a) The fifth MoU with Greece

As previously mentioned, in order to achieve greater flexibility in wage-setting, Greece was instructed in the fifth MoU ‘on Economic and Financial Policies’ and ‘on Specific Economic Policy Conditionality’, concluded in October and December 2011 respectively, to permit the involvement of non-union actors as a party to collective bargaining. The transposition of this (and other) requirements into law was made an

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71. European Commission (DG ECOFIN), *Macroeconomic Imbalances France 2014*, European Economy – Occasional Papers 178, March 2014, pp. 31 f. and 49.

72. COM(2014) 411 final, recommendation 6.

73. Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of France and delivering a Council opinion on the Stability Programme of France, 2014, recommendation 6., OJ C 247, 29.7.2014, p. 42.

explicit condition of the disbursement of the next tranche of financial assistance. The wording was as follows:

‘firm-level collective contracts can be signed either by trade unions or, when there is no firm-level union, by work councils or other employees’ representations, irrespective of the firms’ size.

These amendments are legislated prior to the sixth disbursement.<sup>74</sup>

#### **b) The MoU with Portugal**

Similarly detailed and time-specific demands had already been made of Portugal at an earlier point,<sup>75</sup> compliance with which had been a condition of receiving financial assistance under the EFSM, governed by EU law. The ‘Memorandum of Understanding on Specific Economic Policy Conditionality’ concluded on 17 May 2011<sup>76</sup> stipulated that:

‘4.8. The Government will promote wage adjustments in line with productivity at the firm level. To that purpose, it will:

i. implement the commitments in the Tripartite Agreement of March 2011 concerning the “organised decentralisation”, notably concerning: (i) the possibility for works councils to negotiate functional and geographical mobility conditions and working time arrangements; (ii) the creation of a Labour Relations Centre supporting social dialogue with improved information and providing technical assistance to parties involved in negotiations; (iii) the lowering of the firm size threshold above which works councils can conclude firm-level agreements to 250 employees. Action for the implementation of these measures will have to be taken by Q4-2011;

ii. promote the inclusion in sectoral collective agreements of conditions under which works councils can conclude firm-level agreements

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74. Updated Memorandum of Understanding on Specific Economic Policy Conditionality, fifth update, October 2011, published in Occasional Papers 87, December 2011, p. 156; see also Updated Memorandum of Understanding on Economic and Financial Policies, fifth update, December 2011, paragraph 22, published in Occasional Papers 87, December 2011, p. 121.

75. For more on this subject, see Seifert (2014: 14 and 22 ff).

76. [http://ec.europa.eu/economy\\_finance/eu\\_borrower/mou/2011-05-18-mou-portugal\\_en.pdf](http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf)

without the delegation of unions. An action plan will have to be produced by Q4-2011.

iii. By Q1-2012, present a proposal to reduce the firm size threshold for works councils to conclude agreements below 250 employees, with a view to adoption by Q2-2012. Draft legislation will be submitted to Parliament by Q1-2012.’

The measures were confirmed and approved by Council Implementing Decision 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal.<sup>77</sup> Article 3(6) of the Decision stated that:

‘(6) Portugal shall adopt the following measures during 2012, in line with specifications in the Memorandum of Understanding: [...]

k) Portugal shall promote wage developments consistent with the objectives of fostering job creation and improving firms’ competitiveness with a view to correcting macroeconomic imbalances. Any increase in minimum wages will take place only if justified by economic and labour market developments. Measures shall be taken to address weaknesses in the current wage bargaining schemes, including legislation to redefine the criteria and modalities of the extension of collective agreements and to facilitate firm-level agreements.’

#### 4. Restrictions on the extension of collective agreements

Portugal was also asked to reform its system for the extension of collective agreements. Paragraph 4.7(ii) of the Memorandum of Understanding of 17 May 2011 stated that:

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77. OJ L 159, 17.6.2011, pp. 88-92; updated with regard to the measures to be taken during 2013 (Article 3(7) to (9) of the Decision) by Council Implementing Decision 2013/703/EU of 19 November 2013 amending Implementing Decision 2011/344/EU on granting Union financial assistance to Portugal, OJ L 322, 3.12.2013, pp. 31-37, and simultaneously approved as part of the macroeconomic adjustment programme adopted in accordance with Regulation No 472/2013, in Council Implementing Decision 2013/704/EU of 19 November 2013 approving the update of the macroeconomic adjustment programme of Portugal, OJ L 322, 3.12.2013, p. 38.

‘[...] the Government will [...] define clear criteria to be followed for the extension of collective agreements and commit to them. The representativeness of the negotiating organisations and the implications of the extension for the competitive position of non-affiliated firms will have to be among these criteria. The representativeness of negotiating organisations will be assessed on the basis of both quantitative and qualitative indicators. To that purpose, the Government will charge the national statistical authority to do a survey to collect data on the representativeness of social partners on both sides of industry. Draft legislation defining criteria for extension and modalities for their implementation will be prepared by Q2-2012.’

Consequently, rules were adopted establishing a quorum of 50%, so that, in contrast to the previous legal situation, an agreement can be extended only if the employers covered by the collective agreement employ at least 50% of the workers party to the agreement.<sup>78</sup>

Greece, on the other hand, was instructed in November 2011, as a further means of ensuring the decentralisation of collective bargaining, to suspend altogether the extension of sectoral agreements. It is notable that the Memorandum of Understanding specified a minimum period in this regard (until the end of 2014), but not a maximum suspension period.<sup>79</sup>

## 5. Restrictions to the duration and ‘after-effect’ of collective agreements

The memorandum concluded with Greece in February 2012 included detailed demands concerning the maximum duration of collective agreements and restricted their ‘after-effect’ to a three-month grace period:

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78. Seifert (2014: 14 and 22 f.); Abrantes (2014: 39 and 41).

79. Updated Memorandum of Understanding on Economic and Financial Policies, fifth update, December 2011, paragraph 22, published in Occasional Papers 87, December 2011, p. 121: ‘In addition, the possibility to extend sectoral agreements to those not represented in the negotiations will be suspended for a period until at least end-2014.’

‘Length of collective contracts and revisions of the ‘after effects’ of collective contracts. Changes will specify that: (i) all collective contracts should have a maximum duration of 3 years; (ii) collective contracts already in place for 24 months or more will expire not later than one year after the law is adopted; (iii) the grace period after a contract expires is reduced from six to three months; and (iv) in the event that a new collective agreement cannot be reached after three months of efforts, remuneration will revert back to the basic wage plus the following general allowances (seniority, child, education, and hazardous). This will continue to apply until replaced by terms specified in a new collective agreement or in new or individual contract.’<sup>80</sup>

The Memorandum of 17 May 2011 concluded with Portugal was more tentative, calling merely for a review of the arrangement concerning the ‘after-effect’ of agreements:

‘[...] the Government will [...] prepare an independent review by Q2-2012 on: [...] the desirability of shortening the survival (sobrevigência) of contracts that are expired but not renewed (art 501 of the Labour Code).’

## 6. Reform of arbitration in labour disputes

At the same time, the Greek Memorandum of Understanding of February 2012 provided for the abolition of compulsory arbitration and a reduction in arbitrators’ powers:

‘Elimination of unilateral recourse to arbitration, allowing requests for arbitration only if both parties consent. At the same time, we will clarify (by law or circular) that: (i) arbitrators are prohibited to introduce any provisions on bonuses, allowances, or other benefits, and thus may rule only on the basic wage; and (ii) economic and

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80. Memorandum of Economic and Financial Policies, February 2012, paragraph 29, published in The Second Economic Adjustment Programme for Greece, European Economy-Occasional Papers 94, March 2012, p. 109.

financial considerations must be taken into account alongside legal considerations.<sup>81</sup>

After Law No 3899/2010 had extended the possibility of unilaterally initiating arbitration proceedings yet further than under the previous rules, the requirements of the Memorandum were transposed by Law No 4046/2012 shortly afterwards, so that arbitration could take place only when both sides agreed to it.<sup>82</sup>

## 7. Interference with the content of existing collective agreements

Finally, the same Memorandum of Understanding concluded with Greece in February 2012 set out specific arrangements for the immediate invalidation of the provisions of existing collective agreements. To achieve an overall reduction in unit labour costs of around 15%, it was decided, firstly, to suspend collectively-agreed wage increases automatically set to come into effect after a specified period of time until the unemployment rate had fallen below 10%. At the same time, the minimum wage laid down in a national collective agreement was cut by 22% for all workers and by a further 10% for workers under 25. The relevant provisions of the MoU read as follows:<sup>83</sup>

‘A freeze of ‘maturity’ provided by law and/or collective agreements (referring to all automatic increases in wages dependent on time) until unemployment falls below 10 percent.’

‘We will legislate: (i) an immediate realignment of the minimum wage level determined by the national general collective agreement by 22 percent at all levels based on seniority, marital status and

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81. Memorandum of Economic and Financial Policies, February 2012, paragraph 29, published in *The Second Economic Adjustment Programme for Greece*, European Economy-Occasional Papers 94, March 2012, p. 110.

82. For more detail, see Daskalakis (2014: 87 and 104 ff); see also Bakopoulos (2014: 323 and 329). Nonetheless, a ruling by the Greek Constitutional Court in June 2014 found that the abolition of compulsory arbitration was unconstitutional (Bakopoulos 2014: 331).

83. Memorandum of Economic and Financial Policies, February 2012, paragraph 29, published in *The Second Economic Adjustment Programme for Greece*, European Economy-Occasional Papers 94, March 2012, p. 110.

daily/monthly wages; (ii) its freeze until the end of the program period; and (iii) a further 10 percent decline for youth, which will apply generally without any restrictive conditions (under the age of 25) (prior action). These measures will permit a decline in the gap in the level of the minimum wage relative to peers (Portugal, Central and Southeast Europe). We expect this measure to help address high youth unemployment, the employment of individuals on the margins of the labor market, and to help encourage a shift from the informal to the formal labor sector.’

These stipulations were transposed in full by Law No 4046/2012.<sup>84</sup>

## 8. Involvement of the social partners?

The more specific the reform requirements, the louder the call to involve the social partners in implementing them at national level. Particular emphasis is placed on this, for instance, in the fifth MoU with Greece ‘on Specific Economic Policy Conditionality’:

‘The Government initiates discussions [Q4-2011] with social partners to examine all labour market parameters that affect the competitiveness of the companies and the economy as a whole. The goal is to conclude a national tripartite agreement which addresses the macroeconomic challenges to support stronger competitiveness, growth and employment.

Moreover, based on a dialogue with social partners and taking into account the objective of creating and preserving jobs and improving the firms’ competitiveness, the Government adopts further measures to allow the adaptation of wages to economic conditions. [Fn. 2: Reforms to collective bargaining do not concern health and safety conditions and are implemented in respect of core labour standards and EU law].<sup>85</sup>

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84. See Charisiadou and Koutsogianni-Hanke (2012).

85. Updated Memorandum of Understanding on Specific Economic Policy Conditionality, fifth update, October 2011, published in Occasional Papers 87, December 2011, p. 146.

It remained no more than wishful thinking, however. As the social dialogue failed to yield a solution acceptable to the creditors in the specified time frame of less than three months, the dialogue involving the Government and the social partners was promptly replaced by a dialogue between Troika officials and the Government, as officially reported by the Commission. It was recognised that there was a risk that wage cuts could come at the expense of workers alone while generating higher profits for businesses, a risk that was accepted, at least initially. An extract from the Commission report reads as follows:<sup>86</sup>

‘43. A tripartite dialogue did not deliver a strategy to boost competitiveness and employment. In late 2011 and early 2012, the Government promoted discussions with, and between, the social partners. However, the agreement reached between the social partners’ representatives was not commensurate with the needs of the Greek economy, and did not deliver a strategy to quickly address the large challenges Greece is faced with. In a context of a sharp decline in employment, emergency action was needed to ensure the quick responsiveness of wages to the fall in economic activity. The authorities and the mission staff discussed and agreed on a package of actions to be taken by the Government in the short term, which should contribute to reduce labour costs in the business sector by 15 percent over the programme horizon.

44. The measures decided by the government build on two pillars: an adjustment of wage floors and a revision of the collective bargaining system, with a view to spurring and easing contract renegotiation and promoting wage flexibility. Frontloaded action is justified given the downward rigidities in wage-setting systems, which have prevented the adjustment of private sector wages and contributed to the sharp increase in unemployment, in particular among the low-skilled and youth. The prompt adjustment in wages is particularly important in the context of the monetary union, as the effective exchange rate needs to adjust through nominal prices and wages, rather than movements in the nominal exchange. The downward wage flexibility helps viable companies to reduce their

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86. The Second Economic Adjustment Programme for Greece, Occasional Papers 94, March 2012, p. 36.

production costs, thus creating a potential gains in external market shares, promote investment and thus, to accelerate the much needed change in the structure of the economy. The mission noted, however, that labour and product market reforms need to go in parallel to avoid that wage cuts simply result in an increase in profit margins and rents, which could be socially damaging.’

On this basis, it would appear that the additional interference with the collective bargaining system and existing collective agreements described under headings 5 to 7 took place, however, without any arrangements having been made to prevent the occurrence of the unintentional windfall effect that has been seen in virtually all cases.

## 9. Summary

It is evident that a flexible, productivity-based wage policy has been called for, particularly as a condition of financial assistance, which is to be achieved by means of interference with existing collective bargaining systems. This same tendency is increasingly found, albeit to a lesser degree, in the recommendations issued in the context of macroeconomic surveillance. The question arises, therefore, as to whether these measures are compatible with Article 28 of the Charter of Fundamental Rights, not just in themselves but also in terms of their implementation.



## D. Legal assessment

The question at the heart of this examination is whether measures such as those described in part C.III. are compatible with Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter'). With the entry into force of the Lisbon Treaty<sup>87</sup> on 1 December 2009, the EU Charter of Fundamental Rights<sup>88</sup> acquired the status of primary law in accordance with Article 6(1) of the Treaty on European Union (TEU). This assessment will therefore limit its focus to the recommendations issued in the context of the macroeconomic surveillance procedure and the memoranda of understanding (MoUs) concluded pursuant to the ESM Treaty, along with their implementation in national law.<sup>89</sup>

The assessment is structured as follows: first it must be established whether the Charter is applicable to economic policy recommendations made in the context of macroeconomic surveillance and to MoUs concluded under the ESM Treaty (section I). Next the guarantee inherent in Article 28 of the Charter must be determined (section II), following which it will be examined whether the measures in question constitute a limitation of Article 28 of the Charter (section III). The assessment will conclude by looking at the possible justification for these limitations (section IV). The judicial remedies available will then be described (section V), followed by a brief overview of how the protection afforded by Article 28 of the Charter relates to the fundamental rights protection in the Member States (section VI).

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87. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1; BGBl. 2008 II p. 1038; on its entry into force, see BGBl. 2009 II p. 1223.

88. Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, p. 1.

89. The implementation measures as a subject in their own right take on particular significance with regard to the possibility of judicial remedy under the preliminary ruling procedure (see section V.2. below).

## **I. Applicability of the EU Charter of Fundamental Rights**

### **1. Article 51(1) of the Charter**

Article 51(1) of the Charter of Fundamental Rights governs the Charter's applicability. The provision differentiates in this respect between the actions of EU bodies and those of the Member States. In the case of the former, the Charter is always applicable and, for the latter, 'only when they are implementing Union law'. However, this assessment is concerned exclusively with the actions of the Commission and Council as EU institutions, for which only the first alternative is relevant.

#### **a) Recommendations in accordance with Regulation No 1176/2011**

The first sentence of Article 51(1) of the Charter makes clear that the Charter is applicable whenever institutions, bodies and agencies of the Union take action on the basis of EU law. All Council recommendations and decisions addressed to the Member States must therefore be assessed in the light of Article 28 of the Charter.

Consequently, the country-specific recommendations issued in accordance with Articles 6 and 7 et seq. of Regulation No 1176/2011 on the surveillance of macroeconomic imbalances are, whether they concern preventive or corrective action, also covered by the obligations of the Charter. Whether and under what circumstances these recommendations, plans and programmes may limit fundamental rights is, of course, a separate issue (see part III.).

#### **b) Memoranda of understanding**

There are doubts, however, as to whether the Charter's applicability extends, pursuant to the first sentence of Article 51(1), to MoUs setting out the conditions of financial assistance. We shall concentrate on those MoUs concluded under the ESM, the mechanism by which financial assistance has been granted since 2012, since they are of relevance for the future.

An MoU comes into being in the following way: the ESM, an autonomous international organisation founded by the EU Member States which have the euro as their currency, decides, in principle, to

grant stability support (Article 13(2) of the ESM Treaty) and instructs the European Commission to negotiate an MoU with the Member State that has requested financial assistance (Article 13(3) of the ESM Treaty). The Commission conducts the negotiations in coordination with the ECB and IMF. Once the MoU has been approved by the Board of Governors of the ESM, it is signed by the Commission on behalf of the ESM (Article 13(4) of the ESM Treaty).

The ESM itself is not directly bound by the Charter of Fundamental Rights, as it is not an institution, body, office or agency of the Union within the meaning of Article 51(1) of the Charter. At most, it could be considered to be indirectly subject to the provisions of the Charter through the Member States,<sup>90</sup> although that question will not be explored further at this point.

Instead, it should be clarified whether the Commission is bound by the Charter of Fundamental Rights in its involvement in the agreement of an MoU on behalf of the ESM. This is open to debate, as, in this context, it is not acting within the framework of EU law, but on the basis of the ESM Treaty. Strictly speaking, it is operating as an agency of the ESM and as a delegated institution loaned by the European Union by international agreement.<sup>91</sup>

(1) Wording of the first sentence of Article 51(1) of the Charter

If we begin by looking at the wording of the first sentence of Article 51(1) of the Charter, it does not provide for any restriction of the Charter's scope when EU bodies are acting on behalf of other international organisations. It could be concluded from this that even actions taken by EU bodies outside the framework of Union law should be sufficient to trigger the application of the Charter in respect of those actions.<sup>92</sup> In response, it could be countered that there is no indication that the first sentence of Article 51(1) of the Charter is intended to

90. On similar attempts to argue that the IMF is bound by human rights guarantees, see Goldmann (2014: 16 ff).

91. On the question of whether the loan of institutions is permitted under EU law, see Fischer-Lescano and Oberndorfer (2013: 9 and 10 ff).

92. Opinion of Advocate-General Kokott of 26 October 2012 in Case C-370/12, paragraph 176; see Maaßen (2013: 245 ff, in particular 254 ff).

govern the observance of fundamental rights by institutions that have been ‘loaned’ and that the Charter tacitly assumes a situation related to the implementation of Union law. In this respect, no clear conclusion can be drawn from the wording.

- (2) Alteration of the essential character of an institution’s powers through the absence of an obligation to observe fundamental rights?

It should be borne in mind, however, that any action taken by the Commission by virtue of tasks conferred on it by international agreement is permitted only provided that this action does not alter the essential character of its powers under the TEU and TFEU. This was the ruling of the Court of Justice of the European Union in the *Pringle* case, in which it approved, in principle, the delegation of tasks to EU institutions by the ESM.<sup>93</sup> In this respect, it is the formal division of powers in terms of collective and institutional powers that immediately comes to mind. However, the binding effect of fundamental rights on the EU institutions can also be seen as ensuring the material delimitation of powers: the formal power to act is materially restricted by the obligation to observe fundamental rights. The power to act extends only so far as official competences, on the one hand, and fundamental rights, on the other, permit it to.<sup>94</sup> That being the case, it could easily be viewed as a basic alteration of the essential character of the powers conferred under EU law if the Commission were exempt in its dealings pursuant to the ESM Treaty from the limits imposed by otherwise binding fundamental rights.

However, the question as to whether such a scenario is valid, meaning, essentially, that an agreement under international law delegating tasks to EU institutions would always require the legal system governing the delegated entities to waive some of the fundamental rights enshrined in it, need be explored no further. After all, the ESM is not just any old organisation. It performs a central role in ensuring the stability of monetary union.

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93. Judgment of the CJEU (Full Court) of 27 November 2012 in Case C-370/12 *Pringle*, paragraphs 158 and 162 to 164.

94. As explicitly stated in *Braibant* (2001: 253).

(3) Binding effect by virtue of the functional link between the ESM and monetary union

Through the assistance it grants, the ESM prevents the Member States from falling into bankruptcy, which would make it more expensive for the other Member States to obtain financing and would considerably damage the overall stability of the euro. Accordingly, safeguarding the ‘financial stability of the euro area as a whole and of its Member States’ is defined as the purpose of the ESM in Article 3(1) of the ESM Treaty. The conditional assistance from the ESM ensures that the objective of a single currency for all Member States (Article 3(4) TEU and Article 119(2) TFEU)<sup>95</sup> is not greatly jeopardised by the insolvency of individual countries.

Further evidence of the close functional relationship between the conditional assistance and monetary union is seen in the way in which Regulation No 472/2013 is intertwined with the measures that fall under the ESM. Article 1(1)(b) of Regulation No 472/2013 states that it applies to Member States that request or receive financial assistance from the ESM. Moreover Article 7(2) of Regulation No 472/2013 stipulates that the MoUs concluded under the ESM must be consistent with the macroeconomic adjustment programmes drawn up in compliance with Regulation No 472/2013,<sup>96</sup> while the Commission has a duty under EU law to ensure the conformity of MoUs with Union law. Conversely, Article 13(3), subparagraph 2, of the ESM Treaty states that MoUs must be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular the recommendations addressed to Member States requesting financial assistance. This obligation to guarantee conformity falls, in turn, on the Commission, which the ESM Treaty entrusts with the task of negotiating MoUs. The functional link between EU law and the ESM Treaty, which, as shown in the two-way cross-references cited, is

95. Denmark and the United Kingdom are not required to join the monetary union; see Protocols No 15 and 16 to the TEU and TFEU, OJ C 326, 26.10.2012, p. 284 ff.

96. In accordance with Article 16 of the Regulation, those Member States in receipt of financial assistance on 30 May 2013 were subject to the Regulation and, consequently, from that point on to the requirement under Article 7(1) to prepare a draft macroeconomic adjustment programme. The Member States in question were Greece, Ireland, Portugal and Cyprus; see the Commission Communication to the European Parliament and the Council on the application of Regulation (EU) No 472/2013, COM(2014) 61 final, p. 3, under heading 2.1.

explicitly laid down in Union law, indicates that the Commission, even where it is officially acting as a delegated institution, should be bound by the provisions of the EU Charter of Fundamental Rights.

The CJEU's ruling in the *Pringle* case does not contradict this conclusion. In its judgment, the Court found that, in establishing the ESM, the Member States were not implementing Union law within the meaning of Article 51(1) of the Charter, because EU law does not confer any specific competence on Member States to do so.<sup>97</sup> For that reason, the Member States had acted outside Union law when they established the ESM and, consequently, outside the scope of the Charter of Fundamental Rights. However, the Court's findings in this judgment regarding the creation of the ESM cannot automatically be applied to the Commission's actions as a delegated institution.<sup>98</sup> The Court was called upon to rule whether the Member States, in setting up the ESM, had infringed the right to effective judicial protection laid down in Article 47 of the Charter, given that the binding effect of the Charter of Fundamental Rights was not guaranteed in respect of the ESM. However, in response to the claim that this fundamental right had been violated, the Court found that Article 47 of the Charter could not have been infringed, as the second alternative set out in Article 51(1) of the Charter did not extend its scope to the act of establishing the ESM.

It is not even clear, then, whether the CJEU would rule that the ESM itself was not bound by the Charter of Fundamental Rights. More to the point, nothing is said about whether it has any binding effect on the Commission in its actions under the ESM Treaty. It is true that the Member States were acting outside the scope of EU law when they established the ESM. However, they set up the ESM in such a way that the granting of conditional financial assistance is, functionally speaking, closely intertwined with measures under EU law designed to stabilise monetary union. It is precisely the Commission, in its dual role as EU institution and delegated institution acting for the ESM, that is supposed to ensure this close link. Even when acting under the ESM,

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97. Judgement of the CJEU in Case C-370/12 *Pringle* (see footnote 93), paragraph 180.

98. On the limited scope of the *Pringle* ruling, see also: Martucci (2013: 239 ff); Schwarze (2013: 187) stresses that, for this reason, the debate surrounding the conformity of rescue packages with Union law has not been settled.

the Commission is pursuing the objective laid down in EU law of a stable monetary union, and its actions under the ESM do not stand apart from, but should be consistent with, the measures it takes in pursuit of this objective under Union law.<sup>99</sup> In the light of the *Pringle* ruling, too, therefore, it appears to be confirmed that the actions taken by the Commission under the ESM are subject to the provisions of the Charter of Fundamental Rights.

