

# Better defending and promoting trade union rights in the public sector

Part I  
Summary of available tools and action points

*Report 105*



# **Better defending and promoting trade union rights in the public sector**

## **Part I**

### **Summary of available tools and action points**

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## General introduction

In order to map the current situation in the field throughout Europe, EPSU asked the ETUI-REHS to provide a background paper on European and international norms relating to trade union rights in the public sector. The focus of the research had to be on the obstacles to fundamental trade union rights (freedom of association, collective bargaining, collective action, and information and consultation).

The main objective of this report is thus to provide information to EPSU and its affiliated organisations on:

- existing relevant European (EU and Council of Europe) and international (ILO) standards and instruments;
- the different monitoring and enforcement mechanisms applying to these standards and instruments and the case law relating to public sector (workers);
- the situation in the countries under consideration: specifically, the identification of possible shortcomings;
- the public sector as a whole – as far as possible – irrespective of the degree of state control over the organisation and the employment relationship (functionaries, contractual, and so on).

As for geographical scope, the report is highlighting, as far as possible, the situation in all EU Member States (EU-27), with a focus on the new Member States and the candidate countries Croatia and Turkey.

Furthermore, this report is elaborated in such a way so that it:

- is campaign-oriented and of practical use to the trade unions;
- and allows to identify what actions could/ should be taken at the different levels to remove obstacles and to promote trade union rights in EPSU sectors.

In the collection of the relevant information and material, the following is relied upon:

- relevant official documents of European and international bodies (EU, Council of Europe and ILO) under consideration, including case law established by their respective enforcement bodies;
- secondary literature (for example, ICFTU Annual Surveys on Violations of Trade Union Rights, publications of the Dublin Foundation, etc.);
- (complementary) information provided by EPSU and/or its affiliates.

Information is collected until December 2007.

This part of the report consists in particular of an in-depth analysis of the different possible levels of protection (European Union, Council of Europe and the ILO), the available instruments and monitoring and enforcement procedures as well as the case law deriving from them. A second part of the report, made available in a separate document consists of a country-wise analysis of the main problems and obstacles to the protection of trade union rights in the public sector as identified by the supervisory bodies of in particular the Council of Europe and ILO.



Although it was initially envisaged by EPSU that the report would provide basic information on the situation with regard to trade union rights in the EU institutions, this is not covered by this report, but could form the subject of a subsequent report. The ETUI-REHS research team consisted of the following persons: Wiebke Warneck (ETUI-REHS research officer), Stefan Clauwaert (ETUI-REHS senior research officer and ETUC advisor to the Council of Europe) and Isabelle Schömann (ETUI-REHS senior research officer). They received invaluable assistance in drafting this report from ETUI-REHS trainees Marina Monaco and Victorita Militaru, who did the background research on the case law of, respectively, the Council of Europe Social Charters and the ILO. The report was edited by Stefan Clauwaert and Wiebke Warneck.

## List of abbreviations

<b>CCFSR:</b>	Community Charter of Fundamental Social Rights of Workers
<b>CFA:</b>	Committee of Freedom of Association (ILO)
<b>CEACR:</b>	Committee of Experts on the Application of Conventions and Recommendations (ILO)
<b>CoE:</b>	Council of Europe
<b>ECHR:</b>	European Convention for the Protection of Human Rights and Fundamental Freedoms
<b>ECJ:</b>	European Court of Justice
<b>ECRI:</b>	European Commission against Racism and Intolerance
<b>ECSR:</b>	European Committee of Social Rights
<b>EPSU:</b>	European Public Services Union
<b>ESC:</b>	European Social Charter
<b>ETUC:</b>	European Trade Union Confederation
<b>EU:</b>	European Union
<b>EUMC:</b>	European Monitoring Centre on Racism and Xenophobia
<b>FRA:</b>	European Union Agency for Fundamental Rights
<b>ILO:</b>	International Labour Organisation
<b>IOE:</b>	International Organisation of Employers
<b>ODIHR:</b>	Office for Democratic Institutions and Human Rights
<b>OSCE:</b>	Organization for Security and Co-operation in Europe
<b>RESC:</b>	Revised European Social Charter
<b>UN:</b>	United Nations



## List of main regulations concerning the public sector

<b>Regulation</b>	<b>Year</b>	<b>Subject</b>	<b>Institution</b>
<b>Convention No. 87</b>	1948	Freedom of association and protection of the right to organise	ILO
<b>Convention No. 98</b>	1949	Right to organise and collective bargaining	ILO
<b>Social Charter Art. 6</b>	1961/1996	Collective bargaining	CoE
<b>Social Charter Art. 5</b>	1961/1996	Right to organise	CoE
<b>Convention No. 151</b>	1978	Labour relations	ILO
<b>Convention No. 154</b>	1981	Collective bargaining	ILO
<b>Directive 98/59/EC</b>	1998	Collective redundancies	EU
<b>Directive 2001/23/EC</b>	2001	Transfer of undertakings	EU
<b>Directive 2002/14/EC</b>	2002	Information and consultation	EU



# Executive summary and recommendations

## 1. Introduction

The main objective of this report is to map the current situation as regards the application of and respect for trade union rights in the public sector throughout Europe. Particular emphasis is therefore put on the identification of persistent/existing obstacles and problems, in particular concerning the freedom of association, the right to collective bargaining and the right to take collective action, as well as information and consultation rights.

The analysis focuses on three main forums/levels, namely the European Union, the Council of Europe and the ILO. Apart from identifying the main instruments of each forum/level and the extent to which they cover (or do not cover) the protection of trade union rights (in the public sector), it focuses on the available supervisory/enforcement mechanisms and how (European) trade unions can/should play a role in their implementation. Furthermore, this report provides both a general (part I) and a country-by-country (part II) summary of the relevant case law of these bodies as regards the protection of trade union rights in the public sector.<sup>1</sup>

In this executive summary, we will briefly examine the different levels, instruments and mechanisms, mainly in order to identify how (European) trade unions should/could (better) use them in their endeavours to ensure proper and effective protection of trade union rights in the public sector. This executive summary thus constitutes the action-oriented part of the report and so should be read in conjunction with part I in particular, though also with part II with reference to given country-specific problems.

## 2. EU

At EU level, the protection of trade union rights in the public sector is ensured in a number of ways. As far as instruments are concerned, the most relevant are the EU Charter of Fundamental Rights and Council Directive 2002/14 establishing a general framework for informing and consulting employees. Since 2007, the EU has also had a specific structure to ensure better monitoring of the protection of fundamental rights in general, namely the EU Agency for Fundamental Rights, which was established following the adoption of the EU Charter and building upon the structures and experiences of the former European Monitoring Centre on Racism and Xenophobia (EUMC) in Vienna.

In 2000, the Heads of Government signed **the EU Charter of Fundamental Rights**, which at that time had mainly a political value. This Charter provides, in Articles 27 and 28, for the protection of information and consultation rights and the right to collective bargaining and action. In the meantime, the EU Charter has attained legal status as it is annexed to the EU Lisbon Reform Treaty, Article 6 of which clearly provides that the Charter has the same legal validity as the Treaty itself. But it should also be mentioned

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<sup>1</sup> Besides the official documents of these EU, ILO and Council of Europe supervisory bodies, additional information from, for instance, ICFTU/ITUC surveys or information received from EPSU affiliates was analysed. This report is based on the analysis of information collected until December 2007.

that Poland and the UK, via a separate protocol, obtained restrictions for themselves on the concrete application of the EU Charter.

Both the Advocate Generals and the ECJ itself have used the EU Charter as a basis for their argumentation in numerous cases. Although it is clear from recent case law in the Viking and Laval cases (which confirmed the fundamental nature of collective action but also made it subject to certain criteria or conditions, such as the proportionality test) that using the judicial avenue might entail risks when trying to protect fundamental (social) rights, this should not prevent trade unions from investigating how they might use the EU Charter as basis for argumentation in national court cases but also in cases/information submitted to the ECJ and other EU, ILO and Council of Europe bodies.

**Recommendation:**

(European) trade unions should use the EU Charter of Fundamental Rights as basis for argumentation in judicial proceedings before national and European courts but also in any non-judicial proceedings whereby they mainly intend to inform international and European bodies of alleged violations of trade union and workers' rights.

In all such cases, the trade unions concerned should inform and consult both EPSU and ETUC about their foreseen actions so that coordinated and more effective action can be ensured.

The **information and consultation directive** (Directive 2002/14/EC) has arrived just at the right time to enable employees to defend their jobs by means of an effective, standing and regular procedure for information and consultation on recent and probable developments in the activities of an undertaking, its financial and economic situation, the development of employment and, in particular, decisions likely to lead to major changes in work force organisation. As a vital complement to other directives, such as those on the transfer of undertakings, collective redundancies and European works councils, in many Member States the information and consultation directive represents the essential and in some cases the sole foundation for employees' right to information and consultation, filling a legal gap and paving the way for greater harmonisation of social laws in Europe.

But the objective will not be fully achieved until Member States cease to adopt a minimal interpretation in their transposition measures and in particular in the public sector. Public sector workers should have the same right to be informed and consulted as workers in the private sector, so avoiding discriminatory treatment. Furthermore, in most of these directives the EU legislator referred to undertakings with an "economic activity", which creates confusion and prevents proper coverage of workers in the public sector. Indeed, this restrictive definition or criterion used in EU social law appears to be a means of legislating on public authorities and/or entities without taking into account the specificity of public services in the EU/EEA Member States and candidate countries. There is an urgent need to look further into this issue and to call on the Commission (and other players at the European level) to undertake implementation research on the impact of the information and consultation directive (amongst others) in public sector entities.

**Recommendation:**

EPSU and its affiliates should call on the Commission (and other institutions, such as the EP) to undertake specific implementation research on the impact of (amongst others) the information and consultation directive in public sector entities, following which further action can be identified.

In more general terms, EPSU and its affiliates could also consider calling for a “public sector assessment” (as is now done for SMEs) in relation to all relevant proposals for EU legislation and to reports on the implementation of this legislation.

Following several judgments of the European Court of Justice whereby market freedoms have been ruled superior to fundamental rights, such as the right to collective action (the Laval, Viking and Rüffert cases), ETUC launched an action to ensure a so-called “social progress clause” in both primary and secondary EU legislation. This clause would mainly try to ensure that the fundamental freedoms, as established in Title I and Title III of the EC Treaty, shall be interpreted in such a way as not to infringe the exercise of fundamental rights as recognised in the Member States and by Community law, including the rights to negotiate, conclude and enforce collective agreements and to take industrial action, and so as not to infringe the autonomy of social partners when exercising these fundamental rights in pursuit of legitimate business interests<sup>1</sup> and the protection of workers. EPSU could consider how the guarantee and protection of trade union rights in the public sector, given its peculiarities, might be better reflected in this clause via a specific reference.

Following the signing of the EU Charter of Fundamental Rights and building upon the structures of and experiences gained via the EUMC, in 2007 the EU established the **EU Agency for Fundamental Rights (FRA)**. Apart from collecting and analysing information on the development of fundamental rights (including trade union rights, as in Articles 27 and 28 of the EU Charter) and conducting research and surveys, the FRA’s main function is to advise other EU institutions and Member States on how best to implement fundamental rights. It will also ensure cooperation with other relevant fundamental rights bodies of the EU and Member States, but also those of the ILO and Council of Europe. It is important to note that the FRA does not provide a collective or an individual complaints procedure.

**Recommendation:**

Given, in particular, its advisory and reporting function, EPSU and its affiliates should submit to the FRA all information on worrying developments regarding the protection of trade union rights in the public sector due to EU initiatives and initiatives taken at national level.

EPSU might in this context consider it worthwhile to elaborate a regular “EPSU report on violations of trade union rights in the public sector”, following the example of the ITUC annual report on trade union violations, which could be submitted to the FRA but also to bodies and agencies of other international and European institutions.

They could also use the FRA as a gateway, for instance to call for specific implementation research on adherence to trade union rights in the public sector, as mentioned above.



### 3. Council of Europe

Like the EU, the Council of Europe also provides several instruments and procedures to ensure or enhance the protection of fundamental social rights in general and trade union rights in the public sector in particular.

As for the most relevant **instruments**, reference should be made to the **European Social Charter (ESC) of 1961 and its revised version of 1996 (RESC)**. They both provide, in Articles 5 and 6, rules concerning the protection of the right to organise and the right to collective bargaining and action. In particular, rules are laid down in Article 5 on how these rights can or should be applied in respect of specific public sector groups, such as the police and the armed forces.

The ratification tables of both the ESC and the RESC show that most EU Member States and candidate countries have ratified either the ESC or the RESC, including Articles 5 and 6. But some countries have not done so (namely Greece and Turkey), or have only partially accepted Articles 5 and 6 (namely Austria, Luxembourg and Poland), or have made reservations concerning how these articles apply in their jurisdiction to the public sector or public servants (Germany, the Netherlands and Spain).

#### **Recommendations:**

The EPSU affiliates in the countries that have not (fully or partially) accepted Articles 5 and 6 should develop, in close cooperation with EPSU and ETUC (the latter given its particular role in the supervisory bodies and procedures of the (R)ESC) national action plans on how their governments can be persuaded to sign up to these articles as soon as possible. Non-acceptance of these articles has, among other things, the major consequence that the vast, well developed and protective case law established by the supervisory bodies does not apply to the countries in question and so leaves their public servants or public sector workers less protected than in other Member States.

As mentioned above, over the years the Council of Europe has been able to build up a vast protective case law on the concrete implementation of trade union rights embedded in Articles 5 and 6 in general, as well as for the public sector and public servants in particular. It therefore has at its disposal two major **supervisory mechanisms: a reporting system and a so-called collective complaints procedure**.

As in the case of almost all international and European and some national fundamental rights instruments, the Council of Europe has also established a reporting system for the Social Charters, which is one of its main supervisory mechanisms. National governments are asked on an annual basis to report on how they have implemented (a number of) the fundamental social rights embedded in the Social Charters. In this particular case, these reports are then examined by the European Committee of Social Rights (ECSR), which analyses whether certain situations in national law and practice in the countries concerned are in conformity with the Social Charters' legal obligations, thereby at the same time establishing the general case law applicable to each Article of the Social Charters. Following that, the so-called Governmental Committee, composed of government representatives, looks at the cases of non-conformity from a more social and economic point of view in order to decide upon the most appropriate action and/or sanction. It is thereby very important to highlight two specific features of this reporting system. First,

under the Social Charters governments are obliged to send copies of the national reports that they submit under this reporting system to the national trade union and employers' organisations in their country. These organisations then have the right to submit their comments and observations on these national reports to the Social Charters' supervisory bodies, in particular the ECSR. Second, ETUC has a seat with observer status (that is, full speaking and intervention rights, but no voting rights) on the abovementioned Governmental Committee, which provides both EPSU and its affiliates with an additional avenue to ensure that violations of trade union rights in the public sector are raised and appropriate sanctions or actions called for.

#### **Recommendations:**

EPSU affiliates should:

- ensure that they receive copies of the national reports submitted by their governments to the ECSR;
- ensure that they submit, where relevant and appropriate, comments on these reports, in particular by providing information on violations of trade union rights in both law and practice;
- send copies of these comments to EPSU but also ETUC, in particular given ETUC's seat on the Governmental Committee, which will ensure that these violations are again raised during deliberations, and appropriate actions and/or sanctions called for.

Besides the reporting system, the Council of Europe has also established a **collective complaints procedure** in relation to the Social Charters. In order that this apply to the Member States, their governments need to ratify the specific "Additional protocol providing for a system of collective complaints" (1995).

Although several member states have signed the Protocol, few have ratified it, so making it applicable to them. (For a list of countries that have (not yet) ratified this Protocol – see the annexes to Part I of this report.) Ratification of this Protocol is pivotal as it offers trade union organisations additional avenues to ensure better protection of workers' and trade union rights in both law and practice. Indeed, as soon as a Member State has ratified the Collective Complaints Protocol, this automatically provides certain organisations with the right to launch complaints under this procedure. These organisations include not only ETUC but also trade unions in the country concerned. Furthermore, ETUC has the right to submit its observations in every collective complaint (and thus irrespective of by whom and against which country it is lodged), which provides trade unions with an additional possibility to submit relevant information or comments. Apart from this "automatic right", the collective complaints procedure has another distinct advantage compared to the reporting system, namely its speediness. Indeed, whereas in the reporting system, due to its specific features, it can be several years before sanctions are proclaimed and governments feel obliged to act, under the collective complaints procedure one can count, on average, on a final judgement of the ECSR being reached within a year or eighteen months at the most. Furthermore, the procedure is also "quite light" as regards formalistic and administrative requirements and consists mainly of a speedy written procedure but with a possibility for a hearing if considered necessary.

**Recommendations:**

The EPSU affiliates of the countries that have not yet ratified the Collective Complaints Protocol are urged to develop, in close cooperation with EPSU and ETUC (the latter given its particular role in the supervisory bodies and procedures related to the (R)ESC), national action plans on how their governments can be persuaded to ratify this Protocol as soon as possible.

The EPSU affiliates of countries that have ratified the Protocol are urged to examine the current situation as regards adherence to trade union rights in the public sector in light of the Social Charters' case law, and to identify cases or situations that could form part of a collective complaint. The identification of such cases, as well as preparation of the eventual complaint, should be carried out in close cooperation with EPSU, but in particular with ETUC, given its particular role in collective complaints procedures.

As already mentioned, ratification of the Protocol by a Member State provides the national trade unions and ETUC with an “automatic right” to lodge collective complaints against this Member State. But such an automatic right is, according to the rules of procedure, also conferred upon certain international NGOs (INGOs) that have participatory status with the Council of Europe. It is therefore strongly recommended that EPSU considers applying for such participatory status. This is granted to INGOs that are particularly representative at European level, namely those that have national member organisations in several of the 46/47 Member States of the Council of Europe, as well as in the fields of their competence. According to the CoE website, and in view of achieving closer unity, they should contribute to CoE activities and make the work of the CoE (better) known among the European public.

An application for such participatory status must be made by means of an official form and an accompanying file that should contain (i) the statutes, (ii) a list of member organisations (mentioning the name of the organisation both in the national language and in French or English translation), as well as the approximate number of members of each of these national organisations, (iii) a report on its recent activities, and (iv) a declaration to the effect that the applicant organisation accepts the principles set out in the preamble and in Article 1 of the Statute of the Council of Europe.

To give an idea of comparable trade union or other (employer) organisations currently figuring on the 2007 list of INGOs, the following might be mentioned:

- European Trade Union Confederation (ETUC) (\*)
- European Trade Union Committee for Education (ETUCE)
- European Confederation of Police (EUROPOP) (\*)
- European Organisation of Military Associations (EUROMIL) (\*)
- European Confederation of Independent Trade Unions (CESI) (\*)
- European Council of Police Trade Unions (CESP) (\*)
- European Federation of Employees in Public Services (EUROFEDOP) (\*)
- Education International (IE) (\*)
- Public Services International (PSI) (\*)
- European Hospital and Healthcare Federation (HOPE)

Other INGOs grouping, for instance, specific categories of the judiciary (judges, magistrates, bailiffs, law officers, and so on) also figure on this list.

**The main advantage of appearing on this list** as an INGO is that EPSU could then also apply immediately to the supervisory bodies of the CoE Social Charters in order to obtain acceptance by the Governmental Committee of the European Social Charter (on which two ETUC representatives have a seat, albeit without voting rights) as an INGO entitled to lodge collective complaints concerning violations of the European Social Charter. On the list of organisations mentioned above those marked with an asterisk are also allowed to lodge collective complaints, and CESP and EUROFEDOP in particular have been active in this respect.

#### **Recommendations:**

EPSU should consider applying to the Council of Europe for participatory status. The main advantage would be that EPSU could then apply immediately to the supervisory bodies of the CoE Social Charters in order to obtain acceptance by the Governmental Committee of the European Social Charter as an INGO entitled to lodge collective complaints concerning violations of the European Social Charter.

## **4. ILO**

Like the EU and the Council of Europe, the ILO also provides several instruments and procedures to ensure or enhance the protection of fundamental social rights in general and trade union rights in the public sector in particular.

