The freedom of association and the extension of collective agreements

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1. Introduction

Usually, a collective agreement legally binds only the signatory employers' and workers' associations, and their members. However, in almost all countries employers bound by a collective agreement have to apply similar terms to non-unionised workers[1]. The extension of the coverage of collective agreements to non-members can be achieved in two ways. The first way is to extend the bargaining coverage to non-organised workers in organised enterprises. In order to prevent companies from circumventing the application of the collective agreement by hiring non-organised workers, the majority of European countries have legal provisions extending the coverage. Therefore, enterprises bound by collective agreements are obliged to apply the same labour conditions to their non-organised workers[2]. Secondly, the coverage of the agreement can be extended to unorganised enterprises. Often a declaration of general applicability is used, through which the state, by a legislative act, extends the scope of the collective agreement to companies not affiliated to the contracting party[3].

The possibility to extent the content of the collective agreement to employers who are not members of any of the signatory organisations, must be considered as an element of the right to collective bargaining, which in itself is an aspect of the right to freedom of association. However, this right has been challenged over the years, mainly by invoking the right to freedom of association. Increasingly, this right is judged to comprise a negative aspect which aims to protect individuals against pressure to become a member of an association. Since its first recognition by the European Court of Human Rights, the negative freedom of association has been invoked several times. First, in *Young, James and Webster*, it has been used to oppose closed shops. Later, in *Gustafsson*, the pressure exerted by a trade union on an employer to become member of an employers' organisation, or to enter into the collective agreement, was questioned. As the attempt failed, similar complaints were introduced before the Court of Justice of the European Union on other legal grounds against compulsory affiliation to sectoral pension and health care schemes. More recently, in *Geotech Kancev*, the previous efforts cumulated in the claim of an

[1] S HAYTER and J VISSER, 'The application and extension of collective agreements: Enhancing the inclusiveness of labour protection' in S HAYTER and J VISSER, *Collective Agreements: Extending Labour Protection* (Geneva, International Labour Organisation, 2018) 2.

[2] K OESINGMANN, 'The Extension of Collective Agreements in Europe' (2016) 2 CESifo DICE Report 59-60.

[3] T SCHULTEN, 'The Meaning of extension for the stability of collective bargaining in Europe' (2016) 4 *ETUI Policy Brief, European Economic, Employment and Social Policy* 2.

employer against the application of a collective agreement which involved compulsory affiliation to such a scheme and was declared generally binding.

In *Geotech Kancev*, the European Court of Human Rights held unanimously that the obligation to participate in a Social Welfare Fund, jointly set up by the employers' and workers' associations in the building industry did not violate the negative, nor the positive right to freedom of association of a non-organised employer. No violation of the applicant company's right to peaceful enjoyment of its possessions under Article 1 of the First Additional Protocol was established[4].

This paper is dedicated to the analysis of *Geotech Kancev*. In the paper the facts, the similarities with other cases, the decision of the Court and its significance will be discussed. The focus is on the right to freedom of association, the right to peaceful enjoyment of his possessions will not be addressed. However, consideration will also be given to the case law of the Court of Justice of the European Union, which does not relate to the negative right to freedom of association, but which entails similar challenges of compulsory affiliation to pension or health care schemes, albeit on other legal grounds.

2. The facts of the case

In the building industry in Germany, a collective agreement was concluded between the employers' and workers' associations. The agreement which contained regulations related to the social welfare of employees working in the sector, was declared generally binding by the Federal Ministry for Labour and Social Affairs. Pursuant to Section 5 § 1 of the Law on Collective Agreements (Tarifvertragsgesetz), it was binding on all employers in the building industry. As a consequence, all employers in the building industry were obliged to contribute to the Social Welfare Fund an additional sum amounting to 19.8% of the gross wages paid to their employees. The applicant company was not a member of an employers' association that was party to the relevant collective agreements. It was thus not directly bound by the collective agreements by virtue of such membership. Since the company refused to comply with the obligation, it was ordered to pay 63,625.58 euros in welfare fund arrears by the German Labour Courts.

Its appeals rejected, the company went to Strasbourg where it alleged that the obligation to contribute to the Social Welfare Fund violated its right to freedom of association under Article 11 of the Convention as well as its right to peaceful enjoyment of its possessions under Article 1 of Protocol No. 1. Inspired by the Court's case law in *Evaldsson* and *Olafsson* the applicant company argued that the obligation to contribute to the Social Welfare Fund exerted a significant pressure on it to become a member of one of the employers' associations and deprived it of the necessary means to found its own employers' association. In addition, the applicant company submitted

[4] ECtHR, 2 June 2016, App No 23646/09, *Geotech Kancev GMBH v Germany*.

that the statements of accounts published by the Social Welfare Fund lacked transparency and did not provide sufficient information on the use of the employers' contributions.

