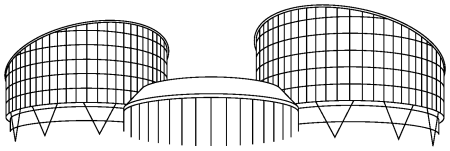

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF HRVATSKI LIJEČNIČKI SINDIKAT v. CROATIA

(Application no. 36701/09)

JUDGMENT

STRASBOURG

27 November 2014

FINAL

27/02/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Hrvatski liječnički sindikat v. Croatia,

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

Isabelle Berro-Lefèvre, *President,*
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Ksenija Turković,
Dmitry Dedov, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 4 November 2014,

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

PROCEDURE

1. The case originated in an application (no. 36701/09) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Hrvatski liječnički sindikat (Croatian Medical Union – hereinafter "the applicant union"), on 17 June 2009.

2. The applicant was represented by Mr S. Posavec, an advocate practising in Zagreb with the Law Firm Posavec, Rašica and Liszt d.o.o. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant union alleged that the decisions of the domestic courts prohibiting it from holding a strike had violated its freedom of association.

4. On 5 September 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant union is a trade union of medical practitioners incorporated under Croatian law. Its registered office is in Zagreb.

A. Background to the case

6. On 8 December 2004 the Government of Croatia on the one side, and the Autonomous Trade Union for the Health Service and Social Protection Service of Croatia, the Croatian Professional Trade Union of Nurses, the Trade Union of Workers in the Health Service, Social Service and Disability Pension Insurance of Croatia, and the applicant union on the other, concluded the Collective Agreement for the Health and Health Insurance Sector (*Kolektivni ugovor za djelatnost zdravstva i zdravstvenog osiguranja* – hereinafter "the Collective Agreement" or "the main Collective Agreement"). Its clause 102 stipulated that the agreement would enter into force on 15 January 2005 if approved by a majority of the votes cast in a referendum, in which at least one third of those employed in the health-care institutions and the Croatian Health Insurance Fund voted. The Collective Agreement was approved in the referendum held on 5 January 2005 and entered into force, as envisaged, on 15 January 2005.

7. In order to regulate issues specific to doctors and dentists, on 8 December 2004 the Government of Croatia and the applicant union also concluded the Collective Agreement for the Medical and Dentistry Sector (*Strukovni kolektivni ugovor za liječničku i stomatološku djelatnost*), which formed an annex (hereinafter "the Annex") to the above-mentioned main Collective Agreement. Clauses 6 and 98(2) of the Annex stipulated that if doctors approved it in a referendum, it would enter into force on 15 January 2005.

8. On 15 December 2004 the Autonomous Trade Union for the Health Service and Social Protection Service of Croatia and the Croatian Professional Trade Union of Nurses instituted civil proceedings against the State and the applicant union, seeking to declare the Annex null and void because it had not been entered into by all the trade unions that had concluded the main Collective Agreement, contrary to the law (for a more detailed description of the course of those proceedings see paragraphs 26-30 below).

9. On 29 December 2004 the Government of Croatia adopted an instruction whereby it (a) instructed the State Attorney's Office to acknowledge the plaintiffs' claim in those proceedings because it was well-founded, with a view to having the Annex declared null and void, and (b) instructed the Ministry of Health and Social Welfare to immediately commence negotiations on the conclusion of a new collective agreement for the medical and dentistry sector.

10. Meanwhile, on 21 December 2004 the referendum committee issued a decision to hold the referendum mentioned in the Annex (see paragraph 7 above).

11. However, on 31 December 2004 the President of the Socio-Economic Council (*Gospodarsko-socijalno vijeće*) – a tripartite body

consisting of representatives of trade unions, employers and the Government – set aside the decision on holding the referendum.

12. The referendum was nevertheless held on 5 January 2005. Of 11,016 doctors, 8,290 voted; 8,255 voted "yes" and twenty-five voted "no".

13. On 18 January 2005 the President of the Socio-Economic Council issued a decision not to recognise the results of the referendum.

14. In a letter to the Ministry of Health and Social Welfare of 23 March 2005, the applicant union announced a strike for 11 April 2005. It stated that the strike was being organised in order to (a) protect the social and economic interests of doctors by insisting that the Government of Croatia honour its obligations arising from the Annex, (b) have the results of the referendum on the approval of the Annex recognised, and (c), as an subsidiary ground for the strike, address issues specific to doctors and dentists within the healthcare system by demanding that a collective agreement for the medical and dentistry sector be concluded. In particular, as regards the last-mentioned ground the applicant union stated as follows:

> "**– addressing issues specific to doctors within the healthcare sector by concluding a collective agreement for the medical and dentistry sector.**
>
> As a subsidiary ground for the strike, the Croatian Medical Union notes that the [main] Collective Agreement for the Health and Health Insurance Sector does not address issues specific to the medical and dentistry professions. Therefore, on the instruction of the Government of Croatia and in accordance with the opinion of the Socio-Economic Council ... of 31 March 2004, the Annex to that Collective Agreement addressing issues specific to doctors was concluded at the same time [as the aforementioned collective agreement]. In that way, issues specific to doctors within the healthcare and health-insurance sectors were comprehensively addressed. Given that at present the Government of Croatia refuse to apply the Collective Agreement for the Medical and Dentistry Sector [i.e. the Annex], and issues specific to the medical and dentistry professions, including a salary increase and other pecuniary rights of doctors, are not addressed in the [main] Collective Agreement for the Health and Health Insurance Sector, a subsidiary ground for the strike is to demand that the Government address issues specific to jobs and professions of doctors and dentists within the healthcare and health-insurance sectors."

15. On the same day the Ministry of Health and Social Welfare invited the applicant union to conclude a new collective agreement for the medical and dentistry sector in the form of an annex to the main Collective Agreement. The draft of the new annex was enclosed with the Ministry's letter. The Ministry emphasised that the draft envisaged a salary supplement amounting to 10% of the basic salary of doctors and dentists in 2005 on account of their increased responsibility for the life and health of patients. It also added that the other trade unions, parties to the main Collective Agreement agreed with the draft, and invited the applicant union to inform it within seven days whether it accepted the draft.

16. On 30 March 2005 the applicant union informed the Ministry that, regrettably, the proposed draft did not address the important issues specific to doctors and dentists within the healthcare sector.

17. On 5 April 2005 the Government of Croatia adopted a decree whereby it unilaterally increased salaries of doctors and dentists by 10% in 2005 (see paragraph 38 below).

B. Civil proceedings for prohibition of the strike

18. On the same day, 5 April 2005, the State brought an action against the applicant union in the Zagreb County Court (*Županijski sud u Zagrebu*), asking the court to prohibit the announced strike. The plaintiff argued that the announced strike would be illegal because it would seek to enforce the Annex, which had never entered into force given that the decision to hold the referendum required for its coming into force had been set aside (see paragraphs 7, 11 and 13 above).

19. By a judgment of 8 April 2005 the County Court found for the State and prohibited the strike. It held that seeking compliance with the obligations arising from a collective agreement or the recognition of the results of a referendum were not permitted grounds for a strike under section 210(1) of the Labour Act (see paragraph 32 below). The relevant part of that judgment reads as follows:

> "From the cited provision [that is, section 210(1)] it follows that, by using the formulation 'in order to protect and promote the economic and social interests', the legislator clearly excluded enforcement of the rights stipulated in a particular collective agreement as a permitted ground for a strike because ... the individual and collective enforcement of rights stipulated in a collective agreement is regulated by sections [191] and [202] of the Labour Act.
>
> ...
>
> As regards the subsidiary ground for the strike ... it has to be noted that the defendant's representative stated at the main hearing that this ground had been listed as subsidiary in case [the Annex was in the meantime declared invalid] in the [parallel] proceedings pending before the Municipal Court.
>
> ...
>
> Finally, it has to be concluded that a strike is legally allowed only in industrial disputes on ... matters that are not legally regulated, and not in those which [are]. Given that the defendant insists on compliance with the [Annex], it is evident that the matters [in dispute] ... are regulated by that Annex and that the procedure for [its] entry into force is also legally regulated, for which reason the substantive requirements for organising the strike are not satisfied."

20. The applicant union then appealed against that judgment to the Supreme Court (*Vrhovni sud Republike Hrvatske*).

21. On 11 April 2005 the applicant union held the strike as planned because under the domestic law its appeal prevented the County Court's judgment from becoming final. According to media reports the applicant union alleged that almost 90% of some 8,000 doctors and dentists had participated in the strike whereas the Minister of Health claimed that only

25% of them had actually been striking while the others had merely expressed solidarity. The Minister also stated for the media that 85% of the services had been rendered and that work stoppages occurred in one out of five clinical centres, one out of seven university hospitals and in six out of 22 general hospitals. The strike lasted until 13 April 2005 when the applicant union called it off in order to comply with the County Court's subsequent provisional measure of 12 April 2005 prohibiting the strike (see the next paragraph).

