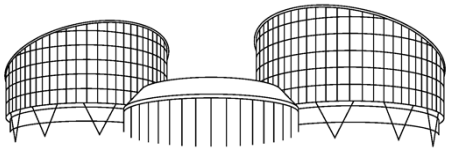

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF NATIONAL UNION OF RAIL, MARITIME AND TRANSPORT WORKERS v. THE UNITED KINGDOM

(Application no. 31045/10)

JUDGMENT

STRASBOURG

8 April 2014

FINAL

08/09/2014

This judgment has become final under Article 44 § 2 of the Convention.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of National Union of Rail, Maritime and Transport Workers v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ineta Ziemele, *President*,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Paul Mahoney,
Krzysztof Wojtyczek,
Faris Vehabović, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 4 March 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 31045/10) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the National Union of Rail, Maritime and Transport Workers (RMT – "the applicant union"), on 1 June 2010.

2. The applicant union was represented before the Court by its General Secretary, Mr B. Crow. Its legal representative was Mr N. Todd of Thompsons Solicitors, Manchester. It was advised by Mr J. Hendy QC and Mr M. Ford QC, barristers in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms R. Tomlinson, Foreign and Commonwealth Office.

3. A joint submission was received from the European Trade Union Confederation (ETUC) and the Trades Union Congress (TUC). A submission was also received from Liberty. These three organisations were given leave by the President to intervene as third parties in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court). The Government replied to the submission of Liberty.

4. The applicant union alleged that its ability to protect its members' interests was subject to excessive statutory restriction, in violation of its right to freedom of association.

5. On 27 August 2012 notice of the application was given to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant is a trade union based in London with a membership of more than 80,000 persons employed in different sectors of the transport industry in the United Kingdom.

7. Noting that in the domestic system industrial disputes are governed by very detailed legislative provisions, the applicant union raised two specific limitations on the statutory protection of strike action that it submitted were inconsistent with Article 11 of the Convention, each of the contested limitations being exposed by a separate set of facts.

A. Strike-ballot notice: The EDF situation

8. The relevant set of facts relied on under this head involved the company EDF Energy Powerlink Ltd. (EDF), which was under contract to manage, operate and maintain the electrical power network used by London's underground transport system. The RMT was one of several trade unions recognised by the company for the purposes of collective bargaining. In all, the company employed some 270 staff at three different sites, the biggest one being that at Tufnell Park with 155 employees. According to the applicant union, there were 52 RMT members there at the relevant time. The company would not have known which of its employees were members of a trade union, as it did not operate a system for deducting union subscriptions from staff wages.

9. Between June and September 2009, the applicant union and the company held several rounds of negotiation on pay and conditions of service. Dissatisfied with the company's offer, it decided to embark on industrial action and on 24 September gave the requisite ballot notice to the company (see paragraph 18 below). The notice described the category of workers that would be voting on industrial action as "Engineer/Technician" and stated how many of such were based at each site. The following day the company wrote to the applicant union, stating that it did not recognise the term "Technician" (it categorised its workers in a more precise way: fitters, jointers, test-room inspectors, day testers, shift testers, OLBI fitters). It considered the ballot notice served on it was therefore not compliant with the relevant statutory provisions. The applicant union replied the following week, maintaining that the term it had used was sufficient to allow the company to know which employees were concerned, thereby meeting the purpose of the relevant provisions of law.

10. Following a further exchange of correspondence between the two sides, the company applied to the High Court for an injunction to restrain

the applicant union from calling industrial action on the basis of the ballot. The injunction was granted by Blake J on 23 October 2009.

11. The judge did not accept the applicant union's claim that the statutory requirements unduly restricted the exercise of its right to call industrial action, this same argument having been rejected by the Court of Appeal in the case of *Metrobus Ltd v. Unite the Union* ([2009] EWCA Civ 829). He also rejected the argument that since the procedure was still at an early stage it would be premature to put a stop to it. Instead he considered the risk of unlawful strike action to be sufficiently imminent to justify the injunction. Given the sector involved, the implications of a shutdown would be substantial, with widespread ramifications elsewhere. Addressing the question whether the applicant union had in fact given sufficient indication of the category of staff that would be balloted, the judge found that it had not, since the union's members at Tufnell Park included persons working at different trades. The applicant union was not under an absolute duty, but instead a duty to do its reasonable best to provide sufficient information to the company. The fact that it used its own system of job classification was relevant but not decisive. Similarly, the fact that a union might not record or possess such information could be a highly material consideration, but not necessarily a decisive one. The applicant union had accepted that it was practicable for a union to supply the necessary information in the context of a small place of employment – it was therefore neither onerous nor unreasonable to require it to do so. Finally, the judge observed that while there was as yet no stated intention on the part of the applicant union to call a strike (the ballot not having taken place), there was a clear nexus between the failure to provide the requisite notice and the employer's ability to respond to the situation either by making preparations for a work stoppage or seeking to persuade employees not to vote for industrial action. The applicant union's failure to comply with the statutory requirements was therefore not a mere technical or immaterial breach.

12. Application for permission to appeal was refused on the papers on 24 November 2009. Renewed application for permission to appeal was refused on 26 January 2010, by which point the industrial dispute between the applicant union and EDF had already been resolved.

13. Following the granting of the injunction against the strike, the applicant union set about gathering the precise job descriptions of the workers concerned and included these in a fresh notice of a strike ballot, the result of which supported industrial action. This went ahead on dates in December 2009 and early January 2010. EDF made an improved offer on 7 January 2010 which was accepted by the union's members and took effect as a collective agreement on 1 April of the same year.

B. Secondary strike action: The Hydrex situation

14. The set of facts relied on under this head involved some RMT members who were employed in railway maintenance by Fastline Limited, a company that formed part of a group of companies known as Jarvis plc. Another company in the group, Jarvis Rail Limited, was engaged in rail engineering work. At the time, Fastline and Jarvis Rail Limited ("Jarvis") employed approximately 1,200 persons in total, 569 of whom were members of the RMT. In August 2007, Fastline transferred part of its undertaking, comprising twenty employees, to another company known as Hydrex Equipment (UK) Ltd ("Hydrex"). These employees' existing terms and conditions were preserved by Hydrex, as required by law (Transfer of Undertakings (Protection of Employment) Regulations 2006). According to the applicant union, the employees involved were nonetheless concerned for their situation, as Hydrex workers were paid significantly less. It also appeared that trade unions had less influence in that company.

15. In March 2009 Hydrex's management informed the ex-Jarvis employees that because of difficult market conditions it intended to reduce the level of their terms and conditions to that of other Hydrex staff. This meant a reduction in salary of some 36-40%, according to the applicant union. In the months that followed, the applicant union made representations to Hydrex on behalf of the employees concerned but without achieving any agreement. When the company indicated that it intended to proceed with its plan, the applicant union organised a strike ballot of the workers concerned (seventeen by that stage). They voted in favour of a strike, which took place between 6 November and 9 November 2009. During the strike, the participants organised pickets at a number of the sites where they normally carried out their work. This caused Hydrex to write to the applicant union to remind it that by law picketing could take place only at or near the employer's premises and to warn that the union was exposing itself to liability for any economic loss incurred by the company due to this unlawful action (see paragraph 19 below).

16. A second strike was announced for 18-20 November 2009, but this was postponed when Hydrex indicated its willingness to resume discussions with the applicant union. This led to a revised offer which the union submitted to its Hydrex members, recommending that they accept it. The result of the vote was known on 21 December 2009. Nine votes were cast, all of them rejecting the Hydrex offer. According to the applicant union, its position was extremely weak given the very small number of its members in the Hydrex workforce. These were far too few for their strike action to have any appreciable effect on the company, whose activities had not really been disrupted at all. The applicant union considered that it would have been in a position to defend its members' interests much more effectively had it been able to mobilise its Jarvis members as well. The simple threat of a strike on

this scale, and *a fortiori* an actual stoppage, would have exerted significantly more pressure on Hydrex to maintain existing terms and conditions. The applicant union stated that Jarvis employees would have been willing to strike in support of their colleagues at Hydrex. Instead, the Hydrex members had had to stand alone, and in the end had no option but to accept the new terms and conditions. They did so under protest.

17. According to the applicant union, neither Jarvis nor Hydrex exist any longer, having been put into administration in March 2010 and November 2011 respectively. The Hydrex undertaking was purchased by another company, which in turn sold it on in November 2012.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. In relation to the EDF case, Blake J referred to the following provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

Section 226

"(1) An act done by a trade union to induce a person to take part, or continue to take part, in industrial action

(a) is not protected unless the industrial action has the support of a ballot, and

(b) where section 226A falls to be complied with in relation to the person's employer, is not protected as respects the employer unless the trade union has complied with section 226A in relation to him."

Section 226A

"(1) The trade union must take such steps as are reasonably necessary to ensure that—

(a) not later than the seventh day before the opening day of the ballot, the notice specified in subsection (2), ...

is received by every person who it is reasonable for the union to believe (at the latest time when steps could be taken to comply with paragraph (a)) will be the employer of persons who will be entitled to vote in the ballot.

(2) The notice referred to in paragraph (a) of subsection (1) is a notice in writing—

(a) stating that the union intends to hold the ballot,

(b) specifying the date which the union reasonably believes will be the opening day of the ballot, and

(c) containing—

(i) the lists mentioned in subsection (2A) and the figures mentioned in subsection (2B), together with an explanation of how those figures were arrived at, or

...

(2A) The lists are—

(a) a list of the categories of employee to which the employees concerned belong, and

(b) a list of the workplaces at which the employees concerned work.

(2B) The figures are—

(a) the total number of employees concerned,

(b) the number of the employees concerned in each of the categories in the list mentioned in subsection (2A)(a), and

(c) the number of the employees concerned who work at each workplace in the list mentioned in subsection (2A)(b).

...

(2D) The lists and figures supplied under this section, or the information mentioned in subsection (2C) that is so supplied, must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time when it complies with subsection (1)(a)."

19. In relation to the Hydrex situation, the statutory protection against liability in tort regarding acts done "in contemplation or furtherance of a trade dispute" (section 219 of the 1992 Act) is confined, by section 244 of the same Act, to "a dispute between workers and their employer". Secondary action is expressly excluded from statutory protection by section 224 of the Act, which defines it as follows:

"(2) There is secondary action in relation to a trade dispute when, and only when, a person—

(a) induces another to break a contract of employment or interferes or induces another to interfere with its performance, or

(b) threatens that a contract of employment under which he or another is employed will be broken or its performance interfered with, or that he will induce another to break a contract of employment or to interfere with its performance,

and the employer under the contract of employment is not the employer party to the dispute."

The provisions on peaceful picketing are contained in section 220 of the Act, which provides:

"(1) It is lawful for a person in contemplation or furtherance of a trade dispute to attend—

(a) at or near his own place of work, or

(b) if he is an official of a trade union, at or near the place of work of a member of the union whom he is accompanying and whom he represents,

for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.

(2) If a person works or normally works—

(a) otherwise than at any one place, or

(b) at a place the location of which is such that attendance there for a purpose mentioned in subsection (1) is impracticable,

his place of work for the purposes of that subsection shall be any premises of his employer from which he works or from which his work is administered."

20. Both parties referred to the previous legislative regime, which included secondary action in the scope of the statutory protection. The Government explained that secondary action was first outlawed by the Trade Disputes and Trade Unions Act 1927, adopted in the aftermath of the general strike of 1926. The situation changed with the Trade Disputes and Trade Unions Act 1946, which lifted the ban.

21. Further reforms occurred in the 1970s. The Trade Union and Labour Relations Act 1974 afforded substantially broader protection to industrial action than is the case at present. It provided at section 13(1) (as amended in 1976):

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only—

(a) that it induces another person to break a contract or interferes or induces any other person to interfere with its performance; or .

(b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or to interfere with its performance."