3. Compulsory affiliation to sectoral funds

The applicant company was certainly not the first employer to call into question the obligation to contribute to a sectoral fund. There is a tendency for employers to challenge mandatory sectoral pension schemes through various legal means. Several examples can be found in the case law of the Court of Justice of the European Union. Many of these cases concern compulsory contributions to Dutch and French sectoral funds, which legitimacy was disputed on the grounds of competition law. As soon as the Court confirmed the conformity of the collective agreements with competition law, the reasoning shifted to the fundamental freedoms of establishment and services.

a) Not contrary to competition law

In the Netherlands, supplementary pensions are managed by funds ('Stichtingen') which are established by collective agreement. According to Dutch law, the Minister of Social Affairs and Employment may, at the request of the parties to the agreement make affiliation to the sectoral pension fund compulsory for every undertaking within the sector. In the 1990s, some employers, preferring to conclude arrangements with certain insurance companies, alleged that such compulsory affiliation was contrary to EC competition rules[5]. In three cases of 21 September 1999 the compatibility with Community law of a compulsory affiliation to a sectoral pension scheme was discussed[6]. In the end, an immunity from EC competition rules was granted to collective agreements. The Court of Justice considered collective agreements concluded in pursuit of social policy objectives, by virtue of their nature and purpose, not to fall within the scope of EC competition rules. As a result, public authorities can make affiliation to a sectoral pension fund compulsory at the request of the organisations representing employers and employees. The judgment was undoubtedly inspired by an intention to protect both the right to social security benefits and the right to collective bargaining and action[7].

[5] At the time Articles 81 EC and 82 EC, currently Articles 101 TFEU and 102 TFEU.

[6] ECJ, 21 September 1999, Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens' Handelonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*; Case C-219/97, *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*; Case C-67/96, *Albany International BV v stichting Bedrijfspensioenfonds Textielindustrie*.

[7] K LENAERTS and P FOUBERT, 'Social Rights in the Case-Law and the European Court of Justice' (2001) 28 (1) *Legal Issues of Economic Integration* 277.

One year later, the exemption from EC competition law was confirmed with respect to a supplementary pension scheme not set up in the context of a collective agreement[8]. The same immunity was granted to supplementary health care insurance, set up under a collective agreement. In *van der Woude*, non-unionised employee contested its affiliated to a supplementary insurance scheme set up under a collective agreement which by order of the Minister had been declared generally applicable for his sector and employer[9]. The collective agreement designated a particular fund, set up by the parties to the agreement. The fund, however, subcontracted the insurance business to an insurance company. The Court considered the fact that the insurance business was subcontracted not to prevent the exception from the prohibition in article 85 TEC. '*To accept such a limitation would constitute an unwarranted restriction on the freedom of both sides of industry who, when they enter into an agreement concerning a particular aspect of working conditions, must also be able to agree to the creation of a separate body for the purposes of implementing the agreement and this body must be able to have recourse to another insurer*' (§ 26).

In the French case *AG2R*, the principles of *Albany* and *van der Woude* were reaffirmed[10]. In *AG2R*, the company Beaudout Père et fils refused to join the supplementary healthcare costs insurance scheme, which management was by collective agreement entrusted to AG2R, as it was affiliated to a scheme by an insurance company. Unlike the pension fund at issue in *Albany*, affiliation to which was compulsory subject to exemptions, the scheme for supplementary insurance to cover healthcare costs in *AG2R* made no provision for exemption from affiliation. The Court considered the principles in *Albany* not called into question by the fact that affiliation to such an agreement is compulsory for all undertakings within the occupational sector concerned and that there is no provision for exemption from affiliation. Moreover, in *van der Woude*, already a supplementary health care scheme without exemptions was assessed.

Although AG2R was regarded as an undertaking engaged in an economic activity for the purposes of Article 102 TFEU, an exclusive right could be conferred on AG2R, since the absence of an exclusive right could have the result of making it impossible to accomplish its tasks of general economic interest which have been assigned to it. Accordingly, Articles 102 TFEU and 106 TFEU did not preclude public authorities from granting a provident society an exclusive right to manage that scheme, without any possibility for undertakings within the occupational sector concerned to be exempted from affiliation to that scheme.