22. Following a request by the State, on 12 April 2005 the Zagreb County Court imposed a provisional measure prohibiting the strike until that court's judgment of 8 April 2005 became final, that is, until the Supreme Court decided on the applicant union's appeal against the judgment. On 21 April 2005 the Supreme Court dismissed the applicant union's appeal against the decision imposing the provisional measure.

23. By a judgment of 27 April 2005 the Supreme Court dismissed the applicant union's appeal against the County Court's judgment of 8 April 2005 (see paragraphs 19-20 above). It held that the Annex was invalid because it had not been entered into by all the trade unions that had concluded the Collective Agreement, contrary to section 186(1) of the Labour Act (see paragraph 32 below), and that therefore any further action based on that agreement, including the strike, was unlawful. The relevant part of the Supreme Court's judgment reads as follows:

> "Given that the Annex was found to be invalid, that is, unlawful, any further actions by the signatories of such an unlawful collective agreement, such as calling for and holding a referendum ... as well as the two first grounds for the strike, which are also based on the unlawful Annex, are also unlawful.
>
> The view of the first-instance court that it was not necessary to address the third, subsidiary, ground for the strike is correct. This is so because, as stated by the defendant's representative at the hearing held on 8 April 2005, this ground had been listed as subsidiary in case [the Annex was in the meantime declared invalid] in the [parallel] proceedings pending before the Municipal Court, a condition which has not been met."

24. On 30 May 2005 the applicant union lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) against the Supreme Court's judgment alleging violations of, *inter alia*, its constitutionally-guaranteed right to strike and its freedom of association guaranteed by the Convention. In so doing the applicant union relied on Article 60 of the Constitution (see paragraph 31 below) and Article 11 of the Convention.

25. On 17 December 2008 the Constitutional Court dismissed the applicant union's constitutional complaint and served its decision on the applicant union's representatives on 26 January 2009. The relevant part of that decision reads as follows:

"Having established that the [contested] judicial decisions were based on the relevant provisions of the Labour Act, the Constitutional Court finds that those decisions were not in breach of the complainant's constitutional right [provided] in Article 60 paragraph 1 of the Constitution nor [were they in breach] of the international-law provisions the complainant relied on."

C. Civil proceedings to declare the Annex null and void

26. Meanwhile, as already noted above (see paragraph 8) on 15 December 2004 the Autonomous Trade Union for the Health Service and Social Protection Service of Croatia and the Croatian Professional Trade Union of Nurses brought a civil action in the Zagreb Municipal Court (*Općinski sud u Zagrebu*) against the State and the applicant union, seeking to declare the Annex null and void.

27. On 19 October 2006 the Zagreb Municipal Court found for the plaintiffs and declared the Annex null and void.

28. On 16 December 2008 the Zagreb County Court dismissed the applicant union's appeal and upheld the first-instance judgment, which thereby became final.

29. On 17 March 2010 the Supreme Court dismissed a subsequent appeal on points of law (*revizija*) lodged by the applicant union. It endorsed the reasoning of the lower courts which had found the Annex invalid because it had not been entered into by all the trade unions that had concluded the main Collective Agreement, contrary to section 186(1) of the Labour Act (see paragraph 32 below) and clause 21 of that collective agreement (see paragraph 36 below).

30. On 16 March 2011 the Constitutional Court dismissed a constitutional complaint lodged by the applicant union.

II. RELEVANT DOMESTIC LAW

A. The Constitution

31. The relevant Articles of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette no. 56/90 with subsequent amendments) read as follows:

Article 43(1)

"Everyone shall be guaranteed the right to freedom of association for the protection of their common interests or for the promotion of social, economic, political, national, cultural and other convictions and aims. For this purpose, anyone may freely form trade unions and other associations, join them or leave them, in accordance with the law."

Article 59(1)

"In order to protect their economic and social interests, all employees shall have the right to form trade unions and to freely join them or leave them."

Article 60

"The right to strike shall be guaranteed.

The right to strike may be restricted in the armed forces, the police, the civil service and public services specified by law."

B. The Labour Act

1. Relevant provisions

32. The relevant provisions of the Labour Act of 1995 (*Zakon o radu*, Official Gazette no. 38/95 with subsequent amendments), which was in force between 1 January 1996 and 1 January 2010, at the material time provided as follows:

Trade unions' collective bargaining committee

Section 186(1)

"If more than one trade union ... exists in the sector in respect of which a collective agreement is to be concluded, the employer ... may negotiate a collective agreement only with a bargaining committee composed of representatives of those trade unions."

Duty to comply in good faith with obligations arising from a collective agreement

Section 191

"(1) The parties to a collective agreement and persons to whom it applies shall comply with its provisions in good faith.

(2) An injured party or a person to whom a collective agreement applies may claim compensation for the damage sustained as a result of non-compliance with the obligations arising from it."

Judicial protection of the rights arising from a collective agreement

Section 202

"A party to a collective agreement may seek judicial protection of the rights arising from such an agreement by bringing an action in the competent court."

Strikes and solidarity strikes

Section 210(1)

"Trade unions and their higher-level associations have the right to call and undertake a strike in order to protect and promote the economic and social interests of their members or on the ground of non-payment of salary ... within thirty days of it becoming due."

2. Relevant case-law

33. Under the case-law of the Croatian courts, a strike is allowed only if its aim is the conclusion or revision of a collective agreement. By converse implication, a strike is illegal if a collective agreement exists. That is so because in such a situation there is an obligation to maintain social peace, which prohibits the calling of a strike in relation to matters that are already governed by a collective agreement. The only exception to that rule is the non-payment of salary, on which ground, as of 10 March 2001 when the 2001 Amendments to the Labour Act entered into force, trade unions may organise a strike. In case no. Gž-4/1996 the Supreme Court interpreted section 210(1) of the Labour Act (see the preceding paragraph) in the following terms:

> "In the Supreme Court's view – having regard to section 210(1) ... of the Labour Act – a strike is lawful only in industrial disputes arising from a conflict of interests, [that is, in disputes over issues] that are not legally regulated but may be regulated by a collective agreement. A strike is therefore a lawful means of industrial action if its purpose is to meet [workers'] demands [as regards matters] that may be subject to a collective agreement. Even though the legislator does not explicitly exclude that a strike on issues which are legally regulated ... and thus susceptible to judicial or arbitral adjudication, may be lawful, the above legal view follows from the textual interpretation of section 210(1) of the Labour Act and in connection with [some other] provisions of the same Act. By using the phrase 'to protect and promote the economic and social interests', the legislator clearly excluded the enforcement of employment-related rights (legal disputes) as a permissible ground for a strike. ... [Section 210(1)] ... indicates that means of pressure ([of which] a strike is the means of last resort) serve to protect and promote workers' interests, but not their rights, which may only be protected during negotiations on the conclusion of collective agreements, and not in matters that are governed by such agreements."

34. In its judgment no. Gž 5/2000 of 13 April 2000 the Supreme Court held that the rule contained in section 210(1) of the Labour Act (see paragraph 32 above) was not mandatory, that is, that parties to a collective agreement could agree otherwise and, for example, provide that a strike was allowed even while the collective agreement was in force. In particular, the Supreme Court held as follows:

> "Section 210(1) of the Labour Act reads: 'Trade unions and their higher-level associations have the right to call and undertake a strike in order to protect and promote the economic and social interests of their members'. The way in which this provision was drafted suggests that it is not mandatory ... There is no doubt that section 210(1) of the Labour Act entitles trade unions to strike in cases of collective disputes, that is, as regards issues that may be, but are not, regulated by a collective agreement. ... [T]he Labour Act has only provided for the protection of the basic rights of employees. [However], there are many other sources of labour law governing employment-related rights and duties. Collective agreements may regulate employment relations in a manner more favourable for employees ... The question therefore arises whether a strike undertaken on grounds provided for in the collective agreement is lawful. ... If the employer, by signing a collective agreement, agreed that the trade union could undertake a strike even in cases of a breach of that agreement by

the employer, then the strike cannot be considered unlawful only because it was undertaken on that ground. ...”

C. The Obligations Act

35. The relevant provision of the Obligations Act of 1978 (*Zakon o obveznim odnosima*, Official Gazette of the Socialist Federal Republic of Yugoslavia no. 29/78 with subsequent amendments, and Official Gazette of the Republic of Croatia no. 53/91 with subsequent amendments), which was in force between and 1 October 1978 and 31 December 2005, read as follows:

Nullity

Section 103

“(1) A contract that is contrary to the Constitution, mandatory rules or morals shall be null and void unless the purpose of the breached rule indicates some other sanction or the law in a particular case provides otherwise.

(2) If the conclusion of a contract is prohibited only to one party, the contract shall remain valid, unless the law in a particular case provides otherwise, and the party that has breached the statutory prohibition shall bear the relevant consequences.”

D. Collective Agreement for the Health and Health Insurance Sector

36. The relevant clauses of the Collective Agreement for the Health and Health Insurance Sector (*Kolektivni ugovor za djelatnost zdravstva i zdravstvenog osiguranja*, Official Gazette nos. 9/05, 156/09, 52/10 and 7/11 – “the Collective Agreement” or “the main Collective Agreement”), which was in force between 15 January 2005 (see paragraph 6 above) and 31 December 2010, read as follows:

Clause 10

“(1) During the validity of this Agreement trade unions shall not strike in respect of the matters regulated by this Agreement.

