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MIGRANT WORKERS AND COLLECTIVE BARGAINING IN THE EUROPEAN UNION: THE POSITIVE OBLIGATIONS OF STATES UNDER THE EUROPEAN SOCIAL CHARTER

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Abstract

This paper examines the positive obligations of States Parties to the European Social Charter (ESC) to secure migrant workers' collective bargaining rights and analyses their interaction with European Union (EU) law. It sets out the Charter framework, notably Article 5 on the right to organise and Article 6 on collective bargaining, read together with Article 19§4(b) on equal treatment in trade union membership and in the enjoyment of the benefits of collective bargaining, and analyses its interpretation in the supervisory practice of the European Committee of Social Rights (ECSR). The paper addresses both formal legal conformity and effective implementation in practice, with particular attention to discriminatory effects and structural impediments that may undermine the practical and effective exercise of these rights. It then examines the interaction between ESC obligations and EU internal market freedoms, as illustrated by the Viking and Laval judgments, and considers whether subsequent EU instruments, including Directive (EU) 2022/2041 on adequate minimum wages, reinforce collective bargaining as a policy objective. It concludes that, notwithstanding areas of convergence, ESC standards retain autonomous normative force and require practical and effective protection of migrant workers' collective bargaining rights.

Key words: *European Social Charter; European Committee of Social Rights; migrant workers; collective bargaining; trade union rights; EU law; discrimination.*

INTRODUCTION

Collective bargaining constitutes a fundamental mechanism for the regulation of working conditions and the representation of workers' interests within European labour law. Under the European Social Charter (ESC), collective labour rights are recognised as legally protected rights linked to social justice and democratic participation in working life. Article 5 of the Charter guarantees the right of workers and employers to form and join organisations for the protection of their economic and social interests, while Article 6 requires States Parties to promote joint consultation, encourage voluntary negotiations leading to collective agreements, and recognise collective action, including the right to strike *(Council of Europe, 1996)*.

Within the Charter's supervisory system, the European Committee of Social Rights (ECSR) examines compliance with these provisions through an assessment of both the conformity of domestic law with the Charter and its application in practice. As reflected in the Committee's case law, legislation that complies with the Charter in abstract terms may nonetheless result in a finding of non-conformity where it is not applied fully or correctly in practice *(European Committee of Social Rights, 2022, p. 9)*. This approach reflects the Charter's emphasis on effectiveness and on the existence of positive obligations requiring States Parties to take appropriate measures to ensure that collective labour rights can be exercised in reality.

These considerations are particularly relevant in relation to migrant workers, whose access to collective labour rights may be affected by legal status, transnational employment arrangements, and structural features of labour markets. The situation of migrant workers is addressed explicitly by Article 19 of the Charter, which guarantees the right of migrant workers and their families to protection and assistance. Article 19§4(b) requires States Parties to secure for migrant workers lawfully within their territory treatment no less favourable than that accorded to nationals with regard to trade union membership and the enjoyment of the benefits of collective bargaining *(Council of Europe, 1996)*.

It should also be recalled that the ESC operates through an *à la carte* system of acceptance of provisions: States Parties may ratify the 1961 Charter or the 1996 Revised Charter while accepting only selected articles or paragraphs as binding obligations. As a result, within the European Union, although all Member States are parties to at least one version of the Charter, acceptance of Articles 6, and especially Article 19§4, is not fully uniform, and this variation can affect the availability of Charter-based guarantees for migrant workers' collective rights across countries *(De Schutter, 2016; Council of Europe, n.d.).* In particular, while trade-union freedom under Article 5 is widely accepted among ESC parties, acceptance of Article 6§4 (collective action) and Article 19§4 (equal treatment, including in trade union membership and collective bargaining benefits) is not universal. The ECSR has consistently confirmed the relevance of Article 19§4 to

collective labour relations. In its interpretation and case law, the Committee has recalled that matters concerning trade union membership, collective bargaining, and collective action in respect of migrant workers also engage the guarantees set out in Articles 5 and 6 of the Charter, in particular the obligation under Article 6§2 to promote and encourage collective bargaining. Where migrant workers are prevented, in law or in practice, from exercising these rights, States Parties may therefore be found in breach not only of Articles 5 and 6, but also of Article 19§4 itself *(Clauwaert, 2017, p. 354)*.