(4) Articles 125 and 136 TFEU

Any remaining doubt about this conclusion is removed by the rules set out in Article 125 and Article 136(3) TFEU. The second sentence of Article 125(1) TFEU stipulates that a Member State is not liable for and must not assume the commitments of another Member State. In the *Pringle* case, too, the question arose as to whether the creation of the ESM had circumvented the prohibition deriving from the second sentence of Article 125(1) TFEU. In this respect, the Court was not content simply to explain that the ESM was not liable for or assuming any commitments but was merely granting financial assistance that, moreover, had to be repaid.<sup>100</sup> Instead, it gave thorough consideration to the question of whether the arrangements under the ESM were compatible with the objective pursued by Article 125 TFEU, which it identified as ensuring that the Member States adhered to a sound budgetary policy for the sake of the financial stability of the euro area. From the Court's point of view, that presupposed that Member States remain subject to the logic of the market when they enter into debt. Union law therefore permits financial assistance to be granted only where it does not undermine the incentive to conduct a sound budgetary policy. That is only the case, however – and this is the crucial part of the Court's reasoning – when the financial assistance granted is subject to strict conditions.<sup>101</sup> Conversely, an ESM that granted financial assistance

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99. This link is explicitly underlined by the Court of Justice itself in the *Pringle* case (see footnote 93): 'By its involvement in the ESM Treaty, the Commission promotes the general interest of the Union. Further, the tasks allocated to the Commission by the ESM Treaty enable it, as provided in Article 13(3) and (4) of that treaty, to ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law' (paragraph 164).

100. Judgment of the CJEU in Case C-370/12 *Pringle* (see footnote 93), paragraphs 130-132 and 144-147.

101. See above, in particular paragraphs 136 and 143.

without strict conditionality would remove the incentive to conduct a sound budgetary policy and would therefore be deemed by the Court to be incompatible with the second sentence of Article 125(1) TFEU.

These links demonstrated by the Court with reference to the second sentence of Article 125(1) TFEU are reinforced under primary law by the adoption of the new Article 136(3) TFEU concurrent to the founding of the ESM by the Member States. The first sentence of this provision confirms, first of all, that EU law does not prohibit the Member States from establishing a stability mechanism to stabilise the single currency. However, the second sentence goes on to state that *'the granting of any required financial assistance under the mechanism will be made subject to strict conditionality.'* In this way, the provision makes explicit the aforementioned obligation under EU law that arises from the Court's reading of Article 125 TFEU. The Member States meet this obligation by granting financial assistance under the ESM Treaty only through the conclusion of an MoU. In each instance, the ESM Treaty assigns the Commission a central role in carrying out this requirement. In this sense, in negotiating the MoU, the Commission is not only performing a task entrusted to it by the ESM Treaty but is helping, simultaneously, to ensure compliance with the obligation under EU law deriving from the second sentence of Article 125(1) and the second sentence of Article 136(3) TFEU. Even when it is operating as a delegated body of the ESM, therefore, it is acting to ensure compliance by the Member States with a requirement under Union law. On that basis, exemption from the binding effect of the Charter of Fundamental Rights cannot be justified. Action taken by the Commission within the framework of the ESM Treaty therefore falls within the scope of the Charter.

Finally, it should be reiterated that recognition of the binding effect of the Charter on the Commission's actions does not amount to an attempt to declare MoUs part of Union law. No further consideration will be given here as to whether the functional intertwining of monetary union and the ESM and the fact that this relationship is governed under primary law by Articles 125 and 136 TFEU could support such a conclusion, even though, formally speaking, an MoU is an agreement between an international organisation, the ESM, and the Member State seeking financial assistance. According to the position put forward here, an MoU is not part of EU law, even if the Commission is fulfilling a primary-law obligation through its involvement in the MoU. The trigger

for the applicability of fundamental rights is not the MoU itself, therefore, but the Commission's role in this regard.

## 2. Conclusion

In the case both of recommendations issued in the context of macroeconomic surveillance on the basis of Articles 6 und 7 et seq. of Regulation 1176/2011 and the Commission's decisive involvement in the agreement of MoUs under the ESM, the applicability of the EU Charter of Fundamental Rights is triggered in accordance with the first alternative of Article 51(1) of the Charter. There is no doubt that this is true of recommendations that have their basis in EU law. However, it also applies to the defining role the Commission plays in the conclusion of MoUs. This essentially results from the fact that, while the Commission is acting pursuant to the ESM Treaty adopted under international law, it is also fulfilling a primary-law obligation of Union law arising from the second sentence of Article 125(1) TFEU and explicitly laid down in the second sentence of Article 136(3) TFEU in connection with the founding of the ESM.

## II. The guarantee inherent in Article 28 of the Charter

In accordance with Article 6(1) TEU, the EU Charter of Fundamental Rights has the status of primary law. Article 28 of the Charter guarantees the right of collective bargaining and action, including the right to strike. From a schematic point of view, Article 28 of the Charter should be read in conjunction with Article 12 of the Charter, which covers, *inter alia*, the right to form and join trade unions (subsection 1). It should be acknowledged, however, that the Court of Justice has, in its rulings to date, attributed very little content to the right of collective bargaining and action as laid down in Article 28 of the Charter (subsection 2). There are conflicting ways of reading this provision, including what emerges as the legally correct understanding, namely that Article 28 of the Charter is a genuine fundamental right that also affords a distinct guarantee against EU law (subsection 3). In determining the guarantee inherent in the provisions of the Charter of Fundamental Rights, it is necessary to refer, as an overriding source of law, to international guarantees in respect of the right of collective

bargaining (subsection 4). On this basis, we shall conclude by breaking down the individual elements that make up the protection offered by Article 28 of the Charter (subsection 5).

## 1. Article 28 of the Charter in terms of wording and scheme

Article 28 of the Charter guarantees the right of collective bargaining and action. It is worded as follows:

‘Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.’

The wording makes clear that both individual workers and employers and their organisations have the guaranteed right to engage in collective bargaining and conclude collective agreements, as well as to conduct labour disputes. Collective agreements in this sense do not refer only to agreements setting out legal rules (cf. § 1(1) of the German *Tarifvertragsgesetz* (TVG) [Law on collective agreements]) but also to other types of collective arrangements. The expression ‘collective agreement’ (in French, ‘*convention collective*’) represents, then, an autonomous concept of EU law.<sup>102</sup>

Article 28 of the Charter also affords protection *ratione personae* in respect of the actions of workers’ and employers’ organisations. The term ‘organisation’ should be interpreted widely in this regard.<sup>103</sup> The main argument for this approach, in schematic terms above all, is Article 12 of the Charter laying down the fundamental right of freedom of assembly and of association, ‘which implies the right of everyone to form and to join trade unions for the protection of his or her interests’. Article 28 of the Charter, however, refers not only to unions but to ‘organisations’ and, in this sense, sets itself apart from Article 12. It considers the bearer of this fundamental right to be any association of

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102. Schubert (2013: 1 and 16), with further references.

103. Heuschmid (2011: number 49); Holoubek (2012: number 15).

workers or employers on a more than temporary basis, whereby the concept of a workers' or employers' organisation covers entities that are independent both of their respective opposing organisation and of the State.<sup>104</sup> Among workers, however, unions typically play a particular role, a fact that is highlighted by Article 12 of the Charter.

From a substantive viewpoint, too, Article 28 of the Charter should be read schematically in conjunction with Article 12. The protection afforded by Article 28 of the Charter is limited to activities relating to collective bargaining, the conclusion of collective agreements and labour disputes. The freedom to form and join associations, meanwhile, is governed by Article 12 of the Charter.<sup>105</sup>

## 2. Guarantee under CJEU case law

### a) Unqualified statutory curtailment by reference to Union law

Even before the Lisbon Treaty came into force, the EU Charter of Fundamental Rights, originally proclaimed in Nice in 2000 and at that point non-binding, served as a reference source for binding general principles of law.<sup>106</sup> Thus, in its judgment in the *Viking* and *Laval* cases in December 2007, the CJEU identified the 'right to take collective action, including the right to strike' as a general principle of Union law. In so doing, it did not refer solely to Conventions Nos 87 and 98 of the International Labour Organisation, the European Social Charter and the Community Charter of Fundamental Social Rights for Workers, but also to Article 28 of the EU Charter of Fundamental Rights.<sup>107</sup> The right

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104. Heuschmid (2011: numbers 49–51).

105. Heuschmid (2011: number 5).

106. See De Schutter (2005: 145 and 165 ff), with further references.

107. Judgment of the CJEU (Grand Chamber) of 11 December 2007 in Case C-438/05 *Viking* (ECR 2007, p. I-10779, paragraph 43 f.); Judgment of the CJEU (Grand Chamber) of 18 December 2007 in Case C-341/05 *Laval* (ECR 2007, p. I-11767, paragraph 90 f.). In respect of EU public service legislation, the CJEU had already recognised the right to form unions, along with the right of freedom of activity for these unions, on the basis of Article 24a of the Staff Regulations (freedom of association, now laid down in Article 24b of the Staff Regulations) (Judgment of the CJEU of 8 October 1974 in Case 175/73 *Amalgamated European Public Service Union v Council*).

of collective bargaining, however, was not recognised as a general principle of EU law until the Lisbon Treaty entered into force.<sup>108</sup>

In direct connection with the recognition of the right to strike as a general principle of Union law, the guarantee inherent in this right began to be defined by the CJEU in a striking fashion. On the one hand, the extent of the protection afforded was perceived to be wide. In the *Laval* judgment, even the blockade of a building site – an action permitted under Swedish law – which involved preventing the delivery of goods onto the site, was viewed as collective action within the meaning of EU law.<sup>109</sup> On the other hand, the margins for restricting this fundamental right were set equally wide: where the right to strike clashed with freedom of movement, there was no attempt to find a balance between the conflicting legal positions; instead the strike action in question was treated as a restriction of a fundamental freedom by national law.<sup>110</sup> That means that any consideration of the right of collective bargaining would take place from the vantage point of the fundamental freedoms and the justification of restrictions on these freedoms.

In addition to the reasons explicitly set out in the TFEU, the unwritten grounds justifying a restriction are the so-called overriding reasons related to the public interest. Some of the overriding reasons of public interest recognised as such by the CJEU include the protection of workers and ‘protection for independence in the organisation of working life by trade unions’.<sup>111</sup> However, when it comes to trade union activities, it is not the Member State’s decision to uphold the exercise of a fundamental right that, from the Court’s point of view, can justify a

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108. As endorsed in the Opinion of Advocate-General Trstenjak of 14 April 2010 in Case C-271/08 *Commission v Germany* (ECR 2010, p. I-7096, paragraph 78); the Court’s judgment in this case, however, relates solely to Article 28 of the Charter of Fundamental Rights (paragraph 43).

109. Judgment of the CJEU in Case C-341/05 *Laval* (see footnote 107), paragraphs 34 and 107; in Germany, however, a full blockade is considered unlawful; see Berg *et al.* (2013: number 225 ff), with further references.

110. Judgment of the CJEU in Case C-438/05 *Viking* (see footnote 107), paragraph 44; see also Schmitt (2014: 195 and 218 ff).

111. Judgment of the CJEU of 3 April 2008 in Case C-346/06 *Rüffert* (ECR 2008, p. I-1989, paragraphs 38 and 41; *Arbeit und Recht* 2008, p. 452); see Hänlein (2008: 275 and 279 ff); cf. also the Opinion of Advocate-General Cruz Villalón of 19 July 2012 in Case C-577/10 *Commission v Belgium*, paragraphs 44-46.

restriction of a freedom, unlike in the *Schmidberger* case, which concerned a conflict between a fundamental freedom and the freedom of demonstration,<sup>112</sup> but rather the objectives pursued by the bearers of the fundamental right in exercising that right.<sup>113</sup> These, and not the State's authorisation of the exercise of the fundamental right in question, must be proven to be legitimate. Moreover, as in the case of any state intervention, the objectives must be pursued in a manner that is proportionate to the fundamental freedom enjoyed by the relevant corporate entity.<sup>114</sup>

Another development occurring directly in parallel with the recognition of the right to strike as a fundamental right of the EU, was the CJEU's failure, in the event of a conflict between the right to strike and secondary EU law relating to harmonisation of the internal market, to consider the latter as a possible restriction of fundamental rights.<sup>115</sup> Accordingly, in the *Laval* judgment, the limitation of Swedish trade unions' right to strike by the Posted Workers Directive was not subjected to any proportionality test. Since then, it has been possible for any provision of secondary law restricting the right of collective bargaining to come into effect without further discussion.

This approach has now hardened into settled case-law of the Court of Justice of the European Union.<sup>116</sup> For instance, the question of determining by collective agreement the implementation methods for old-age occupational pensions funded through the conversion of earnings consequently took a back seat to that of compliance with

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112. Judgment of the CJEU of 12 June 2003 in Case C-112/00 *Schmidberger* (ECR 2003, p. I-5659, paragraph 70 ff, in particular paragraphs 74 and 80 f.).

113. Davies (2008: 126 and 141); cf. the judgment of the CJEU in Case C-438/05 *Viking* (see footnote 107), paragraphs 43-46, 77, 80 and 90; the judgment of the CJEU in Case C-341/05 *Laval* (see footnote 107), paragraph 107 ff.

114. Judgment of the CJEU in Case C-438/05 *Viking* (see footnote 107), paragraphs 43-46, 77, 80 and 90; judgment of the CJEU in Case C-341/05 *Laval* (see footnote 107), paragraph 86 ff; judgment of the CJEU in Case C-346/06 *Rüffert* (see footnote 111) paragraphs 38 and 41.

115. Judgment of the CJEU in Case C-341/05 *Laval* (see footnote 107), paragraph 103 ff.

116. In contrast, the line taken in German case law with regard to Article 28 of the Charter seems rather more varied; cf., for instance, the judgment of the German Federal Labour Court (BAG) of 14 January 2009, File No 3 AZR 20/07, juris, paragraph 47, BAGE 129, p. 105; and the judgment of the BAG of 19 January 2011, File No 3 AZR 29/09, juris, paragraphs 31 and 46-49, *Neue Zeitschrift für Arbeits- und Sozialrecht* (NZA) 2011, p. 860.

tender obligations under secondary law.<sup>117</sup> The emphatic call made by the Advocate-General in her opinion for reliance upon the principle of practical concordance, a feature of German constitutional law, in the event of the restriction by a fundamental right of a fundamental freedom,<sup>118</sup> went unheard by the Court and was not even mentioned in its judgment.<sup>119</sup> In relation, too, to the ban on discrimination enshrined in primary law, and laid down in more specific terms in Directive 2000/78/EC on equal treatment, the CJEU has confirmed in two further judgments that autonomy in collective bargaining may be exercised only within the limits set by Union law.<sup>120</sup>

It is possible, then, to restrict the right to strike with reference to both primary and secondary law without further consideration, i.e. without weighing up the conflicting rights and the general interest. In this sense, the official entry into force of the EU Charter of Fundamental Rights has done nothing to alter CJEU case law on the right of collective bargaining. Instead, the Court relies in its rulings on the reference to Union law contained in Article 28 of the Charter ('...have, in accordance with Union law [...] the right...'). The Court ultimately treats this reference as a form of unqualified statutory curtailment, therefore: the right of collective bargaining extends only so far as Union law will allow it.

#### **b) In essence: no obstruction of collective bargaining**

To date, the CJEU has set just one limit on possible restrictions under EU law. In its judgment in the Albany case, the Court, at that time, held that EU competition rules did not apply to collective agreements, as the objective pursued by collective agreements of improving working

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117. Judgment of the CJEU (Grand Chamber) of 15 July 2010 in Case C-271/08 *Commission v Germany* (conversion of earnings) (ECR 2010, p. I-7091, paragraphs 43 ff and 66, AuR 2010, p. 521, with annotation by Buschmann).

118. Opinion of Advocate-General Trstenjak of 14 April 2010 in Case C-271/08 *Commission v Germany*, paragraphs 86 and 175 ff, in particular 190.

119. Judgment of the CJEU in Case C-271/08 *Commission v Germany* (see footnote 117), paragraph 41 ff.

120. Judgment of the CJEU (Grand Chamber) of 13 September 2011 in Case C-447/09 *Prigge and Others*, paragraphs 46-48; judgments of the CJEU of 8 September 2011 in Joined Cases C-297/10 and C-298/10 *Hennigs and Mai*, paragraph 62 ff, in particular paragraph 67 f.; similarly, see the judgment of the CJEU of 28 June 2012 in Case C-172/11 *Erny*, paragraph 50, on the ban on discrimination based on nationality.

conditions would be seriously undermined.<sup>121</sup> A fundamental right of collective bargaining went unmentioned in this context. The CJEU instead referred to rules relating to the EU's social policy objectives.<sup>122</sup>

In a more recent ruling, in the course of deliberations as to the extent to which collective agreements are concerned with the exercise of fundamental rights, the Court again referred to this case law. In this instance, the question was whether the designation by collective agreement of potential parties to public service contracts for the provision of occupational old-age pensions was compatible with the internal market freedoms and with the EU public procurement provisions which define these freedoms in secondary law.<sup>123</sup> The Court, referring to the judgment in the Albany case, held that it was not compatible, arguing, *inter alia*, that the ban on designating service partners in such a way did not affect the essence of collective bargaining.<sup>124</sup> This essence remained protected because the parties to the collective agreement were perfectly at liberty to negotiate a higher pension level. By that the Court evidently meant that the essence was preserved as the parties to the collective bargaining were also able to pursue their objectives without acting in breach of Union law. To turn that around, it can be only be concluded that the EU would not be permitted to block, on the basis of secondary law, every possible means of seeking the improvement of working conditions by collective agreement.

Here, then, is the limit placed by existing case law on Union law within the meaning of Article 28 of the Charter: EU law may not obstruct collective bargaining and related actions aimed at improving working conditions, at least not by legal means.

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121. Judgment of the CJEU of 21 September 1999 in Case C 67/96 *Albany* (ECR 1999, p. I-5863, paragraphs 52-64); see also the judgment of the CJEU of 4 December 2014 in Case C-413/13 *FNV Kunsten Informatie en Media, NZA 2015*, p. 55, which also covered collective agreements for economically dependent self-employed workers.

122. Judgment of the CJEU in Case C-67/96 (*Albany*) (see footnote 121), paragraphs 54-57.

123. Judgment of the CJEU in Case C-271/08 *Commission v Germany* (see footnote 117), paragraph 36 ff.

124. See above, paragraphs 49 and 55-58.

### **c) Preliminary conclusion**

It should be noted, therefore, that EU case law has not allowed the right of collective bargaining as laid down in Article 28 of the Charter to be asserted as a fundamental right under primary law, nor has it set a material limit in respect of secondary EU legislation. There is no attempt to balance this right with the legal rights of third parties under primary law or with the objectives of general interest pursued by secondary legislation. The most that can be said is that collective bargaining may not be completely obstructed by Union law.

In the present context, it is particularly striking that the possibility of unqualified restriction by EU law affects not only specific collective agreements per se, but also labour disputes in which no agreement has been concluded but in which an agreement is sought, in line with national provisions governing industrial relations. In this sense, the Court has accepted without reservation not only those restrictions placed on collective bargaining arrangements by secondary law, but also, and just as unreservedly, restrictive requirements under primary and secondary law concerning national provisions on autonomy in collective bargaining.

## **3. Contrasting readings**

Some authors ultimately concur with the CJEU's position. In their view, the reference to Union law and to national laws contained in Article 28 of the Charter, results in the provision being stripped of all content and, consequently, of any protective effect.<sup>125</sup> However, there are other approaches to this question.

### **a) Link between protective effect and competence**

Some authors essentially subscribe to the CJEU's view even if they do not believe Article 28 of the Charter to be devoid of all content. It is their opinion that the intention behind the references in Article 28 to

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125. Krebber (2011: Article 28 of the Charter, number 3 f.); Folz (2012: Article 28 of the Charter, number 3).

Union law, on the one hand, and national laws, on the other, is that the protective effect of this article should be exerted in accordance with the allocation of competences as regards the right of collective bargaining.<sup>126</sup> Accordingly, Article 28 of the Charter has a substantial protective effect – the content of which remains undetermined – provided that, with regard to collective bargaining autonomy, the Union is acting on the basis of existing regulatory competence in the field of collective bargaining. That means either the EU’s Staff Regulations or rules on the minimum harmonisation of collective bargaining systems in the Member States, in accordance with Article 153(1)(f) TFEU.<sup>127</sup> This viewpoint has the staggering implication that EU provisions that are not explicitly concerned with the right of collective bargaining should not face any restriction on the grounds of the fundamental right laid down in Article 28 of the Charter.

This position is equally as restrictive as CJEU case law and would evidently reach the same conclusions as in the cases described earlier.<sup>128</sup> One of the arguments with which it must contend is the fact that the supposed narrowness of the protective effect of Article 28 of the Charter, i.e. in respect only of legal provisions resulting from competence to adopt rules on collective bargaining systems, finds no basis in the wording of the article and, consequently, cannot be reconciled with Article 51 of the Charter, which defines the general field of application of the fundamental rights. Moreover, it is not clear what, in practice, could justify exemption from the observance of fundamental rights for measures taken on the basis of a different competence.<sup>129</sup>

#### **b) Variable protection of fundamental rights**

The opposing position is that the reference to national laws and practices contained in Article 28 of the Charter should be understood as indicating that the general nature of Member States’ legal provisions on the protection of fundamental rights should take precedence, even in

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126. Thüsing and Traut (2012: 65 and 66 ff).

127. For a critical perspective, see Schmitt (2014: 195 and 210 ff) who rejects any EU competence for binding obligations relating to collective bargaining systems on account of the close link with freedom of association.

128. Cf. Thüsing and Traut (2012: 65 and 70 ff).

129. Cf. also Junker (2013: 91 and 133).

respect of Union law.<sup>130</sup> The protection under national law of the fundamental right of collective bargaining autonomy should also govern measures that fall within the scope of Union law. For German parties to collective bargaining, Article 9(3)<sup>131</sup> of the Grundgesetz [German Basic Law] would therefore take precedence over EU law. In Member States in which collective bargaining autonomy was not protected as a fundamental right, however, the guarantee inherent in Article 28 of the Charter would be meaningless.

This viewpoint is barely defensible,<sup>132</sup> as it implies that the degree to which fundamental rights are protected should vary from one Member State to the next. The story of EU-wide protection of fundamental rights enshrined in law, which began with the recognition of European fundamental rights as general principles of Union law and reached its present climax with the incorporation of the EU Charter of Fundamental Rights in primary law with binding effect, was born, however, of the CJEU's desire to ensure that variations in the protection of fundamental rights across the Member States could not be allowed to threaten the unity of EU law.<sup>133</sup> It is inconceivable that, in the area of collective bargaining specifically, the unity of European law should, at this point, be abandoned in favour of varying national levels of protection.

### **c) Article 28 of the Charter as a fundamental right**

These contrasting viewpoints to CJEU case law fail also to convince, therefore. Instead, the right of collective bargaining laid down in Article 28 of the Charter should, like any other fundamental right, contain a guarantee that can act as a counterweight against rights asserted under primary law, and be used to establish boundaries with regard to ordinary Union legislation through the requirement for the latter to meet the general condition for limitations on the rights set out in the Charter of Fundamental Rights in accordance with Article 52(1) of the Charter.

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130. Bryde (2012: 2 and 10); in response, see also Waltermann (2014: 86 and 87).

131. Bryde (2012: 2 and 14).

132. For another critical perspective, see Kingreen (2014: 49 ff).

133. Judgment of the CJEU of 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft* (ECR 1970, p. 1125, paragraph 3 f.); judgment of the CJEU (Grand Chamber) of 26 February 2013 in Case C-399/11 *Melloni*, paragraph 60.

At most it could be countered that while these structural requirements apply to fundamental rights in general, that is not the case for the right of collective bargaining. The ostensible reason for this would be its inclusion in the ‘Solidarity’ chapter of the Charter of Fundamental Rights, making it a social right. It has been said that social rights should, in fact, be classed merely as principles rather than rights.<sup>134</sup> Accordingly, their effect is more limited in range, as specified in Article 52(5) of the Charter: principles are judicially cognisable only in respect of acts implementing the respective principle, whether it is a question of interpreting these acts or ruling on their legality.

