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THE INDEPENDENCE OF THE ECB – ENDANGERED BY COLLECTIVE BARGAINING?

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Foreword

Labour law establishes universal values. Even though the scope of certain labour law provisions varies across the world of work, there can be no gaps in the coverage of labour law itself. Nevertheless, gaps in coverage arise time and again – some are well-known, whilst others one would not expect to find there upon first glance. The latter certainly applies to supranational institutions. They stand for the establishment of transnational legal principles. One rightly expects that these rights will, of course, also be upheld by the institutions themselves.

However, this does not appear to be sufficiently the case regarding minimum labour standards, such as freedom of association, employee participation, social security, and also effective access to the courts, which must be guaranteed under the rule of law. The legal framework applicable to supranational organisations, its interpretation by the courts and its application by the organisations themselves contain gaps that are difficult to accept. Prof. Dr Marlene Schmidt, professor at Goethe University Frankfurt am Main and partner at the law firm Apitzsch/Schmidt, and Dr Jannick Borchert, who contributed to the study whilst working as a trainee lawyer at Apitzsch/Schmidt, examine a legal issue that has scarcely been addressed in legal scholarship to date. It is to the authors' great credit that they have highlighted these shortcomings and thus brought them up for discussion.

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A. Introduction

Although both the trade union International and European Services Organisation (IPSO) and the Staff Committee of the European Central Bank (ECB) are very active, the ECB has always rejected any invitations to enter into collective bargaining on working conditions with them – despite the well-known advantages of collective agreements.¹ The Bank refers to its independence, as granted in Art. 130 of the Treaty on the Functioning of the European Union (TFEU)² and in Art. 36 of the Protocol (No. 4) on the Statute of the European System of Central Banks (ESCB) and of the European Central Bank³ (ECB Statute),⁴ as justification.⁵

Of course, the ECB's independence is a unique feature, distinguishing the ECB from any other EU institution. However, all institutions of the European Union are, according to Art. 51 para. 1 sent. 1 Charter of Fundamental Rights of the European Union (CFR),⁶ bound by the provisions of the CFR. Among the fundamental rights granted are the right to collective bargaining and the right to collective action, including the right to strike, as guaranteed in Art. 28 CFR. As a consequence, the ECB should also be required to respect the rights to collective bargaining and collective action, observe these principles and promote their application, as provided for in Art. 51 para. 1 sent. 2 CFR. However, the legal relationship between the ECB's independence and this provision of the CFR remains controversial.

In this paper we examine whether ECB staff is protected by Art. 28 CFR and whether the conditions of the right to strike as granted by the ECB are compatible with Art. 28 CFR. To this end, we first introduce the relevant parties (B.). We then turn to the scope of Art. 28 CFR (C.). Subsequently we analyse the ECB's internal employment provisions regarding the right to collective bargaining and the right to strike (D.). Then we subject the limits of ECB independence to closer review (E.). Following this, we analyse the General Court's decision on workers' rights to information and consultation at the ECB and highlight its relevance for the interpretation of Art. 28 CFR (F.). In the final chapter we discuss whether the ECB's unilateral provisions on the right to strike are compatible with Art. 28 CFR, interpreted in the light of ILO Convention No. 87 (G.). We end the paper with a conclusion (H.).

¹ AG Jacobs, Opinion of 28 January 1999 on case C-67/96 (Albany), ECLI:EU:C:1999:28, para. 181: "It is widely accepted that collective agreements between management and labour prevent costly labour conflicts, reduce transaction costs through a collective and rule-based negotiation process and promote predictability and transparency. A measure of equilibrium between the bargaining power on both sides helps to ensure a balanced outcome for both sides and for society as a whole."

² Consolidated version published in OJ C 202, 7.6.2016, p. 47 et seqq.

³ OJ C 202, 7.6.2016, p. 230 et seqq.

⁴ Cf. ECB, opinion of 21 February 2008 at the request of the German Ministry of Finance on a draft law amending the Law on the Deutsche Bundesbank, CON/2008/9, para. 2.4: "In this regard, it is useful to note that the ECB defines its staff policy autonomously and that this autonomy forms part of the ECB's independence as guaranteed by Article 108 of the Treaty [now Art. 130 TFEU] and Article 36 of the ESCB Statute."

⁵ Urban/Feyerbacher, in: von der Groeben/Schwarze/Hatje/Terhechte, Europäisches Unionsrecht, 8th Ed. 2026, Satzung ESZB/EZB Art. 36 para. 1, 20.

⁶ Consolidated version printed OJ C 202, 7.6.2016, p. 389 et seqq.

B. Potential Parties to Collective Bargaining at the ECB

As is often the case with collective bargaining, the playing field is defined by several different actors, parties and stakeholders.

At the ECB, a dual-channel system of employee representation exists: (1) representation of all ECB staff members by the so-called Staff Committee (cf. below II.) and (2) representation of ECB staff members who are members of the trade union “International and European Public Services Organisation (IPSO)” by IPSO itself (cf. below III.).

I. The European Central Bank

Article 13 of the Treaty on European Union (TEU)⁷ determines that the ECB is one of the European Union’s institutions. Its tasks, functions and structure are regulated in Art. 282-284 TFEU.

The ECB’s governance structure as laid out in Art. 283 para. 1 and 2 TFEU consists of, but is not limited to, the Executive Board and the Governing Council. Members of the Executive Board are the President, the Vice President and four additional board members. The Executive Board manages the day-to-day business of the ECB (see Art. 11.6 ECB Statute), including determining the internal organisational structure of the ECB.⁸ Art. 10.1 of the ECB Statute stipulates that, in accordance with Art. 283 para. 1 TFEU, the Governing Council shall comprise the members of the Executive Board of the ECB and the governors of the national central banks of the Member States whose currency is the euro. As the highest decision-making body, the Governing Council formulates the monetary policy of the EU, which is then implemented by the Executive Board (Art. 12.1 ECB Statute).⁹ Member States of the EU that are not part of the euro system are represented in the ECB’s General Council (Art. 141 para. 1 TFEU).¹⁰

II. The Staff Committee

Establishment, rights and duties of the Staff Committee and of its members are defined in Art. 48-53 of the ECB’s Conditions of Employment (ECB CoE),¹¹ and in Part 9 of its Staff Rules¹² (ECB SR). The ECB Staff Rules “lay down the criteria intended to guide the ECB in exercising its discretion

⁷ Consolidated version published in OJ C 202, 7.6.2016, p.13 et seqq.

⁸ Thiele, Die Europäische Zentralbank, 2nd Ed. 2022, Glos/Benzing, in: Binder/Glos/Riepe, Handbuch Bankenaufsichtsrecht, 2nd Ed. 2020, § 2 para. 161.

⁹ Thiele, Die Europäische Zentralbank, 2nd Ed. 2022, p. 24 f., 36; Glos/Benzing, in: Binder/Glos/Riepe, Handbuch Bankenaufsichtsrecht, 2nd Ed. 2020, § 2 para. 161.

¹⁰ Müller/Kaufhold, in: Kahl/Ludwigs, Handbuch des Verwaltungsrechts Vol. 1, 1st Ed. 2024, § 181 para. 20.

¹¹ Originally adopted by the Governing Body on 9 June 1998 (OJ L 125, 19.5.1999, p. 32 et seqq.), amended several times since.

¹² European Central Bank, Staff Rules, latest amendment applicable from 1 January 2024.

and define more closely the scope of the provisions of the Conditions of Employment that are lacking in clarity”.¹³

According to Art. 48 ECB CoE, the Staff Committee shall represent the general interests of all members of staff in relation to contracts of employment, staff regulations and remuneration, employment, working, health and safety conditions at the ECB, social security cover, and pension schemes. Its members shall be elected for a two-year renewable term by secret ballot (Art. 9.1.1 ECB SR).

The Staff Committee's rights and tasks are mainly of a consultative nature: According to Art. 49 ECB CoE, the Staff Committee must be consulted prior to changes in the Conditions of Employment, the Staff Rules and related matters as defined above. As regards the consultation procedure Art. 9.2.1 ECB SR provides that the Staff Committee may submit suggestions concerning matters within its competence to the President of the ECB or his/her representative, whose decision will be final. Meetings between the Staff Committee and the President or his/her representative may be organised at the request of either party to discuss specific matters according to Art. 9.2.2 ECB SR. The ECB shall respond to reasonable requests for information to assist understanding of the items on the meeting's agendas (Art. 9.2.4 ECB SR).

In order to complement these rather brief provisions,¹⁴ a Memorandum of Understanding on relations between the Executive Board and the Staff Committee of the ECB (MoU ECB SC) was signed in 2003, jointly establishing principles for dialogue between the Executive Board and the Staff Committee and intending to establish by common understanding some principles governing information, consultation and initiative within the scope of the tasks of the Staff Committee.¹⁵

The Memorandum of Understanding provides for at least six formal meetings between the President or his/her representative and the Staff Committee per year; additional meetings may be organised if found necessary (Art. 3.2 MoU ECB SC). Once a year the Staff Committee shall be received by the Executive Board for a general briefing on matters falling within the scope of the Staff Committee's tasks (Art. 3.3 MoU ECB SC).

Even more importantly, the MoU ECB SC establishes a consultation procedure for Executive Board proposals, and *mutatis mutandis* for suggestions of the Staff Committee, in Art. 5-16 MoU ECB SC. Accordingly, the Executive Board shall consult the Staff Committee on proposals relating to the scope of the latter's tasks. To start a consultation procedure, the President or his/her representative shall submit to the Staff Committee a

¹³ Court of First Instance (Fourth Chamber), dec. of 18 April 2002, T-238/00 (IPSO and USE v. ECB), ECLI:EU:T:2002:102, para. 49.

¹⁴ The European Union Civil Service Tribunal, dec. of 24 June 2008, F-15/05 (Andres v. ECB), ECLI:EU:F:2008:81, para. 59, has put it more cautiously: “the Memorandum of Understanding gives concrete expression to the right of the Staff Committee to be consulted and lays down, in particular, the procedure to be followed, beginning with the obligation for the ECB to provide complete information”.

¹⁵ Memorandum of Understanding on relations between Executive Board and the Staff Committee of the ECB, 17 June 2003, p. 1.

written consultation request together with complete information, that is, information which will allow the Staff Committee to acquaint itself with and to examine the subject matter of the consultation. The Staff Committee shall adopt a written opinion, to be delivered within a period to be agreed with the President or his/her representative. If no agreement can be reached, a minimum period of twenty working days applies, unless this is manifestly inappropriate. To prepare its opinion, the Staff Committee may consult ECB staff and external professional parties. The President or his/her representative shall reply in writing to the Staff Committee within a period equal to that granted to the Staff Committee. At any stage of consultation either party may call for a meeting to discuss the proposals. Before a final decision on the matter is made, the President or his/her representative shall ensure that the consultation procedure documents are made available to all those persons and bodies involved in the ECB's decision-making process. The President or his/her representative shall inform the Staff Committee and the staff about the final decision without delay.