[8] ECJ, 12 September 2000, Joined Cases C-180/98 to C-184/98, *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten*.
[9] ECJ, 21 September 2000, Case C-222/98, *Hendrik van der Woude v Stichting Beatrixoord*.
[10] ECJEU, 3 March 2011, C-437/09, *AG2R Prévoyance v Beaudout Père et Fils SARL.*

b) Obligation of transparency

The first case involving the freedom of establishment and freedom to provide services in the context of the award of pension insurance contacts, was the case *Commission v Germany*, in which the Commission started a procedure against Germany for failure to fulfil its obligations[11]. The Commission maintained that local authorities and local authority undertakings, on the base of collective agreements, had been awarding pension insurance contracts to bodies and undertakings without a call for tenders at European Union level. The German government invoked the *Albany* exception against the alleged infringement of the Directive 92/50[12] and the principles of freedom of establishment and freedom to provide services.

The Court recognised the right to collective bargaining as a fundamental right[13], but this fact and the social objective of the practice could not, in themselves, automatically excluded local authority employers from the obligation to comply with the public procurement requirements. Like in the *Viking* and *Laval* cases[14], the exercise of the fundamental right to bargain collectively must be reconciled with the requirements stemming from the freedoms protected by the FTEU and be in accordance with the principle of proportionality.

Although in *Albany* and *van der Woude*, the Court has held that a supplementary pension scheme managed by a pension fund to which affiliation is compulsory does not fall within Article 101(1) TFEU, such reasoning does not in any way prejudge for public-sector employers the separate question of compliance with the EU rules relating to application of freedom of establishment and the freedom to provide services in the field of public procurement. The Court concluded that compliance with the directives concerning public service contracts did not prove irreconcilable with attainment of the social objective pursued by the signatories of the agreements in the exercise of their right to bargain collectively.

Commission v Germany made it possible for applicants to dispute, by virtue of the freedom of establishment and the freedom to provide services, collective agreements which enjoyed

[11] ECJEU, 15 July 2010, C-271/08, *European Commission v Federal Republic of Germany.*

[12] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

[13] Reference is made to Article 6 of the European Social Charter, signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996, Article 12 of the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, and Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter').

[14] ECJEU, 11 December 2007, C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union, v Viking Line ABP, OÜ Viking Line Eesti*; 18 December 2007, C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*.

immunity from EU competition law. In *UNIS*[15], the applicants, UNIS and Beaudout Père et Fils, were seeking annulment of two ministerial orders which extend to all employers and employees in their sectors collective agreements appointing a provident society as the single managing body of one or more supplementary schemes for insurance or for reimbursement of healthcare costs. In the procedure before the Conseil d'Etat the question was raised whether compliance with the obligation of transparency, accepted by the Court in *Sporting Exchange*[16], is also a prior condition for the extension to all undertakings within a sector, of a collective agreement under which a single insurer is entrusted with the management of a compulsory supplementary social insurance scheme. In *Sporting Exchange* the Court decide that service concessions, although not governed by any directive on public procurement, still have to comply with the fundamental rules of the EC Treaty, such as the obligation of transparency, resulting from Article 49 EC[17].

The Court considered that the extension decision was not exempt, because of its subject-matter, from the requirements of transparency. In principle, a Member State may create an exclusive right for an economic operator by rendering binding for all employers and employers in a sector a collective agreement under which that operator is entrusted with the management of a compulsory supplementary social insurance scheme established for the employees in that sector. However, the obligation of transparency precludes the extension by a Member State, to all employers and employees within a sector, of such a collective agreement when the national rules do not provide for publicity sufficient to enable the competent public authority to take full account of information which has been submitted concerning the existence of a more favourable offer.

The obligation of transparency might appear to be only an administrative trifle, but, in fact, it is a very effective means to supervise the signatory parties through the intermediary of the authorities of the Member State. For fear of liability, the public authorities will strictly monitor the actions of the workers' and employers' organisations in this field, which shall affect their autonomy and ability to negotiate.

4. The right to freedom of association

The European Convention on Human Rights does not contain any provisions on competition, public procurement or free movement. However, it includes another provision which has proved

[15] ECJEU, 17 December 2015, C-25/14 and C-26/14, *Union des syndicats de l'immobilier* (*UNIS) v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social, Syndicat national des résidences de tourisme (SNRT) and Others* and *Beaudout Père et Fils SARL v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social, Confédération nationale de la boulangerie et boulangerie-pâtisserie française, Fédération générale agro-alimentaire — CFDT and Others*.

[16] ECJ, 3 June 2010, C-203/08, *Sorting Exchange Ltd v Minister van Justitie*.

