Industrial actions and the European Union

A study on how the European legal order has affected the right to undertake industrial actions for Swedish trade unions

Erik Karlsson

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Supervisor
Federico Fusco

Examiner
Andreas Inghammar

LUNDS UNIVERSITET
Ekonomihögskolan

Abstract

This thesis has the aim of investigating how EU-law has affected the legal position regarding Swedish trade union's possibilities of undertaking industrial actions. It also aims at determining whether the influence of EU-law on the right to undertake industrial actions has had any effects on the Swedish model.

According to CJEU's judgements in *Laval* and *Viking* it must be said that the possibility for trade unions to undertake industrial actions has been decreased in favour of economic rights. This has been done by the fact that the right to undertake industrial actions must be weighed against the freedom of movement, which is secured by the four fundamental freedoms. Restrictions to fundamental freedoms must be proportionate, pursue a legitimate objective compatible with the treaty and be justified by overriding reasons of public interest.

This thesis has found that industrial actions have the purpose of protecting the workers and can therefore be seen as an action that in principle can restrict a fundamental freedom. Industrial actions must also be proportionate, which entails that industrial actions are to be considered as *ultima ratio* and only allowed if jobs and terms of employment are under serious threat or jeopardized. In relation to posted workers it is also only allowed to enforce minimum regulations within the "hard core". This has, in a negative way, impacted the possibility of undertaking industrial actions in Sweden since such actions does not adhere to these principles within the Swedish legal order. From CJEU's case-law it must also be questioned if different kinds of industrial actions are to be assessed differently depending on if they directly regulate the terms and conditions of employment of the affected workers or not.

The principles above have affected the Swedish model, particularly in areas relating to wages and the trade union's possibilities of monitoring and sanctioning a foreign employer. As an effect there has been legal changes that entered into force in 2017 and changes to collective agreements so that they contain explicit minimum wage levels. It is however questionable if these changes have solved the problems since the regulations is yet to be addressed by the courts or analysed in the doctrine.

Keywords: industrial actions, fundamental freedoms, fundamental rights, proportionality

Sammanfattning

Denna uppsats syftar till att undersöka hur EU-rätten har påverkat svenska arbetstagarorganisationers möjligheter att använda sig utav stridsåtgärder och vilka effekter denna påverkan kan ha på den svenska arbetsmarknadsmodellen. För det första måste det sägas att EU-domstolens genom *Laval* och *Viking* har gjort det svårare för arbetstagarorganisationer att vidta stridsåtgärder då domstolen ansett att de ekonomiska aspekterna utav Unionen är viktigare. I dessa fall har rättigheten att använda sig utav stridsåtgärder ställts emot den fria rörligheten för att sedan göra en avvägning för att fastställa om en inskränkning utav den fria rörligheten kan rättfärdigas. För att en inskränkning ska kunna rättfärdigas måste den vara proportionerlig, ha ett legitimt syfte och ändamål som är förenligt med fördragen och om den är motiverad av tvingande hänsyn till allmänintresset.

Uppsatsen har kommit fram till att stridsåtgärders syfte är att skydda arbetstagarna och att det därmed ses som en handling som i princip skulle kunna begränsa den fria rörligheten. Eftersom att det också finns ett proportionalitetsrekvisit så har domstolen slagit fast att stridsåtgärder ska ses som *ultima ratio* vilket innebär att stridsåtgärder enbart får användas i de fall då arbetstagarnas anställning eller anställningsvillkor är i fara eller allvarligt hotade. När det kommer till utstationerad arbetstagare gäller också att det enbart är minimumregleringar inom den ”hårda kärnan” som kan påtvingas genom stridsåtgärder. Inom den svenska rättsordningen har dessa principer inte gällt i förhållande till stridsåtgärder och därmed har detta medfört att det blivit svårare för arbetstagarorganisationer att använda sig utav stridsåtgärder i de situationer då EU-rätten är tillämplig. Utifrån EU-domstolens praxis kan det också ifrågasättas ifall lagligheten utav en viss stridsåtgärd skiljer sig åt beroende på om den enbart syftar till att reglera anställningsvillkoren för de arbetstagare som är påverkade utav stridsåtgärden eller inte.

De ovan beskrivna principerna har haft en viss påverkan på den svenska modellen, speciellt i förhållande till lönebildningen och arbetstagarorganisationernas möjlighet att övervaka och sanktionera en arbetsgivare. Som en följd utav detta har det gjorts förändringar i den svenska lagstiftningen och att flera kollektivavtal idag innehåller uttryckliga lönenivåer. Det är dock inte helt säkert att dessa ändringar har löst problemet då de ännu inte finns någon doktrin eller praxis kring just detta.

Abbreviations

CFREU	European Charter of Fundamental Rights
CJEU	European Court of Justice
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ILO	International Labour Organization
LO	Landsorganisationen i Sverige / Swedish Trade Union Confederation
PWD	Posting of Workers Directive
SEKO	Service- och Kommunikationsfacket
SACO	Sveriges Akademikers Centralorganisation / Swedish Confederation of Professional Associations
SAF	Svenska Arbetsgivarföreningen / Swedish Employers Association
SN	Svenskt Näringsliv / Confederation of Swedish Enterprises
TCO	Tjänstemännens Centralorganisation / Swedish Confederation of Professional Employees
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1 Background

Industrial actions have always been an important right that the employees have undertaken in order to make sure that their economic and social interests have been met when bargaining for a collective agreement.[1] Employers have always had the most power in the employment relationship so industrial actions have been used to balance the power between the parties.[2] Industrial actions are at the very core of the trade unions, and as Sir Otto Kahn-Freund put it "*there can be a strike without trade unions, but no trade union without strike*".[3] Without the risk of being subjected to industrial actions there would be very little incentive for the employer to enter into negotiations and trade unions would therefore not be able to improve their working conditions. In such situations all power would lie with the employer and collective bargaining would be reduced to collective begging.[4] Such actions should therefore be considered as the most essential mean through which workers and trade unions can defend their occupational interests and to improve working conditions.[5]

In Sweden the right to undertake industrial actions is closely related to the Swedish labour market model and is not subjected to many restrictions. In 1993 just before Sweden's accession to the European Union (EU) a letter from the Swedish Minister of Labour was sent to EU in order to get clarification if the membership would affect the Swedish model. In the letter it was stated that the Swedish Labour market model with the importance of social partners and collective agreements is somewhat unique and that a clarification was needed on what effects the social protocol and the Maastricht Treaty would have on the Swedish model and the possibility of implementing directives through collective agreements. In the response the commission stated that the Maastricht Treaty was very flexible and that the social partners would be granted a possibility of replacing EU-legislation with negotiated agreements. This would make it possible for Sweden to regulate the labour market through collective agreements instead of legislation. Furthermore an important general principle of the

[1] Velyvyte (2015), *The right to strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence*, p. 73-75.
[2] Germanotta & Novitz (2002), Globalisation and the right to strike: The case for european-level protection of secondary action, p. 68.
[3] Rocca (2015), *Posting of workers and collective labour law: there and back again : between internal market and fundamental rights*, p. 87.
[4] Barnard (2012), *EU Employment law*, p. 717.
[5] Germanotta & Novitz (2002), *Globalisation and the right to strike: The case for european-level protection of secondary action,* p. 68.

Maastricht Treaty was that the EU would not have competence in matters regarding industrial actions, wages and the freedom of association.[6] This would guarantee that the Maastricht Treaty and the Social protocol would in no way result in changes that would affect the Swedish model, particularly the way collective agreements are concluded by the social partners.[7] As a result of the negotiations the fear that the Swedish model would not comply with EU-law decreased. The Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) stated that they were pleased with the result since the collective agreement's position within the Swedish model had been secured, that the trade union's interests had been met and that that the Swedish legal traditions had been recognized within an international context.[8]

Despite the fact that Sweden had been given these promises the European Court of Justice (CJEU) showed in the *Laval* and *Viking* judgements that the EU did in fact have competence in relation to industrial action. In both judgements the Court came to the conclusion that the right to undertake industrial actions is a fundamental right protected by both national legislation and international conventions but that it by no means is absolute. When such actions are undertaken in situations that involve more than one Member State a proportionality test must be undertaken in order to determine if the restrictions the industrial actions put on the freedom of movement can be seen as justified.[9] The *Laval* judgement, in Sweden known as the "Vaxholm-conflict", gained a lot of media attention in both newspapers and television. Wanja Lundby-Wedin, at the time chairman of LO, claimed that the principle of equal pay no longer applied and that this was the starting point of a race to the bottom.[10] Alongside LO other blue-collar trade unions stated that the judgement had caused an imbalance between fundamental rights and economic freedoms in a way, which could harm the Swedish model.[11] However, not all voices that were heard following the judgement were negative. Unionen and TCO stated that this was not the end for the Swedish model and all that was required to change was more precise and clear collective agreements.[12] Also Margot

[6] Prop. 1994/95:19, Appendix 12, p. 6-9.
[7] Sweden Enlargement Negotiations – Summary Result, (1994), para 2.
[8] Prop. 1994/95:19, p. 228-229.
[9] See C-341/05 *Laval un Partneri v Svenska Byggnadsarbetarförbundet* (hereinafter C-431/05, *Laval*); and C-438/05 *International Transport Workers' Federation and Finnish Seaman's Union v Viking Line ABP and OÜ Viking Line Eesti* (hereinafter C-438/05 *Viking*).
[10] Livet efter Laval, Landsorganisationen i Sverige, 2008, available at: http://www.lo.se/start/livet_efter_laval
[11] Johansson, Lavaldomen i centrum på Europadagen, Svenskt Näringsliv, 2008, available at: https://www.svensktnaringsliv.se/fragor/konfliktregler/lavaldomen-i-centrum-pa-europadagen_544472.html
[12] Hallstedt, Svenska modellen ohotad, Kollega, 2008, available at: https://www.kollega.se/svenska-modellen-ohotad

Wallström, the former first vice chairman of the EU-commission, stated that this was not the end for the Swedish model.[13]

Following the *Laval* judgement the Swedish government made some changes to the right to undertake industrial actions against foreign employers through what has to become known as *"Lex Laval*". These changes made it harder for trade unions to undertake industrial actions against foreign employers but no changes to situations within a strictly national context was done.[14] These regulations were not seen as positive by all and TCO and LO stated that the new regulations was going to hinder trade unions from guaranteeing fair conditions for posted workers in Sweden. Also the political parties the Social democrats, Green Party and the left wing claimed that the changes were too intrusive and restricted the right to undertake industrial actions too much.[15]

In 2013 the European Social Committee stated that the Swedish regulations amended by *Lex Laval* were violating the freedom of association and right to collective bargaining.[16] As a result the current government proposed that *Lex Laval* should be terminated and that trade unions should have a better possibility of undertaking industrial actions, better control measures and more rights for the posted workers should be guaranteed.[17] In 2015 the proposed changes were disclosed and according to the Minister of Labour, Ylva Johansson, the proposed changes are very important for the strengthening of the Swedish Model since it gives trade unions the right to undertake industrial actions in every situation.[18] The proposed changes were passed by voting by the parliament on the 27th of March 2017[19] and came into effect on 1st on June 2017.[20]

Sweden's membership in EU has as seen above warranted extensive legislative actions regarding the right to undertake industrial actions even though a promise was given to

[13] Öijer, Lavaldolem bekymrar inte Margot Wallström, Kollega, 2008, available at: https://www.kollega.se/lavaldomen-bekymrar-inte-margot-wallstrom
[14] SOU 2008:123, p. 13.
[15] Danielsson Öberg, Laval fortsätter att röra upp känslor, Svenska Dagbladet Näringsliv, 2009, available at: https://www.svd.se/laval-fortsatter-att-rora-upp-kanslor
[16] Elisabet Örnerborg, Lex Laval strider mot strejkrätten, Lag & Avtal, 2013, available at: https://www.lag-avtal.se/arbetsratt/beslut-lex-laval-strider-mot-strejkratten-6552708
[17] Lex Laval ersätts med utökad rätt till kollektivavtal, Dagens Nyheter, 2015, available at: https://www.dn.se/debatt/lex-laval-ersatts-med-utokad-ratt-till-kollektivavtal/
[18] http://www.regeringen.se/pressmeddelanden/2017/02/regeringen-foreslar-nya-utstationeringsregler--lex-laval-rivs-upp/
[19] von Scheele, Lex Laval historia: Det är en seger för alla som tror på kollektivavtal, Lag & Avtal, 2017, available at: https://www.lag-avtal.se/arbetsratt/lex-laval-historia-det-ar-en-seger-for-alla-som-tror-pa-kollektivavtal-6844260
[20] Prop. 2016/17:107, p. 226.

Sweden that this would not be the case. It has also warranted extensive public debate where both positive and negative opinions have been heard.

1.2 Purpose and Research Questions

Following Sweden's accession to EU the debate surrounding EU's influence on the Swedish legal order have been extensive. Of particular interest for this thesis are situations where management and labour are not in agreement and the trade union chooses to undertake industrial actions in order to try and have their demands met. This thesis has the purpose of investigating how EU-law has affected the legal position regarding the right to undertake industrial actions for trade unions in Sweden. Secondly the thesis also investigates whether the influence of EU-law on the right to undertake industrial actions has had any effects on the Swedish model. The following questions have been formulated in order to fulfil this purpose:

- What can be defined as an industrial action following EU-law?
- In which way does EU-law affect the trade unions right of undertaking industrial action as regulated by the Swedish law?
- Which are the effects of this influence of the EU law on the "Swedish model"?

1.3 Methods and materials

In order to be able to answer my research questions and be able to fulfil the purpose of this thesis I've primarily used a legal dogmatic method. This has made it possible to discern and evaluate the Swedish and European legal norms concerning industrial actions within each individual legal order so that it is possible to determine *de lege lata*.[21] It can therefore be said that the method entails the reconstruction of the legal order.[22] Since the method aims at determining *de lege lata* it relies on the study of relevant sources of law such as doctrine, legislation and case law.[23] How much consideration that should be taken to each individual source is to be determined by its authority within the individual legal order. These legal sources are of vital importance since the legal dogmatic method is a qualitative method that cannot rely on observations and measurements.[24]

[21] Kleineman (2013), *Rättsdogmatisk metod,* p. 21-23.
[22] Jareborg (2004), *Rättsdogmatik som vetenskap*, p. 4.
[23] Kleineman (2013), *Rättsdogmatisk metod,* p. 21-23.
[24] Sandgren (2015), *Rättsvetenskap för uppsatsförfattare – ämne, material, metod och argumentation*, p. 43-44.

Concerning the Swedish legal order the sources of law that I have mostly made use of is legislation, preparatory works and case law since their legal value if well established. Doctrine, which is also a well-established source of law, have also been of significant importance for this thesis and worked as a supplement to the other sources of law. Preparatory works, case law and doctrine are particularly prominent when studying industrial actions. This is because the Co-Determination Act is to be interpreted as *e contrario* and only states what is lawful so in order to fully grasp the context and intention of the law a study of doctrine, preparatory works and case law must be done. In relation to the new changes to the Posting of Workers Act no doctrine have been used since the changes it is yet to be analysed and evaluated. Considering this I have adopted a critical view of the proposed changes since preparatory works can no longer base it's legal value solely on its authority within the Swedish legal order.[25] Also since it have not yet been analysed I have been forced to solely draw my conclusions based on the preparatory works, in the form of a proposition. I've also to some extent taken guidance from the referral instances and their statements in the proposition. I am well aware of the fact that these see to their own interests first since they are organizations that represent either the employee or employer part. Their statements have therefore been scrutinized to a larger extent so that my analysis would not be biased.

Since the European legal system is a separate legal order the same sources cannot be used since the sources of law hierarchy is different from that of Sweden. This is partly due to the fact that the legislative process is characterized by negotiations and compromises so the legislator's legislative intent cannot be discerned easily since the end result in most cases differs from the original. Also, according to the European traditions of law preparatory works are not legally binding.[26] Preparatory works have therefore not been used to a large extent and I have instead primarily used case law, treaties, directives and doctrine. Case law has been of significant importance since what is to be considered, as *de lege lata* is to a large extent expressed through it. These have also worked as a complement to the various legislative regulations since these are often expressed in a manner that gives very little guidance. However since CJEU is known to overrule their own judgements a great amount of doctrine have been used to achieve a greater understanding of the complex legal order of EU so that *de lege lata* can be described in a satisfactory manner.[27]

[25] Hettne & Otken Eriksson (2011), *EU-rättslig metod: teori och genomslag i svensk* rättstillämpning, p. 114.
[26] Hettne & Otken Eriksson (2011), *EU-rättslig metod: teori och genomslag i svensk* rättstillämpning, p. 113-114.
[27] Hettne & Otken Eriksson (2011), *EU-rättslig metod: teori och genomslag i svensk* rättstillämpning, p. 40-51.

Aside from the legal dogmatic method a comparative method has also to some extent been used since it facilitates the interpretation of national regulations that are affected by international regulations.[28] Since Sweden is a part of EU the right to undertake industrial actions is subjected to changes as a result of regulations stemming from the European legal order. This has been vital for the thesis since the purpose is to answer how the European legal order have affected the trade union's right to undertake industrial actions in Sweden. When undertaking a comparative study one must be vary of the native language and terminology so that misinterpretations are not being done. It is also vital that the correct sources of law are studied, according to their authority and legal value within the legal order, so that *de lege lata* is correctly understood and described.[29] In order to mitigate this risk an overview prior to the start of this thesis were done in order do discern which sources of law that would be relevant to use. Since one of the official languages within EU is English there has not been any problems with understanding the content of the European legal order. Much of the case law and legislative sources also has an official translation in Sweden.

In the thesis the used sources of law have been chosen with consideration since the aim of the legal dogmatic method is to establish *de lege lata* and using the wrong sources of law would result in a flawed analysis, which would not reflect this. Correct information is vital for the authors' possibility of answering the purpose of the thesis in a satisfactory way.[30] This means that the legitimacy of the analysis is dependant on the authority of the used sources of law. Considering this the sources of law have been chosen with respect to their legal authority within both the European and Swedish legal order. With that being said there is however room for the use of other sources of information in order to enrich the analysis.[31] I have therefore to some extent used articles in daily newspapers throughout the thesis to try and paint a broader picture of the problem and to enhance the understanding of it.

1.4 Delimitations

In order to be able to produce a well-written and precise thesis some delimitations has had to be done. Firstly, I will only focus on the private sector since the public sector has its own regulations and there is not enough room or time to thoroughly investigate how the right to undertake industrial actions within the private as well as the public sector have been affected.

[28] Bogdan (2003), *Komparativ rättskunskap*, p. 31.
[29] Bogdan (2003), *Komparativ rättskunskap*, p. 39-41.
[30] Kleineman (2013), *Rättsdogmatisk metod,* p. 21-27.
[31] Sandgren (2015), *Rättsvetenskap för uppsatsförfattare – ämne, material, metod och argumentation*, p. 43-44.

Since the thesis has the purpose of investigation how EU-law has affected the right to undertake industrial actions in Sweden no consideration will be taken in how it has been affected in other countries or on trade unions on EU level e.g. ETUC. This would fall outside the scope of this thesis. Such relations are also a very wide topic and I would not, within the scope of this thesis, be able to describe it in a sufficient way.

Sweden is bound by many conventions regarding the right to undertake industrial actions both from EU and other international sources. Considering the fact that this thesis is about EU's influence no consideration will be taken of sources that do not have relevance to the interpretation of the European Court of Justice (CJEU). I will therefore not consider the European Social Charter (ESC). Some consideration of the ILO will be taken since it has some relevance in relation to the definition of industrial actions. The main focus of this thesis will be the European Charter of Fundamental Human Rights (CFREU), European Convention of Human Rights (ECHR) and the Community Charter of the Fundamental Social Rights of Workers. It should however be said that CJEU does in fact recognize that the right to undertake industrial actions is protected by ILO and ESC[32] but the conventions above are of more importance. Most states within EU have however ratified these and are therefore obliged to fulfil the obligations as set out in these instruments.

Since EU has both social and economic goals there are according to the treaties a protection of both fundamental rights and freedoms, which in some cases can come into conflict with each other. I will not undertake a thorough investigation of the general conflict that exists between fundamental rights and fundamental freedoms since that could constitute a thesis in itself. With that being said there are some situations where this conflict can occur and the right to undertake industrial actions can be restricted. I will however only focus on the more specific situations where fundamental freedoms have the possibility of restricting the right to undertake industrial actions.

1.6 Disposition

In the second chapter of the thesis I will describe the European legal order in order to achieve a greater understanding of how it influences the Swedish legal order. In this chapter the

[32] See C-341/05 *Laval*, paragraph. 90.

emphasis will be put on the fundamental freedoms concerning the freedom to provide services and establishment. Furthermore I will also highlight the social aspects of the Union and also make a short description of the conflict that might occur between fundamental freedom and rights.

Following this chapter a description of the protection of the right to undertake industrial actions within the Union will be done. A definition of what an industrial action is to be considered as will also be described in this chapter. Of significant importance of the right to undertake industrial actions are the judgements of *Laval* and *Viking*, which will be thoroughly described and analysed.

In chapter four the emergence and characteristics of the Swedish model will be described. This has been done thoroughly in order to a achieve a greater understanding of how the labour market relations differ between the Swedish and European legal order and what the consequences of certain EU regulations might have on it.

Following the description of the Swedish model chapter five will contain information regarding the right to undertake industrial actions as regulated by the Swedish legal order. This has been done in order to be able to fully discern how this regulation differs from the European regulations and what is has led to.

In chapter six the legal changes within the Swedish legal order that has occurred, as an effect of EU regulations, will be presented. Special attention has been given to the new regulations that come into force in 2017 since nothing has yet been written about it in the doctrine or been at the attention of the court. This however makes the new regulations somewhat unclear and a precise or clear picture cannot be given as of today.

In chapter seven and eight a presentation of how the European regulation of the right to undertake industrial actions has affected this right within the Swedish legal order. In which ways these regulation has affected the Swedish model will also be presented. These will further be discussed and analysed from different points of views.

2. EU law

2.1 Legal principles and sources of law

One fundamental part of EU is the substantial legal framework that is to be considered as a separate legal system. Courts and authorities in the Member States are obligated to apply EU-law in matters of transnational and national context and are not allowed to hinder its effects or application.[33] Member States must also interpret national law in a way, which is in conformity with EU-law. This means that Member States interpretation of national law cannot come into conflict with a regulation of EU-law and the objective or purpose it is trying to achieve.[34] EU's competence can be either exclusive or joint with the national governments. There are however some areas where the EU does not have any legislative competence at all. This has led to the development of the "principle of conferral". It means that EU can only act within the competence it has been granted by the Member States as stated in the Treaties.[35]

EU-law has two main sources of law; primary and secondary. Primary sources consist of mainly the Treaty of Lisbon, which in turn is separated into TEU and TFEU. Secondary law consist of regulations, directives, decisions, recommendations and opinions. These have been drafted and amended by the different institutions of EU according to the legislative competence they have been given by the treaties. If a conflict between primary and secondary law arises primary law is to be considered as *lex superior*. Aside from primary and secondary law sources non-binding regulations can also have an effect in the form of *soft law*.[36]

Primary law, such as TEU and TFEU, are directly applicable to individuals and authorities in the Member States and warrants no legislative measures in order for it to be incorporated into the national legislation. Such regulations can in some cases have a direct effect, which not only means obligations for the Member State but also rights for the citizens which they can invoke before a national court without the existence of regulations in national legislation. In order to achieve this effect the obligations from these regulations has to be sufficiently precise, unconditional and not warrant any changes in the Member State's legislation.[37]

[33] Nyström (2017), *EU och arbetsrätten*, p. 34-35.
[34] Nielsen (2013), *EU Labour Law*, p. 106.
[35] Nielsen (2013), *EU Labour Law*, p. 57-58.
[36] Nyström (2017), *EU och arbetsrätten*, p. 35-36.
[37] Nyström (2017), *EU och arbetsrätten*, p. 41-43.