In the event of a dispute regarding the rights and obligations set out in the MoU ECB SC, either of the parties involved in the dispute may, having first sought to resolve the issue between themselves, request the other party to agree to a conciliation procedure involving a neutral mediator. The mediator shall provide the parties with a confidential recommendation that aims to reconcile the parties' differences (Art. 17 MoU ECB SC).

III. IPSO

Many of the ECB staff are also organised and represented by the trade union IPSO.¹⁶

In July 2008, after several years of negotiations, IPSO achieved recognition as a trade union at the ECB. This and other agreements were laid down in a Memorandum of Understanding on recognition, information sharing and consultation (MoU ECB IPSO).¹⁷ Inter alia, the MoU ECB IPSO provides in detail that IPSO shall be informed on the recent and intended development of the ECB and its activities, as well as on its economic and financial situation, in as far as they may have an effect on the situation or interests of staff. IPSO shall be part of the early involvement procedure and consulted on proposed structural developments within the ECB as well as on proposed measures leading to material changes in work organisation and measures leading to changes in contractual relations or employment-related policies. IPSO may also submit suggestions on matters falling within this scope. The rules for the early involvement procedure and the consultation procedure

¹⁶ IPSO was founded on 11 December 1997 by the former spokesperson of the staff committee of the European Monetary Institute (predecessor of the ECB) and members of diverse trade unions having merged to become the German trade union "ver.di". At the end of 2015 more than 600 ECB staff members, i.e. more than 40 per cent of permanent ECB staff, were members of IPSO. IPSO itself is a member of Union Syndicate Fiduciaire and is related to UNI-Europa-Finance, the global union for all finance workers. For more information cf. www.ipso.de.

¹⁷ Memorandum of Understanding between the European Central Bank and the International and European Public Services Organisation (IPSO) on recognition, information-sharing and consultation, 3 July 2008.

shall apply *mutatis mutandis* to IPSO's suggestions (Art. 2.a. MoU ECB IPSO).

IV. Summary

Staff Committee and IPSO both enjoy rights of information and consultation at the ECB exceeding what has been unilaterally provided for by the ECB in its CoE and Staff Rules. However, neither the Staff Committee nor IPSO have been acknowledged explicitly by the ECB as a partner for collective bargaining on topics of employment conditions. While the MoU ECB SC does not refer to the question of whether information and consultation may finally result in collective bargaining, the MoU ECB IPSO explicitly states in its preamble that collective bargaining is not dealt with.¹⁸

C. The Fundamental Rights to Collective Bargaining and Collective Action according to Art. 28 CFR

In 2007 the Court of Justice of the European Union (CJEU) in its decisions re Viking¹⁹ and Laval²⁰ recognised the right to collective action, including the right to strike, as a fundamental right. These judgments were handed down before the CFR entered into force. They are now confirmed by Art. 28 CFR.²¹ In 2010, the CJEU took the opportunity to reinforce this finding.²²

According to Art. 28 CFR, workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. Article 28 CFR ensures a free system of collective agreements and industrial action as the basis for an autonomously organised working life.²³ So far, however, the details of its personal and material scope remain undefined by the case law of the European courts.

¹⁸ Recital no. 4: "This Memorandum of Understanding does not address collective bargaining mechanisms on conditions of employment for the staff of the ECB; it is intended to govern the interactions between the ECB and recognised trade unions as regards information and consultation, as well as the rights and obligations of trade unions and their representatives."

¹⁹ ECJ, dec. of 11 December 2007, C-438/05 (International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP), ECLI:EU:C:2007:772, para. 44.

²⁰ ECJ, dec. of 18 December 2007, C-341/05 (Laval un Partneri), ECLI:EU:C:2007:809, para. 91.

²¹ Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 28 para. 10; Thüsing/Pöppers/Stiebert, RdA 2012, 281 (290 f.).

²² CJEU, dec. of 15 July 2010, C-271/08 (Commission v. Germany), ECLI:EU:C:2010:426, paras. 76 seq.; Barnard, in: Peers/Hervey/Kenner/Ward, The EU Charter of Fundamental Rights, 2nd Ed. 2022, CFR Art. 28 para. 20; Kocher, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2nd Ed. 2023, CFR Art. 28 para. 2.

²³ Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 28 para. 1; cf. also AG Cruz Villalón, Opinion of 19 May 2011 on case C-447/09 (Prigge), ECLI:EU:C:2011:321, para. 42.

I. Personal scope of the fundamental rights granted by Art. 28 CFR

Art. 28 CFR grants its rights to “workers and employers, or their respective organisations”.

As with any other notion of EU law, the term “worker” in Art. 28 CFR must be interpreted autonomously. The EU term “worker” is also used in the fundamental freedom of free movement of workers in Art. 45 TFEU, which also has an autonomous meaning specific to EU law.²⁴ As a consequence, many hold the view that the term “worker” in Art. 28 CFR should be interpreted in line with the same notion mentioned in Art. 45 TFEU.²⁵ According to the established case law of the CJEU, the term “worker” in Article 45 TFEU, which defines the personal scope of a fundamental freedom, must not be interpreted narrowly:²⁶ this case-law holds that “the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration”.²⁷

Hence, all employees and civil servants, regardless of the nature of the employer, whether public or private, are granted the rights to collective bargaining and collective action.²⁸ Staff members of the ECB are employees, not civil servants. It is settled case law that “the employment relationship between the ECB and its staff is contractual rather than governed by public service regulations.”²⁹³⁰ Its staff members are covered by the term “worker” in the sense of Art. 45 TFEU and hence by the same term in Art. 28 CFR.

An organisation within the meaning of Art. 28 CFR is any coalition of employees or employers. The organisation is a voluntary association in which a minimum of internal decision-making takes place. Also, a fixed, permanent internal connection is required, which distinguishes the organisation from loose, short-term associations.³¹ Trade unions, such as IPSO, fall within the scope of the term “organisation” defining the personal scope of Art. 28 CFR.³²

²⁴ Cf. *inter alia*, judgment in *Commission v. Netherlands*, C-542/09, EU:C:2012:346, para. 68.

²⁵ Schubert, in: Franzen/Gallner/Oetker, *Kommentar zum europäischen Arbeitsrecht*, 5th Ed. 2024, CFR Art. 28 para. 17, Art. 27 para. 18 f.; Kocher, in: Pechstein/Nowak/Häde, *Frankfurter Kommentar EUV/GRC/AEUV*, 2nd Ed. 2023, CFR Art. 28 para. 14 f.; Thüsing/Traut, *Recht der Arbeit (RdA)* 2012, 65 (71).

²⁶ Cf. *inter alia*, judgment in *Commission v. Netherlands*, C-542/09, EU:C:2012:346, para. 68.

²⁷ Settled case law; cf. judgments in *Lawrie-Blum*, 66/85, EU:C:1986:284, para. 17, and *Petersen*, C-544/11, EU:C:2013:124, para. 30); cf. ECJ, dec. of 30 March 2006, C-10/05 (*Mattern*), ECLI:EU:C:2006:220, para. 18.

²⁸ Kocher, in: Pechstein/Nowak/Häde, *Frankfurter Kommentar EUV/GRC/AEUV*, 2nd Ed. 2023, CFR Art. 28 para. 14; Ulber, in: Ales/Bell/Deinert/Robin-Olivier, *International and European Labour Law*, 1st Ed. 2018, CFR 28 para. 32; Thüsing/Traut, *RdA* 2012, 65 (71).

²⁹ CJEU, dec. of 14 October 2004, C-409/02 P (*Pflugrad v. ECB*), ECLI:EU:C:2004:625, para. 33.

³⁰ Cf. also General Court, dec. of 22 October 2002, T-178/00 and T-341/00 (*Pflugrad v. ECB*), ECLI:EU:T:2002:253, para. 49; General Court, dec. of 18 October 2001, T-333/99 (*X v. ECB*), ECLI:EU:T:2001:251, para. 61.

³¹ Schubert, in: Franzen/Gallner/Oetker, *Kommentar zum europäischen Arbeitsrecht*, 5th Ed. 2024, CFR Art. 28 para. 20.

³² Hüpers/Reese, in: Meyer/Hölscheidt, *Charta der Grundrechte der Europäischen Union*, 6th Ed. 2024, CFR Art. 28 para. 30.

II. Contents of the fundamental rights granted by Art. 28 CFR

To those persons and organisations covered by its personal scope, Art. 28 CFR grants, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Therefore, Art. 28 CFR protects all actions relating to the negotiation and conclusion of collective agreements.³³ According to the CJEU, a collective agreement is characterised by the fact that the social partners, when exercising their fundamental right to collective bargaining recognised in Art. 28 CFR, have taken care to strike a balance between their respective interests.³⁴ During the negotiation stage of an agreement by the social partners, they may engage in dialogue and act freely without receiving any order or instruction from whomsoever and, in particular, not from the Member States or the EU institutions.³⁵ In collective agreements, the parties can stipulate regulations on the establishment, content and termination of an employment relationship.³⁶ This may include aspects of wages and remuneration, benefits, working hours, time off, training or job security.³⁷

On an individual level, Art. 28 CFR – in conjunction with Art. 27 CFR – protects an employee's right of choice to claim time off work for the purpose of representing staff.³⁸

The right to collective action protects, as is explicitly stated in Art. 28 CFR, the right to strike. In a broader sense, the right to collective action protects the taking and implementation of industrial action measures by workers and their organisations.³⁹ Without such a right to collective action, collective bargaining would deteriorate into nothing more than collective begging.⁴⁰ Collective action must aim to eliminate conflicts of interest between the social partners.⁴¹ The aim of strike action shall therefore not necessarily be limited to the conclusion of a collective agreement. It can be carried out as long as it concerns a conflict of interest between employee and employer.⁴²

³³ Jarass, in: Jarass, Charta der Grundrechte, 4th Ed. 2021, CFR Art. 28 para. 6; Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 28 para. 27.

³⁴ CJEU, dec. of 8 September 2011, C-297/10 and C-298/10 (Hennigs and Mai), ECLI:EU:C:2011:560, para. 66.

³⁵ CJEU, dec. of 15 December 2022, C-311/21 (TimePartner Personalmanagement GmbH), ECLI:EU:C:2022:983, para. 72.

³⁶ Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 28 para. 29.

³⁷ Barnard, in: Peers/Hervey/Kenner/Ward, The EU Charter of Fundamental Rights, 2nd Ed. 2022, CFR Art. 28 para. 35.

³⁸ EU Civil Service Tribunal, dec. of 17 December 2015, F-94/14 (Bowles v. ECB), ECLI:EU:F:2015:156, para. 51.

³⁹ Jarass, in: Jarass, Charta der Grundrechte, 4th Ed. 2021, CFR Art. 28 para. 8; Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 28 para. 36; Kocher, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2nd Ed. 2023, CFR Art. 28 para. 25 f.