22. This provision was considered by the House of Lords in the case of *Express Newspapers Ltd v. McShane and another* ([1980] AC 672). The case involved secondary action in the newspaper industry, led by the National Union of Journalists. The majority of the House held that the test to be applied to determine whether an act enjoyed the protection of section 13(1) was a subjective one, that is to say, it was sufficient that the person honestly believed that the act in question might further the cause of those taking part in the dispute. The genuineness of such belief could be tested by the courts, but the person calling the strike did not need to prove that it was reasonably capable of achieving the objective. Lord Wilberforce dissented on the nature of the test, but concurred with the finding that the injunction granted against the union should be discharged.

23. Although the applicant union maintained that the *McShane* judgment was not a significant development in the law, in that it merely confirmed the interpretation of clear statutory language, the case was referred to during the parliamentary debates leading to the passage of the Employment Act 1980 as one of the reasons for introducing restrictions on secondary action (in section 17 of that Act). The 1980 Act retained immunity for secondary action provided that three conditions were satisfied: (i) that it was taken against first suppliers or customers of the employer in dispute or against associated employers of the employer which were substituting for it during the dispute; (ii) that its principal purpose was to directly prevent or disrupt

the supply of goods or services between the employer in dispute and his supplier or customer during the dispute; and (iii) that it was likely to achieve that purpose.

24. The current rule was originally introduced by the Employment Act 1990, and then re-enacted in the 1992 Act in the terms set out above.

25. The parties provided statistical information on the number of days lost to industrial action in the United Kingdom, going back to the 1970s. The Government pointed out that in that decade, the average number of days lost each year was 12.9 million. This decreased in the 1980s to an average of 7.2 million days. From the early 1990s to the present day, the figure is much lower, standing at 700,000 days lost per year on average. They attributed part of this decline at least to the ban on secondary action. The applicant union disputed that interpretation. It noted that the available statistics did not distinguish between primary and secondary strikes. It was therefore impossible to identify the true extent of secondary action before 1980 and, consequently, impossible to ascertain the impact of the restrictions introduced in 1980 and 1990. In the applicant union's view, secondary action had been relatively rare, the overwhelming majority of strikes at that time had been primary strikes. It referred to official figures (contained in a Government publication, the "Employment Gazette") indicating that, since the 1960s, the United Kingdom was consistently close to the European average for days lost to industrial action. According to this source, the country had been middle-ranking since the end of the 1970s. The only exception was for 1984, on account of the long and widespread strike in the mining industry that year. The Government submitted that the comparative statistics needed to be interpreted with caution, given the profound transformation of Europe over the past twenty years. The fact that the United Kingdom remained close to the European average in this regard indicated that, contrary to the applicant union's point of view, the rules on industrial action were not so restrictive as to make it excessively difficult to organise strikes.

III. RELEVANT INTERNATIONAL LAW

26. In support of its application, the applicant union included references to other international legal instruments, and the interpretation given to them by the competent organs. The most relevant and detailed of these materials are referred to below.

A. International Labour Organization Conventions

27. While there is no provision in the Conventions adopted by the International Labour Organization (ILO) expressly conferring a right to strike, both the Committee on Freedom of Association and the Committee

of Experts on the Application of Conventions and Recommendations ("the Committee of Experts") have progressively developed a number of principles on the right to strike, based on Articles 3 and 10 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (summarised in "Giving globalization a human face", International Labour Office, 2012, § 117). This Convention was ratified by the United Kingdom on 27 June 1949.

1. Concerning notice requirements

28. The Committee of Experts has commented several times upon the notice requirements for industrial action in the United Kingdom. The applicant union referred to the following statement, adopted in 2008:

> "In its previous comments, the Committee had taken note of comments made by the TUC to the effect that the notice requirements for an industrial action to be protected by immunity were unjustifiably burdensome. The Committee notes that according to the Government, a number of measures have already been taken to simplify sections 226-235 of the TULRA and 104-109 of the 1995 Order; moreover, as part of a plan published in December 2006 to simplify aspects of employment law, the Government explicitly invited trade unions to come forward with their ideas to simplify trade union law further. Since then, the Government has held discussions with the TUC to examine their ideas to simplify aspects of the law on industrial action ballots and notices. These discussions are ongoing. The Committee notes that in its latest comments, the TUC notes that there has been no progress in this reform. **The Committee requests the Government to indicate in its next report progress made in this regard**."[1]

29. More recently, in a direct request to the Government of the United Kingdom, the Committee of Experts stated:

> "In its previous comments, the Committee had taken note of comments made by the Trade Union Congress (TUC) to the effect that the notice requirements for an industrial action to be protected by immunity were unjustifiably burdensome. The Committee requested the Government to continue to provide information on any developments, as well as any relevant statistics or reports on the practical application and effect of these requirements. The Committee notes the Government's indication that the Court of Appeal decision in RMT v. Serco and in ASLEF v. London Midland (2011) EWCA 226, overturned injunctions which had been obtained by Serco and London Midland Railway against the two main national transport unions, the RMT and ASLEF. In both cases, the injunctions had been obtained on the basis of the unions' breaches of statutory balloting and notification procedures. This case was the latest in a series of cases assessing the extent of unions' technical obligations to ensure that a fair balloting process had taken place. In the RMT v. Serco decision, the Court of Appeal issued some key clarification so that in future it is likely to be more difficult for employers to obtain injunctions to prevent strike action as a result of breaches of the balloting and notice requirements. A Court of Appeal decision is binding on all lower courts. Subsequent to this case, in Balfour Beatty v. Unite (2012) EWHC 267 (QB), the Court found against Balfour Beatty, taking account of the Serco case and the need to strike a balance between striving for democratic legitimacy and

1. Bold text used in the original.

imposing unrealistic burdens on unions and their officers. The Committee notes the TUC's observation that, while it greatly welcomes both decisions, it considers that they do not fully address the problems arising under the legislation that it has identified and that the legislation continues to impose intolerable demands on trade unions. **The Committee notes these developments with interest and requests the Government to provide its comments on the concerns raised by the TUC**."[2]

2. Concerning secondary action

30. The Committee of Experts has taken the following view (see "Giving globalization a human face", § 125):

"With regard to so-called 'sympathy' strikes, the Committee considers that a general prohibition of this form of strike action could lead to abuse, particularly in the context of globalization characterized by increasing interdependence and the internationalization of production, and that workers should be able to take such action, provided that the initial strike they are supporting is itself lawful."

31. The Committee on Freedom of Association also considers this form of industrial action to be protected by international labour law (see "Freedom of Association", *Digest of the decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (revised) edition, International Labour Office, 2006):

"534. A general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful.

...

538. A ban on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association."

32. In its consideration of the United Kingdom's observance of Convention No. 87, the Committee of Experts has repeatedly criticised the fact that secondary strikes are illegal. The initial criticism was included in its 1989[3] observation concerning the United Kingdom:

"The Committee notes that the common law renders virtually all forms of strikes or other industrial action unlawful as a matter of civil law. This means that workers and unions who engage in such action are liable to be sued for damages by employers (or other parties) who suffer loss as a consequence, and (more importantly in practical terms) may be restrained from committing unlawful acts by means of injunctions (issued on both an interlocutory and a permanent basis). It appears to the Committee that unrestricted access to such remedies would deny workers the right to take strikes or other industrial action in order to protect and to promote their economic and social interests.

It is most important, therefore, that workers and unions should have some measure of protection against civil liability. There has been legislative recognition of this imperative since 1906 in the form of a series of 'immunities' (or, more accurately, 'protections') against tort action for trade unions and their members and officials. The

2. Bold text used in the original.
3. That is, at a time when secondary action was merely restricted and not yet banned.

current version of the 'immunities' is to be found in the Trade Union and Labour Relations Act 1974.

The scope of these protections has been narrowed in a number of respects since 1980. The Committee notes, for example, that section 15 of the 1974 Act has been amended so as to limit the right to picket to a worker's own place of work or, in the case of a trade union official, the place of work of the relevant membership, whilst section 17 of the 1980 Act removes protection from 'secondary action' in the sense of action directed against an employer who is not directly a party to a given trade dispute. In addition, the definition of 'trade dispute' in section 29 of the 1974 Act has been narrowed so as to encompass only disputes between workers and their own employer, rather than disputes between 'employers and workers' or 'workers and workers' as was formerly the case.

Taken together, these changes appear to make it virtually impossible for workers and unions lawfully to engage in any form of boycott activity, or 'sympathetic' action against parties not directly involved in a given dispute. The Committee has never expressed any decided view on the use of boycotts as an exercise of the right to strike. However, it appears to the Committee that where a boycott relates directly to the social and economic interests of the workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then that boycott should be regarded as a legitimate exercise of the right to strike. This is clearly consistent with the approach the Committee has adopted in relation to 'sympathy strikes':

It would appear that more frequent recourse is being had to this form of action (i.e. sympathy strikes) because of the structure or the concentration of industries or the distribution of work centres in different regions of the world. The Committee considers that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action provided the initial strike they are supporting is itself lawful."

33. It appears that the Committee of Experts did not take a definitive position on the ban until its 1995 observation concerning the United Kingdom, when it observed as follows:

"The Committee draws the Government's attention to paragraph 168 of its 1994 *General Survey on Freedom of Association and Collective Bargaining* where it indicates that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful. The lifting of immunity opens such industrial action to be actionable in tort and therefore would constitute a serious impediment to the workers' right to carry out sympathy strikes."

It has maintained this view since, stating in its most recent review of the situation (2012 observation, see Report of the Committee of Experts to the International Labour Conference, 102nd Session, 2013, ILC.102/III(1A), pp. 195-96).):

"*Immunities in respect of civil liability for strikes and other industrial action (sections 223 and 224 of the TULRA)*. In its previous comments, the Committee had noted that according to the TUC, due to the decentralized nature of the industrial relations system, it was essential for workers to be able to take action against employers who are easily able to undermine union action by complex corporate structures, transferring work, or hiving off companies. The Committee generally

raised the need to protect the right of workers to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute, and to participate in sympathy strikes provided the initial strike they are supporting is itself lawful. The Committee takes note of the Government indication that: (1) its position remains as set out in its report for 2006-08, that the rationale has not changed and that it therefore has no plans to change the law in this area; and (2) this issue forms part of a matter brought before the ECHR by the National Union of Rail, Maritime and Transport Workers (RMT) and that the Court has yet to consider the case. The Committee recalls the previous concern it raised that the globalization of the economy and the delocalization of work centres may have a severe impact on the right of workers' organizations to organize their activities in a manner so as to defend effectively their members' interests should lawful industrial action be too restrictively defined. ***In these circumstances, the Committee once again requests the Government to review sections 223 and 224 of the TULRA, in full consultation with the social partners, and to provide further information in its next report on the outcome of these consultations***."[4]

B. European Social Charter

34. The right to strike is protected by Article 6, paragraph 4, of the European Social Charter, which the United Kingdom ratified on 11 July 1962. It provides as follows:

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

...

[to] recognise:

4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

1. Concerning notice requirements

35. The European Committee on Social Rights (ECSR) has examined the British rules on strike ballots and deemed them incompatible with the proper exercise of the right to strike. In its most recent assessment of the matter (Conclusions XIX-3, 2010) it stated:

"The Committee considered in its previous conclusions ... that the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive (even the simplified requirements introduced by the Employment Relations Act (ERA)2004). As there have been no changes to the situation, the Committee reiterates its finding that the situation is not in conformity with Article 6 § 4 of the Charter in this respect."