When it comes to secondary law sources it can sometimes be problematic since these must be implemented in the national legislation in order to give rise to rights for the citizens. This is not always done correctly so to combat this particular problem CJEU have through the important *Francovich*-principle stated that directives in some situations can have direct effect. In *Francovich and Bonifaci v. Italy* the court stated that the state cannot plead, against an individual, its own failure to implement a directive. If a directive has not been implemented in time or in the wrong way direct effect can occur if the directive defines rights that individuals are able to assert against the state and are unconditional and sufficiently precise.[38] This principle is of great importance since the effectiveness of EU-law would be seriously jeopardized if individuals would not receive some kind of redress if their rights is violated by the state.[39]

Regulations with direct effect have primacy over national law, which can be seen in *Flaminio Costa v. ENEL*. In the wake of a nationalization of the production of electricity the Milan court requested the court to issue a preliminary ruling on the matter of Italian law were in violation of articles 102, 93, 53 and 37 of the EEC Treaty. In relation to the effect of EU-law the court stated:

> *"The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law".*[40]

Another case where the principles of direct effect and the primacy of EU-law can be seen is *Defrenne v. Sabena*.[41] In 1975 the Court of Brussels referred a question regarding the effect and implementation of TFEU 157 following an alleged wage discrimination claim, in front of the Court of Brussels, by a female cabin steward. The court stated in relation to the effect and implementation that:

> "*The reply to the first question must therefore be that the principle of equal pay contained in Article 119 (now 157 TFEU) may be relied upon before the national courts and that*

[38] C-6,9/90 *Frankovich and Bonifaci v. Italian Republic*, paragraph. 11.
[39] C-6,9/90 *Frankovich and Bonifaci v. Italian Republic*, paragraph. 33.
[40] C-6/64 *Flaminio Costa v. ENEL*, p. 594.
[41] C-43/75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*

> *these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public*."[42]

Through these judgements it can be seen that the Member States has an obligation to guarantee, where there is a direct effect, the rights set out in the regulations to the individuals. It is also clear that EU-law have primacy over national legislation since it is not allowed to adopt legislation that does not harmonize with EU-law. This obligation exists regardless if the violation has occurred due to a regulation in legislation or through collective agreements. Direct effect can be of two different kinds; horizontal and vertical. Horizontal effect means that private legal entities can refer to EU-law against another private legal entity while vertical only gives the private legal entities the possibility to refer to EU-law against the state.[43]

2.2 An economic union, the four freedoms

The main purpose behind the creation of EU was to establish a union that promoted the harmonisation of the Member States economies and a creation of a common market. This was to be done through the notion of free movement without discrimination on grounds of nationality. This lead to the creation of the four freedoms of movement of goods, services, people and capital[44] as stated in Article 26(2) TFEU:

> "*The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.*"

These freedoms were established in order to create conditions so that Member States could, in a fair way, compete with each other on equal terms. This would also lead to a more prosperous and successful union since it would allow companies to relocate to places where their needs for manpower, capital or materials were properly met.[45] In order to fulfil this purpose much of EU legislation has focused on abolishing national trade- restrictions or

[42] C-43/75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, paragraph. 40.
[43] Nyström (2017), *EU och arbetsrätten*, p. 41-43.
[44] Nyström (2017), *EU och arbetsrätten*, p. 101-106.
[45] Vos & Barnard (red.) (2009), *European Union internal market and labour law: friends or foes?*, p. 20.

barriers, which are to be considered as verging on protectionism or considered to be overly intrusive.[46]

Since freedom of movement is of such importance for the common market they are to be seen as a fundamental freedom and an integral part of EU-law. Their purpose is not only to ensure a well functioning common market but also that no discrimination on the grounds of nationality is occurring. This principle can be found in TFEU 18.1 and are to be considered as one of the cornerstones of EU and applicable to all four economic freedoms.[47] Discriminatory actions does not per say have to be discriminatory since every action that makes it harder or dissuades anyone from using their freedom of movement should be seen as discriminatory.[48] In order to make sure that the purposes of the four freedoms are fulfilled they have been granted the status of direct effect so that citizens can bring a claim before the national courts.[49]

The success of the common market depends on the four freedoms and the CJEU have made sure, through its case-law, that these are respected by abolishing trade barriers and national legislation that are discriminatory.[50] In the important judgement of *Cassis de Dijon*[51] the CJEU stated that national regulations cannot prohibit the sale of goods that are lawfully produced and marketed in any Member State. Highly controversial the court also stated that national regulations that treat national and foreign goods in the same way have the possibility of constituting an unjustified restriction.[52] The reasoning behind this is that such regulations will most likely impact the foreign goods to a greater extent.[53] It is however not only through case-law that the common market is being protected since there's also a substantive adoption of legislation with the aim of guaranteeing the common market's success.[54]

Even if the four freedoms are to be seen as fundamental they are by no means absolute. Some restrictions can be put on them as was highlighted in *Aget Iraklis v. Ypourgus Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*:

[46] Bernitz & Kjellgren (2018), *Europarättens grunder*, p. 309.
[47] Bernitz & Kjellgren (2018), *Europarättens grunder*, p. 284-287.
[48] Barnard (2016), *The substantive law of the EU – The four freedoms*, p. 306-307.
[49] De Vries, Bernitz & Weatherill (2013), *The protection of fundamental rights in the EU after Lisbon*, p. 3.
[50] Bernitz & Kjellgren (2018), *Europarättens grunder*, p. 286-287.
[51] C-120/78 *Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein*
[52] C-120/78 *Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein*, paragraph. 14.
[53] Bernitz & Kjellgren (2018), *Europarättens grunder*, p. 331.
[54] Bernitz & Kjellgren (2018), *Europarättens grunder*, p. 286-297.

> "*According to settled case-law, a restriction on freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary, in such a case, that the restriction should be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective.*[55]"

Justified restrictions must, as stated above, be of overriding reasons of public interest, proportionate and relate to an objective compatible with the treaty such as protection of workers, preventing social dumping or avoiding unfair competition on the labour market.[56] Furthermore the restrictions must be applied in a non-discriminatory way unless it relates to public policy, public health or public security.[57] This is a reiteration that follows from the principles drawn from the *Gebhard*[58] judgement, which founded the "*Gebhard-test*".[59]

2.2.1 Freedom to provide services and establishment

Free movement of services and freedom of establishment is an important part of the common market and can be found in TFEU 56-62 and 49-55. This applies to physical and legal persons as well as providers and recipients of services. Both regulations concern the same area but different situations. The freedom to establishment concerns establishments of permanent or semi-permanent nature. If an establishment is to be considered as an establishment in accordance with Article 49 TFEU the undertaking must have a permanent presence in the host state for the pursuit of a genuine economic activity. There is both primary and secondary establishment where the prior relates to the incorporation of a company in a Member State and the latter relates to the creation of a branch, agency or subsidiary in another Member State.[60] The freedom to provide services on the other hands strictly concerns situations where the performed work is of temporary nature.[61]

These regulations apply to both legal and physicals persons and they should not be subjected to any discrimination in relation to their nationality when it comes to providing a service or establishing in another Member State. The general principle of non-discrimination can be found in Article 18.1 TFEU but should also be applied to the freedom to provide services and establishment according Articles 49, 54, 56 and 57 TFEU. In relation to the principle of non-

[55] C-201/15 *Aget Iraklis v. Ypourgus Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, paragraph. 61.
[56] Vos & Barnard (2009), *European Union internal market and labour law: friends or foes?*, p. 25.
[57] C-341/05 *Laval*, paragraph. 117.
[58] C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*
[59] Bernitz & Kjellgren (2018). *Europarättens grunder*, p. 353.
[60] Barnard (2016), *The substantive law of the EU – The four freedoms*, p. 382-386.
[61] Barnard (2016), *The substantive law of the EU – The four freedoms*, p. 295-296.

discrimination this entails a principle of equal treatment, which means that national and domestic individuals and undertakings must be treated in the same way.[62] Also, actions or measures that does not constitute a discriminatory act are not allowed according to Articles 49, 54, 56 and 57 TFEU if they prevent or impede the access to the market.[63] These provision has direct effect and can therefore be invoked regardless of these rights are being violated by legislation, case law, application of law or of the actions by e.g. a trade union.[64]

As is shown above it can be said that all national measure or actions, which make it harder for a foreign undertaking to provide their services or establish in a host state, are a restriction to the freedom to provide services and establishment.[65] Member States therefore, as a result of the principle of equal treatment and non-discrimination, have the obligation to, on a national level, abolish all hinders against the free movement of services and establishment.[66] This has been done by the "single market approach"[67], which was illustrated by *Säger v. Dennemayer*[68] where the court said that the Member States are required to facilitate the:

> "*…elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.*[69]"

Aside from abolishing all restrictions to the freedom to provide services the host state does not have the right to demand that the foreign undertaking must apply the same regulations, as the national undertakings are obliged to do since it would make it pointless or less attractive to undertake work in that particular Member State.[70] This shows that the Cassis de Dijon principle have come to not only apply to the freedom of movement of goods but also the freedom to provide services. This way of regulating this particular matter has led to the strengthening of the common market since it in an effective way abolishes unjustified restrictions to the freedom to provide services.[71] This has however had some affect in the

[62] Bernitz & Kjellgren (2018), *Europarättens grunder*, p. 343.
[63] Barnard (2016), *The substantive law of the EU – The four freedoms*, p. 306.
[64] Bernitz & Kjellgren (2018), *Europarättens grunder*, p. 343.
[65] Bernitz & Kjellgren (2018), *Europarättens grunder*, p. 349.
[66] Nyström (2017), *EU och arbetsrätten*, p. 105-106.
[67] Vos & Barnard (2009). *European Union internal market and labour law: friends or foes?*, p. 22-36.
[68] C-76/90 *Säger v. Dennemayer & Co Ltd*
[69] C-76/90 *Säger v. Dennemayer & Co Ltd*, paragraph. 12.
[70] C-76/90 *Säger v. Dennemayer & Co Ltd*, paragraph. 13.
[71] Vos & Barnard (2009). *European Union internal market and labour law: friends or foes?*, p. 22-36.

labour protection and working environment area since it has lowered the protection of the workers since it is not allowed to apply all regulations.[72]

Despite the fact that the single market approach has had a substantive effect on unjustified restrictions on the fundamental freedoms there are some restrictions, which can be justified. Such restrictions are only allowed if they are justified by imperative reasons relating to the public interest and proportionate in the sense that it must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.[73] Of interest for this thesis is that the possibility to undertake industrial can be seen as an unjustified restriction to the freedom to provide services or establishment. This was brought on by the *Laval* and *Viking* cases and will be thoroughly analysed in chapter 3.5.

2.2.2 Posting of Workers directive

When the Union was created in 1957 the main goal was to promote the economic aspects through the freedom of movement. This does however mean that employers in different countries competes with each other, which can cause a race to the bottom where the employees are the ones paying the price in the form of terms and conditions of employment that aren't fair. This is known as "social dumping" and can occur in a number of different situations. In relation to the labour protection area this occurs when employers cuts down on wages and other terms and conditions of employment in order to win a contract, when an employer posts workers in another Member States and does not pay the amount that is normally paid in the host country or outsources the production to a country where the production costs are much lower. This has caused serious problems for the Union since it does not only contribute to social dumping but also distorts the competition on the market. Member States have therefore, since the creation of EU, used different measure to shield themselves from such problems.[74] The Commission feared that that the lack of a unison regulation throughout the Union would lead to unfair competition.[75] In order to come to turns with this problems and to create a unison way of combating it[76] it was in the *Rush Portuguesa* judgement stated that:

[72] Bernitz & Kjellgren (2018), *Europarättens grunder*, p. 297.
[73] C-76/90 *Säger v. Dennemayer & Co Ltd*, paragraph. 13; Se also Barnard (2016), *The substantive law of the EU – The four freedoms*, p. 310.
[74] Nyström (2017), *EU och arbetsrätten*, p. 116-119.
[75] Prop. 1998/99:90, p. 8-9.
[76] Nyström (2017), *EU och arbetsrätten*, p.. 116-119.

> "*Finally, it should be stated, in response to the concern expressed in this connection by the French Government, that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means….*"[77]

This meant that Member States, following this judgement, had the right to extend collective agreements or legislation and demand that undertakings posting workers had to follow these. Despite this important judgement the legal positions was still somewhat unclear so in 1991 the Commission drafted the Station of Workers Directive (PWD), which came into force in 1996.[78]

In the preamble of the directive it is stated that the aim of the directive is to make sure that posted workers enjoy fair terms and conditions so that a climate of fair competition throughout the Union can be maintained. If employers who are posting workers are forced to apply a certain set of rules they cannot undercut the national undertakings and through this violate the principle of fair competition. This would also in turn make sure that as little social dumping as possible is occurring on the common market.[79] Secondly the directive aims at making sure that the freedom to provide services is not being violated since that is vital for the functioning of the common market.[80] It can therefore be said that the directive strikes a balance between the social and economic aspects of the Union.[81] Furthermore it is also stated that the directive should not interfere with the Member States regulations concerning trade unions and employer associations' possibility to defend their interests through collective actions.[82]

As a general rule within the jurisprudence of EU-law the Rome I regulation determines which country's law should be applied when a worker performs work in a state that is not considered to be the home state. According to the regulation the general rule is that the parties are free to

[77] C-113/89 *Rush Portuguesa Lda v. Office national d'immigration*, paragraph. 18
[78] Nyström (2017), *EU och arbetsrätten*, p. 119.
[79] Barnard (2012), *EU Employment law*, p. 370.
[80] C-346/06 Dirk Rüffert v. Land Niedersachsen, paragraph. 36, and Edström (2008), *The Free Movement of Services and the Right to Industrial Action in Swedish Law – in the Light of the Laval Case*, p. 175.
[81] Cremers, Dölvik & Bosch (2007), *Posting of workers in the single market: attempts to prevent social dumping and regime competition in EU*, p. 528.
[82] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (hereinafter 96/71/EC), paragraph. 22.

decide which country's law that should govern the contract.[83] If no choice has been taken the contract should be governed by the law where the undertaking has its habitual residence or where the contract has the strongest connection too.[84] In relation to individual employments contracts the law from where the employee habitually carries out his work should govern the contract if no choice of law have been taken. Furthermore the country where the work is habitually carried out should not be considered as having been changed if the worker is temporarily employed in another country.[85] Even though the Rome I Regulation determines which country's law should apply the actual terms and conditions that have to be applied are determined by the PWD. Its regulations are to be seen as *Lex Specialias* and therefore have primacy over the regulations of the Rome I regulation.[86] PWD is applicable when a worker for a limited time carries out his work in a Member State where he does not normally work,[87] there is an employment relationship between the worker and employer[88] and when an undertaking transnationally:

> *"(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State…; or*
>
> *(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State,…; or*
>
> *(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State…."*[89]

Each Member State has to make sure that posted workers at minimum enjoy terms and conditions found in 3.1 a-g know as the "hard core".[90] These regulations concerns maximum work period, minimum rest period, minimum paid annual holidays, minimum rates of pay; including overtime, the conditions of hiring-out workers, health, safety, hygiene at work, discrimination and equal treatment. This does however not limit the Member States from allowing the application of more favourable terms and conditions than article 3.1 a-g

[83] Regulation (EC) No 593/2008 of the European parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome 1) (hereinafter Regulation (EC) No 593/2008) , article. 3.1
[84] Regulation (EC) No 593/2008, article. 4.1
[85] Regulation (EC) No 593/2008, article. 8.2
[86] Nyström (2017), *EU och arbetsrätten*, p. 157-159, and Edström (2008), *The Free Movement of Services and the Right to Industrial Action in Swedish Law – in the Light of the Laval Case*, p. 175.
[87] 96/71/EC, article. 2.
[88] 96/71/EC, article. 1.3.
[89] 96/71/EC, article. 1.3.
[90] 96/71/EC, article. 3.1.

permits.[91] However, if the Member State wants to extend the scope of the hard core so that it involves additional areas it can only be done if it's related to public policy.[92] This cannot be done by the labour market parties since such decisions must be taken by the state authorities.[93] Terms and conditions must also be made available so that foreign employers know which terms and conditions to apply.[94] This is to be done through a liaison office, which is to be appointed by the state.[95]

Terms and conditions have to be guaranteed through legislation or collective agreements that have been made universally applicable. If there is no system for such collective agreements the terms and conditions can be guaranteed through "generally available collective agreements" that are generally applicable to all similar undertakings in the geographical area and in the industry or profession or collective agreements concluded by the most representative employers' organizations and trade unions and are applied through out the national territory.[96] Even though there exists a possibility for the use of none universally extended collective agreements it should be interpreted in a strict manner as seen in the *Rüffert* judgement. In this situation the minimum wage demanded by the state was found in a collective agreements that was not declared universally applicable and that could not be considered to fall within the scope of article 3.8 since it only covered the private sector of the building industry. Hence, the court came to the conclusion that terms and conditions found in that collective agreement could not be relied upon since it was not universally declared applicable and it did not fall within the scope of article 3.8.[97]

2.2.2.1 Enforcement directive

Following the strategy for the functioning of the common market in 2010 the Commission announced that they were going to draft new rules concerning posting of workers in order to clarify the nature of the relationship between social and economic rights. It entered into force in 2014 and contained regulations and control mechanisms that were supposed to guarantee the effectiveness of the PWD, the adherence to it and to make the application of it more uniform throughout the entire Union.[98] Through these regulations the Union would be able to

[91] 96/71/EC, article. 3.7.
[92] 96/71/EC, article. 3.1.
[93] Kruse (2009), *Fackliga stridsåtgärder och den fria rörligheten i EU*, p. 194.
[94] 96/71/EC, article. 4.3
[95] 96/71/EC, article. 4.1
[96] 96/71/EC, article. 3.8
[97] C-346/06 *Dirk Rüffert v. Land Niedersachsen*, paragraph. 25-31.
[98] Nyström (2017), *EU och arbetsrätten*, p. 170-171.

combat the problem with undertakings circumventing and abusing the existing rules and therefore taking advantage of the freedom to provide services.[99] It has the same goal as PWD in the sense that it aims at discouraging social dumping and thus promoting fair competition while at the same time making sure that the freedom to provide services is guaranteed.[100] The enforcement directive does not, as is also stated in the PWD, affect the right to undertake collective actions in accordance with national legislation or practice.[101]

In relation to posting of workers the predictability and transparency concerning the information on terms and conditions of employment in the host state is a vital piece of information that an employer posting workers needs in order to run the undertaking. Information that is not presented in such manner often leads to employers not applying the correct terms and conditions of employment. According to PWD there is an obligation for the Member States to make sure that information regarding the hard core is publically available and presented in a clear and transparent way. This regulation have however not been sufficient and it has been difficult to attain the information needed so the Enforcement directive aims at improving this. Member States must according to article 5 make sure that the information is publically available and free of charge in a transparent, clear, comprehensive and easily accessible through electronic means, preferably a webpage. On this webpage there has to be information regarding which collective agreements are applicable and the terms that has to be applied to the stationed workers. Member States must also make sure that there are national bodies and authorities that the foreign employer can turn to in order to get the needed information.[102] Member States must also impose administrative requirements and control measures that are necessary in order to make sure that foreign employers are applying the correct terms and conditions of employment. In order for these to be determined as "necessary" these must according to EU-law be justified and proportionate.[103] It is therefore allowed for Member States to ensure that there are appropriate and effective control systems and controls in the form of inspections. In countries where the terms and conditions are

[99] Directive 2014/67/EU of the Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System (hereinafter 2014/67/EU), paragraph. 7.
[100] 2014/67/EU, paragraph. 16.
[101] 2014/67/EU, article. 1.2
[102] SOU 2015:13, p. 97-99.
[103] 2014/67/EU, article. 9.1

concluded through collective bargaining the parties to the collective agreements are also allowed to perform the inspections.[104]

2.3 Social dimension

In 1957 when the European Economic Union was established it was founded with the intention of making business more prosperous[105] through the creation of a common market through the means of free movement.[106] As an effect of this the social aspects were seen as less important and left to be regulated by the individual Member States. Also, there was no need for a special regulation concerning the social policies since the economic aspects were said to cause wage levels in Member States to harmonise and through the common market create better social conditions for all Member States.[107] However, over time the social aspects of EU have become of more importance and now, supposedly, enjoy the same level of importance as the economic ones.[108] This started around 1970 when the union realised that the promised effects of the common market were absent and that a social dimension was becoming more and more important. This lead to the making of the Action Programme, which stated that the union should work towards three goals:

> *"the attainment of full and better employment in the Union; the improvement of living and working conditions; and increased involvement of management and labour in the economic and social decisions of the Union and of workers in the life of the undertaking".*

During this time it was also not clear if fundamental rights were to be seen as something important by the CJEU or the treaties. However, in 1969 it was explicitly made clear that the CJEU were paying attention to fundamental rights and in *Stauder v. Ulm* it was stated that fundamental human rights should be seen as a general principle of EU-law, which is to be protected by the court.[109] It is here for the first time stated that fundamental human rights can't be seen as something arbitrary since it's to be considered as an general principle of EU-law.[110] This judgement was brought on, not by the fact that fundamental rights were considered to be important but rather the threat against the primacy of EU-law. During this time Germany and Italy expressed concerns that fundamental rights were not protected by

[104] 2014/67/EU, article. 10.1 and 10.4.
[105] Ewing (2015), *The Death of Social Europe,* p. 77.
[106] Barnard (2012), *EU Employment law*, p. 4.
[107] Vos & Barnard (2009). *European Union internal market and labour law: friends or foes?*, p. 20.
[108] Vos & Barnard (2009). *European Union internal market and labour law: friends or foes?*, p. 38.
[109] C-29/69 *Stauder v. Ulm*, paragraph. 7
[110] De Vries (2013), *The protection of fundamental rights in the EU after Lisbon*, p. 60-61.

EU-law so to make sure that the national courts would follow the rule of primacy the court stated in the *Stauder v. Ulm* judgement that fundamental rights were an integral part of EU-law.[111] This notion has been further developed and reiterated by the judgements of *Internationale Handelsgesellschaft* and *Nold*.[112] Another important aspect that has improved the development of fundamental rights is that since 1970 the provisions of the European Convention of Human Rights are considered to be general principles of law that should be applied within EU.[113] As of today it is also stated in article 2 TEU that one of the foundations on which the Union is based upon is the respect for human rights.[114]

This movement of creating a more developed social policy was however halted during the 1980s, mainly by the UK. Under the lead of Margaret Thatcher the UK made it clear that they wanted a more flexible market without state regulations so that they could compete more successfully on the global market.[115] The stagnation in the social rights area took a turn for the better in 1989 and a development for a more social Europe started taking place. It begun with the adoption of the European Social Charter (ESC), which was closely followed by two white papers and one green paper that aimed at reducing unemployment and social exclusion.[116]

Shortly after in 1992 in Maastricht all Member States except the UK decided to sign the social chapter in order to fulfil the obligations set out in the social charter. This mainly regulated questions regarding employee participation in multinational companies, parental leave, non-discrimination of part time workers and the burden of proof in relation to discrimination. From this point on it is clear that the social aspects of the Union were becoming of more importance and the Union had also realised that they needed to set out goals in relation to employment and social inclusion. This was further reiterated in the Treaty of Amsterdam where it was stated that the goal of a high rate of employment was to be seen as highly prioritized amongst all Member States.[117] It was stated in Article 2 of the Treaty of Amsterdam that the community should work towards:

[111] Nielsen (2013), *EU Labour Law*, p. 66.
[112] C-11/70 *Internationale Handelsgesellschaft mbH v. Einfurh- und Vorratsstelle für Getreide und Futtermittel*, paragraph. 4; See also C-4/73 *J. Nold Kohlen- und Baustoffgrosshandlung v. Commission of the European Communities,* paragraph. 13.
[113] Nyström (2017), *EU och arbetsrätten*, p. 97-99.
[114] Herzfeld Olsson (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p. 397.
[115] Barnard (2012), *EU Employment law*, p. 9-10.
[116] Barnard (2012), *EU Employment law*, p. 12-20.
[117] Nyström (2017), *EU och arbetsrätten*, p. 55-56.