There can be no doubt, however, that Article 28 of the Charter expresses more than just a basic principle. This is particularly clear from the official explanations relating to the Charter of Fundamental Rights,<sup>135</sup> which date back to the work of the Praesidium of the Convention which drafted the Charter and the Praesidium of the European Convention. In accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, the explanations must ‘be given due regard’.<sup>136</sup> That means that any interpretation by the CJEU that deviated from the explanations and interpretation guidelines would be problematic,<sup>137</sup> would seem to be possible only in exceptional cases,<sup>138</sup> and would be subject to a high burden of justification. The explanations provide examples of some provisions that do not constitute rights but merely principles, notably environmental protection (Article 37 of the Charter), the integration of persons with disabilities and particular rights of the elderly (Articles 26 and 25 of the Charter, in both cases going beyond the equal treatment to which they are entitled under Article 21 of the Charter). Structurally speaking, these cannot be compared with the right of collective bargaining.

The right of collective bargaining is distinguished from a principle by virtue of the need to define it in law. In reality, this does pose problems

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134. As stated, for instance, in the Opinion of Advocate-General Cruz Villalón of 18 July 2013 in Case C-176/12 *Association de médiation sociale*, paragraph 50 ff., in particular 54 f.

135. Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17.

136. Judgment of the CJEU of 22 December 2010 in Case C-279/09 *DEB* (ECR 2010, p. I-13849, paragraph 32).

137. *Lenaerts* (2012: 3 and 16).

138. *Weiss* (2011: 186 and 187).

when it comes to determining the protection afforded, but it does not reduce the provision to nothing more than a principle. In fact, the very intention behind the reference in Article 28 of the Charter to Union law, on the one hand, and national laws and practices, on the other, is to underline the need for the right to be given practical definition in law.

#### 4. Incorporation of sources of international law

In the light of the foregoing, the content of Article 28 of the Charter must be such that it can stand as a counterweight to EU measures in particular and ensure that potential limitations are justified in accordance with the requirements set out in the Charter of Fundamental Rights (Article 52(1) of the Charter). An important reference point in this respect is Article 52(3) of the Charter. This provision states that those rights contained in the Charter of Fundamental Rights that correspond to rights enshrined in the European Convention on Human Rights (ECHR) should have the same meaning in the former as in the latter, but that the Charter may extend the protection of these rights. In other words: the guarantees afforded by the ECHR that correspond to rights laid down in the Charter are incorporated in the latter as their respective minimum content.<sup>139</sup> Consequently, the ECHR is the first place we must look when determining the content of Article 28 of the Charter of Fundamental Rights.<sup>140</sup>

##### a) Article 11 of the ECHR as cornerstone

The first step is to clarify which provisions of the ECHR correspond to Article 28 of the Charter. To begin with, according to the explanations concerning Article 52(3) and Article 12 of the Charter, Article 12(1) of the Charter corresponds to the guarantee set out in Article 11 ECHR.<sup>141</sup> Article 28 of the Charter, however, is not mentioned in the explanation on Article 52(3), although the list is intended to provide examples only and is not conclusive, as is evident from the way in which it came

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139. Heuschmid (2011: number 27).

140. For more detail, see Heuschmid (2014: 1 and 7 ff).

141. Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, pp. 17, 22 and 34.

about.<sup>142</sup> Moreover, the explanation on Article 28 of the Charter refers explicitly to Article 11 ECHR as regards the right of collective action. The right of collective action was seen as the logical consequence of freedom of association.<sup>143</sup> No explicit reference could be made to case law of the European Court of Human Rights (ECtHR) founded on Article 11 ECHR and concerning the right of collective bargaining, as this did not come until later. Owing to the schematic separation in the EU Charter of Fundamental Rights of freedom of association (Article 12 of the Charter) and freedom to take collective action (Article 28 of the Charter), which is not present in the ECHR, ECtHR case law on collective action should be seen as relating to Article 28 of the Charter. All considered, therefore, the rights guaranteed in Article 28 of the Charter correspond to those enshrined in Article 11 ECHR within the meaning of Article 52(3) of the Charter.<sup>144</sup>

For the ECtHR's part, this view is borne out by the reference made to Article 28 of the Charter in the Court's interpretation of Article 11 ECHR.<sup>145</sup> The approach and solutions adopted by the ECtHR with regard to the rights covered by the guarantees of Article 11 ECHR should therefore determine the way in which Article 28 of the Charter is interpreted.

Article 11 ECHR is worded as follows:

‘(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of

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142. Braibant (2001: 262 ff).

143. Braibant (2001: 177).

144. Heuschmid (2011: number 26 ff); Schubert (2013: 1 and 14); Schmitt (2014: 195 and 224); Junker (2013: 91 and 130 ff); implicit recognition in the judgment of the Civil Service Tribunal of 29 September 2011 in Case F-121/10 *Heath v ECB*, paragraph 121; see also Schmitt (2014: 195 and 225 ff).

145. Judgment of the ECtHR (Grand Chamber) of 12 November 2008, Application No 34503/97 *Demir and Baykara v Turkey*, paragraph 153 f., AuR 2009, p. 269 ff.

health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.’

Generally speaking, it should be noted that the ECtHR, working on the basis of what is known as a progressive interpretation of the ECHR, takes account not only of the Revised European Social Charter, also adopted by the Council of Europe, but of conventions concluded by other international organisations.<sup>146</sup> This is explained by the ECtHR in terms of its understanding of the ECHR as a ‘living instrument’ that must reflect the developments occurring over time at national and international level.<sup>147</sup> Accordingly, more recent case law of the ECtHR has increasingly seen traditional political rights interwoven with social considerations, thereby setting forth a concept of human rights that does not draw a categorical distinction between political and social rights.<sup>148</sup>

The case law of the European Court of Human Rights has undergone a particular evolution with regard to the right of collective bargaining.<sup>149</sup> In its rulings in the *Demir and Baykara* and *Enerji Yapı-Yol Sen* cases, and most recently borne out in its judgments in the *Sindicatul ‘Păstorul cel bun’*, *HLS* and *RMT* cases, the Court has widened its interpretation of Article 11 ECHR (‘Freedom of assembly and association’) to cover the right of collective bargaining.<sup>150</sup> In so doing, the ECtHR has referred, in particular, to the ILO Conventions, the Revised ESC and Article 28 of the Charter of Fundamental Rights. It should be stressed that this widening of the interpretation of Article 11 ECHR was effected with regard for the positions adopted by the committees responsible, respectively, for the

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146. Judgment of the ECtHR, *Demir and Baykara* (see footnote 145), paragraph 147 ff.; for more on this interpretive approach, see Iossa (2011: 245 and 276 ff); and Bücker (2011: 315 and 331 ff).

147. Judgment of the ECtHR, *Demir and Baykara* (see footnote 145), paragraph 153 f.; Heuschmid (2014: 1 and 8).

148. Nußberger (2012: 270 and 271).

149. See Fütterer (2011: 505); Deinert (2012: 45 and 79 ff); and Zimmer (2012: 114 and 117).

150. Judgment of the ECtHR, *Demir and Baykara* (see footnote 145), paragraphs 145 ff. and 154; Judgment of the ECtHR of 21 April 2009, Application No 68959/01 *Enerji Yapı-Yol Sen v Turkey*, paragraph 24 ff., AuR 2009, p. 274; Judgment of the ECtHR of 9 July 2013, Application No 2330/09 *Sindicatul ‘Păstorul cel bun’ v Romania*, paragraph 135; Judgment of the ECtHR of 8 April 2014, Application No 31045/10 *RMT v United Kingdom*, paragraph 76; and Judgment of the ECtHR of 27 November 2014, Application No 36701/09 *Hrvatski Liječnički Sindikat (HLS) v Croatia*, paragraph 49.

ESC and the ILO Conventions.<sup>151</sup> Since then, the ECtHR has consistently based its case law on the positions of these committees.<sup>152</sup>

The ECtHR's approach of referring to substantively comparable rules of international law and taking account of decisions adopted in that context is not without a legal basis. It is in keeping, in fact, with the Vienna Convention on the Law of Treaties (VCLT), which sets out rules for the interpretation of international law. The VCLT is of relevance for the ECHR, which was also adopted as an international treaty. According to Article 31(3)(c) VCLT, the interpretation of treaties should take account of 'any relevant rules of international law applicable in the relations between the parties'.<sup>153</sup> In these terms, Article 31(3)(c) VCLT sets forth the principle of 'systematic integration' in respect of the interpretation of norms. By that, it is meant that the rule of international law in question should be interpreted with respect for its place within a systematically integrated international legal order.<sup>154</sup>

Nevertheless, the question is whether the rules of international law referred to in Article 31(3)(c) VCLT also cover committee 'case law'. The argument against this is that, under the provisions of the very treaties by which it has come about, it has no legally binding effect. This absence of legally binding force is said to have occurred with the reference in Article 31(3)(c) VCLT to other rules of international law in connection with the interpretation of treaties. It makes more sense, therefore, to categorise committee case law alongside the sources of international law referred to in Article 38(1)(d) of the Statute of the International Court of Justice. In addition to judicial decisions, the 'teachings of the most highly qualified publicists of the various nations' are mentioned as 'subsidiary means for the determination of rules of law'. What applies with regard to determining rules of law, also applies to determining the content of rules

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151. Zimmer (2012: 114 and 117 ff); Heuschmid (2014: 1 and 8 ff).

152. For more detail, see Lörcher (2013: 3 ff).

153. It is only logical that the question of whether the relevant rules are binding on the State in question (for criticism of the ECtHR in this regard, see, for instance, Seifert (2009: 357 and 366)) should have no bearing, otherwise the provision subject to interpretation would not have a uniform content across all member States (as stated in Lörcher (2013: 16)).

154. McLachlan (2005: 279 ff); others are in favour of proceeding on the basis of Article 31(3)(b) VCLT, which refers to consideration of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Mechlem 2009: 905 ff).

of law. In this context, committee decisions can be understood as institutionally organised joint statements by the most learned international law scholars in the field in question, whose expert opinions are granted particular weight but have no legally binding force. Based on a classification of this kind, it is entirely consistent, methodologically speaking, that the ECtHR should, recently and for the first time since its landmark ruling in the *Demir and Baykara* case, come to a conclusion that departed from the case law adopted, after disagreeing, in this instance, with the committees' assessment.<sup>155</sup>

Taken all together, the following can be concluded in respect of the interpretation of Article 28 of the Charter: the protection afforded by Article 28 of the Charter may not fall short of that provided by Article 11 ECHR as interpreted by the ECtHR. This, in turn, must take account of substantively comparable rules of international law laid down in ILO Conventions and the ESC in order to ensure a systematic interpretation in accordance with Article 31(3)(c) VCLT. The 'case law' of the committees active within the ILO and ESC must also be taken into consideration as important sources of law within the meaning of Article 38(1)(d) of the Statute of the ICJ. The comparable provisions of the ILO Conventions and the European Social Charter will now be examined in greater detail.

#### **b) Article 6 of the Revised ESC**

In this context, the key provision of the Revised European Social Charter of 1996, and heavily influenced by the ILO Conventions,<sup>156</sup> is Article 6 of the ESC.<sup>157</sup> It reads as follows:

‘With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

1. to promote joint consultation between workers and employers;

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155. Judgment of the ECtHR, *RMT* (see footnote 150), paragraphs 26-37, 76 and 92-98; for more detail on this subject, see Ewing and Hendy (2014: 295 and 302 ff).

156. For more detail on this subject, see Evju (2013: 146 ff).

157. For more detail on this subject, see Lörcher (2011: paragraph 20 ff); Lörcher (2014: 265 ff); Schlachter (2013).

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2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
  3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;
- and recognise:
4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.'

It should be noted at this point that, irrespective of the chain of references running from Article 52(3) of the Charter to Article 11 ECHR to Article 31(3)(c) VCLT, there are additional arguments for the relevance of the provisions set out in Article 6 ESC. The official 'Explanations relating to the Charter of Fundamental Rights',<sup>158</sup> which, according to the third subparagraph of Article 6(1) of the Charter, must be given due regard, state that Article 28 is based on Article 6 ESC.<sup>159</sup> This is no genealogical fact of historical interest but a clear indication that the provisions in question constitute an important source of law.

As discussed, the content of Article 6 ESC is, in turn, lent clarity by the decisions adopted by the European Committee of Social Rights (ECSR).<sup>160</sup> Although these decisions are not directly binding on the States party, they do, as we have also seen, serve as a reference point for the interpretation of the ESC, in accordance with Article 38(1)(d) of the Statute of the ICJ, and, by the same token, are taken into consideration by the ECtHR in its interpretation of Article 11 ECHR.<sup>161</sup>

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158. See footnote 135.

159. Explanations relating to the Charter of Fundamental Rights, p. 26.

160. Schlachter (2013: 77 and 80 ff); on Article 6(4) ESC, see Deinert (2012: 45 and 75 ff).

161. Deinert (2012: 45 and 77).

That being the case, it should be noted en passant that CJEU case law on Article 28 of the Charter is not consistent, in the eyes of the ECSR, with the right of collective bargaining as guaranteed in Article 6 ESC.<sup>162</sup> The ECSR has recently voiced strong criticism of CJEU case law with specific reference to the Laval case.<sup>163</sup>

### c) ILO Conventions Nos 87 and 98

Finally, two conventions of the International Labour Organisation in particular are relevant for the interpretation of Article 28 of the Charter. They are Convention No 87 of 1948 concerning Freedom of Association and Protection of the Right to Organise<sup>164</sup> and Convention No 98 of 1949 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.<sup>165</sup> Both are among the core international labour standards.<sup>166</sup>

Unlike Article 6 ESC, neither is mentioned in the official explanations as a source of law for Article 28 of the Charter. However, as previously stated, they are relevant, under the basic principle of systematic integration and pursuant to Article 31(3)(c)VCLT, for the interpretation of Article 11 ECHR.<sup>167</sup> Without first referring to Article 11 ECHR, the CJEU has, for its part, already drawn on both conventions in order to justify the status of the right to strike as a general principle of EU law, prior to the entry into force of the Charter of Fundamental Rights.<sup>168</sup>

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162. See Evju (2012: 276 ff).

163. ECSR, Complaint No. 85/2012, Swedish Trade Union Confederation and Swedish Confederation of Professional Employees v Sweden, Decision on Admissibility and the Merits of 3 July 2013, in which it is stated that the current status of social rights in the EU legal order would not justify a general presumption of conformity of EU law with the ESC (paragraph 74) and pointed out that the fundamental freedoms guaranteed in EU law 'cannot be treated [...] as having a greater *a priori* value than core labour rights (paragraph 122).

164. For more detail on this subject, see Lörcher (2011: 100 and number 43 ff).

165. For more detail on this subject, see Vargha (2013: 1044 ff); Bruun (2014: 243 ff).

166. For more detail on this subject, see Heuschmid (2014: 1 ff).

167. See part D.II.4.a) of this report.

168. Judgment of the CJEU in Case C-438/05 (*Viking*) (see footnote 107), paragraph 43 onwards; Judgment of the CJEU in Case C-341/05 (*Laval*) (see footnote 107), paragraph 90 onwards.

With the adoption of ILO Convention No 87<sup>169</sup> concerning Freedom of Association and Protection of the Right to Organise (1948), the freedom to take collective action was recognised at an early stage and the principle laid down that the State was to refrain from any interference, in particular in accordance with Article 3 onwards. With regard to the right of collective bargaining, Article 4 of ILO-Convention No 98<sup>170</sup> concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949) stipulated as follows:

‘Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.’

For both conventions, there is a comprehensive body of case law from two committees.<sup>171</sup> The Committee of Experts comments on the interpretation of the conventions in regular reports. The Committee on Freedom of Association, meanwhile, examines complaints regarding the violation of trade union rights. For the reasons given, the case law of these two committees must also be taken into account in the interpretation of Article 28 of the Charter.

Again, it should be noted en passant that, like the ECSR, the ILO’s Committee of Experts has also criticised the CJEU’s interpretation of Article 28 of the Charter of Fundamental Rights for its inconsistency with ILO standards.<sup>172</sup>

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169. [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312232:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312232:NO)

170. [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312243:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312243:NO)

171. For a summary of these, see Deinert (2012: 45 and 82 ff), with further references.

172. This was in response to the issuing of an injunction to prevent a strike by the British pilots’ union BALPA against cross-border outsourcing by an employer. ILO Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 99th Session 2010, Report III (1A), p. 209: ‘The Committee thus considers that the doctrine that is being articulated in these ECJ judgments 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’.

## 5. Breakdown of the minimum content of international provisions

From the aforementioned provisions of international law and the case-law and positions of international committees adopted in respect of these provisions, a minimum content emerges that must be taken into account when interpreting Article 28 of the Charter as a minimum standard. Within this content, distinct defence and guarantee aspects can be identified. Both aspects relate to the essence of collective bargaining, which can be described in the following terms:

The right of collective bargaining refers to the contractual determination of employment conditions by the parties to a collective agreement. During this process of contractual determination, the parties should enjoy full autonomy.

Any aspect of the employer-employee relationship may be governed by a collective agreement. The parties to the collective agreement are not entitled, however, to lay down arrangements regarding matters of general public interest.<sup>173</sup>

The necessarily pre-existing right to form trade unions as a party to collective bargaining applies to all employees, including employees of the church,<sup>174</sup> and public servants, even when the employment relationship is of a public-law nature.<sup>175</sup>

Parties to collective bargaining are also entitled to a free choice as to the level at which the bargaining is to take place,<sup>176</sup> i.e. at central, regional, sectoral or even company level.

This essence of the right of collective bargaining benefits from two-fold protection. On the one hand, a defence aspect guards against state interference. On the other hand, a guarantee aspect offers protection from an inadequately defined legal framework.

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173. For more detail on this subject, see Schubert (2013: 1 and 17 ff).

174. Judgment of the ECtHR in *Sindicatul 'Păstorul cel bun'* (see footnote 150), paragraph 145 ff.

175. Judgment of the ECtHR in *Demir and Baykara* (see footnote 145), paragraphs 109 and 147.

176. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 988 ff.

### a) Defence aspect

The defence aspect comes into play, first of all, in cases in which the right of collective bargaining is denied. Such cases include state bans on forming trade unions, for instance for civil servants, or even the dissolution of a trade union by the State.<sup>177</sup> Another example is the refusal by a State to register a union – in this case representing church employees.<sup>178</sup> In these situations, the right of collective bargaining by individual employees or their organisations is fully denied or rendered impossible.

However, the defence aspect offers protection not only in respect of the right to form parties to collective bargaining, and trade unions in particular, but naturally also ensures autonomy in collective negotiations. Underlying this is a firm understanding of collective bargaining autonomy as an arrangement whereby the social partners alone are responsible for determining working conditions.<sup>179</sup> The right of collective bargaining therefore guards against any interference from public authorities that would restrict or impede the exercise of this right.<sup>180</sup> For instance, any amendment to or even the complete annulment of existing collective agreements by the State constitutes serious interference with the right of collective bargaining.<sup>181</sup> The same applies to state enforcement of collective bargaining,<sup>182</sup> which would exist under a system of compulsory arbitration.<sup>183</sup> Finally, state requirements as to the bargaining level also amount to interference with the right of collective bargaining.<sup>184</sup>

177. Judgment of the ECtHR in *Demir und Baykara* (see footnote 145), paragraphs 87 f. and 117.

178. Judgment of the ECtHR in *Sindicatul 'Păstorul cel bun'* (see footnote 150), paragraph 149.

179. Deinert (1999: 283), with further references.

180. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 880 f.

181. Judgment of the ECtHR in *Demir und Baykara* (see footnote 145), paragraph 156 f.; ILO Committee on Freedom of Association, 365th Report (Governing Body, 316th Session, Geneva, 1-16 November 2012), Case No. 2820 (Greece), paragraphs 784-1003 - from paragraph 990: 'as a general rule, the exercise of financial powers by the public authorities in a manner that prevents or limits compliance with collective agreements already entered into by public bodies is not consistent with the principle of free collective bargaining' (see also paragraph 994); ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 1000 ff.; see also Vargha in Thouvenin and Trebilcock (eds), *Le droit international social*, 2013, pp. 1044 and 1052, marginal number 23.

182. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 925 ff.

183. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraphs 930 and 992 ff. ('machinery').

184. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 988 ff.

## **b) Guarantee aspect**

It goes without saying that the right of collective bargaining cannot take practical effect without some state intervention. Indeed, a legal framework<sup>185</sup> is required, which, as a rule, must be created under national law, so that the right of collective bargaining can be exercised. This is what is meant by the ‘guarantee aspect’ of the right of collective bargaining.

Accordingly, both Article 4 of ILO Convention No 98 and Article 6(2) ESC impose an explicit requirement on States to promote the conclusion of collective agreements. The European Committee of Social Rights considers it a violation of Article 6 ESC if the State in question has not taken the necessary measures to that end.<sup>186</sup> The existence of an obligation to take positive action has also been noted by the ECtHR.<sup>187</sup> Since this requirement to promote collective bargaining cannot be left as a matter of policy but is a legal obligation, it is necessary to determine the criteria a legal framework for the exercise of the right of collective bargaining needs to meet. Otherwise it would never be clear when a State had fulfilled or was in breach of the legal requirement to provide the necessary machinery.

### (1) Functional purpose of the legal framework

In the absence of any other starting point, this clarification must be based on the function of the right of collective bargaining. The main function of that right is, properly speaking, to establish fair working conditions for employees. It is not the role of the national legislature or national courts to establish fair working conditions; instead the task is achieved primarily through the autonomous negotiation and conciliation process conducted by the parties to the collective bargaining, which are mobilised and legitimised by their members. This is the basis of the fundamental right of collective bargaining.

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185. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 880 ff.

186. Kollonay-Lehoczy (2013: 154 and 160 ff), with further references.

187. Judgment of the ECtHR, *Demir und Baykara* (see footnote 145), paragraph 110.

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(2) Individual functional conditions

Looking at the function of the right of collective bargaining as it has just been described, it is possible to identify the following individual elements that the national legal framework must guarantee:

In the negotiation process aimed at establishing fair working conditions, it is not just a question of reaching a joint understanding of what is appropriate or economically justifiable but is always also a matter of equitable distribution of resources. For that reason, the parties to collective bargaining must, first of all, be independent both of each other and of the State.

Secondly, both parties to the collective bargaining must enjoy freedom of contract. This freedom is not compromised by arbitration mechanisms, but it is arguably impaired by compulsory arbitration proceedings.<sup>188</sup> Inherent in freedom of contract is also the discretion to determine the bargaining level.<sup>189</sup>

Thirdly, owing to the distributive aspect of collective bargaining, trade unions need to be equipped with an effective right to strike with which to exert pressure in the negotiation process. Employers, meanwhile, have sufficient means of applying pressure in the form of contractual stability in working conditions over time and of powers of dismissal, which include at least the right to lay off workers for operational reasons. For that reason, additional weapons for employers in labour disputes are unnecessary as regards the function of the right of collective bargaining.

Furthermore, the collective agreements that have been negotiated must, fourthly, come into effect for employees. That usually occurs through the legally binding character of the collective agreement in conjunction with a duty not to engage in industrial action for the duration of the agreement. Such an arrangement is recommended by the ILO.<sup>190</sup>

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188. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 932 f.

189. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 988 ff.

190. Paragraph 3(1) to (3) of ILO Recommendation No 91 suggests that collective agreements should have a legally binding, direct and enforceable effect: see Collective Agreements Recommendation (No 91), 1951, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R091](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R091)

However, effectiveness can also be established by means of functional equivalents,<sup>191</sup> such as non-legally-binding collective agreements without a duty not to engage in industrial action.<sup>192</sup> This effectiveness must also remain intact in the face of unilateral action by an employer, such as withdrawal from an employers' association.

Finally, there needs, as a rule, to be an 'after-effect' for the transitional period between the expiry of one collective agreement and the conclusion of the next,<sup>193</sup> or a functional equivalent. Without an 'after-effect', working conditions would, once a collective agreement had ended, revert to the original starting point for the negotiation of that particular agreement, possibly to the minimum level under statutory contract law. Thus, overnight, conditions would become unfair and, simultaneously, there would be a sudden shift in bargaining power, to the great detriment of the trade unions.<sup>194</sup> With no after-effect, trade unions would have to engage in industrial action each time a collective agreement expired.<sup>195</sup> The function of establishing fair working conditions by means of an autonomous agreement among the parties to the collective bargaining would be greatly disrupted by the breaking-off of negotiations in this way.

(3) The context-dependent nature of the obligation to provide legal machinery

This listing of requirements for an operational legal framework for the right of collective bargaining does not mean that each State subject to these requirements must come up with a law on collective bargaining containing provisions covering each of these areas. The specific obligation upon a State to provide legal machinery depends on what social considerations still need to be addressed within industrial relations in the country in question.<sup>196</sup> If, in a given country, suitable collective bargaining structures have been in place for decades that meet the

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191. Cf. Deinert (1999: 279), Article 6 ESC does not specify how collective agreements should operate.