(2) The abstention from striking referred to in paragraph (1) of this clause does not exclude the right to strike in respect of all other unresolved issues or in the case of a dispute concerning the amendment or supplement to this Agreement.

(3) Trade unions shall have the right to organise a solidarity strike with other trade unions, provided that prior notice is given in accordance with the provisions of this Agreement.”

Amendments and supplements to the Agreement

Clause 21(1) and (2)

“(1) Every party may propose amendments or supplements to this Agreement.

(2) Proposals on behalf of trade unions for amendments or supplements to this Agreement may be submitted by a bargaining committee."

E. Collective Agreement for the Medical and Dentistry Sector

37. The relevant clauses of the Collective Agreement for the Medical and Dentistry Sector (*Strukovni kolektivni ugovor za liječničku i stomatološku djelatnost* – "the Annex"), which was declared null and void by a judgment of the Zagreb Municipal Court of 19 October 2006, that became final on 16 December 2008 (see paragraphs 26-28 above), read as follows:

Clause 1(2)

"This agreement is to be considered a special part of the [main] Collective Agreement for the Health and Health Insurance Sector. In the event that a certain right is regulated differently by the [main] Collective Agreement for the Health and Health Insurance Sector, the law that is more favourable for the employee shall apply."

Clause 14(1) and (2)

"During the validity of this Agreement the Croatian Medical Union shall not strike in respect of matters regulated by this Agreement, unless they [that is, the obligations arising from the Annex] have not been complied with.

The prohibition of a strike referred to in paragraph (1) of this clause does not exclude the right to strike in respect of any other unresolved issue."

Clause 57

"Because of their great responsibility for the life and health of others, doctors [and dentists] shall have the right to a corresponding salary supplement – the supplement for doctor's responsibility.

Given the general situation in the economy the total increase of the basic salary on account of the doctor's responsibility shall be achieved gradually in the period between 15 January 2005 and 1 January 2010 through annual 10% increment calculated by applying the chain index. As of 15 January 2005 the basic salary stipulated in the employment contract shall be increased by 10%. Each consecutive year, starting from 1 January, the basic salary shall be increased by 10% compared to the previous year, up until 1 January 2010."

F. Decree on the salary supplement for doctors and dentists

38. On 5 April 2005 the Government of Croatia adopted the Decree on a salary supplement for doctors and dentists (*Uredba o dodatku na plaće doktora medicine i doktora stomatologije*, Official Gazette no. 44/05 of 5 April 2005 – "the Decree") which entered into force on the same day. The relevant provision of that Decree read as follows:

Section 2

"Because of their great responsibility for the life and health of others, [doctors and dentists] shall have the right to a salary supplement ...

Salary supplement referred to in paragraph 1 of this section shall be paid in 2005 on a monthly basis and shall correspond to 10% of the basic salary."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

39. The applicant union complained that the decisions of the domestic courts prohibiting it from holding the strike planned for 11 April 2005 had breached its right to protect the interests of its members and had thus breached its trade union freedom guaranteed by 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."

40. The Government contested that argument.

A. Admissibility

41. The Government disputed the admissibility of the application by arguing that the applicant union had not had a *locus standi* and that, in any event, it had failed to exhaust domestic remedies.

1. Non-exhaustion of domestic remedies

42. The Government noted that the main ground for the strike which the applicant union had called for 11 April 2005 had been the alleged non-observance by the State of the obligations arising from the Annex (see paragraph 14 above). That being so, the Government argued, instead of resorting to strike action, the applicant union could have achieved the same goal by bringing a civil action against the State, either for damages, relying on section 191 of the Labour Act, or for the protection of rights arising from a collective agreement, relying on section 202 of the same Act (see

paragraph 32 above), thereby protecting the interests of its members. However, the applicant union had not done so and had thus failed to exhaust domestic remedies.

43. The applicant union replied that they had complained before the Court of a violation of their freedom of association on account of the Zagreb County Court's judgment of 8 April 2005 (see paragraph 19 above) prohibiting it from holding a strike on 11 April 2005 – against which they had appealed and lodged a constitutional complaint (see paragraphs 22 and 24 above) – and not on account of non-observance by the State of the obligations stemming from the Annex. Therefore, the violation complained of could not have been remedied by bringing the civil actions suggested by the Government.

44. For the Court, it is sufficient to note that the Annex was eventually declared null and void by the domestic courts (see paragraphs 26-30 above) and that therefore bringing either of the civil actions suggested by the Government would not have had any prospect of success. It follows that the Government's non-exhaustion objection must be dismissed.

2. Lack of locus standi

45. The Government submitted that the main reason why the domestic courts had declared the Annex null and void, with retrospective (*ex tunc*) effect, was that it had not been entered into by all the trade unions that had concluded the main Collective Agreement for the Health and Health Insurance Sector (see paragraphs 23 and 26-29 above). Given that the applicant union must have been aware of that fact before calling the strike, the Government concluded that the union must also have known that the Annex had been invalid from the outset and that therefore any industrial action in support of it had been unlawful and unnecessary. In particular, given that the main ground for the strike had been the alleged non-observance of the obligations arising from the Annex (see paragraph 14 above), the applicant union must have been aware that by organising and holding the strike it could not have forced the State to comply with the invalid Annex. Consequently, in the Government's view, the applicant union could not have protected the interests of its members by holding the strike in question and thus could not complain of its prohibition by relying on Article 11 of the Convention.

46. The applicant union did not comment on that issue.

47. The Court finds that this inadmissibility objection by the Government is inextricably linked to the merits of the application. Therefore, to avoid prejudging the latter, the Court holds that it should be joined to the merits.

3. Conclusion

48. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Whether there was an interference with the applicant union's freedom of association

49. The Government conceded that the Zagreb County Court's judgment of 8 April 2005 (see paragraph 19 above) prohibiting the applicant union from holding a strike on 11 April 2005, which had been upheld by the Supreme Court's judgment of 27 April 2005 (see paragraph 23 above), had constituted an interference with the applicant union's freedom of association. The Court, having regard to its case-law according to which strike action is protected under Article 11 of the Convention (see *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, § 24, 21 April 2009, and *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, § 84, ECHR 2014), sees no reason to hold otherwise.

2. Whether the interference was justified

50. The Court must further examine whether that interference was justified in terms of Article 11 § 2 of the Convention , that is, whether it was in accordance with the law, pursued a legitimate aim and was "necessary in a democratic society" (see *Enerji Yapı-Yol Sen*, cited above, § 25; *Karaçay v. Turkey*, no. 6615/03, § 29, 27 March 2007; and *Urcan and Others v. Turkey*, no. 23018/04 and 10 other applications, § 26, 17 July 2008).

(a) The parties' submissions

(i) The Government

51. The Government argued that the interference had been provided for by law as it had been based on sections 186(1) and 210(1) of the Labour Act (see paragraph 32 above) and section 103 of the Obligations Act (see paragraph 35 above). In their view, those provisions had been clear and unambiguous and those Acts accessible as they had been published in the Official Gazette.

52. The Government further submitted that the interference in question had pursued legitimate aims of protecting the health and the legal order and that it had been "necessary in a democratic society".

53. In particular, the applicant union had been able to exercise its trade union freedom and protect the interests of its members through collective

bargaining which had resulted in the conclusion of the main Collective Agreement and its Annex. Once the domestic authorities had realised that the Annex was null and void, they had invited the applicant union to negotiate the conclusion of a new collective agreement/annex to replace the invalid Annex (see paragraphs 15 above). However, the applicant union had refused all efforts by the domestic authorities in that regard (see paragraph 16 above) and had responded with an illegal strike. Despite that the domestic authorities had unilaterally increased salaries of doctors and dentists in 2005 by 10% with a view to alleviating the situation thus created (see paragraph 17 and 38 above). That being so, and given that under the Court's case-law the right to strike was not the only means to protect occupational interest of trade union members by trade union action (see *Schmidt and Dahlström v. Sweden,* 6 February 1976, § 36, Series A no. 21), the Government argued that the interference in the present case had been proportionate to the legitimate aim pursued. They therefore invited the Court to find that there had been no violation of Article 11 in the present case.

(ii) The applicant union

54. The applicant union argued that in deciding to prohibit the strike, the domestic courts had misapplied the domestic law. First, the courts had acted *extra petitum,* because they had prohibited the strike on the ground that the Annex had been invalid, that is, on a ground on which the State had not relied in its civil action of 5 April 2005 (see paragraphs 18 and 23 above). Secondly, the courts had focused on the name rather than the substance (*falsa nominatio non nocet*). Instead of examining whether the Annex could have remained valid as an independent collective agreement, they had simply held that the Annex had been a part of the main Collective Agreement for the Health and Health Insurance Sector and was thus null and void because it had not been entered into by all the trade unions that had concluded that agreement (see paragraph 23 above).