> *"…a high level of employment and of social protection, equality between men and women….a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."*[118]

Further developments were made in 2003 when the Treaty of Nice came into force and with it the Charter of Fundamental Rights, which despite it not being legally binding had some affect in the labour protection area, particular in regards to industrial actions. It was also stated that EU must work towards reducing unemployment and discrimination and that a balance between the social and economic aspects of the Union must be struck. Following this the Treaty of Lisbon entered into force 2009. This warranted extensive changes to the Union and one of the important factors for a more social Europe was that the Charter of Fundamental Rights was made legally binding and that it would enjoy the same legal status as the treaties.[119] It has also reiterated the importance of fundamental rights since it should be seen as a fundamental value of EU and that according to Article 6(2) TEU the Union shall accede to the ECHR.[120] This propelled the social dimension so that it today is considered as being of significant importance.[121] Its importance can be seen in 3.3 TEU where it is stated that:

> "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.*"

Following the aspects outlined above it is clear that since 1957 the Union has come a long way from its purely economic goals. Social rights can no longer be seen as something secondary but instead something as important as the economic goals.[122]

3 Industrial actions within EU

Even though fundamental rights have, within EU, been granted the attention of the court and treaties since 1969 the right to undertake industrial actions have not been given the same

[118] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1997), article. 2; See also Nyström (2017), *EU och arbetsrätten*, p. 56.
[119] Nyström (2017), *EU och arbetsrätten*, p. 57-59.
[120] De Vries, Bernitz & Weatherill (2013), *The protection of fundamental rights in the EU after Lisbon*, p. 1.
[121] Barnard (2012), *EU Employment law*, p. 27.
[122] Vos & Barnard (2009). *European Union internal market and labour law: friends or foes?*, p. 38.

amount of attention.[123] It was first in 2007 when the *Viking* and *Laval* judgements were settled that it was explicitly clear that the rights to undertake industrial actions by trade unions and employers are to be considered as a fundamental right.[124] What constitute an industrial action is not defined by EU-law since such actions adheres to the regulations in each and every Member State, which to a great extent varies.[125] Such actions have always been seen as something that is to be exercised by the Member States according to their own socially embedded industrial relations systems according to national legislation and other international obligations.[126]

The term industrial actions encompass various kinds of actions that are used in order to put pressure on employers to defend the occupational interests of the trade union's members.[127] There are many different kinds of actions that can be classified as an industrial action and no exhaustive list can be drafted since it varies in every Member State. Since there is no exhaustive list of the existing industrial actions there has to exist a definition so that it can be established if an action is to be considered as an industrial action or not. The definition of Industrial actions within EU should, due to the fact that EU has a cooperation agreement with ILO, draw the definition from the jurisprudence of the Committee on Freedom of Association.[128] If an action is to be classified as an industrial action is based on if the action is a:

> *"collective and concerted withholding of labour in pursuit of specific occupational demands exercised peacefully".*[129]

The concerted prerequisite entails that industrial action can only be undertaken by organizations, employers or a group of individuals since there has to be a certain amount of coordination between the parties undertaking the action. This is supported by the fact that both the European Charter of Fundamental Rights (CRFEU) and the European Charter of Human Rights (ECHR) states that the right to undertake industrial actions should be given to organizations. For an action to be considered as collectively taken the withholding or

[123] Nielsen (2013), *EU Labour Law*, p. 66.
[124] Nyström (2007), *Stridsåtgärder - en grundläggande rättighet som kan begränsas av den fria rörligheten*, p. 867.
[125] Kruse (2009), *Fackliga atridsåtgärder och den fria rörligheten i EU*, p. 187.
[126] Novitz (2016), *The EU and the right to strike: Regulation through the back door and its impact on social dialogue*, p. 46.
[127] *Schmidt and Dahlström v. Sweden*, Application No 5589/72, ECHR 1976, paragraph. 36.
[128] Novitz (2016), *The EU and the right to strike: Regulation through the back door and its impact on social dialogue*, p. 49.
[129] Rocca (2015), *Posting of workers and collective labour law: there and back again : between internal market and fundamental rights*, p. 95.

hindering of labour must be undertaken by several employees simultaneously.[130] When it comes to the occupational demands there can according to the jurisprudence of the ILO be three situations that can be classified as relating to occupational demands. These are to be understood as improving working conditions for the workers, hindering the application of worse terms and conditions, protecting or improving the rights of the trade union and political demands. However since the there is no unison regulation throughout the Union these can to some extent vary. Lastly the actions must be undertaken in a peaceful manner without the destruction of property or physical violence.[131]

Even if there are many types of industrial actions it must be said that strikes are the trade union's most prominent and arguably most important industrial action.[132] Strikes have always been an area that the Union has seen as problematic and been very wary to regulate this matter[133] and according to TFEU 153.5 the Union does not have competence in such matters. This is most likely the result of the Member State's unwillingness to give the Union competence in such matter. With that being said that does not mean that the Union does not have any competence at all in such matters since other regulations in the treaties and secondary law can have an effect on these rights.[134] It can however be questioned if the Union should not have competence in relation to only strikes or other actions as well. In the *Laval* judgement it was stated that "blockade" was to be considered as falling within the scope of TFEU 153.5[135] and therefore be classified as a strike. Also in the *Viking* judgement it was stated that the industrial actions did not fall outside the scope of 153.5[136] even if the actions undertaken by ITF, in the form of a circular, did not constitute a strike per definition. Also, according to ILO, from which the EU definition of industrial action draws its meaning, it is stated that according to their jurisprudence strike actions encompasses actions such as tools-down, go-slow and sit-ins.[137] It is therefore reasonably so assume that the Union does not have any competence in relation to any industrial actions. Despite the fact that the Union does

[130] Rocca (2015), *Posting of workers and collective labour law: there and back again : between internal market and fundamental rights*, p. 87-97.
[131] Rocca (2015), *Posting of workers and collective labour law: there and back again : between internal market and fundamental rights*, p. 87-97.
[132] Rocca (2015), *Posting of workers and collective labour law: there and back again : between internal market and fundamental rights*, p. 87-97.
[133] Novitz (2016), *The EU and the right to strike: Regulation through the back door and its impact on social dialogue*, p. 46.
[134] Herzfeld Olsson (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p. 391-393.
[135] C-341/05 *Laval*, paragraph. 88.
[136] C-438/05 *Viking*, paragraph. 41.
[137] ILO, *Digest of decisions and principles of the Freedom of Association Committee of the governing body of ILO*, paragraph. 545.

not have competence in such matters there has been an adoption of regulations that are to make sure that the right to undertake industrial actions are to be protected.

3.1 European Charter of Fundamental Rights

Following the development of the social aspects of the Union the interest in protecting the fundamental rights increased since some actors claimed that the protection was not living up to the standards it should. In 1998 the Commission tasked a workgroup with investigation how the protection of fundamental rights could be improved. In 1999 the group revealed their results, which stated that all actions taken within the Union must be done with the respect of fundamental rights and that the respect for fundamental rights must be expressed in one of the treaties rather than referring to an individual instrument. This would lead to the fact that the individuals in the Member States would be more aware of their existence and have the possibility of appealing in front of the court if these were to be violated. In order to determine which elements of fundamental rights that should be protected it was proposed that the new regulation should be based on the ECHR, the constitutional traditions common to the Member States, legal principles under EU-law and other international instruments.[138]

The final draft of the European Charter of Fundamental Rights (CFREU) was introduced and implemented as a "solemn proclamation" through the Charter of Nice in 2000. Being a solemn proclamation it was not to be seen as a legally binding document. The fact that it was not legally binding was a result of the concern among Member States that case-law from CJEU might affect the right to undertake industrial action and freedom of association, within the national context, in a negative way. Even though the Member States expressed their concern CJEU still referenced to it in its judgement, which made it into soft law.[139] In 2001 the Commission decided that all new legislation adopted must be in compliance with the CFREU.[140] Its status changed in 2009, through the Treaty of Lisbon, where it was made legally binding[141] and now enjoys the same legal status as the treaties.[142] Following the Treaty of Lisbon the Charter has become an important tool in protecting the fundamental rights and is often relied upon by the CJEU, which has taken upon itself to further develop and clarify its

[138] Herzfeld Olsson (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p. 422-425.
[139] Nyström (2017), *EU och arbetsrätten*, p. 92.
[140] Herzfeld Olsson (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p. 428.
[141] Blanpain (2014), *European Labour Law*, p. 178.
[142] Consolidated version of the Treaty of the European Union (hereinafter TEU post-Lisbon), article. 6.1

content.[143] Furthermore the Commission has tasked itself with creating a "fundamental rights culture" throughout the legislative process. This means that the Commission has given itself the task of making sure that the fundamental rights, as set out in CFREU, is being respected when institutions within EU adopts or amends legislation and when Member States implement EU-law.[144]

When it comes to the protection of fundamental rights the CFREU is arguably the most important source in EU-law.[145] It covers many different areas and are divided into seven chapters; dignity, freedoms, equality, solidarity, citizens' rights and justice.[146] The Charter is only applicable to the Union's institutions and Member States when the concerned situation is within the scope of EU-law.[147] Therefore it does not have an effect in situations that happens within a strictly national context.[148] Furthermore the institutions and Member States must, according to article 51.1, respect, observe and promote the principles in CFREU and the application of these.

When the Charter is applicable it should according to the legal principles of the Union have primacy over national legislation, even if it's a constitutional right, as stated in *Melloni*:

> *"It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, paragraph 21, and Opinion 1/09 [2011] ECR I-1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State….*[149]"

Member States are also not allowed to apply national regulations, which guarantees a better protection that that found in the Charter. This could lead to the fact that the principle of EU primacy is violated since actions that are in compliance with the Charter could be deemed unlawful if they are conflicting with the national legislation of a Member State.[150] National legislation concerning fundamental rights are therefore only allowed if it does not violate the principle of primacy, unity and effectiveness of EU-law as stated by the court in *Melloni:*

[143] Nyström (2017), *EU och arbetsrätten*, p. 93.
[144] COM(2010) 573, Communication from the Commission. Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union.
[145] Bernitz & Kjellgren (2018). *Europarättens grunder*, p. 145-146.
[146] Herzfeld Olsson, (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p. 437-438.
[147] C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, paragraph. 21.
[148] Nielsen (2013), *EU Labour Law*, p. 75-77.
[149] C-399/11 *Stefano Melloni v. Ministerio Fiscal*, paragraph. 59.
[150] C-399/11 *Stefano Melloni v. Ministerio Fiscal*, paragraph. 56-58.

> *"It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.*[151]*"*

Even though fundamental rights are of significant importance they can still, according to CFREU, be subjected to restrictions.[152] According to article 52.1 restrictions can be done if stated in law, related to the public interest, proportionate or done in order to protect the rights of others. What is considered to be proportionate is different in every situation but as a general rule the court has stated that the restrictions must:

> *"…be appropriate for securing the attainment of the objective which they pursue…and must not go beyond what is necessary in order to attain that objective."*[153]

The test of proportionality must be done in every situation in relation to the entirety of EU-law and not just the labour protection area. Other primary law sources thereby have the possibility of limiting the fundamental rights, as stated by the Charter.[154] Of vital consideration is also that the Charter should, according to article 52.3, guarantee the same meaning and scope as the rights found in the European Convention of Human Rights. This means that CJEU takes case law produced by ECtHR into account when interpreting the Charter. This should not hinder the application of a protection of fundamental rights that is more beneficial for the individual than what is stated in ECHR. Lastly the Charter cannot be interpreted so that it restricts fundamental rights recognized by EU-law, international law or conventions such as ECHR or the Member State's constitutions.[155]

In article 28 it is stated that when there is a conflict of interest between trade unions and employers these should have the possibility of undertaking collective actions in order to defend their interests, including strikes. This entails that the right to undertake industrial actions is protected by the CRFEU. Industrial actions are however seen as a part of the collective bargaining process and are therefore only allowed in situations relating to collective bargaining. This way of linking collective bargaining and industrial action makes it clear that

[151] C-399/11 *Stefano Melloni v. Ministerio Fiscal*, paragraph. 60.
[152] Blanpain (2014), *European Labour Law*, p. 265.
[153] C-341/05 *Laval*, paragraph. 57.
[154] Bernitz & Kjellgren (2018). *Europarättens grunder*, p. 302. See also Charter of Fundamental Rights of the European Union (hereinafter CFREU), article. 52.2.
[155] CFREU, article.53.

the sole objective of the latter is to put pressure on the employer during negotiations or to persuade an employer to participate in collective bargaining.[156]

The way the article is put indicates that the collective rights should be guaranteed to both individuals and associations. In relation to collective bargaining it is however not likely that it entails the right for individual workers to conclude a collective agreement. A distinguishing factor, as stated by the Commission, of the collective agreement is that a trade union is one of the concluding parties. It is therefore only employers that have the possibility of conclude collective agreements without being part of an association. When it comes to industrial actions the associations as well as the individuals should be guaranteed this right. This means that workers can come together and collectively undertake industrial actions in order to put pressure on the employer without being part of an association.[157]

In conclusion it can be said that the right to undertake industrial actions is somewhat restricted and are only allowed in some situations. Industrial actions are only allowed if they are undertaken by a trade union, group of individuals or an individual employer and are meant to defend an occupational interest, affects the working conditions or trade union relationships and undertaken against the employer or trade union.[158]

3.2 European Convention of Human Rights

Aside from primary EU-law sources the ECHR also protects fundamental rights. It was created in 1950 by the Council of Europe and is based on UNs' declaration of fundamental rights. Despite it not being a part of EU-law it is, since 1970, to be seen as an integral part of EU-law that has to be respected by the institutions and Member States.[159] The first time CJEU referred to ECHR was in the judgement of *Rutili*[160] and has ever since had an important role in developing the fundamental rights since it has been relied upon in many judgements.[161] Rights enshrined and protected in the ECHR should also apply to EU-law as legal principles as is stated in article 6.3 TEU. Also according to 6.2 TEU the Union shall accede to the ECHR. This has however not been done since that would give the ECtHR competence to judge in matters relating to EU-law which would be a violation of the CJEU's exclusive

[156] Barnard (2012), *EU Employment law*, p. 719-720.
[157] Herzfeld Olsson (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p. 470-471.
[158] Herzfeld Olsson (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p. 477.
[159] Nyström (2017), *EU och arbetsrätten*, p. 96-97.
[160] C-36/75 *Roland Rutili v. Ministre de l'intérieur*, para 32; See also Nielsen (2013), *EU Labour Law*, p. 99.
[161] Nielsen (2013), *EU Labour Law*, p. 99-100.

jurisdiction. Furthermore there is also a concern that the case-law of ECtHR would influence the economic freedoms in a negative way since the ECtHR puts greater emphasis on fundamental rights.[162] It also affects the individual Member States legal orders since all Member States within EU have ratified it and must therefore respect the obligations set out in the convention when implementing EU-law.[163]

As a part of the fundamental rights protected by the ECHR the freedom of association and assembly is protected by article 11:

> "*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.*

In relation to the freedom of association the state has an obligation to make sure that the state itself does not hinder individuals from using this right. There is also a positive obligation that requires the state to make sure that an individual does not hinder other individuals from using their freedom of association. This is particularly troublesome when it comes to the labour market since both employees and employer organisations should have the right to make use of their freedom of association in order to pursue their interests. In order to able to pursue their interests the parties must be given a certain amount of autonomy. At the same time the parties are not allowed to abuse their power against the other party's so that their fundamental freedoms are violated. Aside from the positive obligations there is also a negative obligation. It entails the right for individuals to have the possibility of not joining an association without being subjected to repercussions.[164]

Even though there is an obligation for the state to make sure that these rights are not being violated there is a possibility according to 11.2 to restrict the rights stated in 11.1:

> *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 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.*"

[162] Nyström (2017), *EU och arbetsrätten*, p. 96-97.
[163] Bernitz & Kjellgren (2018). *Europarättens grunder*, p. 157; See also Nyström (2017), *EU och arbetsrätten*, p. 96-97.
[164] Danelius (2015), *Mänskliga rättigheter i europeisk praxis – en kommentar till Europakonvention om mänskliga rättigheter*, s. 515-516.

Restrictions put on the freedom of association must be subjected to a test of proportionality to determine if the restriction is proportionate in relation to what it is trying to attain. When determining if the restrictions is justified the ECtHR considers if it is necessary in a democratic society and if it answers to a pressing social need. In these situations the national courts and authorities are given a margin of appreciation that varies depending on the situation. Labour market relations are characterized by complex national considerations between economic and social aspects so in situations relating to the labour market the Member States are given a very extensive margin of appreciation.[165] Even though CJEU takes case-law from ECtHR into consideration in its judgements it should be mentioned that when the CJEU relies on regulations in ECHR and analyses the lawfulness of a restriction it does so through a perspective that is in compliance with EU-law. That means that restrictions can be done if they are a proportionate with the purpose of fulfilling one of the common market's goals or "objectives of general interest pursued by the Community". It can therefore be said that restrictions according to CJEU are done to protect the interests of the Union while it according to the ECtHR are done in order to protect individual or national interests.[166]

As seen above article 11 only guarantees the freedom of association and the right to defend their interests. There is however no explicit regulation surrounding the right for trade unions to undertake industrial actions. This has been a topic of discussion by the ECtHR and was to some extent clarified by the judgement of *Schmidt and Dahlström v. Sweden.* In this situations the negotiations regarding wages had not been concluded in time so the trade union, SEKO, decided to go on a strike in order to put pressure on the employer. This eventually lead to a collective agreement being concluded but the employer chose to deny the members of SEKO the right to a retroactive payment. Schmidt and Dahlström claimed that this was a violation of the freedom of association since it restricted their right to undertake industrial actions.[167] The court found that strikes are one of the most important ways in which a trade union can protect their interests but there are others. Member States must make sure that trade unions have means to protect their interests but they are free to choose which ones. Therefore there exists a right for Member States that through legislation restrict rights that are not explicitly states in article 11, such as the right to strike.[168] This judgement clearly shows that the right to

[165] Herzfeld Olsson (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p. 295-296.
[166] Herzfeld Olsson (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p. 403-404.
[167] *Schmidt and Dahlström v. Sweden*, Application No 5589/72, ECHR 1976
[168] *Schmidt and Dahlström v. Sweden*, Application No 5589/72, ECHR 1976, paragraph. 36.

undertake industrial actions is a right belonging to the trade unions but it was during this time not particularly well protected under article 11 since the Member State could choose to restrict it if they so wished.

This interpretation have however been challenged by the judgement in *Danilenkov and others v. Russia*. In this situation the employees had tried to get better working conditions in the form of higher wages and health- and life insurance through the undertaking of a two-week long strike. During the weeks following the strike the employer choose to punish the striking workers through relocations, lowering of wages and disciplinary actions, which led to the fact that some workers choose to leave the union.[169] The court found that the state had not properly protected the freedom of association and that the state must guarantee the trade union have the possibility of protecting their interests through trade union actions through industrial actions.[170]

Another judgement of interest that challenged the view in *Schmidt and Dahström v. Sweden* is the judgment of *Enerji Yapi-Yol Sen v. Turkey*. During 2009 employees part of a Turkish civil trade union hade planned on going on a strike in order to conclude a collective agreement. Once this came to the employers' attention information was sent out informing that no civil servants were allowed to strike and that all who participated in the strike would be subjected to disciplinary actions.[171] The court stated that strike actions are an important mean to secure the freedom of association and the right to organize. Industrial actions are an intrinsic corollary of the worker's freedom of association and the most effective means to ensure the effective exercise of the right to collective bargaining. It is also not allowed to apply a "blanket ban" on industrial actions for an entire work category, in this case civil servants. Following this reasoning the court stated that the right to undertake industrial actions is protected by the European Social Charter and it can be concluded that the freedom of association protected by article 11 of ECHR also entails the right to undertake industrial actions.[172] There are however some possibilities for the state to restrict it but they have to be proportionate in the sense that they can't affect an entire work category, they have to be precise and narrow in relation to their form.[173]

[169] *Danilenkov and others v. Russia*, Application No 67336/01, ECHR 2009.
[170] *Danilenkov and others v. Russia*, Application No 67336/01, ECHR 2009, paragraph. 121.
[171] Nyström (2017), EU och arbetsrätten, p. 99.
[172] Veldman (2013), *The protection of the fundamental right to strike within the context of the european internal market: implications of the forthcoming accession of the EU to the ECHR*, p. 112.
[173] Nyström (2017), EU och arbetsrätten, p. 99.

Since the judgement of *Schmidt and Dahlström v. Sweden* the ECtHR has expanded to scope of article 11 so that it now also includes the right for trade unions to undertake industrial actions, especially the right to strike. It is also from the last two cases clear that the right to undertake industrial actions is connected to the collective bargaining process and the possibility of concluding a collective agreement.[174]

3.3 Community Charter of the Fundamental Social Rights of Workers

The community charter contains fundamental social rights for workers such as freedom of movement, social protection, freedom of association and collective bargaining, vocational training and equal treatment and was signed in 1989 by eleven out of the twelve Member States. At the very core of the Charter is the protection of the right to undertake collective actions, including the right to strike and industrial actions, which can be found in article 13:

> "*The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations arid collective agreements.*"

It is however to be considered as a formal proclamation and is therefore not legally binding under either EU-law or international private law. In order for it to have any legal value its contents have to be adopted, by the Commission, into directives, decisions, recommendations or opinions.[175] This has also been the case and it has been the source of many directives in the labour protection area.[176] Secondly there lies a responsibility on the Member States to adopt its contents through case-law, collective agreements or legislation to make sure that the economic and social rights in the Charter are fulfilled within a national context so that the functioning of the common market can be guaranteed.[177] Since it is not legally binding it has not played a vital role in the case-law, surrounding fundamental rights, created by the CJEU. It has however been used as a tool to help the court respect the common traditions, precepts and ideas of the Member States and an aid to interpreting implemented measure and as a statement within which the validity of Union and national legislation is to be determined.[178]

[174] Nyström (2017), EU och arbetsrätten, p. 100.
[175] Hepple (1990), *The implementation of the Community Charter of Fundamental Social Rights*, p. 643-644.
[176] Nyström (2017), *EU och arbetsrätten*, p. 83.
[177] Herzfeld Olsson (2003), *Facklig föreningsfrihet som mänsklig rättighet*, p. 412-416.
[178] Hepple (1990), *The implementation of the Community Charter of Fundamental Social Rights,* p. 644.

3.4 Restrictions to the right to undertake industrial actions

As described above there can arise situations where fundamental rights and fundamental freedoms come into conflict with each other. When it comes to collective actions the two pivotal judgements of *Laval* and *Viking* will be discussed in detail below since the ramifications of said judgements have lead to extensive debate and restrictions to the right to undertake industrial actions.

3.4.1 Laval background

On the 18/12 2007 EUCJ gave a judgment in *Case C-341/05 Laval un Partneri v Svenska Byggnadsarbetarförbundet*. Laval un Partneri ltd (Laval) was a Latvian company who in 2004 posted 35 of its worker to the subsidiary company L&P Baltic Bygg AB (Baltic) with the purpose of construction a school in Waxholm. Baltic was based in Sweden and operated under Swedish law. During 2004 Laval signed a collective agreement with a Latvian trade union and was therefore not bound by a Swedish collective agreement. During 2004 the Swedish trade union Byggettan contacted Laval in order to try and make them sign the national agreement "Byggnadsavtalet". Discussions were held and Laval stated that they wanted to define wages and other terms and conditions of employment at the same time as negotiations were held so that it would be fixed when the agreement would be signed. The parties didn't manage to fully agree on wages and other terms of employment, which lead to the fact that Byggettan in September of 2004 demanded that Laval should sign "Byggnadsavtalet" and guarantee an hourly pay of 145 SEK. If not done collective actions would be undertaken against Laval by Byggnads. Laval didn't agree since they considered it to be too much, even though this at the time was the mean wage of the construction workers in the Stockholm area. As a result Byggnads initiated collective actions in the form of a blockade which begun on 2/11 2004. This meant that goods and vehicles were blocked from entering the site and Latvian workers were not allowed to perform any work.

In late November Laval contacted the Swedish Work Environment Authority in order to obtain information regarding the terms and conditions they had to apply. It responded by saying that the terms and conditions that should be applied are those found in 3.1 a-g of Directive 96/71 and that it is up to the labour market parties to define what the minimum wage should be. Not knowing what the costs would be or what obligations Laval had to fulfil they chose to not sign Byggnadsavtalet. As a result Byggnads intensified their actions in the form of sympathy actions from Elektrikerna, which lead to the fact that the Latvian workers

could not perform any work at all so they went back to Latvia and never returned. Shortly after, Byggnads also boycotted all of Laval's sites, which eventually lead to the company going bankrupt.

During December 2004 Laval filed a complaint to Arbetsdomstolen stating that the blockade and sympathy actions were unlawful and that the trade unions should pay compensation to Laval for the damages they had suffered. Arbetsdomstolen dismissed Laval's claim but decided to make a reference to the CJEU for a preliminary ruling in order to make sure that it was compatible with TFEU 18, 56 and Directive 96/71 that through collective actions force a foreign employer to sign a Swedish collective agreement.