Concerning the **most relevant ILO instruments**, reference should be made to Conventions 87, 98, 151 and 154 that all deal in general, or specifically for the public sector, with fundamental trade union rights and have served as a basis for the different ILO supervisory bodies to establish a vast and protective set of case law.

A look at the ratification tables of these conventions (see below) shows that there can still be improvement, particularly in relation to ratification of Conventions 151 (on labour relations in the public service) and 154 (collective bargaining in general but with specific provisions relating to the public service).

#### **Recommendations:**

The EPSU affiliates of the countries that have not yet ratified these Conventions should develop, in close cooperation with EPSU, ITUC and ETUC, national action plans on how their governments can be persuaded to sign up to these Conventions as well, as soon as possible. Non-acceptance of these Conventions has, among other things, the major consequence that the vast, well developed and protective case law established by the supervisory bodies does not apply to the countries in question and so leaves their public servants or public sector workers less protected than in other Member States. It should be highlighted that the rights and principles contained in Conventions 87 and 98, which are among the ILO's eight fundamental Conventions, must be respected by each Member State, irrespective of whether that Member State has ratified them or not.

As ensuring implementation of the various Conventions and Recommendations is, as for other regulatory systems, also a key element at the ILO level, **the ILO supervisory system** consists of different mechanisms to guarantee the implementation of international norms, ranging from reporting systems through complaints procedures to the provision of technical assistance. A brief overview of the different mechanisms is provided in this Report, but in these recommendations the focus will be on the reporting system and complaints procedure via the Committee on Freedom of Association.

Like the Council of Europe, the ILO has a **regular reporting system** whereby governments are required to submit copies of their reports to employers' and workers' organisations. These organisations may comment on the governments' reports; they may also send comments on the application of conventions directly to the ILO. These reports are then submitted to the Committee of Experts on the Application of Conventions and Recommendations (hereafter "Committee of Experts"), which carries out an impartial and technical evaluation of the state of application of the international labour standards concerned. Following this examination, the Committee of Experts draws up its annual report, which is then submitted to the International Labour Conference the following June, at which it is examined by the Conference Committee on the Application of Standards. This Conference Committee is made up of government, employer and worker delegates. It examines the report, therefore, in a tripartite setting and selects from it a number of observations for discussion. Following deliberation, this Committee draws up its conclusions, recommending, for example, that a particular government needs to take specific steps to remedy a problem or to invite ILO missions or technical assistance. Furthermore, the Committee of Experts often makes unpublished direct requests to governments, pointing to apparent problems in the application of a standard and giving the countries concerned time to respond and tackle these issues before any comments are published. The Committee's interventions facilitate social dialogue, requiring governments to review the application of a standard and to share this information with the social partners, who may also provide information. The ensuing social dialogue can lead to further problem-solving and prevention.

**Recommendations:**

*EPSU affiliates should:*

- ensure that they receive copies of the national reports or replies to direct requests submitted by their governments to the ILO;
- ensure that they submit, where relevant and appropriate, comments on these reports and replies, in particular by providing information on violations of trade union rights in both law and practice;
- send copies of these comments to EPSU and ITUC so that coordinated action can be ensured when these violations are again raised during the deliberations and appropriate actions and/or sanctions are called for.
- Also, ETUC should be kept informed about (developments in) such observations, if only because there is an ILO representative on the Experts Committee on Social Rights, the main supervisory body related to the Social Charters of the Council of Europe, in particular to ensure coherence and complementarities of the case law of both institutions, especially on trade union rights.

The ILO also has several **complaints procedures** at its disposal, the most important in the context of trade union rights being the complaints procedure before the Committee on Freedom of Association (CFA). Given that freedom of association and collective bargaining are among the founding principles of the ILO, and following the adoption of Conventions 87 and 98, the CFA and related procedures were set up for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant Conventions. The latter is thus distinct from the Council of Europe Social Charters' complaints procedures, in respect of which complaints can be brought only against Member States that have ratified the related Additional Protocol and only on the Articles of the Social Charters that the Member States have ratified. Similarly, complaints under the CFA procedure may be brought against a Member State by both employers' and workers' organisations. If the CFA decides to accept the complaint and finds there has been a violation of freedom of association standards or principles, it issues a report through the Governing Body and makes recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of its recommendations. The CFA may also choose to propose a "direct contacts" mission to the government concerned to address the problem directly with government officials and the social partners through a process of dialogue.

#### **Recommendations:**

The EPSU affiliates are urged to examine the current situation concerning adherence to trade union rights in the public sector in light of the ILO's case law, and to identify cases or situations that could form part of a complaint. The identification of such cases, as well as preparation of the eventual complaint, should be done in close cooperation with EPSU and ITUC. ETUC should be kept informed about (developments in) such observations, if only because there is an ILO representative on the Experts Committee on Social Rights, the main supervisory body related to the Social Charters of the Council of Europe, in particular to ensure coherence and complementarities of the case law of both institutions, especially on trade union rights.

## **5. National analysis**

Part II of this report contains a country by country analysis. Although this analysis is based on information available from the different consulted sources, it focuses mainly on alleged violations as identified by the most relevant ILO supervisory/enforcement bodies (the Freedom of Association Committee) and the Council of Europe (the European Committee of Social Rights).

It is *important to note* that although it focuses on the problems/alleged violations in law/practice highlighted by these bodies, these problems and alleged violations might not necessarily be considered problematic by the national trade unions. Second, it should be recalled that some of the case law referred to in the national reports is quite old and might already have been resolved in the meantime. Nevertheless, this information is included in order (i) to make the report as complete as possible and (ii) to allow comparative analysis as some countries might now or in future be confronted with similar situations of alleged violations or infringements.

As for the *main findings concerning the right to organise, the right to collective bargaining and the right to take collective action in the public sector*, when screening the situations in the different countries the following may be highlighted.

The ***right to organise*** seems to be the most unproblematic right for the public sector throughout the different countries, despite which a fair number of worker groups are excluded from this right:

- municipal council employees (for example, Lithuania);
- senior civil servants (for example, Romania);
- managers and deputies at internal affairs authorities (Lithuania);
- members of the armed forces (for example, Lithuania, Latvia, France, Poland (career soldiers));
- active members in the armed forces (for example, Slovak Republic, Bulgaria, Croatia, Poland);
- officers in the Intelligence Service (for example, Slovak Republic, Czech Republic, Romania);
- members of the Security Service (for example, Czech Republic, Poland);
- senior staff of prefectures (for example, France);
- Gendarmerie (for example, France);
- judges (for example, Poland, Romania);
- public prosecutors and members of the Ministry of Justice (for example, Romania);
- those serving in the civil defence corps (for example, Poland).

**Recommendations:**

The EPSU affiliates should analyse and consider how, in light of this international and European case law, they can/should overcome these exclusions within national systems that often go beyond what is allowed by the instruments of the ILO and the Council of Europe.

Since little information could be found on ***the right to collective bargaining***, it is difficult to judge what problems exist or persist in law and/or practice, both in general and in the public sector in particular. The analysis again shows, however, that some groups of public sector workers are excluded from this right, particularly:

- public officials (for example, Bulgaria);
- armed forces (for example, Lithuania, Portugal);
- police (for example, Slovak Republic, Poland);
- workers appointed to the state administration and to municipal authorities, judges, prosecutors and prison guards (for example, Poland).

**Recommendations:**

The EPSU affiliates should analyse and consider how, in light of this international and European case law, they can/should overcome these exclusions within national systems that often go beyond what is allowed by the instruments of the ILO and the Council of Europe.

Although little information could be found, it is clear that the picture is not rosy. The right to collective bargaining for (certain groups of) public sector workers often does not exist, is widely restricted or is embedded in specific structures and procedures that do not allow for the same bargaining rights, coverage and results as in the private sector. It is therefore recommended that the EPSU affiliates elaborate, in cooperation with EPSU, at both European and national level, action-oriented strategies with a view to establishing coherent and well-functioning collective bargaining frameworks covering all workers in the public sector, thereby overcoming the manifold limitations and exclusions that currently still exist throughout Europe. This is needed particularly if one takes into account the fact that public sector workers' right to take collective action is one of the most restricted rights and thus they are often (and largely) deprived of two of the most fundamental workers' and trade union rights.

The ***right to take collective action*** is the most problematic in the public sector. The analysis revealed that often quite important and large groups of workers are restricted in this right. A few examples are:

- civil servants (for example, Austria – in practice);
- police (for example, Belgium);
- public officials (for example, Bulgaria – only symbolic strikes permitted);
- state administration (for example, Hungary);
- health care and social care (for example, Czech Republic, Slovak Republic);
- telecommunications (for example, Czech Republic, Slovak Republic);
- nuclear industry (for example, Slovak Republic);
- civil servants (for example, Austria – in practice);
- police (for example, Belgium);
- public officials (for example, Bulgaria – only symbolic strikes permitted).

Other groups, on the other hand, are totally excluded from the right to take collective action. This affects amongst others:

***Armed forces***

(Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, France, Greece, Hungary, Ireland, Portugal, Spain, Latvia, Lithuania, Luxembourg, Malta, Slovenia)

***Police***

(Cyprus, Denmark, Estonia, France, Greece, Ireland, Poland, Portugal, Latvia, Luxembourg, Malta, Slovenia)



***Ministry of Defence and Ministry of the Interior***

(Romania, France [communications personnel of the Ministry of Interior], Lithuania [Interior])

***Civil servants***

(Denmark, Germany, Poland, Lithuania and Luxembourg [senior])

***Civil national services, officials with a “fundamental function”***

(Hungary, France [staff in a position of authority])

***Judiciary***

(Denmark, France, Hungary, Spain, Czech Republic, Latvia, Slovenia [judges and prosecutors], Latvia [judges], Luxembourg)

***Security forces*** (Czech Republic, France, Greece, Latvia, Lithuania, Luxembourg [when providing essential services])

**Recommendations:**

The EPSU affiliates should analyse and consider how, in light of this international and European case law, they can/should overcome these exclusions within national systems that often go beyond what is allowed by the instruments of the ILO and the Council of Europe.

Apart from highlighting the problems and obstacles country by country, Part II of this report also provides, in a section called “Action to be taken”, specific recommendations or questions for each identified problem. This might take the form of recommendations concerning legislative change, a need to provide information to the relevant ILO and Council of Europe enforcement bodies so that they can properly judge the national situation and/or recommendations for other specific trade union actions that should be considered.

**Recommendations:**

The EPSU affiliates are therefore strongly recommended to look closely at the analysis of their country, as well as the action-oriented recommendations. They are also requested to inform EPSU and ETUC about the steps they envisage taking or that they have already taken to overcome the problems and obstacles identified. Furthermore, they are invited to inform EPSU and ETUC about any other – current or possible future – problem that they might encounter regarding the protection of trade union rights in the public sector, both in law and practice. This will make it possible to decide jointly upon the best and most effective way of raising awareness of the problem among international and European bodies with a view to eradicating it as quickly as possible.

## 6. General operational recommendations

Given the abovementioned manifold possibilities for action at different levels, it is important to use all supervisory and enforcement mechanisms available at each level. In sum, this might mean:

### ▼ EU

- providing the FRA with reports or case files on gross violations of trade union rights in the public sector;
- launching cases before the ECJ (in particular now the EU Charter is legally binding);
- ensuring a regular supply of information to other EU institutions, such as the European Commission and European Parliament, but also ETUC on cases of trade union rights' violations.

### ▼ Council of Europe

- ensuring trade union reactions to/comments on government reports submitted to the reporting system;
- passing on copies of these reactions/comments to EPSU and, in particular, ETUC as it has a role in the follow-up supervisory system (for example, Governmental Committee and collective complaints procedures);
- trade union information input to ETUC for discussions in supervisory bodies;
- better use, where possible, of the collective complaints procedure and this in cooperation with EPSU and ETUC;
- regular supply of information (that is, between official reporting phases) on violations of trade union rights and their submission, in cooperation with EPSU and ETUC, to the relevant Council of Europe Social Charter supervisory bodies.

### ▼ ILO

- ensuring trade union reactions to/comments on government reports submitted to the reporting system;
- passing on copies of these reactions/comments to EPSU and ETUC, and in particular ITUC as it has a role in the follow-up supervisory system;
- trade union information supply to ETUC, but in particular to ITUC for discussions in supervisory bodies;
- better use, where possible, of existing complaints procedure in cooperation with ITUC/ETUC/EPSU;
- regular supply of information (that is, between official reporting phases) on violations of trade union rights, and their submission, in cooperation with EPSU and ETUC, to the relevant Council of Europe Social Charter supervisory bodies.

▼ **National level**

- Consideration of the use of legislative processes to overcome trade union rights problems in both law and practice;
- better use of collective bargaining processes;
- other trade union actions.

But as valuable as it is to use these different channels/mechanisms individually, it is even more valuable *to use them in combination wherever possible and appropriate*. The main reasons for this are as follows:

▼ each level/mechanism has its own advantages/disadvantages in relation to:

- the time needed to complete the procedures (for example, a collective complaints procedure takes, on average, eighteen months, whereas similar procedures before the ILO are more lengthy; reporting procedures are on average very slow before actual sanctions are issued);
- depending on the mechanism/body used, the status of the “sanctions” might vary considerably from mere moral or political sanctions to legal or semi-legal sanctions; this naturally has a major influence on the enforceability of the sanctions.

Furthermore, each level/mechanism requires action by different actors:

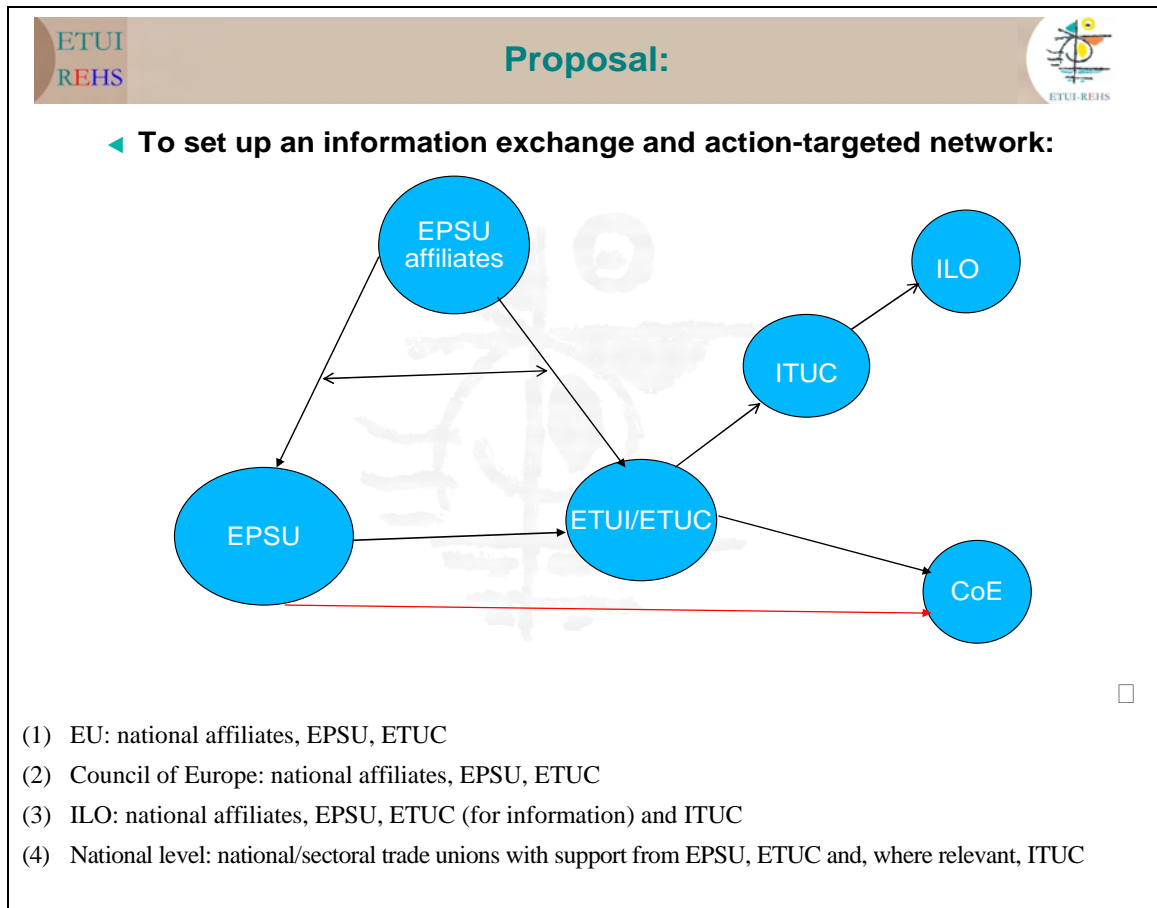
- ▼ **EU:** mainly national affiliates, EPSU, ETUC
- ▼ **Council of Europe:** mainly national affiliates, EPSU, ETUC
- ▼ **ILO:** mainly national affiliates, EPSU, ETUC (for information) and ITUC
- ▼ **National level:** mainly national/sectoral trade unions with support from EPSU, ETUC and, where relevant, ITUC

All these actors have a role to play but if they are to be successful they must cooperate.

**General recommendation:**

In view of all this it is proposed that EPSU considers the establishment of an information exchange and action-targeted network that could ensure regular and coordinated cooperation and information flow between itself, its affiliates and ETUI-REHS/ETUC in order to facilitate decision-making on the most appropriate action towards the Council of Europe and the ILO (the latter also in cooperation with the ITUC, given its particular role in and expertise on the use of ILO supervisory mechanisms). EPSU, in cooperation with its affiliates and with the support of ETUC/ETUI-REHS, should first establish a list of contact persons within each organisation who could serve liaison officers in cases of trade union rights violations. Sharing regular information within this network (for example, ETUC would forward all information on alleged violations under discussion in the supervisory bodies of the Council of Europe Social Charters for reaction and comments) might also make the other members of the network more aware and hopefully more (pro-)active in submitting information/cases on similar or other trade union rights violations in the public sector.

The gathered information could then be also integrated in the abovementioned idea of a regular “EPSU report on violations of trade union rights in the public sector” (inspired by the ITUC annual report on trade union violations).





# Analysis of the different forums and tools

## 1. EU level

### 1.1. The EU Charter of Fundamental Rights

#### a). Introduction: From Community Charter to the EU Charter of Fundamental Rights

When the European Community was founded, the emphasis was on economic matters rather than individual rights. Fundamental rights were not a central concern of those drafting the early European Community treaties. Not surprisingly, the 1951 Treaty of Paris, which set up the European Coal and Steel Community, focused solely on the coal and steel industries. In 1957, in Rome, two treaties were signed to establish the European Atomic Energy Community (Euratom) and the European Economic Community (EEC). These treaties also covered well-defined economic spheres. This set them apart from national constitutions which tend to contain a solemn declaration on fundamental rights. And after all, the 1950 Council of Europe Convention on Human Rights already dealt with human rights.