55. The applicant union further argued that the decisions of the domestic courts suggested that a strike was always unlawful in circumstances such as those in the present case where a trade union wished to strike in order to enforce a collective agreement and where the other party to that agreement had questioned its validity. In particular, the reasons adduced by the domestic courts for their decisions to prohibit the strike seemed to suggest that in such circumstances trade unions could not strike because either (a) the collective agreement was valid and section 210(1) of the Labour Act prohibited strikes in respect of matters already governed by a collective agreement (see paragraph 32 above), or (b) the collective agreement was invalid and for precisely that reason it could not be enforced by resorting to a strike. In the applicant union's view, such an interpretation by the

domestic courts could not be sustained as it completely excluded the right to strike in such circumstances.

(b) The Court's assessment

56. The Court finds no reason to question that the Zagreb County Court's judgment of 8 April 2005 prohibiting the applicant union from holding a strike on 11 April 2005 (see paragraph 19 above), which was upheld by the Supreme Court's judgment of 27 April 2005 (see paragraph 23 above), had a legal basis in domestic law, namely sections 186(1) and 210(1) of the Labour Act (see paragraph 32 above) and section 103 of the Obligations Act (see paragraph 35 above). As to the applicant union's argument to the contrary (see paragraph 54 above), the Court reiterates that its power to review compliance with domestic law is limited and that it is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Federation of Offshore Workers' Trade Unions and Others v. Norway* (dec.), no. 38190/97, 27 June 2002). The Court is therefore satisfied that the interference in the present case was "prescribed by law", as required by Article 11 § 2 of the Convention.

57. The Court further reiterates that the domestic courts' judgments to prohibit the strike were based on the finding that the Annex was null and void because it had not been entered into by all the trade unions that had concluded the main Collective Agreement for the Health and Health Insurance Sector (see paragraphs 23 and 27-29 above). Their judgments aimed to uphold the principle of parity in collective bargaining enshrined in section 186(1) of the Labour Act (see paragraph 32 above) and thus protect the rights of those trade unions. It follows that the interference with the applicant union's freedom of association in the present case pursued the legitimate aim of protecting the rights of others.

58. As regards the proportionality, the Court first notes that neither the Zagreb County Court nor the Supreme Court found it necessary to examine whether the applicant union was allowed to strike to demand the conclusion of a (new) collective agreement for the medical and dentistry sector. The Supreme Court held so, even though in the civil proceedings for prohibition of the strike, where the validity of the Annex was a preliminary issue, that court had itself found the Annex null and void. In those circumstances it was of particular importance to address that third ground for the strike (see paragraph 14 above) because under the domestic law trade unions were allowed to strike in the absence of a collective agreement (see paragraphs 32-33 above). Instead, the domestic courts considered that they were not required to do so because the applicant union's representative had allegedly stated during the proceedings that it had been listed as subsidiary in case in the meantime the Annex was declared invalid in the parallel civil

proceedings for declaring it null and void. In the view of those courts, that condition had not been fulfilled at the time (see paragraphs 19 and 23 above).

59. The effect of that approach was that the applicant union was not entitled to hold a strike in the period between 11 April 2005, as the date of the intended strike, and 16 December 2008, as the date on which the judgment of the Zagreb Municipal Court declaring the Annex null and void in the parallel civil proceedings became final (see paragraph 28 above). In the absence of any exceptional circumstances, the Court finds it difficult to accept that upholding the principle of parity in collective bargaining is a legitimate aim (see paragraph 57 above) capable to justify depriving a trade union for three years and eight months of the most powerful instrument to protect occupational interests of its members. That is especially so in the present case where the applicant union was in that period not allowed to strike to pressure the Government of Croatia to grant doctors and dentists the same level of employment-related rights the Government had already agreed upon in the Annex, which had been invalidated on formal grounds only. It follows that the interference in question cannot be regarded as proportionate to the legitimate aim it sought to achieve. This conclusion is not called into question by the Government's argument (see paragraph 53 above) that the domestic authorities unilaterally increased by 10% salaries of doctors and dentists in 2005. That is so because the Annex provided for progressive increase of their salaries by 10% every year in the period between January 2005 and January 2010 (see clause 57 of the Annex in paragraph 37 above).

60. The foregoing considerations are sufficient to enable the Court to find that there has been a violation of Article 11 of the Convention in the present case.

61. In view of this conclusion, the Government's inadmissibility objection as to the lack of *locus standi* (see paragraph 45 above), must be dismissed.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

63. The applicant union claimed 100,000 euros (EUR) in respect non-pecuniary damage.

64. The Government contested that claim.

65. The Court considers that a finding of a violation of Article 11 of the Convention constitutes in itself sufficient just satisfaction in the circumstances for any non-pecuniary damage the applicant union might have sustained.

B. Costs and expenses

66. The applicant union also claimed a total of EUR 10,000 for the costs and expenses incurred before the domestic courts and for those incurred before the Court.

67. The Government contested that claim.

68. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,250, covering costs under all heads, plus any tax that may be chargeable to the applicant union.

C. Default interest

69. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins to the merits* the Government's objection as to the lack of *locus standi* and *rejects* it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 11 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage the applicant union might have sustained;

5. *Holds*

(a) that the respondent State is to pay the applicant union, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,250 (three thousand two hundred and fifty euros) in respect of costs and expenses, to be converted into Croatian kunas, at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant union;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant union's claim for just satisfaction.

Done in English, and notified in writing on 27 November 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto de Albuquerque is annexed to this judgment.

I.B.L.
S.N.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. I agree that there has been a violation of Article 11 of the European Convention on Human Rights (hereafter "the Convention"). The Chamber's criticism of the respondent State is based on the excessive length of the domestic proceedings relating to the prohibition of the strike and the legality of the Annex ("Collective Agreement for the Medical and Dentistry Sector"), which lasted from 5 April 2005 until 16 December 2008. Although correct, this conclusion does not touch the heart of the case. That is why I feel obliged to add some thoughts on the point of principle raised by the applicant union, and disputed by the Government, which is recognition of the right to strike in the context of a collective agreement[1].

2. An important methodological note should be made in the guise of an introduction to this opinion. As I have argued in my separate opinions in *Konstantin Markin* (GC) and *K.M.C*, when defining the meaning and extension of the protection of social rights under the Convention, the European Court of Human Rights ("the Court") can and must take into account elements of international law other than the Convention and its *travaux préparatoires*, such as instruments of international labour law and the case-law based on the interpretation of such elements by the competent organs, and the practice of European and non-European States reflecting common values[2].

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[1] There is no uniform international definition of a strike. For the purposes of this opinion, it encompasses any work stoppage, however brief and limited, with a view to defending and furthering the workers' interests and rights by exerting pressure on employers, including sympathy or secondary strike in the case of workers who take action in support of colleagues employed by another employer. Strikes may seek solutions to occupational problems or, more broadly, economic and social policy problems which are of concern to the workers. Activities such as go-slow (slowdown in work), work-to-rule (work rules are applied to the letter), tools-down or sit-down (workers are present in place of work, but refuse to continue working or leave), are often just as paralyzing as a total stoppage, and therefore should also be counted as strike action, as has been recognised by the Court (on a go-slow strike, see *Dilek and Others v. Turkey*, nos. 74611/01, 26876/02 and 27628/02, § 57, 17 July 2007), the International Labour Organisation (ILO) (for a very long time now, see Freedom of Association and Collective Bargaining, Geneva, International Labour Office, 1994, paragraph 173, and Digest of the decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition, Geneva, International Labour Office, 2006, paragraph 545) and legal commentators (Ben Saul *et al*., The International Covenant on Economic, Social and Cultural Rights, Commentary, Cases and Materials, Oxford, Oxford University Press, 2014, pp. 577 and 578).

[2] For a justification of this methodology of legal reasoning and interpretation, which aims at the cross-fertilization of international human rights and other fields of international law, see my opinions in *Konstantin Markin v. Russia* [GC], no. 30078/06, 22 March 2012, *K.M.C. v. Hungary*, no. 19554/11, 10 July 2012, and on points of principle, *Case of Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania (GC)*, no. 47848/08, 17 July 2014.

The right to strike in international law

3. The right to strike is explicitly acknowledged in Article 8 § 1 (d) of the United Nations Covenant on Economic, Social and Cultural Rights (CESCR)[3], Article 6 § 4 of the European Social Charter (ESC)[4], Article 28 of the Charter of Fundamental Rights of the European Union (CFREU)[5], paragraph 13 of the Community Charter of the Fundamental Social Rights of Workers[6], Article 45 (c) of the Charter of the Organization of American States (COAS), Article 27 of the Inter-American Charter of Social Guarantees[7], Article 8 (1) (b) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural

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That was in fact also the position of the Court in the ground-breaking case of *Demir and Baykara v. Turkey* [GC], no. 34503/97 (GC), ECHR 2008-V, in its crucial paragraph 85, which I fully share. Thus, the jurisprudence and soft law of other international courts and quasi-jurisdictional, supervisory bodies cannot be lightly brushed aside with the excuse that Article 11 does not restrict the scope for a wide variety of different legislative approaches.