3.4.2 Viking background

On the 11th December in 2007 CJEU came with its judgement in the Viking judgement. Viking is a large ferry operator operating under Finnish law with its seven vessels, including Rosella, which operated under Finnish flag. Workers on board this ship were members of the Finnish trade union "FSU" which in turn was affiliated to "ITF", which is an international federation of transport workers', based in the UK. One of the most important goals for ITF is to combat the problem with companies flagging their ships out of convenience (FOC). The goal is to establish a genuine link between flag of the ship and the nationality of the owner and to protect and improve the working conditions for employees on FOC ships. FOC can be described as when the control of the vessel is exerted from a country where it is not flagged. According to ITF's FOC policy it is only trade unions in the country, from which the control of the ship is exerted, that has the right to conclude collective agreements. This policy is enforced through the means of boycotts and secondary actions between employees.

Rosella had always been flagged under Finnish flag and had to pay wages that was in line with applicable collective agreement and Finnish law. During 2003 the company suffered a devastating loss due to competition from Estonian vessels. In order to combat this Viking tried to reflag Rosella under Estonia or Norwegian flag so that a new collective agreement with lower wages could be concluded. Before the decision was taken Viking informed FSU and Rosella about the decision they planned to undertake. FSU made it clear that it did not approve of these decisions. Shortly after FSU contacted ITF concerning Viking's plans and stated that since the ownership still resided in Finland FSU was the only trade union that hade

the right to enter into collective bargaining with Viking. Following this ITF sent out a circular ordering other trade unions not to take up negotiations with Viking. In November 2013 the applicable collective agreement expired and FSU gave notice of a strike and demanded that Viking should hire eight more people to the Rosella and lay waste to their plans of reflagging the vessel. Viking met their terms in regards of hiring but didn't want to give up their plans to reflag the vessel. FSU stated that they were not willing to sign a collective agreement unless Viking agreed to apply Finnish law, applicable collective agreement, the general agreement and the manning agreement on the Rosella and that no employees on Rosella would be made redundant and that no changes would be done to the terms and conditions of the employees if Viking were to reflag. The motive behind this was that it was for the protection of Finnish jobs. Viking did not agree to this and in late November 2003 they appealed to the Labour court in Finland for a declaration, contrary to the view of FSU, that the manning agreement was still legally binding. Since FSU considered that there was no agreement between the parties in force they gave notice that it would initiate a strike on the 2/12 2003. On the 24th of November 2003 Viking found out about the circular and made a complaint before the Court of First Instance of Helsinki in order to the get planned strike action annulled. No final decision was taken by the court since during the conciliation proceedings Viking committed to not making any employees redundant if they were to reflag the vessel. FSU however did not settle with this and did not cancel their plans to go on strike, which lead to the fact that Viking agreed to meet the terms set by FSU.

Viking did however not abandon their plans of reflagging the ship under Estonian flag but they were not able to do so since the circular was still in force. When Estonia became a member of the European Union Viking saw its opportunity and filed a complaint to the High Court of Justice of England and Wales where they stated that the actions taken by FSU constituted a violation of the freedom of establishment according to article 49 TFEU and that the court should order ITF to withdraw the circular. The court found that the actions taken by ITF and FSU constituted a violation of article 49 TFEU and in alternative a violation of articles 45 and 56 TFEU.

In 2005 ITF and FSU appealed the decision in front of CJEU stating that it is a fundamental right to undertake collective actions in order to preserve jobs. This follows from the regulations in 151 TFEU, the European Social Charter and the Community Charter of Fundamental Social Rights of Workers. Therefore they had the right to undertake said

collective actions in order to hinder Viking from establishing their undertaking in another Member State. In the light of this the question that arose was if the treaty hinders trade unions from undertaking collective actions when they have the purpose of hindering an employers from using his right of establishment.

3.4.3 Judgements of Laval and Viking

In both judgements the Danish and Swedish governments stated that the court according to TFEU 153.5, did not have competence to legislate or to affect the national legislation on matters regarding the right to strike.[179] The court stated that within areas where EU does not have competence the Member States are free to implement regulations or legislation. However, when using this competence the Member States must still adhere to principles and regulations within EU-law.[180] The fact that the right to undertake strike or lock-out does not fall under the competence of 153.5 does not mean that these rights are excluded from the provisions of the freedom of movement.[181]

In relation to the direct effect of articles 49 and 56 TFEU the court stated that these has become directly applicable in the Member States legal orders and confers rights upon the individuals, which are enforceable by them, which the court must protect.[182] Just because certain regulations are directed against the state does not mean that rights are not given to individuals who have an interest in the compliance with said regulation.[183] Furthermore the freedom of movement would be jeopardized if actions taken by associations or organizations not governed by public law could neutralize the abolishment of trade barriers by using their legal autonomy.[184]

In both judgements CJEU acknowledged that the right to undertake industrial actions, including strikes are a fundamental right that is to be seen as an integral part of EU-law that is protected by the ECHR, European Social Charter, ILO, Community Charter and CFREU.[185] Furthermore it was also stated that industrial actions might be the last resort of trade unions to

[179] C-341/05 *Laval*, paragraph. 86; C-438/05 *Viking*, paragraph. 39.
[180] C-341/05 *Laval*, paragraph. 87; C-438/05 *Viking*, paragraph. 40.
[181] C-341/05 *Laval*, paragraph. 88; C-438/05 *Viking*, paragraph. 41.
[182] C-341/05 *Laval*, paragraph. 97.
[183] C-438/05 *Viking*, paragraph. 58.
[184] C-341/05 *Laval*, paragraph. 98; C-438/05 *Viking*, paragraph. 57,
[185] C-341/05 *Laval*, paragraph. 90; C-438/05 *Viking*, paragraph. 43.

ensure the success of their claim and that it is inextricably linked to collective bargaining.[186] Despite the fact that it is to be seen as a fundamental right it is by no means absolute and can in some cases be subjected to restrictions.[187] However, the protection of fundamental rights can also in principle justify a restriction on obligations posed by EU-law, such as the freedom of movement.[188] But this does not mean that fundamental rights falls outside the scope of the provisions of the treaties since according to the judgements of *Omega* and *Schmidberger* the exercise of fundamental rights must be in accordance with the principles in the treaties and the principle of proportionality.[189] The fact that the principle of proportionality should be used in these situations is not shared by everyone. Apposed to the case-law of CJEU Advocate General Poiares Maduro stated in his opinion in *Viking* that a "market partitioning" should be used instead of a principle of proportionality. If an industrial action were to partition the market it would result of a violation of the principle of non-discrimination and the action would be unlawful.[190] Even though *Viking* and *Laval* has some similarities Advocate General Mengozzi did not agree with Poiares Maduro since he stated in his opinion in *Laval* that industrial actions should adhere to the principle of proportionality.[191] CJEU seemingly seems to have disregarded the opinion of Poiares Maduro in favour of Mengozzi's.

In order to determine whether the actions taken by the trade unions in both *Laval* and *Viking* were causing a breach in EU-law the court applied the single market approach, the *Säger-principle*. In the *Viking* judgement the court stated that the actions undertaken by FSU would make it less attractive or even pointless for Viking to use their freedom of establishment since the actions would prevent Viking from enjoying the same treatment as other economic operators establish in that state.[192] Such actions can therefore be considered to restrict the freedom of establishment.[193] In the *Laval* judgement it was stated that the terms and conditions demanded by Byggnads departed from the national legislation and established more favourable terms and conditions than those found in the hard core in 3.1 a-g of PWD while some terms and conditions were not included in the hard core. This could make it less attractive or even impossible for construction companies like Laval to perform work in Sweden. Actions undertaken by Byggnads could therefore in this case be considered as

[186] C-438/05 *Viking*, paragraph. 36.
[187] C-341/05 *Laval*, paragraph. 91; C-438/05 *Viking*, paragraph. 44.
[188] C-341/05 *Laval*, paragraph. 93; C-438/05 *Viking*, paragraph. 45.
[189] C-341/05 *Laval*, paragraph. 94; C-438/05 *Viking*, paragraph. 46.
[190] Opinion of Advocate General Poiares Maduro, para. 62-63.
[191] Opinion of Advocate General Mengozzi, para. 5.
[192] C-438/05 *Viking*, paragraph. 72.
[193] C-438/05 *Viking*, paragraph. 74.

restriction on the freedom to provide services.[194] The possibility of imposing terms and conditions that is more favourable than that of 3.1 are only given to bodies that are governed by public law in the Member States and not trade unions.[195]

Since a breach was found in both judgements the court had to take into consideration if the industrial actions undertaken by the trade unions were a lawful restriction on the freedom of movement. Since article 49 and 56 TFEU are fundamental principles restrictions to these can only be done if the actions pursues a legitimate objective compatible with the treaty and is justified by overriding reasons of public interest. It must also be proportionate in the sense that it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary to attain it.[196] Collective actions that have the purpose of protecting the workers, which was the case in both judgements, can in some cases be justified since they can constitute an overriding reason of public interest, which, in principle, justifies a restriction of one of the fundamental freedoms.[197] However, they must also be proportionate. In order to determine this the economic and social interests must be balanced against each other since the European Union have both economic and social goals[198].

In the *Viking* judgement the court stated that it was up to the national courts to decide the outcome but CJEU gave guidance in how the test of proportionality were supposed to be undertaken. CJEU stated that if Viking's planned changes were deemed to not seriously threaten or jeopardise the jobs and conditions of employment the industrial actions could not be considered as having the purpose of protecting the workers and they would therefore not be lawful. However, if the opposite can be proven a test of proportionality must be done. In its guidance in how to undertake the test of proportionality the court stated that national court must take into consideration that industrial actions are the main ways in which a trade union makes sure that their members occupational interests are protected. This is however not the only mean to use in order to protect their interest. The national court must therefore consider if FSU did have other means than industrial actions at their disposal and if such were available if they would impose smaller restrictions on the freedom of establishment.

[194] C-341/05 *Laval*, paragraph. 99.
[195] C-341/05 *Laval*, paragraph. 84.
[196] C-341/05 *Laval*, paragraph. 101: C-438/05 *Viking*, paragraph. 75.
[197] C-341/05 *Laval*, paragraph. 103; C-438/05 *Viking*, paragraph. 77.
[198] C-341/05 *Laval*, paragraph. 105; C-438/05 *Viking*, paragraph. 79.

In the *Laval* judgement the court did not give its guidance and instead issued a judgement, which left the Swedish Labour Court to only decide on how much the trade unions should pay to Laval in damages. Firstly it was stated that the actions undertaken by Byggnads aimed at making sure that the posted workers were guaranteed fair terms and conditions and that it in principle falls within the objective of protecting the workers.[199] However, in this situation the restrictions to the freedom to provide services that the industrial actions caused could not be considered as proportionate since the collective agreement that Byggnads was trying to enforce contained terms and conditions not included in the hard core or more favourable than what could be found in the relevant legislative provisions in Sweden.[200] In relation to the minimum wages it was stated that the collective actions taken by Byggnads could not be justified with regards to public interest since there were no provisions that in a precise and transparent manner stated what the minimum wage should be.[201] Sweden had failed to implement the provisions regarding minimum wages since they were not stated in the law and Sweden had not used any of the possibilities in 3.8 to regulate this particular matter.[202] However, if a Member State does not make use of the possibilities in 3.1 or 3.8 they are free to use any system they like as long as it does not restrict the freedom to provide services.[203] This means that a test of proportionality must be done in regards to the restrictions this type of regulation puts on the freedom to provide services. Sweden's system that forced foreign employers into negotiations regarding the minimum wages on a case-to-case basis without provisions that in a transparent and precise manner stated what it should be can't be seen as proportionate and must therefore be considered as restricting the freedom to provide services. As a result of the Swedish system it is impossible for an employer from another Member State to attain the knowledge needed in order to fulfil his or her obligations.[204]

In the light of this the court came to the conclusion that article 56 TFEU and PWD hinders a trade union to undertake industrial actions that forces an employer into negotiations regarding minimum wages where there are no clear provisions and to sign a collective agreement where terms and conditions are more favourable than the provision set in national law while others are not stated in article 3.1 a-g of PWD.[205]

[199] C-341/05 *Laval*, paragraph. 107.
[200] C-341/05 *Laval*, paragraph. 111.
[201] C-341/05 *Laval*, paragraph. 110.
[202] C-341/05 *Laval*, paragraph. 67.
[203] C-341/05 *Laval*, paragraph. 68.
[204] C-341/05 *Laval*, paragraph. 110.
[205] C-341/05 *Laval*, paragraph. 111.

Another question of the courts assessment was the regulation in the Co-determination act know as *"Lex Britannia"* which had been introduced in order to combat social dumping. It enabled a trade union to undertake industrial actions against foreign employers bound by a collective agreement concluded under the law of another Member State, no matter the contents of that, as if they were not bound by any.[206] Such a regulation leads to the fact that employers posting workers in Sweden are subjected to discrimination since they are not treated the same way as national employers.[207] Such discrimination is accordingly to TFEU 52 only allowed when it's related to public policy, public security or public health.[208] In the light of this the court came to the conclusion that TFEU 56 and 57 hinders a trade union from undertaking industrial actions when the sole purpose of this action is to amend or set aside an already existing agreement concluded under foreign law between two other parties.[209]

3.4.4 Right to undertake collective actions after Laval and Viking

The judgements above can be said to have lead to a harmonisation of EU-law and national legislation regarding industrial actions even though the European Union lacks competence in this area.[210] In both judgements the Danish and Swedish government stated that no harmonisation can occur since EU does not have competence in said areas. The court disregarded this and stated that even though it does not have competence in such areas Member States must still comply with EU-law when regulating the exercise of the rights at stake in *Laval* and *Viking*.[211] Therefore CJEU still has the possibility of regulating such matters that it does not, according to the treaties, have competence over. This is well true when one also considers that the court also stated that the wages claimed by the trade union in *Laval* did not represent a minimum wage level.

Since the articles concerning the economic freedoms were applicable between two private legal entities, an employer and a trade union, it could a first sight seems like besides the direct effect they also have a full horizontal effect. This is however something that have been avoided by the court and therefore the most likely scenario is that the trade unions in this scenario would be seen as delegated regulatory bodies. This means that case law concerning restrictions on fundamental rights are applicable on trade unions when undertaking a

[206] C-341/05 *Laval*, paragraph. 113.
[207] C-341/05 *Laval*, paragraph. 116.
[208] C-341/05 *Laval*, paragraph. 117 and 119.
[209] C-341/05 *Laval*, paragraph. 120.
[210] Bruun (2008), *EU-domstolen och arbetstagares rätt till fackliga stridsåtgärder på EU:s inre marknad*, p. 472.
[211] C-341/05 *Laval*, paragraph. 87; C-438/05 *Viking*, paragraph. 40.

regulatory task equivalent to that of the state. This is however somewhat puzzling since even though they are seen as equivalent with the state they are not granted a margin of appreciation when assessing restrictions on fundamental freedoms caused by the use of a fundamental right.[212] Trade unions have therefore had more obligations transferred upon them while at the same time not been given the same possibility to derogate from EU-law, as is given to the state.

From the judgements it can be said that the right to undertake industrial actions is not absolute and economic interests have the possibility of restricting this right. Therefore a balance between economic and social interests must be struck, in this case fundamental rights and fundamental freedoms. Industrial actions are only justified if they pursue a legitimate objective compatible with the Treaty and are justified by overriding reasons of public interest and are proportionate. As stated in *Viking* the protection of workers could justify a restriction on any fundamental freedom but only if the jobs and conditions are under "serious threat" or "jeopardised". This means that industrial actions with the purpose of protecting the workers will in many cases be seen as not justified.

Also in the *Laval* judgement the possibility of undertaking industrial actions have been decreased since actions undertaken with the purpose of protecting the workers are only allowed in order to hinder social dumping.[213] However, since trade unions and Member States only have the possibility of enforcing the hard core in Articles 3.1 a-g in PWD it can be said that the term "social dumping" have been given a very narrow meaning. There are however situations where public bodies governed by public law in the Member States can enforce terms and conditions that are more beneficial than what the hard core prescribes if it's related to public policy.[214] This does however mean that all regulations within a collective agreement that are more beneficial than the relevant legislative provisions or not included in the hard core cannot be enforced through industrial actions since it is considered as an unjustified restriction to the freedom of movement since the actions is not undertaken by a body governed by public law. Taking all this in consideration it can now be seen as harder for trade unions to improve the terms and conditions of employment for workers, through industrial actions, and somewhat counterproductive to the social goals of the EU as stated in 151

[212] Rocca (2015), *Posting of workers and collective labour law: there and back again : between internal market and fundamental rights*, p. 242-243.
[213] Rocca (2015), *Posting of workers and collective labour law: there and back again : between internal market and fundamental rights*, p. 246-248.
[214] Kruse (2009), *Fackliga stridsåtgärder och den fria rörligheten i EU,* p. 194.

TFEU.[215] On the other hand this does not mean that more beneficial terms and conditions than that of 3.1 a-g of PWD can be applied through collective agreements that have been concluded on a voluntary basis without the threat or presence of industrial actions.[216]

Aside from only being terms and conditions within the hard core that can be enforced through collective actions they also have to be presented in a clear and precise manner and represent a minimum level. It was stated, by the court, that where there are no clear and precise provisions it is impossible for a foreign employer to know what obligations has to be fulfilled and what the costs are going to be.[217] This statement is particularly troublesome for the Swedish model since there are no statutory minimum wage since it is to be determined by the labour market parties through collective bargaining where either party is free to undertake industrial actions if they so wish. This means that the way in which wages are set must change to some extent so that the obligations of EU-law can be met.[218]

Industrial actions also seem to be considered to be the last resort of trade unions when all other means are exhausted. This becomes clear in the *Viking* judgement since the court stated that the national court must take into consideration if FSU had other means of disposal. As a result of this, trade unions should use industrial actions that lead to the smallest possible impact on the economic freedoms. Therefore it is questionable to what extent this fundamental right should be protected even though it is to be considered as an integral part of EU-law. From these judgements it seems like the economic freedoms are of greater importance since the test of proportionality was only undertaken in regards to the restrictions put on these and not the other way around. This has been up to discussion in the doctrine where it has been stated that these judgements have caused an imbalance between the fundamental right to undertake collective action and economic interests in the favour of the latter.[219] This is because even though CJEU stated that the right to undertake industrial actions are to be seen as fundamental it did not in any way act as if that were to be true. Article 28 of CFREU have also been undermined since the court stated, without further specification, that restrictions to the right to undertake industrial actions can be based on EU-law, national law or practices. This could potentially lead to the fact that anything decided at EU-law could

[215] Rocca (2015), *Posting of workers and collective labour law: there and back again : between internal market and fundamental rights*, p. 247.
[216] Kruse (2009), *Fackliga stridsåtgärder och den fria rörligheten i EU,* p. 194.
[217] C-341/05 *Laval*, paragraph. 110.
[218] Edström (2008), *The Free Movement of Services and the Right to Industrial Action in Swedish Law – in the Light of the Laval Case*, p. 189.
[219] Nielsen (2013), EU Labour Law, p. 173-175.

affect this right.[220] These judgements most likely also have the effect that it discourages trade unions to undertake industrial actions.[221]

[220] Voogsgeerd (2012), *The EU Charter of Fundamental Rights and its impact on labour law: a plea for a proportionality-test "light"*, p. 332.
[221] Velyvyte (2015), *The right to strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence*, p. 75.

4. The Swedish labour market

4.1 The emergence of the Swedish model

Trade Unions are a vital part of the Swedish model and have existed since the 1800s and were established due to the fact that the workers on the labour market felt a certain economic uncertainty.[222] Aside from trade unions the importance of collective agreements cannot be overlooked. The first known collective agreement was concluded in 1869 during a strike undertaken by the bricklayers in Stockholm.[223] This signalled the start of the Swedish trade union movement and from that point on it became more common that trade unions undertook industrial actions in order to defend their interests through the enforcement of collective agreements.[224] This way of regulating the conditions on the labour market through collective bargaining is to be considered as the very core of the Swedish model. Industrial actions as a way of pressuring employers into concluding a collective agreement has had a big impact on the development of the labour market.[225]

As a way of trying to unite and strengthen the workers there was a need to organize and in 1898 "Landsorganisationen" (LO) was established, which at the time and still to this day is the main organization for blue collars. As a response the employers' main organisation "Svenska arbetsgivarföreningen" (SAF)[226] was created in 1902. During the following years the two organizations stated concluding collective agreements with each other, which eventually led to the "December Compromise" in 1906.[227] The most important aspects of this agreement was that the freedom of association were to be inviolate on both side and if a worker were to be dismissed in a way, which could be seen as an attack on the freedom of association the workers were to be able to undertake counter and investigative measure in conjunction with their organization.[228] Of importance for the employers was that they were granted the managerial prerogative, which stated that the employers were allowed to:

> "*…direct and distribute the work, to hire and dismiss workers at will, and to employ workers whether they are organized or not…*".[229]

[222] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 39.
[223] Adlercreutz (2005), *Kollektivavtalet som avtalsform och avtalstyp*, p. 12-13.
[224] Schmidt (1997), *Facklig Arbetsrätt*, p. 22-23.
[225] Magnusson (2017), *Håller den svenska modellen?*, p. 46.
[226] This organization has however changed names is today known as "Svenskt Näringsliv".
[227] Magnusson (2017), *Håller den svenska modellen?*, p. 47-49.
[228] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 43.
[229] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 43.

This regulation was according to SAF an important part of the functioning of the Swedish labour market while LO saw themselves as having to obey the employer in all matter since they were not seen as an equal party.[230] Since this was seen as a controversial subject, especially by the trade unions, it took some time before the local trade unions accepted the fact that they no longer had the right to decide how the work should be undertaken.[231] As an effect of the recognition of freedom of association the right to collective bargaining were also guaranteed. Collective agreements were however first granted legal status in 1928 and with that the notion of the duty to maintain industrial peace when a collective agreement is in effect.[232]

During the time from the December Compromise to 1938 there were many industrial conflicts between the two parties that caused a lot of economic damages to not only the parties but also to a third neutral part. In order to mitigate the economical damages the state felt compelled to intervene through legislative actions. In response to this SAF and LO concluded the "Saltsjöbaden Agreement" in 1938, which mainly stated that the parties had to take responsibility for the effects of industrial actions and that a restriction to the parties right to undertake industrial actions were needed. As an effect of the labour market parties more restricted approach to industrial actions the state chose to not intervene and leave the regulation of the labour market to the parties.[233] This notion of the labour market parties desire to dictate the conditions on the labour market with as little state intervention as possible is at the very core of the Swedish model.[234] This is due to the fact that the labour market parties feel that their relationship is best regulated without state intervention.[235]

This era of no state intervention came to an end during the 1960s and 1970s. During this time the trade unions felt that they could not improve the rights and degree of co-determination for their members through the means of collective bargaining so instead they turned to the political powers. These actions, undertaken by the trade unions, lead to the adoption of various legislations that were mostly in the favour of the trade unions. According to Sigeman in Glavå & Hansson (2016) there are three interventions that are considered as being of

[230] Adlercreutz (1954), *Kollektivavtalet – studier över dess tillkomsthistoria*, p. 344.
[231] Magnusson (2017), *Håller den svenska modellen?*, p. 47-49.
[232] Glavå & Hansson (2016), *Arbetsrätt*, p. 30.
[233] Schmidt (1997), *Facklig Arbetsrätt*, p. 22-27.
[234] Magnusson (2017), *Håller den svenska modellen?*, p. 46.
[235] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 47.

significant importance; the adoption of the Employment Protection Act, Co-determination Act and Shop Steward Act. These legislations decreased the employer's rights, as stated in the December Compromise, since it restricted the right to direct and distribute work, dismiss workers at will, gave the trade unions increased co-determination and increased the rights of the shop stewards. This development continued to some extent during the 1990s with the adoption of extensive protection against discrimination.[236] Adlercreutz and Nyström (2015) however, argues that it might not have been the trade unions that initiated the adoption of new legislation but rather the fact that the political powers wanted more power of the labour market.[237] Regardless of the motives behind the legislative actions it still lead to the strengthening of the trade union's powers.