Indeed, the issue of (and battle for) the protection of fundamental rights, and of social rights in particular, is as old as the Community itself and, to a considerable extent, still ongoing. As regards fundamental social rights in particular, a major breakthrough was achieved in December 1989 with the adoption by 11 of the then 12 member states of the Community Charter of Fundamental Social Rights of Workers (CCFSR). Although the CCFSR was a solemn political declaration without any legal force, it was accompanied by a social action programme (including several proposals for social directives) and in a way formed the basis for the building of a European social policy in the 1990s. As regards trade union rights, the CCFSR provides for the following:

#### **Freedom of association and collective bargaining**

11. *Employers and workers of the European Community shall have the right of association in order to constitute professional organizations or trade unions of their choice for the defence of their economic and social interests.*

*Every employer and every worker shall have the freedom to join or not to join such organizations without any personal or occupational damage being thereby suffered by him.*

12. *Employers' or employers' organizations, on the one hand, and workers' organizations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.*

*The dialogue between the two sides of industry at European level, which must be developed, may, if the parties deem it desirable, result in contractual relations in particular at inter-occupational and sectoral level.*

13. *The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements.*

*In order to facilitate the settlement of industrial disputes the establishment and utilization at the appropriate levels of conciliation, mediation and arbitration procedures should be encouraged in accordance with national practice.*

14. *The internal legal order of the Member States shall determine under which conditions and to what extent the rights provided for in Articles 11 to 13 apply to the armed forces, the police and the civil service.*

### **Information, consultation and participation for workers**

17. *Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States.*

*This shall apply especially in companies or groups of companies having establishments or companies in two or more Member States of the European Community.*

18. *Such information, consultation and participation must be implemented in due time, particularly in the following cases:*

- (i) when technological changes, which, from the point of view of working conditions and work organization, have major implications for the work-force, are introduced into undertakings;*
- (ii) in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers;*
- (iii) in cases of collective redundancy procedures;*
- (iv) when transfrontier workers in particular are affected by employment policies pursued by the undertaking where they are employed.*

But the Court of Justice of the European Communities (ECJ) slowly but steadily began over the years also to monitor how the European institutions and the EU Member States were respecting fundamental rights. The ECJ indeed became a pioneer of fundamental rights by developing an extensive body of case-law based on Article 220 of the Treaty which makes the ECJ responsible for interpreting the Treaty and ensuring that EU law is observed. The ECJ argued on numerous occasions that fundamental rights were core principles of the European legal system. These principles were grounded, it said, in the constitutional traditions of Member States, and in the international treaties to which the Member States belonged, in particular the 1950 European Convention on Human Rights.

The Treaty of Amsterdam formed a further important step in advancing fundamental rights in Europe. In its Article 6, it was made explicit that the European Union is founded on the principles of liberty, democracy, human rights, fundamental freedoms and the rule of law. Furthermore, Article 7 lays down the procedure, with a preventive and sanction mechanism, to be applied in case of serious and persistent violation of fundamental rights by a Member State. This mechanism was reinforced under Article 7 of the Treaty of Nice which gives a greater role to the European Parliament.

### **b) How the European Union Charter of Fundamental Rights came into being?**

Only one month after the Treaty of Amsterdam took effect, the Cologne European Council in June 1999 gave the green light for the drafting of a Charter of Fundamental Rights of the European Union in order to consolidate fundamental rights at EU level into one single text and to make them more visible.

They entrusted the task of drafting the charter to a convention, which met for the first time in December 1999. The composition of the convention that drafted the charter was agreed at the Tampere European Council in October 1999: one representative from each Member State and from the European Commission, 16 members of the European Parliament, and members of national parliaments. The European Court of Justice, the Council of Europe and the European Court of Human Rights had observer status. The European Economic and Social Committee, the Committee of the Regions, the European Ombudsman and the EU applicant countries outlined their views to the convention. There were also public hearings at which churches, trade unions (including the ETUC), businesses, asylum-seekers, gays and lesbians, environmentalists and many other interest groups voiced their opinions. All the documents the convention produced were published on the Internet.

The convention adopted a draft charter on 2 October 2000. The Member States approved the draft at the European Council in Biarritz on 13 and 14 October 2000. The European Parliament gave its approval on 14 November 2000 and the European Commission on 6 December 2000. Finally, the Parliament, Council and Commission signed and *proclaimed the Charter on 7 December 2000 in Nice*.

### **c) What is in the EU Charter?**

The EU Charter sets out the range of civil, political, economic and social rights of EU residents. It is divided into six sections, dealing with dignity, freedoms, equality, solidarity, citizens' rights and justice. The EU Charter draws on the 1950 European Convention on Human Rights, the case law of the Court of Justice of the European Communities, national constitutional traditions, the Council of Europe's social charters and the Community Charter of Fundamental Social Rights of Workers. But it goes beyond enshrining traditional human rights by addressing specifically modern issues such as bio-ethics and protecting personal data.

Most of the fundamental workers' and trade union rights are to be found in the chapter on Solidarity.<sup>2</sup> For the purpose of this report, the most important rights are:

*Article 27: Workers' right to information and consultation within the undertaking*

*Workers 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 Community law and national laws and practices.*

*Article 28: Right of collective bargaining and action*

*Workers and employers, or their respective organisations, have, in accordance with Community 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.*

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<sup>2</sup> The full text can be downloaded from: [http://ec.europa.eu/justice\\_home/unit/charte/index\\_en.html](http://ec.europa.eu/justice_home/unit/charte/index_en.html)



#### **d) The (legal) status of the EU Charter**

Until October 2007, the EU Charter was not part of the EU Treaty. It thus remained merely a – albeit high-level – political declaration. It was, however, agreed during the debates of the Convention that they would look at how the EU Charter<sup>3</sup> could be made legally binding by putting it into the text of the envisaged Constitutional Treaty.

Indeed, following the work of the Convention, the EU Charter was supposed to be incorporated as Part II of the draft Treaty establishing a Constitution for Europe submitted to the European Council meeting in Thessaloniki on 20 June 2003. But as is well known, this text has not been adopted. After a year of discussions following the ‘No’ vote on this Constitution in France and the Netherlands, a reform treaty was proposed and adopted on 19 October 2007 at the EU Tripartite Social Summit meeting in Lisbon.

As it stands, the full text of the Charter is no longer incorporated into the body of the text of this Reform Treaty, but article 6 of the so-called Lisbon Reform Treaty ensures that the Charter has the same legal value as the Treaties. force.<sup>4</sup> On top of this, it should be noted that the UK and Poland have opted out of this text. This Protocol provides amongst others in relation to the Title IV of the Charter, which contains in particular all social rights, that *“in particular and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law”*.<sup>5</sup> The future will tell what the exact impact of this Protocol will be in both countries.

More promising on the other hand is that article 6 of the Treaty provides for the commitment of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe. The modalities and conditions of which are further specified in another Protocol annexed to the Lisbon Treaty.<sup>6</sup>

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<sup>3</sup> B. Bercusson, T. Blanke, N. Bruun, S. Clauwaert, A. Jacobs, Y. Kravaritou, I. Schömann, B. Veneziani and C. Vigneau (2006), **European labour law and the EU Charter of Fundamental Rights**. Baden-Baden: Nomos, 728 p.

<sup>4</sup> The text of Article 6 of the Lisbon Reform Treaty now states:

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.” The full text of the Treaty is available at: <http://eur-lex.europa.eu/en/index.htm>.

<sup>5</sup> Article 1 §2 of the Protocol of which the full text is available at: <http://eur-lex.europa.eu/en/index.htm>.

<sup>6</sup> Protocol relating to Article 6(2) of the Treaty of the European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms ; also available at : <http://eur-lex.europa.eu/en/index.htm>.

The Executive Committee of the European Trade Union Confederation (ETUC), meeting in Lisbon on 18 October 2007, adopted a statement on the draft EU reform treaty and presented it to the EU Tripartite Social Summit meeting in Lisbon. The ETUC regrets the unambitious nature of much of the EU Reform Treaty, which represents merely a set of modest adjustments to the EU's framework of rules, which will have only a limited impact on deepening Europe's capacity to act decisively in the world. Welcoming the fact that the Charter of Fundamental Rights will become legally enforceable in relation to member states, the ETUC deplores that UK and Poland have opted out from the Charter of Fundamental Rights and fears that other restrictions on the Charter will inevitably adversely affect it.

Apart from the use of the EU Charter by the ECJ and its Advocate Generals and this already before the EU Charter<sup>7</sup> obtained its legal force in October 2007, it should be noted that a network of independent experts has existed for the last couple of years to assess the safeguarding of fundamental rights by the European Union Member States.

The network of independent experts was set up by the European Commission in September 2002. It consists of one expert per Member State and is headed by a coordinator. Its objective is to ensure a high degree of expertise in relation to each of the Member States and the European Union as a whole.

The network has three main tasks:

1. To draft an annual report on the state of fundamental rights in the European Union and its Member States, assessing the application of each of the rights set out in the European Union's Charter of Fundamental Rights. The report assesses the situation of fundamental rights on the basis of an analysis of the legislation, case law and administrative practice of the national authorities of the Member States and the institutions of the Union. The synthesis report prepared on an annual basis by the Network is based on 25 country reports prepared by the individual members of the Network, as well as on the report on the situation of fundamental rights in the practices of the institutions of the Union, prepared by the coordinator. The national reports drafted by each network expert are available in English or French on the website of the *Interdisciplinary Research Cell in Human Rights* (CRIDHO).

The objectives of the report are as follows:

- to inform the institutions of the state of play regarding fundamental rights in all the Member States;
- to make recommendations to the institutions based on the information gathered to promote the safeguarding of fundamental rights;
- to add to the pool of experience by producing a list of measures to be presented as good practice;

Furthermore, each annual report also comprises a Thematic Comment, which examines in greater depth one or more areas selected by the Commission and the European

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<sup>7</sup> B. Bercusson, S. Clauwaert and I. Schömann (2006), [Legal prospects and legal effects of the EU Charter](#), in: *European labour law and the EU Charter of Fundamental Rights*. Baden-Baden: Nomos, 41–83.

Parliament. Available in English and French, the report is sent to the Commission in March each year.<sup>8</sup>

2. To provide the Commission with specific information and opinions on fundamental rights issues, on request. The network of independent fundamental rights experts may be called on to deliver an opinion on specific questions raised by the Commission.<sup>9</sup> So far – to be sure dealing as they have with crucial aspects of fundamental rights protection – none of these opinions has related directly or indirectly to trade union rights.
3. To assist the Commission and the Parliament in developing European Union policy on fundamental rights.

Finally, it should be highlighted that every European citizen can send information to this network:

- information concerning the European Union or all the Member States may be sent to the coordinator: Olivier De Schutter, at [cfr\\_cdf@cpdr.ucl.ac.be](mailto:cfr_cdf@cpdr.ucl.ac.be)
- information concerning a specific Member State may be sent to the appropriate member of the network.

One can also send information to the European Commission at the following address: [JAI-CITIZENSHIP@ec.europa.eu](mailto:JAI-CITIZENSHIP@ec.europa.eu)

It should be noted that the network does not undertake to reply to questions addressed to it, or to provide information about action taken in response to information forwarded. Neither the European Commission nor the network accepts liability for information supplied by outside persons.

With the creation of the European Union Agency for Fundamental Rights (see following chapter), it is rather clear that this network will remain in existence, although it is still unclear whether its remit will remain the same and how its structure and its valuable work will be integrated in the new Agency's structure and activities.

## 1.2. The European Union Agency for Fundamental Rights (FRA)

### a) What is the Agency for Fundamental Rights (FRA); what are its bodies and geographical scope?

FRA is an independent body of the European Union (EU), established to provide assistance and expertise on fundamental rights matters to the European Union, its institutions and its Member States (currently 27 countries), when implementing Community law. The aim is to support them in fully respecting fundamental rights when they take measures or formulate courses of action. Therefore, FRA will provide advice based on its expertise and as a result of its activities.

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<sup>8</sup> These reports are available at: [http://www.ec.europa.eu/justice\\_home/cfr\\_cdf/index\\_en.htm](http://www.ec.europa.eu/justice_home/cfr_cdf/index_en.htm)

<sup>9</sup> These opinions are also available at: [http://www.ec.europa.eu/justice\\_home/cfr\\_cdf/index\\_en.htm](http://www.ec.europa.eu/justice_home/cfr_cdf/index_en.htm)

FRA was established through Council Regulation (EC) No 168/2007 of 15 February 2007. It is based in Vienna and is being built on the former European Monitoring Centre on Racism and Xenophobia (EUMC). FRA became operational as of 1 March 2007.

With regard to its governance structure, the **bodies of the Agency** are as follows:

- Management Board (MB);
- Executive Board;
- Scientific Committee;
- Director.

The Management Board (MB) is the Agency's planning and monitoring body. It is composed of persons with experience in the management of public or private sector organisations and knowledge in the field of fundamental rights. It consists of independent persons appointed by each Member State, one independent person appointed by the Council of Europe, and two representatives of the European Commission.

The Executive Board prepares the decisions of the MB, and assists and advises the Director. It is made up of the Chair and the Vice-Chair of the MB, plus two other MB members and one of the MB's representatives from the European Commission. The MB member appointed by the Council of Europe may participate in the meetings.

The Scientific Committee serves as guarantor of the scientific quality of FRA's output. It is composed of eleven independent persons, highly qualified in the field of fundamental rights. The MB appoints the members following an open call for applications and a selection procedure.

FRA is headed by a Director who is responsible for implementing the tasks of the Agency and for its staffing. The MB appoints the Director on the basis of his or her personal merit, experience in the field of fundamental rights and administrative and management skills. The Commission draws up a list of candidates following a call for applications. Before an appointment, the applicants will address the Council and the competent European Parliament Committee.

As for **its geographical scope**, the FRA:

- covers the EU and its 27 Member States;
- will also be open to the participation of candidate countries as observers (Turkey, Croatia, FYRoM), after a decision of the relevant Association Council, which will indicate in particular the nature, extent and manner of this country's participation in the Agency's work, taking into account the specific status of each country;

The European Council may also invite the Western Balkans countries (Albania, Serbia, Bosnia-Herzegovina, Montenegro), which have concluded a stabilisation and association agreement with the EC, to participate in the Agency as observers.

## **b) What fundamental rights issues does FRA handle?**

The Agency's work refers to fundamental rights within the meaning of Article 6(2) of the Treaty on European Union,<sup>10</sup> including the European Convention on Human Rights and Fundamental Freedoms, and as reflected in the EU Charter of Fundamental Rights. The Agency carries out its tasks within the competencies of the Community, as laid down in the EC Treaty. Furthermore:

- EU institutions and the Member States (when implementing Community law) may benefit, as appropriate and on a voluntary basis, from the Agency's general fundamental rights expertise also within the areas of police and judicial cooperation in criminal matters.
- The European Council may seek the assistance of the Agency as an independent body if it finds it useful during a possible procedure under Article 7 of the EU Treaty (which refers to the Council's power to apply penalties in case of a serious breach of fundamental rights in a Member State).<sup>11</sup> FRA does not, however, carry out systematic and permanent monitoring of Member States within the meaning of this Article.

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<sup>10</sup> Article 6 §2 of the EU Treaty: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

<sup>11</sup> Article 7:

"1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community.

This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 3.

6. For the purposes of paragraphs 1 and 2, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its Members."

Within this broad context, the thematic priorities of the Agency's activities are determined through the Multi-annual Framework, covering a 5-year period, which must always include combat against racism, xenophobia and related intolerance.

### **c) What are FRA's tasks?**

FRA carries out the following tasks independently:

#### *Information and data collection, research and analysis:*

- it collects, analyses and disseminates objective, reliable and comparable information on the development of fundamental rights in the EU;
- it develops methods and standards to improve the quality and comparability of data at EU level;
- it carries out or promotes scientific research and surveys.

#### *Advice to EU institutions and Member States:*

- it formulates and publishes conclusions and opinions for the Union and its Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission;
- the European institutions can request opinions on their legislative proposals or positions taken in the course of legislative procedures concerning their compatibility with fundamental rights;
- it publishes an annual report on fundamental rights in the EU, also highlighting examples of good practice;
- it publishes thematic reports based on its research and surveys.

#### *Co-operation with civil society and awareness-raising:*

- it will develop a communication strategy and promote dialogue with civil society;
- it will establish a network through a 'Fundamental Rights Platform';
- it will seek to raise public awareness of fundamental rights.

FRA is NOT empowered to:

- examine individual complaints;
- exercise regulatory decision-making powers;
- monitor the situation of fundamental rights in the Member States for the purposes of Article 7 of the EU Treaty (which refers to the Council's power to apply penalties in case of a serious breach of fundamental rights in a Member State);
- deal with the legality of Community acts or question whether a Member State has failed to fulfil a legal obligation under the Treaty.

### **d) Cooperation between FRA with other bodies of the EU and organisations at member-state and international level, the Council of Europe in particular**

FRA shall coordinate its work with relevant EU bodies, offices and agencies and where relevant and appropriate draw up a memorandum of understanding to set out the terms of the cooperation.

FRA shall also cooperate with Member States via the National Liaison Officer, who shall be a government official nominated by each Member State. The National Liaison Officers may submit opinions on the draft Annual Work programme and will receive documents published by FRA.

FRA's founding Regulation also underlines the importance of coordination with the Council of Europe (CoE) in order to avoid duplication, ensure complementarity and mutually reinforce each other's work. To this end, an agreement between the EU and the CoE shall be concluded. As was the case with the EUMC, the CoE shall appoint an independent person to the FRA Management Board, who can also participate in meetings of the Executive Board.

The EUMC has already established relations with the European Commission against Racism and Intolerance (ECRI), the Commissioner for Human Rights and the Council of Europe's departments responsible for social cohesion issues. This will continue and be developed. The Regulation also foresees cooperation with a number of other bodies:

- OSCE and UN bodies in the human rights field;
- national human rights institutions in the Member States.

FRA will build on EUMC's relations with OSCE, its Office for Democratic Institutions and Human Rights (ODIHR) and the Office of the High Commissioner on National Minorities in particular. In addition, it will further develop EUMC's relations with the UN's Office of the High Commissioner for Human Rights, UNESCO and other bodies.

#### **e) How does FRA cooperate with civil society (NGOs, trade unions, and so on)?**

FRA's founding Regulation foresees the setting up of a flexible cooperation network, the 'Fundamental Rights Platform', which is a mechanism for the exchange of information and the pooling of knowledge.

The ETUC will try to ensure that the trade unions' and workers' voice will be properly heard within the Platform!

#### **f) You have been discriminated against – can the FRA help you?**

Harassment, discrimination and victimisation must of course not be ignored. This, first of all, requires that people know their rights. FRA will make people more aware of their fundamental rights.

As already mentioned, FRA is not itself empowered to deal with individual complaints, but it can refer people to organisations in each Member State where individuals can go for help, advice and also support in legal matters (the list of organisations is accessible from the links below).

All EU Member States are required, according to the EU Racial Equality Directive, to designate 'National Equality Bodies' for the promotion of equal treatment. Details of National Equality Bodies on racial/ethnicity equality issues can be found at: [http://ec.europa.eu/employment\\_social/fundamental\\_rights/rights/neb\\_en.htm#nat](http://ec.europa.eu/employment_social/fundamental_rights/rights/neb_en.htm#nat)

National human rights institutions deal more widely with human rights issues, often also with individual cases. They exist in many European countries.

See: <http://www.nhri.net/NationalDataList.asp?MODE=1&ID=1>

FRA keeps a registry of victim support organisations (with a focus on anti-racism organisations), which can engage on behalf or in support of victims of discrimination in judicial or administrative procedures.

A guide for victims of discrimination is also available at:

[http://ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/public/factsheet2\\_en.pdf](http://ec.europa.eu/employment_social/fundamental_rights/pdf/public/factsheet2_en.pdf)

More information on FRA is available at: <http://fra.europa.eu/fra/index.php>

### 1.3. Information and consultation rights in the public sector

#### a) Introduction

The Community has a long history of harmonising and strengthening rules on employment and workers' rights. In this context, the Community also endeavours to protect working conditions and the workers' right to information and consultation. Several directives adopted since the 1970s contain provisions on the workers' right to be informed and consulted in specific situations at their undertaking, for the protection of their interests: 1) Council Directive 91/533/EEC of 14 October 1991 relating to the conditions applicable to the contract or employment relationship; 2) Council Directive 94/45/EC, of 22 September 1994 establishing European Works Councils; 3) Council Directive 98/59/EC of 20 July 1998 relating to collective redundancies; 4) Council Directive 2001/23/EC of 12 March 2001 relating to the safeguarding of employees' rights in the event of transfers of undertakings; 5) Council Directive 2002/74/EC relating to the protection of employees in the event of the insolvency of the employer; and finally 6) Council Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

In most Directives, public sector bodies/authorities are covered by these EU regulations, along with private sector undertakings. This chapter focuses on EU Directive 2002/14/EC and its domestic implementation with regard to its impact on the public sector. It will also give a brief overview of the implementation measures concerning some of the other Directives mentioned above.