4. Bold and italics used in original.

2. Concerning secondary action

36. Like the ILO Committee of Experts, the ECSR has consistently criticised the situation in the United Kingdom. In its first consideration of the matter (Conclusions XIII-1, 1993) it stated:

> "Referring to the report, the Committee noted the Government's observations concerning the limitations on the right to strike, imposed by the 1990 Employment Act in respect of Great Britain. In particular, it noted that while the Government emphasised the importance of protecting the right of employers to dismiss those engaged in a strike, it also emphasised that the legislation continues to:
>
> (i) allow special protection for peaceful pickets at their own place of work;
>
> (ii) provide statutory immunity to peaceful and lawful pickets;
>
> (iii) provide statutory immunity for lawful trade disputes.
>
> The Committee also noted the recent observations of the ILO Committee of Experts recommending that the legislation be amended to conform with the principle of freedom of association in accordance with ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organise, 1948).
>
> Having regard to this information and having noted that there is no immunity afforded individuals in respect of:
>
> – secondary industrial action other than inducement in the course of peaceful picketing;
>
> – industrial action organised in support of employees dismissed while taking part in unofficial action;
>
> the Committee reiterated its previous negative conclusion for the reasons cited in the twelfth cycle of supervision." (Conclusions XIII-I, reference period 1990-1991)."

37. In the ECSR's most recent pronouncement on the matter (Conclusions XIX-3, 2010) it said:

> "In its previous conclusions ... the Committee found that lawful collective action was limited to disputes between workers and their employer, thus preventing a union from taking action against the *de facto* employer if this was not the immediate employer. It furthermore noted that British courts excluded collective action concerning a future employer and future terms and conditions of employment in the context of a transfer of part of a business (University College London NHS Trust v. UNISON). The Committee therefore considered that the scope for workers to defend their interests through lawful collective action was excessively circumscribed in the United Kingdom. Given that there have been no changes to the situation, the Committee reiterates its finding that the situation is not in conformity with Article 6 § 4 of the Charter in this respect."

C. Charter of Fundamental Rights of the European Union

The relevant provisions are the following:

Article 12
Freedom of assembly and of association

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

..."

Article 28
Right of collective bargaining and action

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

Article 28 appears in Title IV of the Charter. As regards the United Kingdom, reference must be made to Protocol (No 30) to the Treaty on the Functioning of the European Union. It provides, in so far as relevant:

Article 1

"...

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law."

IV. ELEMENTS OF COMPARATIVE LAW

38. The parties provided some elements of comparative law in relation to secondary strikes. Both referred to a comparative study on the regulation of industrial action in Europe (*Strike rules in the EU27 and beyond: A comparative overview*[5], W. Warneck, European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS), 2007). According to this source, secondary action is protected or permitted, subject to varying restrictions and conditions, in the great majority of the member States of the European Union. The States that, like the United Kingdom, do not permit secondary action were identified as Austria, Luxembourg and the Netherlands.

5. Covering the then twenty-seven European Union member States as well as Croatia and Iceland. Published electronically at http://www.etui.org/Publications2/Reports/Strike-rules-in-the-EU27-and-beyond.

39. In their initial submissions, the Government sought to draw support for the situation in the United Kingdom by reference to the situation in the following States: Spain, the Netherlands, Italy, Austria, Norway, Denmark and Germany. They contended that these illustrated a broad tendency in Europe to subject secondary action to much more restrictive conditions than primary industrial action. In reply to this the applicant union provided to the Court statements from labour-law experts in a number of European countries contradicting the Government's remarks. The applicant union concluded that the United Kingdom is the most restrictive among the Contracting Parties to the Convention in this respect. The Government concluded that the material demonstrated that, notwithstanding the great variety of industrial-relations systems and traditions in Europe, most States distinguished between primary and secondary action, with greater restriction on the latter. The broad right claimed by the applicant union was not supported by any real European consensus.

40. The Court notes that comparative information is available from the monitoring mechanism of the European Social Charter[6]. As indicated above, this body has repeatedly criticised the situation in the United Kingdom, which appears to be the only State subject to criticism on this specific ground. The ECSR has also commented in recent years on the lawfulness of secondary action (sometimes using the term "sympathy" or "solidarity" action) in the following States: Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Germany, Malta, Norway, Portugal, Romania, the Slovak Republic, Spain and Sweden. With reference to the three other States identified in the Warneck study as not permitting secondary action, the Court notes that the ECSR has not criticised the situation in the Netherlands on this ground. Nor has it made any comment at all in relation to the situation in Austria or Luxembourg, neither State having accepted Article 6, paragraph 4, of the Social Charter.

41. Some further comparative information is available from the publications and legal databases of the ILO. For example, the Committee of Experts referred to the removal from the Turkish Constitution of the prohibition on solidarity strikes ("Giving globalization a human face", § 125). It has also referred, in its review of State implementation of Convention No. 87, to the lawfulness of sympathy strikes in Albania, Georgia and Latvia. The Committee on Freedom of Association has referred to solidarity strike action in Hungary (complaint no. 2775), and noted that Russian law does not expressly provide for, or for that matter prohibit, such action (complaint no. 2251).

Additionally, the Court notes that in Swiss law strikes are permitted if they "relate to employment relations" (Article 28 § 3 of the Constitution).

6. See the ECSR case-law database
http://hudoc.esc.coe.int/esc2008/query.asp?language=en.

According to one constitutional commentary, a strike must actually be about working conditions, and not pursue corporatist or political objectives outside of the enterprise or branch (*Droit constitutionnel suisse*, vol. II, Auer, Malinverni and Hottelier, p. 723).

THE LAW

ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

42. The applicant union contended that the two situations described above, regarding the statutory requirements on strike-ballot notice and on secondary strike action, disclosed excessive restrictions on its freedom of association under Article 11 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of 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."

43. The Government contested that argument.

44. The Court will examine consecutively the two sets of facts presented by the applicant union and the distinct Convention issues to which each gives rise.

A. Admissibility

1. Strike-ballot notice

45. Regarding the first complaint, notice of which was not given to the Government, the Court finds that it is inadmissible for the following reason. The facts of the practical example provided, as reported by the applicant union, indicate that, while the union experienced some delay in taking action to protect the interests of its members, it succeeded in holding a strike two months later. That action, by the applicant union's own admission, induced EDF to improve its offer to union members, who accepted it and it took effect as a collective agreement shortly afterwards. That successful outcome cannot be disregarded. It would be artificial for the Court to consider the issuing of the injunction against the RMT in isolation from subsequent events. In sum, there is no basis here for the Court to find that

the applicant union's exercise of its rights under Article 11 of the Convention has been interfered with, over and above being required to comply with the procedural requirements set down in law, which it succeeded in doing. While those requirements have been the subject of criticism by other international bodies (see paragraphs 26-37 above), the Court can only examine complaints in light of their concrete facts. It considers that what the EDF situation discloses in reality is ultimately successful collective action by the applicant union on behalf of its members. This aspect of the application is therefore manifestly ill-founded and so must be rejected as inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

2. Secondary strike action

46. In relation to the second aspect of the application, a first issue of admissibility arises out of the fact that the applicant union has complained of the same matter to the ILO Committee on Freedom of Association. This took place after the case had been lodged with the Court, the RMT stating in its application form its intention to apply to the Committee on Freedom of Association. By a letter of 6 June 2013, the applicant union informed the Court that it had "irrevocably withdrawn" that complaint. The Government submitted that maintaining two international complaints in parallel for several years and then withdrawing one of them so as to gain a tactical advantage before the Court should be considered an abuse of the right of application. They added that Article 35 § 2 (b) of the Convention (see paragraph 48 below) should not be construed so as to limit its effect strictly to cases where the applicant has already submitted the matter to another international procedure. In their submission, such a literal reading would defeat the purpose of the provision, since it would allow an applicant to bring a case under the Convention, and then, the very next day, bring that same case before another international body.

47. The applicant union replied that the Government had been aware all along of the existence of the complaint to the Committee on Freedom of Association, having submitted its official reply to the ILO in July 2011. That reply had in fact referred to the existence of the present application before the Court, noting – correctly – that the RMT had given clear priority to the Convention proceedings. This was because the United Kingdom had simply ignored the criticism voiced by the relevant ILO bodies, whereas it would be bound to execute a judgment in the applicant union's favour. The withdrawal of the complaint to the ILO, before any decision was taken by the Committee on Freedom of Association, meant that the prospect of a plurality of international proceedings relating to the same case had been dispelled.

48. Article 35 § 2 (b) of the Convention provides:

"2. The Court shall not deal with any application submitted under Article 34 that

...

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

As established in the Court's case-law, this provision is not limited to situations where an applicant has already applied to another international body regarding the same matter. The Court has held that it is not the date of such a step that is decisive, but whether a decision on the merits has already been taken by the time the Court examines the case (see *Peraldi v. France* (dec.), no. 2096/05, 7 April 2009). That has not occurred in the present case (contrast *POA and Others v. United Kingdom* (dec.), no. 59253/11, 21 May 2013, where the applicant trade union had already submitted an identical complaint to the Committee on Freedom of Association, which had issued its decision on the merits). Furthermore, the Court does not consider that the applicant union has abused the right of application. It did not conceal from the Court at the outset its intention to utilise another international procedure (contrast *Cereceda Martin and Others v. Spain*, no. 16358/90, Commission decision of 12 October 1992, Decisions and Reports 73, p. 120, at p. 133). Its decision to ultimately withdraw that complaint as a measure of precaution cannot be regarded as abusive within the meaning of Article 35 § 3 (a) of the Convention. The Court therefore rejects the Government's preliminary objection under this head.

49. The Government further submitted that the complaint regarding secondary strike action should be rejected as manifestly ill-founded. They considered that there had been no violation of, or even interference with, the applicant union's right of freedom of association since Article 11 did not confer any right to take secondary action. Instead, it was plain from the very wording of that provision that it contemplated collective action by workers to protect their own interests. Sympathy strikes, which were no more than a show of solidarity with another group of workers, lacked the requisite nexus between collective action and the direct interests of the persons taking part in it. It did not appear from the facts adduced that the situation of the RMT members employed by Hydrex had any real bearing on the situation of their union colleagues employed by Jarvis. Had any similar threat to the latter's interests materialised, it would have been open to them to take strike action, just as the Hydrex members had done.

50. The applicant union rejected the Government's reading of Article 11 § 1 as excessively narrow.

51. The Court considers that the Government's preliminary objection under this second head raises an issue of interpretation of the Convention that does not lend itself appropriately to being settled at the stage of the examination of admissibility of the application. It therefore joins the objection to the merits of the case for examination below.

52. As it is not inadmissible on any other ground, the part of the application relating to secondary action must be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant union

53. The applicant union argued that the ban on secondary action had seriously limited its ability to protect its Hydrex members effectively against a drastic cut to their terms and conditions of employment. Had it been possible to organise a sympathy strike at Jarvis, it was highly probable that Hydrex would have desisted from changing matters for the worse. With so few members employed by Hydrex, the effect of the strike had been negligible. The very limited possibility of lawful picketing had made no difference. The revised offer made by management, despite being presented in a positive light by the union leadership, had been unanimously rejected by those polled as totally inadequate. The applicant union stated that a strike by its Jarvis members would have been motivated not just by solidarity with fellow union members who had been their former colleagues, but also by concern to preserve their own terms and conditions. Given the highly competitive environment in which they were employed, a decision by one company to reduce its staffing costs could well trigger similar cuts in rival companies. As the Hydrex situation illustrated, it was easy for a company to terminate the employment of workers and then rehire them on less favourable terms. The ban on secondary action had the effect of undermining trade-union action on behalf of all its members in a given sector, to the detriment of all such workers. From 1980 onwards, there had been a significant and steady decline in the role of collective agreements in the British economy, which made it all the more vital to permit trade unions to act effectively on their members' behalf, protecting those in positions of greater weakness. In the applicant union's view it was only in the period before 1980 that the right to take secondary strike action had been adequately protected in domestic law. The government of the day had not considered it necessary to restrict it. The clear object of the 1980 and 1992 legislation had been to undermine the role and influence of trade unions, leaving workers in a weakened position. The Government's claims that strike action had damaged the economy in the 1970s and 1980s lacked substantiation, and were moreover exaggerated and inaccurate. Despite the lack of any real evidence, trade unions had been unjustly blamed for Britain's economic woes for over thirty years, and were for this reason subject to very restrictive legislation.