Notwithstanding this diversity of commitments, the Committee has clarified that Article 19§4 applies to migrant workers who are lawfully resident or working regularly within the territory, including posted workers, despite the temporary nature of their presence. In Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden *(Complaint No. 85/2012)*, the Committee held that posted workers fall within the scope of Article 19§4(b) for the duration of their lawful stay and are entitled to treatment no less favourable than that of nationals with respect to trade union rights and the enjoyment of the benefits of collective bargaining *(European Committee of Social Rights, 2013, para. 134).* This interpretation was subsequently reaffirmed in the Committee's Statement of Interpretation on Article 19§4, which further specifies that any restriction on equal treatment must be justified in accordance with Article G of the Charter (European Committee of Social Rights, 2016, pp. 6–7).

The Charter's non-discrimination clause reinforces these guarantees. Article E prohibits both direct and indirect discrimination in the enjoyment of Charter rights. The Committee has clarified that indirect discrimination may arise where formally neutral rules or practices produce disadvantages for particular groups, including migrant workers, because relevant differences are not taken into account or because appropriate measures are not adopted to ensure effective access to rights *(Autisme-Europe v. France, Complaint No. 13/2002, decision on the merits, November 4, 2003, para. 53)*. Accordingly, a situation that appears compatible with a substantive Charter provision when considered in isolation may nonetheless violate the Charter when read together with Article E, where migrant workers are unable in practice to exercise the right on equal terms *(European Committee of Social Rights, 2022, pp. 50–52)*.

The personal scope of the Charter, as defined in the Appendix, limits the application of certain provisions to nationals of other States Parties who are lawfully resident or working regularly within the territory. The Committee has nevertheless consistently held that such limitations cannot be interpreted or applied in a manner that deprives individuals of the protection of the most basic Charter rights or leads to outcomes incompatible with human dignity *(International Federation for Human Rights (FIDH) v. France, Complaint No.*

14/2003, decision on the merits, September 8, 2004, para. 31; Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, decision on the merits, October 20, 2009, paras. 47–48). While the Charter does not establish an unconditional right to collective bargaining for persons in an irregular situation, States Parties remain under a positive obligation to ensure that labour-law enforcement mechanisms do not facilitate exploitation or render basic labour protections ineffective.

Against this background, this article examines the positive obligations of States Parties under the ESC to secure migrant workers' collective bargaining rights and analyses the interaction between these obligations and European Union law. It focuses in particular on the interpretation of Articles 5, 6, 19§4(b), and Article E in the supervisory practice of the Committee, and on the implications of EU internal market law, as illustrated by the Viking and Laval judgments and by subsequent legislative developments, including Directive (EU) 2022/2041 on adequate minimum wages. The analysis proceeds on the basis that, notwithstanding areas of convergence, the standards of the ESC retain autonomous normative significance and require practical and effective protection of migrant workers' collective bargaining rights.

I. THE EUROPEAN SOCIAL CHARTER FRAMEWORK FOR MIGRANT WORKERS AND COLLECTIVE BARGAINING

Collective labour rights are recognised under the ESC as core components of social justice and democratic participation in working life. Article 5 guarantees the right of workers and employers to form and join organisations for the protection of their economic and social interests, while Article 6 develops this guarantee by requiring States Parties to promote joint consultation, encourage voluntary negotiations leading to collective agreements, and recognise collective action, including the right to strike *(Council of Europe, 1996)*. In the supervisory practice of the ECSR, compliance with these provisions is assessed through a dual inquiry into the compatibility of domestic law with the Charter and its effective application in practice. Accordingly, legislation that is compatible *in abstracto* may nonetheless lead to a finding of non-conformity where it is incorrectly or not fully applied in practice *(European Committee of Social Rights, 2022, p. 9)*.