[3] The CESCR was adopted on 16 December 1966 and has 162 parties, including Croatia. In respect of the respondent State it entered into force on 12 October 1992. The Committee on Economic, Social and Cultural Rights has urged States parties to take the necessary measures to ensure the full exercise of the right to strike or relax the limitations imposed on this right (Concluding observations on Afghanistan, E/C.12/AFG/CO/2-4, 7 June 2010, paragraph 25, Concluding observations on the UN Administration in Kosovo, E/C.12/UNK/CO/1, 1 December 2008, paragraph 20, Concluding observations on the Liechtenstein, E/C.12/LIE/CO/1, 9 June 2006, paragraph 16, Concluding observations on Uzbekistan, E/C.12/UZB/CO/1, 24 January 2006, paragraph 51, and Concluding observations on Democratic People's Republic of Korea, E/C.12/1/Add.95, 12 December 2003, paragraphs 16 and 36).

[4] The ESC (CETS No. 035) was adopted on 18 October 1961 and has 27 States Parties, including Croatia. In respect of the respondent State the ESC, including Article 6, entered into force on 28 March 2003. The revised version of the ESC (CETS No. 163) was adopted on 3 May 1996 and has 33 States Parties. Croatia signed it on 6 November 2009, but has not yet ratified it.

[5] Initially proclaimed at the Nice European Council on 7 December 2000, but without binding legal effect, the CFREU became legally binding on the EU institutions and on national governments from 1 December 2009, with the entry into force of the Treaty of Lisbon. Croatia has been bound by the CFREU since its accession to the European Union on 1 July 2013.

[6] The Community Charter was adopted at the meeting of the European Council held in Strasbourg on 9 December 1989.

[7] Both the COAS and the Charter of Social Guarantees were adopted on 30 April 1948 by the Ninth International Conference of American States, in Bogota. The later document "sets forth the minimum rights workers must enjoy in the American states, without prejudice to the fact that the laws of each state may extend such rights or recognise others that are more favorable". Later on, the first Protocol of Amendment to the COAS, the so-called "Protocol of Buenos Aires", which was adopted on 27 February 1967 and has 31 States parties, established new objectives and standards for the promotion of the economic, social, and cultural development of the peoples of the Hemisphere, including the right to strike.

Rights (Protocol of El Salvador)[8], and Article 35 (3) of the Arab Charter on Human Rights (ArCHR)[9]. Furthermore, it has also been derived from Articles 3 and 10 of the ILO Freedom of Association and Protection of the Right to Organise Convention (ILO Convention 87)[10], read in conjunction with other ILO instruments which refer to the right to strike, such as the Abolition of Forced Labour Convention (no. 105), which prohibits the use of any form of forced or compulsory labour as a punishment for having participated in strikes, and the Voluntary Conciliation and Arbitration Recommendation (no. 92), which states that the parties should be encouraged to abstain from strikes and lockouts in the event of voluntary conciliation and arbitration, and that none of its provisions may be interpreted as limiting, in any way whatsoever, the right to strike[11]. Finally, Article 22 of the International Covenant on Civil and Political Rights (ICCPR) has also been interpreted as guaranteeing the right to strike[12].

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[8] The Protocol was adopted on 17 November 1988 and has 16 States Parties. In *Huilca Tecse v. Peru, Merits, Reparations and Costs*, 3 March 2005, series C, no. 121, paragraph 70, the Inter-American Court of Human Rights left the door open to the acknowledgment of the Court's contentious jurisdiction on the right to strike as an "appropriate means to exercise" freedom of association under Article 16 of the American Convention, in spite of Article 19 (6) of the Protocol of El Salvador (on this, Laurence Burgorgue-Larsen, "Economic and Social Rights", in Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, The Inter-American Court of Human Rights, Case Law and Commentary, Oxford, Oxford University Press, 2011, p. 624, and Tara Melish, "The Inter-American Court of Human rights, Beyond Progressivity", in Malcolm Langford (ed.), Social Rights Jurisprudence, Cambridge, Cambridge University Press, 2008, p. 398).

[9] The second, updated version of the ArCHR was adopted on 22 May 2004 and has 12 States Parties. This is a revised edition of the first Charter of 15 September 1994.

[10] The ILO Convention 87 was adopted on 9 July 1948 and has 153 States Parties, including Croatia. In respect of the respondent State it entered into force on 8 October 1991.

[11] The first declarations on the right to strike were made, respectively, by the Committee on Freedom of Association Second Report, 1952, Case no. 28 (Jamaica), paragraph 68, and the Committee of Experts General Survey, 1959, paragraph 68. The 1957 Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation and the 1970 Resolution concerning Trade Union Rights and Their Relation to Civil Liberties reinforced those statements of principle. Both the 1957 Convention no. 105 and the 1951 Recommendation no. 92 enjoyed tripartite support.

[12] The ICCPR was adopted by a United Nations General Assembly resolution of 16 December 1966 and has 168 States Parties, including the respondent State. In respect of the respondent State the ICCPR entered into force on 12 October 1992. In *J.B. et al. v. Canada*, Communication no. 118/82, 18 July 1986, paragraph 6 (3) and (4), the Human Rights Committee (HRC) found that Article 22 of the ICCPR did not protect the right to strike, with a remarkable dissenting opinion submitted by five members. The HRC majority's position was determined by the disputable premise that "Each international treaty including the (ICCPR) has a life of its own", detaching the interpretation of the two 1966 Covenants from one another. More recent Concluding Observations have shown a change of heart of the HRC, which now invokes Article 22 of the ICCPR as the basis of the right to strike (Concluding Observations on Estonia, CCPR/C/EST/CPO/3, 4 August 2010, paragraph 15, Concluding Observations on Chile, CCPR/C/79/Add.104, paragraph 25, Concluding

4. It is in Europe that the protection of the right to strike is the most fully developed at the regional level. While none of the above-mentioned European instruments defines the constituent elements of this right, they nonetheless restrict the right of workers and employers to resort to collective action, including the right to strike, to cases of conflicts of interest, subject to obligations that might arise out of the law or collective agreements previously entered into. The obligation of social peace under a collective agreement is thus established as an intrinsic limit to the exercise of the right to collective action, including the right to strike.

Under the ESC, the right to strike is an individual right of every employee to take collective action in employment-related disputes. Workers have the right to strike only in the context of a conflict of interests, not in the context of a conflict of rights, that is, in cases of dispute concerning the existence, validity and interpretation of a collective agreement or its violation, for example through action taken during its currency with a view to the revision of its content[13]. Disputes concerning valid collective agreements should be settled through negotiation, mediation, arbitration or the courts. As a result of the principle *pacta sunt servanda*, the social peace obligation binds both parties to the collective agreement – employees and employers – and those to whom the agreement has been extended, but not unrepresented employees or employers[14]. In any case, the social peace obligation must express the mutual consent of the parties and not be too generally formulated, or include matters not explicitly covered by the agreement[15]. Within those limits, the right to strike should be guaranteed in

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Observations on Lithuania, CCPR/CO/80/THU, 4 May 2004, paragraph 18, Concluding Observations on Germany, CCPR/C/79/Add.73, 8 November 1996, paragraph 18; Concluding Observations on Ireland, CCPR/C/79/Add 21, 3 August 1993, paragraph 17). Scholars have repeatedly criticised the initial narrow position of the HRC and welcomed its later departure from it (for example, Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, 2nd revised edition, Kehl, 2005, pp. 503 and 504; Martin Scheinin, "Human Rights Committee. Not only a Committee on Civil and Political Rights", in Malcolm Langford (ed.), Social Rights Jurisprudence, cited above, p. 546; Sarah Joseph and Melissa Castan, The International Covenant on Civil and Political Rights, Cases, Materials and Comments, Third edition, Oxford, Oxford University Press, 2013, pp. 660, 661, 664 and 665, and Ben Saul et al., The International Covenant on Economic, Social and Cultural rights, cited above, p. 593).

[13] ECSR Conclusions I, Statement of Interpretation on Article 6 § 4, p. 38, and Digest of the case law of the European Committee of Social Rights, 2008, p. 56.

[14] Furthermore, a social peace obligation must reflect with certainty the will of social partners. Whether this is the case is subject to assessment with reference, *inter alia*, to the industrial relations background in the given State (ESCR Conclusions 2004, Norway, p. 404, and Digest of the case law of the European Committee of Social Rights, 2008, p. 57).

[15] ECSR Conclusions XV-1, volume 2, pp. 431 and 432, which criticised a formulation considered to apply not only to matters raised and rejected in connection with the conclusion of the agreement, but even to matters that could have been raised; and

the context of any negotiation between employers and employees in order to settle an industrial dispute. Consequently, prohibiting strikes not aimed at concluding a collective agreement is not in conformity with Article 6 § 4 of the ESC[16].

In accordance with the Appendix to Article 6, paragraph 4, of the ESC, each Contracting Party may regulate the exercise of the right to strike by law, provided that any further restriction can be justified under the terms of Article 31. The latter provision ensures that the rights and principles enshrined in Part I of the ESC and their effective exercise provided for in Part II cannot be made subject to restrictions or limitations not justified under Parts I and II, except where they are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of the public interest, national security, public health or morals. The authorities must demonstrate that these conditions are satisfied in each case[17].