⁴⁰ German Federal Labour Court, dec. of 10 June 1980, 1 AZR 822/79, NJW 1980, 1642 (1643): "Bei diesem Interessengegensatz wären Tarifverhandlungen ohne das Recht zum Streik im allgemeinen nicht mehr als ‚kollektives Betteln‘" ("Given this clash of interests, collective bargaining without the right to strike would generally be no more than 'collective begging'"; translated by the authors).

⁴¹ Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 28 para. 38.

⁴² Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 28 para. 43; Zachert, NZA 2001, 1041 (1045), Zimmer, AuR 2012, 114 (116).

Furthermore, the material scope of Art. 28 CFR is not limited to the right to strike, but the right to collective action also protects more unconventional industrial action measures such as a boycott or calls for a boycott.⁴³

III. The ECB's Obligation Under Art. 51 para. 1 CFR

According to Art. 51 para. 1 CFR, the provisions of the CFR are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They – the institutions and bodies of the Union – shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

The Union's institutions are exclusively listed in Article 13 TEU and Part Six, Title I, Chapter 1 (i.e. Articles 223-287) TFEU. The ECB is explicitly mentioned as one of the Union's institutions in Article 13 TEU.⁴⁴ Consequently, the provisions of Art. 28 CFR are, according to Article 51 para. 1 CFR, (also) to be respected, observed and promoted by the ECB.⁴⁵ The ECB is, like any other Union institution,⁴⁶ bound by the CFR. The constraint whereby the CFR only applies "when they are implementing Union law" exclusively refers to the Member States, not to the institutions, bodies, offices and agencies of the Union.⁴⁷

These findings are supported by the case law of the General Court and the EU Civil Service Tribunal. The courts have repeatedly stated that Art. 27 and 28 CFR "may apply in relations between the EU institutions and their staff"^{48, 49} Of course, it has also been pointed out that the exercise of the rights laid down in those provisions was confined to the cases and conditions provided for by EU law.⁵⁰ However, this caveat does not concern the general fundamental rights obligations of EU institutions as such. It is rather to be seen as a recourse to the material content of Art. 28 CFR, according to which the rights to collective bargaining and collective action

⁴³ Kocher, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2nd Ed. 2023, CFR Art. 28 para. 26.

⁴⁴ Cf. Kerber/Städter, EuZW 2011, 536 (538): „Art. 13 EUV erwähnt sie ausdrücklich als ein EU-Organ. Damit unterliegt sie einer strengen Rechtsbindung“ (*„Art. 13 TEU explicitly mentions it as an EU institution. It is therefore subject to strict legal obligations“*; translated by the authors.)

⁴⁵ Hüpers/Reese, in: Meyer/Hölscheidt, Charta der Grundrechte der Europäischen Union, 6th Ed. 2024, CFR Art. 28 para. 34; Barnard, in: Peers/Hervey/Kenner/Ward, The EU Charter of Fundamental Rights, 2nd Ed. 2022, CFR Art. 28 para. 3; Ulber, in: Ales/Bell/Deinert/Robin-Olivier, International and European Labour Law, 1st Ed. 2018, CFR 28 para. 23.

⁴⁶ For the fundamental rights obligations of EU institutions cf. CJEU, dec. of 19 September 2013, C-579/12 RX-II (Réexamen Commission v. Strack), ECLI:EU:C:2013:570, para. 39.

⁴⁷ CJEU, dec. of 20 September 2016, C-8/15 P – C-10/15 P (Ledra Advertising v. Commission and ECB), ECLI:EU:C:2016:701, para. 67; AG Wahl, Opinion of 21 April 2016 on cases C-8/15 P – C-10/15 P (Ledra Advertising v. Commission and ECB), ECLI:EU:C:2016:290, para. 85; Lenaerts/Rüth, RdA 2022, 273 (276); Schwerdtfeger, in: Meyer/Hölscheidt, Charta der Grundrechte der Europäischen Union, 6th Ed. 2024, CFR Art. 51 para. 31.

⁴⁸ General Court, dec. of 12 December 2019, T-527/16 (Tápias v. Council), ECLI:EU:T:2019:856, para. 58; General Court, dec. of 20 January 2020, T-402/18 (Aquino and Others v. Parliament), ECLI:EU:T:2020:13, para. 57.

⁴⁹ EU Civil Service Tribunal, dec. of 30 June 2015, F-124/14 (Petsch v. Commission), ECLI:EU:F:2015:69, para. 44.

⁵⁰ General Court, dec. of 12 December 2019, T-527/16 (Tápias v. Council), ECLI:EU:T:2019:856, para. 58.

exist in accordance with Union law. Whether and to what extent this reference influences the material content of Art. 28 CFR is highly disputed.⁵¹

IV. Summary

Neither the personal scope nor the material content of Art. 28 CFR indicates that ECB staff and their bodies of representation are excluded from its protection. As a consequence, the ECB – like any other EU institution – is bound by the fundamental rights granted by the CFR.

D. Collective Bargaining and Collective Action according to the ECB's internal rules and agreements

Interestingly, the ECB's internal rules for employment – its Conditions of Employment as well as its Staff Rules – contain selective provisions on the right to strike. Furthermore, there are points of reference in Memoranda of Understanding the ECB has concluded with its Staff Committee and with IPSO.

I. Collective bargaining and collective action in the ECB's internal rules

According to Art. 21.1 of the Rules of Procedure of the European Central Bank,⁵² the employment relationship between the ECB and its staff is determined by the ECB CoE and ECB Staff Rules.

1. Collective bargaining and collective action under the ECB CoE

a) The right to collective bargaining according to Art. 9 ECB CoE

According to Art. 9(c) of the ECB CoE no specific national law governs the ECB CoE. However, the ECB shall explicitly apply (i) the general principles of law common to the Member States, (ii) the general principles of EC law and (iii) the rules contained in the EC regulations and directives concerning social policy which are addressed to Member States. Whenever necessary these legal instruments will be implemented by the ECB.

As the CJEU decided in 2010, the right to bargain collectively is recognised both by various international instruments which the Member States have signed or cooperated in and by instruments developed by those Member States at Community level or in the context of the European Union.⁵³ Against that background, it is – according to the CJEU – “beyond question that the

⁵¹ Cf. Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 28 para. 22 f.; Thüsing/Traut, RdA 2012, 65 (69 ff.).

⁵² OJ L 80, 18.3.2004, p. 33 et seqq.

⁵³ CJEU, dec. of 15 July 2010, C-271/08 (Commission v. Germany), ECLI:EU:C:2010:426, para. 37.

right to bargain collectively and the autonomy, accorded to the parties to that process, inherent in that right must be recognised also in the Community legal order as fundamental rights which form an integral part of the general principles of Community law.”⁵⁴

As a consequence, Art. 9(c)(ii) ECB CoE obliges the ECB to acknowledge and apply the right to bargain collectively.

b) The right to strike according to Art. 8 ECB CoE

Art. 8 of the ECB CoE states that

[t]he right to strike shall be subject to prior written notice from the organising body and to the maintenance of such minimum services as may be required by the Executive Board. The Staff Rules shall further specify these limitations.

Art. 8 ECB CoE obviously acknowledges the employees' right to strike.

2. Specification of the right to strike in Art. 1.2 ECB Staff Rules

In its Article 1.2 the ECB Staff Rules specify the limitations of the right to strike implemented by Art. 8 ECB CoE as follows:

1.2.1 Strike is the deliberate collective abstention from work of employees.

1.2.2 A strike must be organised by a body which is recognised by the Executive Board as representing a group of members of staff (such as the Staff Committee) or by a body representing at least one sixth of the total members of staff or which, within a Directorate or Directorate General of the ECB represents at least one third of the members of staff.

1.2.3 The organising body shall inform the Executive Board in writing of the intention to strike at least ten working days before the first day of the strike. The written notice shall state the precise nature of the dispute, the precise nature of the proposed strike action, and the period during which the strike is going to take place.

1.2.4 The Executive Board of the ECB shall determine, on a case by case basis, the minimum services to be assured at the ECB during a strike.

⁵⁴ AG Trstenjak, Opinion of 14 April 2010 on case C-271/08 (Commission v. Germany), ECLI:EU:C:2010:183, para. 78, with referrals to ECJ, dec. of 11 December 2007, C-438/05 (International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP), ECLI:EU:C:2007:772, para. 43 f. and ECJ, dec. of 18 December 2007, C-341/05 (Laval un Partneri), ECLI:EU:C:2007:809, para. 90 f.

1.2.5 Unless the Executive Board decides otherwise, the total period of the strike shall be deducted from the salary and salary related payments of the member of staff taking part in a strike.

1.2.6 No member of staff shall be forced to strike against his/her will.

1.2.7 No disciplinary action may be taken against any member of staff participating in a strike unless the member of staff has been nominated to provide the minimum services described above and fails to do so in order to take part in the strike.

3. The ECB's Memoranda of Understanding with Staff Committee and IPSO

a) The Memorandum of Understanding with the Staff Committee

The Memorandum of Understanding between the ECB and the Staff Committee does not mention a right to strike. However, in its preamble it states that

[t]his Memorandum does not preclude or curtail any rights for staff or staff representatives to establish relations with the Executive Board under the principles of European Union labour law or on any other basis that may provide for such rights.

As set out above, it is “beyond question that the right to bargain collectively and the autonomy, accorded to the parties to that process, inherent in that right must be recognised also in the Community legal order as fundamental rights which form an integral part of the general principles of Community law.”⁵⁵ Hence, one may argue that the ECB has acknowledged the Staff Committee's right to bargain collectively.

b) Memorandum of Understanding with IPSO

The Memorandum of Understanding with IPSO, however, states:

[t]his Memorandum of Understanding does not address collective bargaining mechanisms on conditions of employment for staff of the ECB.

But collective bargaining is not explicitly denied; it is simply not addressed.

Nevertheless, and interestingly, the Memorandum of Understanding with IPSO provides conditions that any trade union must fulfil to be recognised by the ECB. According to Art. 1 b. of the Memorandum of Understanding with IPSO, trade unions fulfilling these conditions “shall be deemed to be recognised bodies within the meaning of Article 1.4.2 [now 1.2.2] of the Staff

⁵⁵ AG Trstenjak, Opinion of 14 April 2010 on case C-271/08 (Commission v. Germany), ECLI:EU:C:2010:183, para. 78, with referrals to ECJ, dec. of 11 December 2007, C-438/05 (International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP), ECLI:EU:C:2007:772, para. 43 f. and ECJ, dec. of 18 December 2007, C-341/05 (Laval un Partneri), ECLI:EU:C:2007:809, para. 90 f.

Rules.” To achieve recognition any trade union must have a membership representing at least 10% of the ECB staff holding a contract of indefinite duration and must adhere to the principles set out in the Memorandum of Understanding with IPSO.

4. Summary

First, it must be noted that Art. 8 ECB CoE explicitly recognises the right to strike. This right is then tied to an organising body. Art. 1.1.2 ECB SR specifies the detailed requirements. It follows that the Staff Committee is regarded as an organising body in any case. Furthermore, the Memorandum of Understanding with IPSO stipulates that trade unions representing 10% of the permanent staff of the ECB shall be recognised by the ECB as an organising body within the meaning of Art. 1.4.2 [today: Art. 1.2.2] ECB SR. It remains uncertain, however, whether the ECB recognises the right to strike as an individual right of its staff or as a collective right of the organising bodies.