[17] At present Article 56 TFEU.

to be very successful in confronting collective agreements: Article 11 on the right to freedom of association. The negative aspect of the right to freedom of association makes it possible for workers and employers to call into question established national traditions of collective bargaining.

a) The negative right to freedom of association

Whereas the positive right to freedom of association guarantees everyone the right to form or join an association, the negative right to freedom refers to the opposite: a protection against compulsory membership. Since its first recognition in 1981, the Court has considered many cases on the negative right to freedom of association.

Still, the recognition and successful application of the negative freedom remain surprising, as few treaties explicitly provide for such a right. Most treaties and declarations formulate the right to freedom of association as a right to join an employees' or employers' organisation[18]. None of the UN-, ILO- or Council of Europe Conventions explicitly state that there is a right not to join an employees' or employers' organisation[19].

Besides, the non-inclusion of a negative right to freedom of association is no oblivion. During the drafting of the treaties, proposals were made to include such a right. At that time, however, there was no support for the recognition of a negative right to freedom of association[20], and the proposals were rejected or remained undiscussed[21]. An amendment aimed at introducing the right not to join an organisation into Convention No 87 was rejected by the International Labour Conference which prepared the Convention[22]. Only the Community Charter and the EU Charter explicitly provide for a negative right of freedom of association. Both conventions are of later date

[18] At UN level, freedom of association is protected by Article 23.4 of the Universal Declaration of Human Rights, as well as Article 22.1 of the International Convenant on Civil and Political Rights and Article 8 of the International Convenant on Economic, Social and Cultural Rights. Freedom of association is also subject of two ILO conventions: the Conventions 87 and 98. In the context of the Council of Europe, freedom of association is included in Article 11 of the European Convention on Human Rights and Article 5 of the European Social Charter. Finally, freedom of association is mentioned in Article 11 of the Community Charter of the Fundamental Social Rights of Workers and in Article 12(1) of the EU Charter of Fundamental Rights.

[19] Article 20.2 of the UDHR states that no one may be forced to join an association. However, Article 23(4), which deals with freedom of association, only provides for the right to form and join trade unions in order to defend one's rights.

[20] According to SPIROPOULOS, in 1956 only a few countries granted the negative right to freedom of freedom of association protection. See G SPIROPOULOS, *La liberté syndicale* (Paris, Librairie générale de droit et de jurisprudence, 1956) 214.

[21] M C R CRAVEN, *The International Convenant on Economic, Social, and Cultural Rights – A Perspective on its Development* (Oxford, Clarendon Press, 1998) 268.

[22] Bureau International du Travail, *Etude d'ensemble*, 47-49 nr° 100 and International Labour Office, *Compilation of decisions of the Committee on Freedom of Association*, 6th Edition (Geneva, International Labour Organisation, 2018) 102 n° 553-555.

than the recognition of a negative dimension by the European Court of Human Rights and the European Committee of Social Rights.

At the level of the ILO, the specific monitoring body, the Committee on Freedom of Association, which monitors compliance with Conventions 87 and 98, has not yet expressed an opinion on whether Conventions 87 and 98 also provide for a negative right to freedom of association. The Committee on Freedom of Association has left the decision on this matter to the Member States[23]. It has, however, stressed that Article 2 of Convention 87 confers a right to become a member of the organisation of its choice. The worker must be able to choose between the various trade unions or to form trade unions in addition to those already in existence. This means that the worker has at least the right not to join a trade union designated by the public authorities in order to join another trade union or to form a trade union of his own[24].

At the level of the Council of Europe the rights embedded in the European Convention on Human Rights are monitored by the European Court of Human Rights. As early as 1981, In *Young, James and Webster*[25], the British applicants complained to the Court for being dismissed because of refusal to join a trade union under a closed shop agreement. They alleged, inter alia, that their negative right to freedom of association had been violated. Although no negative right to freedom of association had been accepted at the time, the Court considered the negative aspect of the freedom of association not to completely fall outside the ambit of Article 11. The ECtHR was therefore the first body to recognise a negative freedom of association. It was noteworthy in this respect that the Court did not make any point of recognising a negative right to freedom of association, although the preparatory works of the ECHR explicitly mention that 'in view of the difficulties caused by the 'closed shop system' in certain countries' it was undesirable to include a negative freedom of association in Article 11. The decision was the start for a series of cases on compulsory membership, in which the Court gradually developed the negative right to freedom of association and extended its protection against compulsory membership[26].

The Court has tightened its case law over the years, so that today any form of a closed shop can be considered a violation of Article 11, regardless of the political opinion of the worker[27], the time

[23] *Compilation*, 102-103, n° 552-557.

[24] 'In fact, the rights of the workers who do not wish to join the federation or the existing trade unions should be protected, and such workers have the right to form organizations of their own choosing, which is not the case in a situation where the law has imposed the system of the single trade union.', see *Compilation*, 92, n° 496; Committee on Freedom of Association in case nr. 1652, China, Report nr. 286, March 1993, nr. 716.

