**Does European Law forbid Anti-Union Discrimination?**[1]

*by Silvia Borelli (University of Ferrara)*

In *Viking*, *Laval* and *Rüffert*, the Court of Justice of European Union (CJEU) had to decide whether a fundamental economic freedom (freedom of establishment - Art. 49 TFEU, or freedom to provide services - Art. 56 TFEU) can be restricted by the right to take collective action (Art. 28 CFREU). On the contrary, the Italian Constitutional Court and the European Court of Human Rights (ECtHR) are sued to assess "whether and to what extent these fundamental economic freedoms can actually restrict genuine fundamental rights", so that they should justify any restriction to citizens' rights, "instead of forcing citizens to justify the exercise of their human rights"[2]. The sentences of the ECJ are strongly conditioned by the applicants' claims and it is known that a national judge can refer a question to the CJEU only if, in the main proceeding, a European rule is relevant. Is there a European rule that allow the national judges to request the CJEU whether the right to take collective action can be restricted by economic freedoms?

In my opinion, this rule can be detected in Directive 2000/78 that lays down "a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation" (Art. 1). An unfavourable treatment of workers that take part in a collective action could be qualified as discrimination forbidden by the Directive *only if* anti-union discrimination is considered as discrimination on the ground of belief.

The problem is not analysed by the Italian commentators of Directive 2000/78. In our State, anti-union discrimination, together with discrimination on the basis of religion and political opinion, have been banned since 1970 (Art. 15 of the

[1] Paper presented by the author during the seminar "*I diritti dei lavoratori nelle Carte europee dei diritti fondamentali*", University of Ferrara, 25-26 November 2011. See: *I diritti dei lavoratori nelle Carte europee dei diritti fondamentali*, eds. S. BORELLI, A. GUAZZAROTTI, S. LORENZON, Jovene, 2012.

[2] F. DOSSERMOND, *A judicial pathway to overcome Laval and Viking*, OSE Research Paper N° 5 - September 2011, 18.

Statuto dei Lavoratori)[3]. Therefore, "belief" has been considered as synonymous of "political opinion" and "anti-union"[4].

The European Commission has a different opinion. In the *Accompanying document to the Report 2010 on the Application of the EU Charter of Fundamental Rights* (SEC(2011) 396 final), the Commission agrees "with the Austrian Supreme Court's interpretation that political views were not covered by EU equal treatment legislation. Since the case falls outside the scope of EU law, there could be no violation of the Charter" (p. 24). Therefore, anti-union discrimination, considered together with discrimination on political opinion, might not be covered by discrimination on the ground of belief. In the *Commission Staff Working Document on the Application of the EU Charter of Fundamental Rights in 2011* (SWD(2012)84 final, p. 64), the Commission clarify that « there is no EU law which prohibits Member States from introducing, through national laws, changes to practices previously applied under collective agreements. Nor is there any specific EU law regulating the right of association or the right to strike. In these circumstances, there did not seem to be any link with any EU legislation in that case. It is therefore for the competent authorities, including the courts, to assess the legality of the eventual restrictions on the exercise of these rights, and to enforce the relevant national legislation with due respect to the applicable international obligations of the Member States».

It is worth underlining that the Reports 2010 and 2011 have been prepared by DG *Justice*, now competent for tackling discrimination (DG *Employment and Social Affairs* was competent until 2009) and fundamental rights. Moreover, the proposals to modify Directive 96/71 on posting of workers have been inserted in the *Single Market Act* (COM(2011)206 final, point 2.10), prepared by DG *Internal Market and Services*.

Various arguments can be put forward to refute the Commission's opinion.

First of all, ILO law interdicts "any distinction, exclusion or preference made on the basis of...political opinion..., which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" (Art. 1 Discrimination (Employment and Occupation) Convention, 1958 no. 111). In the recent Report of the Director-General *Equality at work: The continuing challenge* (Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference,

[3] A. LASSANDARI, *Le discriminazioni nel lavoro: nozione, interessi, tutele,* Padova, 2011, 171.

[4] M. BARBERA, *La tutela antidiscriminatoria al tempo dello Statuto e ai tempi nostri*, in *Diritti lavori e mercati,* 2010, 723; T. TREU, *Condotta antisindacale e atti discriminatori*, Franco Angeli, 1979. Among the decisions that apply Directive 2000/78 to anti-union discrimination see: T. Turin n. 4020/2011 (point 11, p. 58) and, in France, Cour de Cassation n. 06-46.179 of 24 September 2008.

100th Session 2011), it has been specified that "discrimination on grounds of political opinion may also be combined with anti-union discrimination" (p. 42)[5]. Moreover, Article 1 of ILO Convention No. 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively provides that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment"[6].

The Council of Europe's European Committee of Social Rights has interpreted Art. 5 of the European Social Charter, holding that "domestic law must protect trade union members from any harmful consequence that their trade union membership or activities may have on their employment, particularly any form of reprisal or discrimination in the areas of recruitment, dismissal or promotion because they belong to a trade union or engage in trade union activities" (*Danilenkov v Russia*, Application No 67336/01, 30 July 2009, p. 103)[7].

The right not to be discriminated on the ground of trade union membership is a necessary instrument to guarantee the effectiveness of trade union rights. This link is evident in the ECtHR case-law. Article 14 of ECHR forms an integral part of each of the articles laying down rights and freedoms whatever their nature. Often, the ECtHR simply examines the claim under Article 11 and does not discuss the violation of Art. 14, considering the latter absorbed by the former[8].

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[5] "The ILO Committee on Freedom of Association (CFA) has dealt with several cases in which governments have argued that workers and their representatives were undertaking illegal political action, when in reality they were exercising their legitimate trade union rights" (p. 42).