Within this framework, the specific situation of migrant workers is addressed explicitly by Article 19 of the ESC, which guarantees the right of migrant workers and their families to protection and assistance. Pursuant to Article 19§4, States Parties are required to secure for migrant workers lawfully within their territory treatment no less favourable than that accorded to nationals with regard to remuneration and other employment and working conditions, trade union membership, and the enjoyment of the benefits of collective bargaining *(Council of Europe, 1996).*

The relevance of Article 19§4 to collective labour relations has been expressly confirmed in the Committee's interpretation and case law. The Committee has stressed that issues concerning trade union membership, collective bargaining, and collective action in respect of migrant workers also engage the rights guaranteed under Articles 5 and 6 of the Charter, in particular the obligation under Article 6§2 to promote and encourage collective bargaining. Discrimination observed in any of these areas may therefore give rise not only to non-compliance with Articles 5 and/or 6, but also to a negative conclusion under Article 19§4 itself *(Clauwaert, 2017, p. 354)*.

In the same vein, the Committee has confirmed that Article 19§4 applies to posted workers for the duration of their lawful stay and work in the host State, notwithstanding the temporary nature of their presence. In Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden *(Complaint No. 85/2012)*, the Committee held that posted workers fall within the scope of Article 19§4 and are entitled, for the duration of their lawful stay, to treatment not less favourable than that of nationals as regards, inter alia, the enjoyment of the benefits of collective bargaining *(European Committee of Social Rights, 2013, para. 134)*. This interpretation was subsequently reaffirmed in the Committee's Statement of Interpretation on Article 19§4 (rights of posted workers), published in the General Introduction to Conclusions XX-4 (2015), which confirms the applicability of Article 19§4 to posted workers for the period of stay and work in the host State and reiterates that any restrictions on equal treatment must be objectively justified, having regard to Article G of the Revised Charter *(European Committee of Social Rights, 2016, pp. 6–7)*.

The non-discrimination clause in Article E reinforces this analysis. Article E prohibits both direct and indirect discrimination in the enjoyment of Charter rights and applies where formally neutral rules or practices produce discriminatory effects. The Committee has clarified that indirect discrimination may arise where public authorities fail to take due account of relevant differences or fail to adopt adequate measures to ensure that rights and collective advantages formally open to all are effectively accessible to all (*Autisme-Europe v. France, Complaint No. 13/2002, decision on the merits, November 4, 2003, paras. 52–54)*. Although Article E is not autonomous and must be read in conjunction with a substantive provision of the Charter, the Committee has consistently held that a situation which appears compatible with a substantive right taken in isolation may nonetheless be incompatible with the Charter when read together with Article E where it operates in a discriminatory manner *(European Committee of Social Rights, 2022, p. 206).*

Finally, the personal scope of the Charter, as defined in the Appendix, limits the application of certain provisions to nationals of other States Parties who

are lawfully resident or working regularly within the territory. The Committee has nevertheless emphasised that such limitations cannot be interpreted or applied in a manner that deprives individuals of the protection of the most basic Charter rights or produces outcomes incompatible with human dignity *(International Federation for Human Rights (FIDH) v. France, Complaint No. 14/2003, decision on the merits, September 8, 2004, para. 31; Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, decision on the merits, October 20, 2009, paras. 47–48)*. While this does not entail a general extension of collective bargaining rights irrespective of migration status, it sets a clear interpretative boundary: personal-scope restrictions cannot be applied in a manner that facilitates severe exploitation or deprives individuals of the protection of the most basic Charter rights linked to human dignity.

II. MIGRANT WORKERS IN THE EUROPEAN UNION: MOBILITY REGIMES AND THEIR RELEVANCE FOR COLLECTIVE BARGAINING

Migrant workers in the European Union do not constitute a homogeneous legal category. From the perspective of collective labour rights, several distinct mobility regimes coexist, each shaping not only workers' legal status but also their capacity to exercise the rights protected under Articles 5 and 6 of the ESC. For analytical purposes, four groups are particularly relevant: (1) EU mobile workers exercising free movement rights; (2) posted workers temporarily providing services within the framework of the EU posting of workers acquis, including Directive 96/71/EC and its subsequent amendments; (3) third-country nationals admitted for employment under EU labour migration instruments, including the Single Permit regime; and (4) workers in irregular situations who nonetheless participate in labour markets and are exposed to heightened risks of exploitation. These regimes condition the practical accessibility of collective bargaining structures and, consequently, the effectiveness of Charter guarantees in practice.