In its most recent assessment of the legal framework of the respondent State, the ECSR concluded that the right to strike was not limited to strikes aimed at concluding a collective agreement, but that the situation in Croatia was not in conformity with Article 6 § 4 of the ESC because the right to call a strike was reserved to trade unions, the formation of which could take up to thirty days, which was excessive[18].

5. In European Union law, the right to strike is a fundamental right of employees. In the common market legal order dependent work was primarily seen as a purely economic factor. Article 27 et seq. of the CFREU have considerably changed this perspective, by emphasizing the social role played by trade unions and strengthening the collective character of workers' rights. To that extent these provisions have enshrined essential elements of a *Sozialstaalichkeit* [19] at the level of the constitutional foundations of the Union. Nevertheless, regulation of collective and strike action remains within the scope of the powers of the Member States of the

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Conclusions XIII-2, p. 283, which censured a formulation applicable to matters subject to bargaining during the negotiations but not covered by the agreement.

[16] ECSR Conclusions IV, Germany, p. 50, Conclusions XIX-3 (Germany) (2010), and Digest of the case law of the European Committee of Social Rights, 2008, p. 56.

[17] ECSR Conclusions X-1, p. 76, reiterated in Conclusions XIII-1, p. 151, and Conclusions XV-1, p. 432.

[18] ECSR Conclusions XIX-3 (2010) (Croatia), p. 12. In its Conclusions XVIII-1 Volume 1 (Czech Republik) (2006), the ECSR noted from the Czech Supreme Court's judgments that it did in principle recognise the right to strike outside the context of collective bargaining. It is important to remember that, in *Tüm Haber Sen and Çınar v. Turkey*, no. 28602/95, § 39, ECHR 2006‑II, the Court described the ECSR as a "particularly qualified" body in this domain.

[19] As Robert Rebhahn, Rechte des Arbeitslebens, in Christoph Grabenwarter (ed.), Europäischer Grundrechtsschutz, 1 Auflage, Baden-Baden, NOMOS Verlag, 2014, p. 679, put it, expressing the idea of a State governed by the rule of law with a social conscience.

Union, in accordance with Article 153 (5) of the Treaty on the Functioning of the European Union (TFEU)[20]. Moreover, the right to strike can be subject to restrictions where its effects may disproportionately hinder an employer's freedom of establishment or freedom to provide services[21].

6. Within the ILO, workers' organisations such as trade unions, federations and confederations, must enjoy the right to strike as an essential means of defending and furthering the economic and social interests of workers. The legitimate exercise of the right to strike may not result in sanctions of any sort, which would be tantamount to acts of anti-union discrimination. Only limited categories of workers may be denied this right and only limited restrictions may be imposed by law on its exercise. The ILO Committee on Freedom of Association and the Committee of Experts on the Application of Convention and Recommendations (the "Committee of Experts") have considered temporary restrictions on strikes under provisions prohibiting strike action in breach of collective agreements as compatible with freedom of association, since the solution to a legal conflict as a result of a difference in the interpretation or application of a legal text should be left to the competent courts[22]. Conversely, a ban on strike action

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[20] Article 2 of Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States makes it clear that it may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right to strike.

[21] Court of Justice of the European Union, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Esti*, judgment of 11 December 2007 (paragraph 44: "the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures… As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices."), followed by Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareforbundet*, judgment of 18 December 2007. Attention should be drawn to the crucial circumstance that these two judgments, although citing Article 28 of the Charter, were delivered when this provision was not yet binding, and before *Demir and Baykara*. In spite of the laudable statement of principle of the right to strike as a "fundamental right" referred to above, the conclusions of those judgments on the admissibility of extensive restrictions to the right to strike may no longer be tenable after the entry into force of that provision, when read in the light of *Demir and Baykara*, which is not compatible with a reading giving undue prominence to the employers' economic freedoms over the professional interests of workers, nor with the levelling down of national labour protection standards to the condition of the worst. The more balanced approach of the Luxembourg Court, in its judgment of 15 July 2010 delivered in Case C-271/08, *Commission v. Germany*, comes closer to the imperative direction set by the Court in *Demir and Baykara*.

[22] Both the Committee on Freedom of Association and the Committee of Experts have established a set of principles on the right to strike, based on Articles 3 and 10 of the ILO Convention No. 87, which are summed up in the following texts: Collective Bargaining in the Public Service: A way forward, Geneva, International Labour Office, 2013, paragraphs 409-433 and 604-611; Giving Globalisation a Human Face, Geneva, International Labour

not linked to a collective dispute to which the employee or union is a party would be contrary to the principles of freedom of association. Thus, recourse to strike action is generally possible as a means of pressure for the adoption of an initial agreement or its renewal, although strikes systematically decided long before negotiations take place do not fall within the scope of the principles of freedom of association. Provisions which prohibit strikes if they are concerned with the issue of whether a collective employment contract will bind more than one employer are also contrary to the principles of freedom of association, since workers and their organisations should be able to call for industrial action in support of multi-employer contracts. Furthermore, workers' organisations bound by collective agreements should not be prevented from striking against the social and economic policy of the Government, in particular where the protest is not only against that policy but also against its effects on some provisions of collective agreements. If the legislation prohibits strikes during the term of collective agreements, this restriction must be compensated by the right to have recourse to "impartial and rapid arbitration machinery" for individual or collective grievances concerning the interpretation or application of collective agreements[23].

Office, 2012, paragraphs 117-161; Digest of the decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition, Geneva, International Labour Office, 2006, paragraphs 520-676; Collective bargaining: ILO standards and the principles of the supervisory bodies, Geneva, International Labour Office, 2000, pp. 59 and 60; Bernard Gernigon, Alberto Odero and Horacio Guidoilo, Principles concerning the right to strike, Geneva, International Labour Office, 2000; and Committee of Experts' General Survey, Freedom of Association and Collective Bargaining, Geneva, International Labour Office, 1994, paragraphs 136-79. In spite of the opposite position of the Employer's Group at the ILO, the ILO bodies have consistently regarded the right to strike as an "intrinsic corollary of the right to organize under the Convention no. 87" or "one of the essential means available to workers and to their organisations for furthering and developing their interests" (see, for example, the groundbreaking General Survey, 1994, paragraph 179). The Committee of Experts considers that, in so far as its views are not contradicted by the International Court of Justice, they should be considered as valid and generally recognised (Collective Bargaining in the Public Service: A Way Forward, Geneva, International Labour Office, 2013, foreword, § 8). That has also been the position of scholars (for example, Roy Adams, "Labor Rights", in David Forsythe (ed.), Encyclopedia of Human Rights, volume 3, Oxford, Oxford University Press, 2009, p. 386, and Colin Fenwick, "The International Labour Organisation, An integrated approach to economic and social rights", in Malcolm Langford (ed.), Social Rights Jurisprudence, cited above, p. 598).

[23] This requirement dates back to the Committee of Experts' General Survey, Freedom of Association and Collective Bargaining, cited above, paragraph 167, and has been reiterated over the years. More recently, see Collective Bargaining in the Public Service, cited above, paragraph 605: "The Committee points out that the State should make available to the parties to collective bargaining free and expeditious dispute settlement machinery which is independent and impartial and has the confidence of the parties".

The right to strike in comparative constitutional law

7. The right to strike as a means of action of workers' organisations is almost universally accepted. In a very large number of countries, the legislature has viewed this right as sufficiently important to immunise it from potential interference, by explicitly recognising it at the constitutional level, such as in Albania, Algeria, Angola, Argentina, Armenia, Azerbaijan, Belarus, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Chile, Colombia, Congo, Czech Republic, Democratic Republic of the Congo, Costa Rica, Ivory Coast, Croatia, Cyprus, Djibouti, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, France, Georgia, Greece, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Italy, Kazakhstan, Kenya, Republic of Korea, Kyrgyzstan, Latvia, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Madagascar, Maldives, Mali, Mauritania, Mexico, Republic of Moldova, Montenegro, Morocco, Mozambique, Nicaragua, Niger, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Rwanda, San Marino, Sao Tome and Principe, Senegal, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Suriname, Timor-Leste, Togo, Turkey, Ukraine, Uruguay and Venezuela[24]. In addition, in some countries, such as Ireland and the United States, the highest courts have held that the right to strike is implicit in their constitutional laws[25]. This is clear, abundant and uncontested evidence of a continuing international trend[26].

The right to strike as a human right under the Convention

8. In the light of *Demir and Baykara*, cited above, the right of association of workers includes the following essential elements: the right to form and join a trade union, the prohibition of closed-shop agreements, the right to bargain collectively with the employer and the right for a trade

[24] See Giving Globalisation a Human Face, cited above, paragraph 123.

[25] For the US, *Charles Wolff Packing Company v. Court of Industrial Relations*, 262 U.S. 522, and *Lyng v. Auto Workers*, 485 U.S. 360, and for Ireland, *Education Co v. Fitzpatrick* (1961) IR 345, Kingsmill Moore J at 397. In Canada, after the historic case of *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, where collective action has been acknowledged as a right protected by the Charter of Rights and Freedoms, the Supreme Court heard a case on May 16 of this year on whether the right to strike in essential services is constitutionally protected.