#### 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<sup>12</sup>*

(Official Journal L 080, 23/03/2002 P. 0029 – 0034)

The purpose of Information and consultation Directive is to establish a general framework setting out the minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community.

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<sup>12</sup> The information on this Directive is mainly derived from an ETUI-REHS implementation report; see: Schömann, I., Clauwaert, S. and Warneck, W. (2006), Information and consultation in the European Community. Implementation report on Directive 2002/14/EC. Report 97. ETUI-REHS Research Department, Brussels (also available in French).



***Interpretation: Does the notion of ‘undertaking’ according to the Information and consultation Directive include public services?***

According to Article 2 of the Information and consultation Directive, the notion of ‘undertaking’ means ‘a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States’. In this respect, public sector enterprises seem to be part of the scope of the Information and consultation Directive. But the definition of an undertaking is undoubtedly not very explicit with reference to Article 2(a) of the Directive.

The Community concept of ‘undertaking’, essentially associated with competition law (Articles 85 et seq. of the EC Treaty), has, however, been defined and refined in the case law of the European Court of Justice (ECJ).

The concept of an undertaking according to ECJ case law, therefore, is one of ‘every entity engaged in an economic activity’, regardless of its legal status and the way in which it is financed (Höfner judgment, ECJ 23 April 1991, C-41/90), whether it is a legal or a natural person (Gøttrup-Klim judgment, ECJ 15 December 1994, C-250/92) and whether it is profit-making or non-profit-making (Fédération française des sociétés d’assurance judgment, ECJ 16 March 1995, C-244/94). The Court has further refined this definition by specifying that ‘undertaking’ refers to an organised grouping of persons and assets facilitating the exercise of an economic activity (Süzen judgment, ECJ 11 March 1997, C-13/95).

The exceptions to this rule relate to bodies exercising powers that are typically those of a public authority (Eurocontrol judgment, ECJ 19 January 1994, C-364/92), as well as organisations fulfilling a social function such as basic social security systems based on the principle of national solidarity (Poucet & Pistre judgment, ECJ 17 February 1993, C-159/91 and 160/91, and Garcia judgment, ECJ 26 March 1996, C-238/94).

**Domestic transpositions**

In most domestic transposition measures, the term ‘undertaking’ or ‘establishment’ is taken to refer to current national definitions.

The exception to the right of information and consultation, according to the Directive (Article 3(2)), applies to undertakings directed towards more cultural aims. In general, the national transposition measures incorporate this exception without amendment.

**Article 3, paragraphs 2 and 3**

2. In conformity with the principles and objectives of this Directive, Member States may lay down particular provisions applicable to undertakings or establishments which pursue directly and essentially political, professional organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions, on condition that, at the date of entry into force of this Directive, provisions of that nature already exist in national legislation.

3. Member States may derogate from this Directive through particular provisions applicable to the crews of vessels plying the high seas.

Although this exception does not include the public sector, some Member States have extended this exception to public or semi-public services and broadcasting undertakings employing at least 50 employees, as in Poland, where in this case the law provides for the creation of a works council. In the United Kingdom, some public services are also not covered by the transposition measures. In Belgium, moreover, Collective Labour Agreement No. 9, which is not the statutory transposition of the Directive but which regulates employees' right to be informed and consulted, applies only to the private sector.

Furthermore, there are situations in which civil servants and private employees work together, as a consequence of the fact that changes in the regulatory framework for employment affect only the workers recruited after the utility's transformation into a private company, while the existing employees often retain their status and rights. The presence of both civil servants and private employees may have consequences for company-level employee representation. For instance, in Germany there is a duplication of representation structures, with both staff councils for civil servants and works councils for private employees. Something similar is happening in France. Until 2004, France Télécom did not have private sector staff representative bodies, such as works councils and workforce delegates, but continued with the system of public sector representation, that is, a series of joint committees (Commissions administratives paritaires, CAPs), which cover issues such as promotion, transfers, training and disciplinary matters. In accordance with an agreement signed in July 2004 by the France Télécom management and five trade unions, since January 2005 there have also been private sector representation bodies, which will take on some of the tasks earlier assigned to the CAPs, as in the case of information and consultation prerogatives. At EDF, the transformation into a private company in 2004 started a three-year adjustment process, which will introduce private sector representation bodies. But according to the Minister of the Economy, modifications to the existing situation will be limited to the 'bare minimum'. In the UK, interesting developments regarding the implementation of the information and consultation Directive including case law show how difficult it is to broaden ICE Regulation to public sector and to cover all workers.

Case law of national courts witnesses the difficulty of a harmonised transposition of the directive, and as the ETUI-REHS report mentions, national-level implementation of this directive have tried to restrict themselves to the minimum. Although Directive 2002/14/EC has come just at the right time to enable employees to defend their jobs through an effective, standing and regular procedure for information and consultation on recent and probable developments in the activities of an undertaking, as well as its financial and economic situation, the development of employment and, in particular, decisions likely to lead to major changes in work organisation, the objective is only halfway achieved so long as many Member States adopt a minimal interpretation in their transposition measures.

## b) Other Council Directives

### **Council Directive 2001/23/EC of 12 March 2001**

*on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses*

(Official Journal L 082 , 22/03/2001 P. 0016 – 0020)

The purpose of the Transfer Directive (of 1977 amended in 1998 and in its last version in 2001) is to safeguard employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

***Interpretation: Does the notion of 'undertaking' according to the Transfer Directive include public services?***

According to Article 1 paragraph 1 c) of the Transfer Directive '*applies to public and private undertakings engaged in economic activities whether or not they are operating for gain*'. Here again the definition is the same as the one used in information and consultation Directive.

Additionally, Article 1 paragraph 1 c) specifies that '*an administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive*'.

Furthermore, and according to the EU Commission memorandum of 2004, activities involving the exercise of public authority do not fall within the scope of the directive.

#### **Article 1**

1. (a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

c) This Directive shall **apply to public and private undertakings engaged in economic activities whether or not they are operating for gain**. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.

This latter restriction applies, for example, in the following case: the Portuguese government proposed a mobility or transferability scheme for public servants (*Regime de Mobilidade dos Funcionários da Administração Pública*) in order to reform public administration, a proposal which is considered a central tool for implementing the government's ambitious restructuring plan. A special mobility scheme is being designed for public servants who are affected by the curtailing, merging or restructuring of services, or by measures to rationalise human resources.

**Concerning the nature of the transaction** at the origin of the transfer, the ECJ has held that the Directive is applicable to transfers of undertaking which take place in the following:

- A situation in which a public authority decides to terminate the subsidy paid to a foundation, which is its only source of income, as a result of which its activities are fully and definitively terminated, and to transfer it to another foundation with a similar aim (Case C-29/91 Redmond Stichting).

- A situation in which a public body which had contracted out its home-help service for persons in need or awarded a contract for maintaining surveillance of some of its premises to a first undertaking decides, upon expiry of or after termination of the contract which it had with the first undertaking, to contract out that service or award that contract to a second undertaking, provided that the operation is accompanied by the transfer of an economic entity between the two undertakings (Joined cases C-173/96 and C-247/96 *Sánchez Hidalgo*).
- A situation in which an entity operating services for public use and managed by a public body within the State administration is, following a decision by the public authorities, the subject of an administrative concession to a private company established by another public body which holds all its capital (Case C-343/98 *Collino*).
- A situation such as the taking over by a municipality – a legal entity governed by public law – of the provision of publicity and information concerning the services offered by it to its inhabitants, activities previously carried on, in the interests of that municipality, by a non-profit-making association – a legal entity governed by private law (ECJ Judgment *Mayeur v Association Promotion de l'information messine (APIM)*, Case C-175/99).
- The taking over by an undertaking of non-maritime public transport activities – such as the operation of scheduled local bus routes – previously operated by another undertaking, following a procedure for the award of a public service contract under Directive 92/50 on public service contracts (C-172/99 *Oy Liikenne*).

**Concerning changes in working conditions**, and according to the ECJ, an obligation, prescribed by national law, to terminate contracts of employment governed by private law in the case of the transfer of an activity to a legal entity governed by public law constitutes a substantial change in working conditions to the detriment of the employee resulting directly from the transfer, with the result that termination of such contracts of employment must, in such circumstances, be regarded as resulting from the action of the employer (Case C-175/99 *Mayeur*).

### ***National transpositions***

Neither the European Commission nor ETUI-REHS has undertaken a study of the implementation of the Transfer Directive. A report of the European Commission on the implementation of Transfer Directive of 1977 was published in 1992 (SEC (92) 85), but did not mention implementation in the public sector.

In the EU Commission's report on the implementation of the Transfer Directive of 1977 in Austria, Finland and Sweden, some information is given regarding domestic measures under Finnish law: the preparation of a new Civil Servant Act (*Virkamieslaki*, 750/1994) in 1994 brought up the question of whether civil servants should be covered by the Directive. The public sector is not excluded from the scope of the Directive but neither is it explicitly included. The case law of the ECJ has, however, stated that 'employee' is defined according to the definition in the national legislation of each Member State. The Court has added that employees that in one way or another have the status of employee may not be excluded from the rights and protection granted by the Directive. The aim of the Directive is to protect employees without regard to how their employment relation is considered by national legislation. However, there is no clear ruling on how the Directive is to be applied in the public sector.

**Council Directive 98/59/EC of 20 July 1998**

*on the approximation of the laws of the Member States relating to collective redundancies*  
(Official Journal L 225 , 12/08/1998 P. 0016 – 0021)

The purpose of the collective redundancies Directive is to provide greater protection to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community.

However, as mentioned in Article 2 paragraph b of the collective redundancies Directive, workers employed by public administrative bodies or by establishments governed by public law or equivalent bodies are not covered by the Directive.

**Article 2**

This Directive shall not apply to:

(b) workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies).

Here again, neither the European Commission nor ETUI-REHS have undertaken a study on the implementation of the collective redundancies Directive.

**c) Conclusion**

The information and consultation Directive has arrived in the European Union just at the right time to enable employees to defend their jobs through an effective, standing and regular procedure for information and consultation on recent and probable developments in the activities of an undertaking, on its financial and economic situation, the evolution of employment and in particular in relation to decisions likely to lead to major changes in the organisation of the work force. As a vital complement to the “employment” and “European works council” directives, in many Member States the information and consultation Directive represents the essential and in some cases the sole foundation for the employee’s right to information and consultation, filling a legal gap and paving the way for a higher degree of harmonisation of social laws in Europe.

The objective is only halfway achieved, however, so long as many Member States adopt a minimal interpretation in their transposition measures and in particular in the public sector. Public sector workers should have the same right to be informed and consulted as every worker of the private sector, thus to avoid any discriminatory treatment. However, it is clear that the concept of “economic activity” generally used in EU legislation, although not figuring as criteria in Council of Europe and ILO case law creates confusion and prevents proper coverage of workers in public sector. Indeed this restrictive definition or criteria used in EU social law appears to be a means for legislating on public authorities and/ or entities, without taking into account the specificity of public services in the EU/EEA Member States and candidate countries. Definitively there is a crucial need to look further in to this particular issue and call on Commission (and other players at the European level) to ensure specific implementation research on the impact of the information and consultation Directive (amongst others) in public sector entities.

## 2. Council of Europe – European Social Charters

### 2.1. Introduction

In a first part of this chapter (parts 1–4), a brief overview is provided of the main instruments for the protection of trade union rights, that is, the European Social Charters of 1961 and 1996, the rights contained in them, their monitoring procedures, and so on. In the second part of this chapter (parts 5 and 6), we provide an overview of the specific case law relating to trade union rights in the public sector.

### 2.2. What is the European Social Charter?

The European Social Charter (ESC) sets out rights and freedoms and establishes a supervisory mechanism guaranteeing that States adhere to them. It was revised in 1996, which led to the Revised European Social Charter (RESC), which came into force in 1999 and is gradually replacing the initial 1961 treaty.

The following states have signed and ratified the ESC or RESC: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, «the former Yugoslav Republic of Macedonia», Turkey, Ukraine and United Kingdom.

The following states have signed but not yet ratified the ESC or RESC: Liechtenstein and Switzerland (for the ESC) and Bosnia-Herzegovina, Montenegro, Russia, San Marino and Serbia (for RESC)

For an overview of the (dates of) signatures and ratifications by EU and EEA member states and EU candidate countries, see ANNEX 1.<sup>13</sup>

### 2.3. What rights are guaranteed by the Charter?

The rights guaranteed by the Charter concern all individuals in their daily lives: housing, health, education, employment, social protection, movement of persons, non-discrimination.

States have to accept at least 6 of the 9 articles of the ‘hard core’ provisions of the Charter (Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20) and select an additional number of articles or numbered paragraphs to be bound by. The total number of articles or numbered paragraphs by which every state has to be bound can not less than 16 articles or 63 numbered paragraphs.

***It is thus perfectly possible for countries to ratify the (R)ESC without having ratified/accepted Articles 5 and 6 which contain the core trade union rights on the right to organise, collective bargaining and collective action.***

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<sup>13</sup> This overview, which is regularly updated, can also be consulted at:  
[http://www.coe.int/t/e/human\\_rights/esc/1\\_general\\_presentation/Signatures-Ratifications\\_en.pdf](http://www.coe.int/t/e/human_rights/esc/1_general_presentation/Signatures-Ratifications_en.pdf)

<b>Employment</b>	<ul style="list-style-type: none"> <li>– the right to earn one's living in an occupation freely entered upon;</li> <li>– a social and economic policy designed to ensure full employment;</li> <li>– fair working conditions as regards pay and working hours;</li> <li>– action to combat sexual and psychological harassment;</li> <li>– prohibition of forced labour;</li> <li>– freedom to form trade unions and employers' organisations to defend economic and social interests; individual freedom to decide whether or not to join them;</li> <li>– promotion of joint consultation, collective bargaining, conciliation and voluntary arbitration;</li> <li>– protection in case of dismissal;</li> <li>– the right to strike.</li> </ul>
<b>Social protection</b>	<ul style="list-style-type: none"> <li>– the right to social security, social welfare and social services;</li> <li>– the right to be protected against poverty and social exclusion;</li> <li>– special measures catering for the elderly, families, persons with disabilities and young persons.</li> </ul>
<b>Non-discrimination</b>	<ul style="list-style-type: none"> <li>– the right of women and men to equal treatment and equal opportunities in employment;</li> <li>– a guarantee to all nationals and foreigners legally resident and/or working that all the rights set out in the Charter apply regardless of race, sex, age, colour, language, religion, opinions, national origin, social background, state of health or association with a national minority.</li> </ul>
<b>Health</b>	<ul style="list-style-type: none"> <li>– accessible, effective health care facilities for the entire population;</li> <li>– policy for preventing illness with, in particular, the guarantee of a healthy environment;</li> <li>– elimination of occupational hazards so as to ensure that health and safety at work are provided for by law and guaranteed in practice;</li> <li>– protection of maternity.</li> </ul>
<b>Housing</b>	<ul style="list-style-type: none"> <li>– construction of housing in accordance with families' needs;</li> <li>– reduction in the number of homeless persons; universally assured access to decent, affordable housing;</li> <li>– equal access to social housing for foreigners.</li> </ul>
<b>Education</b>	<ul style="list-style-type: none"> <li>– a ban on work by children under the age of 15;</li> <li>– free primary and secondary education;</li> <li>– free vocational guidance services;</li> <li>– initial and further vocational training;</li> <li>– special measures for foreign residents.</li> </ul>
<b>Movement of persons</b>	<ul style="list-style-type: none"> <li>– the right to family reunion;</li> <li>– the right of nationals to leave the country;</li> <li>– procedural safeguards in the event of expulsion;</li> <li>– simplification of immigration formalities for European workers.</li> </ul>

As regards these Articles 5 and 6 of the (Revised) Social Charter, all EU, EEA member states and candidate countries accepted these provisions, with the exception of:

Austria:	did not accept Article 6 (4) (on collective action)
Luxembourg:	same
Poland:	same
Greece:	did not accept Articles 5 and 6 in full
Turkey:	same

Furthermore, Germany, the Netherlands and Spain, although they ratified Articles 5 and 6, made some reservations as to the application of these articles in particular in relation to public servants.

As for Germany, pensionable civil servants (“*Beamte*”), judges and soldiers are subject to special terms of service and loyalty under public law, based in each case on an act of sovereign power. Under the national legal system of the Federal Republic of Germany they are debarred, on grounds of public policy and State security, from striking or taking other collective action in cases of conflict of interest. Nor do they have the right to bargain collectively since the regulation of their rights and obligations in relation to their employers is a function of the freely elected legislative bodies. This does however not relate to the legal status of non-pensionable civil servants (*Angestellte*).

Regarding the Dutch Antilles, the (Kingdom of the) Netherlands accepted the application of articles 5 and 6 to all workers, but excluded the application of article 6 §4 (on collective action) for all civil servants

As for Spain, the Declaration of reservation prescribes that the rights contained in articles 5 and 6 of the Charter are applied as long as they are compatible with certain articles of the Spanish Constitution (e.g. articles 28, 37, 103.3 and 127) which allow for exceptions and limitations for certain categories of civil servants such as armed forces. (For more details see the country report on Spain in Part II).

## **2.4. How does monitoring work?**

The European Social Charter is provided with an internal system which allows the different bodies to control the state of application of the provisions of the Charter in the contracting Countries.

On the one hand, there is the monitoring *reporting procedure*, based on national reports, while on the other hand, there is the *collective complaints procedure*.

### **The monitoring procedure based on national reports**

Every year the Member States submit a report indicating how they are implementing the European Social Charter in law and in practice. These report look at some of the accepted provisions of the European Social Charter.<sup>14</sup>

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<sup>14</sup> Until 2007, in odd years the report concerned the ‘hard core’ provisions (Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20) and in even years the other provisions. As from 2007, a new reporting system is in force whereby the provisions of the Charter (1961 Charter and the Revised Charter) have been divided into four thematic



It should be highlighted that, according to Article 23 of the ESC, each State has the obligation to send copies of its national reports to the national trade union and employers' organisations which are members of the ETUC, BUSINESSEUROPE and IOE [International Organisation of Employers]. These national organisations have the right to submit remarks or comments on these national reports. In that case, the State concerned has the obligation to the ECSR to respond to any comments on the said reports received from these national organisations, if so requested. The national organisations can also directly forward their comments to the ECSR.

The national reports are examined by the **European Committee of Social Rights (ECSR)** which has the function of ascertaining whether countries have honoured the undertakings set out in the Charter. It is composed of 13 independent, impartial members elected by the Council of Europe Committee of Ministers for a period of six years, renewable once. The ECSR examines the reports and decides whether the situations in national law and practice in the countries concerned are in conformity with the Charter. Its decisions, known as 'conclusions', are published every year.<sup>15</sup>

A **Governmental Committee**, composed of representatives of the governments of the States which are party to the Charter, representatives of the European social partners participating as observers, and representatives of European employers' organisations (BUSINESSEUROPE and the International Organisation of Employers (IOE) and of trade unions (ETUC), considers decisions on non-compliance in the months following their publication.

The State concerned must be in a position to set out the measures which it has taken or which it is contemplating taking in order to remedy the situation and, in the latter case, has to provide a timetable for achieving compliance. In the event that the Governmental Committee considers that it is not envisaged to remedy a violation and take action on a decision of non-compliance, it may propose that the Committee of Ministers takes action against the non-complying State.

Every year, the Governmental Committee presents a report to the **Committee of Ministers**.<sup>16</sup> The Committee of Ministers is the Council of Europe's final decision-making body. It comprises the Foreign Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg. It is both a governmental body, where national approaches to problems facing European society can be discussed on an equal footing, and a collective forum, where Europe-wide responses to such challenges are formulated. In collaboration with the **Parliamentary Assembly**, it is the guardian of the Council's fundamental values, and monitors member states' compliance with their undertakings.