For EU mobile workers, the governing principle under EU law is equal treatment with nationals of the host Member State as regards employment and working conditions, a principle that extends, in formal terms, to collective labour rights. From a Charter perspective, Articles 5 and 6 apply to EU mobile workers as "workers" without distinction, while Article E reinforces the requirement that access to collective organisation and collective bargaining not be undermined by nationality-based discrimination *(Council of Europe, 1996)*. In practice, however, the effective enjoyment of these rights may be weakened by structural factors such as occupational segmentation, language barriers, limited access to information, and vulnerabilities linked to recruitment practices. Where collective bargaining coverage is high and sectoral agreements are extended erga omnes, mobile workers may benefit indirectly from collectively agreed standards. By contrast, in systems characterised by fragmented or decentralised bargaining,

effective access to collective representation often depends on workplace-level organisation and individual enforcement, which may be structurally difficult for migrant workers to mobilise. In such contexts, formal compliance with Articles 5 and 6 may fail to translate into practical and effective enjoyment, raising issues under Article E where equal access exists in law but not in fact.

Posted workers constitute a distinct category in that, while the employment relationship remains anchored in the sending Member State, the posting simultaneously triggers the application of host-State mandatory rules during the temporary performance of work in the host State. The EU posting framework seeks to reconcile worker protection with the freedom to provide services by requiring host States to guarantee a core set of minimum terms and conditions laid down by law or by collective agreements or arbitration awards declared universally applicable, or by their functional equivalents under the Directive *(Directive 96/71/EC; Directive 2014/67/EU; Directive (EU) 2018/957)*. From the perspective of the ESC, posted workers fall within the scope of Article 19§4(b), which secures equal treatment in respect of trade union membership and the enjoyment of the benefits of collective bargaining. The ECSR has clarified that discrimination affecting posted workers' access to collective bargaining or collective action may engage not only Article 19§4, but also Articles 5 and 6 of the Charter, in particular Article 6§2 concerning the encouragement of collective bargaining (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on the merits, July 3, 2013, para. 134; European Committee of Social Rights, 2016, pp. 5–6).

This Charter-based approach contrasts with the constraints introduced in EU law following Laval *(Case C-341/05)*, in which the Court of Justice of the European Union held that collective action by host-State trade unions aimed at imposing host-State collective terms on foreign service providers may be restricted where such terms are not imposed in accordance with the Posting of Workers Directive and the host State's rules on applicable collective standards *(Court of Justice of the European Union, 2007b)*. The resulting tension confirms the continued normative relevance of the Charter framework as an autonomous source of protection for collective labour rights in transnational service-provision contexts.

Third-country nationals admitted for employment are protected under EU law through equal-treatment clauses contained in labour migration directives. The recast Single Permit Directive *(Directive (EU) 2024/1233)* consolidates and strengthens procedural guarantees and equality-related rights, including equal treatment in working conditions and access to information on labour rights *(European Parliament and Council of the European Union, 2024)*. From a Charter perspective, third-country nationals who are lawfully resident or working

regularly fall within the personal scope of Articles 5, 6, and 19§4 *(Council of Europe, 1996)*. Nevertheless, the effective exercise of collective labour rights may be inhibited by structural features of migration governance, including employer-dependent residence permits, the risk that dismissal may result in the loss of lawful status, and limited access to effective remedies. These factors may discourage trade union membership or participation in collective bargaining and may therefore give rise to de facto inequality contrary to Article 19§4(b), particularly when assessed in conjunction with Article E.

Workers in irregular situations represent the most challenging category from the perspective of collective labour rights protection. While the Appendix to the Charter restricts the personal scope of certain provisions, the European Committee of Social Rights has consistently held that such limitations cannot be interpreted or applied in a manner that undermines human dignity or facilitates exploitation *(International Federation for Human Rights (FIDH) v. France, Complaint No. 14/2003, decision on the merits, September 8, 2004, para. 31; Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, decision on the merits, October 20, 2009, paras. 47–48)*. Although Articles 5 and 6 do not automatically apply to all workers irrespective of migration status, States' positive obligations under the Charter require that labour-law enforcement mechanisms operate in a manner that does not render fundamental protections illusory. In this respect, the development of institutional "firewalls" between labour-law enforcement and immigration control has been identified as a relevant mechanism for ensuring that irregular migration status does not operate as a barrier to the prevention of exploitation and to access to basic labour-law remedies (Crépeau and Hastie, 2015, pp. 563–565).