[26] In *Christine Goodwin v. the United Kingdom [GC]*, no. 28957/95, § 85, ECHR 2002-VI, the Court attached "less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend", quoting the legal situation in non-European countries.

union to seek to persuade the employer to hear what it has to say on behalf of its members[27]. In a democratic society, the ultimate practical "means to persuade the employer to hear"[28] the demands of the workers is obviously strike action. If collective action represents the core of the workers' freedom of association, strike action is the core of the core. Indeed, striking predated both unions and collective bargaining. Thus, the taking of strike action should be accorded the status of an essential element of the Article 11 guarantee[29].

9. The right to collective action, including the right to strike, is the starting point from which any restriction must be justified, and any such restriction much be construed strictly[30]. As the right to strike is an essential

[27] *Demir and Baykara*, cited above, §§ 145 and 154. Interestingly the Court added: "This list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations". The Court's case-law has been further confirmed and developed, with regard to the right to strike, in *Enerji YAPI-YOL SEN v. Turkey*, no. 68959/01, 21 April 2009, which went well beyond earlier pronouncements on the protection of strike actions as a side effect of the right to peaceful assembly, made in *Karaçay v. Turkey*, no. 6615/03, § 35, 27 March 2007, *Dilek and Others v. Turkey*, nos. 74611/01, 26876/02 and 27628/02, § 71, 17 July 2007, *Urcan and Others v. Turkey*, nos. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04, § 34, 17 July 2008.

[28] To refer to the wording of *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, §§ 44 and 46, ECHR 2002-V.

[29] Indeed, this is an "important aspect" (as in *Schmidt and Dahlström v. Sweden*, judgment of 6 February 1976, Series A no. 21, p. 16, § 36), or even an "indispensable corollary" of the freedom of association of union trades (*Enerji YAPI-YOL SEN*, cited above, § 24, referring to the ILO language). In spite of its clarity, *Enerji YAPI-YOL SEN* was not correctly understood in some quarters (see for a misguided reading of that case, *Metrobus Ltd. v. Unite the Union*, (2009) EWCA Civ 829, as opposed to the correct reading made by Sophie Robin-Olivier, Conv. EDH, art. 11: Liberté de réunion et d'association et liberté syndicale, in Répertoire de droit européen, Avril 2014, F. Dorssemont, "The right to take collective action under Article 11 of the ECHR", in F. Dorssemont and others (ed.), The European Convention on Human Rights and the Employment Relation, Oxford, Hart Publishing, 2013, p. 332, O. Edström, "The right to collective action as a fundamental right", in Mia Ronmar (ed.), Labour Law, Fundamental Rights and social Europe, Oxford, Publishing Hart, p. 66, K.D. Ewing and J. Hendy, "The dramatic implications of Demir and Baykara", in 39 Industrial Law Journal, 2 (2010), and J.P. Marguénaud and J. Mouly, "La Cour européenne des droits de l'homme à la conquête du droit de grève", in Revue de Droit du Travail, 9 (2009), 499). The attempt of *The National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, § 84, 8 April 2014 to backtrack from the position of principle of *Enerji YAPI-YOL SEN* is not convincing, since the two above-mentioned expressions were used in the same paragraph of *Enerji YAPI-YOL SEN* and the second one was clearly intended to clarify the meaning of the first one. That intention is reflected in the fact that in the same paragraph 24 of *Enerji Enerji YAPI-YOL SEN* the Court refers to the need to read the Convention in the light of other international law instruments, and even to the authority of *Demir and Baykara*.

[30] This has been the position of principle of the Court since *UNISON v. the United Kingdom (dec.)*, no. 53574/99, 10 January 2002: "the prohibition of the strike must be regarded as a restriction on the applicant's power to protect those interests and therefore discloses a restriction on the freedom of association guaranteed under the first paragraph. It has

element of the workers' right of association, any restriction of that right must be lawful[31], pursue a legitimate aim stated in Article 11 § 2 of the Convention and be necessary in a democratic society[32]. Collective agreements may be a source of legitimate restrictions of the right to strike, if and when these conditions are complied with.

In *UNISON*, the Court accepted that the restriction on strike action concerned the "rights of others", referring only to the employer[33]. Subsequently, *The National Union of Rail, Maritime and Transport Workers* amended this restricted view by considering that 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 could also be considered for the legitimate purpose of protecting the rights and freedoms of others, not limited to the employer's side in an industrial dispute. Furthermore, it differentiated between an accessory and a core aspect of trade union freedom, 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 being considered as an accessory, and not a core, aspect of that freedom, with the consequence that Governments should have a wider margin of appreciation in regulating that aspect. In view of the interests that could be hurt by sympathy strikes or secondary action, that margin of appreciation could eventually include the outright suppression of that facet of the workers' right to collective action through strike[34].

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examined, below, whether this restriction was in compliance with the requirements of Article 11 § 2 of the Convention, namely whether it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 and was "necessary in a democratic society" for the achievement of those aims".

[31] In the context of employment the requirement of lawfulness must be understood as encompassing both the public and private regulatory framework applicable in each professional sector (see, for example, *Casado Coca v. Spain*, no. 15450/89, §§ 42 and 43, 19 February 1993). Restrictions on the strike's purposes, space and time extension, modalities and timing and the strikers' conduct must be clearly provided for by this legal framework.

[32] At this juncture, it cannot be ignored that the restriction clause of Article 11 § 2 of the ECHR is more extensive than the ones of Article 8 (1) (a) and (c) of the CESCR (on this, see Matthew Craven, The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development, Oxford, Clarendon Press, 1995, p. 258, and Ben Saul *et al*., The International Covenant…, cited above, p. 581). Restrictions which aim at certain categories of public servants, or certain essential services the interruption of which would endanger the life, personal safety or health of the whole or part of the population, or situations of acute national or local crisis, although only for a limited period and solely to the extent necessary, might possibly meet these requirements.

[33] See *UNISON*, cited above. No reasons were provided to support such a restrictive approach, which – taken to its limit – would legitimize every restriction of strike action in view of its inherent impact on the financial interests of the employer.

[34] I find problematic the distance taken in *The National Union of Rail, Maritime and Transport Workers*, cited above, §§ 86-88, with regard to § 119 of *Demir and Baykara*, in

10. While it is true that the right to collective bargaining does not *per se* correspond to a "right" to have a collective agreement, and a concomitant obligation on employers to actually enter into a collective agreement, or remain in any particular collective bargaining arrangement, or accede to the requests of a union on behalf of its members[35], it is also undeniable that the right to engage collectively in social dialogue with employers would be devoid of its real practical force if not accompanied by the possibility of resorting to strike action whenever employers either do not want to enter that dialogue, or have abandoned or undermined it. To use the strong, but appropriate, words of the Chamber in the present case, the right to strike is "the most powerful instrument to protect occupational interests" of trade unions and their members. States have a duty to guarantee that the exercise of this fundamental human right be fully preserved both in the public and the private employment sector. They can neither be neutral nor passive when faced with breaches of the right to collective bargaining, including the right to strike, in the private employment sector, and therefore a positive obligation is imposed on States under Article 11 to remedy and even prevent those breaches[36].

As regards the argument that the union's interests in protecting its members must not necessarily weigh more heavily than the employer's economic freedoms, the Court has already set its own standard applicable to these conflicting interests, when it considered that the impact of any

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which the Court restricted the margin of appreciation in this domain. This is so for two reasons: first, the somewhat lax, non-purposive interpretative approach of *The National Union of Rail, Maritime and Transport Workers* may engender great legal uncertainty, and second, blanket and absolute prohibitions of strike action may tilt the balance unacceptably towards the benefit of employers and put in jeopardy the inalienable substance of the Article 11 right. They therefore call for a narrow margin of appreciation. From this standpoint, the defence that the legislature was required to decide to eschew case-by-case consideration in favour of a uniform prohibitive rule, and the contention that any less restrictive approach would be impracticable and ineffective, failed to properly balance the competing rights and freedoms, particularly if regard is had both to the discernible international trend calling for a less restrictive approach and the legislative history of the respondent State which points to the existence of conceivable feasible alternatives to an outright ban of secondary industrial action. Lord Wright's call, in a landmark 1942 case, affirming that "the right of workmen to strike is an essential element in the principle of collective bargaining", was not heard (*Crofter Hand Woven Harris Tweed v. Veitch* (1942) AC 3, p. 463).

[35] *Demir and Baykara*, cited above, § 158.

[36] The "horizontal effect" (*effet horizontal*, *Drittwirkung*) of workers' Convention rights in the context of a collective agreement has already been acknowledged by the Court in its seminal case *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A No. 44, § 49, and further developed over the years (see, for instance, *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, 2 July 2002; *Danilenkov v. Russia*, no. 67336/01, 30 July 2009; and *Vilnes and Others v. Norway*, no. 52806/09 and 22703/10, 5 December 2012). Space limits further elaboration on this topic.

restriction on unions' ability to take strike action must not place their members at any real or immediate risk of detriment or of being left defenceless against future attempts to downgrade pay or other work conditions. When that occurs, the restriction is disproportionate[37].