[25] ECtHR, 13 August 1981, App Nos 7601/76 and 7806/77, *Young, James and Webster v UK*.

[26] See also I VAN HIEL, 'The Right to Form and Join Trade Unions Protected by Article 11 ECHR' in F DORSSEMONT, K LÖRCHER and I SCHÖMANN (eds), *The European Convention on Human Rights and The Employment Relation* (Oxford and Portland, Oregon, Hart Publishing, 2013) 287-308.

[27] This eliminates the possibility of a compulsory membership of a neutral organisation, see e.g. W KEARNS DAVIS JR, '*Sigurjónsson v. Iceland*: The European Court of Human Rights Expands the Negative Right of Association' (1995) 27(1) *Case Western Reserve Journal of International Law* 317.

when the closed shop was introduced and the extent of the damage suffered. Given that fewer and fewer Member States are still applying the closed shop, the Court considers that there is little support for the preservation of the closed shop agreements and that the EU instruments clearly indicate that their use is not a necessary means for the effective enjoyment of trade union freedom. Moreover, the Court does not rule out the possibility that in certain cases negative and positive freedom may enjoy equal protection[28].

The European Committee of Social Rights, which monitors compliance with the European Social Charter, has followed the European Court on Human Rights in recognising a negative freedom of association. In the light of the appendix to Article 1.2, the European Committee of Social Rights first kept aloof but eventually declared all forms of closed shop to be contrary to Article 5, even before the European Court of Human Rights did so[29].

When the closed shop agreements had been eradicated, some employers did investigate what further use could be made of the negative right to freedom of association. The first to come into view were the Swedish monitoring fees. These are contributions that are deducted by the employer from all employees' wages in order to compensate the trade unions for monitoring compliance with wage agreements. They were unsuccessfully challenged in 2002 before the Committee on Social Rights, which found that the contribution did not lead to compulsory membership and was also collected from trade union members. The assessment of whether the contributions were actually used to finance the supervision and not for other activities was left to the national courts[30]. In *Evaldsson*[31] the monitoring fees were rejected by the European Court of Human Rights for the same reason – lack of transparency about their destination. Although this was not done on the basis of Article 11 of the ECHR, but on the basis of Article 1 of the First Additional Protocol[32], it caused a change of the committee's position. In the *Digest* published in 2008, states are urged to prohibit all automatic deductions from the wages of employees - members or non-members - in order to co-finance trade union activities[33].

[28] ECtHR, 11 January 2006, nr. 52562/99 and 52620/99, *Sørensen and Rasmussen v Denmark*.
[29] European Committee of Social Rights, Report Decision on the merits, *The Confederation of Swedish Enterprise v Sweden*, nr. 12/2002. See also with regard to Denmark, *Conclusions XVIII-1 Volume 1*, 2006; Sweden, *Conclusions 2006 Volume 2* and Finland, *Conclusions XIII-5*, 1997, as well as I E KOCH, *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Leiden/Boston, Martinus Nijhoff Publishers, 2009) 234.
[30] European Committee of Social Rights, Report Decision on the merits, *The Confederation of Swedish Enterprise v Sweden*, no 12/2002 and with regard to Romania, *Conclusions* 2002 and 2004.
[31] ECtHR, 13 February 2007, nr. 75252/01, *Evaldsson and others v Sweden.*
[32] The Swedish courts confirmed *Evaldsson*, see Swedish Labour Court judgement AD 2012 No. 74, http://www.arbetsdomstolen.se/upload/pdf/2012/74-12.pdf.
[33] Council of Europe, *Digest of the case law of the European Committee of Social Rights* (1 September 2008) 50.

When two years later, in *Olafsson*, an obligation to pay an industry charge to an employers' organisation is presented to the Court, the Court also considers it to be contrary to Article 11[34]. It mattered that a distinction was made between members and non-members and that the obligation was imposed by law, which also constitutes an infringement for the ILO. However, the monitoring bodies of the ILO still allow the law to impose a deduction on the wages of all employees, member or non-member, for the benefit of the majority trade union, without mentioning a particular trade union[35].

b) A negative right not to bargain collectively?

In the past the European Court of Human Rights already has been asked whether being obliged to respect a collective bargaining agreement could in itself constitute a violation of one's negative right to freedom of association.