192. On mutual dependence in autonomous collective agreements in Europe, see Kempen (1994: 13 and 41).

193. On this subject, see Gamillscheg (1997: 872 ff).

194. See also Bruun (2014: 243 and 253).

195. It is certainly possible that, faced with trade unions that are willing and in a position to strike, employers will automatically agree to abide by the terms of a collective agreement that has expired, without there being any legal obligation to do so. As we have seen with regard to the legal effect of collective agreements in force, the right and ability to strike can form a functional equivalent to legally-binding status.

196. On a similar note, see Deinert (2009: 1176 ff).

functional conditions described without extensive legislation to back them up, there is no need to provide legal machinery.<sup>197</sup> It is sufficient, in this case, for the legislature or national civil courts to support the existing system by means of private-law provisions, such as the exemption of trade unions from claims for criminal damage compensation following strike action or collectively-agreed safeguards against unjust enrichment claims. It is only in the case of a relevant change in social conditions that the obligation to provide for legal machinery is triggered.

It should be noted in this context that the functional conditions listed above do not suggest an optimal model for the provision of legal machinery. That is true wherever viable functional equivalents to the standard arrangements have been given. Moreover, the aforementioned functional conditions require substantive clarification in law or in collective practice in ways that differ in each case and which cannot be deduced from the functional conditions themselves. In this sense, there is some discretion, with no obligation to justify the approach taken.

(4) Non-compliance with this obligation as a limitation requiring justification

For the avoidance of misunderstanding, it should be underlined in conclusion that, with the aid of the functional conditions of collective bargaining autonomy, the extent of the obligation that arises from the guarantees of international law to ensure ('promote') the existence of the necessary legal machinery has been determined, and is identified here as the guarantee aspect as distinct from the defence aspect. A violation of the requirement inherent in the guarantee of the right to collective bargaining to provide this legal machinery does not equate, therefore, to a violation of the fundamental right itself. Instead, non-compliance with the obligation to provide the necessary legal machinery represents a limitation of the right of collective bargaining. This is not prohibited per se, but it does require justification. It makes no difference, in this regard, whether adequate machinery has yet to be provided or whether existing, once-adequate machinery has been curtailed through legislative measures.

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197. On the ESC, in this respect, see Schlachter (2013: 77 and 87), with further references.

## 6. Conclusion

In the CJEU's case law to date, Article 28 of the Charter has barely been acknowledged as having any content in its own right. The right of collective bargaining is being limited to its very essence, i.e. the basic right to conclude collective agreements in the aim of improving working conditions, by legal rights asserted under primary law, namely the fundamental freedoms, and by secondary law. No attempt is made to find a balance with these legal rights or with the objectives of general interest pursued under secondary law.

Nevertheless, it should be borne in mind that Article 28 of the Charter is a genuine fundamental right with its own inherent guarantee. It should be weighed up against conflicting legal positions under primary law, and any limitation of this right by secondary legislation should be assessed in the light of the general criteria laid down in Article 52(1) of the Charter. This is the logical consequence of the stipulation in Article 52(3) of the Charter that the protection of rights in the Charter of Fundamental Rights should be consistent with that afforded by the ECHR. That means that the minimum protection under Article 28 of the Charter is the protection inherent in Article 11 ECHR.

In determining the minimum content afforded by Article 11 ECHR, Article 6 ESC and ILO Conventions Nos 87 and 98, as well as the 'case law' of the competent committees, are also of relevance. These rules of international law must be taken into consideration, in accordance with Article 31(3)(c) VCLT, under the principle of systematic integration, while the committee case law must taken into account as expert teachings pursuant to Article 38(1)(d) of the Statute of the ICJ. The relevance of Article 6 ESC, and that of the case law adopted as the basis for the autonomous interpretation of the ESC, to the interpretation of Article 28 of the Charter is also clear from the reference made to it in the official explanations of the Praesidium of the Convention which drafted the Charter and the Praesidium of the European Convention.

These sources of international law lay down a right of collective bargaining that has a defence aspect and a guarantee aspect. The defence aspect guards against state interference with the autonomous actions of the parties to the collective bargaining, such as compulsory arbitration or the direct amendment of existing collective agreements.

The guarantee element, which is generally referred to in the sources of international law as an obligation to ‘promote’<sup>198</sup> the machinery of collective bargaining, requires the provision of an operational framework for the exercise of the right of collective bargaining. The requirements of this framework should be determined on the basis of the function of the right of collective bargaining. That means the possibility for fair working conditions to be established effectively through autonomous negotiations conducted by the parties to the collective bargaining. The nature of the obligation to provide the necessary machinery to that end is dependent on the societal context of the country in question, as it determines what is needed by way of a legal framework.

### III. Limitation of the right of collective bargaining

In order to establish the extent to which Council recommendations issued in the context of macroeconomic surveillance and the Commission’s decisive involvement in the agreement of MoUs constitute an infringement of the right of collective bargaining as laid down in Article 28 of the Charter, it is first necessary to clarify in what sense they represent limitations within the meaning of Article 52(1) of the Charter. To that end, we shall examine the degree to which recommendations and involvement in the agreement of MoUs can be classified as limitations in the first place, when they have no legally-binding force themselves, but, instead, result in the implementation of measures in national law (subsection 1). Next it must be determined, on the basis of the measures discussed here, in what way individual recommendations and involvement in setting particular conditions in MoUs can, in practice, be classed as a limitation of Article 28 of the Charter (subsection 2).

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198. The ‘obligation to promote’ referred to here should be distinguished from the ‘obligation to protect’ that is a feature of the German doctrine of basic rights. The obligation to promote stresses the obligation to provide the necessary machinery, while the obligation to protect relates to safeguarding from infringements of fundamental rights by third parties.

## 1. Limitation or not?

It is clear that recommendations in the context of macroeconomic surveillance and MoUs are designed to bring about a change in the legislation of the country to which they are addressed. However, it could be argued that they cannot be considered to have the nature of a limitation because the demands they impose are not legally enforceable and the Member State in question may be left with some discretion as to how to implement them.

### a) Definition of a limitation

Article 52(1) of the Charter does not define the concept of a limitation and the official explanations relating to the Charter of Fundamental Rights also say nothing on this point. Analysis of the wording of the provision indicates, at most, that it is not confined strictly to measures of a legislative nature.

Existing CJEU case law generally points to a broad understanding of the term ‘limitation’, which goes beyond directly binding legislative acts. The Court has thus far concentrated on determining whether a measure is suitable and necessary; a definition of the protection afforded by the article and of the concept of limitation has barely taken shape.<sup>199</sup> However, in the case law of the ECtHR, which, according to Article 52(3) of the Charter, should be seen as the minimum level of protection, a broad understanding of the limitation of a fundamental right also predominates.<sup>200</sup>

Of interest when considering whether or not recommendations and MoUs can be regarded as a limitation is the case law on the restrictive nature of directives. With regard to directives, the CJEU examines whether the application of a directive directly or indirectly interferes with a right and whether this interference is the object or, at least, the effect of the directive.<sup>201</sup> The first conclusion that can be drawn is that

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199. Marauhn and Merhof (2013: Chapter 7, number 5 ff).

200. Marauhn and Merhof (2013: Chapter 7, number 14 ff), with further references; Fischer-Lescano (2013: 38), with further references.

201. Judgment of the CJEU of 28 October 1992 in Case C-219/01 *Ter Voort* (ECR 1992 I-5485, paragraph 36 f). (The application of Directive 65/65/EEC does not affect the freedom of

direct and intentional interference does, in all cases, constitute a limitation that must be justified. It is also evident that indirect and de facto interference may be regarded as a measure requiring justification. There are no clear criteria in this respect. In one case, the CJEU indicated that indirect interference assumes the nature of a limitation when third parties are necessarily induced to interfere with a fundamental right.<sup>202</sup> In a separate, subsequent case, it insisted that there needed to be a ‘sufficiently direct and significant effect’.<sup>203</sup>

It should be noted in particular that, as far as the CJEU is concerned, the mere fact that a directive needs to be implemented does not mean that it cannot be considered to have a restrictive effect. That is apparent, for instance, from the Court’s ruling on the Data Retention Directive.<sup>204</sup> In this judgment, the CJEU assumes, without hesitation and irrespective of the fact that the Directive must be implemented by the Member States, that limitations within the meaning of Article 52(1) of the Charter have been imposed.<sup>205</sup> The priority in this regard is to ascertain the source to which interference with the fundamental right can be attributed.<sup>206</sup> The key question, here, is whether the limitation on fundamental rights stems from the Union legislation itself or whether it is based on legal provisions adopted on the own initiative of

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expression of a third party disseminating information about a foodstuff regarded as a medicinal product under the Directive).

202. Judgment of the CJEU of 28 April 1998 in Case C-200/96 *Metronome* (ECR 1998, p. I-1971, paragraph 28) (The Court ruled that the distortions of competition alleged to have resulted from the prohibition of rental by individual authors on the basis of an exclusive rental right conferred on authors by a Community directive did not restrict the right to pursue a trade or profession because the distortions were not the direct consequence of the exclusive rental right and this right did not necessarily have the object or the effect of encouraging rightholders to prohibit the rental of their products).
203. Judgment of the CJEU of 23 September 2004 in Case C-435/02 *Springer* (ECR 2004, p. I-8663, paragraph 49) (The question of whether the obligation under EU law to publish annual accounts has a sufficiently direct and significant effect on the freedom to pursue a trade or profession remains unanswered, as it is, in any case, regarded as justified.)
204. Judgment of the CJEU (Grand Chamber) of 8 April 2014 in Case C-293/12 *Digital Rights Ireland and Others*.
205. Judgment of the CJEU (Grand Chamber) of 8 April 2014 in Case C-293/12 *Digital Rights Ireland and Others*, paragraph 34.
206. Cf., in this respect, the Opinion of Advocate-General Cruz Villalón of 12 February 2013 in Case C-293/12 *Digital Rights Ireland and Others*, paragraph 116 f. (a parallel can be seen here with the widening of the traditional definition of interference in German-language legal doctrine to include, in particular, the indirect and de facto limitation of fundamental rights, which has been driven, largely, by questions of attribution: see Holoubek (2013: 79 and 81)).

Member States, to whom discretion has perhaps been left regarding implementation of the former.<sup>207</sup>

The question arises, then, whether the requirements agreed in MoUs or set out in economic policy recommendations in the context of macroeconomic surveillance should be assessed in the light of the same criteria. It is necessary, in this regard, to take a closer look at the country-specific recommendations issued in connection with macroeconomic surveillance (b), on the one hand, and the operation of MoUs in relation to the granting of financial assistance (c), on the other.

### **b) Recommendations in accordance with Regulation No 1176/2011**

It must be established, therefore, whether requirements included in country-specific recommendations can constitute a limitation of a fundamental right. It should be noted, first of all, that recommendations, irrespective of the sometimes detailed demands laid down in them, are, in themselves, not binding under primary EU law (Article 288(5) TFEU). However, the CJEU long ago noted that even non-binding recommendations are not to be ‘regarded as having no legal effect’: national courts are bound to take them into consideration, ‘in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.’<sup>208</sup> However, it is doubtful whether they can be considered, on the basis of this case law, to have the nature of a limitation.

Instead, the priority here is to examine whether it is correct to assume that recommendations issued in the context of macroeconomic surveillance also count as non-binding measures. To that end, it is not the name by which the measure is known or the apparent form chosen but its content that is decisive.<sup>209</sup>

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207. Cf. the Opinion of Advocate-General Cruz Villalón of 12 February 2013 in Case C-293/12 *Digital Rights Ireland and Others*, paragraph 116 f.

208. Judgment of the CJEU of 13 December 1989 in Case C-322/88 *Grimaldi* (ECR, p. 4407, paragraph 18).

209. See above, paragraph 14.

Under the newly-created system for the surveillance of macroeconomic imbalances, recommendations may be issued for either preventive or corrective action. In accordance with Article 6 of Regulation No 1176/2011, the Council, acting on a suggestion from the Commission, may issue recommendations for preventive action when macroeconomic imbalances have been identified that are not yet considered excessive. If, on the other hand, excessive macroeconomic balances have been noted, the Council may specify 'a set of policy recommendations to be followed' and a deadline for the submission of a corrective action plan (Article 7(2) of Regulation No 1176/2011). If the corrective action plan is considered insufficient, the Member State is given an extended deadline to submit a new corrective action plan (Article 8 of Regulation No 1176/2011). If the corrective action plan is sufficient, a more detailed recommendation is adopted that sets out specific actions and the deadlines for carrying them out (Article 8(2) of Regulation No 1176/2011). The Commission monitors the implementation of corrective action (Article 9 of Regulation No 1176/2011). In the event of non-compliance by a Member State, the Council adopts a decision establishing this non-compliance, on the one hand, and issuing a recommendation setting new deadlines for taking corrective action, on the other (Article 10(4) of Regulation No 1176/2011).

Following on, systematically, from these provisions, Regulation No 1174/2011 lays down sanctions applicable to euro-area States that fail to take the recommended corrective action. Whenever a decision establishing non-compliance is adopted in accordance with Article 10(4) of Regulation No 1176/2011, an interest-bearing deposit is imposed at the same time (Article 3(1) of Regulation No 1174/2011). If a second decision establishing non-compliance is adopted in the same procedure, this deposit is converted into an *annual* fine (Article 3(2)(b) of Regulation No 1174/2011). An annual fine is also imposed, *inter alia*, on Member States whose corrective action plans have twice successively been deemed insufficient and which, in accordance with Article 8(3) of Regulation No 1176/2011, have been called upon in recommendations to take action (Article 3(2)(a) of Regulation No 1174/2011). The deposit or annual fine amounts to 0.1% of the GDP of the country in question in the preceding year (Article 3(5) of Regulation No 1174/2011). In the case of Germany, therefore, which had a GDP of around USD 3 635 billion in 2014, the fine would come to USD 3.6 billion, or for Greece, with a GDP

of approximately USD 241 billion in 2014, to USD 241 million, i.e. a considerable sum.

It is also significant that the system of sanctions for non-compliance with a corrective action plan is largely automated. Initially, the Council, as is frequently the case, acts merely on a recommendation from the Commission when it identifies an excessive macroeconomic imbalance, when it instructs the Member States in question to draw up a corrective action plan, and when it approves the corrective action plan and adopts it as a recommendation for that Member State. However, while non-compliance with the corrective action plan and the application of sanctions in respect of this non-compliance are, formally speaking, also the subject of Council decisions, the method followed is different: the Commission recommendation is deemed adopted unless the Council decides, by qualified majority, to reject the recommendation within 10 days of its adoption by the Commission, even if the Council is not scheduled to meet in the time period in question.<sup>210</sup>

The intention behind this automation of decisions is to ensure that the monitoring of compliance with recommendations and the application of sanctions for non-compliance are not influenced by considerations of political expediency within the Council. Monitoring and sanctions should instead be overseen by the Commission in strict adherence with the rules. The arrangements in this regard are consequently very similar to those under a directive. It is also impossible to enforce the implementation of a directive. However, the Commission can bring infringement proceedings before the CJEU in connection with this non-implementation. The infringement proceedings result not in an enforceable order to implement the directive but in a substantial fine.<sup>211</sup> Compared with that scenario, the Commission is in a far stronger

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210. This decision-making procedure is contrary to primary law: see Bast and Rödl (2012: 269 and 277); and Palm (2014: Article 136 TFEU, number 38).

211. Furthermore, just as with directives, there is no 'substitute performance' with regard to the implementation of measures that limit a fundamental right. The possibility that has emerged under CJEU case law of relying directly, after the deadline for transposition has expired, upon sufficiently detailed provisions of a Directive applies only to individuals in actions against the Member State in which the delay has occurred and not the other way round (Judgment of the CJEU of 8 October 1987 in Case 80/86 *Kolpinghuis Nijmegen*, (ECR 1987, p. 3939, paragraph 10). The same is true of claims by individuals seeking to establish the liability of a State for the failure to transpose a directive in a timely and correct fashion.

position as regards the recommendations. It is not obliged to prove the non-compliance with the corrective action plan before the CJEU; the power to identify the non-compliance and impose sanctions resides with the Commission itself. Only after the event can the Member State affected appeal before the CJEU against the decision to impose sanctions. Overall, then, there are sufficient structural parallels between a directive and a recommendation in the context of macroeconomic surveillance. It is not possible to enforce the implementation of either a directive or a recommendation of this kind. However, a failure to implement both is punishable by a fine, which, in the case of the recommendations, is not even imposed by the CJEU but by the Commission itself.

That enables us to assume that the fact that a recommendation needs still to be implemented in national law cannot prevent its being regarded as a limitation. A directive also requires implementation. The officially non-binding nature of a recommendation also carries no weight, given that sanctions can be imposed in the event of non-compliance with it. As with directives, therefore, recommendations for corrective action in the context of macroeconomic surveillance can be classified as a limitation where the relevant limitation is attributed to the recommendation itself, as an instrument of Union law, and not to the Member State in question, based on its use of the discretion at its disposal.

It could be said that the same does not apply to recommendations for preventive action, which are adopted by the Council on the basis of Article 6 of Regulation No 1176/2011. In this case, macroeconomic imbalances have been identified but have not been categorised as excessive. Non-compliance with a recommendation in this context is not subject to any particular sanctions. Under the general rules on economic policy coordination, the Commission may simply issue a warning to Member State in question (third sentence of Article 121(4) TFEU), while the Council may address further specific recommendations, which it may also decide to make public (fourth sentence of Article 121(4) TFEU).

In this sense, the situation is markedly different from that of a directive. A recommendation for preventive action also needs to be implemented. However, failure to implement it does not lead to a fine, but to a public

debate at European level. It is to be assumed that, where the implementation of a particular recommendation proves incompatible with the EU Charter of Fundamental Rights or national provisions safeguarding fundamental rights, the Member State will be able to defend itself successfully at this level, without requiring any means of judicial protection.<sup>212</sup>

Nevertheless, it can be countered that, in this case, the legislator has deliberately adopted an arrangement whereby a recommendation for preventive action could also be classed as a limitation. Article 6(3) of Regulation No 1176/2011 states the following with regard to recommendations for preventive action:

‘The recommendations of the Council and of the Commission shall fully observe Article 152 TFEU and shall take into account Article 28 of the Charter of Fundamental Rights of the European Union.’

This stipulation was not included in the versions of the Regulation originally proposed by the Commission.<sup>213</sup> It was added at the instigation of the European Parliament. The impetus for Parliament’s initiative came from the Committee on Economic and Monetary Affairs and the Committee on Employment and Social Affairs in particular.<sup>214</sup> The amendments eventually adopted were spoken of by both Parliament and the Commission as strengthening the right of collective bargaining.<sup>215</sup> In that sense, it would be strange if this amendment were

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212. This consideration does not apply, however, to judicial protection against the implementation of a recommendation: in this case the Member State is acting within the scope of Union law and, consequently, the Charter of Fundamental Rights. For that reason, implementing legislation must respect the fundamental rights guarantees enshrined in both EU and national law. See parts V and VI for further explanation.

213. See COM(2010) 527 final.

214. Cf. the report by the Committee on Economic and Monetary Affairs of 6 May 2011, Rapporteur: Elisa Ferreira, A7-0183/2011, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0183&language=EN>; individual amendments were tabled by the MEPs Olle Ludvigsson (Amendments 140 and 295), Olle Schmidt (Amendment 144), Othmar Karas und Hannes Swoboda (Amendment 148) and Philippe Lamberts (Amendment 161 and 162), see <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE458.584>.

215. Debates of the EP, 22 June 2011, item 16, p. 69 ff. (Elisa Ferreira, Rapporteur: ‘Parliament’s enhanced powers, the greater involvement of the social partners and respect for collective bargaining practices have all been guaranteed.’ (p. 70); Olli Rehn, Commissioner: ‘[...] you have inserted firm guarantees on social dialogue, respect for national traditions on collective

to have no meaning whatsoever. It appears reasonable to assume that the meaning here is, in fact, that recommendations for preventive action should also be assessed in the light of the criteria justifying interference with fundamental rights. However, this question cannot be fully explored here.

### c) Decisive involvement in memoranda of understanding

As previously mentioned,<sup>216</sup> MoUs set out detailed conditions for the recipients of financial assistance. According to the first sentence of Article 13(3) of the ESM Treaty, once the ESM has decided in principle to grant financial assistance, negotiations take place between the Commission, representing the ESM, on the one hand, and the euro-area Member State concerned, on the other. The Commission's task under this Treaty provision is to negotiate '*with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility.*' The financial instrument chosen and the financial terms and conditions are specified separately in a financial assistance facility agreement.

There is discussion as to whether the memoranda of understanding themselves are legally-binding international agreements.<sup>217</sup> It should be borne in mind, in this regard, that in international relations the form of 'memorandum' is generally chosen because the parties concerned wish to avoid a legally-binding arrangement.<sup>218</sup> To settle this question, it is advisable to make a distinction: on the one hand, there is the question of whether the conditions laid down in the MoU are legally binding to the extent that failure to comply with them will trigger liability under international law. The answer to this question is clearly 'no'. On the other

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agreements, wage formation, and the role of social partners, which we fully share.' (p. 78); Olle Schmidt: 'It is my hope that the Swedish Social Democrats will be able to support this proposal, particularly as we have managed to get rules through that safeguard the Swedish collective agreements.' (p. 87).

216. See part C.I.2.b).

217. Portugal's Constitutional Court ruled that they were in its judgment of 5 April 2013 in Case No 187/2013, paragraph 29 under heading II.E.1., <http://www.tribunalconstitucional.pt/tc/acordaos/20130187.html>; Greece's Supreme Administrative Court, however, found that they had no binding force; see Ioannidis (2014: 61 and 99), with further references; also considering them binding; Fischer-Lescano (2013: 34 ff and 39 ff); considering them non-binding; Maaßen (2013: 268 ff and 280 ff).

218. Fischer-Lescano (2013: 35), with further references.

hand, there is the question of whether non-compliance with the conditions has legal consequences. The answer to that question is obviously ‘yes’:

The aforementioned financial assistance facility agreement refers to the MoU that has been concluded and consequently makes it part of the agreement.<sup>219</sup> The General Terms for ESM Financial Assistance Facility Agreements,<sup>220</sup> which form part of every financial assistance facility agreement, govern the legal consequences of non-compliance with the conditions laid down in MoUs. On the basis of a financial assistance facility agreement, the beneficiary State is legally entitled to receive financial assistance. The legal consequence of any breach of the MoU is the loss of that entitlement to funding.<sup>221</sup> In the event of any dispute in this regard, the matter may be settled in judicial proceedings before the Court of Justice of the European Union. In comparison with the automated system of sanctions in the case of recommendations for corrective action issued pursuant to Regulation No 1176/2011, it should be stressed that this legal consequence is enforceable. In particular, it does not require any special decision to be adopted by the Board of Governors of the ESM, in which the latter could, perhaps, exercise a degree of political discretion.<sup>222</sup> MoUs consequently determine the rights and obligations of the parties, i.e. of the ESM and beneficiary State. In this sense, they are legally binding.

Now it could seemingly be argued that, while MoUs are binding between the ESM and the beneficiary State, there has, nonetheless, been no limitation of a fundamental right. After all, the Member State in question can decide not to limit the fundamental right and instead

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219. Cf. the agreement with Cyprus dated 8 May 2013 (<http://www.esm.europa.eu/assistance/cyprus/index.htm>), paragraph 2.1 of which states: ‘ESM makes available to the Beneficiary Member State under this Financial Assistance Facility Agreement a financial assistance facility (the “Financial Assistance Facility”) in the Aggregate Financial Assistance Amount subject to the terms and conditions of the MoU, the General Terms and the relevant Facility Specific Terms’ (author’s emphasis); see also Fischer-Lescano (2013: 35 ff).