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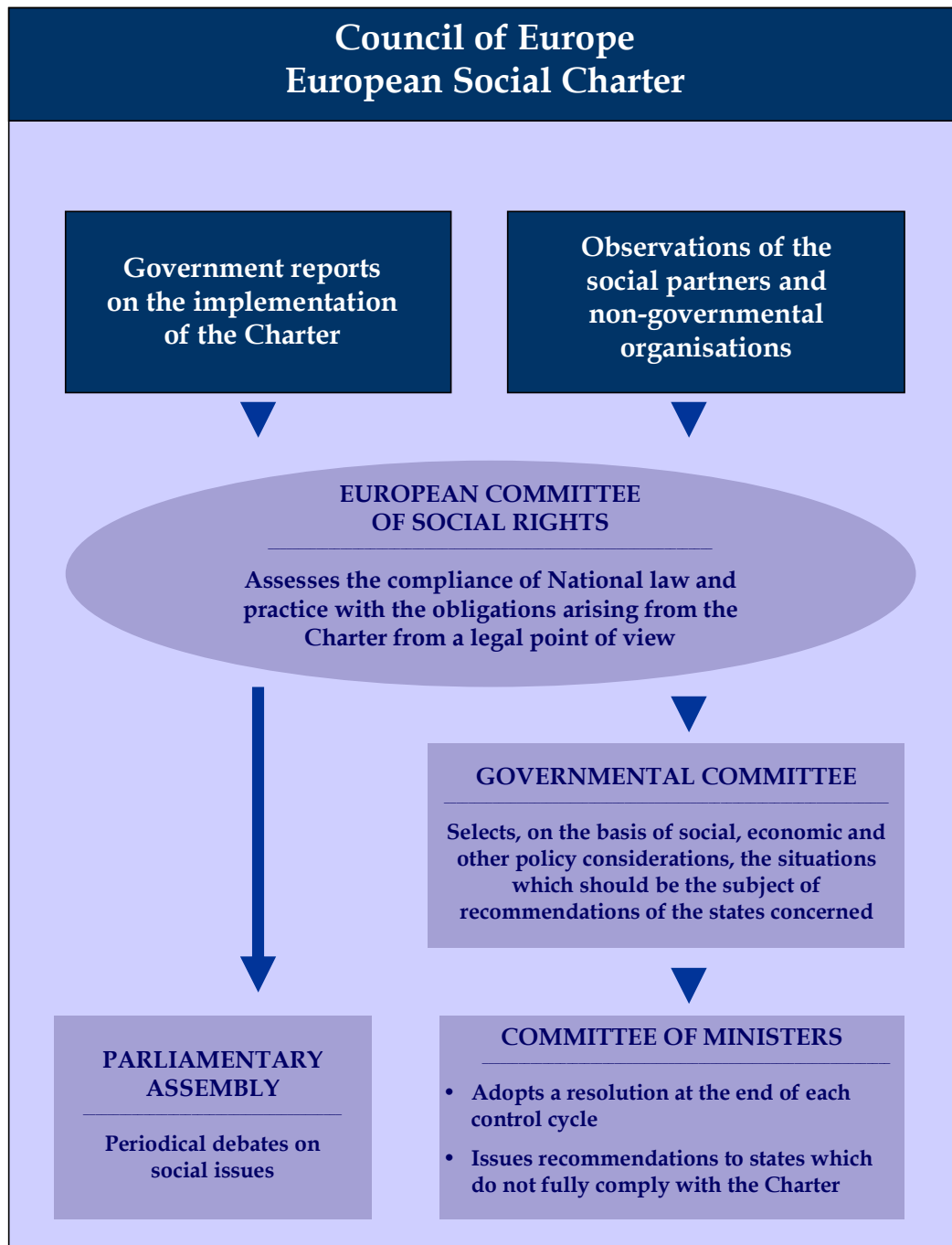
groups. States now have to present a report on a part of the provisions annually and each provision of the Charter will henceforth be reported on once every four years. The four thematic groups are: 'employment, training and equal opportunities', 'health, social security and social protection', 'labour rights' (including Articles 5 and 6 on trade union rights) and 'children, families and migrants'.

<sup>15</sup> Available at: [http://www.coe.int/t/e/human\\_rights/esc/3\\_reporting\\_procedure/2\\_Recent\\_Conclusions/default.asp#TopOfPage](http://www.coe.int/t/e/human_rights/esc/3_reporting_procedure/2_Recent_Conclusions/default.asp#TopOfPage)

<sup>16</sup> These are available at: [http://www.coe.int/t/e/human\\_rights/esc/3\\_reporting\\_procedure/3\\_Follow-up\\_to\\_the\\_Conclusions/default.asp#TopOfPage](http://www.coe.int/t/e/human_rights/esc/3_reporting_procedure/3_Follow-up_to_the_Conclusions/default.asp#TopOfPage)

The Committee of Ministers can either adopt resolutions at the end of each control cycle, or issue recommendations to the State concerned. A recommendation calls on the State concerned to take appropriate measures to remedy and change the situation in law and/or in practice.

## Control Procedure



Source: Social rights in Europe, Report carried out by Gérard Fonteneau (ETUC) and the Human Rights at Work Foundation, February 2002, ETUC

### Specific role of ETUC in this reporting procedure

As mentioned above, the ETUC is represented as an observer, with full speaking rights but no voting rights, in the Governmental Committee. It thus examines together with the governmental representatives each case of non-compliance and can call on the Governmental Committee to vote on a warning or recommendation for the state concerned if the alleged violation persists.

In order to do this effectively it is, however, crucial that the ETUC receives all relevant information on the actual state of play of the alleged violations. This is possible in different ways and at different stages:

- National organisations need first to submit comments on the national reports and send copies of these comments directly to the ETUC; unfortunately, not many ETUC affiliates do submit comments on the reports and ways will have to be found to improve this.
- Second, before each meeting of the Governmental Committee, the ETUC representatives in the Governmental Committee try to send the information on the most relevant and crucial cases of non-compliance which will be discussed at the meeting to the ETUC affiliates of the country concerned, with a request for feedback. This is done in particular in cases related to Articles 5 and 6. It is of pivotal importance that affiliates provide the necessary information on the current state of play relating to the alleged violation (solved, not solved, solution in process, and so on) as this information is then disseminated by the ETUC at the meeting of the Governmental Committee and can help to put pressure on the Governmental Committee to insist that the country remedies the situation as soon as possible or even trigger the adoption of a warning or a recommendation to the concerned state.

### Collective complaints procedure

Under the 1995 Additional Protocol providing for a system of Collective Complaints which came into force in 1998 complaints of violations of the Charter may be lodged with the ECSR.

The introduction of such a system has to be regarded as a complement to the supervisory machinery based solely on the submission of governmental reports, which naturally constitutes the basic mechanism for the supervision of the application of the Charter: the complaints procedure also increases the efficiency of the supervisory mechanism and, above all, increases the interest and involvement of management, and of social, labour and non-governmental organisations. The procedure provided for in the Protocol is also shorter than that for examining reports.

Only certain organisations are entitled to lodge complaints with the ECSR:

- a. **European Trade Union Confederation (ETUC)**, **BUSINESSEUROPE** and **International Organisation of Employers (IOE)**;
- b. **Non-governmental organisations (NGOs)** with consultative status with the Council of Europe which are on a list drawn up for this purpose by the Governmental Committee;<sup>17</sup>

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<sup>17</sup> For a full overview of the organisations entitled to lodge complaints:

[http://www.coe.int/t/e/human\\_rights/esc/4\\_collective\\_complaints/organisations\\_entitled/OING\\_List\\_en.pdf](http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/organisations_entitled/OING_List_en.pdf)

- c. Employers' organisations and trade unions in the country concerned; and only if the concerned state has explicitly accepted this;
- d. National NGOs. *(For the moment only Finland has accepted this possibility!)*

The ECSR examines the complaint and, if the formal requirements have been met, declares it admissible. Once the complaint has been declared admissible, a written procedure is set in motion, with an exchange of memoranda between the parties. The information on each complaint is also sent to ETUC, BUSINESSEUROPE and the IOE who are invited to also submit their observations on the complaint. If necessary, the ECSR may decide to hold a public hearing and only the parties which have submitted written observations will be invited to this hearing.

The ECSR then takes a decision on the merits of the complaint, which it forwards to the parties concerned and the Committee of Ministers in a report, which is published at the latest within four months of its being sent out. Finally, the Committee of Ministers adopts a resolution. If appropriate, it may recommend that the state concerned take specific measures to bring the situation into line with the Charter.

## Collective Complaints Procedure



Source: Social rights in Europe, Report carried out by Gérard Fonteneau (ETUC) and the Human Rights at Work Foundation, February 2002, ETUC

So far (December 2007), only the following countries have ratified the Protocol on collective complaints procedure: Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia and Sweden.

For an overview of all decisions on the admissibility and the merits of collective complaints lodged see: [http://www.coe.int/t/e/human\\_rights/esc/4\\_collective\\_complaints/List\\_of\\_collective\\_complaints/default.asp#TopOfPage](http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/List_of_collective_complaints/default.asp#TopOfPage)

#### **Specific role of the ETUC in the collective complaints procedure**

The ETUC has a twofold function in the procedure, i.e. as actual complainant itself or as organisation which has the possibility of submitting observations on all introduced complaints and this irrespective of the organisation that has submitted the complaint and the State against which the complaint is addressed! Depending on the alleged violation, the ETUC decides in consultation with the national affiliates of the country concerned what is the best Action to be taken.

First, the ETUC is indeed listed amongst those organisations which can file a collective complaint against a state which has ratified the Collective Complaints procedure. So far, this has happened only once, in a case against Bulgaria on violations of the trade union rights of public servants (collective complaint n° 32/2005). In sum, the ETUC will only be a complainant against a state if:

- such a request is received from and/or supported by all ETUC affiliated trade unions of the country concerned; and
- it concerns a very serious and long standing case of violation, in particular on trade union rights;
- it will always act as co-complainant next to the national trade union organisations.

As already mentioned, in all other collective complaints which are submitted to the ECSR, the ECSR has the obligation to inform the ETUC of these complaints and request it to submit observations. In the meantime, a system has been set up within the ETUC whereby all information received on submitted collective complaints is forwarded to all ETUC affiliates in the given country with a request to:

- advise the ETUC whether it is considered necessary to submit observations;
- if so, provide detailed information which the ETUC can then integrate in its observations.

However, it is very unlikely that the ETUC will submit its observations if not all ETUC affiliates of that country consider it worthwhile to do so!

The submission of observations by the ETUC also has as an advantage that if the ECSR decides that there is a need, next to the written procedure, to hold a hearing, the ETUC will be invited to attend this hearing and express its views.

As already mentioned, the ETUC prefers, except in very serious cases, that national trade union organisations themselves file the complaint as that offers them the possibility via the ETUC observations to provide additional information/arguments on the alleged violations and also ensures that, if necessary, the ETUC can be present at any hearing which might be organised.

## **5. Collective complaints relating to trade union/workers' rights in the public sector (state of play December 2007)**

### ***No. 43/2007, Sindicato dos Magistrados do Ministério Público (SMMP) v. Portugal***

The complaint registered in April 2007 relates to the right to social security. It is alleged that staff of the Public Prosecutor's Office in Portugal are excluded from the Social Welfare Service of the Ministry of Justice (Legislative Decree No. 212/2005 of 9 December 2005).

### ***No. 40/2006, European Council of Police Trade Unions (CESP) v. Portugal***

The complaint registered in February 2007 relates to the right to bargain collectively, to information and consultation and to take part in the determination and improvement of working conditions and the working environment. It is alleged that in practice police officers do not enjoy these rights in Portugal. The complaint was declared admissible in May 2007.

### ***No. 38/2006 European Council of Police Trade Unions (CESP) v. France***

The complaint relates to the right to an increased rate of remuneration for overtime work. It is alleged that French legislation does not allow the Operational Command Corps of the National Police Force, which is classified as an A-grade body within the national civil service, to receive compensation for the overtime worked as a result of anti-governmental demonstrations held in France in the first half of 2006. The complaint was declared admissible in March 2007.

### ***No. 37/2006 European Council of Police Trade Unions (CESP) v. Portugal***

The complaint relates to the right to adequate remuneration, the right to an increased rate of remuneration for overtime work and the right to collective bargaining: joint consultation and machinery for voluntary negotiations. It is alleged that the Portuguese state has not observed the democratic rules of collective bargaining, having decided unilaterally to apply to the criminal investigation personnel of the Criminal Police a rule reducing their basic pay by 25%, thus avoiding payment of the on-call bonus. The complaint was declared admissible in December 2006.

### ***No. 36/2006 Frente Comum de Sindicatos da Administração Pública v. Portugal***

The complaint relates in particular to the right to bargain collectively. It alleges a breach of the right to collective bargaining and discrimination, since the Government refused to continue negotiations with the complainant organisation on issues related to the General Employees' Statute. The complaint was declared inadmissible in December 2006.

### ***No. 32/2005 European Trade Union Confederation (ETUC), Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour 'Podkrepa' (CL 'Podkrepa') v. Bulgaria***

The complaint relates to the right to strike. It is alleged that the right to strike is restricted in several sectors of the economy in a manner that is not in conformity with the Revised Charter. The ECSR decided that indeed on all grounds Bulgaria was in violation of the provisions of the Charter.

**No. 29/2005 *Syndicat des hauts fonctionnaires (SAIGI) v. France***

The complaint relates to the right to organise. It is alleged that there are no effective remedies in the event of a breach of the right to organise where the State is acting as an employer. The complaint was declared inadmissible in June 2005.

**No. 26/2004 *Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France***

The complaint relates to the right to organise. It is alleged that French legislation impairs the freedom to organise since Decree No. 89-1 on the National Council for Higher Education and Research (*Conseil national de l'enseignement supérieur et la recherche – CNESER*) does not guarantee collective legal remedies. The complaint was declared admissible alleging in substance a violation of the right to organise.

**No. 25/2004 *Centrale générale des services publics v. Belgium***

The complaint relates to the right to collective bargaining: joint consultation and machinery for voluntary negotiation. It is alleged that Belgium does not guarantee the effectiveness of the legislation on the exercise of the right to collective bargaining in the Belgian public sector. The ECSR concluded that there was no violation.

**No. 24/2004 *Syndicat SUD Travail Affaires Sociales v. France***

The complaint relates to the prohibition of all forms of discrimination in employment. It is alleged that under the Labour Code (Article L.122-45) numerous categories of workers are excluded from protection against discrimination in employment. The ECSR concluded that there was a violation.

**No. 23/2003 *Syndicat occitan de l'éducation v. France***

The complaint relates to the right to organise and the right to collective bargaining. It is alleged that the prohibition on non-representative professional organisation presenting candidates in professional elections violates these provisions. The ECSR concluded that there was no violation.

**No. 11/2001 *European Council of Police Trade Unions v. Portugal***

The complaint relates to the right to organise and the right to collective bargaining. It is alleged that members of the *Polícia de Segurança Pública* are not guaranteed these rights. The ECSR concluded that there was no violation.

**No. 5/1999 *European Federation of Employees in Public Services (EUROFEDOP) v. Portugal***

The complaint relates to the right to organise and the right to bargain collectively. It is alleged that the armed forces are denied these rights. The ECSR concluded that there was no violation.

**No. 4/1999 *European Federation of Employees in Public Services (EUROFEDOP) v. Italy***

The complaint relates to the right to organise and the right to bargain collectively. It is alleged that the armed forces are denied these rights. The ECSR concluded that there was no violation.

**No. 3/1999 European Federation of Employees in Public Services (EUROFEDOP) v. Greece**

The complaint relates to the right to organise and the right to bargain collectively. It is alleged that the armed forces are denied these rights. The complaint was declared inadmissible.

**No. 2/1999 European Federation of Employees in Public Services (EUROFEDOP) v. France**

The complaint relates to the right to organise and the right to bargain collectively. It is alleged that the armed forces are denied these rights. The ECSR concluded that there was no violation.

**2.6. Articles 5 and 6 on the right to organise, collective bargaining and collective action – an overview of the case law in relation to the public sector**

**Introduction**

As for the subject of this report on the guarantee and respect of trade union rights in the public sector, the most relevant articles of both the European Social Charter and its revised version of 1996 are Articles 5 and 6. These articles state:

**Article 5 – The right to organise**

*With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.*

**Article 6 – The right to bargain collectively**

*With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:*

- 1. to promote joint consultation between workers and employers;*
  - 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;*
  - 3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;*
- and recognise:*

*the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.*

An overview follows of the main orientations of the ECSR case law on these articles is provided, particularly in relation to the public sector.



## Article 5 – The right to organize

*With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.*

Since the beginning of its supervision activity, the ECSR has outlined that in this provision there are two obligations: the first requires the absence of any legislation or regulation or any administrative practice such as to impair the freedom of employees or workers to form or join their respective organisations; by virtue of the second obligation ‘the Contracting States are obliged to take adequate legislative or other measures to guarantee the exercise of the right to organise and in particular to protect workers' organizations from any interference on the part of the employers' (Conclusions I, p. 31).

National legislation and practice have revealed different forms of restrictions in the public sector, but these are not necessarily contrary to the requirements of Article 5, if viewed in the light of Article 31.<sup>18</sup>

The freedom to organise implies that trade unions and their members have the possibility to act freely in pursuance of the protection of their economic and social interests, this protection being itself, in the wording of Article 5, the very reason for constituting workers' and employers' organisations.<sup>19</sup>

This statement implies first of all a certain connection between Article 5 and Article 6, at para. 2<sup>20</sup>, where it ‘presupposes the guarantee of a complete freedom to organize’ (Conclusions IV, p. 46). The Committee has also stated that ‘a precondition of satisfactory compliance with the provisions arising out of art. 6.2 is the full observance of art. 5’ (Conclusions VI, p. 36). As a consequence, a State that is found not in conformity with Article 6, paragraph 2 will often be found not to be complying with Article 5 either, and the other way round.

In this perspective, we can underline an issue particularly related to the public sector regarding intervention in the conduct and organisation of lawful strikes.

The Committee does not consider the right to take collective action to be within Article 5, being confined solely to Article 6 (4), but in Supervision Cycle XII it had the opportunity to make an important statement with regard to a German case: in Germany, on several

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<sup>18</sup> Human Rights Social Charter Monographs No. 5 (October 2001), *The right to organise and to bargain collectively*, 2<sup>nd</sup> edition, Council of Europe Publishing.

<sup>19</sup> Samuel, L. (2002), *Fundamental social rights. Case law of the European Social Charter*, 2<sup>nd</sup> edition, Council of Europe Publishing, 104–119.

<sup>20</sup> “to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements”

occasions civil servants had been seconded to replace striking employees and manual workers *who were members of the same trade union*.

The Committee considered that ‘interventions of this kind by public authorities in the conduct and organization of a lawful strike could constitute a restriction on the rights and freedoms guaranteed by art. 5 particularly in cases where unionized civil servants are required to replace employees or manual workers *belonging to the same trade union*’ (Conclusions XII-2, p. 99).<sup>21</sup>

Article 5 does not permit any restriction to be imposed on the right of civil servants to organise (Conclusions I, p. 8).

In order to monitor freedom of affiliation, the Committee examines national situations closely through questions laid down in the questionnaire used to draw up the national reports. Question A requests specific information on any special laws or regulations applying to the formation and joining of organisations by public servants and other persons employed by public authorities.

The ECSR noted that the countries who prohibit their civil servants from joining organisations other than those composed exclusively of public officials do not comply with Article 5, as restrictions on the freedom of civil servants' trade unions to affiliate in federations or confederations are also incompatible (Conclusion II, p. 184).<sup>22</sup>

The Committee agreed that public servants' trade union rights could be subject to certain restrictions, but that these should fall within the scope of Article 31:<sup>23</sup>

#### **Article 31 – Restrictions:**

*1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.*

*2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.*

These principles were applied in respect of the situation created at Government Communications Headquarters at Cheltenham (GCHQ) in 1984, when the UK Government prohibited the *civilian* employees from joining, forming or remaining members of a trade union, on grounds of national security, GCHQ being a security and intelligence agency concerned with military and official communications.

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<sup>21</sup> However, the case was already pending before the Constitutional Court and in Cycle XIII the Committee noted that the judgment was that this type of requisition was unconstitutional unless the matter was expressly regulated by law. The Committee therefore referred to its observations under Article 6 (4) (Conclusions XIII, p. 269).