III. POSITIVE OBLIGATIONS UNDER THE ESC: ENABLING MIGRANT WORKERS' COLLECTIVE RIGHTS

A recurrent feature of the ECS and of its interpretation by the ECSR is that the guarantees it enshrines frequently entail positive obligations for States Parties. Within the supervisory logic of the Charter, States are therefore required not merely to recognise rights in law, but to adopt and implement adequate legal, administrative, and enforcement measures ensuring that those rights are secured in practice. This effectiveness-oriented approach is of particular importance in relation to migrant workers, whose position in the labour market is often characterised by structural vulnerability *(European Committee of Social Rights, 2022, pp. 9–10)*.

Article 19§4 of the Charter constitutes the core normative expression of these positive obligations in the context of labour migration and operates as a structural provision informing the interpretation of Articles 5 and 6 when applied to migrant workers *(European Committee of Social Rights, 2022, p. 162)*.

In particular, Article 19§4 expressly guarantees migrant workers equality of treatment with nationals as regards trade union membership and the enjoyment of the benefits of collective bargaining. In the context of Charter supervision, States Parties are required to demonstrate the absence of discrimination, whether direct or indirect, in law and in practice, and to provide information on any practical measures adopted to remedy situations of discrimination (European Committee of Social Rights, 1973; European Federation of National Organisations Working with the Homeless (FEANTSA) v. the Netherlands, Complaint No. 86/2012, decision on the merits, July 2, 2014, paras. 202–203). The Committee has consistently emphasised that equality in law does not necessarily ensure equality in practice and that additional action may be required in light of the particular situation of migrant workers (European Committee of Social Rights, 1977). Accordingly, States Parties are expected to pursue a positive and continuous course of action providing, where necessary, for more favourable treatment of migrant workers *(Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on the merits, July 3, 2013, para. 133).*

These positive obligations apply equally to posted workers, who fall within the scope of Article 19 for the duration of their lawful stay and work in the host State. As confirmed in the Committee's Statement of Interpretation on Article 19§4, posted workers are entitled to equal treatment under that provision notwithstanding the temporary nature of their presence *(European Committee of Social Rights, 2016, pp. 6–7; European Committee of Social Rights, 2022, p. 163). Any restriction on equal treatment justified by reference to the specific nature of their sojourn must be objectively justified, having regard to their particular situation and status, and assessed in the light of Article G of the Revised Charter (European Committee of Social Rights, 2022, p. 163)*. States Parties also retain responsibility for regulating, in national law, the conditions and rights of workers engaged in cross-border postings (European Committee of Social Rights, 2022, p. 163).

With respect to remuneration and other employment and working conditions under Article 19§4(a), the Committee has held that States Parties are obliged to eliminate all legal and de facto discrimination affecting migrant workers, including discrimination relating to vocational training, in-service training, and promotion *(European Committee of Social Rights, 2022, p. 163; European Committee of Social Rights, 1981; European Committee of Social Rights, 2019a)*. This obligation concerns both the content of applicable norms and their application in practice and is not limited by the number of workers affected.

As regards trade union membership and the enjoyment of the benefits of collective bargaining under Article 19§4(b), the Committee has consistently required States Parties to eliminate all legal and de facto discrimination relating to

participation in trade unions and access to collective labour advantages. This includes not only the right to join a trade union, but also the right to participate in trade union activities, to be a founding member, and to access administrative and managerial posts within trade unions *(European Committee of Social Rights, 2022, p. 163; European Committee of Social Rights, 1995; European Committee of Social Rights, 2011a; European Committee of Social Rights, 2011b)*. The principle of non-discrimination in the collective bargaining context further requires States Parties to take action to ensure that migrant workers benefit equally from collective agreements aimed at implementing equal pay for equal work, as well as from legitimate collective action in support of such agreements, in accordance with domestic law or practice *(European Committee of Social Rights, 2022, p. 163)*.