In 1996 the ECtHR had to decide on an alleged violation of an employer's negative freedom of association, when the owner of a restaurant complained about a lack of state protection against the industrial action directed at his restaurant. The collective action aimed at inducing the owner to meet the trade union's demand that he be bound by a collective agreement: either by joining an employers' organisation or by signing a substitute agreement, a common practice in Sweden where no system of universally binding collective agreements exists. The Commission agreed with the applicant, but the Court did not travel the same road. In *Gustafsson v Sweden*[36] the Court accepted that 'to a degree', the enjoyment of the applicant's freedom of association might be affected by the pressure to join an employers' organisation or to sign a substitute agreement. However, only the first alternative involved membership of an association and no economic disadvantages attached to the substitute agreement compelled the applicant to opt for membership. In reality, the applicant's principal objection to the signing of a collective agreement appeared to be his disagreement with the collective-bargaining system in Sweden.

While the Court considered that Article 11 of the Convention did not guarantee a right not to enter into a collective agreement, it would not go so far as to completely exclude collective agreements from the scope of Article 11. It stated that Article 11 may well extend to treatment connected with the operation of a collective bargaining system, but only where such treatment impinges upon freedom of association. Compulsion which does not significantly affect the enjoyment of that freedom, even if it causes economic damage, cannot give rise to any positive obligation under Article 11. Having regard to the wide margin of appreciation to be accorded to

[34] ECtHR, 27 April 2010, nr. 20161/06, *Olafsson v Iceland*.

[35] Bureau international du Travail, *Etude d'ensemble*, 47-49 n° 102 en 103 and International Labour Office, *Compilation*, 103 n° 559.

[36] ECtHR, 25 April 1996, App No 15573/89, *Gustafsson v Sweden*. See also J-P Marguenaud and J Mouly, 'Comment on *Gustafsson v Sweden*' (1997) 29 *Recueil Dalloz* 365–68; T Novitz, 'Negative Freedom of Association' (1997) 26 *Industrial Law Journal* 79–87.

the State in the area under consideration, the Court did not find that Sweden had failed to secure the applicant's rights under Article 11.[37]

The Court's decision inspired the EU Court of Justice, in *Hans Werhof v Freeway Traffic Systems*,[38] to refuse a dynamic interpretation of Article 3, § 1 of the Council Directive on Transfers of Undertakings.[39] This interpretation was not in line with the judgment, as the EU Court of Justice apparently considered the right not to enter into a collective agreement as an aspect of the negative right to freedom of association. It is also worth noting that similar trade union practices as in *Gustafsson* gave rise to the *Laval*[40] decision of the EU Court of Justice.

The case law of the Court also features examples of workers contesting the enforcement of collective agreements. In *Englund v Sweden*[41] the application of two workers of Gustafsson was declared inadmissible by the Commission, which ruled that the collective actions had no influence on their right not to be a member of a trade union or their working conditions. In *Johansson v Sweden*[42] a worker invoked his negative right to freedom of association against his compulsory affiliation to a collective home insurance scheme agreed on by his trade union. As the applicant did not dispute his trade union membership, but only the trade union's competence to sign for its members binding agreements on non-work-related issues, the case was decided on the basis of the right of trade unions to draw up their own rules and to administer their own affairs. The Commission observed that when the applicant became a member of the trade union, he thereby entered into a private agreement with the trade union, which, inter alia, implied that he accepted the regulations of the trade union. His application was then declared inadmissible, as there was no indication of any abuse of dominant position. Also in *Costut*[43], the European Court of Human Rights did not support individuals in disputing the validity of collective agreements.

An important aspect of the *Gustafsson* decision was the refusal of the Court to derive a right to collective bargaining from Article 11. Two decades later, in *Demir and Baykara*[44], the Court ruled that the right to collective bargaining was an essential element of the right to freedom of association, including the right to conclude collective agreements. It is not yet clear whether the

[37] Some years later, the Swedish courts applied the jurisprudence of the ECtHR in a similar conflict, but the applicant questioned their impartiality on the basis of Article 6 of the ECHR. The ECtHR dismissed the claim in a judgment of 1 July 2003, App No 41579/98, *AB Kurt Kellermann v Sweden*.

[38] CJEU, 9 March 2006, C-499/09, *Hans Werhof v Freeway Traffic Systems.*

[39] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, *PB* L 61, p 26.

[40] CJEU, 18 December 2007, C-341/05, *Laval un Partneri v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*.

[41] ECtHR, 8 April 1994, App No 15533/89, *Englund v Sweden*.

[42] EComHR, Decision of 7 May 1990, App No 13537/88, *Johansson v Sweden*.

[43] ECtHR, 3 December 2013, App No 41547/08, *Marinel Costut v. Romania*.

[44] ECtHR (Grand Chamber), 12 November 2008, App No 34503/97, *Demir and Baykara v Turkey*.

recognition of the right to collective bargaining as an essential element of the right to freedom of association, could also imply a negative right to collective bargaining.