In any case, however, the right to strike, as granted by the ECB, is subject to strict limitations provided by the ECB Staff Rules. It is hardly conceivable that any trade union would have accepted such narrow preconditions for a strike.

II. The ECB's right to determine conditions of employment unilaterally

The ECB holds the view that Art. 36.1 ECB Statute bestows upon the bank the right to determine conditions of employment unilaterally without influence of any third party. This supposedly follows from the ECB's independence granted in Art. 130 TFEU.⁵⁶

Art. 36.1 ECB Statute states that

[t]he Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

Although employee participation and negotiation rights are laid down in all Member States' national labour laws as well as in relevant directives of the EU,⁵⁷ the ECB's Executive Board and its Governing Council hold the view

⁵⁶ Urban/Feyerbacher, in: von der Groeben/Schwarze/Hatje/Terhechte, *Europäisches Unionsrecht*, 8th Ed. 2026, *Satzung ESZB/EZB* Art. 36 para. 1, 20.

⁵⁷ Cf. for example Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation, OJ L 80, 23.3.2002, p. 29, Art. 4 para. 4 stipulating: “Consultation shall take place ... in such a way as to enable the employees' representatives to meet the employer and obtain a response ... with a view to reaching an agreement.”

that they can unilaterally adopt fundamental changes in all its labour rules without regard for or negotiating with its staff.⁵⁸

As already mentioned, “the employment relationship between the ECB and its staff is contractual rather than governed by public service regulations.”⁵⁹⁶⁰ Nevertheless, changes to the employment relationship – according to the General Court and the CJEU – do not require consensual agreement. Rather, the General Court has held that “[a]lthough the binding force of contracts precludes the ECB as an employer from imposing alterations to the conditions under which employment contracts are performed without the consent of the staff members concerned, that principle applies only to the essential elements of the employment contract.”⁶¹ The General Court referred to settled case law according to which European institutions enjoy wide discretion in the organisation of their services and the assignment of their staff to perform these services. With specific regard to unilateral changes to employment conditions and contracts the General Court concluded from this:

It [the ECB] may therefore over time develop its employment relationships with its staff in the best interests of the service in order to arrive at an effective organisation of work and a consistent allocation of the various duties among members of the staff and to adapt to varying needs. A member of staff recruited to a post for an indefinite period which might last until he reached the age of 65 cannot reasonably expect that every aspect of internal organisation will remain unchanged for his entire career or that he will retain throughout his career the responsibilities allocated to him at the time of his appointment.⁶²

The CJEU added, upon appeal, that where the contracts are concluded with an EU institution, entrusted with public interest responsibilities and authorised to lay down, by regulation, provisions applicable to its staff, the consent of the parties to such a contract was necessarily circumscribed by all manner of obligations deriving from those particular responsibilities. These obligations deriving from public interest responsibilities were, at the ECB, met by the ECB CoE and ECB Staff Rules. Therefore, by signing a contract with the ECB, the staff agreed to be bound by the Conditions of Employment without being able to negotiate individually any of their terms.

⁵⁸ Cf. ECB, opinion of 21 February 2008 at the request of the German Ministry of Finance on a draft law amending the Law on the Deutsche Bundesbank, CON/2008/9, para. 2.4: “In this regard, it is useful to note that the ECB defines its staff policy autonomously and that this autonomy forms part of the ECB’s independence as guaranteed by Article 108 of the Treaty [now Art. 130 TFEU] and Article 36 of the ESCB Statute.”

⁵⁹ CJEU, dec. of 14 October 2004, C-409/02 P (Pflugradt v. ECB), ECLI:EU:C:2004:625, para. 33.

⁶⁰ Cf. also General Court, dec. of 22 October 2002, T-178/00 and T-341/00 (Pflugradt v. ECB), ECLI:EU:T:2002:253, para. 49; General Court, dec. of 18 October 2001, T-333/99 (X v. ECB), ECLI:EU:T:2001:251, para. 61.

⁶¹ General Court, dec. of 22 October 2002, T-178/00 and T-341/00 (Pflugradt v. ECB), ECLI:EU:T:2002:253, para. 53.

⁶² General Court, dec. of 22 October 2002, T-178/00 and T-341/00 (Pflugradt v. ECB), ECLI:EU:T:2002:253, para. 54.

Consent was thus limited in particular to acceptance of the rights and obligations laid down by the ECB CoE and ECB Staff Rules.⁶³

In conclusion, the employment relationship between the ECB and its staff may be of a contractual nature, but the consensual agreement concluding this contract of the staff members is limited to the acceptance of the ECB CoE and ECB Staff Rules. Changes in the employment relationship between staff and the ECB are therefore not made by amending the contractual relationship between these parties, but rather by making adjustments to the ECB's internal legal framework regarding its staff.

The question arises, hence, whether those Conditions of Employment and Staff Rules may be changed unilaterally by the ECB. In this regard, the CJEU has held that it was within the discretion of the management bodies of the ECB to implement measures entailed by the public interest obligations deriving from the particular responsibilities entrusted to the ECB. "Those bodies may for instance be compelled, in order to meet such requirements of the service, and in particular to enable it to adapt to new needs, to take unilateral decisions or measures liable to alter inter alia the implementing conditions of employment contracts."⁶⁴

Moreover, the Civil Service Tribunal has repeatedly found that decisions taken unilaterally by the ECB and without co-determination of or bargaining with staff representatives cannot be regarded as faulty.⁶⁵ The court held that in particular Art. 28 CFR did not comprise "any obligation to introduce a collective bargaining procedure".⁶⁶ Since there were no collective agreements in place between the ECB and any trade union regarding such a bargaining procedure and the internal legal framework of the ECB only provided for consultation procedures, the Civil Service Tribunal concluded that the ECB could unilaterally amend its Conditions of Employment and Staff Rules, provided that the consultation procedure with the Staff Committee was observed.⁶⁷

However, it cannot be concluded from the case law of the Civil Service Tribunal that ECB independence as a principle prevents collective bargaining procedures. On the contrary, the Civil Service Tribunal indicated that it very well deems it legally possible for the ECB to enter into collective agreements. The court found that in this particular case there was no obligation to do so but indicated that such an obligation could arise from a collective agreement between the ECB and a trade union establishing a common framework for collective bargaining procedures. As a prerequisite

⁶³ CJEU, dec. of 14 October 2004, C-409/02 P (Pflugradt v. ECB), ECLI:EU:C:2004:625, para. 34, 35; cf. also General Court, dec. of 4 December 2018, T-517/16 (Janoha and Others v. Commission), ECLI:EU:T:2018:874, para. 100; General Court, dec. of 4 May 2016, T-129/14 P (Andres and Others v. ECB), ECLI:EU:T:2016:267, para. 131; cf. Siekmann, in: Siekmann, *The European Monetary Union*, ECB Statute Art. 36 para. 19.

⁶⁴ CJEU, dec. of 14 October 2004, C-409/02 P (Pflugradt v. ECB), ECLI:EU:C:2004:625, para. 36; approvingly Urban/Feyerbacher, in: von der Groeben/Schwarze/Hatje/Terhechte, *Europäisches Unionsrecht*, 8th Ed. 2026, *Satzung ESZB/EZB* Art. 36 para. 8, 20.

⁶⁵ EU Civil Service Tribunal, dec. of 28 October 2010, F-84/08 (Cerafogli v. ECB), ECLI:EU:F:2010:134, para. 47; EU Civil Service Tribunal, dec. of 17 March 2015, F-73/13 (AX v. ECB), ECLI:EU:F:2015:9, para. 252 f.

⁶⁶ EU Civil Service Tribunal, dec. of 17 March 2015, F-73/13 (AX v. ECB), ECLI:EU:F:2015:9, para. 252.

⁶⁷ EU Civil Service Tribunal, dec. of 17 March 2015, F-73/13 (AX v. ECB), ECLI:EU:F:2015:9, para. 253.

it must be legally possible for the ECB to enter into such agreements. The principle of ECB independence is not mentioned.

III. A violation of Art. 51 para. 1 CFR following from the ECB's refusal to negotiate collectively

In a nutshell, the Staff Committee, or a trade union recognised by the ECB, can of course demand the ECB to enter into negotiations on changes or amendments to the ECB CoE and ECB Staff Rules. However, as long as the ECB is regarded as entitled to amend working conditions unilaterally, one significant incentive to enter into collective bargaining is missing. In such a context, the right to strike becomes even more important.

This result can also be reconciled with Art. 36.1 ECB Statute: Even if the ECB's Governing Council is legally empowered to unilaterally amend Conditions of Employment and Staff Rules, the organising bodies may approach the Governing Council to conduct its power in a certain fashion. If the Governing Council refuses and also refuses to enter into negotiations on the proposed changes, the necessary conflict of interest arises. The organising bodies may resort to the right to strike. During a period of collective pressure, the Governing Council may rethink its position on the suggested amendments. The outcome of such industrial action may be a collective agreement.

However, the strict refusal of the ECB to enter into negotiation may contravene its obligations under Art. 51 para. 1 sent. 2 CFR. Accordingly, all EU institutions shall respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. Art. 51 para. 1 sent. 2 CFR sheds light on the functions bestowed upon fundamental rights by the Charter. The obligation to "respect" and "observe" the rights laid down in the Charter expresses negative obligations of institutions bound by the CFR. This function is aimed at preventing infringements of fundamental rights (duty to respect or defensive function).⁶⁸ On the other hand, the notion to "promote" the application of fundamental rights emphasises the obligation of institutions bound by the Charter to take up positive measures to guarantee and implement fundamental rights (positive obligations).⁶⁹ The most substantial feature of these positive obligations of fundamental rights is the duty to protect. As duties to protect, fundamental rights require their addressees to actively defend those within the personal scope of application of the fundamental right.⁷⁰ Such a duty to protect may also be derived through interpretation of Art. 28 CFR. Within the scope of Art. 28 CFR the institutions bound by the CFR are obligated to take up efforts to ensure the realisation of the right to collective action and

⁶⁸ Schwerdtfeger, in: Meyer/Hölscheidt, Charta der Grundrechte der Europäischen Union, 6th Ed. 2024, CFR Art. 51 para. 75; Jarass, in: Jarass, Charta der Grundrechte, 4th Ed. 2021, CFR Art. 51 para. 5; Kingreen, in: Callies/Ruffert, EUV/AEUV, 6th Ed. 2022, CFR Art. 51 para. 29.

⁶⁹ Schwerdtfeger, in: Meyer/Hölscheidt, Charta der Grundrechte der Europäischen Union, 6th Ed. 2024, CFR Art. 51 para. 76; Jarass, in: Jarass, Charta der Grundrechte, 4th Ed. 2021, CFR Art. 51 para. 31; Kingreen, in: Callies/Ruffert, EUV/AEUV, 6th Ed. 2022, CFR Art. 51 para. 31.