In this respect, the Committee has made clear that excluding or limiting the right to collective bargaining or collective action with respect to foreign undertakings, for the purpose of facilitating cross-border service provision or enhancing competition within a common market, may constitute discriminatory treatment on grounds of nationality where it results in lower levels of protection and more limited economic and social rights for posted foreign workers in the host State *(European Committee of Social Rights, 2022, pp. 162–163)*. This interpretation was articulated authoritatively in Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, where the Committee held that legislative restrictions undermining trade unions' capacity to negotiate or engage in collective action in respect of posted workers were incompatible with Article 19§4(b), read in conjunction with Articles 5 and 6 of the Charter *(European Committee of Social Rights, 2013, paras. 140–141; European Committee of Social Rights, 2022, p. 163)*.

Finally, Article 19§4 entails procedural, monitoring, and remedial obligations designed to ensure its effective application. The Committee has stressed that it is insufficient for States Parties to demonstrate the absence of discrimination in law alone; they must also show that adequate practical steps have been taken to eliminate discrimination in practice *(European Committee of Social Rights, 2022, p. 164)*. To this end, States Parties should establish effective monitoring procedures or bodies capable of collecting relevant information, including disaggregated data on remuneration and information concerning proceedings before employment tribunals *(European Committee of Social Rights, 2022, p. 164)*. Moreover, access to a right of appeal before an independent body against relevant administrative decisions is considered essential to the effective enjoyment of equal treatment under Article 19§4 across all matters it covers *(European Committee of Social Rights, 2022, p. 164)*.

Article E further reinforces this analytical framework by prohibiting both direct and indirect discrimination in the enjoyment of Charter rights. The

Committee has consistently held that situations which appear compatible with a substantive Charter provision when considered in isolation may nonetheless be incompatible with the Charter when read in conjunction with Article E, where their effects disproportionately disadvantage a particular group *(European Committee of Social Rights, 2022, p. 35)*. In the context of migrant workers' collective labour rights, this requires States to scrutinise whether formally neutral rules governing collective bargaining, representation, or enforcement mechanisms operate in practice to exclude migrant workers from effective participation or protection.

In this light, the Charter provides an autonomous standard of protection grounded in effectiveness, equality of treatment, and the positive obligations incumbent upon States in the field of collective labour rights, including in cross-border employment situations. The ensuing issue is therefore not whether Union law recognises collective action in principle, but whether the internal market framework, as interpreted and operationalised through secondary legislation and the Court's case law, permits a level of protection that is compatible with the requirements flowing from the Charter. The following section examines this interaction between the two legal orders.

V. ESC STANDARDS AND EU LAW: CONFLICT OR COMPLEMENTARITY?

The relationship between the commitments undertaken by States under the ESC and obligations deriving from EU law has been the subject of sustained legal and scholarly scrutiny, particularly following the judgments of the CJEU in International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP (Case C-438/05) and Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet (Case C-341/05), both delivered in 2007 *(Court of Justice of the European Union [CJEU], 2007a, 2007b).*

In Viking Line, which concerned planned collective action affecting a company's freedom of establishment, the Court accepted that collective action pursued for the protection of workers could constitute a legitimate interest capable of justifying a restriction on economic freedoms. However, it subjected such action to a strict proportionality assessment, requiring that it be suitable, necessary, and proportionate in relation to the objectives pursued (CJEU, 2007a). Similarly, in Laval, which concerned trade union action aimed at compelling a foreign service provider to comply with host-State collective agreement standards, the Court acknowledged that the prevention of social dumping constituted a legitimate objective. Nevertheless, it held that the collective action at issue was incompatible with EU law, inter alia because the Swedish framework did not provide sufficiently precise and accessible rules enabling foreign service providers to ascertain their obligations in advance, in a regulatory context structured by Directive 96/71/EC on the posting of workers *(CJEU, 2007b).*

Taken together, these judgments introduced a balancing formula in which collective labour rights are treated as interests to be weighed against internal market freedoms rather than as autonomous social rights enjoying presumptive priority. This approach has been widely criticised for privileging economic freedoms and for narrowing the scope available to trade unions to defend labour standards in transnational contexts *(Verschueren, 2015)*. By subjecting collective action to heightened proportionality and legal-certainty requirements, the Court functionally constrained a fundamental social right, thereby creating a regulatory asymmetry in which employers may invoke free-movement rights as directly effective entitlements, while workers' collective rights remain conditional upon market-compatibility assessments.