5. The decision of the Court

In this judgment, the European Court of Human Rights was given the opportunity to make a number of clarifications. Unfortunately, it did not do so unambiguously. The judgment does not mention the right to collective bargaining, nor does it mention the positive right to freedom of association that could also have been a good justification for the sectoral regulation. The question of whether or not the right to collective bargaining has a negative aspect that can be invoked by an non-organised employer or employee is carefully avoided, because the European Court of Human Rights only deals with the case from the angle of the compulsory payment of membership contributions. Therefore, the decisions in *Gustafsson* and *Demir and Baykara* had no major impact on the decision.

a) No compulsory membership

The court first repeated the principles related to the negative right to freedom of association and compulsory membership. However, the Court held that the case did not concern compulsory membership: it was legally impossible for the applicant company to become a member of the Social Welfare Fund, nor was it obliged to become a member of one of the two employers' associations in question. Following the declaration of general applicability of the collective agreement, the applicant company was only obliged to contribute financially to the Social Welfare Fund. Nevertheless, in *Olafsson* the sole obligation to contribute financially to an association was held to constitute an interference with the negative aspect of the right to freedom of association as it has an important feature in common with that of joining an association.

The applicant claims was rejected because the Court did not treat contributions to a sectoral fund in the same way as membership contributions. It must be said that in doing so, the European Court of Human Rights showed a great deal of insight into the objective of the fund and the function of the declaration of universal applicability. First of all, the Court points out that the obligation to contribute was introduced on the basis of solidarity and in the interest of all employees in the sector. The declaration of universal applicability is a prerequisite for achieving this objective. If the collective agreement had not been declared universally applicable, only the employers' members would have been bound by it. The Court implicitly weighs up the general interest or at least the collective interest of the employees of the sector against the interest of the applicant. The Court concludes that there has been no interference with the applicant's negative freedom, since no advantages were granted to the parties to the collective agreement

and the contributions were used solely for the management of the fund and the payment of the benefits. In addition, there was transparency regarding the use of the contributions, the obligation to pay was compensated by a drawing right and there was State control over the fund.

In view of the aim of the supplementary social welfare scheme to protect the employees in the building industry against the disadvantages of their specific working conditions, the Court distinguished the case from *Olafsson*. The Court observes that the applicant company was obliged to contribute financially to social welfare entitlements in the interest of all employees working in the building industry, and was based on the principle of solidarity. Sector-specific supplementary social welfare systems could not provide the intended social security for all employees in that sector if only employers who were members of an employers' association had to participate. The Court further notes that the contributions at stake could not be considered membership contributions, as they could exclusively be used to administer and to implement these schemes and to pay out the respective benefits and the fund offered optional benefits to employers and employees, irrespective of whether or not the employer was a member of an employers' association. What is more, the duty to pay contributions was offset by the applicant company's entitlement to reimbursement by the Social Welfare Fund.

Contrary to *Olafsson* the members of the associations that set up the Social Welfare Fund did not receive reductions in their membership fees, nor more favourable treatment than non-members in other areas. Non-members of employers' associations were not treated less favourably than members in relation to transparency and accountability as all the companies that contributed to the Social Welfare Fund received comprehensive information on their rights and duties as well as annual reports informing them about the use of the contributions. Moreover, the applicant company's obligation to contribute financially to the Social Welfare Fund originated in the declaration of general applicability of the collective agreement and there was a significant level of involvement of, and control by, public authorities of the Social Welfare Fund.

b) No *de facto* incentive for membership

The applicant also argued that the obligation to pay contributions was a *de facto* incentive for an employer to become a member of one of the parties to the collective agreement. Because the fund is only managed by the parties to the collective agreement, an unorganised employer would be encouraged to become a member of one of the employers' organisations in the construction sector, with a view to participate in the organisation and management of the fund. This argument applies to the entire bargaining system that operates through representation, and it is therefore regrettable that the Court did not pay more attention to it.

In § 57. the Court acknowledged that the obligation to contribute financially to the Social Welfare Fund could be regarded as creating a *de facto* incentive for the applicant company to join one of the employers' associations in the building industry in order to be able to participate in that association's decision-making process and to assert its interests by exercising control over the activities of the Social Welfare Fund. However, in light of the above, the Court judged that this *de facto* incentive was too remote to strike at the very substance of the right to freedom of association guaranteed by Article 11 of the Convention and did, therefore, not amount to an interference with the applicant company's freedom not to join an association against its will.