54. Replying to the Government's argument that secondary action, by its nature, had the effect of embroiling other employers in industrial disputes to

which they were not party and over which they had no control, the applicant union submitted that such considerations were irrelevant to the facts of this case. It would only have called out the Jarvis workforce, which would have been sufficient to induce Hydrex to leave existing terms and conditions intact. In any event, the applicant union rejected as generalisations the Government's arguments regarding the disruptive effects of secondary strikes and the risks these posed to the Convention rights of third parties (interference with businesses, threats to livelihoods, and even – in extreme situations – to life and health). Sufficient safeguards existed elsewhere in the law, including the criminal law. There was thus no justification for a complete ban on secondary action. A less restrictive regime could surely be devised, as required by the principle of proportionality. The possibility of organising peaceful pickets made no real difference, as shown by the facts of this case; it did not mitigate the disproportionate effects of the ban on secondary action.

55. Citing several of this Court's judgments and decisions in trade-union cases, the applicant union argued that the taking of strike action must now be regarded in its own right as an essential element of freedom of association that States must respect. Alternatively, the Court having identified collective bargaining as an essential element of trade-union rights, it must logically follow that the right to strike was equally essential, since without the threat of industrial action, collective bargaining would be deprived of any effectiveness and be little more than "collective begging". The ban on secondary action thus impaired the essence of freedom of association. This could be accepted only upon proof of some truly compelling justification. The State must meet a stringent test of necessity, with only a limited margin of appreciation, subject to the very rigorous scrutiny of the Court.

56. The applicant union urged the Court to reject any narrow concept of trade-union freedom of association that would be limited to the protection of the strictly personal interests of individual workers. Such an interpretation would impoverish the substance of Article 11. In the many cases it had decided involving strikes, the Court had never attached any significance to what was at stake for the workers in the dispute. It was entirely legitimate for unions to pursue broader, common objectives. Trade unionism was fundamentally about solidarity among union members and among workers more generally, and the wording of Article 11 of the Convention should be construed in keeping with this. Workers should be able to take industrial action to protect those who may be prevented from doing so, or who, on their own, lack the collective strength to defend their interests at work. This broad concept of freedom of association was espoused by the two most eminent international bodies in the field of trade-union rights, the ILO Committee of Experts and the ECSR. Both had repeatedly criticised the United Kingdom for its ban on secondary action, which they deemed to be

incompatible with the relevant international legal standards. These had been interpreted to mean that the only acceptable condition that could be attached to secondary action was that the primary dispute itself be lawful. The applicant union urged the Court to adopt the same position. If that were overbroad, a criterion of proximity might be envisaged, that is to say, a requirement of a link of some sort between workers engaged in primary action and those striking in sympathy with them. Such a link was present here, since the group of workers concerned had originally been Jarvis employees and continued to perform the same work at the same sites after the transfer. A worsening in their terms and conditions could have had negative consequences for all workers in that sector. In the modern economy, the workforce was becoming increasingly fragmented through the transfer of undertakings or part of them, the creation of complex corporate structures, agency work, privatisation, the contracting-out of services leading to further sub-contracting, non-genuine self-employment, and so forth. This led to a situation in which persons performing the same job at the same place of work could have different employers, meaning that they could not legally support one another in time of industrial conflict.

57. With its outright prohibition on secondary action, the United Kingdom was part of a very small minority of European countries adopting such an extreme position. The approach adopted by the great majority of European States, notwithstanding the differences between them in the field of industrial relations generally, was a permissive one. This represented, so the applicant union submitted, the consensus in Europe on the issue.

(b) The Government

58. The Government did not accept the applicant union's account of the Hydrex situation. They noted that, as required by domestic law, the group of ex-Jarvis employees had continued to enjoy their previous terms and conditions of employment after the transfer, and this had continued for a period of two years. At that point, as shown by the documents submitted by the applicant union, the company's financial difficulties led it to propose new, less advantageous contracts to the persons concerned. The applicant union defended their interests by making representations and ultimately through strike action that led to an improved offer. While that offer had been rejected, and the applicant union now described it as inadequate, it had in fact been endorsed at the time by the RMT General Secretary, who had considered the strike a success and urged union members to vote in favour of acceptance.

59. As for the RMT members employed by the Jarvis group, the Government noted that, contrary to the applicant union's speculations, there was no evidence of any move by the employer to reduce their terms and conditions as Hydrex had done. The two companies were unrelated. Had

there been any move to do so, it would have been open to the applicant union to organise a strike by Jarvis employees in defence of their interests.

60. The Government contended that the right to strike was adequately protected in domestic law. As long as industrial action was organised in compliance with the relevant statutory provisions, the individual worker was protected against dismissal and the trade union enjoyed immunity in tort. The domestic courts had held that the statutory regime was compatible with Article 11, as interpreted by this Court (see *Metrobus Ltd*, cited in paragraph 11 above). The Government clarified that Parliament had taken care to ensure that the general ban on secondary action did not curtail primary action – secondary action would be lawful if it also constituted primary action in relation to another dispute (section 224(5) of the 1992 Act). Moreover, persons taking part in industrial action were permitted to mount a peaceful picket at or near their place of work with a view to peacefully persuading others to withdraw their labour.

61. According to the Government, the present statutory framework came about as a reaction to the widespread disruptions caused to the British economy by widespread secondary action in the 1970s and 1980s. Prior to the enactment of the Employment Act 1980, trade unions had enjoyed a very broad power to organise secondary action, with highly detrimental consequences for businesses and their workforces, as well as for the general public. A dispute in one part of the economy could rapidly spill over into others, embroiling third parties in it who had no stake in the conflict and no real means of resolving it. Just how permissive the legislation in force at that time was became fully apparent in the *McShane* case (see paragraph 22 above). The government of the day had determined that this should be restricted, and the parliamentary debates contained many actual examples of the damage and disruption wrought by unrestricted secondary strikes. Ten years later, the government considered that even in its more restricted form secondary action had the potential to damage the economy, notably by deterring multinational companies from developing their operations in the United Kingdom. Parliament had accordingly introduced the current ban. Although the Labour Party, then in opposition, had opposed the move, it had never sought to reverse it during its thirteen-year tenure in government. Nor was the current coalition government minded to revisit the issue. This indicated the very broad political acceptance in the United Kingdom of the current balance struck regarding the right to strike.

62. The Government accepted that, in light of the recent case-law of this Court, the right under Article 11 to join a trade union normally implied the ability to strike. But this was by no means an absolute right – it could be subject to conditions and restrictions in accordance with Article 11 § 2 that were within the State's margin of appreciation. Nor did the Government consider secondary action an essential element of freedom of association,

finding no support for such a proposition in the relevant case-law of the Court, none of which concerned secondary action.

63. Rather, their reading of that case-law was that there had to be a nexus between the employees' interests and the action taken by their trade union on their behalf, be it collective bargaining or strike action. This was absent in the Hydrex situation. Secondary action by Jarvis employees in support of their former colleagues would have been on the basis of solidarity only – such action would not have had any real connection to their own interests *via-à-vis* Jarvis, with whom they had no dispute. Accordingly, the restriction on secondary action did not impinge on any essential element of freedom of association. There was thus no interference with the right set out in Article 11 § 1.

64. In the view of the Government, the manner in which secondary action was regulated by law was wholly within the United Kingdom's margin of appreciation. As the Court had recognised in its case-law, the margin in this area must be a wide one in light of the sensitive social and political considerations involved and the very significant differences between the national industrial-relations frameworks in Europe. In any event, the situation should be examined in light of Article 11 as a whole, which called for a balancing exercise between the effects of the restriction on the applicant union's rights and the potential effects of secondary action on third parties. Regarding the former element, the Government pointed out that the ban on secondary action did not interfere with the ability of a trade union to take primary action in defence of its members' own interests. Against that must be set the far-reaching and uncontrollable effects that secondary action could have on the rights and freedoms of others, including their rights under the Convention, specifically under Article 1 of Protocol No. 1 and, it could not be excluded, under Article 2. Where the balancing exercise involved competing Convention rights, the case-law of the Court allowed a broad margin of appreciation for the national authorities. In the view of the Government, the balance struck in the United Kingdom was a defensible one.

65. An additional consideration was the highly decentralised industrial-relations structure in the United Kingdom, which stood in contrast to the situation in many other European States. The Government considered that this had amplified the disruptive effect of secondary action in the 1970s, and would do so again were the Court to find the situation incompatible with the requirements of the Convention. It should also be borne in mind that – again in contrast to other national systems in Europe – trade unions already had broad freedom to take strike action. In the British system there was no concept of a "peace clause", that is a binding undertaking not to take industrial action during the currency of a collective agreement. Nor was there any rule of proportionality to limit the intensity or extent of a strike, which was entirely a matter for trade unions to determine. Responding to

the applicant union's point about the decline of collective bargaining over the past thirty years, the Government indicated its neutrality on the issue – whether workers and employers wished to engage collectively or otherwise was a matter for them to decide. The Government disputed that the decline was due to the ban on secondary action or any other restriction referred to by the applicant union. There were other factors at work, such as the privatisation of many former public enterprises whose workforces had traditionally been highly unionised, and the marked development of labour law, conferring many more rights on workers that could be enforced through the courts rather than through the intervention of trade unions.

66. The restriction had been in place so long that, in the Government's view, management and labour had adapted to it, even if on the trade-union side there were emerging signs of an increasingly confrontational attitude towards the Government's economic strategy in the current difficult economic conditions. The country's recovery would be imperilled if the applicant union succeeded and the Government were required to repeal the ban on secondary action.

67. Outside of the rules on strike action, it remained open to trade unions to publicise their grievances by exercising the broad right to freedom of assembly. The Government gave the example of demonstrations staged by electricians in a number of public places to inform the public of an ongoing industrial dispute.

68. The Government rejected the applicant union's suggestion that the outright ban on secondary action might be replaced with a restriction based on some concept of proximity or remoteness. These were inherently vague concepts and any rule formulated in such terms would inevitably generate legal uncertainty and so could be expected to give rise to litigation. In reality, what the applicant union sought was the right to organise strike action purely on the ground of solidarity between workers in different companies, the only condition being that the primary strike be lawful. This was a plea for no restriction at all on secondary action, eliminating any balancing exercise. No such indiscriminate right could be derived from Article 11. While the applicant union asserted that the Hydrex situation did not present the risk of a broad overspill into other sectors, this was not a relevant point – Parliament had decided against permitting any case-by-case consideration but had preferred a clear and uniform rule. Accordingly, the ban was either in conformity with the Convention or it was not. In the latter eventuality, the consequence would be to open up a very broad right to take secondary action, with all of the potential ramifications of this for society.

69. The above analysis was not, in the Government's view, affected by the provisions of other international texts referred to by the applicant union. Regarding Article 6 § 4 of the Social Charter, the Government considered that the ECSR regarded the right to strike as integral to the process of collective bargaining between trade unions and employers in cases of

conflicts of interest between them. This corresponded to primary industrial action, where workers' interests were directly engaged, not to secondary. The Government further observed that the ECSR was not a judicial or quasi-judicial organ, but simply an independent body that submitted its conclusions to the Committee of Ministers annually. It was the latter that had the power to adopt recommendations to States in relation to any instance of non-compliance with the Charter. As far as the ban on secondary action was concerned, the Committee of Ministers had never taken a stance. In any event, the basis for the ECSR's critique of the United Kingdom in this respect was that the ban could have the effect of preventing workers from striking against the "real" or *de facto* employer, where this is a distinct entity from the direct employer. This was also the basis for the criticism voiced by the ILO Committee of Experts, but it had no relevance to the Hydrex situation, which formed the factual basis for the Court's examination of the issue. In any event, that Committee was not a judicial or quasi-judicial body either, and its interpretation of ILO Conventions was not definitive. Rather, its role was to provide impartial and technical evaluation of the state of application of international labour standards. In fact, the question of a right to strike was currently the cause of sharp controversy within the ILO, as part of which the status of the interpretations given by the Committee of Experts had been called into question. In addition, the Government perceived a divergence of view between the Committee of Experts and the Committee on Freedom of Association, the latter regarding the right to strike as applying only to the defence of one's economic interests. It was noteworthy that the ILO Governing Body had refrained from taking any position on the situation. The Government thus did not accept that the United Kingdom was in breach of its obligations under Convention No. 87.