From the perspective of the ESC, this outcome raises significant concerns. The European Committee of Social Rights addressed the resulting tension explicitly in Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden *(Complaint No. 85/2012),* which concerned legislative amendments adopted by Sweden in response to Laval that substantially restricted the ability of trade unions to take collective action against foreign service providers. The Committee found that these reforms violated Article 6§2 (promotion of collective bargaining) and Article 6§4 (right to collective action) of the Charter, read in conjunction with Article 19§4(a) and (b), which guarantees migrant workers equal treatment in respect of remuneration, working conditions, and the enjoyment of the benefits of collective bargaining *(European Committee of Social Rights, 2013, paras. 133–141)*.

In its reasoning, the Committee articulated principles of systemic importance. First, it confirmed that obligations arising under the Charter continue to apply in full even where national measures are adopted in order to implement EU directives or to comply with judgments of the Court of Justice, affirming that the EU-law origin of national provisions does not remove them from the ambit of the Charter *(European Committee of Social Rights, 2013, para. 120)*. Second, it stressed that, when implementing EU law, States Parties remain bound to take full account of their Charter obligations, ensuring that EU-driven reforms do not undermine the substance of protected social rights. Third, it reaffirmed that EU law and the ESC constitute distinct legal systems and that there is no presumption of automatic conformity between the two *(European Committee of Social Rights, 2022)*.

Applying these principles, the Committee concluded that Sweden's post-Laval restrictions weakened the promotion of collective bargaining and deprived posted workers of effective and equal access to collective labour protection, thereby breaching Articles 6 and 19 of the Charter. It rejected arguments based on constraints allegedly imposed by EU law and reaffirmed that limitations on collective action may be justified only under the strict conditions laid down in

Article G of the Charter and must not undermine the essence of Article 6 *(European Committee of Social Rights, 2013, paras. 140–141)*. The Committee has further clarified in its supervisory practice that Article 19§4(b) applies to posted workers insofar as they are lawfully within the territory of the host State, entitling them to equal enjoyment of collective agreements and protection against discriminatory treatment *(European Committee of Social Rights, 2022, p. 163)*.

Whether the ESC and EU legal orders are inherently in conflict or capable of complementarity depends largely on political and judicial choices. In response to criticism of the Viking and Laval jurisprudence, EU legislation on posted workers has evolved. Directive 96/71/EC was amended by Directive (EU) 2018/957, strengthening the principle of equal pay for equal work in the host State and extending the application of host-country employment conditions to long-term postings. Directive 2014/67/EU introduced enhanced enforcement mechanisms, including measures addressing letterbox companies and abuses linked to subcontracting. These developments bring EU law closer to the equal-treatment requirements under Article 19§4 of the ESC, without displacing the Charter's autonomous normative standards, and their effectiveness remains contingent on robust national enforcement *(European Committee of Social Rights, 2022)*.

Beyond the context of posting, recent EU initiatives also reflect a degree of convergence with Charter standards. Directive (EU) 2022/2041 requires Member States with low collective bargaining coverage to adopt action plans promoting collective bargaining, echoing the positive obligation under Article 6§2 of the ESC. The same policy orientation is consistent with the Interinstitutional Proclamation on the European Pillar of Social Rights, which underlines that nothing in the Pillar should be interpreted as restricting rights recognised in international agreements to which the Union or Member States are party, including the European Social Charter (European Parliament, Council of the European Union, and European Commission, 2017). Similarly, the recast Single Permit Directive strengthens procedural safeguards and equal-treatment guarantees for third-country workers legally residing in a Member State, including reinforced access to information on labour rights and relevant actors *(Directive (EU) 2024/1233)*.

Despite these developments, normative coherence between EU law and the ESC remains fragile. While EU law enjoys primacy within the domestic legal orders of Member States, the Charter binds States as an international treaty, and States remain internationally responsible for violations of its provisions even where such violations result from EU-driven reforms. The case law of the European Committee of Social Rights consistently advocates systemic integration, requiring States to interpret and implement EU obligations in a manner that preserves the essential content of Charter rights *(European Committee of Social*

Rights, 2022). Proposals aimed at enhancing coherence include systematic compatibility assessments of EU legislation with ESC standards and, more ambitiously, EU accession to the European Social Charter pursuant to Article 216(1) TFEU *(De Schutter, 2016, pp. 44–48)*.