220. ESM General Terms for Financial Assistance Facility Agreements of 8 December 2014. <http://www.esm.europa.eu/pdf/20141208%20-%20GT%20Financial%20Assistance%20Facility%20Agreements.pdf>

221. Cf. General Terms (see footnote 220), section 5, in particular paragraphs 5.3.4 and 5.3.7.

222. Cf. the General Terms (see footnote 220), section 5 and paragraph 5.3.4: ‘... ESM’s obligation [...] shall be subject to ... 5.3.4 the Board of Directors, after considering the most recent periodic assessment of the Beneficiary Member State by the Commission in liaison with the ECB, being satisfied with the compliance by the Beneficiary Member State with the terms of the MoU, including prior actions (if any)’.

accept the legal consequences that arise with regard to the ESM. In that respect, responsibility could be said to lie with the Member State alone. However, in practice, there is no decision to be made from the Member State's point of view. Failure to meet all the conditions laid down in the MoU would deprive the country of its entitlement to financial assistance, threatening it with bankruptcy and economic collapse. That is the drastic de facto 'sanction' for failure to comply with the conditionality laid down in the MoU.<sup>223</sup> Under these circumstances, it is clear that the fact that implementation is required and is, theoretically, a matter for the Member State to decide cannot be taken seriously as an argument. The impossible situation in which the country finds itself overshadows any national decision-making process.<sup>224</sup> There is generally no alternative but to implement the measures that have been laid down.<sup>225</sup>

That is true, however, not just from the Member State's perspective. The granting of financial assistance subject to conditions is not simply an offer with which the ESM is seeking to enter the international government financing market. Instead, through the ESM, the euro-area countries are striving to stabilise the euro area and to guard against the dangers and risks inevitably bound up with the bankruptcy of a euro-area Member State. In that sense, the ESM is not just any contracting partner looking to assert its rights under the financial arrangement. Rather it is in the fundamental interest of the EU as a whole and the

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223. A further sanction is administered outside the framework of the ESM: the ECB permits government bonds issued by a Member State to be used as collateral for loans only if the Member State is bound by conditions laid down in an MoU or by a macroeconomic adjustment programme. The exemption for Greek government bonds (see the ECB press release of 8 March 2012, [https://www.ecb.europa.eu/press/pr/date/2012/html/pr120308\\_1.en.html](https://www.ecb.europa.eu/press/pr/date/2012/html/pr120308_1.en.html)) was lifted at the beginning of February 2015 (see the ECB press release of 4 February 2015, <https://www.ecb.europa.eu/press/pr/date/2015/html/pr150204.en.html>). Non-compliance with conditions also results in ineligibility for the purchase of government bonds by the ECB in the as yet untested and controversial OMT (Outright Monetary Transactions) programme, which was announced by the ECB on 2 August 2012 and the conditionality of which was outlined in a press release of 6 September 2012 ([http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html)). On the latter, see also the reference for a preliminary ruling of the BVerfG of 14 January 2014 – 2 BvE 13/13 *inter alia*, BVerfGE 134, p. 366; and the opinion of Advocate-General Cruz Villalón of 14 January 2015 in Case C-62/14.
224. Hoffmann and Krajewski (2012: 2 and 15); see also Ioannidis (2014: 61 and 100 ff); Bogdandy (2014: 283 and 326 ff).
225. Ioannidis (2014: 61 and 102).

euro area in particular that the Member State affected should meet the agreed conditions so that it can receive the promised financial assistance. From the Union's point of view too, therefore, the Member State has no choice between compliance with the conditions or bankruptcy. It would also be a severe setback for the objective of monetary union, which is enshrined in the Treaties. For this reason, there is a clear expectation, functionally linked to the survival of the euro, that the Member State affected will abide by the conditions set out in the MoU.

The Commission is decisively involved in the conclusion of MoUs. Without its involvement, no MoU can be negotiated. The ESM Treaty does not specify any entity that could act in place of the Commission if it were to refuse to carry out the task entrusted to it.<sup>226</sup> The Commission therefore plays a significant part in determining the content of MoUs. Accordingly, the Commission is also responsible for this content. That the beneficiary Member State has agreed to this content is irrelevant. Firstly, it has, in practice, as good as no negotiating power and, consequently, just as little influence over the content. Secondly, even if the situation were otherwise, it would do nothing to lessen the significance of the Commission's involvement. Given these circumstances, and unless the scope of the EU Charter of Fundamental Rights extends to MoUs themselves, it is right for the responsibility for the observance of fundamental rights to be shifted one logical step backwards to the Commission, in the decisive role it plays, and for this decisive involvement in MoUs to be classified as an action that can constitute a limitation on fundamental rights.

## 2. Restrictive measures

### a) Requirements concerning the substance of collective agreements

Now that it has been confirmed that recommendations for corrective action and decisive involvement in MoUs can constitute a limitation of fundamental rights, it is necessary to illustrate, by means of examples, how these measures interfere, in practice, with Article 28 of the

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226. It does not even fall within the residual competence of the Board of Governors in accordance with Article 5(7)(n) of the ESM Treaty.

Charter. Easy to assess are those measures which make amendments to the provisions of collective agreements or otherwise impose requirements as regards the content of these agreements. Such demands interfere with provisions that have or could be agreed in a context of guaranteed collective bargaining autonomy. A measure of this kind gives rise to a limitation of Article 28 of the Charter that must be justified. The following are examples of such requirements:

- (1) Amendment of the Greek national collective agreement in respect of the minimum wage

The requirement for Greece to reduce by law its minimum wage level, as specified in the MoU of February 2012,<sup>227</sup> entailed amending the national collective agreement in force that had, until that point, fixed the minimum wage. This represents a clear and – given that the level was set to fall by 22% (all workers) or 32% (young people under 25) – severe limitation of the right of collective bargaining.

- (2) Duration of collective agreements

The same applies to the setting of a maximum legal duration of three years for all collective agreements, as stipulated by the same MoU with Greece of February 2012, in conjunction with the automatic termination, at the latest one year after the entry into force of the implementing law, of collective agreements that have been in force for longer than 24 months. This constitutes a restriction of the autonomy of the parties to the collective bargaining, as the duration of an agreement is a matter for the parties involved.<sup>228</sup>

- (3) Automatic correction of collectively-agreed wage increases

The same would be said of a recommendation for corrective action that resembled the recommendation for preventive action recently addressed to Belgium<sup>229</sup> stipulating that the country should ensure that

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227. Memorandum of Economic and Financial Policies, February 2012, paragraph 29 (see footnote 83).

228. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 1047.

229. See part C.III.1.b).

‘automatic corrections’ take effect when wage evolution undermines cost-competitiveness. If a correction of this kind were to be enacted in law or if a wage-setting arrangement of this kind were to be mandatory for parties to collective bargaining, this would not only compromise the autonomous negotiation of collective agreements by the social partners but would render collective bargaining completely redundant in these areas. This would represent a serious interference.

(4) Variable pay in line with a firm’s productivity

A limitation of the right of collective bargaining can also be found in the first MoU with Greece, namely in the demand for it to introduce variable pay in order to link wage development to productivity performance at company level. If this type of intervention is achieved directly through legislation, the core issue in negotiations, remuneration, is partially taken out of the hands of the parties to the collective bargaining. Even if the law merely prescribes the relevant wage differentials, that is also a limitation of the right enshrined in Article 28 of the Charter, for the parties to the collective bargaining would lose the power to decide whether or not they wanted to adopt arrangements of this kind.

**b) Changes to the legal framework**

(1) Clarification or limitation?

Recommendations for corrective action and conditions set out in MoUs are not, however, concerned solely with the provisions of existing collective agreements but also with the legal context in which the right of collective bargaining is exercised. In this regard, the assessment of a limitation must differentiate, on the one hand, between clarification of the right of collective bargaining through the definition of the necessary legal machinery, which is permitted, i.e. does not require further justification, and the limitation of this right through non-compliance with the obligation to provide the relevant machinery, on the other, which does require justification. As previously stated, the legal machinery means those provisions that are necessary for working

conditions to be comprehensively established in law. Rules that obstruct or hinder this process constitute limitations that must be justified.<sup>230</sup> That is what it is understood here by the obligation laid down in the ILO Conventions, the ESC and the case law of the ECtHR ‘to promote’ the right of collective bargaining.<sup>231</sup>

As has already been pointed out, the extent of the obligation to provide the necessary legal machinery is dependent on the societal context of the country in question. This dependence on context inevitably also comes into play in the question of distinguishing between clarification and limitation. It is impossible, therefore, to determine whether a measure obstructs or hinders the process of collectively agreeing working conditions without taking account of the social rights situation in the Member State concerned. Each Member States has a collective bargaining system that has evolved historically in a distinct way. Consequently, whether the effect of a measure is to help or, conversely, to hinder depends largely on how it fits into the existing system. The laws and practices that have developed provide the crucial context for assessing each individual measure.

- (2) Decentralisation, in particular the prioritisation of company-level collective agreements

There is some ambivalence surrounding decentralised collective bargaining. Historically, it is for good reason that more centralised bargaining levels have been the preferred option, not least sectoral bargaining.<sup>232</sup> In order to have an effective collective bargaining system, it must at least be possible for negotiations to take place at a centralised

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230. Particular difficulties, not covered separately in the course of this analysis, are presented by the distinction between clarification and limitation with regard to rules governing the relationship between competing parties to collective bargaining and their respective collective arrangements. In this sense, it is necessary to reconcile an effective right of collective bargaining, on the one hand, and freedom to take collective action for every trade union, on the other.

231. Article 4 of ILO Convention No 98; Article 6(2) ESC; Judgment of the ECtHR in *Demir and Baykara* (see footnote 145), paragraph 110; for more detail, see part D.II.5.b), in particular subsection (4).

232. Cf. Ewing and Hendy (2014: 295 and 296) who emphasise the contribution collective bargaining at sectoral level made to overcoming the economic crisis of the 1930s.

level.<sup>233</sup> At the same time, the parties to the collective bargaining must essentially be free to choose to conclude collective agreements at other levels, including company-level. That is integral to the principle of autonomy in collective bargaining.<sup>234</sup>

A line is crossed and a limitation arises when national rules prescribe the bargaining level. This may also occur indirectly. In this regard, the ILO's Committee on Freedom of Association stresses that legislation must not constitute an obstacle to collective bargaining at industry level.<sup>235</sup> The Committee on Freedom of Association consequently identified an infringement of ILO Convention No 98 in respect of the decentralisation measures in Greece. The possibility, introduced in legislation implementing the MoU, of concluding agreements at a decentralised level that generally also contain less favourable arrangements for workers was even viewed as a threat to the overall stability of the collective bargaining system and of workers' and employers' organisations.<sup>236</sup> This assessment is backed up, rather strikingly, by the statistics for Greece: the number of sectoral agreements fell from 65 in 2010 to 14 in 2013, while the number of company-level agreements rose from 227 in 2010 to 976 in 2012 and 406 in 2013, with wage cuts stipulated in 80% of the latter.<sup>237</sup> This decline began with the prioritisation of company-level agreements negotiated by parties other than those responsible for the centralised collective agreements they were replacing.<sup>238</sup> Furthermore, firms with fewer than 50 workers are now allowed to conclude company-level collective agreements.<sup>239</sup> An additional factor supporting this trend is

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233. Cf. Lörcher (2014: 265 and 284) and footnote 104 on the ECSR's practice of looking not only at the number of collective agreements concluded but also at the proportion of employees covered by them.

234. Cf. Bruun (2014: 243 and 253); Lörcher (2014: 265 and 285).

235. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 990.

236. ILO Committee on Freedom of Association, Case No. 2820 (Greece), 365th Report (see footnote 181), paragraph 997: 'The Committee underlines that the elaboration of procedures systematically favouring decentralized bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilization of the collective bargaining machinery and of workers' and employers' organizations and constitutes in this regard a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos 87 and 98.'

237. Schulten (2014: 9).

238. Thus, the relevant bargaining level is determined not by the social partners with regard for their collective interests but by the competition between them; cf. also Deliyanni-Dimitrakou (2013: 457, under heading II.2); see also Lörcher (2014: 265 and 285 ff).

239. Bakopoulos (2014: 323 and 328).

the ban in Greece on trade-union representation in firms with fewer than 20 employees.<sup>240</sup> In these circumstances, it is correct to view the prioritisation of collective agreements negotiated at company level by different collective bargaining partners as a destabilising force within the collective bargaining system.<sup>241</sup>

Given that both Article 6 ESC and the ILO Conventions lay down an obligation to promote the right of collective bargaining, it must be assumed that on the basis of the ESC, too, a limitation has occurred. The key point that results in the assessment of a limitation as such is not the possibility per se that company-level collective agreements may deviate from agreements concluded at industry level, but that the decision of whether and in what circumstances a deviation may take place to the detriment of workers in that company is taken out of the hands of the social partners.<sup>242</sup>

For someone accustomed to the German collective bargaining system, this may appear surprising at first. In Germany, cases involving competing collective agreements have long been settled through the application of the principle of speciality.<sup>243</sup> This approach was clarified after 1990 to the effect that company-level collective agreements should always be seen as more specific than universally applicable collective agreements.<sup>244</sup> However, the principle of speciality is unproblematic as regards guaranteeing the fundamental right to autonomy in collective bargaining only when it comes to resolving situations of genuine

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240. For more detail on this subject, see Travlos-Tzanetatos (2011: 325 and 329 ff); and Daskalakis (2014: 87 and 93 ff); see also subsection 3 below.

241. For an identical assessment in relation to Article 6 of the revised ESC, see Lörcher (2014: 265 and 284 ff). This question was also referred to the European Committee of Social Rights, which, for procedural reasons, was unable to issue a decision on the matter, as Greece had not ratified Article 6 ESC (ECSR, Complaint No 65/2011, General Federation of employees of the national electric power corporation [GENOP-DIE] and Confederation of Greek Civil Servants' Trade Unions [ADEDY] v Greece, Decision on the Merits of 23 May 2012, paragraph 40).

242. Deliyanni-Dimitrakou (2013: 457, under heading II.2); see also Lörcher (2014: 265 and 285 ff).

243. Judgment of the BAG of 22 February 1957, File No 1 AZR 536/55, AP No 2 on § 4 TVG *Tarifkonkurrenz* [competing collective agreements]; on other approaches taken, see Konzen, H., *Die Tarifeinheit im Betrieb*, RdA 1978, p. 146.

244. Judgment of the BAG of 20 March 1991, File No 4 AZR 455/90, AP No 20 on § 4 TVG *Tarifkonkurrenz*; on the development and characteristics of the principle of speciality, see Schliemann, H. *Tarifkollision – Ansätze zur Vermeidung und Auflösung*, NZA-Beilage 2000, pp. 24 and 30.

competition between collective agreements, i.e. conflicts between different collective agreements concluded by the same parties to collective bargaining. Under the principle of speciality, too, it is also integral to collective bargaining autonomy to retain a more centralised regulatory level for collective agreements as an effective means of avoiding the adoption of conflicting rules at company level or merely ensuring that more favourable arrangements are made. On the other hand, the principle of speciality has proven problematic in relation to co-existing collective agreements concluded by different social partners. After all, by replacing the more general universally-applicable collective agreement with the more specific company-level agreement concluded by other parties to collective bargaining, both the freedom of the parties to the superseded agreement to take collective action and the effectiveness of the collective bargaining system is undermined. Under these circumstances, the German Federal Labour Court rightly ceased to apply the case law in question,<sup>245</sup> which, until that point, had, on the basis of the principle of exclusivity of collective agreements, equated the existence of several collective agreements with instances of genuinely competing collective agreements, so that wherever there was conflict between universal and company-level collective agreements, even where these were negotiated by different social partners, the principle of speciality would be applied.<sup>246</sup>

The demands set out in the MoU with Portugal can be assessed in a different light from the legally-imposed decentralisation in Greece. With regard to the ‘organised decentralisation’ mentioned in the MoU, it should be noted that it is based on an agreement drafted with the participation of the Government, employers’ organisations and trade unions. The MoU merely stipulated that the Portuguese Government should promote the inclusion in collective agreements of a clause allowing non-union employee representatives to conclude company-

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245. Judgment of the BAG of 27 January 2010, file No 4 AZR 549/08 (A), juris, paragraph 22 ff., NZA 2010, 645; judgment of the BAG of 23 June 2010, file No 10 AS 2/10, NZA 2010, p. 778; judgment of the BAG of 7 July 2010 – 4 AZR 537/08, juris, paragraph 18.

246. While the principle of speciality, as represented here and where it is applied to co-existing collective agreements, constitutes a limitation of collective bargaining autonomy, it does not follow that every attempt to resolve a situation of multiple co-existing agreements also constitutes such a limitation. This issue will not be explored any further here.

level collective agreements without the involvement of trade unions.<sup>247</sup> There were no calls for legislation to that effect. On the basis of the MoU, therefore, the parties to collective bargaining retained control over the implementation of these measures. Under these circumstances, there was no limitation of Article 28 of the Charter in the stipulation that Portugal should carry out decentralisation.

(3) Non-union employee representatives as a party to collective bargaining

The ILO Committees differ in their opinion as to whether non-union employee representatives should be permitted to act as a party to collective bargaining. There are no concerns regarding non-union actors provided that they are able to act as a partner in collective negotiations only where there is no trade union representation. The intention, in this sense, is to avoid competition between trade unions and other employee representatives.<sup>248</sup> The case law of the European Committee of Social Rights in respect of the ESC reveals similar reasoning.<sup>249</sup>

The criticism of the measures in Greece is based, consequently, on their impact on the system as a whole.<sup>250</sup> It is true that, in the implementation of the fifth MoU of October/December 2011, non-union employee representatives were, generally speaking, permitted only where there was no existing trade union representation. The MoU had already prescribed the application of subsidiarity in this regard. What had not been taken into account, however, was the fact that, under Greek collective bargaining legislation, no trade union representation could be established in firms with fewer than 20 employees. This legal provision remained in force, thus granting non-union representatives a monopoly on collective bargaining in small enterprises. This monopoly is strengthened by the fact that company-level collective agreements may now deviate from sectoral or occupational collective agreements, including to the detriment of workers. Working conditions in these

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247. Memorandum of Understanding on Specific Economic Policy Conditionality of 17 May 2011 (see footnote 76), paragraph 4.8.ii.; see also part C.III.3.b) of this report.

248. ILO Committee on Freedom of Association, Digest, 5th rev. ed. 2006, paragraph 994 ff; analysed by Jacobs (2014: 171 and 187).

249. See Lörcher (2014: 265 and 287 ff); Jacobs (2014: 171 and 191).

250. For more detail on the following, see Daskalakis (2014: 87 and 93 ff); and Bakopoulos (2014 : 323 and 328) with footnote 35.

small firms were previously governed at sectoral level. The extension of sectoral agreements played an important part in this respect. Overall, it rendered the absence of trade union representation in small enterprises irrelevant. That is changing with the possibility for firms of any size to conclude company-level collective agreements, the general precedence of the latter over other agreements, restrictions to the extension of collective agreements and the authorisation of non-union employee representation. The figures speak for themselves in this regard: of the 975 company-level collective agreements concluded in 2012, 701, i.e. around 72 %, of them were negotiated by non-union in-house employee representatives.<sup>251</sup> This represents a breach of the obligation enshrined in Article 4 of ILO Agreement No 98 to promote the machinery of collective bargaining, a fact that has already been criticised on two successive occasions by the ILO's Committee of Experts.<sup>252</sup>

The MoU with Portugal of May 2011 also called for a more prominent role for non-union employee representatives. Firstly, Portugal was required to implement a tripartite agreement that already made provision for changes to that effect, namely the possibility for works councils to negotiate mobility conditions and working time arrangements. Secondly, it was necessary to promote the inclusion in sectoral collective agreements of clauses allowing works councils to conclude collective agreements without the involvement of trade unions. Finally, it was made possible for collective agreements to be negotiated by works councils not just in very large firms, but also in those with a minimum of 250 employees.<sup>253</sup>

The granting of regulatory autonomy with regard to determining geographical mobility and working time arrangements to in-house representatives can be seen as a clarification of the scope of regulatory autonomy enjoyed by the parties to collective bargaining. However, it

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251. Bakopoulos (2014: 323 and 328) with footnote 36.

252. Report of the ILO Committee of Experts on the Application of Conventions and Recommendations – observations adopted in 2013 and published at the 103rd session of the International Labour Conference (2014), and its earlier observations adopted in 2012 and published at the 102nd session of the ILC (2013), [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3149782](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3149782)

253. Memorandum of Understanding on Specific Economic Policy Conditionality of 17 May 2011 (see footnote 76), paragraph 4.8.; see also part C.III.3.b) of this report.

should be considered to all intents and purposes as a demand on Portugal to make legislative provision for an opt-out clause in sectoral collective agreements in favour of negotiation by works councils.<sup>254</sup> Nevertheless, the stipulation is merely that the parties to the collective bargaining should be urged to include the relevant clauses in collective agreements. In this sense, the autonomy of the collective bargaining parties remains intact, in spite of the requirement laid down in the MoU.

(4) Restrictions on the extension of collective agreements

The extension of a collective agreement means that its scope can be widened beyond the original parties to the agreement. This does not entail a limitation of the right of collective bargaining with regard to the parties to the extended collective agreement.<sup>255</sup> However, a limitation in respect of competing parties to collective bargaining does arise when a collective agreement made generally applicable by extension takes precedence over other collective agreements.<sup>256</sup> An extension of this kind therefore requires justification. If, however, the extension of the collective agreement constitutes a limitation of the right of collective bargaining requiring justification, the restriction of this extension, for instance by attaching stricter conditions for its application or suspending the use of this instrument for a fixed period of time, serves to remove the limitation, without, itself, being subject to any justification.

Nevertheless, that is not to say that every instance in which the extension of a collective agreement is restricted is of no consequence. It can alter the backdrop against which the effectiveness of a legal framework for collective bargaining is judged. In Greece and Portugal, the regular extension of collective agreements is central to the functioning of the collective bargaining system. From Greece's point of view, therefore, the

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254. Cf. Linsenmeier (2015: Article 9 GG, number 60) on the unconstitutional nature of legally-sanctioned opt-out clauses for firms under German labour law.

255. The degree to which the extension of collective agreements undermines what is sometimes known as the 'negative freedom of association' of employers and employees not bound by a collective agreement will not be explored further here. It should be noted merely that 'negative freedom of association' means the freedom, in law and in practice, not to join a trade union; it does not refer to the freedom to make oneself subject to enforceable provisions of collective agreements. The freedom to enter into an employment contract is affected, however (cf. on this subject, Kamanabrou (2011: 3 and 68 ff)).

256. Cf. Kamanabrou (2011: 3 and 71).

inability now to extend collective agreements is considered the reason for the increasing insignificance of sectoral agreements, the ‘multiple fragmentation’ of the collective bargaining landscape and ‘unfettered and extreme competition’.<sup>257</sup> Similarly, it is predicted that the introduction in Portugal of a 50% quorum<sup>258</sup> will see this mechanism largely allowed to fall into disuse, accompanied by an ever-more rapid erosion of the collective bargaining system.<sup>259</sup>

If the effectiveness of a collective bargaining system is dependent on the extension of collective agreements, then the legal basis for this extension, exceptionally in this instance, forms part of the legal framework for the exercise of the right of collective bargaining which it is necessary to promote. If the effectiveness of the legal framework is significantly undermined by restrictions on the extension of collective agreements, there must be some form of compensatory measure to offset this loss of effectiveness. Without such a measure in place, the obligation to provide the necessary legal machinery has not been met.<sup>260</sup> In a situation of this kind, the restriction on the extension of a collective agreement gives rise to a limitation of the fundamental right of collective bargaining. That is evidently the case in Greece and Portugal.

(5) Reduction of the ‘after-effect’ of collective agreements

As previously stated, the ‘after-effect’ of a collective agreement, or a functional equivalent, is an integral part of the machinery required for the exercise of the right of collective bargaining. Based on this finding, the question now is whether a reduction in the legal ‘after-effect’ of collective agreements, as stipulated by the MoU with Greece concluded in February 2012, constitutes a limitation requiring justification.<sup>261</sup>

It should be noted, first of all, that the legal reduction of a collectively-agreed ‘after-effect’ represents interference with an existing collective

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257. Daskalakis (2014: 87 and 101 [author’s translation]).

258. The employers party to the collective agreement must employ at least 50% of the employees covered by the agreement for it to be eligible for extension; see part C.III.4. of this report, with further references. The equivalent requirement has only recently been removed from German law.

259. Seifert (2014: 14 and 23).

260. On a similar note, see Bruun (2014: 243 and 256).

261. The legal reduction of a collectively-agreed ‘after-effect’ would certainly be classed as interference with the provisions of existing collective agreements.

agreement and can therefore, without doubt, be classed as a limitation. The same applies to a restriction of future agreements. It is considered interference if the agreement of provisions that are, in themselves, permissible is declared invalid with regard to particular subject-matter.