70. Commenting on the comparative information before the Court, the Government noted that the United Kingdom was not alone in banning or significantly restricting secondary action. Given the great diversity of the different industrial-relations systems in Europe, any superficial comparison on this precise point would be of limited assistance. Contrary to what the applicant union asserted, that diversity pleaded in favour of a wide margin of appreciation.

(c) The third parties

(i) ETUC/TUC

71. The two organisations stated their view that the right to strike is absolutely essential to the functioning of trade unionism in free societies, and that a total ban on secondary action is unacceptable. They referred to a series of international treaties that expressly recognise the right to strike, or have been authoritatively interpreted as protecting that right. In the

jurisprudence of the ILO supervisory bodies, the right to strike was widely applied and strongly protected. There could be restrictions, but these must not be such as to result in practice in an excessive limitation of the right to strike. Sympathy strikes had to be permitted. This was also clearly established in the jurisprudence of the ECSR. The complete ban on secondary action meant that workers in dispute could not in any circumstances call on members of their own union for support, or of any other trade union with which their own was associated at a higher level (for example, a federation or confederation). This diminished the very purpose of joining a trade union, and undermined the purpose of this dimension of Article 11 of the Convention, which reflected the principle that workers should be free to combine for mutual support in times of crisis. The ban was a relatively recent innovation, coming in more than eight decades after the foundational statute in British industrial relations, the Trade Disputes Act of 1906. The Government had failed to justify the restriction before the ILO Committee of Experts. In particular, that Committee had not accepted the Government's argument that the ban was made necessary by the decentralised nature of the British system of industrial relations. On the contrary, the Committee considered that this made it more important for workers to be able to take action against employers who are easily able to undermine union action by complex corporate structures, by transferring work or by hiving off companies. Workers in the United Kingdom were forbidden to take action in support of colleagues employed by another employer forming part of the same group of companies, even though they stood to be affected by the outcome of the dispute. That could not be right. The two organisations expressed their dismay that the Government was ignoring the need to amend the law and refusing to bring it up to the level of minimum international standards. The centre of gravity among European States appeared to lie somewhere between the total prohibition of such action and no restriction at all. The total ban in force in the United Kingdom was an unjustifiable restraint on the right to freedom of association, which could not be justified in all circumstances to protect the rights and freedoms of others.

(ii) Liberty

72. Liberty considered that the ban on secondary action was an unjustified interference with the rights of workers and their trade unions. In many situations, workers were not in fact able to exercise their right under Article 11 to take industrial action; for example, those employed in very small establishments, or working for entities where terms and conditions are effectively determined by a third party such as a client, or those with insecure employment status. The traditional set-up in which all the members of the same workforce had the same employer no longer corresponded to the reality of a large and growing category of workers. It had been estimated

that over three million jobs were now outsourced in the British economy, a great many of these from the public sector, where union density had traditionally been highest. This fragmentation of the traditional labour market had implications for labour law generally, and made it increasingly difficult for trade unions to continue to defend the interests of their members, who were increasingly dispersed among different economic operators. In this context, the effect of the ban on secondary strikes was to greatly reduce the value of trade-union membership, as it prevented the union from mobilising broadly in solidarity with and so as to protect the interests of members in dispute with their direct employer. The ban made it easy for companies to undercut the influence of trade unions by reconfiguring their organisations. It was clearly established in domestic case-law that the corporate veil could not be lifted in such circumstances. This deprived trade unions of the possibility of taking effective action against those with real decision-making power or control. Before 1980, the scope for secondary strikes was very broad, as illustrated by the House of Lords in *N.W.L. Ltd v. Woods* ([1979] 1 WLR 1294), which recognised the lawfulness of industrial action by dock workers taken in solidarity with foreign seafarers working for very little pay on flagged-out vessels. The ban denied some workers their only source of effective union support in the form of financial pressure exerted on the employer's commercial relationships. It also hindered freedom of association in small firms (fewer than twenty-one employees), which were excluded from the statutory procedure for recognising trade unions. If such an employer refused to recognise a trade union on a voluntary basis, the ban on secondary action made it impossible for fellow members in other workplaces to take industrial action so as to induce the employer to accept trade-union representation.

73. Liberty argued that this Court had consistently protected the substance of workers' freedom of association, and had never accorded any significance to whether a strike was of the primary or any other type. While the right to take secondary action could be restricted in accordance with the terms of Article 11 § 2, and balanced against competing rights and freedoms, this could not go so far as to impair the very essence of the right.

74. The Government replied to Liberty's observations, observing that the latter addressed broader, background issues that were not relevant to the facts of the present case. While accepting that the structure of the labour market had evolved over the past two decades, the Government disagreed that this had generally hindered the enjoyment by the workers concerned of the benefits of trade-union rights. Practice actually showed that trade unions were capable of acting effectively in such circumstances – the three examples referred to by Liberty were in fact instances of the successful resolution of an industrial dispute via trade-union involvement (the three examples were: one involving airline catering staff, one concerning bus

drivers in London during the 2012 Olympics, and one involving fuel lorry drivers). The charge that workers were prevented from taking action against the party that really determines their terms and conditions was no more than a hypothesis – no actual examples had been given. Nor had there been any decline in the number of days lost to strike action each year for the past twenty years, which tended to refute Liberty's view that domestic law had increasingly restricted trade-union freedom. In this respect, the United Kingdom was close to the European Union and Organisation for Economic Co-operation and Development average. As to the assertion that the threshold of twenty-one employees represented a loophole that employers could easily exploit in order to avoid having to recognise a trade union, the Government did not see its relevance to the facts of the case. Even so, there were safeguards in place to prevent employers from circumventing their statutory duty. Only genuine small firms were excluded, and that was for valid policy reasons. Finally, the Government submitted that there was no explicit support in the Court's case-law for the proposition that the right to take secondary action is an essential element of freedom of association, or that the ban could not be justified under Article 11 § 2.

2. The Court's assessment

(a) Applicability of Article 11

75. The Court must first determine whether, as the applicant union argued, secondary action comes within the scope of Article 11 of the Convention or, as the Government argued, it does not. The question is a novel one, not having arisen directly in any previous case.

76. What the Government propose is a literal reading of the second clause of the first paragraph of Article 11. Although it is possible to derive such a meaning from the language of the text taken on its own, the Court would observe that, as provided in Article 31 § 1 of the Vienna Convention on the Law of Treaties, the provisions of a treaty are to be interpreted in accordance with their ordinary meaning, in their context and in the light of the treaty's object and purpose. Furthermore, it has often stated that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention of "any relevant rules of international law applicable in relations between the parties", and in particular the rules concerning the international protection of human rights (see *X v. Latvia* [GC], no. 27853/09, § 92, ECHR 2013, with further references therein). In this regard, it is clear from the passages set out above (see paragraphs 26-37) that secondary action is recognised and protected as part of trade-union freedom under ILO Convention No. 87 and the European Social Charter. Although the Government have put a narrower construction on the positions adopted by the supervisory bodies that operate

under these two instruments, these bodies have criticised the United Kingdom's ban on secondary action because of a perceived risk of abuse by employers, and have illustrated this with some examples. The Government further queried the authority, for the purposes of the Convention, to be attributed to the interpretative pronouncements of the expert bodies tasked with supervising compliance with these specialised international standards. The Court will consider this later in its analysis. For now it suffices to refer to the following passage from the judgment in *Demir and Baykara v.Turkey* ([GC], no. 34503/97, § 85, ECHR 2008):

> "The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. ..."

It would be inconsistent with this method for the Court to adopt in relation to Article 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law. In addition, such an understanding of trade-union freedom finds further support in the practice of many European States that have long accepted secondary strikes as a lawful form of trade-union action.

77. It may well be that, by its nature, secondary industrial action constitutes an accessory rather than a core aspect of trade-union freedom, a point to which the Court will revert in the next stage of its analysis. Nonetheless, the taking of secondary industrial action by a trade union, including strike action, against one employer in order to further a dispute in which the union's members are engaged with another employer must be regarded as part of trade-union activity covered by Article 11.

78. The Court therefore concludes that the applicant union's wish to organise secondary action in support of the Hydrex employees must be seen as a wish to exercise, free of a restriction imposed by national law, its right to freedom of association within the meaning of Article 11 § 1 of the Convention. It follows that the statutory ban on secondary action as it operated in the example relied on by the applicant union constitutes an interference with its rights under this provision. To be compatible with paragraph 2 of Article 11, such interference must be shown to be "prescribed by law", to pursue a legitimate aim, and to be "necessary in a democratic society" to achieve those aims.

(b) Lawfulness and legitimacy of the interference

79. There was no dispute between the parties that the interference was prescribed by law. The Court agrees.

80. As to the aim of the interference, the applicant union argued that it found no legitimation in Article 11 § 2. It clearly did not concern national security or public safety, the prevention of disorder or crime, or the protection of health or morals. As for the remaining aim recognised as

legitimate, namely the "protection of the rights and freedoms of others", the applicant union's argument was that it would be illogical to restrict the right to strike on account of the impact of such action on the employer. The very purpose of strike action is to have a strong impact on the employer's position, to induce the employer to meet the demands of labour. It would be erroneous to allow this to serve as a justification for curbing the right to strike. The applicant union therefore invited the Court to reconsider the reasoning followed in this regard in *UNISON v. the United Kingdom* ((dec.), no. 53574/99, ECHR 2002-I), in which the Court had accepted that the restriction on strike action concerned the "rights of others", referring to the employer. The economic interests of an employer should not be permitted to take precedence over the human rights of employees. Such reasoning contradicted the approach of the ECSR, for example, which did not accept any principle of proportionality between the taking of strike action and the consequences of this on the employer's interests. The applicant union further argued that the *UNISON* decision sat ill with the earlier judgment of the Court in *Gustafsson v. Sweden* (25 April 1996, *Reports of Judgments and Decisions* 1996-II). There the Court had not entertained the applicant's complaint that the trade-union boycott of his business was an interference with his rights under Article 1 of Protocol No. 1. Nor had it accepted that the impact on his business, although it caused considerable economic damage, gave rise to any positive obligation on the State to come to his aid. The Court should instead take a stringent approach as it had done in two cases involving sanctions against public-sector employees who participated in a one-day strike (*Karaçay v. Turkey*, no. 6615/03, 27 March 2007 and *Kaya and Seyhan v. Turkey*, no. 30946/04, 15 September 2009). In each case the Court had not been persuaded that the interferences in question pursued legitimate aims, although it ultimately had left that point open in view of its finding that the interferences complained of were not "necessary in a democratic society".

81. The Government contended that the ban sought to protect the rights and freedoms of others, above all of persons not connected to the industrial dispute. In light of the potentially far-reaching and uncontrollable effects that secondary action could have on third parties, protecting the latter was clearly a legitimate objective that Parliament had pursued when it introduced the ban. The Government added that it could be readily envisaged how secondary action could threaten the enjoyment of rights protected by the Convention, such as the right to make one's living.

82. The Court considers that the present case is distinguishable from the decision in *UNISON*, cited above. The latter concerned primary strike action, the complaint being that the applicant trade union had been prevented from taking industrial action in defence of its members' future interests, in the context of the impending privatisation of hospital services. During the domestic proceedings the Court of Appeal held that the impact

of such a strike on members of the public was irrelevant to the legal issues arising. This Court took the same view, and for this reason the aim of "protection of the rights and freedoms of others" was taken in the circumstances as referring just to the employer's rights. The ground for distinguishing the present case is the fact that it concerns secondary action. As the Government have argued, by its nature secondary action may well have much broader ramifications than primary action. It has the potential to impinge upon the rights of persons not party to the industrial dispute, to cause broad disruption within the economy and to affect the delivery of services to the public. Accordingly, the Court is satisfied that in banning secondary action, Parliament pursued the legitimate aim of protecting the rights and freedoms of others, not limited to the employer side in an industrial dispute.