With the start of 1970s it can be said that the change in the balance of power between the two parties, through legislative measures, lead to the fact that the relationship between the two deteriorated. During the following years SAF and LO gradually stopped concluding collective agreements on a central level and responsibility was instead taken over by the central organisations. Since the central organisations now were taking on the role of concluding collective agreements the employee and employer branch organizations changed into lobby organizations.[238] Despite the fact that they mostly engage in lobby activities they do to some extent conclude some agreements, such as the Industry agreement.[239] Even if the Swedish model has changed during the years the common theme has always been the interplay between the labour market parties. It can also be said that despite the fact that during the last decades there has been a certain degree of decentralization the labour market can still be said to be somewhat centralized.[240]

4.2 Characteristics of the Swedish model

The characteristics of the Swedish model have not changed significantly since the 1930s and it is to this day characterized by little state intervention and the possibility for the labour market parties to regulate the labour market through collective agreements. Aside from regulation through collective agreements there exists legislative regulations concerning the freedom of association, industrial actions, mediation, collective agreements and the duty to

[236] Glavå & Hansson, (2016), *Arbetsrätt*, p. 32-37.
[237] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 50.
[238] Magnusson (2017), *Håller den svenska modellen?*, p. 52-54.
[239] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 51.
[240] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 55.

maintain industrial peace. These two aspects of the labour market are intertwined in the sense that the legislation aim at promoting the conclusion of collective agreements and the protection of these once they have been concluded.[241] Since the Swedish model is characterized by little state intervention and self-regulation by the labour market parties the importance of such regulations cannot be overlooked. Without the protection from the state the Swedish model would not function properly since there would be no balance of power in the collective bargaining process.[242]

Furthermore the Swedish model relies heavily on the survival and existence of strong trade unions and employer organisations. This is made sure by the extensive legislative protection of every individual's right to freedom of association. This entails rights for every individual to belong to an employer or employee organisation, exercise the rights of membership in such organisation, and to participate in such organisation or the establishment thereof.[243] The right to association shall not be infringed by anyone and any action that hinders an individual from using this right is prohibited.[244] Trade Unions in Sweden have a significant impact on the labour market and about 65 percent of the workforce is a member of a trade union. This is however decreasing and has done so since the 1990s.[245] Even though this number is decreasing the number of employers bound by a collective agreement is still very high at 86 percent.[246]

Aside from strong labour market parties the collective agreements are of vital importance for the functioning of the Swedish labour market. Legislation cannot cover every aspect of the relationship between employers and employees so collective agreements have become the main measure for regulating the conditions on the labour market.[247] Legislation is often constructed in a way so that it is vital for the parties to cooperate in order to achieve a desirable outcome. This flexibility has been achieved by the notion of "semi-disposition". This means that the labour market parties in some areas have the possibility to derogate from the statutory regulated labour protection. Derogations can however in most cases only be made if they are more beneficial for the employee or fulfils the provisions set out by EU-

[241] Glavå & Hansson (2016), *Arbetsrätt*, p. 129.
[242] SOU 2015:83, p. 45-47.
[243] Glavå & Hansson (2016), *Arbetsrätt*, p. 130-131; See also 7 § co-determintation act (1976:580).
[244] 8 § Co-determination act (1976:580).
[245] SOU 2015:83, p. 44.
[246] http://www.mi.se/files/PDF-er/ar_diagram_och_tabeller/ar_2015_diatab/Siffror%20och%20diagram%20om%20medlemsantal.pdf
[247] Glavå & Hansson (2016), *Arbetsrätt*, p. 163.

law.[248] Collective agreements also play a central role as an instrument to making sure that industrial peace is maintained.[249] Even though collective agreements are of such importance there is no possibilities for *Erga Omnes*.[250]

Collective agreements are only legally binding for the signing parties and their members. Employers must despite this apply the agreement on employees that are members of another trade union or not part of any union. Signing parties must follow what is stated in the collective agreement and if that is not done it is up to the labour market parties to make sure that the regulations are being followed. This means that aside from the Work Environment Agency and the Equality Ombudsman there are no authorities that make sure that employers pay fair wages or other applies fair terms and conditions since that task is given the to the trade unions. If a regulation within a collective agreement is not followed by either party the affected part has the right to complain in front of the court in order to force the other party to fulfil their obligations.[251]

The basis for concluding collective agreements is that the right to negotiations is secured and promoted. This has lead to extensive legislation that regulates the right to collective bargaining and negotiation in situations that includes co-determination.[252] The right to negotiation is only attributed to employers and trade unions. Negotiations can regard anything that concerns the relationship between an employer and a member of the trade union.[253] Employers must also on their own initiative negotiate with the employer association to which he is bound by a collective agreement before taking any decisions regarding significant changes in the activities of the undertaking.[254]

The right to undertake industrial actions to put pressure on the employer is an integrated part of the collective bargaining system and a vital part for the functioning of the Swedish model. Employee and employer associations have always to a great extent had the possibility of undertaking such actions. This is because the labour market parties have had the state's trust since the Saltsjöbaden Agreement was concluded. The right to undertake industrial actions

[248] SOU 2015:83, p. 45-47.
[249] Glavå & Hansson (2016), *Arbetsrätt*, p. 163.
[250] SOU 2015:83, p. 45-49.
[251] SOU 2015:83, p. 45-49.
[252] Glavå & Hansson (2016), *Arbetsrätt*, p. 153.
[253] 10 § co-determination act (1976:580).
[254] 11 § co-determination act (1976:580).

can be found in the constitution and in multiple international conventions ratified by Sweden.[255]

Sweden is also one of the few countries that do not have a statutory minimum wage. Following the rampant increase in wages during 1980-1990 the state does not longer intervene in matters concerning wages. Wages are instead to be determined through collective agreements concluded by the labour market parties.[256] Since 1997 the Industrial Agreement concluded by the employee and employer associations within the industrial sector sets the "mark" for the wage level. Since the industry is the leading export sector the rest of the Swedish labour market should adhere to this collective agreement so that Sweden can still be competitive outside of its own borders. Even though there is a collective agreement that should be respected the labour market parties can in some situations not reach an agreement regarding fair wage level. If this is the case there exists a possibility to reach out to the "Swedish National Mediation Office" that can help the parties to come to a conclusion.[257]

5. Industrial actions under Swedish legislation

5.1 The right to undertake industrial action

The right to undertake industrial actions have always been of importance for the Swedish model and is guaranteed by the constitution of Sweden. This right can only be restricted through legislation or agreements. The possibility of undertaking industrial actions is only guaranteed employee and employer organizations or an individual employer but not individual workers.[258] Regulations surrounding industrial actions are mostly found in the Co-determination act. The provisions of that act are to be interpreted *e contrario*, which means that everything that is not stated in the act is lawful. There is a wide array of different types of industrial actions that the labour market parties have the possibility of undertaking but the most important and frequently used ones are strikes, stoppage of work and lock-out.[259] Industrial actions are allowed regardless of if it is undertaken by the trade union's members at a particular undertaking or undertaken by the trade union's members against an undertaking

[255] Glavå & Hansson (2016), *Arbetsrätt*, p. 176-177.
[256] SOU 2015:83, p. 46.
[257] SOU 2015:83, p. 46.
[258] 2 chapter 14 § the Constitution of Sweden (1974:152).
[259] Sigeman (2001), *Arbetsrätten – en översikt av svensk rätt med europarätt*, p. 63.

that does not employ any of the trade unions members.[260] As result trade unions are able to not only protect the occupational interests of an individual member but also an entire sector.[261]

Aside from the protection of the right to undertake industrial actions in the constitution Sweden is also bound by the ECHR, which has been incorporate into the Swedish legislation through the act regarding the incorporation of the European Convention of Human Rights.[262] The convention has a unique legal standing in the Swedish legal system in the sense that according to the Swedish constitution no act, law or other provision can be adopted that contravenes the obligations placed upon Sweden by the convention.[263]

5.1.1 Definition of industrial actions

Industrial actions are to be seen as an offensive or hostile measure that is undertaken by a labour market party against another labour market party[264] and there is no exhaustive list of all existing industrial actions. Instead the distinction if an action is to be considered an industrial action is if it's a measure (1) undertaken with the intention of exerting pressure on the other party in a matter relating to the relationship between employee and employer (2) and is a measure (3) of collective and concerted nature. The first defining factor means that for it to be considered as an allowed action it must be undertaken in order to put pressure on the other party in matters that directly or indirectly are related to the relationship between employer and employees or undertaken as a retaliation of the other party's failure to accept the demands of the party.[265]

Secondly, it is not only the most frequently used industrial actions, such as strike and lock-out that can be considered as an industrial action. All actions that have the possibility of affecting the opposite party and objectively have the possibility of fulfilling that purpose can be seen as an industrial action. It is therefore the purpose of said action and not the action itself that determines if it is to be considered as an industrial action or not. This means that basically any

[260] AD 2006:94
[261] *Evaldsson and others v. Sweden*, Application No 75252/01, ECHR 2007; See also *Gustafsson v. Sweden*, Application No 15573/89, ECHR 1996.
[262] Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna
[263] 2 chapter 19 § The Constitution of Sweden (1974:152).
[264] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 217.
[265] Glavå & Hansson (2016), *Arbetsrätt*, p. 178-180.

action can be considered as such an action.[266] This can be seen in judgements from the Swedish Labour Court where it has been stated that general statements and propaganda can be seen as an industrial action if they have the purpose of affecting the other party.[267] This also entails the fact that a threat or a notification of the potential use of an industrial action can be seen as an offensive action and thereby constitutes an industrial action in itself.[268]

Thirdly, the collective and concerted nature prerequisite is fulfilled only if an action is undertaken by any of the parties that has legal capacity to conclude collective agreements and a certain amount of consensus between the parties undertaking the action exists.[269] In situations where the party undertaking the industrial action is an unaffiliated individual employer there does not have to be any consensus since that employer acts at its sole discretion and has no one to consult. Industrial actions do not have to affect several individuals as long as it affects an area of collective nature. It can therefore be said that the purpose of the actions must extend beyond the boundaries of an individual employment contract between an employee and employer.[270]

5.1.2 Restrictions to the right to undertake industrial actions

On the Swedish labour market the labour market parties have an extensive right to undertake industrial actions since it is not subjected to many restrictions.[271] The most extensive restriction must be said to be the responsibility to maintain industrial peace that follows from 41 § Co-determination act. This entails that when there is no collective agreement is in force the parties are free to undertake industrial actions[272] but when a collective agreement has been concluded there is a responsibility placed upon the concluding parties to maintain industrial peace. I can therefore be said that the peace obligation is to be regarded as a legal effect of the collective agreement.[273] Industrial actions are therefore not allowed in matters that are regulated by a concluded collective agreement.[274] Even if there is a duty to maintain industrial

[266] Glavå & Hansson (2016), *Arbetsrätt*, p. 181-183.
[267] Holke & Olausson (2015), *Medbestämmandelagen – med kommentar*, p. 299.
[268] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 217.
[269] Glavå & Hansson (2016), *Arbetsrätt*, p. 185-188.
[270] Holke & Olausson (2015), *Medbestämmandelagen – med kommentar*, p. 299-300.
[271] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 217.
[272] Sigeman (2001), *Arbetsrätten – en översikt av svensk rätt med europarätt*, p. 65.
[273] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 216.
[274] Glavå & Hansson (2016), *Arbetsrätt*, p. 206.

peace either party has the right to undertake industrial actions in matters that are not regulated by the concluded collective agreement.[275]

Since industrial actions are not allowed in matters regulated by the collective agreement it is unlawful to exert pressure through industrial actions in regards to a concluded collective agreement's validity, existence, correct interpretation or whether an action undertaken by any of the concluding parties is in breach of the provisions of the collective agreement or the Co-determination act.[276] If an industrial action is undertaken in any of these situations it constitutes a conflict of rights, which is to be solved by judicial matters. It can therefore be concluded that industrial actions are only allowed to be undertaken in situations where the dispute concerns a conflict of interest. Furthermore the duty to maintain industrial peace also includes situations where either of the concluding parties is trying to cause an amendment to the already existing agreement. This is an effect of the notion of *pacta sunt servanda*, which entails the duty to honour concluded agreements.[277] The duty to maintain industrial peace expires the same day as the collective agreements expires so it is not allowed to undertake actions in order to try and affect a provision that will enter into force after the existing agreement have ceased to exist.[278] This regulation prevents the parties from violating the peace obligation and taking advantage of a situation to obtain a promise of a change in the next collective agreement. It is also not allowed to aid a party that is not allowed to undertake an industrial action.[279]

The duty to maintain industrial peace should be respected by all parties to a collective agreement. This also extends to members of trade unions or employer associations that are bound by the collective agreement[280] and to employers that through the transfer of business ownership have been bound by a collective agreement.[281] If one of the concluding parties, despite this responsibility, undertakes an industrial action that is in breach of the regulations of the Co-determination act the affected party is not allowed to retaliate since they have the obligation to take the matter in front of a court.[282]

[275] Bergqvist, Lunning & Toijer (1997), *Medbestämmandelagen: lagtext med kommentarer*, p. 427.
[276] 41 § co-determination act (1976:580).
[277] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 218.
[278] 41 § co-determination act (1976:580).
[279] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 218.
[280] 26 § co-determination act (1976:580).
[281] 28 § co-determination act (1976:580).
[282] Bergqvist, Lunning & Toijer (1997), *Medbestämmandelagen: lagtext med kommentarer*, p. 425.

Furthermore it is according to article 41a § Co-determination act unlawful for employers to withhold pay or other remuneration for work that has already been performed by the employee as an industrial action.[283] This regulation differs from the other regulations in the act since it also applies in situations where no collective agreement is in force.[284] As a result of changes to the Co-determination act in 2000 industrial actions are, according to 41b § co-determination act, not allowed to be undertaken against small business owners that do not have any employees or only have family members as employees.[285] In situations where a foreign employer has posted workers in Sweden trade unions are not allowed, according to 41c § Co-determination act, to undertake industrial actions that does not comply with the Posting of Workers act.

Since the Swedish labour market is to a great extent regulated by the labour market parties these are also tasked with making sure that the duty to maintain industrial peace is upheld and that no unlawful industrial actions are undertaken. This applies regardless of the fact of a collective agreement is in force or not. Trade unions or employer organizations are not allowed to organize, induce, support or participate in an unlawful industrial action. If a member of an organization, that is bound by a collective agreement, plans to undertake or undertakes an unlawful action the organization must prevent the initiation of such or work towards the cessation of an already undertaken action.[286] Even if the duty to maintain industrial peace is of importance for the Swedish labour market it is by no means absolute. An important exception from the duty to maintain industrial peace is the possibility of undertaking secondary actions in support of a lawful primary action. Industrial actions that can be categorized as a collection blockade should also not be subjected to the duty to maintain industrial peace.[287]

5.1.3 Industrial actions against an employer already bound by a collective agreement

According to article 41 § Co-determination Act the duty to maintain industrial peace only applies to the concluding parties. This means that trade unions not bound by any collective agreement has the right to undertake industrial actions against an employer bound by a

[283] Sigeman (2001), *Arbetsrätten – en översikt av svensk rätt med europarätt*, p. 64.
[284] Bergqvist, Lunning & Toijer (1997), *Medbestämmandelagen: lagtext med kommentarer*, p. 438-439.
[285] Sigeman (2001), *Arbetsrätten – en översikt av svensk rätt med europarätt*, p. 64.
[286] 42 § co-determination act (1976:580).
[287] Sigeman (2001), *Arbetsrätten – en översikt av svensk rätt med europarätt*, p. 67-

collective agreement to another party.[288] This is a principle derived from the *Britannia* judgement but has been further clarified by the judgement of AD 2005:110. It was stated that trade unions should always have the possibility of undertaking industrial actions in order to conclude a collective agreement even if there is already a collective agreement in effect that is not compatible with the one the trade union is trying to enforce. Such situations should not be solved through the means of a prohibition against industrial actions but rather through the development of legal principles concerning competing collective agreements.

However, if a trade union undertakes industrial actions where the sole purpose of the actions is to amend or set aside the already concluded collective agreement it cannot be seen as lawful. This is the case if a trade union demands that the employer applies terms and conditions in the collective agreement that the trade union is trying to conclude on employees that are members of the trade union that is part of the already existing collective agreement. The latter situation has however not occurred many times in Sweden since the Labour Court has not been inclined to admit that the industrial actions have had the sole purpose of amending or setting aside an already concluded collective agreement.[289] This situation has warranted some issues for Sweden, particularly for the port of Gothenburg where the employer is already bound by a collective agreement and does not want to sign another collective agreement for the same type of work and workers. This has led to the fact that the trade union that is trying to conclude a collective agreement and the employer has undertaken industrial actions against each other. According to the Swedish government the Swedish model does not handle the situation with competing collective agreements particularly well and the situations that arise in these situations can be a threat to the functioning of the Swedish model. In order to guarantee the effectiveness of the Swedish model and the legal status of collective agreements an investigation has been initiated regarding the right to undertake industrial actions.[290]

5.1.4 Secondary Actions

Aside from primary industrial actions there is a possibility in Sweden to undertake secondary actions. These actions are undertaken by one party in order to support another party that is

[288] Prop. 2016/17:107, p. 37-39.
[289] Glavå & Hansson (2016), *Arbetsrätt*, p. 197; See also AD 2011:95 where the labour court however came to the conclusion that the industrial actions had the sole purpose of amedning or setting aside an already concluded collective agreement.
[290] http://www.regeringen.se/pressmeddelanden/2017/05/oversyn-av-stridsatgardsratten/

already involved in a conflict.[291] This is an important aspect of the right to undertake industrial actions and something that the trade unions have been anxious to keep while employers have wanted to restrict it since such actions can be very destructive.[292]

The regulation surrounding secondary actions has a special position in the sense that it is not subjected to the obligation to maintain industrial peace. Parties' bound by a collective agreement has according to 41 § Co-determination Act the right to undertake secondary actions as long as the primary conflict is allowed under the provisions of the Co-determination Act.[293] Secondary actions are only allowed to be undertaken in order to support a primary conflict and the secondary actions must cease when the primary conflict has been resolved. There is nothing that stops a trade union or employers association from being part of both the primary and secondary conflict. Secondary actions must not have an independent purpose or a purpose that might come into conflict with the prohibitions of 41 § Co-determination Act. If this is suspected to be the case it might justify an examination of the purpose of the secondary action and ultimately to treat the primary conflict and the secondary actions as one coherent unit and therefore unlawful.[294]

5.1.5 Principle of proportionality

In many Member States in EU industrial actions must adhere to the principle of proportionality. This is however not the case in Sweden but it has been up for debate. Following the rampant wage increases in Sweden during the late 1900s the government, in 1995, investigated if it was possible to improve the way wages are set through the means of legislation. As a mean to attain this purpose it was proposed that the principle of proportionality should be placed upon industrial actions since there most likely was an imbalance in the power that the employer and employees possessed in situations of industrial actions.[295] However, when the proposition was released in 1999 the government stated that industrial actions should not be subjected to the principle of proportionality since there is no need for it in the Swedish legal system.[296]

[291] Holke & Olausson (2015), *Medbestämmandelagen – med kommentar*, p. 306.
[292] Adlercreutz & Nyström (2015), *Labour law in Sweden*, p. 220.
[293] Bergqvist, Lunning & Toijer (1997), *Medbestämmandelagen: lagtext med kommentarer*, p. 428.
[294] Glavå & Hansson (2016), *Arbetsrätt*, p. 209-210.
[295] SOU 1998:141, p. 254.
[296] Glavå & Hansson (2016), *Arbetsrätt*, p. 191.

This topic was also up to discussion in the *Kellerman*[297] judgement where a small employer had been the subject of industrial actions since he had not wanted to sign a collective agreement. According to the employer this had caused a significant amount of economical damages to the company and that the industrial actions therefore was unlawful since they could not be considered as proportionate. The labour court however stated that in the Swedish legal system industrial actions should not be subjected to the principle of proportionality since there is no legal basis for such regulation.[298]

The principle of proportionality in national legislation should however not be confused with the principle of proportionality that follows from the provisions of EU-legislation. As seen in the *Laval* and *Viking* judgements the test of proportionality did not aim at determining if the industrial actions were proportionate in relation to their effect but rather if they were proportionate in relation to the restriction to the freedom of movement they were causing. Aside from the *Laval* and *Viking* judgements this particular test of proportionality has been applied by the Swedish Labour Court in the *Fonnship*[299] judgement.

During 2001 a Norwegian shipping company, named Fonnship, had one of their vessels "Sava Star" docked in the Swedish port of Holmsund. During this time the trade union "Svenska Transportarbetarförbundet" (Transport) demanded that Sava Star should sign the ITF approved collective agreement "Special agreement". Industrial actions in the form of blockade were undertaken in order to pressure the company into signing the collective agreement, which was successful and a collective agreement was signed shortly after. In 2003 when the agreement had ceased to exist the story repeated itself but this time the concluding party was "Service- och Kommunikationsfacket" (SEKO). Shortly after Fonnship initiated proceedings in front of the Swedish Labour Court stating that the industrial actions had been unlawful according to EU-law and that the collective agreements had been inapplicable and excessive. In AD 2012:10 the Swedish Labour Court requested a preliminary ruling in order to determine if the freedom of movement should also apply to companies established in EFTA states where the vessel is flagged in a state outside EU. The CJEU found that companies establishes in an EFTA state that provides services within the Union should be able to refer to the regulations regarding fundamental freedoms.[300]

[297] AD 1998:17.
[298] See also Glavå & Hansson (2016), *Arbetsrätt*, p. 190.
[299] AD 2015:70.
[300] AD 2015:70; AD 2012:10

In the final judgement 2015:70 the Swedish Labour Court reiterated the principles found in *Laval* and *Viking* and stated that Article 56 TFEU requires Member States to not discriminate undertakings from other Member States on the basis of nationality, hinder or make it less attractive for undertakings to perform work in another Member State. According to EU case-law the practice of enforcing terms and conditions through industrial actions can be seen as a restrictions to the freedom of movement. Such restrictions can however be warranted if its related to an objective compatible with the treaty, are of public interests and is proportionate. The goal of protecting the workers and combating social dumping by guaranteeing fair terms and conditions through industrial agreements can in some situations be considered as a justified restriction to the freedom of movement. At the same time the undertakings that already apply fair terms and conditions should not be punished from a competition point of view.

It was therefore up to the Swedish Labour Court to undertake a test of proportionality to determine if the industrial actions could constitute a justified restriction on the freedom of movement. It found that the terms and conditions the trade unions were trying to enforce would have made it more difficult and less attractive for Fonnship to undertake work in Sweden. Also since none of the trade unions had members that worked at the ship the industrial actions most likely did not aim at improving the affected workers terms and conditions but rather to make sure that Fonnship was not competing on unfair grounds with Swedish companies. This is however allowed in some situations according to article 11 ECHR since it aims at protecting the occupational interest of all employees within that sector. In this situation however the court found that the terms and conditions that the trade unions were trying to enforce were too extensive, especially the wages, and that the actions therefore constituted a restriction on the freedom of movement not compatible with EU-law.

In order to make sure that industrial actions against foreign employers do not violate the principle of proportionality a significant amount of legislation have been adopted. There have been many changes in the regulations in this area throughout the years. As an effect of this the current regulation concerning the trade unions possibility of undertaking industrial actions against foreign employers contains both new and old regulations. I will therefore in the next chapter describe all legislative measures that have been undertake in this area and what has initiated the legislative process.

6. EU-law and industrial actions in Sweden

6.1 Collective actions before the Posting of workers directive, "Lex Britannia"

Lex Britannia was constructed after the Swedish Labour Court's judgment in AD 1989 number 120 "Britannia" where the "Britannia-principle" was formed. In 1988 the ship flagged under Cyprus and owned by Seabronze arrived at the port of Gothenburg with the intent of unloading and loading cargo. Once it arrived into port two representatives from the ITF and Svenska Sjöfolksförbundet visited the ship with the intent of concluding a collective agreement. No agreement could be concluded and Svenska Sjöfolksförbundet decided to undertake industrial actions and shortly after SEKO decided to undertake secondary actions. Seabronze claimed that the industrial actions were unlawful since the company were already bound by a Filipino collective agreement.