In this sense, it must be clarified whether the legal restriction of an 'after-effect' already set out in law, as Greece was asked to carry out in the MoU of February 2012, constitutes a limitation.<sup>262</sup> Originally, the arrangements laid down in collective agreements continued to apply by law for a six-month duration and subsequently remained in force as part of individual employment contracts. This statutory period of continued validity was shortened from six to three months. At the end of that period, however, not all arrangements remained in force as part of individual employment contracts, but only the basic salary, along with four specific allowances relating to seniority, children, studies and hazardous work. Furthermore, only the national minimum working conditions applied after this point.<sup>263</sup> It is our view that this measure constitutes a limitation. The restriction of the after-effect gives rise to a sudden shift in bargaining power as a result of the mere passing of time, prompting an unjustifiable disruption of the negotiation process and thereby undermining the purpose of collective bargaining autonomy.<sup>264</sup>

No such conclusion can be drawn with regard to the MoU with Portugal of May 2011. The requirement to review the desirability of the current 'after-effect' arrangement under Portuguese law is only a preliminary measure, the outcome of which has yet to be seen.

#### (6) Arbitration requirements

The MoU of February 2012 stipulated that Greece should make specific adjustments scaling back its arbitration mechanisms. Compulsory arbitration was to be abolished, while voluntary arbitration should concern basic remuneration only. All other working conditions could be determined only by means of collective agreement or would remain

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262. In contrast, the MoU concluded with Portugal merely required the country to review whether it would be desirable to reduce the 'after-effect' currently in application; see part C.III.5 of this report.

263. Bakopoulos (2014: 323 and 329).

264. See part D.II.5.b)(2) of this document.

unregulated.<sup>265</sup> In their arbitration proceedings, arbitrators should be obliged to serve the common interest, by taking account in their decisions of economic and financial considerations.<sup>266</sup>

The requirement for compulsory arbitration to be abolished raises no misgivings. In fact, it brings the situation in line with that advocated by the ILO conventions and the ESC.<sup>267</sup>

However, at the same time, mechanisms for voluntary arbitration should be promoted, as explicitly stated in Article 6(3) ESC. The stipulation that arbitrators may not rule on elements of remuneration other than the basic wage is contrary to this provision. It limits arbitration by removing other working conditions from its remit altogether. Given that the rules of voluntary arbitration, including the subject-matter and scope the arbitration should cover, also fall essentially within the autonomy of the social partners, this restriction constitutes a limitation of Article 28 of the Charter.<sup>268</sup>

The additional requirement that arbitrators must serve the common interest by taking account in their decisions of economic and financial considerations undermines the autonomy of the parties to collective bargaining. If the social partners themselves were obliged to pursue objectives of common interest, that would represent a violation of their autonomy.<sup>269</sup> If arbitrators are required to pursue such goals, the parties to the collective bargaining are surrendering their autonomy, in this respect, whenever they engage in arbitration proceedings. Consequently, according to ECSR case law, the issuing of binding requirements concerning arbitration decisions is incompatible with Article 6(3) ESC.<sup>270</sup> It therefore also constitutes a limitation of Article 28 of the Charter.

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265. Bakopoulos (2014: 323 and 329); the Greek Administrative Court ruled in judgment 2307/2014 that this restriction of arbitration to basic remuneration was unconstitutional, as above, p. 331.

266. See part C.III.6 of this document.

267. Ironically, however, the Greek Supreme Administrative Court (in Decision 2307/2014 of 24 June 2014) held that the abolition of compulsory arbitration was incompatible with Art 22(2) of the Greek Constitution, as it would lead to regulatory gaps (Bakopoulos 2014: 323 and 331).

268. Cf. Bruun (2014: 243 and 258); and, on Article 22(2) of the Greek Constitution, the Greek Supreme Administrative Court (see previous footnote).

269. On Article 9(3) GG, see Dieterich (2002: 1, 10 and 13 ff).

270. Schlachter (2013: 77 and 87).

### 3. Conclusion

Both Council recommendations for corrective action in accordance with Regulation No 1176/2011 and the Commission's decisive involvement in MoUs have the nature of a limitation. The fact that recommendations and MoUs need to be implemented in national law does not invalidate this conclusion, as non-compliance with recommendations or the conditions laid down in MoUs results in legislative and, in the case of MoUs, practical sanctions. With regard to both measures, there is a clear expectation of compliance, based on the pursuit of EU objectives, whereby a Member State is not simply free to choose legislative sanctions over adherence to recommendations and MoU conditions.

Limitations requiring justification arise, first of all, when there is interference with existing collective agreements, such as legislation imposing wage cuts or the restriction of the duration of a collective agreement. The same applies to other substantive requirements concerning the content of collective agreements, for instance, productivity-based wages or variable pay in line with a firm's productivity.

Limitations requiring justification also occur where the obligation to equip the collective bargaining system with adequate machinery has not been met. These limitations can be found in the general precedence granted to company-level collective agreements, the substantive restriction of voluntary arbitration and the repeal of legislative provisions governing the 'after-effect' of collective agreements. Depending on the societal context, restrictions on the extension of collective agreements and the authorisation of non-union employee representatives as a party to collective bargaining may also be characterised as limitations.

## IV. Justification of the limitations

The measures identified in the previous sections constitute a limitation of Article 28 of the Charter and therefore require justification. The criteria to that end are to be found in Article 52(1) of the Charter and Article 11(2) ECHR (section 1). A limitation is justified, in the first instance, as long as the measures in question are 'provided for by law', i.e. founded, more specifically, on a legal basis adopted in accordance

with the division of powers (section 2), and respect the essence of the right of collective bargaining (section 3). If that is the case, the measures must also serve a legitimate objective (section 4) and be proportionate (section 5).

## 1. Criterion for assessment: Article 52(1) of the Charter in conjunction with Article 11 ECHR

Article 52(1) of the Charter of Fundamental Rights sets out the general rules concerning the limitation of the fundamental rights laid down in the Charter:

‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

It follows from Article 52(3) of the Charter that the provisions laid down in the Charter that correspond to rights guaranteed in the ECHR must have at least the same meaning and scope as the latter.<sup>271</sup> As demonstrated, Article 11 ECHR corresponds, in this respect, to Article 28 of the Charter.<sup>272</sup> According to Article 11(2) ECHR, the right to engage in collective bargaining and take collective action is subject to the following restrictions:

‘No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful

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271. Heuschmid (2011: number 25).

272. See section II.4.a) of this document.

restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.’

These restrictions imposed by the ECHR should also be taken into account when determining whether a limitation of Article 28 of the Charter is justified. The explanations on Article 52(3) specify that this requirement for consistency between provisions also extends to the limitation of rights.<sup>273</sup> The CJEU has explicitly endorsed this viewpoint.<sup>274</sup> It also makes logical sense. Otherwise the guarantee inherent in the right of collective bargaining could be reduced in practice by means of tighter restrictions under Union law.

## 2. Legal basis

Article 52(1) of the Charter requires, first of all, that limitations must be ‘provided for by law’. A legal basis in substantive terms is sufficient. It is not necessary for Parliament to have been involved.<sup>275</sup> The ECtHR also understands the requirement for a legal basis set out in Article 11(2) ECHR to mean a law not in the formal but in the material sense. Delegated legislation, such as administrative regulations adopted by the relevant authorities, is adequate in this regard.<sup>276</sup> Even a church statute in conformity with the Constitution of the country in question counts as a legal basis.<sup>277</sup> In this regard, the criterion under Article 11(2) ECHR does not exceed that under Art 52(1) of the Charter of Fundamental Rights.

### a) Recommendations for corrective action in accordance with Regulation No 1176/2011

The main requirement of the legal basis for a limitation of a fundamental right is that it should be consistent with the division of powers. It is debatable whether, in the case of Article 7 of Regulation

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273. Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, pp. 17 and 33.

274. Judgment of the CJEU (Grand Chamber) of 9 November 2010 in Joined Cases C-92/09 und C-93/09 *Schecke* and *Eifert* (ECR 2010, p. I-11063), paragraphs 1 and 66, EuZW 2010, p. 939).

275. See above, paragraphs 1 and 66; a Commission Regulation, for instance, is enough (paragraph 51 f.)

276. Judgment of the ECtHR in *Enerji Yapı-Yol Sen* (see footnote 150), paragraph 26 f.

277. Judgment of the ECtHR in *Sindicatul ‘Păstorul cel bun’* (see footnote 150), paragraph 151 ff.

No 1176/2011, the legal basis for recommendations for corrective action, this requirement has been met.

In the first instance, it could be argued, with reference to Article 153(5) TFEU, that recommendations that relate specifically to the reorganisation of collective bargaining systems do not fall within the Union's competence. After all, Article 153(5) TFEU excludes pay, the right of association and the right to strike from the areas of labour law over which it has harmonising powers. If Article 153(5) TFEU were understood to refer to an area outside the scope of Union law as a whole, recommendations for corrective action issued pursuant to Regulation No 1176/2011 would be contrary to the division of powers where they concerned the right of collective bargaining. However, Article 153(5) TFEU excludes the aforementioned subject-matter only in respect of the adoption of directives setting out minimum requirements in accordance with Article 153(2) TFEU. EU provisions that affect pay, the right of association and the right to strike and are adopted on the basis of other powers are unaffected.<sup>278</sup> The same must apply to recommendations, which are issued on the basis of competences laid down elsewhere, namely in Article 121(4) TFEU. Article 153(5) TFEU presents no obstacle in this respect.<sup>279</sup>

It has already been demonstrated at length elsewhere that the adoption of Regulation No 1174/2011, which governs the sanctions for non-compliance with recommendations for corrective action, represents a breach of the Union's powers.<sup>280</sup> The application of sanctions in respect of economic policy recommendations issued in the context of the economic policy coordination laid down in the Treaties is not covered by Article 121 TFEU. In that regard, we have yet to examine the extent to which the rules on the issuing of recommendations for corrective action set out in Regulation No 1176/2011 can be seen as a breach of powers. Looking in isolation at Regulation No 1176/2011, which does

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278. Cf. the judgment of the CJEU in Case C-341/05 *Laval* (see footnote 107), paragraphs 86-88; the exercise of an alternative power may not, however, be used as a pretext for circumventing Article 153(5) TFEU (Opinion of Advocate-General Mengozzi of 23 May 2007 in Case C-341/05 *Laval*, paragraph 57). See also Heuschmid (2011: number 7).

279. Schmitt (2014: 195 and 210); for a different view see Seifert (2014: 14 and 25 ff) who perceives in the EU's economic policy instruments as a whole a 'cold harmonisation of wage policy' and, consequently, a circumvention of Article 153(5) TFEU.

280. Bast and Rödl (2012: 269 and 274 ff).

not make any provision for sanctions, it would, perhaps, be easy to conclude that the recommendations, which the Regulation itself makes clear are non-binding, are covered by the Treaty stipulation contained in Article 121(4) TFEU. However, it is not appropriate here to consider it only in isolation. Regulations Nos 1176/2011 and 1174/2011 form a functional unit. A particular macroeconomic surveillance procedure initiated in the event of an excessive macroeconomic imbalance in accordance with Regulation No 1176/2011 makes sense only in the context of the sanctions applied on the basis of Regulation No 1174/2011 in respect of non-compliance with a recommendation. In view of this functional link between the recommendations for corrective action issued in accordance with Regulation No 1176/2011 and the rules on sanctions laid down in Regulation No 1174/2011, not only the latter but also the former should be regarded as a breach of powers.

**b) Decisive involvement in memoranda of understanding**

As far as the legal basis for the Commission's decisive role in the conclusion of MoUs is concerned, it should be noted, first of all, that this is derived from Article 13(3) and (4) of the ESM Treaty. In this sense, its actions have a legal basis, that is to say a basis in international law. The Member States were also authorised to found the ESM.

However, the basis found in the ESM Treaty would not be adequate if the Commission's actions under the ESM were prohibited under EU law. The CJEU has established the following requirements for the conduct of EU institutions to which tasks are entrusted under international law:<sup>281</sup> firstly, the area in which the tasks have been delegated must not fall under the exclusive competence of the Union. Secondly, the Commission's task must remain within the framework of coordinating actions taken by Member States or managing financial assistance. Finally, the tasks performed must not alter the essential character of the powers conferred by the TEU and TFEU.

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281. Judgment of the CJEU in Case C-370/12 *Pringle* (see footnote 93), paragraph 158.

The CJEU was very clear in the *Pringle* ruling that the Commission's activities in connection with the ESM met all these criteria: the duties carried out by the Commission under the ESM Treaty fall under economic policy, for which the Union does not have exclusive competence. In terms of the restriction of the Commission's activities to coordination and management, the Court underlines the fact that the MoU commits only the ESM. It is also significant that the Commission is genuinely acting solely on behalf of the ESM and that the EU itself is in no way committed. Moreover, the Commission has no powers under the ESM to take binding decisions, as this authority lies ultimately with the Board of Governors (see Article 13(4) of the ESM Treaty). It is certainly open to question whether the duties performed by the Commission are really confined to coordination and management when it alone is entrusted with the task of negotiating the MoU, if not also of concluding it.<sup>282</sup> It is not clear, however, on the basis of which aspects a larger institutional role for the Commission within a different context would result in its actions being deemed unacceptable under EU law.

Finally, the CJEU ruled that the tasks carried out by the Commission did not alter the essential character of its powers. Under Article 17 TEU, it is incumbent on the Commission to promote the general interest of the Union and to oversee the application of EU law. Given that the ESM's purpose is to ensure the stability of monetary union, the Commission is promoting the general interest of the Union through its role within the ESM. The fact that MoUs must be consistent with acts of Union law is stipulated by the ESM itself (in the second subparagraph of Article 13(3) of the ESM Treaty).

It has been argued in response that, in view of the requirements pertaining to labour law, the essential character of the Commission's powers has, in fact, been altered in terms of both the collective powers of the Union and its powers as an institution. The essential character of its institutional powers is said to have been altered, as the European Parliament has played no part, contrary to the provisions of

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282. The CJEU has, however, fully recognised the strong institutional role played by the Commission within the ESM: judgment of the CJEU in case C-370/12 *Pringle* (footnote 93), paragraph 161: '...duties [...] important as they are ...'.

Article 153(2) of the TFEU.<sup>283</sup> However, the involvement of Parliament on the basis of Article 153(2) TFEU relates to the adoption of directives harmonising minimum requirements in particular areas of labour law. The negotiation of the conditions attached to financial assistance awarded to individual countries cannot be considered as harmonisation of this kind. This indicates that the Commission's actions under the ESM may not have altered the essential character of its institutional powers within the EU as far as Parliament's rights are concerned.

With regard to the EU's collective powers, reference could again be made to Article 153(5) TFEU.<sup>284</sup> However, it has been pointed out already that this provision excludes the subjects of pay, the right of association and the right to strike in the first instance only from the harmonisation of minimum requirements by means of directives pursuant to Article 153(2) TFEU. Action on the basis of competences defined elsewhere in the Treaty is not ruled out, therefore. If, hypothetically speaking, the ESM Treaty were part of Union law, Article 153(5) would certainly not stand in the way of any action by the EU.

Nevertheless, it is the case that other legal bases in Union law may not be used to circumvent the restriction arising from Article 153(5) TFEU. For instance, a minimum harmonisation across the Member States of the right to strike which, in accordance with Article 153(5) TFEU, could not be based on Article 153(2) TFEU, could not be adopted in the form of a measure harmonising the freedom to provide services. Whether the activities carried out under the ESM Treaty are comparable with a circumvention of this kind appears doubtful. While it was explained earlier that the policy of stabilisation is underpinned by a flexible, productivity-based wage model,<sup>285</sup> that is not sufficient cause to view the conditionality that the Commission negotiates with individual Member States requiring financial assistance as an alternative means of introducing in practice the harmonisation referred to in Article 153(2) TFEU.

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283. Fischer-Lescano (2013: 42 ff); the European Parliament also criticised its lack of involvement in (paragraph 2 of) its resolution of 13 March 2014 on employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries (2014/2007(INI)).

284. Fischer-Lescano (2013: 41 ff); Seifert (2014: 14 and 25 ff).

285. See part C.III.1 of this document.

In any case, the following observations can be made: the requirement that any limitation of the right of collective bargaining must have a legal basis is not met with regard to recommendations for corrective action issued in accordance with Article 7 et seq. of Regulation No 1176/2011 in conjunction with Regulation No 1174/2011. The legal basis for the Commission's decisive involvement in the agreement of MoUs, meanwhile, should be found in the relevant provisions of the ESM Treaty.

### 3. Respect for the essence of a right

According to the first sentence of Article 52(1) of the Charter EU-GRC, limitations cannot be justified if they do not respect the essence of a right. The measures under examination here cannot, therefore, be subject to any further assessment if they ultimately leave no room whatsoever for collective bargaining. In this sense, it should be noted that both the conditions laid down in MoUs and recommendations for corrective action do not, based on the examples discussed here, render collective bargaining impossible, but merely restrict it in part. Only the accumulation of restrictive measures in Greece's case could be considered a possible violation of the essence of the right of collective bargaining. In that respect, the de facto exclusion of trade unions from collective bargaining in small enterprises alongside the promotion of company-level negotiations as the main bargaining level amounts to a grave situation. However, while this has a significant destabilising effect on the system, collective bargaining is not rendered completely impossible as a result. In this sense, it cannot be said that the essence of Article 28 of the Charter has been violated.

### 4. Legitimate objective

Limitations of fundamental rights must meet a legitimate objective. Article 52(1) of the Charter refers to 'objectives of general interest recognised by the Union'. The CJEU is essentially generous in its interpretation of the general interest.<sup>286</sup> Accordingly, any limitation of the

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286. See Lenaerts (2012: 3 and 10).

right of collective bargaining must serve legitimate aims as defined by Article 11 ECHR,<sup>287</sup> and these are also subject to a broad interpretation by the ECtHR. The ‘prevention of disorder’ includes the enforcement of legally prescribed bans in order to prevent discrepancy between legislation and practice<sup>288</sup> and to protect ‘the rights of others’ (e.g. the autonomy of the Romanian Orthodox Church under Article 9 ECHR<sup>289</sup>). In particular, the ECtHR has ruled that the implementation of an economic adjustment programme negotiated with the Troika in order to achieve economic recovery was in the public interest.<sup>290</sup>

The recommendations issued in the context of the surveillance of macroeconomic imbalances seek directly to prevent or correct these imbalances. They should, according to their primary-law basis in Article 121(4) TFEU, ultimately serve to ensure the ‘proper and smooth functioning of the economic and monetary union’ (recitals 3 and 17 of Regulation No 1176/2011). This proper functioning is further said to entail ‘achieving and maintaining a dynamic internal market’ (recital 3 of Regulation No 1176/2011). At the same time, the surveillance of macroeconomic imbalances is intended to introduce a pre-emptive aspect to budgetary surveillance (see recital 7 of Regulation No 1176/2011).<sup>291</sup>

There is no doubt that the aforementioned goals are legitimate objectives. Ultimately, they are functional requirements of economic and monetary union, the founding and, consequently, the preservation of which, is one of the EU’s Treaty objectives (Article 3(5) TEU). Constitutional criticism of the basic architecture of monetary union, such as the absence of a ‘transfer union’, which would offer political alternatives to the prevailing emphasis on budgetary consolidation and

287. Article 11 ECHR lists the following: ‘national security or public safety’, ‘prevention of disorder or crime’, and ‘protection of health or morals’. Similarly, the general provision in the European Social Charter (Article G(1)) refers to ‘protection of public interest’, ‘national security’, ‘public health’ and ‘morals’. Hence the equally restrained assessment by the ECtHR of the measures taken in Greece: Complaint No. 65/2011, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v Greece, Decision on the Merits of 23 May 2012, paragraphs 16-18. On the limitations of Article 6 ESC, see Lörcher (2014: 265 and 279 ff).

288. Judgment of the ECtHR in *Demir und Baykara* (footnote 145), paragraph 118.

289. Judgment of the ECtHR in *Sindicatul ‘Pastorul cel bun’* (footnote 150), paragraph 158.

290. Judgment of the ECtHR of 8 October 2013, Applications Nos 62235/12 and 57725/12 *Da Conceição and Santos Januário v Portugal*, paragraph 26 (a Portuguese case brought by pensioners against a reduction, initially for two years, in holiday and Christmas subsidies).

291. On the structural parallels, see part C.II.3 of this report.

Member States' competitiveness on the global market, make no difference in this regard.

Through its involvement in the agreement of MoUs, the Commission is pursuing objectives laid down in EU law, in particular that of stabilising the monetary union. This has already been discussed in connection with the second sentence of Article 125(1) TFEU and the second sentence of Article 136(3) in order to illustrate that the Commission's actions fall within the scope of Union law. It follows, conversely, that the Commission's actions in this regard also meet an objective of general interest recognised in EU law.

## 5. Proportionality of the limitations

The key question, therefore, is whether the recommendations and conditions deemed to constitute a limitation of Article 28 of the Charter are proportionate to the objectives of 'proper and smooth functioning of the economic and monetary union' (Article 121(4), Article 136(1) TFEU, and recitals 3 and 17 of Regulation No 1176/2011) and 'the stability of the euro area' (Article 136(3) TFEU).

### a) Depth of assessment

German legal doctrine tends to differentiate three stages of assessment, namely the suitability, necessity and proportionality *stricto sensu* (in the narrow sense) of a limitation of a fundamental right. The CJEU, meanwhile, applies in its settled case-law only the criteria of suitability and necessity under the principle of proportionality.<sup>292</sup> Consequently, Article 52(1) of the Charter refers to only two elements of the principle: any limitations must 'genuinely meet' the objectives and be 'necessary'. An in-depth test of proportionality *stricto sensu*, namely the means-ends relationship or the fair balance between the general public interest and the limitation of a right, has, however, long been missing from CJEU case law on fundamental rights. Nevertheless, since the entry into

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292. Judgment of the CJEU (Grand Chamber) of 8 June 2010 in Case C-58/08 *Vodafone and Others*, (ECR 2010, p. I-4999, paragraph 51 ff., with further references); Judgment of the CJEU in Case C-293/12 *Digital Rights Ireland and Others*, paragraph 46 (see footnote 204).

force of the EU Charter of Fundamental Rights, a tendency to carry out a more detailed proportionality test has been evident.<sup>293</sup> This more extensive assessment weighing up the interests at stake can be seen, for instance, in the *Schecke*<sup>294</sup> and *Digital Rights Ireland*<sup>295</sup> rulings. In these cases, the CJEU discusses at length whether, instead of the measure adopted, a similarly suitable but less restrictive measure could have been taken, and therefore comes appreciably close to carrying out a test of proportionality *stricto sensu* as it is understood under German law. The Court found certain provisions of a directive to be disproportionate, firstly, because they entailed wide-ranging and particularly serious limitations of fundamental rights and, secondly, because they included no effective measures to ensure that the limitations would remain confined to what was strictly necessary.<sup>296</sup> In view of the scale of the interference with the fundamental rights in question, the Court called for the EU legislation in question to lay down clear and precise rules and to establish minimum safeguards to guard against abuse.<sup>297</sup>

In the case law of the ECtHR, the proportionality test is accorded a central role. On the one hand, the Court is considered to take a more rigorous approach than the CJEU.<sup>298</sup> At the same time, the ECtHR sometimes grants Contracting States considerable discretion. Unlike a national constitutional court, the ECtHR does not itself give any judgment on proportionality in the narrower sense. This peculiarity has no bearing on the present legal assessment, however, as it is not an infringement of Art 11 ECHR with which we are concerned but of Article 28 of the Charter of Fundamental Rights. The latter may not be interpreted in such a way that the protection it affords is less than that of the ECHR. Nevertheless, that does not mean that this provision should also take on the structural peculiarity that the ECtHR has adopted with regard to the ECHR of allowing Contracting States a degree of discretion. Neither Article 28 of the Charter or the Charter of

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293. Marauhn and Merhof (2013: Chapter 7, number 45 ff); a ‘noticeable tightening of the standard of scrutiny’ is also stressed by Danwitz (2013: 253 and 255); see also Müller (2013: 179, 187 and 190 ff).

294. Judgment of the CJEU in Joined Cases C-92/09 and C-93/09 *Schecke* and *Eifert* (see footnote 274), paragraph 72 ff.

295. Judgment of the CJEU in Case C-293/12 (see footnote 204), paragraph 45 ff.

296. Judgment of the CJEU in Case C-293/12 (see footnote 204), paragraphs 37 and 48 ff.

297. See above, paragraph 54.

298. Marauhn and Merhof (2013: Chapter 7, number 48 ff).

Fundamental Rights as a whole provides for any discretion of this kind; nor can it be observed in CJEU case law. It would also be incompatible with the idea of uniform European protection of fundamental rights equivalent to that provided in the Member States.<sup>299</sup>

It should therefore be noted that, with regard to Article 28 of the Charter, a proportionality test must examine the suitability and necessity of a measure, whereby examination of its necessity includes detailed consideration of less restrictive alternatives.