<sup>22</sup> This had happened in Cyprus, but was put right in 1980 by Public Service Law No. 31, abolishing these restrictions (Conclusions VII, p. 31).

<sup>23</sup> Article 31 in the 1961 version; Article G in the Revised European Social Charter.

Accepting that restrictions on Article 5 are admissible only on the basis of Article 31 and that these restrictions were based on an internal law, due to the particular status of GCHQ and the nature of its activity, essential to *national security*, the Committee found the situation not to be in breach of the Charter and not to exceed the limits prescribed in Article 31 (Conclusions XI,-1, p. 83).<sup>24</sup>

### ***Police and armed forces***

These groups of public sector employees deserve particular attention, given the huge number of cases that have been raised with regard to the restrictions provided by the ESC itself and their application by the Contracting Parties.

In the third supervision cycle, the Committee clearly states the situation regarding the police and armed forces as public employees: the second part of Article 5 has to be read carefully, and the ECSR makes it clear that

Art. 5 guarantees the full enjoyment of the freedom to organize, in principle to every category of employer and workers, including public officials. If the text of the article allows the complete suppression of the right of members of the armed forces to organize, comparisons of the second and third sentences of art. 5 and the “*travaux préparatoires*”, make it clear that the Contracting Parties may only limit the freedom of the police to organize on condition that its members are not deprived of *all* the rights guaranteed by this article.

As in the first cycle (Conclusions I, 31), the Committee repeats that, regarding police officers, if restrictions are allowed it is not justified to deprive them entirely of the guarantees of art. 5.

It is also crucial to underline that a distinction exists between the right to establish a union and to join it and the right of negotiation and collective action, provided for in Article 6. The one does not imply the other (Conclusions II, 22).

As far as ***police forces*** are concerned, total suppression of the right to organise is not compatible with the Charter.

Contracting Parties are also not in compliance with Article 5 if:

- they forbid policeman to set up their own trade union or to join a trade union of their choice;
- oblige policemen to join a trade union imposed by statute, even if the statutory or other compulsory body effectively engages in collective bargaining.

It is possible to restrict members to joining or forming organisations composed exclusively of their own members (Conclusions X-2, 68), although they can federate with other trade unions constituted solely of police officers (Spain). But any police association should be

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<sup>24</sup> Nevertheless, the Committee ‘wondered whether the government's decision denoted a “restriction or limitation of the right to organize”, in accordance with art. 31, or a total abolition of that right, which would be contrary to the Charter” (Conclusions X-1, p. 80). In cycle XI it noted that GCHQ Staff Federation, officially set up in 1985, had been registered as a trade union and given the right to negotiate on behalf of its members. The membership of the federation was also optional and its members belong to all the categories of staff employed.

able to exercise certain trade union-type prerogatives, such as the right to negotiate their conditions of service and remuneration and the right to assembly (Conclusions X-2, 67; the UK, Cyprus, Portugal and Spain are involved in this provision).

Moreover, membership must not be compulsory, to protect the negative right to organise (Conclusions X-1, 68).

**Members of the armed forces** can be entirely and legally deprived of the right to organise, as confirmed in the preparatory works and documents to the Charter. For the moment, in France and Spain, the situation of semi-military bodies (such as the Gendarmes and the Civil Guard) is under examination. A number of complaints have been launched under the Collective Complaints Procedure, but so far they have always received a negative response from the Committee.<sup>25</sup>

Besides complaints from organisations entitled to make them, the Parliamentary Assembly<sup>26</sup> of the Council of Europe also takes an active part in the debate concerning the right of association of members of the armed forces.<sup>27</sup>

In a 2001 motion for a Recommendation,<sup>28</sup> the Assembly, considering that a previous Assembly Resolution<sup>29</sup> on the right of association for members of the professional staff of the armed forces had made no significant progress, 'recommends that the Committee of Ministers reconsider this issue and promote the acceptance in all member states of the right of members of the armed forces to join and participate in specific associations formed to protect their professional interests within the framework of democratic institutions' (par. 3).

In 2002,<sup>30</sup> the Parliamentary Assembly called again on all member states of the Council of Europe to grant professional staff of the armed forces, under normal circumstances, the right of association – though with a prohibition of the right to strike – and to implement the ESC. It denounced the fact that the right to organise of members of the professional staff of the armed forces was still not recognised in all member states of the Council of Europe, and that several member states that did recognise this right imposed severe restrictions.

This does, however, underline that in recent years armies in some member states have been undergoing transformation from a largely conscript-based system to a purely professional one, so increasingly becoming 'regular' employers: members of armed forces in these circumstances should be fully eligible for the employees' rights established in the European Social Charter, as 'citizens in uniform'. They should enjoy the full right, when the army is not in action, to establish, join and actively participate in specific associations formed to protect their professional interests within the framework of democratic institutions, while

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<sup>25</sup> See pages 53-55 of this report.

<sup>26</sup> [http://assembly.coe.int/ASP/Doc/ATListing\\_E.asp](http://assembly.coe.int/ASP/Doc/ATListing_E.asp)

<sup>27</sup> See among others Resolution 903 (1988); Recommendation 1380 (1998); Order No. 539 (1998); Resolution 1166 (1998).

<sup>28</sup> Document 9080, 4 May 2001.

<sup>29</sup> 903 (1988).

<sup>30</sup> With Recommendation 1572, based on Doc. 9518 and 9532.

performing their service duties. Therefore, the Assembly not only recommends that the Committee of Ministers calls on the governments of the member states to allow members of the armed forces and military personnel to organise themselves in representative associations with the right to negotiate on matters concerning salaries and conditions of employment, but also calls on the Committee of Ministers itself to examine the possibility of revising the text of the revised European Social Charter by amending its Article 5 to read: *‘the extent to which the guarantees provided for in this article shall apply to the police and the members of the armed forces shall be determined by national laws or regulations.’*

The reply from the Committee of Ministers in 2003<sup>31</sup> was that in many member states members of the armed forces and military personnel have the right to organise and to bargain collectively and that it would like all member states to study the various examples.

Nevertheless, with regard to the proposal to amend the text of Article 5 by deleting the third sentence, relating exclusively to members of the armed forces, and to add this category to the second sentence presently covering only the police, the Committee noted the procedure for amendments contained in Article J, which provides that proposals for amendments must be examined by the Governmental Committee, the text adopted submitted to the Committee of Ministers for approval after consultation with the Parliamentary Assembly and, after approval by the Committee of Ministers, forwarded to the Contracting Parties (i.e. the countries) to the Charter for acceptance. Any amendment will enter into force only in respect of those Contracting Parties that have accepted it.

The Assembly’s proposal seems far from likely to be accepted at present, since the Governmental Committee has not backed the text of an amendment to Article 5 along the lines suggested, opinions being divided in the Committee (9 delegations in favour, 15 against and a large number of abstentions).<sup>32</sup>

The latest relevant document is Parliamentary Assembly Recommendation 1742 (2006) concerning ‘Human rights of members of the armed forces’,<sup>33</sup> in which the Assembly declares that

*[T]he army is the institution which is responsible for protecting the State and defending the community [and] considers that members of the armed forces are citizens in uniform who must enjoy the same fundamental liberties, including those set out in [the European Convention on Human Rights and] the European Social Charter, within the limits imposed by the specific exigencies of military duties,*

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<sup>31</sup> Doc. 9885, 21 July 2003.

<sup>32</sup> During discussions held by the Governmental Committee on this proposal, some delegations indicated that they were not in a position to take a decision on it at this stage. It also appeared that national delegations were divided: 9 of them stated that they could accept the proposal; 15 of them expressed the opposite opinion on the grounds that their national legislation did not recognise union rights for military personnel. One delegate stated that her country objected to this proposal only in relation to the right of members of the professional staff of the armed forces to join political parties.

<sup>33</sup> Parliamentary Assembly, Recommendation 1742 (2006) on Human rights of members of the armed forces of 11 April 2006 (available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1742.htm>) and based on Doc. 10861 of 24 March 2006 on Human rights of members of the armed forces (Report of the Committee on Legal Affairs and Human Rights - Rapporteur: Mr Alexander Arabadjev, Bulgaria, Socialist Group – available at: <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc06/EDOC10861.htm>)

*especially with the ending of conscription and the professionalization of the armed forces in several countries ... Any restrictions on the exercise and enjoyment by members of the armed forces of the mentioned right must fulfil the following specific criteria: they must have a legitimate aim, be strictly justified by the needs and specificities of military life, discipline and training, and be proportional to the aim pursued; they must be known, be provided for and strictly defined by law and comply with the provisions of the Constitution; they must not unjustifiably threaten or jeopardize the physical or mental health of members of the armed forces.*

## **Article 6 – The right to bargain collectively**

*‘With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:*

- 1. to promote joint consultation between workers and employers;*
- 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;*
- 3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;*

*and recognise:*

- 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.’*

Collective bargaining is one of the core means by which an employee or employer organisation protects and furthers its members' interests.

Although the ECSR has already held in relation to Article 5 that the right to bargain collectively is a fundamental trade union prerogative, Article 6 is explicit in guaranteeing this right and requiring contracting parties to undertake certain measures to ensure its protection.

### **Paragraph 1: Joint consultation**

*‘With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake ... to promote joint consultation between workers and employers’*

In the first supervision cycle the ESCR interpreted this paragraph *‘as meaning that any contracting state which has accepted it is bound to take steps to promote joint consultation between workers and employers, or their organizations, on all matters of common interest and on the following questions among others: productivity, efficiency, industrial health, safety and welfare’* (Conclusions I, pp. 34–35).

The personal scope of this provision covers all employed persons, but not the self-employed. The ECSR also explicitly held that *“the provisions of art. 6 as a whole to be applicable not only to employees in the private sector, but also to public officials subject to regulations, though with the modifications obviously necessary in respect of persons*

*bound not by contractual conditions but by regulations laid down by the public authorities. Article 6 para. 1 can only be regarded as respected where such officials are concerned if consultation machinery is arranged for the drafting and implementation of regulations, which should not give rise to any special difficulty.” (Conclusions III, p. 33)*

Public employees whose employment is governed by a contract are covered by this paragraph in the same way as private employees. The ECSR therefore always requests information from the Contracting Parties on how joint consultation is being organised in the public sector.<sup>34</sup>

**Art. 6 paragraph 2: Promotion of machinery for voluntary negotiations.**

*‘With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake ... to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.’*

According to the ECSR's interpretation, in accepting the terms of this provision, the Contracting Parties undertake not only to recognize, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreements if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other. Where adequate machinery for voluntary negotiation is set up spontaneously, however, the Government in question is not bound to intervene in the manner prescribed in this paragraph. (Conclusions I, p. 35)

As regards public employees, the ECSR pointed out that even though, in the case of those whose employment was subject in some degree to regulation by law (and not by a contract of employment), it was not possible for the ordinary collective bargaining procedures to apply, these employees must nevertheless participate in the drafting of the regulations which were to apply to them.<sup>35</sup>

This interpretation was confirmed once again in the tenth supervision cycle in connection with the situation in Spain, where paragraph 2 of Article 6 was not infringed, as the law authorised the most representative trade unions to participate in the determination of working conditions, including remuneration, in the civil service.<sup>36</sup>

More recently, the ECSR examined the practice of the unilateral imposition of a wage freeze in the public sector in Spain, despite the existence of a collective agreement between the public administration and the trade unions for the period. On that occasion, it noted that certain limitations on the right to collective bargaining on the part of public employees might not be incompatible with the Charter, but where a general agreement has

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<sup>34</sup> Conclusions V, p. 42 – France; Conclusions XI-2, p. 77 – Spain; Conclusions XIII-3, p. 114 – Malta; Conclusions XIII-3, p. 275 – Portugal; Conclusions XIII-5, p. 59 – Finland; Conclusions XIV-1, Vol. 1, p. 418 – Ireland; Conclusions XV-1, Vol. 2, p. 635- UK.

<sup>35</sup> Conclusions III, p. 34 – Germany and Conclusions IV, p. 45 – Austria.

<sup>36</sup> Conclusions X-2, p. 73; also Conclusions XIV-1, p. 299 – Germany; and Addendum to Conclusions XV-1, p. 155-156 – Poland.

been concluded and duly adopted by the authorities, any unilateral infringement of its terms could be justified only with reference to Article 31. Although the wage freeze in question was prescribed by law, it had not been documented that *‘it was necessary in a democratic society or the protection of the rights of others or for the protection of public interest, national security, public health or morals’* (Conclusions XV-1, Vol. 2, pp. 517-18).

The ECSR also pointed out, in connection with Germany, that while it was impossible to draw up proper collective agreements for civil servants subject to regulations, Article 6, paragraph 2 nonetheless entails the obligation to arrange for the participation of those concerned, through the intermediary of their representatives, in the drafting of the regulations which are to apply to them (Conclusions III, p. 34).

### **Art. 6 paragraph 3: Conciliation and arbitration**

*‘With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake ... to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes.’*

The ECSR is particularly concerned with the question of conciliation and arbitration in the public sector (Conclusions V, p. 46; VIII, pp. 92–93).

Several countries have been found not to be complying with this provision. Often in the civil service and local government, there is no regulatory procedure for conciliation, mediation or arbitration to settle conflicts of interest which may arise between the administration and its employees, even if in practice a mediator is sometimes appointed; in these cases it is not necessary for the parties involved to accept its conclusions for the situation to be in conformity with the Charter.

With regard to the armed forces in particular, the Parliamentary Assembly suggested that the Committee of Ministers call upon member states to examine the possibility of setting up the office of an ombudsman to whom military personnel could apply in case of labour and other service-related disputes. The Committee of Ministers, in its reply to Parliamentary Recommendation 1572 (2002), considers that such an institution could certainly be useful for regulating disputes of the kind in question. There may be other options, however, that would be equally useful. Consequently, it considers that it is up to the individual member states to decide how they wish to regulate labour disputes involving military personnel, provided basic principles of justice apply to such procedures.

### **Art. 6 paragraph 4: Right to strike in the European Social Charter.**

*‘With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties recognise the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.’*

Public employees’ right to strike is a controversial issue in many countries. Nowadays, the arguments against recognition of the right to strike for public employees are that public service strikes inflict more damage on the public than on the employers, as they interrupt the ‘essential services’ that the state needs to continue to provide to the population in general.



Another very common argument is that increasing strike action by public employees may be a major threat to the balance of public finances and indirectly curtail general efforts to implement anti-inflationary incomes policies.<sup>37</sup>

The European Social Charter of 1961 was the first instrument explicitly requiring the protection of the right to strike adopted by the Council of Europe.

Some have pointed out<sup>38</sup> that the right set out in Article 6 (4) of the ESC is somehow particularly circumscribed: comparing the supervisory procedure attached to the Charter with the quasi-judicial process established for the protection of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950, it seems that the right to strike is considered, as one of the socio-economic rights, somehow of inferior status to civil and political ones, which receive greater protection.<sup>39</sup>

On the other hand, in 1951 the Committee of Ministers adopted two resolutions which established the power to conclude agreements both with ‘any intergovernmental organization’ on matters within the Council’s competence and with the ILO, opening up the possibility for the Council to convene European conferences of a tripartite nature on topics that did not seem to be part of its core concerns.

Both ECHR and ESC recognise freedom of association and the right to join and be active as a member of a trade union, but only the ESC expressly recognises a right to strike.

Though there is a partial overlap of the two instruments, the ESC’s socio-economic entitlements are not all guaranteed as minimum standards, and the Contracting Parties only have the obligation to *promote* these rights (Article 6, paragraphs 1–3), not positive obligations.

Under both international and European law, states may place legal restrictions on the right of members of the police and the armed forces to take industrial action.

The definition of ‘civil servants’ as employees in state/governmental central and local administrations is quite plain in the various member states, and therefore the scope of application of the restrictions on their right to strike is clear.

What is more controversial is the extent to which **‘public servants’** are entitled to strike.

The definition of the ‘essential services’ that have to be guaranteed over the right to strike of workers, and the functions of these workers, differ from state to state: the rights to organise, to bargain collectively and, consequently, to take action for the protection of interests are subject to different restrictions in national legislation, in conformity or not with the **restrictions** allowed by **Article 31/G**:

*“The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or*

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<sup>37</sup> This argument has been strongly supported by employers’ organisations.

<sup>38</sup> T. Novitz (2002), *International and European protection of the right to strike*, Oxford University Press, pp. 125ff.

<sup>39</sup> The 1993 Declaration of Vienna required member states to sign the ECHR and to accept its entire supervisory process in a short time, without mentioning the ESC in this context.

*limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.*

*The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.”*

The Appendix to Article 6 paragraph 4, furthermore declares:

*“It is understood that each contracting party may, in so far as it is concerned, regulate the exercise of the right to strike by law, provided that any further restrictions that this might place on the right can be justified under the terms of Art. 31.”*

The provision only intends to make clear that the restrictions mentioned in Article 31 are applicable to the paragraph, in addition to those which the latter contains, namely the obligations arising out of collective agreements.

Article 6 paragraph 4, (unlike Article 5) lists no category of persons upon whom restrictions may be imposed. Nevertheless it is not incompatible with the Charter to restrict the right of certain categories of civil servants (or other workers) to strike if not in accordance with Article 31.

In relation to civil servants, but also public employees, the ECSR has stated:

*“as regards the right of public servants to strike, the Committee recognizes that, by virtue of art. 31, the right to strike of certain categories of public servants may be restricted, including members of the police and armed forces, judges and senior civil servants. On the other hand, the Committee takes the view that a denial of the right to strike to public servants as a whole cannot be regarded as compatible with the Charter.”*

Many Contracting Parties restrict the right of certain categories of public employees to strike; where a Contracting Party merely limits, for example, the right of members of the police, the judiciary, the fire brigade or the prison service to strike, it is in compliance, in principle, with the Charter.

In the ESC framework, in some cases the interpretation of Article 31 has been 'generous', and has included situations in which the restrictions are justified *'for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health'*.<sup>40</sup>

On the other hand, the ECSR has often stated that governments cannot prohibit *all* civil servants from striking because not all of them do work to which Article 31 will apply.<sup>41</sup>

Moreover, sometimes the ECSR and the Governmental Committee did not take the same view: in the case related to Germany and the ban on strike action by *'Beamte'*, the ECSR

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<sup>40</sup> Conclusions X-1, 68–69.

<sup>41</sup> Conclusions I, p. 39; Conclusions III, 36.

(as well as the Parliamentary Assembly which took the same line) found that this treatment was in breach of Article 6 paragraph 4, while the Governmental Committee underlined that Article 31 'would permit a government to take measures depriving certain functionaries and other employees in the public service of the right to strike'.<sup>42</sup>

**Restrictions on the right to strike**<sup>43</sup> exist above all in the public services, to which special rules apply in all Council of Europe countries. For instance, in Doc. 10546 of 11 May 2005, the Parliamentary Assembly notes that:

*“In Italy, for example, public services are treated as necessary for the realization of fundamental rights and are established in the Constitution, considered universal, their aim being to promote economic and social development.*

*In Germany, Austria, Denmark and Estonia, public servants do not have the right to strike either, in order to ensure the continuity of public services and in return for security of employment.*

*In Turkey, a law barring public servants from striking was passed in 2001. In Poland, a 1991 act limits strikes that are considered detrimental to life and health or that threaten state security.*

*There are similar restrictions in Slovakia, Slovenia. In Hungary, in addition to legal restrictions, certain constraints are imposed on the civil service under an agreement between civil-service unions and the Ministry of the Interior. The parties have a legal duty to reach agreement in order to allow a minimum service to be maintained, in particular for transport and electricity, gas and water supply during the pre-strike negotiation and arbitration periods. In these European countries legislation includes compulsory social-harmony clauses for trying to avoid strikes. In particular, the duty to preserve social harmony prohibits all industrial action during the negotiation of collective agreements, also known as ‘conciliation periods’.”*

The armed forces and law enforcement agencies are not allowed to strike almost anywhere.

The reason for such legislation is that, in general, strikes in **essential services** can cause the public significant harm in relation to their lives or liberties.