CONCLUSION

The analysis developed in this article demonstrates that the ESC imposes positive obligations on States Parties to secure the effective exercise of migrant workers' collective bargaining rights in practice, and not merely through formal legal guarantees. Under the Charter, migrant workers, including EU citizens exercising free movement, lawfully resident third-country nationals, and posted workers within the scope of Article 19§4 as interpreted by the ECSR, are entitled to equal treatment in trade union membership and in the enjoyment of the benefits of collective bargaining on the same basis as nationals. To render this equality effective, States Parties are required to identify and remove structural and de facto barriers that disproportionately affect migrant workers, such as language obstacles, information deficits, precarious residence status linked to employment, or fear of retaliation.

A consistent strand in the ECSR's jurisprudence is that formal recognition of rights is insufficient. States are expected to ensure the practical and effective enjoyment of the right to organise and to bargain collectively. This entails concrete measures, which may include facilitating trade union outreach to migrant communities, ensuring access to information, translation, and legal assistance, and establishing safeguards allowing migrant workers to report labour law violations without exposure to immigration-related sanctions. Where structural inequalities prevent migrant workers from exercising their collective rights in practice, the Committee has consistently found violations of the Charter, reflecting the principle that equality in law must be accompanied by equality in fact.

These obligations acquire particular significance in the context of the European Union's internal market. The Viking and Laval judgments of the Court of Justice of the European Union illustrated how collective action may be constrained when assessed primarily through the lens of economic freedoms (International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP, C-438/05; Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, C-341/05). By subjecting the right to strike and other forms of collective action to proportionality review vis-à-vis freedom of establishment and freedom to provide services, these judgments generated a regulatory imbalance in which market freedoms benefited from robust protection, while collective labour rights were treated as conditional.

From the perspective of the ESC, such outcomes are difficult to reconcile with the requirements of Articles 6 and 19§4. In Swedish Trade Union

Confederation (LO) and TCO v. Sweden, the ECSR reaffirmed that EU law does not displace Charter obligations and that States Parties remain fully responsible for ensuring compliance with the Charter when implementing EU legislation or following CJEU case law (European Committee of Social Rights, 2013). Any limitation on collective labour rights must satisfy the strict conditions set out in Article G of the Charter, including necessity, proportionality, and respect for the essential content of the right. The Committee's approach reinforces the autonomy of the Charter as a human rights instrument and its function as a normative counterweight where market integration risks undermining social protection.

At the same time, EU legislative developments indicate a cautious movement toward greater alignment with Charter principles. Reforms to the Posting of Workers framework and the adoption of Directive (EU) 2022/2041 on adequate minimum wages, which explicitly promotes collective bargaining in Member States with low coverage, reflect an increasing recognition of the role of collective labour relations in ensuring fair working conditions (Directive (EU) 2022/2041). Similarly, strengthened equal-treatment guarantees under EU migration instruments resonate with the Charter's emphasis on effective protection for migrant workers. While these developments do not eliminate structural tensions between the two legal orders, they suggest emerging areas of complementarity.

Nevertheless, normative coherence remains fragile. The absence of formal mechanisms ensuring systematic consistency between EU law and the European Social Charter continues to place States Parties in a position of potential compliance tension. The ECSR's jurisprudence promotes an approach of systemic integration, requiring States to interpret and apply EU obligations, as far as possible, in a manner that preserves the substance of Charter rights. This calls for careful legislative and policy choices at national level to avoid undermining collective bargaining while implementing EU law.

In this context, the ESC remains an indispensable instrument for the protection of migrant workers' collective labour rights. By imposing positive obligations aimed at preventing marginalisation and exclusion from collective bargaining structures, the Charter reinforces the social dimension of European integration. Ensuring that migrant workers can freely organise and bargain collectively strengthens social dialogue, supports labour market inclusion, and affirms the indivisibility of human rights. The responsibility ultimately lies with States Parties to ensure that economic mobility and market integration proceed in parallel with robust social protection, in accordance with their commitments under the ESC.

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