### **b) Suitability**

To some extent the general suitability of so-called austerity measures as a means of tackling the economic and financial crisis has been called into question.<sup>300</sup> Doubts have been voiced precisely with regard to the goal of a sound budgetary policy. Firstly, in Greece's case, the target for reducing the level of public debt was missed. The IMF was relatively muted in its acknowledgement in June 2013 of the impact of the conditions laid down in the MoU.<sup>301</sup> The serious adverse effects on employment were also criticised by the European Parliament.<sup>302</sup> Doubts are particularly evident concerning the suitability of reforms aimed at achieving an overall reduction of wage levels. While it is indisputable that wage cuts lessen the burden on the public sector in the short term, the same cannot be said of a general reduction in wages through the lowering of minimum wages or deregulation of the collective bargaining system. After all, lower wages also mean lower tax revenue and a fall in social security contributions, as well, possibly, as additional spending in the form of the necessary support payments.

In terms of economic and monetary policy, however, the suitability of the reforms to collective bargaining systems is impossible to deny, at least in theory. Monetary union, in particular, requires balanced

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299. In this context, we are chiefly concerned with the actions of EU institutions. A degree of discretion in favour of these institutions would come into play only once they had acceded to the ECHR.

300. Fischer-Lescano (2013: 45 ff), with further references.

301. IWF, Public Information Notice No 13/64 of 5 June 2013, <http://www.imf.org/external/np/sec/pn/2013/pn1364.htm>.

302. Resolution of 13 March 2014 (see footnote 283), paragraphs 5 to 13.

competitiveness across the Member States. The assessment of competitiveness takes account, in turn, of unit labour costs, which are calculated as the ratio of labour costs to productivity. The call for wage costs to be aligned with productivity is the obvious logical consequence.<sup>303</sup> While it is possible to criticise the basic economic ideas on which this alignment is based, the legal assessment of the suitability of a restrictive measure is not the context in which to settle differences of fundamental economic theory. That is especially true when the EU legal framework does not allow for any preferable political alternative.<sup>304</sup>

### c) Necessity

The international bodies entrusted with monitoring worker and trade union rights do not question, in principle, the idea that it may be necessary to limit social rights in order to overcome crises of a financial nature.<sup>305</sup> The necessity of recommendations for corrective action or conditions laid down in MoUs ultimately depends on whether less restrictive but equally effective measures can be taken.

It must be conceded that the assessment of the necessity of structural changes to collective bargaining systems designed to stabilise the euro or safeguard competitiveness is thoroughly problematic. This is because the conditions and recommendations in question do not arise in isolation but in conjunction with numerous other measures concerning budgetary policy and welfare systems, the labour market, the economy, and administration etc. In view of this connection to a wider context, it is difficult, on the whole, to measure the effectiveness of possible less restrictive alternatives.

Aside from that, the assessment of necessity is dependent on the specific circumstances, on the specific crisis situation in the country affected, on the one hand, and the structure and stability of industrial

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303. For an in-depth look at this subject, see Rödl and Callsen (2014: 101, 110 and 113 ff).

304. On this subject, see Scharpf (2011: 163 ff).

305. ILO Committee of Experts on the Application of Conventions and Recommendations, 'Collective bargaining in the public service: a way forward', 102nd session of the International Labour Conference, 2013, Report III(1B), p. 124, paragraph 342 f.; more guardedly: ECSR, Complaint No 65/2011, General Federation of employees of the national electric power corporation [GENOP-DIE] and Confederation of Greek Civil Servants' Trade Unions [ADEDY] v Greece, Decision on the Merits of 23 May 2012, paragraphs 16–18.

relations, on the other, rather than following clear guidelines. Nevertheless, it is possible to name at least three aspects that must, at any rate, be taken into account in respect of necessity. To begin with, a less restrictive alternative to the limitations of the right of collective bargaining discussed here is the negotiation and agreement of reforms by the social partners themselves (subsection 1). Rather than introducing them on a permanent basis, it is less drastic to place a time restriction on them (subsection 2). In addition, safeguard mechanisms can be put in place to prevent the limitations from resulting in particular hardship in individual cases.

(1) Involvement of the parties to collective bargaining

At the heart of the right of collective bargaining is the autonomy of the social partners. Consequently, it is settled case-law of the ILO Committee on Freedom of Association that governments should first attempt to persuade the parties to collective bargaining to alter their arrangements on a voluntary basis.<sup>306</sup> Compared with legislation imposing a limitation, this is the less restrictive option. Admittedly, this procedural guarantee, or consultation requirement, cannot be absolute. Otherwise, any legislative proposal could be held up for years. Nevertheless, prior to the adoption of primary or delegated legislation, a serious attempt must be made to reach an agreement on the reforms with the collective bargaining partners concerned. This approach also ensures that alternatives are identified.<sup>307</sup>

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306. ILO Committee on Freedom of Association, Case No. 2820 (Greece), 365th Report (see footnote 181), paragraph 995: [...] Where intervention by the public authorities is essentially for the purpose of ensuring that the negotiating parties subordinate their interests to the national economic policy pursued by the government, [...] this is not compatible with the generally accepted principles [...]. The suspension or derogation by decree – without the agreement of the parties – of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98. If a government wishes the clauses of a collective agreement to be brought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force. [See Digest, op. cit., paras 1000, 1005 and 1008.] [...] the Committee must recall that measures that might be taken to confront exceptional circumstances ought to be temporary in nature having regard to the severe negative consequences on workers' terms and conditions of employment and their particular impact on vulnerable workers [...] (author's emphasis).

307. Cf. Krajewski (2013: 16).

In the response to the crisis, the procedural requirement described here was followed in Portugal's case: the reforms were decided in a tripartite agreement between the Government, employers and trade unions.<sup>308</sup> In Greece, however, the requirement was not observed.<sup>309</sup> While the MoU made formal reference to involving the social partners in its implementation, they were not given any powers to determine how this should be done. In fact, the MoU had already set out in detail the measures that needed to be taken. Moreover, the time frame of just under three months was too tight for there to be any serious expectation of an agreement on the reforms. The social dialogue or triologue was promptly replaced in spring 2012 by negotiations between the Greek Government and Troika officials.<sup>310</sup>

In this respect, the recommendation to Belgium that wages should be linked to regional or local productivity should also be seen as disproportionate. From the outset, the social partners were intended to be involved only in implementing the measure and not in the decision about the form it should take.<sup>311</sup>

It is obligatory, therefore, wherever there is interference with existing collective agreements or the legal framework for collective bargaining, to involve the parties to collective bargaining in the decision concerning the adoption and practical details of these measures. A failure to comply with this procedural guarantee renders the measure disproportionate.

## (2) Time-limited measures

Each of the limitations discussed here is a reaction to an acute situation of economic crisis. The respective crisis situation is, by the very approach taken in the EU's response, temporary in nature. In the case of the conditions agreed in MoUs, a lack of proportionality appears likely with regard to the necessity element, given the absence of any time restriction: the support programmes for countries in crisis run for

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308. Seifert (2014: 14 and 19 ff).

309. See ILO Committee of Experts on the Application of Conventions and Recommendations, 'Collective bargaining in the public service: a way forward', International Labour Conference, 102nd session, 2013, Report III(1B), p. 125 ff.

310. See part C.III.8 of this report.

311. See part C.III.1.b) of this report.

a clearly-defined period; the conditions, by contrast, have no time limit. In this sense, there is a discrepancy between the duration of programmes designed to tackle the crisis and the agreement of permanent measures, which have been criticised by the European Parliament as threatening the EU's social objectives.<sup>312</sup> Temporary limitations should apply primarily only to future collective agreements,<sup>313</sup> as this is less restrictive than interference in existing, autonomously negotiated collective agreements. Exceptions may be made only in the event of serious and insurmountable difficulty, for the preservation of jobs and the continuity of enterprises and institutions.<sup>314</sup> In the particular case of Greece, the ILO's Committee on Freedom of Association has reiterated its opinion that limitations lasting longer than three years are disproportionate.<sup>315</sup> The same applies to recommendations for corrective action in the context of macroeconomic surveillance. In this regard, too, the recommendations are designed to correct 'macroeconomic imbalances' that are dependent on economic developments and therefore subject to change.

In view of these considerations, it is evident that, in the event of any limitation of the right of collective bargaining, the measures in question should be imposed for a specified period or be tied to economic conditions. Requirements that cease to apply with the conclusion of macroeconomic surveillance or the termination of the financial assistance programme under the ESM are a possibility. A more long-term arrangement would be acceptable only if there was sufficient

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312. Resolution of 13 March 2014 (see footnote 283), paragraph 4.

313. ILO Committee of Experts on the Application of Conventions and Recommendations, 'Collective bargaining in the public service: a way forward', International Labour Conference, 102nd session, 2013, Report III(1B), p. 124, paragraph 342; Bruun (2014: 243 and 249); Vargha (2013: 1044 and 1052, number 23); see also the 365th Report of the ILO Committee on Freedom of Association (see footnote 181), Case No 2820 (Greece), paragraphs 990 and 994.

314. ILO Committee of Experts on the Application of Conventions and Recommendations, 'Collective bargaining in the public service: a way forward', International Labour Conference, 102nd session, 2013, Report III(1B), p. 124, paragraph 342.

315. ILO Committee on Freedom of Association (see footnote 181), Case No 2820 (Greece), 365th Report, paragraph 990: '[...] as a general rule, the exercise of financial powers by the public authorities in a manner that prevents or limits compliance with collective agreements already entered into by public bodies is not consistent with the principle of free collective bargaining. [...] a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards. [...] 'restraints on collective bargaining for three years are too long [...]' (author's emphasis).

likelihood of a return to the crisis situation once the measures were lifted. In this case, careful adjustment arrangements would need to be considered.

As a rule, therefore, long-term interference with the legal framework governing national collective bargaining systems cannot be considered proportionate on the grounds that it is not necessary. Exceptions are possible, but would require special justification.

**d) Proportionality *stricto sensu***

The element of proportionality *stricto sensu*, or in the narrow sense, presents us with two matters to consider. Firstly, a provision that serves a legitimate objective and is both suitable and necessary in itself can, nevertheless, be disproportionate in the narrow sense and, therefore, in the wider sense too, simply because the limitation of a fundamental right required to meet this objective is too great (2). Secondly, it may be the case that excessive constraints of this kind arise not across the board but only in particular cases. For a provision to be seen as proportionate in this instance, special arrangements must be adopted to address this hardship (1).

(1) Safety nets in case of hardship

The recommendations and conditions examined here may ultimately prove disproportionate in certain cases because they do not provide any means of mitigating particular hardship arising from the application of the standard rules. This issue does not concern the suitability or the necessity of a provision but its proportionality *stricto sensu*. In this regard, the ILO Committees call for limitations of the right of collective bargaining to be accompanied by adequate safeguards to protect workers' living standards.<sup>316</sup> A similar idea, whereby a provision that results in particular hardship requires particular mitigation, can also be

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316. ILO Committee on Freedom of Association, Case No. 2820 (Greece), 365th Report (see footnote 181), paragraph 990; ILO Committee of Experts on the Application of Conventions and Recommendations, 'Collective bargaining in the public service: a way forward', International Labour Conference, 102nd session, 2013, Report III(1B), p. 124, paragraph 342; on the IMF's practice since the 1990s of including specific measures in financing agreements to ensure that especially vulnerable groups do not suffer disproportionately from cuts to welfare payments, see also Goldmann, Working Paper 9 April 2014, p. 7.

found in the CJEU's judgment on data retention, in which the Court points out that the Directive in question did not provide for any exception for persons bound by professional secrecy.<sup>317</sup>

The question of whether a general rule causes particular hardship, requiring additional provisions to be adopted so that the principle of proportionality is observed, can be determined only on a case-by-case basis and can be discussed only hypothetically here. It is conceivable, for instance, that a restriction on the extension of collective agreements that could, in certain circumstances, constitute a limitation of the right of collective bargaining may not be allowed in particular low-wage sectors, so as to prevent the complete distortion of the labour market, which would leave a large number of workers living below the minimum subsistence level. In Greece's case, the decentralisation of the collective bargaining system should have been combined, in especially vulnerable sectors at least, with a strengthening of trade union representation at company level. In this way, the interference would have had a less destabilising effect. With regard, too, to the reduction of a minimum wage laid down in a national collective agreement, it would be necessary, unless social security payments were triggered, to keep in mind when determining the threshold that a minimum wage must allow the recipient to have a decent standard of living.

Consequently, where interference with existing collective agreements or in the legal framework governing national collective bargaining systems results in particular social hardship and no special provisions are adopted to mitigate this hardship, the measure in question is deemed to be disproportionate in the narrow sense and, therefore, in the wider sense too.

(2) General test of proportionality *stricto sensu*

The very issue with which we are concerned in this study, namely drastic limitations of the right of collective bargaining, demonstrates quite clearly that CJEU case law needs to evolve further and make a genuine test of proportionality *stricto sensu* part of its approach to

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317. Judgment of the CJEU in Case C-293/12 *Digital Rights Ireland and Others* (see footnote 204), paragraph 58.

determining the overall proportionality of limitations of fundamental rights. Without a test of this kind, there is a danger that objectives of general interest will, as a rule, outweigh the guarantees contained in fundamental rights. A case in which the general interest must take a back seat because it is served at too great an expense to the exercise of fundamental rights is impossible unless the additional criterion of proportionality *stricto sensu* is applied.

However, as far as the post-crisis interference with the legal framework for the right of collective bargaining is concerned, such a scenario is easily conceivable. Unlike isolated changes to existing collective agreements, far-reaching interference with legal frameworks can be overturned only with great difficulty. Every adjustment to legal structures, particularly when there is no time restriction on that adjustment, is inevitably accompanied by a change to the practical structures, i.e. the organisation and actions of the parties concerned – trade unions and employers. Whether a subsequent reversal of changes that have destabilised a functioning collective bargaining system can restore the effectiveness of the system is in no way certain. So much of the social and organisational make-up of collective industrial relations has evolved slowly over time and cannot be abolished and resurrected at will. In the assessment of the necessity of changes to the legal framework, more stringent criteria must be applied than to interference with individual collective agreements, and not just in terms of the criterion of necessity, but also with regard to their proportionality.

It should be underlined, once more, that the proportionality *stricto sensu* of a measure can ultimately be determined only on the basis of the specific crisis conditions, the state of industrial relations in the country affected and the impact of the limitation in question. As a rule of thumb, however, it can be said that measures which, taken together, lead to a wholesale destabilisation of a country's collective bargaining machinery, as the ILO Committees have observed with regard to the MoU conditions imposed on Greece,<sup>318</sup> must, in view of their lack of proportionality *stricto sensu*, be deemed to constitute a violation of Article 28 of the Charter of Fundamental Rights.

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318. ILO Committee on Freedom of Association, Case No. 2820 (Greece), 365th Report (see footnote 181), paragraph 997.

## 6. Conclusion

The examples provided of limitations of the right of collective bargaining in the form of interference arising from recommendations in the context of macroeconomic surveillance or conditions attached to financial assistance from the ESM are, in many cases, not justified and represent a violation of Article 28 of the Charter.

The requirement for a limitation of the right of collective bargaining to be provided for by law is not met in respect of recommendations for corrective action issued in accordance with Article 7 et seq. of Regulation No 1176/2011 in conjunction with Regulation No 1174/2011. The adoption of these provisions lay outside the scope of EU competence.

From a substantive point of view, the essence of the right of collective bargaining remains intact and, from a legal perspective, the measures are suitable. However, in many cases, the criterion of necessity was not satisfied, as equally effective but less restrictive measures could have been taken. This is true in three respects: in procedural terms, interference cannot take place without the consultation of the social partners, as their involvement always renders the measure less restrictive. Secondly, it is generally less restrictive if the measures designed to overcome an acute situation of economic crisis are made subject to a time limitation. Thirdly, the need for the less restrictive measure to take precedence means that, in individual cases at least, special provisions must be adopted in order to mitigate cases of particular hardship.

Wherever there is drastic, and, consequently, destabilising interference with the legal framework for the right of collective bargaining, it can never be considered proportionate in the narrow sense. However, as an element of the overall proportionality test, proportionality *stricto sensu* is, as yet, underdeveloped in CJEU case law.

## V. Possible judicial remedies

The conclusion that certain conditions and recommendations constitute a violation of the right of collective bargaining guaranteed in Article 28 of the Charter of Fundamental Rights remains of theoretical interest

only, if there is no possibility for this violation to be challenged in judicial proceedings. In line with the stated focus of this study, the following section is concerned solely with the judicial remedies available at EU level.<sup>319</sup>

For the sake of completeness, it should be mentioned at this point that the ESM has its own arbitration procedure, in which the final decision lies with the CJEU (Article 37 of the ESM Treaty). In the event of a dispute arising between an ESM Member and the ESM in connection with the interpretation and application of the ESM Treaty, a decision is initially taken by the Board of Governors (Article 37(2) of the ESM Treaty). This decision can then be contested before the CJEU (Article 37(3) of the ESM Treaty). In principle, therefore, it would be possible to challenge the violation of internationally guaranteed fundamental rights arising from conditions laid down in MoUs through this channel. It is doubtful, however, whether Article 28 of the Charter could be cited in this context. The dispute-settlement mechanism provided for in Article 37 of the ESM Treaty is part of the legal system specific to the ESM, which is not bound by the EU Charter of Fundamental Rights. It is quite likely, therefore, that complaints of a violation of the provisions of the Charter could not be considered in this internal procedure of the ESM. It is possible that the ESM is bound by the international guarantees relating to the right of collective bargaining or that the binding effect of the Charter on the EU Member States could extend, by association, to the ESM, even without any commitment having been explicitly imposed on the ESM itself. However, this question cannot be explored further at this point.

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319. Something should also be said about proceedings before the international committees and the ECtHR, which safeguard the guarantees of international law to which Article 28 of the Charter corresponds. However, at present, only national (implementing) measures are eligible for review in this context. Moreover, it is not possible to obtain a repeal of the measures, but most likely a well-publicised verdict and, in the case of the ECtHR, possibly the payment of compensation. There are, then, two collective complaints procedures open to trade unions, before the European Committee of Social Rights (ECSR) (on this subject, see Schlachter (2013:77 and 81 ff); and Lörcher (2014: 265 and 290 ff) and before the ILO's Committee on Freedom of Association (CFA) (on this subject, see Bruun (2014: 243 and 261 ff). Neither complaints procedure requires an exhaustion of remedies. An examination of the complaint can therefore take place relatively quickly. It should be borne in mind, however, that referral of a matter to the ECSR or CFA may render proceedings inadmissible before the ECtHR pursuant to Article 35(2)(b) ECHR, so coordination with other complainants may be necessary (Ewing and Henty 2014: 295 and 320).

## 1. Action for annulment, Article 263 TFEU

The most effective means of pursuing a remedy in respect of violations of the right of collective bargaining as laid down in Article 28 of the Charter of Fundamental Rights would be to seek the repeal of the measures through an action for annulment. An application for interim legal protection may also be submitted in connection with an action of this kind, in accordance with Article 278 et seq. onwards (Article 160 of the Rules of Procedure of the Court of Justice).<sup>320</sup> In all cases, it is necessary to observe the deadline of two months from the date on which the plaintiff became aware of the measure at issue (sixth paragraph of Article 263 TFEU).<sup>321</sup>

### a) Recommendations for corrective action

In accordance with the first paragraph of Article 263 TFEU, an action for annulment can be brought, *inter alia*, against acts of the Council, into which category recommendations for corrective action fall. However, the first paragraph of Article 263 TFEU explicitly excludes recommendations as the possible subject-matter of an action, for the admittedly logical reason that, as laid down by the Treaties themselves, recommendations have no binding force (fifth paragraph of Article 288 TFEU).

Nevertheless, in its settled case-law, the CJEU has interpreted the first paragraph of Article 263 to mean that an action for annulment must be permitted in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.<sup>322</sup> There is no doubt that this is true of recommendations for corrective action. They provide the basis for decisions to impose sanctions in accordance with Regulation No 1174/2011. A decision imposing sanctions can, by law, be taken only following the prior adoption of a recommendation and confirmation by the Commission of

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320. Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012) as amended on 18 June 2013 (OJ L 173, 26.6.2013, p. 65) – consolidated version, [http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf).

321. With regard to the MoUs that have already been agreed and the recommendations issued in 2014, that deadline has obviously passed.

322. Judgment of 17 March 1970 in Case 22/70 *Commission v Council* (ECR 1970, p. 263, paragraph 42).

non-compliance with the recommendation. In this way, the recommendation for corrective action itself produces legal effects, with the result that an action for annulment can be brought.

The second paragraph of Article 263 indicates that, generally speaking, any Member State is entitled to bring an action, including, in particular, the Member State to which the recommendation is addressed. In addition, in accordance with the fourth paragraph of Article 263, any natural or legal person has the same entitlement, provided that the contested act is of direct and individual concern to them. In this sense, it is conceivable that an action could be brought by the parties to collective bargaining as the bearers of the fundamental right enshrined in Article 28 of the Charter.<sup>323</sup>

It is debatable, however, whether the parties to collective bargaining are actually directly and individually concerned by recommendations instructing the Member States to place limitations on the right of collective bargaining. That said, the requirements of eligibility to bring an action laid down in the fourth paragraph of Article 263 have been far from clarified by the CJEU.<sup>324</sup>

In the present context, the requirement that the plaintiff must be concerned by a measure in the sense of being adversely affected by it is not subject to doubt. The CJEU considers the criterion of individual concern to be met when the potential applicant is distinguished individually in the same way as the addressee of a measure (the ‘Plaumann formula’).<sup>325</sup> According to a line of case law, this occurs when the legal situation of the potential applicant is affected.<sup>326</sup> According to prevailing opinion,<sup>327</sup> which, thus far, the CJEU has had

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323. On the derivation of semi-privileged applicant status for the the European Trade Union Confederation for the purpose of protecting its own prerogatives pursuant to the third paragraph of Article 263 TFEU, see *Annex 1 – Possibility for Direct Action to the EU Courts by the ETUC Against Certain Austerity Measures Based on the Violation of the Right to Consultation: TTUR Recommendations*, in Bruun, Lörcher and Schömann (eds): *The economic and financial crisis and collective labour law in Europe*, 2014, p. 331 ff.

324. For more detail, cf. Dörr (2014: Article 263 TFEU, number 59 ff).

325. Judgment of the CJEU of 15 July 1963 in Case 25/62 *Plaumann v Commission* (ECR 1963, pp. 217 and 238).

326. Judgment of the CJEU of 18 May 1994 in Case C-309/89 *Codorniu v Council* (ECR 1992, p. I-1853, paragraph 21 onwards).

327. Cremer (2011: Article 263 TFEU, paragraphs 45 and 53).

no cause to question,<sup>328</sup> a situation in which a fundamental rights position is affected also results in an adverse effect on an individual within the meaning of the fourth paragraph of Article 263 TFEU.

As regards the requirement of direct concern, the need for the recommendations to be implemented by the Member State in question again raises doubts. Formally speaking, the limitation occurs only with the amendment of national legislation. It could be argued that, up until that point, the parties to collective bargaining are not adversely affected in any way. However, the CJEU also accepts the existence of a situation of ‘material directness’, whereby the Member State is left with no meaningful discretion as to implementation.<sup>329</sup> Provided, therefore, that the recommendations for corrective action frame the required limitations in sufficiently precise terms, the criterion of direct concern is met and the parties to collective bargaining are generally deemed eligible to bring an action on the basis of the fourth paragraph of Article 267 TFEU.<sup>330</sup>

In addition to seeking a legal remedy against the recommendation for corrective action, the Member State affected also has the option of bringing an action for annulment against the Council decision imposing sanctions for non-compliance with the recommendation for corrective

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328. Although it was rejected by the General Court in its judgment of 2 March 2010 in Case T-16/04 *Arcelor v Parliament and Council* (ECR 2010, p. II-211, paragraph 103), because the Court took the view that, in that specific case, the applicant was not distinguished individually to a sufficient degree for the fourth paragraph of Article 263 TFEU to be applicable.

329. Dörr (2014: Article 263 TFEU, number 66), with references to CJEU case law in marginal number 62; cf., however, the judgment of the General Court of 27 November 2012 in Case T-541/10 *ADEDY and Others v Council*, paragraph 76, which found that the provision in question was not of direct concern to the applicants and that while the Council decision had laid down some specific requirements for the reform of the Greek pension system (e.g. a retirement age of 65), it otherwise left the Greek authorities sufficient discretion.