[6] As stated in *Danilenkov v Russia* (Application No 67336/01, 30 July 2009), "the Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (2006) includes the following principles: "...769. Anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions....818. The basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed....820. Respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial....835. Where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention".

[7] "Where such discrimination occurs, domestic law must make provision for compensation that is adequate and proportionate to the harm suffered by the victim" . Furthermore, "in order to make the prohibition of discrimination effective, domestic law must provide for appropriate and effective remedies in the event of an allegation of discrimination; remedies available to victims of discrimination must be adequate, proportionate and dissuasive. Domestic law should provide for an alleviation of the burden of proof in favour of the plaintiff in discrimination cases" (*Danilenkov v Russia* (Application No 67336/01,30 July 2009), p. 103 and 104).

[8] A. GUAZZAROTTI, *Art. 11*, in *Commentario breve alla Convenzione europea dei diritti dell'uomo*, eds. S. Bartole, P. De Sena, V. Zagrebelsky, Cedam, 2012, 25; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination Law*, 2010, 117.

However, when the ECtHR has ruled upon the differential treatment on the basis of trade-union membership, it has stated that the protection against discrimination on this ground should be included in the measures implemented to safeguard the guarantees of Article 11 (*Danilenkov v Russia*, Application No 67336/01,30 July 2009, p. 123; see also Art. 11 of ILO Convention n. 87)[9].

Furthermore, Directives 2001/86 on the involvement of employees in the European company, 2002/14 on the general framework for informing and consulting employees, and 2009/38 on European Works Council have already established a prohibition of discrimination on the ground of trade-union membership. Indeed, employees' representatives "must not be subject to any discrimination as a result of the lawful exercise of their activities and must enjoy adequate protection as regards dismissal and other sanctions" (whereas n. 34 dir. 2009/38 and whereas n. 12 dir. 2001/86; Conclusion of Advocate General, C-405/08, par. 50).

Lastly, the absence of a rule to forbid anti-union discriminations could prejudice the *Voice* in the European integration process (as stated by J. Weiler, the theory *Exit, Voice and Loyalty* can be used to study the integration process)[10].

The recognition of a prohibition of anti-union discrimination as discrimination on the ground of a belief allows the worker, who considers himself/herself affected by failure to apply the principle of equal treatment to him/her, to engage any procedure for the enforcement of obligations under Directive 2000/78 (Art. 9). The national judge may refer to the CJEU the following question: does the fact that an employer applies e.g. a disciplinary sanction to a worker who has taken part in a collective action constitute a discrimination within the meaning of Article 2 of Directive 2000/78? As a consequence, the ECJ has to analyse "whether there is a difference of treatment, and, if so, whether it is justified by a legitimate aim and is appropriate and necessary in order to pursue that aim" (Conclusion of Advocate General, C-144/04, *Mangold*, par. 85). A difference of treatment which is based on a the trade-union membership does not constitute discrimination *only if* an exception or a justification listed in Directive 2000/78 is applicable. In this case, the scrutiny of CJEU should be particularly strict since the anti-discrimination principle (Art. 21 CFREU; CJEU, 19 January 2010, C-555/07, *Kücükdeveci*) should be combined with the rights guaranteed by Art. 28 CFREU.

[9] "The Court finds crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and should have the right to take legal action to obtain damages and other relief. Therefore, States are required under Articles 11 and 14 of the Convention to set up a judicial system that ensures real and effective protection against anti-union discrimination" (*Danilenkov v Russia* (Application No 67336/01), 30 July 2009, p. 124).

[10] J. WEILER, *The European Community in Change: Exit, Voice and Loyalty*, in *Irish Studies in International Affairs*, vol. 3, no. 2, p. 15.

Another problem should be considered: are trade unions entitled to enforce a procedure for the right not to be discriminated against to be respected? Can a national judge ask the ECJ whether a threat to make trade unions liable in unlimited damages for any losses caused by collective action constitutes a discrimination within the meaning of Article 2 of Directive 2000/78? The question is important since the lack of an effective protection of the right not to be discriminated against "could engender fears of potential discrimination and discourage other persons from joining the trade union. This in turn could lead to its disappearance, with adverse effects on the enjoyment of the right to freedom of association" (*Danilenkov v Russia* (Application No 67336/01),30 July 2009, par. 135).

Art. 28 of Statuto dei Lavoratori allows Italian trade unions to sue against any anti-union behaviour of the employer. In *Wilson* the ECtHR seems to apply to the trade unions the right not to be discriminated against, recognising that the State's failure to secure the enjoyment of the rights under Article 11 of the Convention amounted to "a violation of Article 11, as regards both the applicant trade unions and the individual applicants" (par. 49; see also *Gustafsson v. Sweden*, 25 aprile 1996, *Reports of Judgments and Decisions*, 1996-II, 652-53). On the other side, Directive 2000/78 states that the organisations which have a legitimate interest in ensuring that the provisions of this directive are complied with, "may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive" (Art. 9, par. 2). In *Feryn*, the CJEU affirmed that "Article 7 of Directive 2000/43 does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive…to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant" (par. 27). If a Member State has recognised this right, a case can be referred to the CJEU for preliminary ruling (see also Art. 11 par. 3 proposal for a directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM(2012)131final).

The recognition of the right not to be discriminated against on the ground of union membership may have significant consequences. It allows the CJEU to rule upon each case of collective action (national or transnational). Moreover, the judges are supposed to respect the collective freedom of the social parties. Nowadays, however, the European and National Labour Law is inflected by the economic and financial exigencies. Therefore, the courts are to defend, in any case of threat, the *Voice* of European workers.