The ECSR views the concept of essential services and enterprises as including the hospital sector, the electricity sector, transport, water and food supply, waste disposal, communications and air traffic control. Like all restrictions on the right to strike, prohibition or limitation of the right to strike in essential public services is assessed in the light of compliance with the Charter’s Article 31/G: any restriction must be founded in domestic law, and the law must be sufficiently precise, accessible and predictable, and pursue a legitimate aim. Besides, the restrictions must be justified as regards ensuring respect for the rights and freedoms of others or safeguarding public interest, national security, public health or morals.

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<sup>42</sup> ESC Governmental Committee, 1st report, Committee of Ministers/Del/Concl. (61), 96.

<sup>43</sup> Doc. 10546, 11 May 2005, Parliamentary Assembly; [http://assembly.coe.int/ASP/Doc/DocListingNum\\_E.asp?selCriteres=num&num=10546&Submit=Search](http://assembly.coe.int/ASP/Doc/DocListingNum_E.asp?selCriteres=num&num=10546&Submit=Search)

In general terms, a ban on strikes in sectors considered essential to the life of the community is deemed to pursue a legitimate aim to the extent that a work stoppage could imperil public interest, national security or public health or is necessary in a democratic society. The concept of necessity presupposes that the restriction corresponds to a social imperative and is proportionate to the legitimate aim pursued. The test of proportionality involves weighing the prejudice to the individual or group against the prejudice to the 'state'.

An outright prohibition of strike action in a sector regarded as essential, without a distinction being drawn according to the functions of the staff concerned – particularly where the sector is broadly defined, for instance energy or health – is not viewed as a measure proportionate to the demands of the sectors in question.

On the part of the different Contracting Parties, national legislation sometimes also tries to regulate how the right to strike is exercised in these 'crucial' sectors.<sup>44</sup>

The wording of Article 6 paragraph 4 has led the ECSR to defer to the content of collective agreements. In Conclusions I, the ECSR has stated that governments may prohibit industrial action in essential services, if compatible with Article 31, this compatibility depending 'on the extent to which the life of the community depends on the service involved', which has to be decided case by case.

Also, the **extent or length of a strike** in what are 'non-essential' services may provide sufficient reason for a government to intervene, if the superior interests which Article 31 aims to protect are endangered.

The **response to a strike in essential services** by governments should be regulated appropriately, in the ECSR's opinion, with the imposition of procedural requirements. The ECSR is willing to contemplate a 'cooling off' period of up to three weeks where 'the strike affects vitally important functions or causes serious harm to the public good' (Conclusions XIV-1, 219).

Where it does not concern an essential service, in the strict sense of the term, but a total or prolonged stoppage could result in serious consequences for the public, the ECSR favours the establishment of a '**minimum service**'. It should be '*confined to operations that are strictly necessary to avoid endangering the life or normal living conditions of the whole or part of the population*' (Conclusions XII-2, 117).

With the exception of the United Kingdom, where there is no minimum or guaranteed service, most Council of Europe countries have regulated a certain minimum service in the event of a strike in essential services. Generally speaking, arrangements for a minimum service are negotiated between the social partners.

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<sup>44</sup> For instance, in Italy there is an array of strike prevention measures. Ten days' notice is required in the public services. Once this period has expired, a strike cannot exceed four hours, and subsequently 24 hours, once a further ten days' notice has been given. There must be at least ten days between two strikes in the same sector or affecting the same group of users. It is strictly forbidden to take industrial action in the transport sector during school holidays or election periods. It is also impossible to combine a national and a local strike in the same sector of activity.

Workers should also be involved in **determining** what a **reasonable minimum service** would be (for example, not rendering the strike ineffective, and respecting the fact that workers are entitled to participate in decisions affecting their everyday life), with an independent body deciding in case of lack of agreement. Therefore, arrangements for a minimum service are negotiated with the social partners.

Nevertheless, because of the wording of Article 6 paragraph 4, where a **collective agreement** is in place which puts particular restrictions upon strikes in essential services, these restrictions may legitimately extend beyond those which a government would be permitted to impose on industrial action (Conclusions VIII, 98).

In relation to **states of emergency and economic crises**, the ECSR accepts that industrial action may be restricted or prohibited where it would either create or exacerbate a state of emergency (Conclusions I, 38), but only for a restricted period of time. Restrictions and sanctions must be proportionate to the harm done. The mere fact that a strike affects essential services or the public sector does not represent by itself a state of emergency, nor does a general strike which remains peaceful. Industrial action cannot be declared illegal because of the number of workers engaged. In case the strike should lead to an 'economic' emergency, it would be acceptable, in principle, that states prohibit recourse to industrial action (Conclusions I, 38). The crucial point is how severe the danger to the national economy is and how to determine it. The topic first arose in respect of public sector strikes.<sup>45</sup>

#### **General observation concerning the rights contained in Articles 5 and 6 of the Charter, in the Countries which did not ratify them**

As explained above (see page 32), it is perfectly possible for countries to ratify the (R)ESC without having ratified/accepted Articles 5 and 6. Some countries have done so in full, others only partially (e.g. Austria, Luxembourg and Poland) and some have not at all ratified Articles 5 and 6 (Greece and Turkey). Other countries like Germany, Netherlands and Spain have ratified these articles but made reservations as to their applicability to public servants.

But even if a country has not ratified article 5 and/or 6, the Social Charters do also foresee some kind of monitoring system which is laid down in Article 22.

Following this Article 22, the ECSR can and has requested information concerning the state of application of the rights contained in Article 5 and 6 from those countries which, for various reasons, have not ratified them. Therefore, Austria, Greece, Poland and Turkey have provided up-to-date information which the Committee took account of in the Seventh report.<sup>46</sup>

In particular, according to the information contained in the reports, it appears that the delay in the acceptance of Articles 5 and 6 by Greece is due to restrictions on the right to join trade unions, the prohibition of lockouts and the possibility of arbitration being imposed.

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<sup>45</sup> Novitz (2002), p. 313.

<sup>46</sup> Council of Europe (1998), European Social Charter, Committee of Independent Experts, Sixth report on certain provisions of the Charter which have not been accepted; Council of Europe (2000), European Social Charter, ECSR, Seventh report on certain provisions of the Charter which have not been accepted, 2000.

With regard to Poland and Turkey, the adoption of Article 6 paragraph 4 by Poland is obstructed by the fact that only trade unions have the right to call a strike and only with the aim of concluding collective agreements, and the fact that all categories of civil servants are denied the right to strike. For Turkey, the main reasons seem to lie in the fact that in Turkey only trade unions have the right to call a strike and only with the aim of concluding a collective agreement and that moreover, civil servants are still denied the right to strike.

As regards Austria, the law still provides a possibility that participation in a strike can form a ground for termination of contract and dismissal which the ECSR does not find compatible with the Charter.

For Luxembourg, the reason for non-acceptance seems to lie mainly in the fact that there exist rules which allow for wage deductions for strikes of less than one day and which the ECSR also finds not compatible with the Charter.

The ECSR therefore expects the governments concerned to take measures enabling them in the near future to accept Articles 5 and 6 or Article 6 paragraph 4. However, so far none of the states concerned seem to be ready to make the changes to their laws and thus accept Articles 5 and/or 6 of the Charter.



## 3. ILO

### 3.1. Introduction

The present chapter provides a general description of the international principles and texts relating to the trade union rights of public sector workers.

First, an overview is provided of the ILO Conventions and Recommendations relevant to the trade union rights of public sector workers, as well as the state of play as regards their ratification by the EU and EEA member states and EU candidate countries.

Secondly, this section contains a description of case law on the right to collective bargaining and the right to strike as interpreted by the Committee on Freedom of Association and the Committee of Experts, and of the supervisory mechanisms established internationally.

### 3.2. Main relevant texts

#### a) Conventions relating to public sector workers<sup>47</sup>

**Convention No. 87** – on Freedom of Association and Protection of the Right to Organise

Adoption: 9/07/1948

Entry into force: 4/07/1950

**Convention No. 98** – on the Right to Organise and Collective Bargaining

Adoption: 1/07/1949

Entry into force: 18/07/1951

**Convention No. 151** – on Labour Relations (Public Service)

Adoption: 27/06/1978

Entry into force: 25/02/1981

**Convention No. 154** – on Collective Bargaining

Adoption: 19/06/1981

Entry into force: 11/08/1983

#### b) Recommendations relating to public sector workers<sup>48</sup>

**Recommendation No. 159** – on Labour Relations (Public Service)

Adoption: 27/06/1978

**Recommendation No. 163** – on Collective Bargaining

Adoption: 19/06/1981

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<sup>47</sup> For the relevant text of these Conventions and Recommendations, see annex 3.

<sup>48</sup> See note 47.



### 3.3. Signatures and ratifications by EU and EEA member states and EU candidate countries of the ILO Conventions relevant to the trade union rights of public sector workers (State of play: December 2007)

Countries	Convention n° 87	Convention n° 98	Convention n° 151	Convention n° 154
Austria	+	+	–	–
Belgium	+	+	+	+
Bulgaria	+	+	–	–
Croatia	+	+	–	–
Cyprus	+	+	+	+
Czech Republic	+	+	–	–
Denmark	+	+	+	–
Estonia	+	+	–	–
Finland	+	+	–	+
France	+	+	–	–
FYROM	+	+	–	–
Germany	+	+	–	–
Greece	+	+	+	+
Hungary	+	+	+	+
Iceland	+	+	–	–
Ireland	+	+	–	–
Italy	+	+	+	–
Latvia	+	+	+	+
Liechtenstein	–	–	–	–
Lithuania	+	+	–	+
Luxembourg	+	+	+	–
Malta	+	+	–	–
Netherlands	+	+	+	+
Norway	+	+	+	+
Poland	+	+	+	–
Portugal	+	+	+	–
Romania	+	+	–	+
Spain	+	+	+	+
UK	+	+	+	–
Slovakia	+	+	–	–
Slovenia	+	+	–	+
Sweden	+	+	+	+
Turkey	+	+	+	–

(Source: [www.ilo.org](http://www.ilo.org))

### 3.4. The ILO Supervisory System

Ensuring implementation of the various Conventions and Recommendations is of course, as for other regulatory systems, also a key element at the ILO level.

The ILO supervisory system consists of different mechanisms to guarantee the implementation of international norms, ranging from reporting systems through complaints procedures to the provision of technical assistance. Below a brief overview of the different mechanisms is provided.<sup>49</sup>

#### a) The regular supervisory system or “reporting” system

Once a country has ratified an ILO convention, it is obliged to report regularly on the measures it has taken to implement it.

Every two years governments must submit reports detailing the steps they have taken in law and practice to apply any of the eight fundamental<sup>50</sup> and four priority conventions<sup>51</sup> they may have ratified; for all other conventions, reports must in principle be submitted every five years, although reports may be requested at shorter intervals.

***Governments are required to submit copies of their reports to employers’ and workers’ organisations. These organisations may comment on the governments’ reports; they may also send comments on the application of conventions directly to the ILO.***

These reports are then submitted to the Committee of Experts on the Application of Conventions and Recommendations (hereafter “Committee of Experts”) which makes an impartial and technical evaluation of the state of application of the international labour standards concerned.<sup>52</sup>

Following this examination, the Committee of Experts draws up its annual report which consists of three parts. Part I contains a General Report, which includes comments about member states’ adherence to their Constitutional obligations and highlights from the Committee’s observations. Part II contains the observations<sup>53</sup> on the application of international labour standards. Part III is a General Survey<sup>54 55</sup>.

<sup>49</sup> The information is mainly drawn from the ILO website (<http://www.ilo.org/public/english/standards/norm/applying/index.htm>) but adapted for the purposes of this report by its authors.

<sup>50</sup> Convention on Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Convention on the Right to Organise and Collective Bargaining, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

<sup>51</sup> Labour Inspection Convention, 1947 (No. 81); Labour Inspection (Agriculture) Convention, 1969 (No. 129); Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144); and the Employment Policy Convention, 1964 (No. 122).

<sup>52</sup> This Committee was already set up in 1926 and comprises today 20 eminent jurists appointed for three years and stemming from different geographic regions, legal systems and cultures.

<sup>53</sup> The Committee of Experts can make two kinds of comments. On the one hand, so-called “*Observations*” which contain comments on fundamental questions raised by the application of a particular Convention by a state. These observations are published in the Committee’s annual report. On the other hand it can make so-

This annual report of the Committee of Experts, usually adopted in December, is then submitted to the International Labour Conference the following June, at which it is examined by the Conference Committee on the Application of Standards. ***This Conference Committee is made up of government, employer and worker delegates. It examines the report in a tripartite setting and selects from it a number of observations for discussion.*** The governments referred to in these comments are invited to respond before the Conference Committee and to provide information on the situation in question. In many cases, the Conference Committee draws up conclusions recommending that governments need to take specific steps to remedy a problem or to invite ILO missions or technical assistance.<sup>56</sup>

As to the impact of the regular supervisory system, the Committee of Experts keeps track of examples of progress in relation to which it has noted changes in law and practice which have improved the application of a ratified Convention. To date (since 1964), over 2,300 cases of progress have been noted.

However, the impact of the regular supervisory system is not limited to cases of progress. The Committee of Experts also examines each year whether member states have fulfilled their obligation to submit adopted instruments to their legislative bodies for consideration. Even if a country decides not to ratify a Convention, it may choose to bring its legislation into conformity with it. Member states regularly review the Committee's comments on the application of a Convention in other countries and may nonetheless amend their own legislation and practice so as to avoid similar problems in the application of a standard or in order to emulate good practices. Where a Convention has been ratified, the Committee often makes unpublished direct requests to governments, pointing to apparent problems in the application of a standard and giving the countries concerned time to respond and tackle these issues before any comments are published. ***The Committee's interventions facilitate social dialogue, requiring governments to review the application of a standard and to share this information with the social partners, who may also provide information. The ensuing social dialogue can lead to further problem-solving and prevention.***

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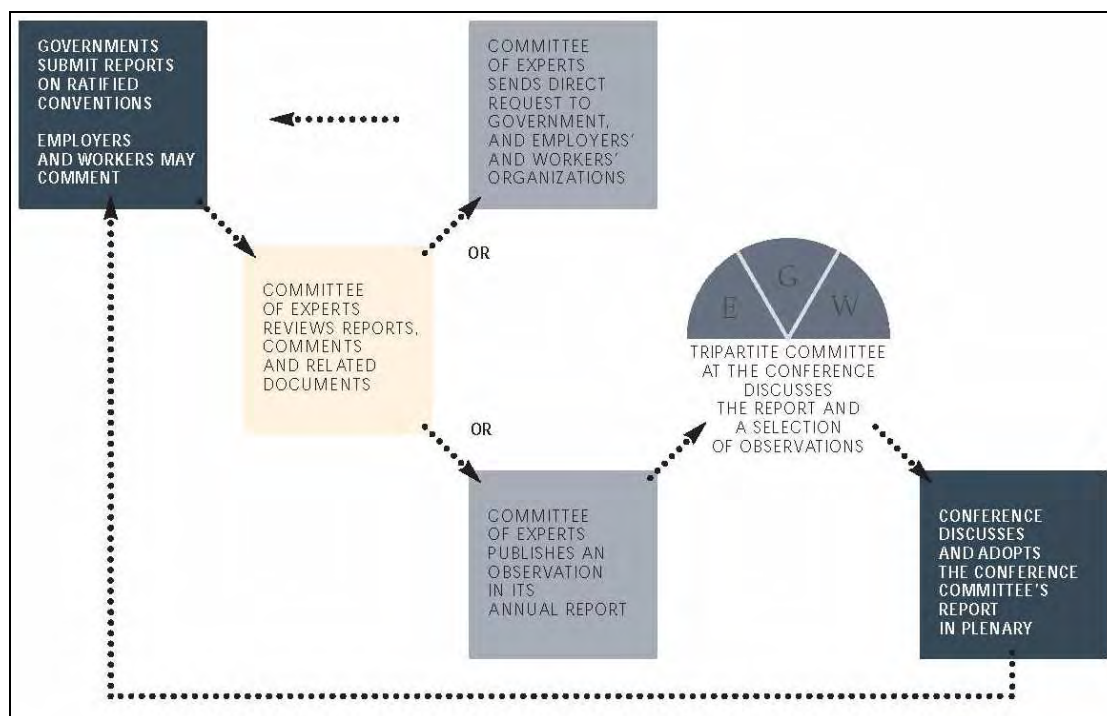
called “Direct requests” which relate to more technical questions or requests for further information. They are not published in the report but are communicated directly to the governments concerned.

<sup>54</sup> On the basis of Article 19, the Committee of Experts publishes an in-depth annual General Survey on member states' national law and practice, on a subject chosen by the Governing Body. These surveys are established mainly on the basis of reports received from member states and information transmitted by employers' and workers' organisations. They allow the Committee of Experts to examine the impact of Conventions and Recommendations, to analyse the difficulties indicated by governments as impeding their application and to identify means of overcoming these obstacles. Recent General Surveys include: Equal Remuneration (1986); Equality in Employment and Occupation (1988, 1996); Freedom of Association and Collective Bargaining (1994); Tripartite Consultation (2000); Protection of Wages (2003); Employment Policy (2004); Hours of Work (2005); Labour Inspection (2006); Forced Labour (2007) and Labour Clauses in Public Contracts (forthcoming 2008). All General Surveys are available at : <http://www.ilo.org/ilolex/english/surveyq.htm>

<sup>55</sup> These annual reports are available at: <http://www.ilo.org/public/english/standards/norm/applying/committee.htm>

<sup>56</sup> The discussions and conclusions concerning the situations examined by the Conference Committee are published in its report. These reports are Available at: <http://www.ilo.org/public/english/standards/norm/applying/conference.htm>

Governments and the social partners thus have an even greater incentive to solve problems in the application of standards in order to avoid critical comments by these bodies. Upon the request of member states, the ILO can provide substantial technical assistance in drafting and revising national legislation to ensure that it is in conformity with international labour standards (see below).

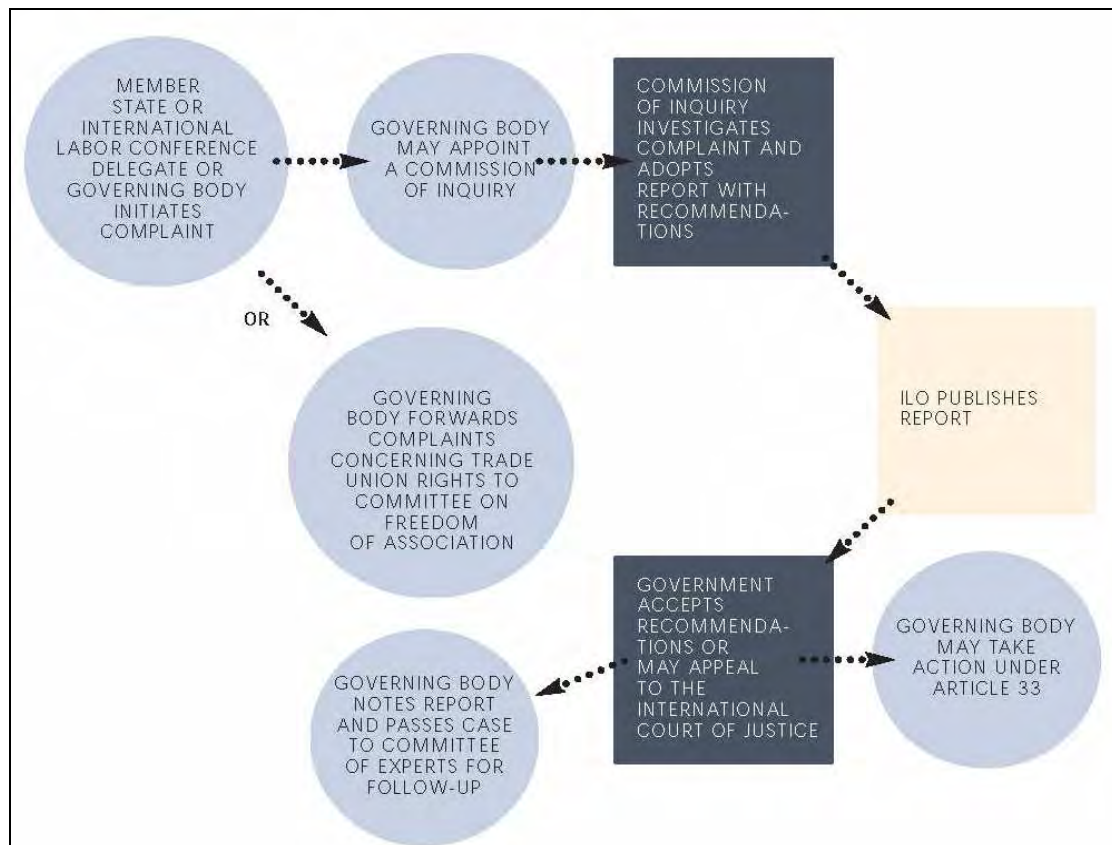


(Source : [www.ilo.org](http://www.ilo.org))

## b) Complaints

A complaint may be filed against a member state for not complying with a ratified Convention by another member state which has ratified the same Convention, a delegate to the International Labour Conference (so also trade union delegates forming part of the Conference) or the Governing Body in its own right. Upon receipt of a complaint, the Governing Body may form a Commission of Inquiry, consisting of three independent members, which is responsible for carrying out a full investigation of the complaint, ascertaining all the facts of the case and making recommendations on measures to be taken to address the problems raised by the complaint. A Commission of Inquiry is the ILO's highest-level investigative procedure; it is generally set up when a member state is accused of committing persistent and serious violations and has repeatedly refused to address them.