330. In so far as the CJEU should prove sympathetic to this view, it should be borne in mind that, further down the line, when the action for annulment brought by the parties to collective bargaining against the recommendation for corrective action is declared admissible ‘beyond any doubt’, the parties to collective bargaining themselves could then find that they are no longer able to apply for the measures to be reviewed in a preliminary ruling in accordance with Article 267 TFEU (‘Degendorf case law’: Judgment of 9 March 1994 in Case C-188/92 *TWD v Germany* (ECR 1994 p. I-833, paragraph 17); on case-based reasoning, see Dörr (2014: Article 263 TFEU, number 140 ff).

action.<sup>331</sup> It is not necessary, in this case, for the Member State also to have sought the annulment of the original recommendation.

#### **b) Agreement of memoranda of understanding**

It is also possible for involvement in the negotiation of an MoU to be the subject of an action for annulment in accordance with Article 263 TFEU. The fact that the Commission's activities in respect of the MoU come under the ESM Treaty is no obstacle in this respect. After all, CJEU case law recognises that Article 263 TFEU does not stipulate that it must be acting for the Union on the basis of the EU Treaties. If the Commission is operating within a framework outside that of EU law, it is simply because powers have been entrusted to it as an EU institution within that framework. Such was the CJEU's ruling with regard to a situation in which 'internal agreements' among representatives of the Member States, meeting within the Council, which were to be concluded for the implementation of development cooperation (Article 208 TFEU et seq.) and joint development aid policy, had delegated to the Council as an EU institution the power to take decisions in this regard.<sup>332</sup> Wherever an institution is 'loaned', this power is automatically delegated to that institution, at least when there is a close functional link to EU law, as is the case here.<sup>333</sup>

Meanwhile, it is still unclear whether proceedings can be brought in isolation against the Commission's involvement in the negotiation of MoUs. It is an action that results in the conclusion of the MoU as a legal act only in collaboration with others, namely the beneficiary State and the Board of Governors. In this sense, the Commission's role may lack the necessary 'external legal effect'. In the case of acts arising on the basis of powers conferred by EU law, the legal effects of which are felt within the framework of Union law, it is not possible to contest in isolation preparatory measures taken by an institution, such as a

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331. Bast and Rödl (2012: 269 and 277); in this procedure, the breach of powers in respect of the adoption of Regulation No 1174/2011 can also be cited, although the deadline for an action for annulment against the Regulation itself would have passed (see above, p. 277 with footnote 64).

332. Judgment of 2 March 1991 in Case C-316/91 *Parliament v Council* (ECR 1994 p. I-625, paragraph 9).

333. Dörr (2014: Article 263 TFEU, number 34).

legislative proposal of the Commission.<sup>334</sup> However, under EU law, preparatory acts are followed by the definitive act, which then constitutes the real subject of an action for annulment. It is precisely this that is lacking in the case of an MoU concluded under the ESM Treaty. It could be argued that allowance should be made for this peculiarity, to ensure that scrutiny of the Commission's observance of fundamental rights does not lose all effectiveness.

Nevertheless, it makes even more sense to draw parallels with the Union's conclusion of international agreements. Whenever the EU adopts an international agreement, it is acting on the basis of the relevant powers conferred under primary law (Article 218(6) TFEU). In this scenario, it is not the international agreement itself but the Council decision concluding the agreement that can be contested in an action for annulment.<sup>335</sup> This principle can be applied directly to the Commission's decisive involvement in MoUs. It is not the MoU itself that can be contested but the decision to sign the MoU with the beneficiary State.

The fact that the ESM and not the Union is bound by the MoU makes no difference here, because, as previously stated, Article 263 TFEU is concerned with the accountability of the EU institutions. It is also of no relevance that, when signing an MoU, the Commission, unlike the Council in the case of an international agreement, is not acting on the basis of powers conferred under EU law. As explained at length earlier, this is because its actions are permitted under Union law. Any remaining doubt in this regard should be removed by consideration of the fact that, even in the event of the Commission's involvement in the conclusion of a private contract, for which it can also claim no competence under primary law and in which respect it acts in the legal capacity accorded by the provisions of private law in the country in question (Article 335 TFEU), an action for annulment may be admissible, although, here too, the legal effect arises not with the decision to sign the contract, but only when the contract is also signed by the other

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334. Dörr (2014: Article 263 TFEU, number 39).

335. See, for instance, the judgment of 10 January 2006 in Case C-94/03 *Parliament v Council* (ECR 2006, p. I-1); see Dörr (2014: Article 263 TFEU, number 36), with further references.

party.<sup>336</sup> Nevertheless, if decisive involvement in contracts of private law can be the subject of an action for annulment, then the same must be true in the case of decision involvement in agreements of international law. In principle, therefore, an action for annulment may be brought in respect of the Commission's decisive role in the conclusion of MoUs.

In terms of eligibility to bring an action, the situation for the Member States and parties to collective bargaining is as described with regard to recommendations for corrective action. From the point of view of CJEU case law, the eligibility of the social partners is not certain, but it is supported by prevailing opinion.

Finally, it should be noted that if, in the course of this procedure, the CJEU finds that the Commission's actions have resulted in a violation of Article 28 of the Charter, this will be without prejudice to the binding force of the MoU. The MoU itself is not under scrutiny and the CJEU may review the provisions laid down in it only in accordance with Article 37 of the ESM Treaty. It is very likely, however, that the ESM will cease to apply the condition in question.

## 2. Reference for a preliminary ruling, Article 267 TFEU

At the same time, there is also the option of challenging the violations of the right of collective bargaining as laid down in Article 28 of the Charter in a reference for a preliminary ruling pursuant to Article 267 TFEU. Under this procedure, a ruling is given on the interpretation of EU law, and the validity of acts of the EU institutions is examined. This occurs when a national court considers the question presented to be of relevance in settling a dispute currently before it. The referring court's assessment regarding the relevance of the question is not subject to any checks by the CJEU.<sup>337</sup>

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336. In the context of public procurement, see, for instance, the judgment of the General Court of 25 February 2003 in Case T-183/00 *Strabag Benelux v Council* (ECR 2003, p. II-135, paragraphs 27 to 29); see Dörr (2014: Article 263 TFEU, number 33), with further references.

337. Judgment of the CJEU of 13 March 2001 in Case C-379/98 *PreussenElektra* (ECR 2001, p. I-2099, paragraph 38); judgment of the CJEU of 5 December 2000 in Case C-448/98 *Guimont* (ECR 2000, p. I-10663, paragraph 22).

**a) Recommendations for corrective action**

In the case of recommendations issued in accordance with Regulation No 1176/2011, preliminary ruling proceedings before the CJEU could be initiated in the following scenario: the Member State in question implements a recommendation for corrective action (Article 7 et seq. of Regulation No 1176/2011 in conjunction with Regulation No 1174/2011) in respect of which a violation of the right of collective bargaining is suspected. The social partners then seek judicial remedy against the recommendation in the Member State concerned, possibly before the national constitutional court, based on the suspected violation of the right of collective bargaining as guaranteed under EU law.

The national court before which the case has been brought will generally examine the implementation of the legislation in part on the basis of national constitutional law. Irrespective of its findings in this regard,<sup>338</sup> however, the court must bear in mind that the legislation has been adopted by the Member State for the purpose of implementing an officially approved recommendation. In implementing Union law, therefore, the Member State is acting in accordance with Article 51(1) of the Charter of Fundamental Rights. Consequently, its legislation falls within the scope of Union law and, in this sense, the Member State must not exceed the limits arising from the guarantees enshrined in the Charter of Fundamental Rights, which naturally includes Article 28 of the Charter.

However, the final decision concerning the content of the Charter does not lie with the national court. The Charter of Fundamental Rights forms part of primary law, the interpretation of which must be clarified by the CJEU in preliminary ruling proceedings. National legislation falling within the scope of EU law must therefore be checked in accordance with the standards applied by the CJEU in preliminary ruling proceedings to determine whether it is compatible with EU fundamental rights.<sup>339</sup>

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338. On the relationship between EU and national fundamental rights protection, see the following section (VI).

339. Judgment of the CJEU (Grand Chamber) of 26 February 2013 in Case C-617/10 *Åkerberg Fransson*, paragraph 19; judgment of the CJEU of 18 January 1991 in Case C-260/89 *ERT* (ECR 1991, p. I-2925, paragraph 42). However, it is also necessary for the national court in

It should be stressed at this point that verification on the basis of Article 28 of the Charter of national legislation implementing a recommendation for corrective action may be carried out even if the recommendation by itself is not sufficiently specific in its provisions to constitute a violation of Article 28 of the Charter. That is because, even where discretion is afforded in terms of the implementation of requirements of EU law, the legislative measure is deemed to implement Union law and is consequently required to observe the provisions of the EU Charter of Fundamental Rights.

**b) Agreement of memoranda of understanding**

As regards the implementation of MoUs, the situation is essentially similar. Nonetheless, an additional step must be taken that has not yet been covered. It has been established that, in its decisive involvement in the agreement of MoUs, the Commission is meeting an obligation deriving from the second sentence of Article 125(1) TFEU and the second sentence of Article 136(3) TFEU. Its involvement consequently falls within the scope of EU law. The same applies to the beneficiary State as a party to the financial assistance facility agreement that forms part of the MoU. By undertaking to observe the conditions laid down in the MoU, the Member State is, like the Commission, fulfilling the same obligation arising from the second sentence of Article 125(1) TFEU and the second sentence of Article 136(3) TFEU. This correlation extends to implementation of the MoU.

For this reason, in implementing the conditions set out in an MoU, the Member State is acting within the scope of EU law, a situation deriving, as described, from the second sentence of Article 136(3) TFEU. In this it is bound by the EU Charter of Fundamental Rights as well as national fundamental rights provisions, and, therefore also by Article 28 of the Charter. In its judicial examination of the implementing legislation, the national court must ascertain whether the guarantee enshrined in

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question to comply with its obligation to submit a reference for a preliminary ruling. In 2011, for instance, the Greek Supreme Administrative Court failed, in proceedings concerning national implementation of the Council decisions on public-sector wage cuts and the reform of the pension system based on Articles 126 and 136 TFEU, to refer the matter to the CJEU (see part C.III.1.a)), in spite of an arguable obligation to do so; for an analysis on this subject, see Yannakopoulos (2013: 147, under point b).

Article 28 of the Charter has been violated. The same question must then be referred to the CJEU for a preliminary ruling.

Meanwhile, this finding appears to stand in direct contradiction to the CJEU's ruling of 2013 in the case *Sindicato dos Bancários do Norte and Others*.<sup>340</sup> The Court evidently declared the referral by the Labour Court in Porto to be inadmissible. However, the latter court had failed to demonstrate the correlation explained here, whereby the implementation of conditions laid down in the MoU concluded with the ESM represents, by virtue of the second sentence of Article 125(1) TFEU and the second sentence of Article 136 TFEU(3), an action within the scope of EU law. Accordingly, the CJEU also failed to look into the matter.<sup>341</sup> The Portuguese court also omitted to establish a link between the contested measures and the MoU concluded with Portugal. In fact, contrary to Article 94(c) of the CJEU's Rules of Procedure, no explanation of the relationship with EU law was given,<sup>342</sup> with the obvious result that the CJEU declared itself to have no competence in the matter. On this basis, the chamber judgment of the CJEU has no significance for arguments put forward here.

Finally, it should also be noted that, if the national legislation is found to infringe Article 28 of the Charter, the binding force of the MoU will not be affected. In this case too, however, it is certain that the ESM would not persist in applying the condition in question.

### 3. Conclusion

Violations of the right of collective bargaining as laid down in Article 28 of the Charter arising both from recommendations for corrective action issued by the Council and the Commission's decisive involvement in the agreement of MoUs can be challenged by means of an action for

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340. Judgment of the CJEU of 7 March 2013 in Case C-128/12 *Sindicato dos Bancários do Norte and Others*, paragraph 8 ff (at present only the relevant Order is available, in either French or Portuguese); for a sceptical response, see Seifert (2014: 14 and 26).

341. In contrast to the case *Sindicato dos Bancários do Norte and Others*, the CJEU could not and would not be able to leave the present question for a chamber to decide.

342. Case C-128/12 *Sindicato dos Bancários do Norte and Others* (see footnote 340), paragraph 12.

annulment in accordance with Article 263 TFEU. In addition to the Member State concerned, social partners in that country are also eligible to bring an action.

National legislation implementing recommendations for corrective action and conditions laid down in MoUs that are contested by the parties to collective bargaining or by others before national courts may also be the subject of a reference for a preliminary ruling pursuant to Article 267 TFEU, under which procedure the CJEU will examine whether there has been an infringement of Article 28 of the Charter.

## VI. Relationship with national protection of fundamental rights

Finally, we shall outline the extent to which the protection of fundamental rights under the EU Charter of Fundamental Rights would supplant national fundamental rights protection. From the perspective of the parties to collective bargaining, it would be unfortunate if national fundamental rights protection, under constitutional provisions or in the light of their interpretation in case law, were to prove the stronger of the two. That would routinely be the case if the CJEU failed to adopt the position regarding the content of Article 28 of the Charter that has been presented here and persisted in its current reading, whereby, as demonstrated earlier, no meaningful protective function is attributed to Article 28.

At present, the CJEU takes the view that the Member States are free to apply national standards of protection of fundamental rights, even when they are implementing EU law, with the result that the national legislation also comes under scope of the EU Charter of Fundamental Rights.<sup>343</sup> National and EU fundamental rights provisions essentially

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343. Judgment of the CJEU in Case C-399/11 *Melloni* (see footnote 133), paragraph 60. Also implicit prior to that in the judgments of the French Court of Cassation (Labour Division) of 29 June 2011 in Appeal No 09-71107, *Bulletin des arrêts de la Cour de cassation: Chambres civiles* No 6, Item 181, and of the Austrian Constitutional Court of 14 March 2012 in Case U466/11 *inter alia*, section II.5.8, [http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT\\_09879686\\_11U00466\\_2\\_00](http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_09879686_11U00466_2_00).

apply simultaneously, therefore.<sup>344</sup> In this sense, there is a ‘double binding effect’.<sup>345</sup>

However, the application of national fundamental rights must not compromise ‘the primacy, unity and effectiveness of EU law’.<sup>346</sup> This would certainly occur where the Member State was allowed no discretion in the implementation of EU law, such as in the case of a directive, and national fundamental rights provisions afforded a higher level of protection than EU rules on fundamental rights.

One could choose to conclude from this that, in the case of recommendations for corrective action, too, national fundamental rights provisions cannot apply, so long as the Member State is afforded no discretion that would allow it to implement the recommendation in conformity with its own fundamental rights standards. However, the peculiarity with regard to the implementation of recommendations for corrective action is that they set out requirements specially tailored to one Member State. If the Member State asserts its own standards of fundamental rights protection in respect of these requirements, the unity of EU law cannot be endangered as it would in the case of implementation of harmonising directives. Whether this is enough to ensure that national levels of fundamental rights protection are enforced cannot be explored in the present study.

As regards MoUs, meanwhile, the aforementioned condition for the coexistence of EU and national fundamental rights protection is satisfied. MoUs are concluded outside the framework of EU law. It is impossible, therefore, for scrutiny of national legislation implementing MoUs to compromise the ‘primacy, unity and effectiveness of EU law’.

Consequently, it should be noted that the level of protection guaranteed by Article 28 of the Charter cannot, in the case of MoUs, supplant that afforded under national fundamental rights provisions. Whether that is true of sufficiently detailed recommendations for corrective action cannot be answered here.

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344. As explicitly stated by the CJEU in its judgment of 11 September 2014 in Case C- 112/13 *A v B and Others*, paragraph 41; Ritzleng (2013: 267 ff, under section II).

345. Heuschmid (2014: 1 and 9 ff); Heißl (2013: 59 and 63 ff).

346. Judgements of the CJEU in Case C-399/11 *Melloni* (see footnote 133), paragraph 60; and Case C- 112/13 *A v B and Others* (see footnote 344), paragraph 44.

## VII. Summary

Council recommendations to take preventive and corrective action issued under the macroeconomic surveillance procedure (Articles 6 and 7 et seq. of Regulation No 1176/2011 in conjunction with Article 3 of Regulation No 1174/2011) and the Commission's decisive involvement in the agreement of memoranda of understanding (MoUs) pursuant to the Treaty establishing the European Stability Mechanism (Article 13(3) and (4) of the ESM Treaty) fall within the scope of the EU Charter of Fundamental Rights.

The right of collective bargaining enshrined in Article 28 of the Charter represents a genuine fundamental right on the same footing as the provisions of primary law and permits limitations in the general interest only in accordance with Article 52(1) of the Charter.

Article 28 of the Charter is being limited both by national requirements regarding the content of collective agreements and by states' failure to meet the obligation to promote this fundamental right, which entails providing a legal framework for the effective exercise of the right of collective bargaining.

Some of the Council recommendations issued in response to the euro stability crisis would, if they were adopted under the new Macroeconomic Imbalance Procedure, constitute a violation of the right of collective bargaining laid down in Article 28 of the Charter, regardless of the need to transpose them into national law.

In any case, the Commission's decisive role in defining the conditions of MoUs drawn up on behalf of the ESM also represents, in numerous instances, a limitation of the right of collective bargaining as laid down in Article 28 of the Charter, again regardless of the need for these conditions to be implemented by the Member State seeking assistance.

Many of these limitations cannot be justified in the light of the principle of proportionality pursuant to Article 52(1) of the Charter, as they are neither necessary nor proportionate in the narrow sense of the term. The Council recommendations in question and the Commission's involvement are therefore unlawful, being in violation of Article 28 of the Charter.

The Member States concerned and the parties to collective bargaining can seek judicial remedy against Council recommendations for corrective action and the Commission's decisive involvement in the agreement of MoUs by means of an action for annulment pursuant to Article 263 TFEU. National provisions implementing recommendations for corrective action and MoU conditions can be reviewed in the light of their compatibility with Article 28 of the Charter in a preliminary ruling issued pursuant to Article 267 TFEU.

In further detail:

## 1. Applicability of the EU Charter of Fundamental Rights

In the case both of recommendations issued in the context of macroeconomic surveillance on the basis of Articles 6 und 7 et seq. of Regulation 1176/2011 and the Commission's decisive involvement in the agreement of MoUs under the ESM, the applicability of the EU Charter of Fundamental Rights is triggered in accordance with the first alternative of Article 51(1) of the Charter. There is no doubt that this is true of recommendations that have their basis in EU law. However, it also applies to the defining role the Commission plays in the conclusion of MoUs. This essentially results from the fact that, while the Commission is acting pursuant to the ESM Treaty adopted under international law, it is also fulfilling a primary-law obligation of Union law arising from the second sentence of Article 125(1) TFEU and explicitly laid down in the second sentence of Article 136(3) TFEU in connection with the founding of the ESM.

## 2. The guarantee inherent in Article 28 of the Charter

In the CJEU's case law to date, Article 28 of the Charter has barely been acknowledged as having any content in its own right. The right of collective bargaining is being limited to its very essence, i.e. the basic right to conclude collective agreements in the aim of improving working conditions, by legal rights asserted under primary law, namely the fundamental freedoms, and by secondary law. No attempt is made to find a balance with these legal rights or with the objectives of general interest pursued under secondary law.

Nevertheless, it should be borne in mind that Article 28 of the Charter is a genuine fundamental right with its own inherent guarantee. It should be weighed up against conflicting legal positions under primary law, and any limitation of this right by secondary legislation should be assessed in the light of the general criteria laid down in Article 52(1) of the Charter. This is the logical consequence of the stipulation in Article 52(3) of the Charter that the protection of rights in the Charter of Fundamental Rights should be consistent with that afforded by the ECHR. That means that the minimum protection under Article 28 of the Charter is the protection inherent in Article 11 ECHR.

In determining the minimum content afforded by Article 11 ECHR, Article 6 ESC and ILO Conventions Nos 87 and 98, as well as the 'case law' of the competent committees, are also of relevance. These rules of international law must be taken into consideration, in accordance with Article 31(3)(c) VCLT, under the principle of systematic integration, while the committee case law must be taken into account as expert teachings pursuant to Article 38(1)(d) of the Statute of the ICJ. The relevance of Article 6 ESC, and that of the case law adopted as the basis for the autonomous interpretation of the ESC, to the interpretation of Article 28 of the Charter is also clear from the reference made to it in the official explanations of the Praesidium of the Convention which drafted the Charter and the Praesidium of the European Convention.

These sources of international law lay down a right of collective bargaining that has a defence aspect and a guarantee aspect. The defence aspect guards against state interference with the autonomous actions of the parties to the collective bargaining, such as compulsory arbitration or the direct amendment of existing collective agreements. The guarantee element, which is generally referred to in the sources of international law as an obligation to 'promote' the machinery of collective bargaining, requires the provision of an operational framework for the exercise of the right of collective bargaining. The requirements of this framework should be determined on the basis of the function of the right of collective bargaining. That means the possibility for fair working conditions to be established effectively through autonomous negotiations conducted by the parties to the collective bargaining. The nature of the obligation to provide the necessary machinery to that end is dependent on the societal context of the country in question, as it determines what is needed by way of a legal framework.

### 3. Limitation of the right of collective bargaining

Both Council recommendations for corrective action in accordance with Regulation No 1176/2011 and the Commission's decisive involvement in MoUs have the nature of a limitation. The fact that recommendations and MoUs need to be implemented in national law does not invalidate this conclusion, as non-compliance with recommendations or the conditions laid down in MoUs results in legislative and, in the case of MoUs, practical sanctions. With regard to both measures, there is a clear expectation of compliance, based on the pursuit of EU objectives, whereby a Member State is not simply free to choose legislative sanctions over adherence to recommendations and MoU conditions.

Limitations requiring justification arise, first of all, when there is interference with existing collective agreements, such as legislation imposing wage cuts or the restriction of the duration of a collective agreement. The same applies to other substantive requirements concerning the content of collective agreements, for instance, productivity-based wages or variable pay in line with a firm's productivity.

Limitations requiring justification also occur where the obligation to equip the collective bargaining system with adequate machinery has not been met. These limitations can be found in the general precedence granted to company-level collective agreements, the substantive restriction of voluntary arbitration and the repeal of legislative provisions governing the 'after-effect' of collective agreements. Depending on the societal context, restrictions on the extension of collective agreements and the authorisation of non-union employee representatives as a party to collective bargaining may also be characterised as limitations.

### 4. Justification of the limitations

The examples provided of limitations of the right of collective bargaining in the form of interference arising from recommendations in the context of macroeconomic surveillance or conditions attached to financial assistance from the ESM are, in many cases, not justified and represent a violation of Article 28 of the Charter.

The requirement for a limitation of the right of collective bargaining to be provided for by law is not met in respect of recommendations for corrective action issued in accordance with Article 7 et seq. of Regulation No 1176/2011 in conjunction with Regulation No 1174/2011. The adoption of these provisions lay outside the scope of EU competence.

From a substantive point of view, the essence of the right of collective bargaining remains intact and, from a legal perspective, the measures are suitable. However, in many cases, the criterion of necessity was not satisfied, as equally effective but less restrictive measures could have been taken. This is true in three respects: in procedural terms, interference cannot take place without the consultation of the social partners, as their involvement always renders the measure less restrictive. Secondly, it is generally less restrictive if the measures designed to overcome an acute situation of economic crisis are made subject to a time limitation. Thirdly, the need for the less restrictive measure to take precedence means that, in individual cases at least, special provisions must be adopted in order to mitigate cases of particular hardship.

Wherever there is drastic, and, consequently, destabilising interference with the legal framework for the right of collective bargaining, it can never be considered proportionate in the narrow sense. However, as an element of the overall proportionality test, proportionality *stricto sensu* is, as yet, underdeveloped in CJEU case law.

## 5. Possible judicial remedies

Violations of the right of collective bargaining as laid down in Article 28 of the Charter arising both from recommendations for corrective action issued by the Council and the Commission's decisive involvement in the agreement of MoUs can be challenged by means of an action for annulment in accordance with Article 263 TFEU. In addition to the Member State concerned, social partners in that country are also eligible to bring an action.

National legislation implementing recommendations for corrective action and conditions laid down in MoUs that are contested by the parties to collective bargaining or by others before national courts may

also be the subject of a reference for a preliminary ruling pursuant to Article 267 TFEU, under which procedure the CJEU will examine whether there has been an infringement of Article 28 of the Charter.

## 6. Relationship with national protection of fundamental rights

The level of protection guaranteed by Article 28 of the Charter cannot, in the case of MoUs, supplant that afforded under national fundamental rights provisions. Whether that is true of sufficiently detailed recommendations for corrective action cannot be answered here.

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