The Swedish Labour Court stated that according to already concluded legal principles in Sweden it is allowed for a trade union to undertake industrial actions in order to conclude a collective agreement even if the employer is already bound by another collective agreement. In such situations the employer does not have to apply the regulations of the latest concluded collective agreement in areas where it is not compatible with the first one. It is however not allowed to undertake industrial actions in order to amend or set aside an already existing collective agreement. The labour court found that these regulations should also apply to foreign employers and that the industrial actions in this situation were unlawful.[301]

This judgement was not welcomed by the Swedish trade unions since it decreased their capability of concluding collective agreements with foreign employers. LO and TCO stated that the Swedish legislation should be changed so that it would not hinder trade unions from undertaking industrial actions against employers bound by a collective agreement concluded under foreign law.[302] Following this the government proposed the passing of the bill known as "*Lex Britannia*", which was subsequently passed and adopted into Swedish legislation in 1991. It aimed at making it impossible for employers from other countries to apply terms and conditions of employment that did not live up to the standards of collective agreements on the

[301] AD 1989:120
[302] Prop.1990/91:162, p. 6.

Swedish labour market. This would in turn shield Sweden from the threat of social dumping, which was becoming more of a threat following the globalisation.[303]

A cornerstone on the Swedish market is that most of the terms and conditions of employment can be found in the various collective agreements found on the labour market. Trade unions and employers make sure, through collective bargaining, that these terms and conditions are fair. However, if a foreign employer already bound by a collective agreement wants to undertake work in Sweden Swedish trade union can't know if that agreement lives up to the standards on the Swedish labour market.[304] In order to protect these workers and to prevent social dumping new regulations were amended in 25a §, 31a § and 42 § Co-determination act (MBL). According to 25a and 31a §§ MBL a collective agreement, concluded through industrial actions, can not be declared void by foreign legislation if is lawful under the provisions of MBL. Also if a collective agreement is concluded under the provisions of MBL it has primacy over the foreign collective agreement in parts where they are not in agreement.[305] Lastly, according to 42 § MBL a collective agreement concluded under foreign legislation, no matter the content, does not give rise to the obligation to maintain industrial peace. Trade unions therefore had the possibility to try and amend or set aside an already conclude foreign collective agreement through the means of industrial actions.[306] Following these changes the trade union's right to industrial actions were strengthened since they were able to treat foreign employers, bound by collective agreements under foreign law, as if they were not bound by any no matter the content.[307]

Shortly before this law entered into force Sweden was preparing its accession to EU in 1994 and there was some concern that this regulation might come into conflict with the free movement and that it might be considered as discriminatory. According to the preparatory works it was found that *Lex Britannia* would not come into conflict with EU-law since it aims at combating social dumping.[308] However in 1993 there was some concern that the Swedish model might be threatened by EU-law, particularly in relation to industrial actions. This fear had risen as an effect of the *Rush Portugesa* judgement and the PWD and the effects these might have on the right to undertake industrial actions. As a response the Swedish

[303] Prop.1990/91:162, p. 7.
[304] Prop.1990/91:162, p. 8.
[305] Prop.1990/91:162, p. 14-15.
[306] Prop.1990/91:162, p. 17.
[307] SOU 2008:123, p. 165.
[308] Prop.1990/91:162, p. 11-12.

Government tasked Sven-Hugo Ryman with investigating if *Lex Britannia* would be in violation of EU-law.[309] He found that *Lex Britannia* might come into conflict with the principle of non-discrimination since the enforcement of Swedish collective agreements might hinder the freedom to provide services. However, the restrictions to this freedom is done to prevent social dumping, which can be related to the public interest and that can warrant a restriction to any of the fundamental freedoms.[310]

6.2 Lex Laval

6.2.1 Background

When the Posting of Workers act as was adopted in 1999 it was presumed that PWD did not in way hinder trade unions from enforcing terms and conditions through industrial actions since it only lays down a minimum level of protection. It was also, following *Lex Britannia*, considered lawful to amend or set a side an already concluded foreign collective agreement no matter the content of that. However, the *Laval* judgement made it clear that changes had to be done regarding the right to undertake industrial actions against foreign employers.[311] These changes, know as *Lex Laval*, led to changes in the MBL and the Posting of Workers act during 2010. This was done in order to guarantee that Sweden did not violate any regulations of EU-law in matters relating to posted workers.[312]

It was also made clear by the *Laval* judgement that the Swedish way of regulating the labour market is not, to the same extent, applicable when it comes to posted workers. The Swedish model gives rise to a situation where the freedom of movement is violated in a way, which cannot be seen as justified or proportionate.[313] Since the balance on the Swedish labour market depends on the trade unions capabilities of concluding collective agreements through industrial actions changes had to be done in order to safeguard the survival of the Swedish model.[314]

[309] Ds. 1994:13, p. 144-145.
[310] Ds. 1994:13, p. 362-363.
[311] Prop. 2009/10:48, p. 24-25.
[312] Malmberg & Sjödin (2012), *Lex Laval*, p. 47- 48.
[313] Prop. 2009/10:48, p. 25.
[314] Malmberg & Sjödin (2012), *Lex Laval*, p. 47.

6.2.2 Changes to 5a § Posting of Workers act

Collective agreements are the instrument in Sweden that is being used most often when determining the terms and conditions of employment. It is therefore important that the labour market parties have the ability to conclude collective agreements to a great extent. There must however be some restrictions to this right. Following the changes of *Lex Laval* it was therefore made clear that trade unions only have the right to, through industrial actions, enforce terms and conditions that can be found in a central collective agreement that is generally applied throughout Sweden and is applicable to the same type of workers or work. If a collective agreement is to be considered as generally applicable is based on its coverage on the labour market. In Sweden it can be said that the majority of employers are affiliate to an employer association or bound by a substitute collective agreement. It can therefore be said that collective agreements concluded on a central level generally have very high coverage and that these are generally applied on similar employers throughout Sweden. However, the deciding factor when determining if a collective agreement should be considered as "generally applicable" is if the collective agreement is applied throughout the entire state. Since all central collective agreements in Sweden are applied throughout the state it can be said that all central collective agreements are to be considered as "generally applicable" and therefore in line with article 3.8 PWD.[315]

Furthermore it is only the terms and conditions within the areas that are stated in article 5 § in the Posting of Workers act and minimum wages found in central collective agreements that Sweden can demand that foreign employers apply. This regulation is based on CJEU's statement in the *Laval* judgement that according to article 3.1 of PWD the Member States must guarantee the posted workers the conditions found in the hard core that consists of; maximum work period, minimum rest period, minimum paid annual holidays, minimum rates of pay; including overtime, the conditions of hiring-out workers, health, safety, hygiene at work, discrimination and equal treatment.[316] Since Sweden has chosen to fulfil the obligations of the PWD through article 3.8 there exists a possibility to enforce terms and conditions within the hard core found in every central collective agreement that is considered to be generally applicable through industrial actions. It is however required that the terms and conditions in the collective agreement are more favourable than the ones regulated by law for it to be lawful. Aside from the hard core the normal legal affects stemming from a concluded

[315] Prop. 2009/10:48, p. 30.
[316] 96/71/EC, article 3.1 a-g

collective agreements such as co-determination and shop stewards were also supposed to apply to the concluding parties. [317] Industrial actions are also only allowed if it leads to an improvement for the workers since it otherwise had the possibility of constituting an unjustified restriction to the freedom of movement. This also entails a prohibition to sign collective agreements with regulations that hinder the application of more beneficial regulations.[318] It should also be said that while the *Laval* judgement restricted which terms and conditions that could be enforced through industrial actions it did however not state that collective agreements concluded on a voluntary basis should adhere to such restrictions.[319]

As stated above *Lex Britannia* was deemed as discriminatory, by the CJEU, in the *Laval* judgment since industrial actions could be undertaken no matter the content of the foreign collective agreement. Therefore a new regulation had to be adopted so that the right to undertake industrial actions had to depend on the contents of the already concluded collective agreement. According to the Posting of Workers act 5a § second paragraph it was therefore stated that it was only allowed to enforce terms and conditions in areas where the employer did not guarantee the same level of protection as those found in the collective agreement that the trade union was trying to enforce. This was known as the "burden of proof regulation". This meant that if the employer claimed that the terms and conditions lived up to the same standards the industrial actions weren't lawful. This was because they couldn't be seen as proportionate and legal since they didn't have the purpose of improving the workers working conditions. If such a claim were made by the employer the burden of proof would be put on the employer so that he or she had to show that the terms and conditions did in fact live up the standards of that collective agreement. This would guarantee the Swedish trade unions the possibility of monitoring and controlling that fair terms and conditions were applied and as a last resort undertake industrial actions. It would also guarantee that Swedish collective agreements were not favoured in every situation and that foreign employers from other Member States would not be hindered from undertaking work in Sweden.[320]

6.2.3 Changes to Co-determination Act

The right to undertake industrial actions is a vital part of the Swedish model and is guaranteed by the constitution where it is said that restrictions can be done through legislation, which can

[317] SOU 2015:83, p. 154.
[318] Prop. 2016/17:107, p. 51.
[319] Malmberg & Sjödin (2012), *Lex Laval*, p. 49.
[320] SOU 2008:123, p. 294-299.

mainly be found in the co-determination act. As a result of the changes a new restriction was stated in 41c § MBL, which said that industrial actions undertaken in breach of 5a § Posting of Workers act were unlawful.[321]

The most important change was however entered into 42a § MBL, which extended the trade unions responsibility of maintaining industrial peace. Prior to these changes trade unions were not obliged to maintain the duty of industrial peace if the foreign employer were already bound by a collective agreement concluded under foreign law. The new changes in 42a § MBL meant that 42 § MBL was also applicable in relation to foreign employers posting workers in Sweden and trade unions could therefore be held accountable if they undertook industrial actions against a foreign employer already bound by a collective agreement.[322] It was also changed so that Swedish collective agreement no longer had primacy over foreign collective agreements in parts where they are not in agreement. This was motivated by the fact that the CJEU found that according to *Lex Britannia* Swedish collective agreements were favoured in every situation since trade unions were allowed, through industrial actions, to try and amend or set aside an already concluded foreign collective agreement no matter the content of that. Such a regulation was found to be discriminatory against employers in other Member States and therefore a clear violation of EU-law.[323]

6.3 Implementation of the Enforcement directive and the removal of Lex Laval

6.3.1 Background

In 2012 LO and TCO raised a collective complaint to the European Committee of Social Rights in regards to *Lex laval*. They stated that the changes that had been made in 2010 discouraged Swedish trade unions from signing collective agreements with foreign employers since the consequences of making an unlawful industrial action could be disastrous. This had led to the fact that fewer collective agreements were signed and that workers with low wages and bad working conditions were competing with Swedish employers on unfair grounds. They claimed this could have a negative impact on the Swedish labour market model and that Sweden through *Lex laval* was violating its obligations of the European Social Charter.[324] In

[321] Prop. 2009/10:48, p. 39-40.
[322] Prop. 2009/10:48, p. 40.
[323] SOU 2008:123, p. 247-248; See also SOU 2008:123, p. 294-299.
[324] Collective complaint No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation Of Professional Employees (TCO) v. Sweden.

its decision the Committee found that Sweden was in violation of the right to industrial actions and collective bargaining as stated by the Social Charter. Changes brought on by *Lex Laval* had not led to the promotion of a system where employers and employees on a voluntary basis engage in collective bargaining. It had also led to a disproportionate restriction of the trade unions right to improve the rights of the posted workers through industrial actions. Sweden was therefore in the situations that they fulfilled their obligations under EU-law but at same time violating their responsibilities under international obligations against ILO and the European Committee of Social Rights.[325]

As a result of this judgement and the adoption of the enforcement directive in 2014 the government decided to review the Swedish legislation regarding posted workers and most specifically *Lex Laval*. Three legal documents was presented in 2015 and one in 2017, which contained information regarding the removal of *Lex Laval* and how the Enforcement directive would be implemented in Swedish legislation.[326] Since all documents relate to both aspects a picture of the changes a whole will be described below.

6.4.2 Posting of workers collective agreement

Following the new regulations no changes were made in relation to which terms and conditions than can be enforced through industrial actions. Sweden also still fulfils the obligations PWD through legislation and generally available collective agreements according to article 3.8 second paragraph.[327] The biggest change is the possibility for trade unions to conclude a "posting of workers collective agreement" through industrial actions.[328] These are only subjected to regulations in the Posting of Workers act and therefore only consist of regulations within the hard core.[329] Terms and conditions within these collective agreements must also, as previously, be more favourable than what is stated in 5 § Posting of Workers act and not hinder the application of more beneficial terms and conditions.[330]

Also, regulations within the labour protection area that normally apply between the concluding parties e.g. co-determination and shop stewards should not be applied. Firstly, these regulations cannot be considered as belonging to the hard core and if a trade union

[325] Nyström (2017), *EU och arbetsrätten*, p. 181.
[326] Nyström (2017), *EU och arbetsrätten*, p. 181.
[327] Prop. 2016/17:107, p. 48.
[328] SOU 2015:83, p. 276-277.
[329] 96/71/EC, article 3.1 a-g.
[330] Prop. 2016/17:107, p. 48-51.

enforces terms and conditions that is not considered as belonging to the hard core it could constitute a restriction to the freedom of movement. Secondly these regulations can be seen as particularly burdensome for foreign employers since they are not normally active on the Swedish labour market. A system that forces foreign employers to conclude a collective agreements with all its usual legal effects cannot be seen as proportionate.[331]

Since posting of workers collective agreements does not adhere to the regulations in the Co-determination Act or Shop Stewards Act there must exist another possibility for the trade unions to make sure that the EU-workers adheres to the regulations in the collective agreement and sanctions if this is not the case.[332] According to article 10.4 of the enforcement directive it is in accordance with national law or practices up to the Member States to determine how this should be done. In countries like Sweden where terms and conditions are mostly determined by collective agreements there is, according to the enforcement directive, a right for trade union, instead of authorities, to monitor that the relevant terms and conditions in the collective agreement is applied to the posted workers. Normally trade unions have good knowledge of the circumstances on the workplace since the local members of the trade union or the shop steward monitors it and can alert if something is awry. However, in situations where a posted worker collective agreement is concluded there are most likely not many, if any, of the union's members that are working for that particular employer. Also since the regulations in Co-determination act and Shop Stewards act does not apply to a foreign employer if a posting of workers collective agreement has been concluded he does not have the obligation to remunerate a shop steward to make sure that the collective agreement is being applied correctly. This means that the trade unions possibilities to control the application of a collective agreement are worse than would be the case if it were a Swedish employer. Too make sure that the correct terms and conditions are being applied a new regulation have been implemented in 5d § Posting of Workers Act. It entails an obligation for the employer to upon request from the trade union, too which the employer is bound by a posting of workers collective agreement, provide documents to show that he or she is in fact applying the correct terms and conditions.[333]

[331] Prop. 2016/17:107, p. 56-58.
[332] SOU 2015:83, p. 276.
[333] Prop. 2016/17:107, p. 92-97.

6.4.3 Transparency

In order to comply with PWD all terms and conditions must be presented in a clear and transparent way so that employers know what is expected from them.[334] The right to undertake industrial actions against foreign employers is therefore, according to EU-law, dependant on the transparency of the hard core in the host state.[335] For the promotion of the freedom of movement for services it is vital that the employer knows what terms and conditions that must be applied and what the costs might be.[336]

In order to make sure that the hard core was transparent the regulations in *Lex Laval* appointed the Swedish Work Environment Authority as a liaison office that foreign employers could contact. They had to provide foreign employers with information regarding terms and conditions that might be enforced through industrial actions or otherwise applicable through a number of different measures. This task was however not easy to fulfil since trade unions were only obliged to submit terms and conditions that might be enforced through industrial actions. However, when the process of implementing the enforcement directive was initiated it was however uncertain if these regulations lived up to the standards set out in Article 5 of the Enforcement Directive.[337]

The biggest issue in relation to article 5 was that very few collective agreements had been submitted to the Swedish Work Environment Authority so there was very little information regarding terms and conditions in collective agreements. In Member States that relies on fulfilling PWD through collective agreements the labour market parties must be involved in the process of providing information regarding terms and conditions so that it is being presented in a transparent and open way.[338] New regulations was therefore introduced in 9a § Posting of Workers act to clarify that trade unions now have the explicit obligation to submit collective agreements regardless of if they plan to enforce these through industrial actions or not.[339] The information that should be included in the submitted terms and conditions is the hard core and particularly the level of the minimum wages[340] Even though there exists an obligation to submit the relevant terms and conditions there are no sanctions if it's not done.

[334] Prop. 2016/17:107, p. 53.
[335] Prop. 2016/17:107, p. 45.
[336] This can be seen in the *Laval* judgement paragraph 110 where it was stated that it is unreasonably to force an employer into negotiations when there are no provisions, which clearly states what the minimum wage is.
[337] Prop. 2016/17:107, p. 67-70.
[338] Prop. 2016/17:107, p. 74.
[339] Prop. 2016/17:107, p. 77-78.
[340] Prop. 2016/17:107, p. 74.

Furthermore the validity of industrial actions should not be affected by the fact that the enforced terms have not been submitted to the liaison office since that would be not be a proportionate restriction of the right to undertake industrial actions according to EU-law and other international obligations.[341]

6.4.4 Removal of the "Burden of proof" regulation

One major change that was bought on the by changes in 2017 was the removal of the "burden of proof regulation". This particular regulation was widely criticized by the trade unions[342] since it made it very easy for an employer to avoid being subjected to industrial actions simply by showing that he or she in essence were guaranteeing the same minimum regulations that could be found in a central collective agreement. This gave the employer the ability to "shop" for the best collective agreements since there are many applicable collective agreements within each sector. This have however been changed and trade unions can now through posting of workers collective agreements enforce terms and conditions within the hard core that is found in any central collective agreement. However, in order for this to be in compliance with the PWD there has to be a certain degree of transparency. To achieve this level of transparency trade unions can only enforce such terms and conditions that have been submitted through a posting of workers collective agreement to the Swedish Work Environment Authority. If a foreign employer has the intention of posting workers in Sweden he or she can then contact the liaison office to get the information needed in order to get an overview of the obligations that has to be met and what the costs are going to be. There can however arise situations where the foreign employer considers that a certain set of enforced terms and conditions are less beneficial than that of another posting of workers collective agreement. This should however not have an effect on the lawfulness of the industrial actions since the less beneficial collective agreements fulfils all the prerequisites of article 3.8 of PWD.[343]

6.4.5 Competition between Swedish and foreign collective agreements

There might however arise situations where the foreign employer is already bound by a collective agreement in the home state. Sweden has chosen to fulfil the obligations of PWD through generally available collective agreements while most countries resort to universally

[341] Prop. 2016/17:107, p. 80.
[342] Nyström (2017), *EU och arbetsrätten*, p. 179-180.
[343] Prop. 2016/17:107, p. 51-54.

applicable collective agreements or legislation. In any of these three cases the foreign employer must apply some of the regulations in the host state. When the regulations can be found in universally applicable collective agreements or legislation there exists an authority that is tasked with making sure that the foreign employer does in fact apply the correct terms and conditions. This responsibility however only comes into affect if the foreign employer does not adhere to the provisions of the country's regulations. If those regulations are not being followed there are sanctions that can be put on said employer. However, when it comes to generally available collective agreements, such as those in Sweden, there are no monitoring authorities or sanctions available if there is no collective agreement in force. Foreign collective agreements, employment contracts or legislation is not an approved measure, according to PWD, to make sure that the posted workers enjoy the terms and conditions in the hard core. Sweden can therefore not allow foreign employers posting workers in Sweden to guarantee minimum terms and conditions through collective agreements, individual employment contracts or legislation under foreign law. It is therefore reasonable to assume that generally available collective agreements concluded through industrial actions should be able to set the norm in the same way as legislation or universally applicable collective agreements.[344]

Therefore, following the new legislation industrial actions are allowed even if a foreign employer is already bound by a collective agreement under foreign law no matter the content of that. It is however required that the enforced posting of worker collective agreement does not hinder the application of more beneficial terms and conditions through foreign employment contracts or agreements. Such a collective agreement cannot be said to have the sole purpose of amending or setting aside an already concluded collective agreement for three reasons. Firstly, the provisions of the posting of workers collective agreement only comes into effect if the foreign employer does not guarantee the terms and conditions found in the hard core. Secondly since posting of workers collective agreements have special legal provisions[345] they only adhere to the regulations in the Posting of Workers act. The legitimacy of the foreign collective agreement is therefore not affected since it's only the hard core that is affected by the Swedish collective agreement. Thirdly, if a foreign employer is not bound by a Swedish collective agreement there is no way actors in Sweden can make sure that the minimum terms and conditions that should be applied are being followed and no obligation

[344] Prop. 2016/17:107, p. 37-38.
[345] This has been described above in section 6.4.2.

for the employer to pay for damages if these are not being followed. Such a situation has a lot of similarities with what would be the case if a Swedish employer would not be bound by any collective agreement.[346]

6.4.6 Minimum wages

When it comes to minimum wages there are no exhaustive definition in article 3.1 of PWD of what it should contain. It is instead up to the individual Member State in accordance with national legislation and case-law determine what the minimum wage should include and what it should be as long as it does not restrict the freedom to provide services.[347] All remunerations that occurs as an effect of the posting aside from expenses relating to travel, board and lodging should be included within the minimum wage. Minimum wages should consist of the wage the workers are paid for the work and overtime compensation. Within the term "overtime compensation" various types should be included such as payment for working on uncomfortable hours, working during the night and working on a shift. The minimum wage should also be allowed to be differentiated depending on the workers duties, education, experience, responsibility and competence.[348] Wages should also be allowed to be differentiated based on where in the Member State the worker is located if the wage is geographical differentiated in the central collective agreement. Furthermore the payment of occupational insurances for work related injuries or deaths should be included in the minimum wage definition. However, occupational pension schemes that follow from collective agreements should not be included in the minimum wage.[349] With that being said there is some uncertainty whether insurances for work related injuries and deaths should be included. According to the statements in preparatory works the CJEU in the *Laval* judgement stated that an entire insurance package cannot be forced upon a foreign employer. The situation could however be different if it's just some components that are enforced. Considering this it can therefore be said that the legal position is somewhat unclear and that it will be up to the courts to decide if it should be included or not.[350]

Furthermore there are no regulations within the Swedish legislation that states what the minimum wage should be. In the *Laval* judgement Sweden was criticized since there were no

[346] Prop. 2016/17:107, p. 37-39.
[347] Case C-396/13 *Sähköalojen ammatiliito ry v. Elektrobudowa Spolka Akcyjna*, paragraph. 31-34.
[348] Case C-396/13 *Sähköalojen ammatiliito ry v. Elektrobudowa Spolka Akcyjna*
[349] Case C-396/13 *Sähköalojen ammatiliito ry v. Elektrobudowa Spolka Akcyjna* and Prop. 2016/17:107, p. 48-50.
[350] Prop. 2016/17:107, p. 49-50.

provisions that in a precise and clear manner declared what the minimum wage should be. Following these new changes trade unions must in a precise and sufficient manner state what the minimum wage is in a posting of worker collective agreements if they want to enforce it. It is however somewhat questionable if the new regulations fulfils this criteria since as of today (18/3-2018) there are only 31 posting of workers collective agreements submitted to the Swedish Work Environment Authority[351] when there are approximately 670 central collective agreements on the Swedish labour market.[352] Since there are so many collective agreements there can arise situations where there can be more than one applicable collective agreement on the same type of work. This means that there can be more than one minimum wage for the same type of work, which also can differ depending on where in Sweden the work is being performed. This shows that it can be quite difficult for a foreign employer to be able to get to know what his costs are going to be and what wage that should be applied. It is unclear if this new regulation does in fact present the minimum wage in a precise and clear manner and something that the court will have to decide upon.

[351] https://www.av.se/arbetsmiljoarbete-och-inspektioner/utlandsk-arbetskraft-i-sverige/utstationering---utlandsk-arbetskraft-i-sverige/kollektivavtal/
[352] http://www.mi.se/kollektivavtal-lagar/

7. Analysis

7.1 What can be defined as an industrial action following EU-law?

As described above EU has its own legal framework that is to be considered as a legal order separate from the individual Member States. According to TFEU 153.5 the Union does not have competence in matters relating to strikes. It can however be questioned if other industrial actions should be included into this term as well. This is supported by ILO, from which the EU definition of strike draws its meaning, where it is stated that according to their jurisprudence the term strike encompasses not only strikes but also actions such as tools-down, go-slow and sit-ins.[353] This reasoning can also to some extent be seen in the *Laval* judgement where it was stated that the industrial action "blockade" is to be considered as falling within the scope of TFEU 153.5[354] and therefore be classified as falling within the term strike. Also in the *Viking* judgement it was stated that the industrial actions did not fall outside the scope of 153.5[355] even if the actions undertaken by ITF, in the form of a circular, did not constitute a strike per definition. This clearly shows that the term "strike" as defined by the treaties does in fact encompass all actions that can be classified as an industrial action.