(c) Necessity in a democratic society

83. It remains to be determined whether the statutory ban on secondary industrial action, in as much as it affected the ability of the applicant union to protect the interests of its Hydrex members, can be regarded as being "necessary in a democratic society". To be so considered, it must be shown that the interference complained of corresponded to a "pressing social need", that the reasons given by the national authorities to justify it were relevant and sufficient and that it was proportionate to the legitimate aim pursued.

84. The Court will first consider the applicant union's argument that the right to take strike action must be regarded as an essential element of trade-union freedom under Article 11, so that to restrict it would be to impair the very essence of freedom of association. It observes that it has already decided a number of cases in which restrictions on industrial action were found to have given rise to violations of Article 11 (see, for example, *Karaçay*, cited above; *Dilek and Others v. Turkey*, nos. 74611/01, 26876/02 and 27628/02, 17 July 2007; *Urcan and Others v. Turkey*, nos. 23018/04 and 10 others, 17 July 2008; and *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, 21 April 2009). The applicant union placed great emphasis on the last of these judgments, in which the term "indispensable corollary" was used in relation to the right to strike, linking it to the right to organise (see *Enerji Yapı-Yol Sen*, cited above, § 24). It should, however, be noted that the judgment was here adverting to the position adopted by the supervisory bodies of the ILO rather than evolving the interpretation of Article 11 by conferring a privileged status on the right to strike. More generally, what the above-mentioned cases illustrate is that strike action is clearly protected by Article 11. The Court does not therefore discern any need in the present case to determine whether the taking of industrial action should now be accorded the status of an essential element of the Article 11 guarantee.

85. What the circumstances of this case show is that the applicant union in fact exercised two of the elements of freedom of association that have been identified as essential, namely, the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members, and the right to engage in collective bargaining. The strike by its Hydrex members was part of that exercise, and while it did not achieve its aim, it was not in vain either since it led the company to revise its offer, which the applicant union then commended to its members. Although the Government criticised the applicant union for supporting the revised offer at the time and then reversing its stance in the present proceedings, the Court recognises that the union was bound to respect its members' negative vote. Yet the fact that the process of collective bargaining and industrial action, including strike action against the employer of the union members who were the subject of the dispute, did not lead to the outcome desired by the applicant union and its members does not mean that the exercise of their Article 11 rights was illusory. The right to collective bargaining has not been interpreted as including a "right" to a collective agreement (see, in this respect, *Demir and Baykara*, cited above, § 158, where the Court observed that the absence of any obligation on the authorities to actually enter into a collective agreement was not part of the case). Nor does the right to strike imply a right to prevail. As the Court has often stated, what the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (ibid., § 141, and, more recently *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, § 34, ECHR 2013). This the applicant union and its members involved in the dispute were largely able to do in the present case.

86. In previous trade-union cases, the Court has stated that regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. Since achieving a proper balance between the interests of labour and management involves sensitive social and political issues, the Contracting States must be afforded a margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members may be secured. In its most recent restatement of this point the Grand Chamber, referring to the high degree of divergence it observed between the domestic systems in this field, considered that the margin should be a wide one (see *Sindicatul "Păstorul cel Bun"*, cited above, § 133). The applicant union relied heavily on *Demir and Baykara* (cited above, § 119) in which the Court considered that the respondent State should be allowed only a limited margin. The Court would point out, however, that the passage in question appears in the part of the judgment examining a very far-reaching interference with freedom of association, one that intruded into its inner core, namely the dissolution of a trade union. It is not to be understood as narrowing decisively and

definitively the domestic authorities' margin of appreciation in relation to regulating, through normal democratic processes, the exercise of trade-union freedom within the social and economic framework of the country concerned. The breadth of the margin will still depend on the factors that the Court in its case-law has identified as relevant, including the nature and extent of the restriction on the trade-union right in issue, the object pursued by the contested restriction, and the competing rights and interests of other individuals in society who are liable to suffer as a result of the unrestricted exercise of that right. The degree of common ground between the member States of the Council of Europe in relation to the issue arising in the case may also be relevant, as may any international consensus reflected in the apposite international instruments (see *Demir and Baykara*, cited above, § 85).

87. If a legislative restriction strikes at the core of trade-union activity, a lesser margin of appreciation is to be recognised to the national legislature and more is required to justify the proportionality of the resultant interference, in the general interest, with the exercise of trade-union freedom. Conversely, if it is not the core but a secondary or accessory aspect of trade-union activity that is affected, the margin is wider and the interference is, by its nature, more likely to be proportionate as far as its consequences for the exercise of trade-union freedom are concerned.

88. As to the nature and extent of the interference suffered in the present case by the applicant union in the exercise of its trade-union freedom, the Court considers that it was not as invasive as the applicant union would have it. What the facts of the case reveal is that it held a strike, albeit on a limited scale and with limited results. It was its wish to escalate the strike, through the threatened or actual involvement of hundreds of its members at Jarvis, another, separate, company not at all involved in the trade dispute in question, that was frustrated. The Court has noted the applicant union's conviction that secondary action would have won the day. Inevitably, that can only be a matter of speculation – including as to the result of any ballot on the subject – since that course of action was clearly ruled out. It cannot be said that the effect of the ban on secondary action struck at the very substance of the applicant union's freedom of association. On this ground the case is to be distinguished from those referred to in paragraph 84 above, which all concerned restrictions on "primary" or direct industrial action by public-sector employees; and the margin of appreciation to be recognised to the national authorities is the wider one available in relation to the regulation, in the public interest, of the secondary aspects of trade-union activity.

89. As for the object of the interference in issue in the present case, the extracts from the debates in Parliament preceding the passage of the Employment Act 1980 make clear the legislative intention to strike a new balance in industrial relations, in the interests of the broader economy, by

curbing what was a very broad right to take secondary action. A decade later, the government of the day considered that even in its more limited form secondary action posed a threat to the economy and to inward investment in the country's economic activity. As a matter of policy it considered that restricting industrial action to primary strikes would achieve a more acceptable balance within the British economy. The Government have reiterated that position in the present proceedings. That assessment was sharply contested at the time by the opposition in Parliament, and is rejected by the applicant union as grounded in animus towards trade unions rather than any clear evidence of direct damage to the economy. Yet the subject matter in this case is certainly related to the social and economic strategy of the respondent State. In this regard the Court has usually allowed a wide margin of appreciation since, by virtue of their direct knowledge of their society and its needs, the national authorities, and in particular the democratically elected Parliaments, are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds and which legislative measures are best suited for the conditions in their country in order to implement the chosen social, economic or industrial policy (see, among many authorities, *Stummer v. Austria* [GC], no. 37452/02, § 89, ECHR 2011).

90. There are, it is true, factors going in another direction as regards the range of permissible choices available to the United Kingdom legislature.

91. The first of these is the extent to which it can be said that there is common ground among European States as regards secondary action. The comparative information adduced before the Court reveals a spectrum of national positions, ranging from a broadly permissive stance in countries such as Greece, Finland, Norway and Sweden, to those that do not recognise or permit it. The other States mentioned above (see paragraphs 38-41) are located between these two outer points. The Government played down the significance of the comparative perspective, emphasising the deep structural and cultural differences among European States in the field of industrial relations. The Court acknowledges that diversity, which it has recognised in other cases concerning the rights of trade unions (see, for example, *Sindicatul "Păstorul cel Bun"*, cited above, § 133, and *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, § 58, ECHR 2006-I). It is nevertheless clear that, with its outright ban on secondary action, the respondent State stands at one end of the comparative spectrum, being one of a small group of European States to adopt such a categorical stance on the matter. The varied comparative picture, and the position of the United Kingdom within it, do not in themselves, however, mean that the domestic authorities have overstepped their legitimate margin of appreciation in regulating this aspect of trade-union activity.

92. Secondly, a prominent feature of this case is the wealth of international-law material. The United Kingdom banned secondary action

more than two decades ago and throughout this time has been subject to critical comments by the ILO Committee of Experts and the ECSR. The applicant union prayed these materials in aid. The Government did not consider the particular criticisms made to be relevant to the factual situation denounced in the present case, or otherwise significant. The Court will now examine this point.

93. The Government disputed the relevance to this case of the two bodies' criticisms in light of the manner in which they were formulated, as they contemplated quite different potential situations to the one impugned by the applicant union (see paragraphs 33 and 37 above).

94. The Government did not regard the ECSR's assessment as an authoritative source of law, since, despite the independence and expertise of its members, the ECSR did not possess judicial or quasi-judicial status. Its role was to report to the Committee of Ministers. The Court observes that the ECSR's competence is stipulated in the Protocol amending the European Social Charter (also known as the "Turin Protocol", Council of Europe Treaty Series No. 142), namely to "assess from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter". It is true that this Protocol has not come into force as several States Parties to the Charter, including the United Kingdom, have not ratified it. Yet the interpretative value of the ECSR appears to be generally accepted by States and by the Committee of Ministers. It is certainly accepted by the Court, which has repeatedly had regard to the ECSR's interpretation of the Charter and its assessment of State compliance with its various provisions (see, for example, *Demir and Baykara*, cited above; see also *Tüm Haber Sen and Çınar v. Turkey*, no. 28602/95, § 39, ECHR 2006-II, a trade-union case in which the Court described the ECSR as a "particularly qualified" body in this domain).

95. As for the absence of any recommendation by the Committee of Ministers to the United Kingdom in relation to this issue, the Court notes first of all that the role of the Committee of Ministers under the Turin Protocol is to address recommendations to States on a selective basis, guided by social, economic and other policy considerations. Its role is not to endorse the conclusions of the ECSR. Secondly, the Court notes that the Governmental Committee of the European Social Charter has taken a first step in the direction of a Committee of Ministers' recommendation on the issue of secondary action, by adopting a warning to the United Kingdom that "urged the Government to take all adequate steps to bring the situation into conformity with the Charter" (see its Report concerning Conclusions XIX-3 (2010), T-SG(2012)1_final, at p. 59).

96. With respect to the ILO Committee of Experts, the Government made a similar observation – that body was not formally competent to give authoritative interpretations to ILO Conventions. It drew the Court's attention to an ongoing disagreement within the ILO precisely regarding the

legal status or even existence of a right to strike. The Committee of Experts had recently recognised the limits of its role, stating that "[its] opinions and recommendations are not binding within the ILO supervisory process and are not binding outside the ILO unless an international instrument expressly establishes them as such or the Supreme Court of a country so decides of its own volition" (from the foreword to "Collective Bargaining in the Public Service: A way forward", a report of the ILO Committee of Experts to the 102nd session of the International Labour Conference, 2013). This text goes on to describe the Committee of Expert's interpretations as "soft law". The foreword concludes (§ 8):

> "As regards the interpretation of ILO Conventions and the role of the International Court of Justice in this area, the Committee has pointed out since 1990 that its terms of reference do not enable it to give definitive interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution of the ILO. It has stated, nevertheless, that in order to carry out its function of determining whether the requirements of Conventions are being respected, the Committee has to consider the content and meaning of the provisions of Conventions, to determine their legal scope, and where appropriate to express its views on these matters. The Committee has consequently considered that, in so far as its views are not contradicted by the International Court of Justice, they should be considered as valid and generally recognized. The Committee considers the acceptance of these considerations to be indispensable to maintaining the principle of legality and, consequently, to the certainty of law required for the proper functioning of the International Labour Organization."