⁷⁰ Kingreen, in: Callies/Ruffert, EUV/AEUV, 6th Ed. 2022, CFR Art. 51 para. 32.

collective bargaining granted by Art. 28 CFR.⁷¹ A general refusal to enter into collective negotiations, when invited to, may be seen as contravening the ECB's obligation to promote the application of the fundamental right of collective bargaining and action.

E. The Limits of ECB Independence

However, the result just found would be incorrect if the ECB's independence, granted in Art. 130 and Art. 282 para. 3 TFEU and in Art. 36.1 ECB Statute, precluded the conclusion of any collective agreement. After all, the right to collective bargaining and collective action is guaranteed under Art. 28 CFR only "in accordance with Union law". The right to collective bargaining and collective action must therefore be exercised in compliance with the law of the European Union.⁷²

I. ECB Independence

According to Art. 130 TFEU, crucial to the legal status of the ECB,⁷³ neither the ECB nor a national central bank, nor any member of their decision-making bodies, shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.

Furthermore, Art. 282 para. 3 sent. 3 TFEU provides that the ECB shall be independent in the exercise of its powers and in the management of its finances. Also, Art. 7 ECB Statute echoes this statement.⁷⁴

The CJEU has found that these provisions intend "to shield the ECB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the EC Treaty and the ESCB Statute."⁷⁵ Therefore, ECB independence must be understood as a "functionalized concept".⁷⁶

⁷¹ Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 28 para. 4.

⁷² CJEU, dec. of 8 September 2011, C-297/10, C-298/10 (Hennigs and Mai), ECLI:EU:C:2011:560, para. 67; CJEU, dec. of 13 September 2011, C-447/09 (Prigge), ECLI:EU:C:2011:573, para. 47; Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 28 para. 55.

⁷³ Cf. Griller, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 86. Lieferung 09/2025, TFEU Art. 130 para. 1.

⁷⁴ Cf. Griller, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 86. Lieferung 09/2025, TFEU Art. 130 para. 2.

⁷⁵ CJEU, dec. of 10 July 2003, C-11/00 (Commission / ECB), ECLI:EU:C:2003:395, para. 134; cf. for confirmation of this ruling CJEU, dec. of 16 June 2015, C-62/14 (Gauweiler), ECLI:EU:C:2015:400, para. 40.

⁷⁶ Baroncelli, MJ 23 (2016), 79 (82).

It follows that independence within the meaning of Art. 130, 282 TFEU is only guaranteed for the performance of the ECB's specific tasks and powers granted by the Treaties.⁷⁷ The specific task assigned to the ECB is, first and foremost, to guarantee price stability.⁷⁸ The ECB's monetary policy is to remain free of external influence.⁷⁹ However, the CJEU further emphasised that ECB independence does not have "the consequence of separating it entirely from the European Community and exempting it from every rule of Community law."⁸⁰ This means that beyond its primary function of maintaining price stability, the concept of ECB independence is limited.⁸¹

Generally, four aspects of ECB independence are distinguished: (1) Institutional independence, including a guarantee of the ECB's continued existence as an EU institution.⁸² (2) Functional independence, describing the ECB's scope of discretion in terms of how and by what means it achieves its central objective of price stability.⁸³ (3) Financial independence, requiring the ECB to have its own financial resources so that it can fulfil its tasks independently.⁸⁴ (4) Personal independence, intended to prevent the bank's monetary policy from being practically predetermined by the selection of the members of the decision-making bodies of the ECB.⁸⁵ The latter finds explicit expression in provisions governing the terms of members of the decision-making bodies and their protection against dismissal.⁸⁶

II. The Functional Limits of ECB Independence

To sum it up with a few words, and as the CJEU has already pointed out: ECB independence must be understood in conjunction with the tasks assigned to the bank by the Treaties. Beyond these tasks, the concept of independence is limited. Especially personal independence is limited to members of the decision-making bodies, that is, the Executive Board and the Governing Council.⁸⁷ Only these decision-making bodies have direct influence on the formulation of the monetary policy of the European Union.

⁷⁷ Baroncelli, MJ 23 (2016), 79 (82).

⁷⁸ Manger-Nestler, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2nd Ed. 2023, TFEU Art. 130 para. 2.

⁷⁹ Griller, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 86. Lieferung 09/2025, TFEU Art. 130 para. 8.

⁸⁰ CJEU, dec. of 10 July 2003, C-11/00 (Commission v. ECB), ECLI:EU:C:2003:395, para. 135.

⁸¹ Baroncelli, MJ 23 (2016), 79 (82 f.); Manger-Nestler, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2nd Ed. 2023, TFEU Art. 130 para. 11 f.; Selmayr, in: von der Groeben/Schwarze/Hatje/Terhechte, Europäisches Unionsrecht, 8th Ed. 2026, TFEU Art. 282 para. 135.

⁸² Manger-Nestler, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2nd Ed. 2023, TFEU Art. 130 para. 6.

⁸³ Griller, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 86. Lieferung 09/2025, TFEU Art. 130 para. 35.

⁸⁴ Selmayr, in: von der Groeben/Schwarze/Hatje/Terhechte, Europäisches Unionsrecht, 8th Ed. 2026, TFEU Art. 282 para. 131; Manger-Nestler, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2nd Ed. 2023, TFEU Art. 130 para. 27.

⁸⁵ Manger-Nestler, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2nd Ed. 2023, TFEU Art. 130 para. 21.

⁸⁶ Selmayr, in: von der Groeben/Schwarze/Hatje/Terhechte, Europäisches Unionsrecht, 8th Ed. 2026, TFEU Art. 282 para. 131.

⁸⁷ Manger-Nestler, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2nd Ed. 2023, TFEU Art. 130 para. 21; Zilioli/Ioannidis, in: von der Groeben/Schwarze/Hatje/Terhechte, Europäisches Unionsrecht, 8th Ed. 2026, TFEU Art. 130 para. 17.

Therefore, their independence as decision-making bodies as a whole, but also the personal independence of each single member, must be provided.

Personal independence as a concept, however, does not extend to members of staff in rank below the leadership of the ECB. If ECB independence is to be understood as a lack of political pressure on the bank's decisions regarding the EU's monetary policies, it is hardly conceivable how internal collective influences on the ECB CoE and ECB Staff Rules could constitute an infringement of this independence in any case.

This result is not precluded by Art. 36.1 ECB Statute, according to which "[t]he Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB." Even if Art. 36.1 ECB Statute should allow the ECB to amend the ECB CoE and Staff Rules unilaterally, this cannot be understood as an extension of the ECB's personal independence beyond the constitutional provisions in Art. 130 and 282 TFEU. Art. 36.1 ECB Statute has to be interpreted in line with Art. 130 TFEU. The ECB's independence as regards its monetary policy does not require it to have almost unlimited discretion towards the employment conditions of its staff.

As a consequence, the ECB's independence does not prevent the ECB from entering into collective bargaining or concluding collective agreements.

III. Summary

Neither has the case law of the European judiciary established limitations of the right to collective bargaining and collective action based on the ECB's independence, nor does ECB independence itself, as shaped by the CJEU, indicate that such limitations exist. Art. 36.1 ECB Statute must be read in connection with these interpretations.

The ECB is granted independence, first and foremost, in order to properly perform its obligations assigned to it by the Treaties. Beyond these obligations the bank's independence is limited, last but not least, by a fundamental principle of primary EU law as the right to collective bargaining and the right to collective action. If the performance of an independent monetary policy is not affected, the bank may not invoke its independence to shield itself from external forces. In the special case of collective bargaining, it must be noted that such influence is not exerted by external but rather internal forces, that is, the staff and their representatives.

F. The General Court's Decision on Workers' Right to Information and Consultation at the ECB

The findings in Chapter E are confirmed by an important decision of the General Court on Art. 27 CFR and its applicability to the ECB. Art. 27 CFR grants workers rights to information and consultation. Accordingly,⁸⁸

[w]orkers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

I. Scope and nature of Art. 27 CFR

Article 27 CFR provides workers and their representatives with rights to information and consultation.⁸⁹ In contrast to Art. 28 CFR,⁹⁰ it is still disputed whether the right to information and consultation guaranteed in Art. 27 CFR is a fundamental right or rather a principle within the meaning of Art. 52 para. 5 CFR, which may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers.⁹¹ The CJEU has not yet handed down a decision on this matter.⁹²

The material scope of Art. 27 CFR, according to Art. 6 para. 1 subpara. 3 TEU and Art. 52 para. 7 CFR, must be interpreted with due regard to the Explanations Relating to the Charter of Fundamental Rights of the Praesidium of the Convention⁹³.⁹⁴ The Explanation on Art. 27 CFR refers to the sources of the provision of the Charter, which can be found in Art. 154 and 155 TFEU, and Directives 2002/14/EC (general framework for informing and consulting employees), 98/59/EC (collective redundancies), 2001/23/EC (transfers of undertakings) and 94/45/EC (European works councils).⁹⁵

⁸⁸ An overview of relevant provisions of the CFR in an employment and labour law context can be found at Becker, EuR 2019, 469 (473); Hilbrandt, NZA 2019, 1168 (1169 ff.).

⁸⁹ Zachert, NZA 2001, 1041 (1045).

⁹⁰ For the recognition of Art. 28 CFR as a fundamental right in the sense of Art. 52 para. 1 CFR cf. supra C.

⁹¹ For Art. 27 CFR as a principle in the sense of Art. 52 para. 5 CFR cf. Frenz/Götzkes, RdA 2007, 216 (217 f.); Seifert, EuZA 2013, 205 (212); for Art. 27 as a fundamental right in the sense of Art. 52 para. 1 CFR cf. Sagan, in: Oetker/Preis, Europäisches Arbeits- und Sozialrecht - EAS, 235. Lieferung, 11/2024, B 1100 para. 99.

⁹² Especially CJEU, dec. of 15 January 2014, C-176/12 (Association de médiation sociale), ECLI:EU:C:2014:2, para. 45 has not clarified this issue, cf. Schlachter, EuZA 2015, 149 (157 f.).

⁹³ OJ C 303, 14.12.2007, p. 17 et seqq.

⁹⁴ Cf. Schlachter, EuZA 2015, 149 (158 f.).

⁹⁵ Cf. Schmitt, in: Oetker/Preis, Europäisches Arbeits- und Sozialrecht - EAS, 235. Lieferung, 11/2024, B 8300 para. 30.