Which actions that are to be classified as an industrial action cannot be discerned easily since there is no exhaustive list within the European legal order since it's to be defined by the individual Member States legislation. Instead there is a definition used by CJEU in order to determine if an action is to be considered as an industrial action or not. The definition draws heavily on the constitutional traditions common to the Member States and the jurisprudence created by the ILO supervisory organ Committee on Freedom of Association. Industrial actions are considered to be such actions where labour is withheld collectively and concerted in a lawful way in order to pursue an occupational demand. This means that industrial actions are such actions that cause economical damages in order to try and cause a reaction from the other party. Furthermore, in order for the action to be considered as pursuing an "occupational" demand it should, according to the jurisprudence of ILO, relate to improvement of working conditions for the workers, hinder the application of worse terms and conditions e.g. lowering wages or redundancy, protecting or improving the rights of the

[353] ILO, *Digest of decisions and principles of the Freedom of Association Committee of the governing body of ILO*, paragraph. 545.
[354] C-341/05 *Laval*, paragraph. 88.
[355] C-438/05 *Viking*, paragraph. 41.

trade union or political demands. This must also be undertaken in a lawful way or it could possibly be deemed as a criminal offense if for instance any individuals or property takes any damage. It should however be mentioned that actions, which are normally deemed as unlawful and criminal can be considered as lawful if undertaken by a trade union. This can be the case during blockades since it would be unlawful for individuals to restrict the access to a building but if a trade union were to do it as a part of an industrial action it could be lawful, depending on the regulations within the legislation concerning industrial actions.

Industrial actions can therefore be said to encompass all actions that entails a collective and concerted withholding of labour in order to defend an occupational interest and undertaken in a lawful manner. The European regulation resembles the Swedish regulation to a large extent since industrial actions in Sweden must also be undertaken in a collective and concerted manner in the pursuit to defend an occupational interest. It must also be said that actions must be of "conflict nature" in order to be classified as an industrial action since there are other means that can be used that to put pressure on the other party that cannot be considered as industrial actions e.g. co-determination or veto. This follows from article 153.1f TFEU where it is stated that the Union shall promote the possibility of trade unions to collectively defending the interest of their members through measures such as co-determination.

7.2 In which way does EU-law affect the right to undertake industrial action as regulated by the Swedish law?

As a result of the case law from CJEU and its primacy the possibility for trade unions to undertake industrial actions in areas where EU-law is applicable have been impacted for the worse. This is especially clear in Sweden where the right to undertake industrial actions is very extensive. This follows from *Melloni* where it was stated that EU-law have primacy over legislation and constitutional regulations and that Member States cannot protect the right to undertake industrial actions in a way, which can jeopardize the primacy of EU-law. National regulations that give a more extensive protection than EU-law can therefore be considered as unlawful. The right to undertake industrial actions have been restricted by the CJEU when there has occurred a conflict between fundamental rights and fundamental freedoms. In these situations the use of industrial actions have been deemed as restricting the freedom to provide services and establishment in a way which cannot be seen as justified. More specifically it can be said that the industrial actions have restricted the possibility of posting workers in another Member State or stopped an undertaking from relocating to another Member State. This

follows from the two important and controversial judgements of *Laval* and *Viking*. Following the *Laval* judgement the right to undertake industrial actions has been limited, through the Posting of Workers act, in situations relating to the possibility of enforcing a collective agreement upon a foreign employer that has the intention of posting workers in Sweden. The effects of the *Viking* judgement has led to the fact that it has been made clear that industrial actions in some situations can make or pointless or less attractive to establish in another Member States. This constitutes a restriction to the freedom of establishment that in most cases cannot be seen as justified or lawful.

7.2.1 Principle of proportionality

According to TFEU 153.5 the Union does not have competence in matters relating to industrial actions. This is however not true since CJEU have made it perfectly clear, through *Laval* and *Viking*, that it does in fact have competence in such matters. Its competence is based on the conflict that occurs between the right to undertake industrial actions and the fundamental freedoms. In this particular sense the conflict that arises is the interest of an undertaking to perform an economic activity and the trade union's wish to hinder social dumping and to protect the interests of their members. This conflict can be said to constitute a conflict between social and economic rights that supposedly should be of equal importance. Fundamental freedoms have been established to guarantee the functioning of the common market while industrial actions undertaken with the intention to conclude a collective agreement can hinder the occurrence of social dumping that the use of the fundamental freedoms might entail. It should however also be stated that it in extreme cases industrial actions can also lead to social dumping on the common market. This can clearly be seen in *Laval* where the company became insolvent and the workers were redundant as a result. Furthermore it is not clear if the workers did receive any sort of compensation when they returned to Latvia. Since EU has both social and economic goals the right to establish or to provide a service must be balanced against the right to undertake industrial actions in order to determine if the restriction to the fundamental freedom is justified. In order to determine if the industrial action can warrant a restriction to any fundamental freedom it must first be established that it pursues a legitimate objective that is compatible with the treaties and is justified by overriding reasons of public interests. According to *Laval* and *Viking* it has been made clear that industrial actions can have the purpose of protecting the workers, which is a legitimate objective that is compatible with the treaties. Industrial actions must also be

proportionate in the sense that the action does not go beyond what is necessary in order to attain the objective of protecting the workers.

Another aspect of the principle of proportionality is that according to *Viking* it is evident that trade unions are only allowed to undertake industrial actions if jobs and conditions are under serious threat or jeopardised. What is to be considered as jeopardised or under serious threat was not clarified by the court. Also, industrial actions cannot be undertaken if trade unions have other effective means at their disposal. Following this judgement trade unions cannot as quickly and effectively as before undertake industrial actions against a foreign employer since they must first exhaust all other effective means that are at their disposal. This entails that the lawfulness of the industrial action depends on the steps taken by the trade union in order to try and resolve the dispute, which actions that have been taken and what the consequences are for the employees and employer. This is a restriction that has not existed within the Swedish legislation prior to the *Viking* judgement since industrial actions does not adhere to the principle of *ultima ratio* within the Swedish legal order.

Furthermore, in relation to the posted workers, CJEU has made it perfectly clear that national and foreign employers cannot be treated in the same way if the industrial actions are to be considered as proportionate. It can therefore be said that it is not possible to apply a principle of equal treatment to the same extent as usual since it's only minimum regulations within the hard core that can be enforced upon foreign employers. The fact that it is only the minimum terms and conditions that can be enforced are most likely an effect of the *Cassis de Dijon-principle* that is also being applied on other fundamental freedoms than the freedom of movement for goods. Since it is only minimum regulations within the hard core that can be enforced through industrial actions the term "social dumping" has been given a very narrow meaning. It is only considered to be social dumping if the foreign employer does not apply the hard core, which effectively mean that other differences in the states labour regulations aren't taken into consideration. Sweden can however choose to maintain a very high level of minimum standards since the PWD should not harmonize the material content of the minimum regulations within the individual Member States.[356]

Since trade unions have to adhere to the principle of proportionality it can be said that it has been made harder for trade unions in Sweden to undertake industrial actions despite the fact

[356] C-341/05 *Laval*, paragraph. 60.

that it is considered to be a fundamental right according to CFREU, ILO, ECHR and the Community Charter. Within the national context trade unions does not, according to the *Kellerman* judgement, have to adhere to the principle of proportionality when undertaking industrial actions since they are free use whatever measure they see fit no matter the economic consequences for the other party. However, if the industrial actions are thought to have huge economic consequences for a neutral third party there can however be some restrictions.

The principle of proportionality could have the possibility of dissuading trade unions from using industrial actions for three major reasons. Firstly, it might be difficult to discern what is considered to be proportionate in the individual situation since the possibility of undertaking industrial actions against a foreign employer differs from when it is undertaken against an employer from Sweden. Secondly, if an industrial action that is not proportionate is undertaken the consequences for the trade union can be disastrous. This follows from the *Laval* judgement where it was stated that the regulations regarding the economic freedoms have horizontal direct effect and can therefore be invoked against a trade union when actions are undertaken against an employer. This lead to the fact that the Swedish Labour Court, after the CJEU's judgement in *Laval*, ruled that the trade unions were obliged to pay an amount of close to 2.5 million SEK in damages and legal fees to Laval. Thirdly, trade unions are not given a margin of appreciation, which means that there is not much, if any, room for making an error. This would most likely dissuade many trade unions from undertaking industrial actions since they might not be able to afford such a substantial loss if the industrial actions were to be deemed as unlawful.

7.2.2 Principle of non-discrimination

Aside from the principle of equal treatment there exists a principle of non-discrimination, which can be found in Article 18 TFEU and prohibits any discrimination based on nationality. Prior to *Laval* trade unions could enforce collective agreements even if a foreign employer was already bound by a collective agreement concluded under foreign law. This was, through *Laval*, determined to be unlawful since it meant that trade unions could amend or set aside an already concluded collective agreement no matter its contents. This meant that industrial actions could be undertaken even if the provisions of the hard core were being fulfilled. This was seen as discriminatory since it meant that Swedish collective agreements were favoured in every situation. It was also discriminatory due to the fact that a foreign collective

agreement could be amended or set aside despite the fact that this was not lawful within a strict national setting. This lead to the implementation of the "burden of proof regulation" which made it unlawful to amend or set aside foreign collective agreement if it contained regulations that fulfilled the provisions of the hard core. This had severe repercussions for the possibilities of undertaking industrial actions since it meant that trade unions could not undertake such actions if the foreign employer already fulfilled the provisions of the hard core.

The burden of proof regulation have as an effect of the recent law changes been removed and trade unions once again have the possibility of enforcing posting of workers collective agreements in any situation. According to the preparatory works the new regulation must be seen as lawful since such a collective agreement cannot, according to the preparatory works, be seen as amending or setting aside an already concluded collective agreements since it should only guarantee monitoring possibilities and reinforcing the duty of applying the hard core as it is regulated in Sweden. It does however seem to bear some resemblance to the previous regulation since foreign collective agreement does not, according to the preparatory works, seem to be an approved measure of guaranteeing the hard core within Sweden. This have however not yet been touched upon by the court and it will ultimately be up to the courts to decide if this regulation is to be seen as favouring Swedish collective agreements in all situations and therefore be considered as discriminatory.[357]

7.2.3 Permissibility of different kinds of industrial actions

In both *Viking* and *Laval* it can be seen that there are different types of industrial actions and it can be questioned if all industrial actions should be assessed in the same way since they can be said to be divided into two separate groups. Firstly there are strikes or other similar actions that are undertaken by the trade union's members at the particular undertaking. Secondly there are actions such as blockade and secondary actions that are undertaken if the trade union does not have any members at the undertaking. In relation to the former it must be said that it is clear that such actions are undertaken in order to directly regulate the terms and conditions of employment for the trade union's members at that particular undertaking. Following the judgement of *Schmidt and Dahlström v. Sweden* it was stated that such actions, such as

[357] A more thorough investigation into this particular matter will be done in chapter 7.3.2

strikes, are the most important mean that trade unions can make us of in order to protect the interest of their members.

In relation to blockade and secondary actions it must be said that the actions does not aim at directly regulating the terms and conditions of employment since in these situations it is most likely that the trade unions does not have any members at the undertaking. Such actions must therefore be said to have the purpose of protecting similar undertakings in the same sector from being subjected to unfair competition and possible social dumping. This is very clear in *Laval* where the company became insolvent as a result of the blockade. It seems as if the trade union wanted to protect the sector at all costs and did not care if the posted workers did in fact take any damage as a result of their actions. The actions undertaken by ITF, as a result of their FOC policy, could also be said as having the purpose of protecting the undertakings within the sector and not directly the terms and conditions of the affected workers. Trade unions would most likely not undertake such extensive actions if members of the trade union were working at that particular undertaking since they would all loose their employment. Actions undertaken where trade unions does not have any members at the undertaking could therefore seemingly be seen as very protectionist and something that clearly does not adhere to the principles belonging to the Union. Protectionist actions should according to CJEU be abolished since they constitute an unjustified restriction to the freedom of movement.

Actions that aim at protecting the undertakings in the industry can however in principal have the purpose of protecting the workers[358], as is also stated in the judgement of *Gustafsson* and *Evaldsson*. It should however be mentioned that in the two latter cases the situation at hand was limited to a strict national setting and the ruling was made by ECtHR and not CJEU. In the *Wolff & Müller* judgement it was also stated that actions that aims at protecting the undertakings in the sector might not always have the purpose of protecting the posted workers. Such actions must be assessed so that it can be determined that they actually have the purpose of protecting the posted workers in the sense that it actually increases their social protection.[359]

CJEU found in both *Laval* and *Viking* that the industrial actions in both cases had the purpose of protecting the workers but could still not be seen as justified since they were not

[358] C-341/05 *Laval*, paragraph. 107; C-438/05 *Viking*, paragraph. 77.
[359] C-60/03 *Wolf & Müller GmbH & Co. KG v. Jose Filipe Pereira Félix*, paragraph. 38, See also C-165/99 *Portugaia Construcoes Lda*, paragraph. 28.

proportionate. Of interest is however the fact that the proportionality of the strike, which was undertaken by FSU, was left to be determined by the national court as opposed to the actions undertaken by ITF and the trade unions in *Laval*.[360] Therefore it seems as if industrial actions that aims at protecting the undertakings within a certain sector is to be more heavily scrutinized under the test of proportionality than others. This is also to some extent supported by *Wolff & Müller* where it was stated that such actions must be verified that they actually has the purpose of protecting the posted workers. This implies that it is not always clear that such actions actually have the purpose of protecting the posted workers, which is required in order for it to be able to restrict a fundamental freedom. Furthermore it can also be questioned if actions that aim at protecting the undertakings in the sector are to be more scrutinized because there is no contractual relationship between the parties. In such situations the actions undertaken by the trade unions could be considered as more intrusive and restricting since there is no relationship between the parties at all.

This has far-reaching repercussion for the Swedish way of enforcing terms and conditions of employment upon foreign employers. Blockades and, most importantly, secondary actions must be considered as the most used and effective mean of pressuring a foreign employer into concluding a collective agreement since it is very likely that the trade union does not have any members employed by the foreign employer.

7.2.4 Industrial actions for the benefit of the trade union's members and the effect of PWD

Through the judgement of *Laval* it has been made clear that it is only the hard core that can be enforced if there are no members of the trade union at that particular undertaking. It was however not touched upon if this could differ depending on if there are some or none of the trade union's members working for the foreign employer. It can be questioned if actions undertaken for the benefit or members of the trade union at the subjected foreign employer are to be scrutinized under the principle of proportionality to the same extent as industrial actions undertaken where the trade union does not have any members at the undertaking. According to the case law produced by the ECtHR in the judgements of *Danilenkov and others v Russia* and *Enerji Yapi-Yol Sen v. Turkey* it is clear that the right to undertake industrial actions is a corollary of the right to collective bargaining and freedom of association. It is also one of the most important means through which the trade union can protect the interests of their

[360] C-438/05 *Viking*, paragraph. 87.

members. According to Malmberg and Sjödin (2012) it can be said that if the CJEU were to restrict the right to undertake industrial actions for nothing other than the hard core it could be considered to constitute a breach of the case law produced by the ECtHR. It would also constitute a substantial restriction to the trade union's possibilities to defend the interests of their members. This restriction cannot be done in a strict national setting and it should not matter that the members happens to be posted workers originating from another country. This can however only be possible if the collective agreements is an "exclusivity agreement" where the terms and conditions in it are only regulating the terms and conditions of the trade union's members at that particular undertaking. [361]

It can however be questioned if CJEU would in fact see it in the same way as the ECtHR. This is due to the fact that it must be taken into account since the case law produced by ECtHR is based on the protection of individual rights while case law produced by CJEU have the purpose of protecting the interests of the Union. It should also be mentioned that the right to undertake industrial actions, as understood by the ECtHR, is an intrinsic corollary of the freedom of association while it, according to the Union, is a part of the right to collective bargaining. Judgements by ECtHR and CJEU could therefore differ and it is not sure that the CJEU would allow the enforcement of more than the hard core for the benefit of the trade union's members.

7.3 Which are the effects of this influence of the EU law on the "Swedish model"?

As stated above EU case law has had a significant effect on the possibility for Swedish trade unions to undertake industrial actions against foreign employers. The Swedish regulation of industrial actions circulates around the fact that trade unions have a very extensive possibility to undertake such actions and that a large portion of autonomy is given to the labour market parties. Before Sweden became a member of EU it was stated that we would be able to fulfil the provisions of EU-law in accordance with he Swedish model. This reassurance made the labour market parties feel positive about the membership since they did not want to change the Swedish model which is over 100 years old and something that we hold dearly. As it turns out this was not completely true. In relation to the right to undertake industrial actions our membership has warranted extensive trouble for Sweden since it has not been an easy task to

[361] Malmberg & Sjödin (2012), *Lex Laval*, p. 55-57.

make sure that the possibility of undertaking industrial actions fulfils the obligations stemming from EU while at the same time being in accordance with the Swedish model.

As a result Sweden has had to change its legislation surrounding the possibility of undertaking industrial actions against a foreign employer twice. This was done for the first time in 2010 when *Lex Laval* came into force, which made it significantly harder for trade unions to enforce collective agreements through industrial actions. In 2017 new regulations entered into force that amended and removed some of the regulations of *Lex Laval* and has made it considerably easier to undertake industrial actions. This new regulation is more in compliance with the Swedish model since it more heavily relies on the autonomy of the labour market parties. Its regulations are however not without concerns and it can be questioned if the effects of EU-law in this particular matter have affected the Swedish model in any way.

7.3.1 Industrial actions as a way of fulfilling the obligations of PWD

Sweden has chosen to fulfil the obligations of PWD through legislation and generally available collective agreements within the industry or sector according to article 3.8 of PWD. This means that terms and conditions of employment can be settled through both legislation and collective agreements. In Sweden there are no state authorities, aside from the Swedish Work Environment Authority and the Equality Ombudsman, monitoring that terms and conditions in the legislation is being applied correctly. This duty has instead been given to the labour market parties since the Swedish model is based on an autonomous collective bargaining system where a majority of the labour market is regulated through collective agreements. In terms of posted workers Sweden has to, according to 3.1 of PWD, make sure that the hard core is being applied correctly but if no collective agreement is in force Sweden cannot make sure that the provisions of the PWD are being fulfilled. In some situations it is highly likely that a foreign employer is willing to conclude a Swedish collective agreement but in some situations this might not be the case. In such situations trade unions must be able to undertake industrial actions in order to make sure that a collective agreement is concluded so that it can be made sure that the hard core is being applied. In this sense it can be said that Sweden to some extent also fulfil the provisions of PWD with the aid of industrial actions. Following the *Laval* judgement it can however be questioned if the Swedish way of allowing trade unions to use their autonomy to make sure that the provisions of the PWD is fulfilled through the use of industrial actions can be seen as lawful under EU-law.

In *Laval* it was stated that Sweden had failed to implement the PWD since it had not chosen any of the possible measures given in 3.1 or 3.8. However, since PWD is not supposed to harmonise the Member State's systems for establishing terms and conditions of employment Member States are allowed to, on a national level, chose another system than that of PWD if it does not hinder the freedom to provide services.[362] On the other hand it is also stated that foreign employers must, as a result of the coordination achieved by PWD, guarantee the posted workers the terms and conditions within the hard core.[363] These two statements are somewhat contradictory since it is stated that the Member States are free to choose a system of guaranteeing the hard core while at the same time stating that there in fact is some degree of coordination as a result of the PWD. As a result it can be questioned if this could mean that the Swedish system of making sure that the terms and conditions within the hard core are followed through the use of industrial action is to be considered as unlawful.

On one hand the court stated that Member States are allowed to choose another system, than that of 3.1 or 3.8, but only on a "national level". This implies that the possibility of creating another system is allowed but only in situations where EU-law is not applicable. This would in fact mean that some harmonization can occur as a result of the PWD but that the way of determining terms and conditions of employment within a strict national context should not be affected. This notion is further strengthened by the fact that the court mentions that there is in fact a certain degree of "coordination" that must be done in accordance to the regulations of PWD. According to the PWD this coordination shall be done through legislation, generally available collective agreements or universally collective agreements according to article 3.1 and 3.8. Following a strict interpretation of these statements it would be considered as not allowed for a Member State to make sure that posted workers are guaranteed minimum terms and conditions within the hard core in any other way than that. This would mean that the Swedish model would not be in compliance with the PWD since the provisions of it are to some extent fulfilled through industrial actions.

Furthermore it is also stated in paragraph 108 of the *Laval* judgement that the industrial actions are deemed unlawful for two separate reasons. Firstly the blockade and sympathy actions aimed at enforcing terms and conditions that where not included within the hard core

[362] C-341/05 *Laval*, paragraph. 68.
[363] C-341/05 *Laval*, paragraph. 108.

or more beneficial than what was stated in the legislation. Secondly, and most importantly, foreign employers are already, as a result of the coordination achieved by the PWD, forced to apply the hard core in the host country as it has been laid down in accordance with article 3.1 and 3.8. This would imply that industrial actions in order to make sure that terms and conditions are followed can't be seen as proportionate since foreign employers are already forced to adhere to the hard core that should have been laid down in the host state through the means of article 3.1 and 3.8. This would mean that the Swedish model does not work to satisfaction in situations relating to the posting of workers. If a foreign employer does not want to sign a collective agreement there would be no authorities or parties making sure that the terms and conditions of the hard core would be applied correctly. This would leave the Swedish labour market susceptible to social dumping that ultimately would be able to affect it in a negative way. This would ultimately also mean that Sweden had not implemented the PWD in a correct way since there would be no ways of determining that the hard core is in fact applied correctly.

It is however highly unlikely that this is what the CJEU intended with their judgement since there are other factors that have to be considered as well. Firstly, the right to undertake industrial actions is a fundamental right that is to be seen as an integral part of EU-law that is protected by a number of different international instruments.[364] If the CJEU did in fact mean that industrial actions is not allowed to be undertaken in order to make sure that the hard core is applied it would basically constitute a blanket ban on all industrial actions undertaken in order to conclude a collective agreement with a foreign employer. This would most definitely violate the case law produced by ECtHR in *Enerji Yapi-Yol Sen v. Turkey*, where it is stated that blanket bans are too wide of a restriction. It would also severely restrict the right to collectively bargain since it would make it impossible for a trade union to conclude such an agreement since they would not have any means to pressure the employer into bargaining. It is highly unlikely that the court did in fact intend that the right to undertake industrial actions and to collectively bargaining would be restricted to such an extent that they would be rendered useless. This is particularly true when considering that the right to undertake industrial actions is, according to EU-law, a corollary of the right to collective bargaining. It is also likely that the court did in fact mean that other systems than that of 3.1 and 3.8 would be allowed even in situations where EU-law is applicable as long as it does not affect the fundamental freedoms. This entails that the court did in fact mean that industrial actions are

[364] C-341/05 *Laval*, paragraph. 90-91.

allowed as long as they are proportionate. As seen in paragraph 110 in the *Laval* judgement where it is stated that "*collective actions such as those at issue in the main proceedings cannot be justified in the light of public interest…*" it is clear that the industrial actions undertaken by the trade unions in this particular case were not proportionate but that does not mean that there can't be other situations where the actions are to be seen as proportionate.

This would mean that the Swedish model is still working in situations relating to posted workers but not to full satisfaction. There is no imminent threat to the autonomy of the labour market parties and that there still exists a possibility to make sure that the provisions of the PWD are fulfilled through industrial actions. It does however mean that the autonomy of the trade union is somewhat restricted since they have to adhere to the principle of proportionality as laid down by CJEU. It does also mean that the principle of equal treatment cannot be applied in such situations since a national and foreign employer cannot be treated in the same way. Industrial actions can only aim at concluding collective agreements that does not include the same terms and conditions as the ones being signed with employers originating from Sweden. This means that the principle of equal treatment have been set aside in favour of minimum regulations.