97. The Court does not consider that this clarification requires it to reconsider this body's role as a point of reference and guidance for the interpretation of certain provisions of the Convention (see, more generally, *Demir and Baykara*, cited above, §§ 65-86). While the Government referred to disagreements voiced at the 101st International Labour Conference, 2012, it appears from the records of that meeting that the disagreement originated with and was confined to the employer group (Provisional Record of the 101st Session of the International Labour Conference, No. 19 (Rev.), §§ 82-90). The governments who took the floor during that discussion were reported as saying that the right to strike was "well established and widely accepted as a fundamental right". The representative of the government of Norway added that her country fully accepted the Committee of Experts' interpretation that the right to strike was protected under Convention No. 87. In any event, the respondent Government accepted in the present proceedings that the right afforded under Article 11 to join a trade union normally implied the ability to strike (see paragraph 62 above).

98. The foregoing analysis of the interpretative opinions emitted by the competent bodies set up under the most relevant international instruments mirrors the conclusion reached on the comparative material before the Court, to wit that with its outright ban on secondary industrial action, the respondent State finds itself at the most restrictive end of a spectrum of

national regulatory approaches on this point and is out of line with a discernible international trend calling for a less restrictive approach. The significance that such a conclusion may have for the Court's assessment in a given case was explained in *Demir and Baykara* (cited above, § 85) in the following terms:

> "... The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases."

The Grand Chamber's statement reflects the distinct character of the Court's review compared with that of the supervisory procedures of the ILO and the European Social Charter. The specialised international monitoring bodies operating under those procedures have a different standpoint, shown in the more general terms used to analyse the ban on secondary action (see paragraphs 33 and 37 above). In contrast, it is not the Court's task to review the relevant domestic law in the abstract, but to determine whether the manner in which it actually affected the applicant infringed the latter's rights under Article 11 of the Convention (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 116, ECHR 2012; see also *Kart v. Turkey* [GC], no. 8917/05, §§ 85-87, ECHR 2009). The applicant union as well as the third parties dwelt on the possible effect of the ban in various hypothetical scenarios, which could go as far as to exclude any form of industrial action at all if the workers directly concerned were not in a position to take primary action, thereby, unlike in the present case, striking at the very substance of trade-union freedom. They also considered that the ban could make it easy for employers to exploit the law to their advantage through resort to various legal stratagems, such as delocalising work centres, outsourcing work to other companies and adopting complex corporate structures in order to transfer work to separate legal entities or to hive off companies. In short, trade unions could find themselves severely hampered in the performance of their legitimate, normal activities in protecting their members' interests. These alleged, far-reaching negative effects of the statutory ban do not, however, arise in the situation at Hydrex. The Court's review is bounded by the facts submitted for examination in the case. This being so, the Court considers that the negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter are not of such persuasive weight for determining whether the operation of the statutory ban on secondary strikes in circumstances such as those complained of in the present case remained within the range of permissible options open to the national authorities under Article 11 of the Convention.

99. The domestic authorities' power of appreciation is not unlimited, however, but goes hand in hand with European supervision, it being the Court's task to give a final ruling on whether a particular restriction is reconcilable with freedom of association as protected by Article 11 (see *Vörður Ólafsson v. Iceland*, no. 20161/06, § 76, ECHR 2010). The

Government have argued that the "pressing social need" for maintaining the statutory ban on secondary strikes is to shield the domestic economy from the disruptive effects of such industrial action, which, if permitted, would pose a risk to the country's economic recovery. In the sphere of social and economic policy, which must be taken to include a country's industrial-relations policy, the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010). Moreover, the Court has recognised the "special weight" to be accorded to the role of the domestic policy-maker in matters of general policy on which opinions within a democratic society may reasonably differ widely (see, in the context of Article 10 of the Convention, *MGN Limited v. the United Kingdom*, no. 39401/04, § 200, 18 January 2011, referring in turn to *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII, where the Court adverted to the "direct democratic legitimation" that the legislature enjoys). The ban on secondary action has remained intact for over twenty years, notwithstanding two changes of government during that time. This denotes a democratic consensus in support of it, and an acceptance of the reasons for it, which span a broad spectrum of political opinion in the United Kingdom. These considerations lead the Court to conclude that in their assessment of how the broader public interest is best served in their country in the often charged political, social and economic context of industrial relations, the domestic legislative authorities relied on reasons that were both relevant and sufficient for the purposes of Article 11.

100. The Court must also examine whether or not the contested restriction offended the principle of proportionality. The applicant union argued that it did, given its absolute character, which completely excluded any balancing of the competing rights and interests at stake and prohibited any differentiation between situations. The Government defended the legislature's decision to eschew case-by-case consideration in favour of a uniform rule, and contended that any less restrictive approach would be impracticable and ineffective. In their submission, the inevitable variations in the potentially numerous individual cases such as the present one are not such as to disturb the overall balance struck by Parliament.

101. The Court observes that the general character of a law justifying an interference is not inherently offensive to the principle of proportionality. As it has recently stated, a State may, consistently with the Convention, adopt general legislative measures applying to predefined situations without providing for individualised assessments with regard to the individual, necessarily differing and perhaps complex circumstances of each single case governed by the legislation (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 107, ECHR 2013, with many further references concerning different provisions of the Convention and Protocol No. 1). That does not mean the specific facts of the individual case are

without significance for the Court's analysis of proportionality. Indeed, they evidence the impact in practice of the general measure and are thus material to its proportionality (ibid., § 108). As already stated, the interference with the applicant union's freedom of association in the set of facts at Hydrex relied on by it cannot objectively be regarded as especially far reaching.

102. The risks attendant upon any relaxation of the ban constitute a relevant consideration, which is primarily for the State to assess (ibid., § 108). In this respect, the applicant union has argued that it would have limited its action to a secondary strike at Jarvis, with no further spill-over effects. That can only be a matter of speculation however. As the materials in the case file show, the very reason that caused Parliament to curb the broad scope for secondary action was its capacity, pre-1980, to spread far and fast beyond the original industrial dispute. It is to that situation that, according to the applicant union, the United Kingdom should return if it is to conform to the requirements of Article 11.

103. As has been recognised in the case-law, it is legitimate for the authorities to be guided by considerations of feasibility, as well as of the practical difficulties – which, for some legislative schemes, may well be large-scale – to which an individuated approach could give rise, such as uncertainty, endless litigation, disproportionate public expenditure to the detriment of the taxpayer and possibly arbitrariness (ibid.). In this regard it is relevant to note that for a period of ten years, 1980-90, the United Kingdom found it possible to operate with a lighter restriction on secondary action (see paragraphs 23-24 above). The Government have not argued that this legislative regime was attended by the difficulties referred to above, or that this was why the ban was introduced. The applicant union did not comment in detail on the legal position during that period. It took the view that the question of its compatibility with the Convention was "of entirely academic interest", though added that were the point relevant it would argue such a restriction would not be acceptable. The Court observes that, although the legislative history of the United Kingdom points to the existence of conceivable alternatives to the ban, that is not determinative of the matter. For the question is not whether less restrictive rules should have been adopted or whether the State can establish that, without the prohibition, the legitimate aim would not be achieved. It is rather whether, in adopting the general measure it did, the legislature acted within the margin of appreciation afforded to it (see *Animal Defenders*, cited above, § 110) – which, for the reasons developed above, the Court has found to be a broad one – and whether, overall, a fair balance was struck. Although the applicant union has adduced cogent arguments of trade-union solidarity and efficacy, these have not persuaded the Court that the United Kingdom Parliament lacked sufficient policy and factual reasons to consider the impugned ban on secondary industrial action as being "necessary in a democratic society".

104. The foregoing considerations lead the Court to conclude that the facts of the specific situation challenged in the present case do not disclose an unjustified interference with the applicant union's right to freedom of association, the essential elements of which it was able to exercise, in representing its members, in negotiating with the employer on behalf of its members who were in dispute with the employer and in organising a strike of those members at their place of work (see paragraphs 15-16 above). In this legislative policy area of recognised sensitivity, the respondent State enjoys a margin of appreciation broad enough to encompass the existing statutory ban on secondary action, there being no basis in the circumstances of this case to consider the operation of that ban in relation to the impugned facts at Hydrex as entailing a disproportionate restriction on the applicant union's right under Article 11.

105. Accordingly, no violation of Article 11 of the Convention can be held to have occurred on the facts of the present case.

106. In closing, the Court would stress that its jurisdiction is limited to the Convention. It has no competence to assess the respondent State's compliance with the relevant standards of the ILO or the European Social Charter, the latter containing a more specific and exacting norm regarding industrial action. Nor should the conclusion reached in this case be understood as calling into question the analysis effected on the basis of those standards and their purposes by the ILO Committee of Experts and by the ECSR.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits the Government's preliminary objection and *declares* the complaint concerning the ban on secondary action admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 11 of the Convention.

Done in English, and notified in writing on 8 April 2014 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Ineta Ziemele
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Ziemele, Hirvelä and Bianku;

(b) concurring opinion of Judge Wojtyczek.

I.Z.
F.A.

JOINT CONCURRING OPINION OF JUDGES ZIEMELE, HIRVELÄ AND BIANKU

1. We voted with the majority in this case and we also agree with the reasoning in the judgment. However, it should be pointed out that the case raises a very delicate and complex issue as regards the interpretation of the European Convention on Human Rights today. First of all, the Convention was conceived as a treaty on civil and political rights. However, the division between the so-called three generations of human rights has been rightly abandoned since then (see the 1993 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights). At the same time, the States Parties to the Convention have not given the Court the mandate to address the issues concerning their economic and social policies. These are always very difficult. Therefore, the Court has in fact accepted that the States have a wide margin of appreciation for decisions in cases touching upon economic and social policies (see, for example, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, §§ 80-82, *Reports of Judgments and Decisions* 1997-VII).

2. While, in view of Article 31 of the Vienna Convention on the Law of Treaties and the Court's case-law, especially its findings in *Demir and Baykara v. Turkey* ([GC], no. 34503/97, ECHR 2008), the Court does not have a choice but to conclude that secondary strikes form part of Article 11 of the Convention, the Court should be reluctant to render a binding judgment which would require the modification of an important social and economic policy principle with wide implications for the country's economy. At this juncture we should say, however, that we are not impressed with the argument that, merely because Parliament has adopted a particular general measure, the Court may not overrule it, as it were. The Court has to adjudicate upon the individual facts and those facts may stem from a general measure. The Court may well conclude that the measure is contrary to the Convention in view of its effects on the facts of the case. This is true in particular where such measures affect fundamental civil and political rights, such as freedom of expression, the supervision over the protection of these rights having been the very purpose of the Court's creation (see the dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano in *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013). It is in this respect that we see the case at hand as different, with the margin of appreciation clearly being wider than in freedom of expression cases. For us, the solution that the Court adopts is not so much about the general measure as such, it is about the character of the right concerned or an aspect thereof. The assessment of the general measure depends on the character of the right in issue. Furthermore, it is about the prejudice sustained by the applicant union by

virtue of the application of the general measure. The right to strike is not absolute. There are already a number of limitations applicable in view of the general public interest. In the case at hand, we are even further from the core issue in that secondary or sympathy strikes are not necessarily or directly relevant to the rights or interests of those engaged in such strikes.

3. Given the nature of such strikes and the implications for economic-policy considerations, the issue is best dealt with as part of the ongoing dialogue between the specialised monitoring bodies in the field of social and labour rights. That kind of softer process allows the respondent State to continue examining its economic options. A judgment of the European Court of Human Rights finding a violation would have the effect of putting an abrupt end to such a process. However, it should be pointed out that if the very essence of the applicant union's right to strike were affected, there would be no doubt as to what the Court's decision would be.

CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I fully agree with the view of the majority that in the present case the respondent State has not violated Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). However, I disagree with the methodology of the interpretation of the Convention applied by the majority. In my view, it would have been more correct to say that Article 11 is not applicable in this case and that therefore there has been no violation of this provision.