II. The Decision in Case IPSO v. ECB – T-713/14

Article 27 CFR has gained special significance in court proceedings brought by IPSO challenging the legal validity of an Executive Board decision on the use of agency workers at the ECB.⁹⁶ IPSO initiated discussions with the bank concerning the situation of agency workers at the ECB. A working group was established. The Executive Board decided that “secretarial and administrative agency staff should only be used to cover for temporary business needs, and that the total duration of their successive contracts should not exceed 24 months”,⁹⁷ before the working group could deliver its final report. IPSO challenged the Executive Board’s decision on the grounds of a violation of Art. 27 CFR as well as of Directive 2002/14/EC, stemming from the disregard of consultation procedures laid down in the Memorandum of Understanding between the ECB and IPSO and the discussions in the working group.⁹⁸

The General Court held that while Art. 27 CFR was not directly applicable to IPSO,⁹⁹ it must be determined whether IPSO might rely on provisions of the Directive 2002/14/EC, which – according to the Explanations on Art. 27 CFR – constitute the conditions under which Art. 27 CFR is applicable.¹⁰⁰

After clarifying that agency workers indeed find themselves in an “employment relationship” with the user undertaking¹⁰¹ and that the ECB qualifies as an employer within the meaning of the Directive regarding agency workers,¹⁰² the court turned to the question whether a Directive can directly impose obligations upon an EU institution in its relations with its staff.¹⁰³ For an answer, the General Court referred to three scenarios from the case law of the European judiciary in which Directives could directly impose such obligations: (1) Rules or principles laid down in the Directive may be relied on against the institutions where those rules or principles themselves appear to be merely the specific expression of fundamental treaty rules and general principles directly applicable to the institutions.¹⁰⁴ (2) A Directive may be binding on an institution where the latter, within the scope of its organisational autonomy in particular, has sought to carry out a specific obligation laid down by a Directive¹⁰⁵ or (3) in the specific instance where an internal measure of general application itself expressly refers to measures laid down by the Union legislature pursuant to the Treaties.¹⁰⁶

⁹⁶ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727; cf. also regarding these proceedings Karthaus, AuR 2017, 355.

⁹⁷ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 7.

⁹⁸ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 79.

⁹⁹ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 87.

¹⁰⁰ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 88.

¹⁰¹ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 96 ff.

¹⁰² General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 101.

¹⁰³ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 104.

¹⁰⁴ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 105.

¹⁰⁵ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 106.

¹⁰⁶ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 106.

The court quickly dismissed scenarios (1)¹⁰⁷ and (3).¹⁰⁸ Through a comparison of the rights of staff representatives and representative bodies under the Memorandum of Understanding between the ECB and IPSO on the one hand and such rights guaranteed in Directive 2002/14/EC on the other, the General Court arrived at the conclusion that this Memorandum of Understanding indeed constituted an implementation of Directive 2002/14/EC at the ECB. Within its organisational autonomy, the bank had sought to carry out specific obligations conferred upon employers in the Directive. Therefore, the court found that the ECB was “bound by the rules and principles laid down in that directive in its relations”¹⁰⁹ with IPSO.¹¹⁰

Since the Memorandum of Understanding, in Art. 1.a., in defining the term “member of staff”, explicitly excludes agency workers from its scope of applicability, the court had to answer the question whether the Memorandum of Understanding had been subject to amendments through the discussions in the working group.¹¹¹ In short, the General Court found sufficient proof of such an intent on the ECB’s side and regarded the personal scope of the Memorandum of Understanding as extending to agency workers.¹¹² The court concluded:

in adopting the contested act without first having involved [IPSO], even though the subject matter of the act came under the discussions in the working group, and without awaiting the working group’s report, the ECB did not respect [IPSO’s] rights to be informed and consulted, which form part of its rights and powers as the trade union representing the persons concerned, in breach of Article 27 of the Charter of Fundamental Rights, defined by Directive 2002/14 and implemented by the framework agreement as extended to cover agency staff by the creation of the working group.¹¹³

The court upheld IPSO’s plea for annulment of the Executive Board’s decision.¹¹⁴ Consultation and information constitute the lowest level of employee involvement. Its purpose is to make the concerns of staff heard by decision-makers prior to finalising their decisions.¹¹⁵ However, this can only be achieved if the interests of the workforce are not represented individually but collectively by a representative body such as a trade union.¹¹⁶ The decision of the General Court therefore reinforces the characterisation of information and consultation obligations as a procedural guarantee for employee representatives to be able to influence a decision-

¹⁰⁷ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 108: Even though Directive 2002/14/EC is an expression of Art. 27 CFR, this Art. 27 CFR is not directly applicable as the General Court has found in para. 86.

¹⁰⁸ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 109-111: Art. 9 (c) Conditions of Employment may reflect general principles of Union law, but it itself does not constitute an obligation of the ECB to inform or consult workers’ representatives.

¹⁰⁹ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 122.

¹¹⁰ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 113-122.

¹¹¹ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 129.

¹¹² General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 130-139.

¹¹³ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 148.

¹¹⁴ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 151.

¹¹⁵ General Court, dec. of 13 December 2016, T-713/14 (IPSO v. ECB), ECLI:EU:T:2016:727, para. 144.

¹¹⁶ Seifert, EuZA 2013, 205 (212).

making process.¹¹⁷ By sanctioning the breach of consultation and information obligations with the invalidity of the Executive Board's decision, the court has significantly strengthened the rights of trade unions at the ECB.

III. Impact on the ECB's Memorandum of Understanding with the Staff Committee

The decision of the General Court did not refer to the Memorandum of Understanding between the ECB and the Staff Committee. However, this Memorandum of Understanding also covers information and consultation procedures on contracts of employment, staff regulations and remuneration, employment, working, health and safety conditions at the ECB, social security cover and pension schemes. In the preamble of the Memorandum of Understanding complete information is regarded as a basis of effective dialogue. The Memorandum of Understanding with the Staff Committee must therefore also be regarded as an autonomous implementation of obligations laid down in the Directive 2002/14/EC. As a result, if the consultation and information procedures stipulated in the Memorandum of Understanding between the ECB and the Staff Committee are not observed, the Staff Committee may file a plea for annulment of the respective decision by the ECB.

IV. The Decision's Significance for the Interpretation of ECB Independence

Neither the General Court's decision in IPSO v. ECB (Case T-713/14) nor its reasons reveal whether the ECB did raise concerns as regards its independence or whether the court was simply unable to recognise the legal relevance of this argument. Since it is the purpose of the consultation and information obligations and procedures to secure a minimum level of influence of staff and their representatives on decisions by the ECB, one would assume that the ECB held the view that IPSO's rights to information and consultation constituted an infringement of the ECB's independence. Nonetheless, the independence of the ECB is not mentioned in the grounds of the judgment. It can therefore be concluded that staff involvement under the Memorandum of Understanding does not constitute an infringement of the ECB's independence. The same applies to Art. 28 CFR.

G. Shaping the right to strike at the ECB

So far, we have shown that the ECB as an EU institution is per se bound by the provisions of Art. 28 CFR. Furthermore, the concept of ECB independence does not in itself present a hindrance for collective bargaining with or collective action at the ECB. In addition, the right to strike as provided for in the internal provisions of the ECB does not conflict with the powers

¹¹⁷ Karthaus, AuR 2017, 355.

invested in the Governing Council by Art. 36.1 ECB Statute. As a consequence, members of ECB staff and their representative bodies have the right to strike and are protected by Art. 28 CFR.

Nonetheless, the provisions in Art. 8 ECB CoE and Art. 1.2 ECB Staff Rules impose certain restrictions on the staff member's right to strike. These limitations shall be examined in the following. According to Art. 52 para. 1 CFR any limitation on the exercise of the rights and freedoms recognised by the CFR must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

I. Interpretation of Art. 28 CFR in the Light of International Labour Law

According to Art. 52 para. 3 CFR, the meaning and scope of rights granted by the CFR which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), shall be the same as those laid down by the said Convention.

Therefore, when interpreting the rights guaranteed by the CFR, in order to ensure consistency between the rights contained in the CFR and the corresponding rights guaranteed in the ECHR, the CJEU takes into account the corresponding rights guaranteed by the ECHR, as interpreted by the European Court of Human Rights (ECtHR).¹¹⁸ There is still a lively debate about how this reference to the ECHR and ECtHR case law is to be understood. Some interpret this, in essence, as a complete incorporation of the ECHR as well as the case law of the ECtHR into the CFR.¹¹⁹ Others see Art. 52 para. 3 CFR as a rule of interpretation for the fundamental rights of the CFR for which the ECHR remains a mere legal source^{120, 121} In any case, when interpreting the scope of rights of the CFR, due regard must be given to the rights of the ECHR and the respective case law. The ECHR and its corresponding interpretation by the ECtHR constitute a minimum standard of fundamental rights protection under the CFR.¹²² This is also underscored by para. 5 of the Preamble of the CFR, according to which the CFR reaffirms, with due regard for the powers and tasks of the Union and for the

¹¹⁸ CJEU, dec. of 8 December 2022, C-694/20 (Orde van Vlaamse Balies and Others), ECLI:EU:C:2022:963, para. 26; cf. also Heuschmid, in: Däubler, Arbeitskampfrecht, 4th Ed. 2018, § 11 para. 12.

¹¹⁹ Terhechte, in: von der Groeben/Schwarze/Hatje/Terhechte, Europäisches Unionsrecht, 8th Ed. 2026, CFR Art. 52 para. 15; Heuschmid/Klebe, in: Däubler/Zimmer, Arbeitsvölkerrecht – Festschrift für Klaus Lörcher, p. 347; Heuschmid, in: Däubler, Arbeitskampfrecht, 4th Ed. 2018, § 11 para. 12; cf. also Weiß, EuZW 2013, 287 (289).

¹²⁰ „Rechtserkenntnisquelle“, cf. Schwerdtfeger, in: Meyer/Hölscheidt, Charta der Grundrechte der Europäischen Union, 6th Ed. 2024, CFR Art. 52 para. 64.

¹²¹ Schwerdtfeger, in: Meyer/Hölscheidt, Charta der Grundrechte der Europäischen Union, 6th Ed. 2024, CFR Art. 52 para. 64; Kingreen, in: Callies/Ruffert, EUV/AEUV, 6th Ed. 2022, CFR Art. 52 para. 37; Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, CFR Art. 52 para. 10; Pache, in: Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2nd Ed. 2023, CFR Art. 52 para. 45.

¹²² Biltgen, in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 1st Ed. 2019, § 12 para. 24; Schlachter, EuR 2016, 478 (480); Lenaerts, EuR 2012, 3 (12); Bramehuber, EuZA 2016, 46 (51); Bourazeri, NZA-Beilage 2019, 25 (29).

principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.¹²³ As a consequence, the CJEU regularly refers to the ECHR and ECtHR case law when defining and determining the material scope of fundamental rights of the Charter.¹²⁴

This is particularly interesting as regards the right to collective bargaining and the right to strike as protected in Art. 28 CFR, because the ECtHR has acknowledged the protection of the right to strike in Art. 11 ECHR. The ECtHR itself refers in its judgments to further provisions of international law, which by indirect reference must be considered when interpreting the rights of the CFR.¹²⁵ According to Art. 11 para. 1 ECHR 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 their interests. It corresponds to Art. 28 CFR.¹²⁶

In its landmark decisions “Demir and Baykara”¹²⁷ and “Enerji Yapi-Yol Sen”¹²⁸ the ECtHR found for the first time that the right to form and join trade unions also and specifically includes the right to collective bargaining¹²⁹ and the right to strike^{130, 131}. This has since become settled case law of the ECtHR.¹³² These decisions are not only of particular interest because the court helped to usher in “a new era of collective human rights”,¹³³ but also because of its recourse to international labour law provisions.¹³⁴ In its Demir and Baykara judgment the ECtHR referred to International Labour Organization (ILO) Conventions No. 98¹³⁵ and No. 151¹³⁶ to justify its

¹²³ Cf. Biltgen, in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 1st Ed. 2019, § 12 para. 22; Heuschmid, in: Däubler, Arbeitskampfrecht, 4th Ed. 2018, § 11 para. 14; Schadendorf, EuR 2015, 28 (41).