The assessment of the facts of the case under the European test

11. The applicant union's justification for striking was threefold: first, to protect the social and economic interests of doctors by insisting that the Government of Croatia honour its obligations arising from the Collective Agreement for the Medical and Dentistry Sector – the Annex; second, to have the results of the referendum on the approval of the Annex recognised; and third, and as a subsidiary ground, to address issues specific to doctors and dentists within the healthcare system by demanding that a collective agreement for the medical and dentistry sector be concluded.

The applicant union itself admitted that the Annex was concluded without all the partners of the collective agreement having signed it, but argued that the Annex was a "separate legal act" and that it was "empowered to negotiate" it alone and hence wanted to "bring about the application of the signed agreement"[38]. That submission is clearly unfounded, since the "Annex" was not a "separate act" and the collective agreement could only be complemented or altered by all the signatories, in accordance with the principle of parity in collective bargaining (section 186(1) of the Labour Act). To that extent the domestic courts were right in finding the Annex invalid and the first two grounds for the strike unlawful.

12. Since the Annex was formally invalid, and the first two grounds for the strike were dependent on its validity, the only ground left for the strike was the "subsidiary" demand that a collective agreement for the specific medical and dentistry sector be concluded. The crux of the case lies in knowing whether that subsidiary ground for striking was covered by Article 210(1) of the Labour Act ("in order to protect and promote the economic and social interests of their members or on the ground of non-payment of salary..."), or Article 10 of the Collective Agreement for the Health and Health Insurance Sector ("in respect of all other unresolved issues or in the case of a dispute concerning the amendment or supplement to this Agreement"). It evidently was. The legal framework in question did provide for striking for the purpose of ensuring employment-related

[37] See *UNISON*, cited above. This obviously means that the employer's freedoms do not benefit from *a priori* prevailing status over the rights and interests of the workers "to the point of subjecting the worker to the employer's interests" (see *Palomo Sanchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 76, 12 September 2011).

[38] See pp. 12 and 13 of the applicant's observations to the Chamber, of 29 February 2012.

interests not provided for in the collective agreement, which was exactly what the applicant union intended, since it aimed at addressing the special needs of a professional sector which were not dealt with by the collective agreement.

Arguably, the applicant union's claim that there were "unresolved issues" in the medical and dentistry sector could be used as a roundabout way of taking collective action that runs counter to the social peace obligation. But that was not the case, and the best evidence for that was that the applicant's claim was endorsed by all the other relevant participants in the negotiation process regarding the main collective agreement. Three facts support this assessment: firstly, the Government had already entered into a special agreement with the applicant union in order to satisfy the specific needs of the professional sector in question, which was invalid only on account of a procedural flaw in the decisional process[39]; secondly, the Government acknowledged the need for a salary increase in this special professional sector, and even implemented it unilaterally[40]; and thirdly, even the other trade unions, parties to the Collective Agreement for the Health and Health Insurance Sector, had agreed that there was a need for a special arrangement for the specific needs of the medical and dentistry sector[41]. In reality, a genuine need for a special arrangement protecting the interests of the members of this professional sector which had not been covered in that agreement had emerged, and that need had been recognised by all relevant stakeholders in the Croatian health service labour market.

13. In other words, the third ground for the strike was lawful and the strike was perfectly legitimate. Conversely, while the prohibition of the strike on the basis of its first and second grounds (to enforce the Annex obligations) was lawful and pursued a legitimate aim, it was unlawful and did not pursue a legitimate aim with regard to its alternative third ground (to regulate issues specific to doctors and dentists). The domestic courts decided, in the civil proceedings for the prohibition of the strike, that they were not required to take into consideration the third ground because the applicant union's representative had allegedly stated during the proceedings that it had been listed as a subsidiary ground in case the Annex was declared invalid in the meantime in the parallel civil proceedings to have it declared null and void, and that condition had not been fulfilled at the time of the delivery of their judgments. This formalistic approach of the domestic courts is unacceptable: in the civil proceedings for the prohibition of the strike, the domestic courts found that the Annex was "invalid", but did not draw all the legal consequences from that reasoning. Instead, they avoided addressing the legality of the prohibition order in the light of the third

[39] See paragraph 7 of the judgment.
[40] See paragraph 17 of the judgment.
[41] See paragraph 15 of the judgment.

purpose of the strike on grounds that the Annex had not yet been declared invalid. *Allegans contraria non est audiendus*[42].

14. Moreover, the prohibition of the right to strike for a period of three years and eight months is *per se* disproportionate[43]. The right to have recourse to "impartial and rapid arbitration machinery" for individual or collective grievances concerning the interpretation or application of collective agreements is a crucial element of the right to collective bargaining. The same right applies to disputes on the validity of amendments or supplements to the collective agreement. The perpetuation of the provisional order of the Zagreb Court of 12 April 2005 not only petrified the labor conflict, but also deprived the applicant union of the "most important instrument" it had to put pressure on the Government to address the special interests of doctors and dentists and grant them the same level of rights that had already been agreed upon in the Annex[44].

15. Finally, the Government argued that the strike could have had grave consequences in terms of the quality and quantity of the medical and dentistry service provided nationwide[45]. The strike was announced for 11 April 2005 and lasted only two days. Although the effects of the strike are disputed, the Government admitted that 85% of services had been rendered and work stoppages occurred in only one out of five clinical centres, one out of seven university hospitals and six out of 22 general hospitals[46]. It is inherent in the very exercise of the right to take collective action, including to strike, that some degree of social nuisance will be caused and fundamental economic freedoms of the employer will be

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[42] One cannot affirm a point at one time and deny it at another time. This is a principle of good faith, which is the guiding principle in this domain, as provided by section 191 of the Labour Act of 1995, in force at the material time. It is indeed remarkable that in its judgment of 27 April 2005, the Supreme Court on the one hand concluded that the annex was invalid, but on the other hand did not address the third subsidiary ground for the strike because the annex had not yet been declared invalid in the parallel proceedings pending before the Municipal Court (see paragraph 18 of the judgment). The respondent Government reiterated that argument before the Court. Courts should not seek to impose on employees additional, artificial hurdles beyond those already set by law. Hence, I cannot follow the Chamber's conclusion in paragraphs 57 and 58 of the judgment on the legality and legitimacy of the prohibition order. And I leave aside the additional question whether the domestic courts could even prohibit the strike on a ground that had not been invoked by the State in its civil action of 5 April 2005.

[43] On the specific features of the proportionality and the necessity tests under Article 10 § 2, see my opinion in *Mouvement Raëlien Suisse v. Switzerland*, no. 16354/06, 13 July 2012. Similar considerations apply under Article 11 § 2.

[44] In paragraph 59 of the judgment, the Chamber does not exclude that "in exceptional circumstances" such a long period of prohibition could be considered as proportionate. I can see no such circumstances that would justify the deprivation of the exercise of a core aspect of a Convention right for so long.

[45] See paragraph 84 of the Government's observations to the Chamber, of 17 January 2012, referring to "irreparable damage".

[46] See paragraph 21 of the judgment.

prejudiced to a certain degree. The Article 11 § 2 test of "necessity in a democratic society" may take into account the social and economic consequences of the exercise of the right to strike[47]. In this particular case, the social nuisance and economic damage caused cannot be considered excessive, in view of the number of days of the strike, the percentage of medical services rendered during the strike and the percentage of work stoppages that occurred in clinical centres, university hospitals and general hospitals nationwide, and therefore the prohibition of the strike was not necessary in a democratic society.

Conclusion

16. Freedom of association of workers, collective bargaining and strike action are inextricably linked, the latter being an instrumental means of exercising the former. The Convention cannot be immune to the realities of labour life. It would be carrying judicial anchoritism too far if this Court were to feign ignorance of the different bargaining position of employees and employers in an employment relation in today's global, volatile and fragmented labour market and the practical, counter-balancing effect of collective and strike action when employers are not committed to dialogue and negotiation.

Thus, the Convention protects the right to strike as an essential, core right of workers' freedom of association, and any restrictions to that right must be lawful, pursue a legitimate aim stated in Article 11 § 2 of the Convention and be necessary in a democratic society. In the context of a collective agreement, strike action is legitimate when there is a genuine need for a special arrangement regarding the interests of the members of a professional sector which have not been covered in that agreement. This is the added value of the present judgment, which is fully in line with, and even required by, *Demir and Baykara* as well as international human rights law, international labour law and comparative constitutional law.

Consequently, I find that there has been a violation of Article 11 on account of the unlawful, illegitimate, disproportionate and unnecessary prohibition of the applicant union's Convention right to strike.

[47] A similar view has been developed by the ECSR. In fact, the ECSR has already held that, on the basis of Article 31 of the ESC, damage caused to third parties and financial losses sustained by the employer could be taken into consideration in exceptional cases, when justified by a pressing social need (ECSR Conclusions XIII-1, p. 152).