2. The majority rightly invokes the Vienna Convention on the Law of Treaties ("the Vienna Convention"), which codifies the customary rules of treaty interpretation. It is important to remember that the Vienna Convention applies only to treaties concluded by States after its entry into force with regard to such States (Article 4). It is true that the Vienna Convention does not apply as such to the Convention. However, the customary rules as expressed in the Vienna Convention are applicable to it.

The point of departure for the interpretation in international law is the wording of the provision to be interpreted. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty. The interpreter also has to take into account the "internal" context of the treaty consisting of (a) the entire text (including the preamble and the annexes); (b) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and (c) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. The ordinary meaning of the terms used in the treaty has to be established in the light of its object and purpose. The interpretation should further take into account the "external" context consisting of (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the parties. Finally, if necessary, it may be useful to have regard to supplementary means of interpretation, including the preparatory work on the treaty and the circumstances of its conclusion.

The exact meaning of Article 31 § 3 (c) of the Vienna Convention referring to "any relevant rules of international law applicable in the relations between the parties" is the subject of scholarly disputes. It has to be noted in this context that one of the aims of this provision is to ensure some degree of coherence within international law. Some scholars refer to the rule enshrined in this provision as the principle of systemic integration (see, for instance, M. Koskenniemi, "Fragmentation of international law: difficulties arising from the diversification and expansion of international

law", Report of the Study Group of the International Law Commission, United Nations, A/CN.4/L.482, pp. 173-205, and C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", *International and Comparative Law Quarterly*, vol. 54, 2005, pp. 279-320).

The reference to "external" international law may be particularly useful in two situations. First, if the exact meaning of a term or phrase is not clear, resorting to other pertinent rules of international law may be a useful tool for clarifying the meaning of the provision. Other relevant treaties may serve as an international legal dictionary (compare C. McLachlan, op. cit., p. 315). In such a situation, one may legitimately take into account treaties binding only some of the parties to the treaty to be interpreted, as guidelines stemming from other treaties are in any event not binding for the interpreter.

There is also a second situation in which it is necessary to take into account other relevant rules of international law, namely where the treaty to be interpreted conflicts with other rules of international law. In such a situation the interpreter should try to find an interpretation which makes it possible to avoid or, at least, to minimise the conflict of rules.

Rules binding only some of the parties may be taken into account but they cannot be considered as a decisive argument for the interpretation of a treaty provision. On the contrary, a situation where a rule of international law is applicable to some of the States Parties to the Convention is an important argument, albeit not decisive, against aligning the interpretation of the Convention with that rule.

Article 31 § 3 (c) of the Vienna Convention sets up a rule of *interpretation*. It is mainly a tool for clarifying the meaning of ambiguous or obscure terms and phrases and not for extending the scope of treaty obligations irrespective of its wording. Article 31 § 3 (c) of the Vienna Convention may not be understood as an entitlement to align the meaning of a treaty with the content of other rules of international law, especially if those rules are not binding on all the parties to the treaty to be interpreted. In particular, this provision should not justify referring to rules that bind only some of the States Parties to the Convention in order to align its content with those rules, without duly taking into account the wording of the provisions under interpretation.

3. It should be stressed that the Convention establishes a minimum standard for a selective catalogue of rights. In this context, it is interesting to note the content of Article 53 of the Convention:

Safeguard for existing human rights

> "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

The Convention clearly envisages in this provision a situation in which different instruments may provide a higher level of protection than the Convention itself. Such a situation cannot be seen as an example of fragmentation, let alone of incoherence, of international law. The nature of the Convention as a minimum standard for a limited catalogue of rights limits the risk of contradictions with other treaties. A situation in which other treaties guarantee broader rights or offer a higher standard of protection of the same rights cannot be seen as a conflict of treaties. Nor does it change *per se* the scope of the rights protected under the Convention. While there is no doubt that the Convention has to be interpreted in the context of other rules of international law, the scope of its protection does not automatically align on the highest standard set by other rules of international law binding the Parties to the Convention.

It has to be stressed that the mandate of the European Court of Human Rights has been defined in a restrictive way by Article 19 of the Convention. The role of the Court is to ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention and the Protocols thereto. Therefore the Court remains the guardian of a limited catalogue of rights as protected under the minimum standard set forth in the Convention and the additional Protocols.

It is also necessary to bear in mind that human rights are interrelated in different ways. Quite often different human rights may collide in specific circumstances. In such situations, heightening the standard of protection of one right may lead to lowering the standard of protection of other fundamental human rights.

4. The majority cites the judgment in *Demir and Baykara v. Turkey* ([GC], no. 34503/97, ECHR 2008). In this judgment the Court stated, *inter alia*, as follows:

> "78. The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.
>
> ...
>
> 86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see, *mutatis mutandis*, *Marckx* [*v. Belgium*, 13 June 1979], § 41[, Series A no. 31])."

These passages triggered criticism from a significant number of legal scholars who questioned the methodology of interpretation applied in them. I share this criticism. Unlike consensus between the High Contracting

Parties, a "continuous evolution in the norms and principles applied in international law" is not *per se* an argument for an extensive interpretation of the Convention. Furthermore, in my view the questions whether a specific treaty has been ratified by the respondent State and whether it binds all the High Contracting Parties to the Convention are of the utmost relevance for the interpretation of the latter. The fact that a treaty rule is not binding on at least one Contracting State is an argument against any kind of teleological reinterpretation of the Convention in accordance with this rule. In my view, it is illegitimate to transform treaty rules that bind only some members of the Council of Europe into an element of the Convention, unless unequivocal rules of treaty interpretation require otherwise. In any case, invoking arguments such as a "continuous evolution in the norms and principles applied in international law" or a "strong international trend" usually discloses the fact that there are no strong arguments based on international law to support the chosen interpretation. It is an unequivocal warning sign of judicial activism.

I regret that in the present case the majority decided to follow the flawed approach adopted in *Demir and Baykara*, cited above, consisting in aligning the Convention with some external rules of international law applicable to some of the Parties to the Convention, without even trying to analyse the wording of Article 11 of the Convention.

5. As pointed out above, the interpretation of a treaty begins with establishing the ordinary meaning of the terms and phrases used in the provisions to be interpreted. Article 11 § 1 of the Convention states that "[e]veryone 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." The wording of the provision does not suggest that it encompasses secondary industrial action (or sympathy strikes). Even assuming that there is a general agreement that the essence of the freedom to form and to join trade unions for the protection of one's interests encompasses the right to strike, which itself may be legitimately disputed, it does not follow from this assumption that sympathy strikes are an element of trade-union freedom within the meaning of the Convention.

6. In the present case, the majority refers to different types of international legal materials (Conventions of the International Labour Organization (ILO), the European Social Charter and the Charter of Fundamental Rights of the European Union) labelled as "relevant international law". When a judgment of an international court refers to "relevant international law", the reader may legitimately expect an explanation as to why and in what respect the documents referred to in it are relevant for the resolution of the instant case. I regret that the majority has not found necessary to explain clearly the relevance of the international law referred to for the interpretation of Article 11 of the Convention. In my view, its relevance is limited.

I note that the Freedom of Association and Protection of the Right to Organise Convention (No. 87) has been ratified by forty-four European States which are Parties to the Convention. Three States (Andorra, Liechtenstein and Monaco) did not wish to be Parties to Convention No. 87. Although it does not expressly guarantee the right to strike, different bodies set up to monitor the application of the ILO Conventions have consistently held that trade-union freedom encompasses the right to strike.

The majority quotes various documents issued by the bodies set up to monitor the application of the ILO Conventions (the Committee of Experts and the Committee on Freedom of Association). It has to be stressed that those documents do not state unequivocally that a general ban on secondary industrial action constitutes a violation of Convention No. 87. The Committee of Experts says only that "a general prohibition of sympathy strikes **could lead** to abuse" (emphasis added), pointing to a potential problem. The nature and scope of State obligations pertaining to sympathy strikes have not been clearly defined.

One of the most important instruments invoked by the majority is the European Social Charter. Article 6 of this treaty stipulates as follows:

> "With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:
>
> ...
>
> and recognise:
>
> 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

The European Social Charter has a specific character, as most of the undertakings are optional. In particular, each of the Contracting Parties to the Charter undertakes to consider itself bound by at least five of the following Articles of Part II of the Charter: Articles 1, 5, 6, 12, 13, 16 and 19. The States may choose not to be bound by Article 6 § 4 of the Charter. In fact, ten European States have chosen not to be bound by this provision. The standard set forth in it is not a universally recognised standard among European States. On the contrary, ten States do not wish to guarantee the right to strike under the European Social Charter.

I note further that the majority quotes the Charter of Fundamental Rights of the European Union. Article 51 of the Charter defines its scope of application in the following way:

> "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

Legislation on the right to strike remains in principle within the scope of the powers of the European Union member States (see, in particular, Article 153 § 5 of the Treaty on the Functioning of the European Union). However, the fundamental freedoms on which the European Union is based may interfere and collide with the right to strike and therefore, according to the case-law of the Court of Justice of the European Union, may justify restrictions on the right to strike. Furthermore, under this case-law, trade unions may be held liable for strikes which interfere with the fundamental freedoms protected by European Union law (see, in particular, the judgment of the Court of Justice of the European Union of 11 December 2007 in Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*; and its judgment of 18 December 2007 in Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*). In any event, while European Union law should not violate the right to strike in so far as it is protected under the Charter, this instrument does not entitle the European Union to prevent its member States from imposing restrictions on the right to strike.

7. On the other hand, it is important to note that the right to strike is enshrined in the Covenant on Economic, Social and Political Rights which has been ratified by forty-six States Parties to the Convention. Article 8 § 1 (d) of this treaty guarantees "[t]he right to strike provided that it is exercised in conformity with the laws of the particular country". The wording of this provision stresses the wide margin of appreciation left to national legislatures when regulating the right to strike.

8. The interpretation of treaty provisions pertaining to social rights has to take into account the specific nature of those rights. States have devised specific mechanisms for monitoring the implementation of social rights without having to entrust the adjudication of disputes concerning social rights to international courts. States also make use of optional instruments which leave them some choice as to their undertakings, such as the European Social Charter. Some States have clearly expressed their reluctance to undertake obligations in the field of social rights. An extensive interpretation of existing treaties pertaining to social rights may have a chilling effect on those States when they consider entering into new treaties in this field.

The right to strike has further peculiarities. The interpretation of the scope of freedom of association under Convention No. 87 is not uncontroversial, as employers' organisations have contested the idea that the freedom to form trade unions encompasses the right to strike. It is important

to bear in mind in this context that the right to strike may encroach on the human rights of other persons and have an impact on the national economy. Therefore, the interpretation of international treaty provisions pertaining to the right to strike should take into account the various conflicting rights and the legitimate private and public interests at stake. Similarly, national legislation implementing the right to strike has to achieve a proper balance between different rights and interests. Broadening the scope of protection of the right to strike may entail the narrowing of the protection of other fundamental human rights.

9. The majority in the present case states that the Court should not adopt an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law. I am not persuaded by this argument. Firstly, the scope of trade-union freedom may differ from one treaty to another even if the wording of the relevant provisions is similar. Secondly, as pointed out above, the nature and scope of State obligations pertaining to sympathy strikes have not been clearly defined in international law. Thirdly, the different treaty rules protecting the right to strike have not been accepted by all the forty-seven High Contracting Parties to the Convention.

The majority also invokes the fact that many European States have long accepted secondary industrial action as a lawful form of trade-union action. For my part, I note that some European States take the opposite view. Not only is there no European consensus on this issue but, moreover, one can observe a strong resistance to recognising sympathy strikes. In any event, the fact that a majority of States adopts a higher standard of protection of a right is not a sufficient argument for imposing this standard on a minority of States which rejects it.

10. To conclude, in my view, the analysis of international law does not support the opinion that Article 11 of the Convention should be interpreted in such a way as to encompass the right to sympathy strikes. To hold otherwise exposes the Court to the risk of being legitimately criticised for judicial activism.