¹²⁴ Cf. CJEU, dec. of 22 November 2022, C-69/21 (Staatssecretaris van Justitie en Veiligheid (Éloignement - Cannabis thérapeutique)), ECLI:EU:C:2022:913, para. 61 ff.; CJEU, dec. of 17 December 2015, C-157/14 (Neptune Distribution SNC), ECLI:EU:C:2015:823, para. 65.

¹²⁵ Heuschmid, in: Däubler, Arbeitskampfrecht, 4th Ed. 2018, § 11 para. 12 ff.; Heuschmid/Klebe, in: Däubler/Zimmer, Arbeitsvölkerrecht – Festschrift für Klaus Lörcher, p. 346 ff.; Ulber, in: Ales/Bell/Deinert/Robin-Olivier, International and European Labour Law, 1st Ed. 2018, CFR Art. 28 para. 12; cf. also Biltgen, in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 1st Ed. 2019, § 12 para. 22; and Veneziani, in: Bercusson, European Labour Law and the EU Charter of Fundamental Rights, 1st Ed. 2006, p. 293 (“ILO Conventions offer a wide and consistent set of prescriptions and recommendations which can be used to interpret the rights of collective bargaining.”).

¹²⁶ Brameshuber, EuZA 2016, 46 (52).

¹²⁷ ECtHR, dec. of 12 November 2008, App. No. 34503/97 (Demir and Baykara v. Turkey), ECLI:CE:ECHR:2008:1112JUD003450397.

¹²⁸ ECtHR, dec. of 21 April 2009, App. No. 68959/01 (Enerji Yapi-Yol Sen v. Turkey), AuR 2009, 274.

¹²⁹ ECtHR, dec. of 12 November 2008, App. No. 34503/97 (Demir and Baykara v. Turkey), ECLI:CE:ECHR:2008:1112JUD003450397, para. 153 f.

¹³⁰ ECtHR, dec. of 21 April 2009, App. No. 68959/01 (Enerji Yapi-Yol Sen v. Turkey), AuR 2009, 274, para. 24.

¹³¹ Lörcher, AuR 2009, 229; Franzen, EuZA 2010, 453 (455 f.); Schlachter, RdA 2011, 341 (343).

¹³² Recently ECtHR, dec. of 14 December 2023, App. No. 59433/18 (Humpert and others v. Germany), NVwZ 2024, 221, para. 104; cf. for further references Schubert, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th Ed. 2024, ECHR Art. 11 para. 10 ff.

¹³³ Lörcher, in: Däubler, Arbeitskampfrecht, 4th Ed. 2018, § 10 para. 40.

¹³⁴ Buchholtz, in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 1st Ed. 2019, § 10 para. 12.

¹³⁵ ILO Convention No. 98 Right to Organise and Collective Bargaining Convention, 1949.

¹³⁶ ILO Convention No. 151 Labour Relations (Public Service) Convention, 1978.

reconsideration of the interpretation of Art. 11 ECHR.¹³⁷ In *Enerji Yapi-Yol Sen* the ECtHR again refers to an ILO Convention, this time ILO Convention No. 87,¹³⁸ for its conclusion that the right to strike is an essential part of the right to collective bargaining.¹³⁹ It must be stated that with these judgments, the ECtHR acknowledges the impact of international labour law provisions on the rights of the ECHR and their interpretation.¹⁴⁰

Circling back to Art. 52 para. 3 CFR, the impact of these conclusions is profound. On the one hand, the interpretation of Art. 11 ECHR by the ECtHR including its references to international labour law becomes the minimum standard for the interpretation of Art. 28 CFR.¹⁴¹ On the other hand, since the interpretation of Art. 11 ECHR must be taken into account to achieve the necessary coherence between the two fundamental rights orders,¹⁴² the legal sources for interpreting Art. 11 ECHR must also be considered for interpreting Art. 28 CFR.¹⁴³ Art. 52 para. 3 CFR creates the bridge across which Art. 11 ECHR and its interpretations by the ECtHR, including international labour law provisions, may influence the CFR.¹⁴⁴

Therefore, in the following, we will discuss the limitations put on the right to strike under the ECB CoE and ECB Staff Rules in the light of the relevant ILO Conventions, as was acknowledged by the ECtHR in order to determine the proportionality of the restrictions and, as a result, their compatibility with Art. 28 CFR.

II. ECB CoE and ECB Staff Rules in the Light of ILO Convention No. 87

Neither ILO Conventions No. 87, 98 or 151 nor any other Convention explicitly mentions the right to strike. Nonetheless, the right to strike is commonly regarded as a central piece of the ILO legal framework.¹⁴⁵ The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has repeatedly held that the right to strike was firmly implemented and protected through ILO Convention No. 87, Freedom of Association and Protection of the Right to Organise, from 1948. Taking

¹³⁷ ECtHR, dec. of 12 November 2008, App. No. 34503/97 (*Demir and Baykara v. Turkey*), ECLI:CE:ECHR:2008:1112JUD003450397, para. 147 f.; cf. also Fütterer, EuZA 2011, 505 (511 f.).

¹³⁸ ILO Convention No. 87 Freedom of Association and Protection of the Right to Organise, 1948.

¹³⁹ ECtHR, dec. of 21 April 2009, App. No. 68959/01 (*Enerji Yapi-Yol Sen v. Turkey*), AuR 2009, 274, para. 24; Buchholtz, in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 1st Ed. 2019, § 10 para. 17; Fütterer, EuZA 2011, 505 (512); Sädevirta, EuZA 2016, 445 (451).

¹⁴⁰ Lörcher, AuR 2011, 88 (88 f.); Heuschmid/Klebe, in: Däubler/Zimmer, Arbeitsvölkerrecht – Festschrift für Klaus Lörcher, p. 348; Buchholtz, in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 1st Ed. 2019, § 10 para. 21.

¹⁴¹ Biltgen, in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 1st Ed. 2019, § 12 para. 24; Heuschmid/Klebe, in: Däubler/Zimmer, Arbeitsvölkerrecht – Festschrift für Klaus Lörcher, p. 348 f.; Fütterer, EuZA 2011, 505 (515).

¹⁴² Cf. Seifert, EuZA 2013, 205 (210): „Bei der künftigen Konkretisierung des Schutzbereichs von Art. 28 GRCh wird allerdings die zu Art. 11 EMRK entwickelte Dogmatik [...] eine nicht zu unterschätzende Bedeutung erlangen.“ („In the future concretisation of the scope of protection of Art. 28 CFR, however, the dogmatics developed with regard to Art. 11 ECHR will gain significance that should not be underestimated.“, translated by the authors.).

¹⁴³ Schubert, RdA 2013, 370 (376).

¹⁴⁴ Schubert, RdA 2013, 370 (376).

¹⁴⁵ Cf. Lörcher, in: Däubler, Arbeitskampfrecht, 4th Ed. 2018, § 10 para. 46; Klein, in: Frieling/Jacobs/Kreis, Arbeitskampfrecht, 1st Ed. 2021, § 2 para. 22; Zimmer, in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 1st Ed. 2019, § 5 para. 85; Sädevirta, EuZA 2016, 445 (446 ff.); Sädevirta, EuZA 2017, 505 (509).

Art. 3, 8 and 10 ILO Convention No. 87 as a whole, the CEACR found that the “recognized right of workers' and employers' organizations to organize their activities and to formulate their programmes for the purposes of furthering and defending the interests of their members”¹⁴⁶ constituted the legal basis for the right to strike in ILO Convention No. 87.¹⁴⁷ As a prerequisite, the promotion and defence of workers' interests required means of action by which the workforce can bring pressure to have their demands met.¹⁴⁸ The CEACR has continuously reaffirmed its position.¹⁴⁹ Furthermore, the Committee on Freedom of Association (CFA) regards the right to strike as one of the essential means through which workers and their organisations may promote and defend their economic and social interests.¹⁵⁰

However, these ILO bodies do not consider the right to strike to be unlimited.¹⁵¹ Therefore, an extensive body of case law has been developed which further outlines the scope of the right to strike under ILO Convention No. 87. This case law will now be subjected to further review to assess the limitations put on the right to strike of ECB staff in its Conditions of Employment and Staff Rules.

1. Maintenance of minimum services during a strike

At the ECB, the right to strike is, according to Art. 8 ECB CoE, subject to the maintenance of minimum services during a strike. The minimum services required during a strike shall be determined by the Executive Board, according to Art. 1.2.4 Staff Rules, on a case-by-case basis.

The CEACR deems such minimum services justified only in certain situations: (i) in services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (or essential services; (ii) in services which are not essential in the strict sense of the term, but in which strikes of a certain magnitude and duration could cause an acute crisis threatening the normal conditions of existence of the population; and (iii) in public services of fundamental importance.¹⁵² Since the banking sector is not considered an essential service in the strict sense of the term,¹⁵³ it could be doubtful whether the ECB falls within this scope,

¹⁴⁶ ILC, 81st session 1994, Report III (Part 4B), General Survey, para. 147.

¹⁴⁷ ILC, 43rd session 1959, Report III (Part IV), General Survey, para. 68; ILC, 81st session 1994, Report III (Part 4B), General Survey, para. 147; ILC, 101st session 2012, Report III (Part 1B), General Survey, para. 117; Klein, in: Frieling/Jacobs/Krois, *Arbeitskampfrecht*, 1st Ed. 2021, § 2 para. 22; Zimmer, in: Schlachter/Heuschmid/Ulber, *Arbeitsvölkerrecht*, 1st Ed. 2019, § 5 para. 86; Lörcher, in: Däubler, *Arbeitskampfrecht*, 4th Ed. 2018, § 10 para. 48; Trebilcock, in: Ales/Bell/Deinert/Robin-Olivier, *International and European Labour Law*, 1st Ed. 2018, ILO Convention No. 87 Art. 3 para. 31; Schlachter, *AuR* 2017, 10; Sädevirta, *EuZA* 2016, 445 (447).

¹⁴⁸ ILC, 81st session 1994, Report III (Part 4B), General Survey, para. 148.

¹⁴⁹ ILC, 101st session 2012, Report III (Part 1B), General Survey, para. 119.

¹⁵⁰ ILO, CFA Digest, 6th Ed. 2018, para. 753.