The judgment does not specify what is meant by a *de facto* incentive. It also does not explain why the protection against compulsory membership is suddenly extend to incentives, since incentives have not yet been discussed in the case law on compulsory membership. The only case in which incentives played a role – real incentives and not *de facto* incentives, was *Wilson and Palmer*. In that case, however, the Court addressed an alleged infringement of the positive right to freedom of association.

In *Wilson and Palmer*, British trade unions and their members opposed the British legislation which permitted employers to undermine collective bargaining by offering more favourable conditions of employment to employees agreeing not to be represented by a trade union[45]. Although the Court considered that Article 11 did not imply an obligation to recognise trade unions for collective bargaining purposes, the legislation had to protect the right of workers to be represented by a trade union. The Court emphasised that the freedom of employees to instruct or permit the union to make representations to their employer or to take action on their behalf constitutes an essential feature of union membership. Consequently, the State had to ensure that trade union members were not prevented or restrained from using their union to represent them in their relations with their employers. By permitting employers to use financial incentives to induce employees to surrender important union rights, the UK failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention.

In the present case, however, the Court considered the *de facto* incentive too limited to constitute an interference with the applicant's negative right to freedom of association. After all, in line with established case law, there would only be an interference if the *de facto* incentive did strike at the very substance of the right to freedom of association.

c) No infringement on the positive right to freedom of association

[45] ECtHR, 2 July 2002, App Nos 30668/96, 30671/96 and 30678/96, *Wilson, National Union of Journalists and Others v UK*.

In so far as the applicant company alleged that there had been an interference with its positive right to freedom of association, the Court observed that the duty to contribute to the Social Welfare Fund did not in any way take away the applicant company's right to establish an association, to promote it or to join an existing association and that the applicant company's duty to pay contributions was offset by its entitlements against the Social Welfare Fund. The Court also rejected the alleged violation of Article 1 of the First Additional Protocol to the ECHR.

6. The significance of the case

The *OECD Employment Outlook 2017* shows a decrease in collective bargaining coverage among OECD countries. On average across the OECD countries, the share of workers covered by a collective agreement dropped from 45 % in 1985 to 33% in 2015. It is noticeable from the study that the collective bargaining coverage remains high and stable only in countries where multi-employer agreements (at sector or national level) are negotiated and where either the share of firms which are members of an employer association is high or where agreements are extended also to workers working in firms which are not members of a signatory employer association[46]. Other research indicates that there is a negative relationship between technological change and collective bargaining only in countries that make little or no use of extension procedures. Where governments regularly extend collective agreements, there is little effect of technological change on collective bargaining coverage[47].

Given the importance of the extension of collective agreements, the Court's judgment is to be welcomed. By not considering the obligation to contribute to a Social Welfare Fund as an interference with the negative right to freedom of association, the sector funds and the collective agreements that have been declared universally binding and that provide for their financing have been safeguarded. Moreover, the extension and thus the application of collective agreements to non-aligned employers is seen as a requirement for the effectiveness of the collective agreement. The fact that the Court accepts the application of collective agreements to non-organised employers by means of the extension strengthens my conviction that the Court does not recognise a right not to be covered by a collective agreement. In this sense, the absence of any reference to the right to collective bargaining could indicate that the Court simply does not attribute a negative dimension to this right to be invoked by an individual. The opposite - allowing unorganised employers to evade universally binding collective agreements - would pose a serious threat to social dialogue. It is to the court's credit that it has recognised this danger.

[46] X, 'Chapter 4 – Collective bargaining in a changing world of work'' in OECD, *Employment Outlook 2017* (OECD, 2017) 126-127.

[47] B MEYER and Th BIEGERT, 'The conditional effect of technological change on collective bargaining coverage, Political consequences of technological change' (2019) 1 *Research and Politics* 1-9.

However, the Court has lost sight of the fact that the extension of the protection against compulsory membership to (*de facto* or otherwise) incentives may entail similar risks for the social dialogue. In some countries, it is perfectly legal for trade unions to negotiate certain benefits for their members alone. These advantages compensate for the fact that non-members benefit from the agreements reached by the trade unions, whereas they do not contribute to the functioning of the trade union movement like members. It cannot be ruled out that in the future certain employers or employees will try to argue, on the basis of § 57, that an incentive for membership constitutes a possible interference with the negative right to freedom of association. The fact that the alleged interference did not exist in this case, because the incentive was only a *de facto* incentive and was too limited to have an impact, does not prevent that other incentives might strike at the very substance of the negative right to freedom of association. It would therefore be desirable not to give too broad a scope to § 57 of the judgment in order to avoid it being used to call into question national traditions again, as it could further weaken systems of collective bargaining which are already experiencing difficulties.