7.3.2 Monitoring possibilities of terms and conditions for posted workers

One drawback of the Swedish model in relation to posted workers is that the possibility of monitoring that terms and conditions in the legislation is applied is to a large extent done by the trade unions. Trade unions only have the possibility of monitoring that the terms and conditions are applied and the possibility of sanctioning the employer to pay for damages if the regulations are not followed if a collective agreement has been concluded. Within a national context this is not a problem since trade union have a very extensive possibility of undertaking industrial actions. Prior to *Laval* this was not a problem in relation to posted workers but ever since *Lex Britannia* was considered as discriminatory it has become an area of concern. Following the *Laval* judgement trade unions could not enforce a collective agreement if the foreign employer was already bound by a collective agreement that guaranteed the same level of protection as the one the trade union were trying to enforce. As a result trade unions were unable to make sure that the correct terms and conditions were actually applied since they had no way of controlling or sanctioning the foreign employer if he was not in compliance with the regulations. It can therefore be questioned if the Swedish

model is working to satisfaction since there is no monitoring or sanction regulations that can be applied on the foreign employers if no collective agreement is concluded. This particular problem is thought to have been solved through the new changes in the Posting of Workers act since industrial actions are now allowed to be undertaken in every situation if the aim is to conclude a posting of workers collective agreement. It can however be questioned if this is in compliance with EU-law since it resembles the regulations of *Lex Britannia*, which was determined to be discriminatory by CJEU.

As stated above it has become clear that industrial actions is an approved measure to make sure that the hard core is being applied as long as the action are proportionate. The most important aspect of the proportionality is that it is only the hard core that can be enforced. However, if a foreign employer already applies the minimum terms and conditions within the hard core, as regulated by the Swedish legislation, it could be questioned if industrial actions can still be undertaken in order to enforce a collective agreement if the purpose is to only make sure that the trade union is granted monitoring possibilities and it does not hinder the application of the terms and conditions that the workers already enjoy. If trade unions would not be able to undertake industrial actions under these circumstances it would have far-reaching implications for the Swedish model since it would hamper the power of the trade unions considerably.

In order for industrial actions to be able to restrict a fundamental freedom it has to pursue a legitimate objective compatible with the treaty that is justified by overriding reasons of public, such as the protection of workers. One of the ways in which trade unions can protect the workers is by monitoring that terms and conditions within a collective agreement are actually being applied. In *Evaldsson and others v. Sweden* the court stated that Sweden has no state authorities monitoring that terms and conditions within legislation is complied with since that responsibility has been given to the labour market parties through collective agreements. Monitoring that employers are in compliance with the regulations of a collective agreement are therefore considered as pursuing a legitimate aim in the public interest since it aims at protecting the workers as long as they are proportionate.[365] Also in *Wolff & Müller* it was stated that it is allowed to implement measure so that it is possible to monitor that foreign employers are in compliance with the national legislation or provisions of collective

[365] Evaldsson and others v. Sweden, Application No 75252/01, ECHR 2007, paragraph. 54.

agreements as long as they are proportionate.[366] Furthermore it was stated in *Commission vs. Germany* that employment contracts and payslips were to be provided by the foreign employer, according to national legislation, so that the competent authorities could carry out the monitoring necessary to make sure that the foreign employer was in compliance with the legislation. These actions were considered to restrict the freedom to provide services but they were considered to pursue a legitimate objective in the sense that they aimed at protecting the workers. It was deemed as necessary for the foreign employer to provide the documents since it otherwise would be impossible for the authorities to carry out their duties of making sure that the workers would be protected if the undertaking had not provided these documents. These regulations were therefore justified since they were considered as proportionate since they did not pose a heavy administrative burden and did not go beyond what is necessary to achieve the objective of protecting the workers.[367]

In 2014 the Enforcement directive was adopted and resulted in harmonisation of monitoring possibilities for the Member States so that a better and more uniform implementation and adaption of PWD could be done. It allowed Member States to implement certain administrative requirements and control measures so that it would be possible to make sure that the foreign employers would comply with the national regulations. The implemented measure must however have the purpose of protecting the workers and be proportionate. Such measure are only considered as proportionate if it is impossible to make sure that the foreign employers are in compliance with the national regulations without the implemented measures and there are no other or less restrictive measures at hand.[368] The responsibility to monitor the compliance with the national regulations can be given to the labour market parties or other bodies provided that they monitor in a non-discriminatory and objective manner.[369]

When Sweden implemented the enforcement directive they chose to do so according to the Swedish model so that the monitoring measures were decided to be dependent on the fact that a collective agreement must be concluded since the task is given to the trade union bound by that collective agreement. If no collective agreement is concluded industrial actions must be undertaken in order to fulfil the provisions of the enforcement directive. There is no question that it is a legitimate aim of the trade union to monitor the compliance with national

[366] C-60/03 *Wolf & Müller GmbH & Co. KG v. Jose Filipe Pereira Félix*
[367] C-490/04 *Commission of the European Communities v. Federal Republic of Germany*, paragraph. 70-76.
[368] 2014/67/EU, paragraph. 23.
[369] 2014/67/EU, paragraph. 31.

regulations but it can be questioned if it is proportionate if the hard core is already guaranteed the posted workers. If industrial actions are undertaken in this situation it would not affect the terms and conditions of the posted workers since it would only affect the foreign employer in the sense that he might be subjected to monitoring and sanctions. Such industrial actions could not be considered as particularly intrusive since the enforced collective agreement does not give rise to any other obligations than the explicit obligations to apply the hard core, which the foreign employer already have according to PWD. It can however be questioned if it is the least restrictive approach since it would be possible to give the task of monitoring to another authority e.g. the liaison office or not make the monitoring possibilities dependent of the fact that a collective agreement must be concluded. This would however not be in compliance with the Swedish model since it would not rely on the autonomy of the labour market parties.

It can also be questioned if the trade unions monitoring is possible to maintain in a non-discriminatory and objective manner since trade unions only represent their members and therefore see to their own interests before acting on someone else's behalf. They can therefore chose to subject particular employers within certain sectors or Member State to particularly extensive industrial actions. Also, since industrial actions are allowed to be undertaken even if a foreign collective agreement is concluded it seems as if the Swedish regulations does not see foreign collective agreements as a way of making sure that the hard core is applied and that Swedish collective agreements are favoured in all situations. This could be seen as discriminatory, as this was the court's reasoning when determining that *Lex Britannia* was discriminatory.

Since the Swedish courts have not tried this new regulation it is uncertain if this is to be determined as in compliance with EU-law since trade unions effectively can stop a foreign employer from undertaking work in Sweden even if the provisions of the hard core is fulfilled. In relation to this question it must also be mentioned that in the *Fonnship* judgement it was stated that undertakings that already apply fair terms and conditions should not be punished from a competition point of view. It can be questioned if the Swedish Labour Court will consider the enforcement of a collective agreement to guarantee monitoring and sanctions possibilities as violation of the principles in *Fonnship*. It must therefore be said that the legal position is unclear and no final conclusions can be drawn as of today.

7.3.3 Determination of wages

In relation to only being able to enforce the hard core through industrial actions the most problematic aspect for the Swedish model is that the wage can only be enforced in certain situations. As an effect of the Swedish model the process of determining wages have been placed on the labour market parties through the autonomous collective bargaining system. Since wages are to be determined by the labour market parties through collective bargaining they are free to undertake industrial actions in order to pressure the other party if they cannot come to an agreement. From the *Laval* judgement it is questionable if the Swedish model is working to satisfaction when it comes to determining wages, more specifically the minimum wage.

As stated in paragraph 109 of the *Laval* judgement Member States are allowed to make sure that foreign employers comply with the minimum wage regulations by use of appropriate means. What is to be determined as appropriate means is those that according to the principle of proportionality entails a justified restriction to the freedom to provide services or freedom of establishment. In regards to industrial actions it can be said that the court did not deem the use of such actions as a way to determine the minimum wage as unlawful but rather the fact that it is somewhat restricted. In order for industrial actions to be able to determine the minimum wage the wage must be presented in a precise and transparent manner so that the foreign employer on beforehand know what obligations has to be met and what his costs are going to be. This means that industrial actions cannot be undertake in order to force and employer into negotiations on a case-to-case basis where considerations have to be taken to every individuals specific conditions e.g. experience and competence.[370] This is where it gets problematic since this makes it very hard to undertake industrial actions in order to conclude a minimum wage in a way, which is in accordance with the Swedish model.

7.3.3.1 Transparency

When it comes to the transparent and precise manner it should be stated that in the Swedish legislation there are no provisions that states what the wage or minimum wage should be for a certain category of workers. This task has instead been given to the labour market parties through collective bargaining and ultimately industrial actions. Also, in many collective agreements there are no fixed wage levels or minimum wage since the wage is to be determined on a case-to-case basis. This case-to-case basis means that wages are to be set

[370] C-341/05 *Laval*, paragraph. 110

locally where consideration shall be taken to the local conditions and to every employee's individual situation. The wage therefore depends on where the undertaking is geographically situated, the employee's experience, position within the company, education etc. In order for this to work the central collective agreements can be said to constitute a general framework in which the local parties have a certain amount on autonomy, which they can use to conclude local collective agreements within the boundaries of the central collective agreement. This general framework consists of procedural and economic guidelines that must be followed by the local parties. Within this framework there is often no fixed wage level since it is instead stated that the wages should be increased by a certain percentage of the company's total salary costs. This is then to be divided amongst the individuals based on certain criteria's that is stated in each individual collective agreement. This means that the way of determining wages in Sweden is heavily decentralized and as a result the wage can vary to a great extent. It can therefore exist a large variance in wage levels throughout Sweden since the wages is to be determined by both central and local collective agreements. Another aspect of the variance in wage levels is that there are employers that are not bound by any collective agreement, which can set wages without consideration to a collective agreement. This leads to the fact that wages are not presented in a transparent and clear manner since they vary to a large extent and it's not possible to know what the wage is going to be before a collective agreement has been concluded.

Determining wages in accordance with the Swedish model entails another problem in the sense that the decentralized way of determining wages is a problem in itself since it is only generally available collective agreement that can be enforced through industrial actions according to the PWD. Such collective agreements must be based on a central collective agreement, which means that it is only these that can determine the wages and no consideration should be given to a local collective agreement. It is therefore not possible to try and use industrial actions to conclude wages through a local collective agreement or on a case-to-case basis. This deviates to a large extent from the Swedish model since the local parties are, to a large extent, the ones that determine the wages so that they are compatible with the local setting. Despite the fact that it deviates from the Swedish model there is also the issue with that central collective agreements to a large extent only contains economic and procedural guidelines that the local parties must follow and not specific wage levels. In order for the wages to be presented in a transparent and precise manner the central collective agreements cannot have this type of construction since there must be a specified wages levels.

It must however be said that during the last couple of years the central collective agreements have become less flexible in the sense that many agreements contain explicit wage levels. There does however still exist collective agreements without explicit wage levels.

7.3.3.2 Minimum wage

According to the case law of CJEU it is only the minimum wage that can be enforced through industrial actions. In Sweden this is a problem since there are no provisions within the Swedish legislation that states what the minimum wage should be. Also, as an effect of the way in which wages are set it is not all collective agreements that contain a minimum wage. During the last years there have however been a change and today there are many central collective agreement that does in fact contain a minimum wage. However, even in situations where there is a minimum level stated in the collective agreements it is unclear if that can be seen as a "true" minimum wage. When I say "true" I mean that there can exists many different minimum wages. There are around 670 central collective agreements in Sweden, which means that there can be more than one minimum wage that is applicable on the same type of work in the same geographical area. This can for instance been seen between Ledarna and Unionen where Unionen is trying to enforce their collective agreement in areas where Ledarna traditionally have been most prominent. This would mean that in these situations it would not be possible to determine which is to be considered as the "true" minimum wage. Also, since there exists so many central collective agreements there could also be a problem with the fact that it is not always easy to discern which collective agreement that should be applicable.

According to the preparatory works for the changes that came into effect in 2017 trade unions should be able to enforce the minimum wage in all central collective agreements regardless of the fact that they might differ. However, as was seen in the *Laval* judgement CJEU took upon itself to determine if the minimum wage did in fact represent the minimum level and found that it did not.[371] Since CJEU clearly have competence in such matters it is not unlikely that when there are more than one minimum wage applicable the CJEU could state that one of the wages does not constitute a minimum wage. If the minimum level in one collective agreement is higher than that of another collective agreement that is applicable on the same kind of work in the same region it is possible that the higher wage might be deemed as not being a

[371] C-341/05 *Laval*, paragraph. 69-70.

minimum wage. This is also problematic since it has not been clarified if there, according to the PWD, can exist just one generally available collective agreement for a particular area or if there can in fact exist more than one. This particular question have not been answered by CJEU but the latter scenario would be more beneficial for Sweden since it can occur situations where more than one central collective agreement and minimum wage is applicable in the same area.

7.3.3.3 Summary

It can be said that as of today the Swedish model effectively creates a situation where there are no transparent and precise regulations surrounding minimum wages or wages for that matter. This makes it very difficult, if not impossible, for a foreign employer to find out what his exacts costs are going to be if he decides to post workers in Sweden. As a result the way of determining wages according to the Swedish model is highly problematic seen from a EU perspective since industrial actions to conclude a minimum wage would in most cases pose an unjustified restriction on the freedom to provide services. It is also highly problematic for the Swedish labour market since it reduces the possibility of enforcing wages onto a foreign employer. The possibility of concluding a collective agreement to regulate wages can be considered as extremely vital, if not the most important, for the possibility of suppressing social dumping and protecting the posted workers. Furthermore it is also in a country, like Sweden, where the industrial relations is based on an autonomous collective bargaining system where there are no legal provisions on minimum wage or wages vital that there exists a possibility to undertake industrial actions in order to conclude a collective agreements that has provisions on minimum wages. If Sweden does not solve the problem of minimum wages it will not only be very susceptible to social dumping but also violate the obligations of the PWD.

In order to come to turns with this a change to the way wages are set must be done. Central collective agreements have to a large extent become, as stated above, more flexible in the sense that it leaves room for the local parties to determine what the wage should be. This trend cannot continue and an explicit minimum wage level must be set in the central collective agreements. If this is not done the Swedish model will not be able to sufficiently determine the minimum wage since according to the statements of CJEU this way of regulating the wages does in no way act as a floor of rights, as it should according to the PWD. In one or another way these collective agreements must be changed so that they

explicitly state what the minimum wage should be so that it can act as a floor of rights. Despite that fact that central collective agreement must be less flexible in some sense it should still be possible to have a differentiated minimum wages in relation to skill or location. In such situations wage must fixed to a particular work or geographical location and cannot be negotiated on a case-to-case basis.

8. Conclusion

Before Sweden's accession to EU the Swedish government wanted to make sure that the Swedish model was compatible with the European legal order and that the provisions of it could be fulfilled through collective agreements. In a letter from the Commission to Sweden it was stated that the membership would not impact the Swedish Model, especially the way of undertaking industrial actions. There is some resemblance in the regulations regarding the right to undertake industrial actions between the Swedish and European legal order and the definition of an industrial action. This is due to the fact that the right to undertake industrial actions is to be understood as a part of the collective bargaining process. Even though the right to undertake industrial actions is protected the Union does not, according to TFEU 153.5, have competence in matters relating to industrial actions.

It has however through the judgements of *Laval* and *Viking* been made explicitly clear that the Union does in fact have competence in matters relating to industrial actions if such actions come into conflict with any of the fundamental freedoms. This is due to the fact that Member States, according to the *Säger-principle*, should not make it pointless or less attractive for a foreign employer to undertake work in another Member State. Aside from the *Säger-principle* it is also stated in *Melloni* that Member States in some situations cannot have a better protection of the right to undertake industrial actions than that of the CFREU since it has the possibility of threatening the primacy of EU-law. This is particularly troublesome for Sweden since the Swedish model guarantees the labour market parties a very extensive possibility of undertaking industrial actions. This has lead to the fact that trade unions cannot to the same extent as before subject foreign employers to industrial actions in order to conclude a collective agreement. This is particularly true in relation to the terms and conditions of employment for posted workers even though the PWD and enforcement directive explicitly

states that they should not affect the right to undertake industrial actions as recognized by the Member States.

As an effect of the CJEU's judgements there has been changes made, within the Swedish legal order, in order to make sure that the right to undertake industrial actions is in compliance with EU-law and the Swedish model. Changes that came into effect in 2017 marked the second time changes had been done. These changes have only effected situations where EU-law is applicable and industrial actions within a strict national context have not been affected. With that being said it has however had repercussions for the Swedish model as a whole.

8.1 Test of Proportionality

According to the case law of CJEU industrial actions can in some situations restrict the freedom to provide services or establishment, which is not justified if these are undertaken in a way, which cannot be seen as proportionate. Prior to *Laval* and *Viking* Swedish trade unions did not have to adhere to the test of proportionality since this principle does not exist within Swedish legal order in relation to industrial actions according to the *Kellerman* judgement. Trade unions in Sweden have always had an extensive possibility to undertake industrial actions and not many restrictions have been put on it. What is to be considered as proportionate varies from each situation but it can be said that there are some general guidelines. According to *Viking* it must be said that industrial actions are to be considered as *ultima ratio*. Furthermore it also, according to *Viking*, clear that jobs and conditions of employed must be seriously jeopardized or threatened if an industrial actions is to be considered as proportionate and lawful. This means that industrial actions are only allowed to be undertaken in the most extreme situations, which goes well in hand with the principle of *ultima ratio*. This is a severe restriction that is not in line with the right as regulated by the Swedish legislation. Prior to these judgements Swedish trade unions have always had the possibility of undertaking industrial actions whenever they pleased without regards to if they had other measures at their disposal or to what extent jobs and conditions of employed where threatened or jeopardized.

From the judgements of *Viking* and *Laval* it can however be questioned if the principle of proportionality might differ depending on the nature of the industrial action. Following the statements in these judgements and the case-law developed by CJEU and ECtHR it can be

argued that different type of actions should also be assessed differently under the test of proportionality. According to the case-law of CJEU and ECtHR it can be stated that industrial actions that mainly have the purpose of protecting the industry as a whole and directly regulating the terms and conditions of employment for the affected workers are to be more heavily scrutinized under the test of proportionality. This is due to the fact that the direct regulation of the terms and conditions of the affected workers is to be considered at the very core of the trade union's possibilities of defending the interest of their members. It is also to be seen as a corollary of the freedom of association and the right to collective bargaining. Since protection of the industry as a whole does not aim to directly regulate the conditions of the posted workers it cannot be allowed to the same extent. This is also partly due to the fact that according to *Wolf and Müller* it is not always certain that such actions actually have the aim of protecting the affected workers. This is particularly troublesome for Sweden since it means that the most effective industrial actions, in the form of blockades and secondary actions, have been limited to a large extent.

Furthermore, specifically in relation to posted workers the principle of proportionality has made the PWD into a maximum and a minimum regulation at the same time. This has been done so that industrial actions are not going to restrict the freedom to provide services and therefore make it harder or less attractive to undertake work in another Member State. This follows from the *Säger-principle*, which states that actions or barriers that make it harder, less attractive or pointless for a foreign employer to undertake work in another Member State should be abolished. Trade unions therefore only have the possibility of enforcing minimum terms and conditions found within the hard core. The possibility of only enforcing a certain level of terms and conditions is a restriction that did not exist in the Swedish legal order prior to *Laval*. Parties have always had the possibility of demanding terms and conditions at whatever level they see fit. It is however questionable if this should apply to the same extent if the trade union undertakes industrial actions to directly regulate the terms and conditions of employment for their own members since that would be a severe restriction to the possibility of defending the interests of their members. This particular question have not been addressed by CJEU since in *Laval* the trade unions did not have any members working for that particular undertaking and the issue was as an effect not addressed.

8.2 Minimum wage

In relation to the Swedish model the most troublesome area within the hard core has been the wages since it is only the minimum wages that can be enforced. Minimum wages must, according to the CJEU, be stated in legislation or collective agreements and be presented in a precise and transparent manner so that wages does not have to be concluded on a case-to-case basis. If wages are concluded on a case-to-case basis it means that the foreign employer might not be able to foresee his costs and what provisions he must fulfil and therefore it constitutes an unjustified restriction to the freedom of movement. This is not in line with the Swedish model since the decentralized wage setting system entails the determination of wages on a case-to-case basis that is to be done locally by the local parties. The judgement of *Laval* have somewhat questioned this principle and calls for less flexible regulation of minimum wages in collective agreements than previously. Central collective agreements cannot only contain economic and procedural guidelines since it must also exist explicit provisions concerning wage levels. When *Laval* was settled it was not many central collective agreements that contained minimum wage levels but this have somewhat changed and as of today it can be said that many central collective agreements contains an explicit minimum wage level, especially within the construction sector. Furthermore it is also questionable if it does exist a true minimum wage in Sweden. Traditionally there has only been one central collective agreement that is applicable in a certain situation but during the recent years it has been made clear that there can exists more than one agreement that is applicable. This would be a problem if the PWD entails that there can only exists one generally available collective agreement for a particular situation. This have however not been addressed by CJEU so as of today it is unclear if it possible to enforce the minimum wage within every generally available collective agreement or if there should just exists one within each individual situation. Furthermore it is also questionable if there exists a true minimum wage since there are different minimum wages that can be applicable on the same situation.

8.3 Monitoring and sanction possibilities

According to the Swedish model the task of making sure that the employer fulfils the obligations of a concluded collective agreement or legislation is given to the trade unions. This has warranted some issues in relation to foreign employers since if there is no Swedish collective agreement in force there is no possibility to monitor the foreign employer or subject him to sanctions if any regulation is violated. If there is no possibility of undertaking industrial actions to conclude a collective agreement the Swedish labour market would be

very susceptible to social dumping and Sweden would not fulfil the obligations of PWD and the Enforcement Directive. Following the *Britannia* judgement in 1989 the trade unions very much feared this. In 1991 the Swedish government adopted *Lex Britannia*, which gave trade unions a more extensive possibility of undertaking industrial actions against a foreign employer since they did not have to adhere to the duty to maintain industrial peace. However, following the *Laval* judgement it was declared by the court that this regulation was to be considered as discriminatory since it always favoured Swedish collective agreements no matter the content of the foreign collective agreement. This was however not especially unexpected since the regulation had received a lot of criticism in the Swedish doctrine.[372] In order to come to terms with this the "burden of proof regulation" was amended through *Lex Laval*. It meant that trade unions could not undertake industrial actions against foreign employers bound by a collective agreement under foreign legislation if he or she could prove that posted workers already in essence enjoyed the same terms and conditions. This was a substantive hinder for trade unions and it was subsequently heavily criticised by these for being too restrictive.

This regulation have however been removed as an effect of the changes that came into force in 2017 and trade unions are now able to use industrial actions to enforce a posting of workers collective agreement in all situations, even if a foreign employer is already bound by a collective agreement. Such collective agreements are said to not amend or set aside an already concluded collective agreements since it only contains regulations within the hard core and therefore respect the already concluded collective agreement. Such collective agreements therefore only have the purpose of reinforcing the obligations that is placed upon the foreign employer when posting workers in Sweden. It is the only way for Sweden to make sure that the posted workers are enjoying the correct terms and conditions since there are no sanctions or control measures available if no collective agreement is in force.

This is however somewhat questionable since that would mean that a foreign employer that already fulfils their obligations according to Swedish legislation can still be subjected to industrial actions and subsequently hindered from undertaking work in Sweden. This can certainly be said to constitute a restriction to the freedom to provide services but it can be questioned if it is proportionate or not. In order to be considered as proportionate it must be the least intrusive measure and it must be secured that it can be undertaken in a non-

[372] Nyström (2007), *Stridsåtgärder - en grundläggande rättighet som kan begränsas av den fria rörligheten*, p. 869.

discriminatory fashion. Even if this regulation is in line with the Swedish model it can be questioned if industrial actions are to be considered as the least intrusive measure. It is also questionable if it can be undertaken in a non-discriminatory manner since trade union have their own agendas and only see to their own interests and therefore have the possibility of subjecting certain employers for especially intrusive industrial actions. It must also be said that according to the *Fonnship* judgement it was said that foreign employers that fulfils the provisions of the hard core cannot be punished from a competition point of view. This would most definitely be the case in these situations since a foreign employer could be hindered from undertaking work in Sweden even if the provisions of the hard core is fulfilled. The legal position of this regulation is unclear since it is yet to be tried by the Swedish Labour Court but it must be said that the possibility of monitoring and sanctioning employers in accordance with the Swedish model is a concern in situations related to industrial actions and foreign employers.

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