¹⁵¹ ILC, 101st session 2012, Report III (Part 1B), General Survey, para. 119; Trebilcock, in: Ales/Bell/Deinert/Robin-Olivier, *International and European Labour Law*, 1st Ed. 2018, ILO Convention No. 87 Art. 3 para. 32; Sädevirta, *EuZA* 2017, 505 (509 f.).

¹⁵² ILC, 101st session 2012, Report III (Part 1B), General Survey, para. 136; ILO, CFA Digest, 6th Ed. 2018, para. 866; Lörcher, in: Däubler, *Arbeitskampfrecht*, 4th Ed. 2018, § 10 para. 101.

¹⁵³ ILC, 101st session 2012, Report III (Part 1B), General Survey, para. 134.

however, it must be conceded that its prominent position as a central bank must be taken into account.¹⁵⁴

In any case, the provision in Art. 1.2.4 ECB SR does not meet the procedural requirements under ILO Convention No. 87. Firstly, workers and their organisations must be able to participate in defining what is considered a minimum service.¹⁵⁵ Secondly, any dispute regarding the extent of minimum services should be settled by an independent body,¹⁵⁶ and final judgment must be left to the courts.¹⁵⁷ ¹⁵⁸ The current provisions in the ECB Staff Rules do not require the Executive Board to enter into negotiations with organising bodies on the requirement and/or extent of minimum services. Rather, the Executive Board is granted the power to unilaterally define the term minimum services and is thus empowered to override the effect of a strike. This provision must therefore be regarded as disproportionate.

2. Notice period and required information in strike notices

At the ECB, the organising body shall, according to Art. 1.2.3 ECB SR, inform the Executive Board in writing of the intention to strike at least ten working days before the first day of the strike.¹⁵⁹ The written notice shall state the precise nature of the dispute, the precise nature of the proposed strike action, and the period during which the strike is going to take place.

In general, the CFA regards notice periods as justified limitations of the right to strike, as long as the notice is reasonable.¹⁶⁰ A 48-hour notice period has been deemed reasonable.¹⁶¹ However, advance notice periods should not be an additional obstacle to bargaining.¹⁶² To be regarded as reasonable, the notice period must be conceived “as a stage designed to encourage the parties to engage in final negotiations before resorting to strike action”.¹⁶³ Moreover, the CFA concretises the content requirements of a strike notice. Information asked for in a strike notice should be reasonable.¹⁶⁴ In conclusion, the requirement for a strike notice including the notice period must as a whole be reasonable.

It can be conceded that an employer has a legitimate interest in knowing when a strike will take place and what specific strike action is planned. In Art. 1.2.3 ECB SR in particular and in Art. 1.2 ECB SR as a whole, however, there is no indication that the notice period has the purpose of enabling last

¹⁵⁴ It should be noted that according to ILO, CFA Digest, 6th Ed. 2018, para. 842, a Central Bank is not considered an essential service.

¹⁵⁵ ILO, CFA Digest, 6th Ed. 2018, para. 882; ILC, 81st session 1994, Report III (Part 4B), General Survey, para. 161; ILC, 101st session 2012, Report III (Part 1B), General Survey, para. 137.

¹⁵⁶ ILO, CFA Digest, 6th Ed. 2018, para. 883; ILC, 101st session 2012, Report III (Part 1B), General Survey, para. 137.

¹⁵⁷ ILO, CFA Digest, 6th Ed. 2018, para. 884.

¹⁵⁸ Lörcher, in: Däubler, Arbeitskampfrecht, 4th Ed. 2018, § 10 para. 102; Sädevirta, EuZA 2017, 505 (513).

¹⁵⁹ According to Art. 8 Conditions of Employment the strike shall be subject to prior written notice from the organising body.

¹⁶⁰ ILO, CFA Digest, 6th Ed. 2018, para. 799.

¹⁶¹ ILO, CFA Digest, 6th Ed. 2018, para. 800.

¹⁶² ILC, 101st session 2012, Report III (Part 1B), General Survey, para. 145.

¹⁶³ ILC, 101st session 2012, Report III (Part 1B), General Survey, para. 145.

¹⁶⁴ ILO, CFA Digest, 6th Ed. 2018, para. 803.

minute negotiations to prevent a strike. Due to the systematic proximity of Art. 1.2.3 to Art. 1.2.4 ECB Staff Rules, it can be assumed that the notice has the purpose of enabling the Executive Board to determine the extent of minimum services required during the strike. However, this provision must be deemed disproportionate.¹⁶⁵ As a result, the enumerated requirements in Art. 1.2.3 rather seem like additional hurdles for the organising bodies to clear before calling a lawful strike. There is good reason for the assumption that this provision also does not meet the proportionality requirements of restrictions on the right to strike.

3. Organisation of the strike and required proportion of represented members of staff

At the ECB and pursuant to Art. 1.2.2 ECB SR, a strike must be organised by a body which is recognised by the Executive Board as representing a group of members of staff (such as the Staff Committee) or by a body representing at least one-sixth of the total members of staff. In conjunction with Art. 1.b MoU ECB IPSO it becomes clear that trade unions shall also be recognised bodies if they represent at least 10% of ECB staff holding a contract of indefinite duration but are therefore also exempt from the requirement of representing at least one-sixth of the total members of staff.¹⁶⁶

Within the case law of the ILO authorities there has, as far as can be seen, been no case on restrictions relating to the proportion of staff represented by the body calling for a strike. However, the CFA states that procedural prerequisites for calling a lawful strike must be reasonable and must not place substantial limitations on the right to strike.¹⁶⁷ Such procedural requirements may not make it practically impossible to declare a legal strike.¹⁶⁸

In essence, the threshold imposed through Art. 1.2.2 ECB SR and the conditions for recognition under the Memorandum of Understanding aim to ensure that only those trade unions that enjoy sufficient support among the staff members can call a strike. However, it cannot be assumed that only these organisations can assert the collective pressure required to bargain with the employer. For example, in France, union representation is generally low, while strike participation can be high.¹⁶⁹ Therefore, it remains an open question if such a threshold can be called reasonable. There are legal scholars who are of the opinion that the right to strike extends to all trade unions, even those that are categorised as unrepresentative.¹⁷⁰

¹⁶⁵ Cf. supra G. II. 1.

¹⁶⁶ Cf. supra D. I. 4.

¹⁶⁷ ILO, CFA Digest, 6th Ed. 2018, para. 789.

¹⁶⁸ ILO, CFA Digest, 6th Ed. 2018, para. 790; cf. also Lörcher, in: Däubler, Arbeitskampfrecht, 4th Ed. 2018, § 10 para. 103.

¹⁶⁹ Worker-participation.eu, National Industrial Relations - Countries - France. trade union representation in France extends to 8% of the working population, however, this results in a collective bargaining coverage of 98% percent.

¹⁷⁰ Zimmer, in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 1st Ed. 2019, § 5 para. 94; Bourazeri, NZA-Beilage 2019, 25 (27).

4. Salary deductions

At the ECB, the total period of the strike shall be deducted from the salary and salary-related payments of the member of staff taking part in a strike, unless the Executive Board decides otherwise. Art. 1.2.5 ECB SR therefore empowers the Executive Board to impose salary deductions on a case-by-case basis.

The CFA states that within the ILO framework, it has been repeatedly held that salary deductions do not constitute illegitimate restrictions to the right to strike.¹⁷¹ However, the deduction may not be higher than the amount corresponding to the duration of the strike. Additional deductions would constitute sanctions for taking part in the strike and can be deemed unlawful.¹⁷² Furthermore, salary deductions must be applied to all strike participants, not only to certain participants, such as to members of trade unions. Contrary practices could be categorised as discrimination against union membership.¹⁷³ Therefore, the discretion granted to the Executive Board under Art. 1.2.5 ECB SR is limited. It may not impose salary deductions at random amongst strike participants. Additionally, if the Staff Committee and a representative trade union call for a strike, the Executive Board may not distinguish between union members and non-union members when assessing salary deductions.

As a result, the wording of the provision in Art. 1.2.5 ECB SR at present meets the requirements of ILO Convention No. 87. Nonetheless, the discretion granted to the Executive Board is limited by case law relating to the ILO framework.

III. Summary

Not all restrictions placed on the right to strike in Art. 8 ECB CoE and Art. 1.2 ECB SR meet the requirements of ILO Convention No. 87. In particular, the provisions regarding the requirements of minimum services contravene the standing interpretation of the ILO authorities. There is also good reason to be sceptical about the conformity of the notice requirements in advance of a strike and of the provisions requiring a certain quorum of representation of staff. Salary deductions are, however, not to the same extent subject to such scepticism. In particular, the rule for salary deductions, in its wording alone, meets the requirements deduced from ILO Convention No. 87. The application of this power by the Executive Board is nonetheless subject to strict limitations.

H. Conclusion

Labour relations at the European Central Bank are under tension because the ECB so far successfully insists on regulating employment conditions unilaterally. This result, however, is less attributable to the ECB's

¹⁷¹ ILO, CFA Digest, 6th Ed. 2018, para. 942.

¹⁷² ILO, CFA Digest, 6th Ed. 2018, para. 943.

¹⁷³ ILO, CFA Digest, 6th Ed. 2018, para. 946.

independence, preventing it from concluding collective agreements, but rather to actual power relations, that is, the ECB simply refusing to bargain.

As we have shown in this paper, the ECB is not exempt from fundamental rights obligations under the CFR. ECB staff fall within the personal scope of the fundamental right formulated by Art. 28 CFR, and as an EU institution the ECB is bound by its provisions. Internal rules at the ECB acknowledge the existence of a right to collective bargaining and collective action, including a right to strike. The fact that the ECB may change the conditions of employment unilaterally doesn't conflict with the ECB's independence. Rather, case law suggests that despite its independence the ECB may be party to collective bargaining agreements. In fact, its continuous refusal to bargain collectively may present a violation of the ECB's obligations under Art. 51 para. 1 CFR.

Furthermore, ECB independence as a concept doesn't prevent the institution from entering into collective bargaining agreements, as the primary function of its independence is to shield the ECB from external influence on its monetary policies. Beyond this primary function ECB independence is indeed limited. There are no reasons to believe that collective bargaining agreements on ECB staff working conditions may influence European monetary policy.

As we have seen through analysis of case law on the application of Art. 27 CFR at the ECB, the courts have not recognised ECB independence as a legal argument against the obligation to implement and observe consultation procedures before amending working conditions. The same applies to Art. 28 CFR.

ECB staff may therefore invoke their rights to strike as granted under internal ECB rules. However, not all of those rules meet the legal requirements as established by Art. 28 CFR, which itself must be interpreted in the light of international labour law provisions.

We can conclude that ECB independence as a concept itself is not endangered by collective bargaining and collective action. The concept may not be invoked to block any efforts of employee participation at the ECB. Rather, ECB independence formulates what is off-limits for collective bargaining procedures. This limit, however, is only reached, when (or if) collective bargaining procedures touch on the ECB's monetary policies. Everyday concerns of ECB staff are unlikely to have such profound effects.

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