When a country refuses to address the recommendations of a Commission of Inquiry, the Governing Body can recommend to International Labour Conference any action it “deems wise and expedient to secure compliance with the recommendations.



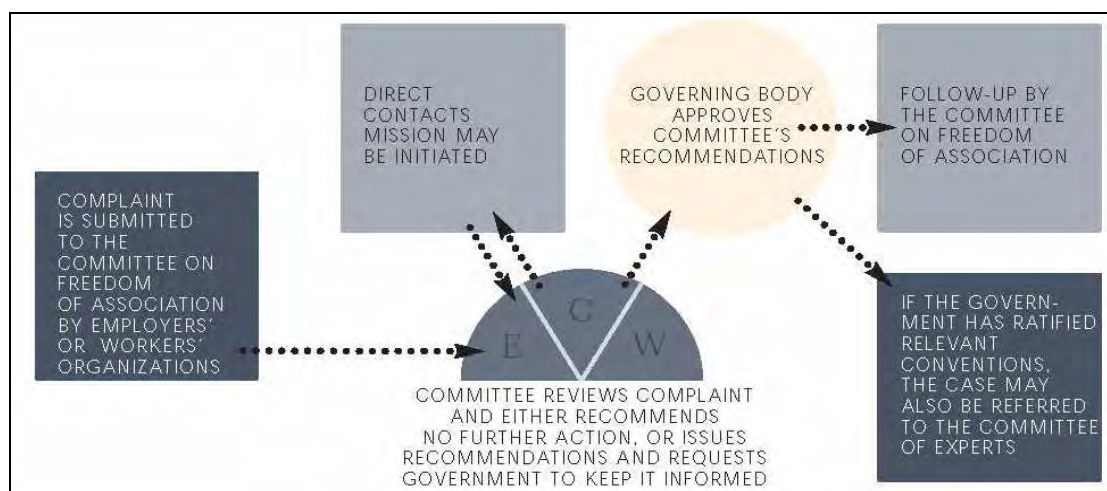
(Source: [www.ilo.org](http://www.ilo.org))

### c) The Committee on Freedom of Association

Freedom of association and collective bargaining are among the founding principles of the ILO. Soon after the adoption of Conventions Nos 87 and 98 on freedom of association and collective bargaining, the ILO came to the conclusion that the principle of freedom of association needed a further supervisory procedure to ensure compliance with it in countries that had not ratified the relevant Conventions. As a result, in 1951 the ILO set up the Committee on Freedom of Association (CFA) for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant Conventions. Complaints may be brought against a member state by employers' and workers' organisations.

The CFA is a Governing Body committee, and comprises an independent chair and three representatives from governments, employers and workers, respectively. If it decides to accept the case, it establishes the facts in dialogue with the government concerned. If it finds that there has been a violation of freedom of association standards or principles, it issues a report through the Governing Body and makes recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of its recommendations. In cases in which the country has ratified the relevant instruments, legislative aspects of the case may be referred to the Committee of Experts. The CFA may also choose to propose a 'direct contacts' mission to the government concerned to address the problem directly with government officials and the social partners through a process of dialogue. In over 50 years of work, the CFA has examined over 2,300 cases. More than 60 countries on five continents have acted on its recommendations and have informed it of positive developments on freedom of association during the past 25 years.





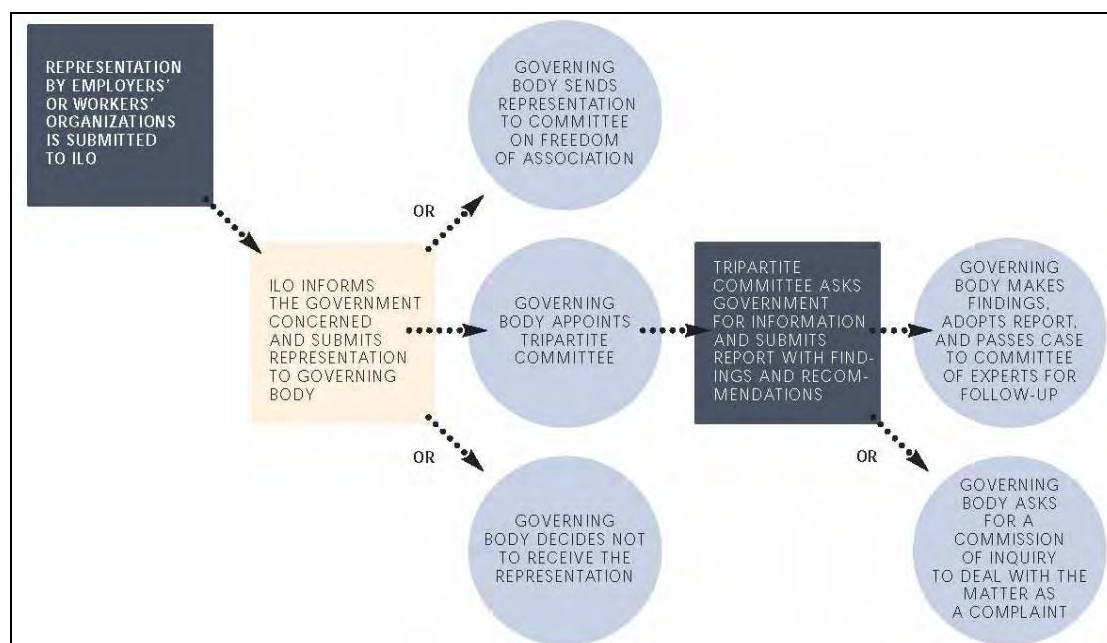
(Source: [www.ilo.org](http://www.ilo.org))

On the ILO website, one can find the following interesting resource documents:

- *A Digest of Decisions of the Committee on Freedom of Association* (Fifth (revised) edition of 2006 – compiling the major principles on trade union rights laid down by the CFA (available at: <http://www.ilo.org/ilolex/english/23e2006.pdf>)
- LibSynd: a database on all Committee on Freedom of Association cases (available at: <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1>)

#### d) Other mechanisms: representations and technical assistance and training

The **representation procedure** grants an organisation of employers or of workers the right to present to the ILO Governing Body a representation against any member state which, in its view, has failed to ensure effective compliance of a Convention which it ratified. A three-member tripartite committee of the Governing Body may be set up to examine the representation and the government's response.



(Source: [www.ilo.org](http://www.ilo.org))

The report that the committee submits to the Governing Body states the legal and practical aspects of the case, examines the information submitted, and concludes with recommendations. Where the government's response is not considered satisfactory, the Governing Body is entitled to publish the representation and the response. Representations concerning the application of Conventions Nos 87 and 98 are usually referred for examination to the Committee on Freedom of Association. (see above c).)

The ILO also provides **different forms of technical assistance** which include amongst others advisory and 'direct contacts' missions, during which ILO officials meet government officials to discuss problems in the application of standards with the aim of finding solutions; and promotional activities, including seminars and national workshops, with the purpose of raising awareness of standards, developing national actors' capacity to use them and providing technical advice on how to apply them to the benefit of all. The ILO also provides assistance in drafting national legislation in line with its standards.

Furthermore, the ILO International Training Centre in Turin (Italy) offers **training in international labour standards** for government officials, employers, workers, lawyers, judges and legal educators, as well as specialised courses on issues like labour standards, international labour standards and globalisation, and the rights of women workers (for more information, see: <http://www.ilo.it>).

### **3.5. The right to collective bargaining: rules established by the Committee on Freedom of Association and the Committee of Experts**

Article 1 of Convention No. 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service defines public sector workers as 'all persons employed by public authorities'.

Although the right to collective bargaining constitutes the practical implementation of the principle of freedom of association at work, collective bargaining in the public service raises specific problems stemming from the fact that there are several different categories of public sector workers in the same country, and the fact that the remuneration of these workers comes from public budgets. When approving pay, the bodies responsible have to take into account the economic situation of the country and the general interest. Moreover, the categories of workers that can be defined as public servants vary a great deal from one country to another.

But according to ILO Conventions N° 98 and 151, the only categories that can be excluded from this right are:

- 1) the armed forces
- 2) the police<sup>57</sup>
- 3) public servants<sup>58</sup>

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<sup>57</sup> 'The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations' (Article 5 paragraph 1 of Convention No. 98 and Article 1 paragraph 3 of Convention No. 151).

<sup>58</sup> 'This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way' (Article 6 of Convention No. 98).

However, a restrictive interpretation should be made of the exclusions set out in these Conventions.

Generally, the right of public servants to collective agreements is not called into question. *‘All public service workers other than those engaged in the administration of the State should enjoy the right to collective bargaining, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service.’*<sup>59</sup> Thus only those directly engaged in the administration of the state can be excluded from the scope of the Convention. These are very high-ranking officials.

For other public servants employed by the government or by autonomous public institutions, the Convention applies in full.

The distinction must therefore be drawn between, on the one hand, public servants who by their functions are directly engaged in the administration of the state – that is, civil servants employed in government ministries and other comparable bodies, as well as *officials acting as supporting elements in these activities* – and, on the other hand, *other persons employed by the government, by public undertakings or by autonomous public institutions*. Only the former category can be excluded from the scope of Convention no. 98.<sup>60</sup>

As set out in Articles 4 to 6 of Convention No. 98, the areas protected by collective agreement are working conditions and terms and conditions of employment.

The voluntary nature of all negotiations and collective agreements is expressly stipulated in Article 4 of this Convention, which provides that:

*“Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”*

The principle of free and voluntary collective bargaining means not having recourse to mandatory arbitration. Such recourse is nonetheless permissible in cases where the parties do not reach agreement through collective bargaining. But it is permissible only in the context of essential services in the strict sense of the term, that is, services the interruption of which might endanger the life, safety or health of persons in the whole or in part of the population.<sup>61</sup>

### **3.6. Right to strike of public sector workers: principles established by the Committee on Freedom of Association and the Committee of Experts**

The right to strike is not directly provided for in the international Conventions of the International Labour Organisation (ILO). It arises indirectly from Article 3 paragraph 1 of Convention No. 87 on Freedom of Association and Protection of the Right to Organise, which stipulates that *‘Workers’ and employers’ organisations shall have the right to draw*

<sup>59</sup> CFA Report No. 291, case no. 1557, §285a.

<sup>60</sup> CFA Report No. 243, case no. 1348, §289.

<sup>61</sup> CFA report No. 286, cases nos. 1648 and 1650, §461.



*up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.'*

The right to strike is one of the principal means whereby workers can defend and promote their occupational interests.

While this right is generally granted to workers in the private sector, it is significantly limited in the case of civil servants and public sector workers.

According to the Committee on Freedom of Association, recognition of the principle of freedom of association for public servants does not necessarily imply the right to strike.<sup>62</sup>

The right to strike can be *restricted or even prohibited in the public service or in essential services* insofar as a strike there could cause serious hardship to all or part of the population.<sup>63</sup>

Nevertheless, this is subject to one condition: the limitations must be accompanied by certain compensatory guarantees.<sup>64</sup>

### **Public servants excluded from the right to strike:**

The right to strike can be restricted or even prohibited *only for public servants exercising authority in the name of the state*,<sup>65</sup> but it is left to national legislation to define the categories of public servants carrying out such functions. Examples include: public servants in the administration of justice and the judiciary,<sup>66</sup> the armed forces, the police and prison officers.

Furthermore, an overly broad definition of the concept of public servant is likely to result in a very widespread restriction or even prohibition of the right to strike for these workers.<sup>67</sup> This runs counter to the objectives of the Conventions.

### **General prohibition of the right to strike:**

The Committee on Freedom of Association has acknowledged the possibility of a general prohibition of strikes, but for a limited period of time. This would apply in the event of an *acute national crisis*.<sup>68</sup> For example, a coup d'état against a constitutional government leading to the declaration of a state of emergency in accordance with the national constitution could constitute an acute national crisis.<sup>69</sup>

However, the stoppage of services or undertakings such as transport companies or railways *does not constitute an acute national crisis*. Indeed, while it is recognised that such a stoppage might disturb the normal life of the community, it is difficult to concede that it would be likely to bring about an acute national crisis.

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<sup>62</sup> Digest 1985, §365.

<sup>63</sup> CFA Report No. 294, case no. 1629, §262.

<sup>64</sup> Digest 1985, §393.

<sup>65</sup> CFA report no. 294, case no. 1629, §262

<sup>66</sup> Report No. 291, case no. 1706, §485; and Report No. 291, cases nos 1653 and 1660, §106.

<sup>67</sup> Report No. 297, case no. 1762, §281.

<sup>68</sup> Digest 1985, §423.

<sup>69</sup> Report No. 284, case no. 1626, §91.

**Essential services:**

Public servants in state-owned commercial or industrial enterprises should have the right to negotiate collective agreements, enjoy suitable protection against acts of anti-union discrimination and even enjoy the right to strike, provided that the interruption of the services they provide does not endanger the life, personal safety or health of persons<sup>70</sup> in the whole or part of the population;

It is left to national legislation to define essential services. In order to determine situations in which a strike could be prohibited, the criterion to be established is: *the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population.*<sup>71</sup>

In the view of the Committee on Freedom of Association, ***the following may be considered to be essential services in the strict sense of the term:***

- Air traffic control
- Electricity services
- Hospital sector
- Telephone services
- Water supply services

***The following DO NOT constitute essential services in the strict sense of the term:***

- Agricultural activities, the supply and distribution of foodstuffs
- Automobile manufacturing
- Banks
- Computer services for the collection of excise duties and taxes
- Construction sector
- Department stores and pleasure parks
- Education sector
- Hotel services
- Metallurgical industry and the whole of the mining sector
- Oil installations and ports
- Postal services
- Radio and television services
- Refrigeration companies
- The Mint, the government printing service and state alcohol, salt and tobacco monopolies
- Transport in general
- Underground transport systems

Where the right to strike is prohibited in the public service and essential services, ‘appropriate’ compensatory guarantees must be established. ‘Appropriate guarantees’ means the establishment of adequate, impartial and speedy conciliation and arbitration proceedings. The awards made must be fully and promptly implemented.

<sup>70</sup> Report No. 259, case no. 1465, §677 and Report no. 292, case no. 1625, §75.

<sup>71</sup> Report No. 279, case no. 1576, §114.



## Annex 1:

### Signatures and ratifications by EU and EEA member states and EU candidate countries of the European Social Charter, its Protocols and the European Social Charter (Revised) (State of play: December 2007)

Member states	European Social Charter (1961)		Additional protocol (1988)		Amending protocol (1991)		Collective Complaints Protocol (1995)		Revised European Social Charter (1996)	
	Signature	Ratification	Signature	Ratification	Signature	Ratification	Signature	Ratification	Signature	Ratification
Austria	22/7/63	29/10/69	4/12/90	-	7/5/92	13/7/95	7/5/99	-	7/5/99	-
Belgium	18/10/61	16/10/90	20/5/92	23/6/03	22/10/91	21/9/00	14/5/96	23/6/03	3/5/96	2/3/04
Bulgaria	(a)	(a)	(b)	(b)	(a)	(a)	©	©	21/9/98	7/6/00
Croatia	8/3/99	26/2/03	8/3/99	26/2/03	8/3/99	26/2/03	8/3/99	26/2/03	-	-
Cyprus	22/5/67	7/3/68	5/5/88	(b)	21/10/91	1/6/93	9/11/95	6/8/96	3/5/96	27/9/00
Czech Republic	27/5/92*	3/11/99	27/5/92*	17/11/99	27/5/92*	17/11/99	26/2/02	-	4/11/00	-
Denmark	18/10/61	3/3/65	27/8/96	27/8/96	-	**	9/11/95	-	3/5/96	-
Estonia	(a)	(a)	(b)	(b)	(a)	(a)	(a)	-	4/5/98	11/9/00
Finland	9/2/90	29/4/91	9/2/90	29/4/91	16/3/92	18/8/94	9/11/95	17/7/98	3/5/96	21/6/02
France	18/10/61	9/3/73	22/6/89	(b)	21/10/91	24/5/95	9/11/95	7/5/99	3/5/96	7/5/99
FYROM	5/5/98	31/3/05	5/5/98	-	5/5/98	31/3/05	-	-	-	-
Germany	18/10/61	27/1/65	5/5/88	-	-	**	-	-	-	-
Greece	18/10/61	6/6/84	5/5/88	18/6/98	29/11/91	12/9/96	18/6/98	18/6/98	3/5/96	-
Hungary	13/12/91	8/7/99	7/10/04	1/6/05	13/12/91	4/2/04	7/10/04	-	7/10/04	-
Iceland	15/1/76	15/1/76	5/5/88	-	12/12/01	21/2/02	-	-	4/11/98	-
Ireland	18/10/61	7/10/64	(b)	(b)	14/5/97	14/5/97	4/11/00	4/11/00	4/10/10	4/10/00
Italy	18/10/61	22/10/65	5/5/88	26/5/94	21/10/91	27/1/95	9/11/95	3/11/97	3/5/96	5/7/99
Latvia	29/5/97	31/1/02	29/5/97	-	29/5/97	9/12/03	-	-	-	-
Liechtenstein	9/10/91	-	-	-	-	-	-	-	-	-
Lithuania	(a)	(a)	(b)	(b)	(a)	(a)	(a)	-	8/9/97	29/6/01
Luxembourg	18/10/61	10/10/91	5/5/88	-	21/10/91	**	-	-	11/2/98	-
Malta	26/5/88	4/10/88	(b)	(b)	21/10/91	16/2/94	(a)	-	27/7/05	27/7/05
Netherlands	18/10/61	22/4/80	14/6/90	5/8/92	21/10/91	1/6/93	23/1/04	-	23/1/04	-
Norway	18/10/61	26/10/62	10/12/93	10/12/93	21/10/91	21/10/91	20/3/97	20/3/97	7/5/01	7/5/01
Poland	26/11/91	25/6/97	(d)	-	18/4/97	25/6/97	(d)	-	25/10/05	-
Portugal	1/6/82	30/9/91	(b)	(b)	24/2/92	8/3/93	9/11/95	20/3/98	3/5/96	30/5/02
Romania	4/10/94	(a)	(b)	(b)	(a)	(a)	(a)	-	14/5/97	7/5/99
Slovak Republic	27/5/92*	22/6/98	27/5/92*	22/6/98	27/5/92*	22/6/98	18/11/99	-	18/11/99	-
Slovenia	11/10/97	(a)	11/10/97	(b)	11/10/97	(a)	11/10/97	(c)	11/10/97	7/5/99
Spain	27/4/78	6/5/80	5/5/88	24/1/00	21/10/91	24/1/00	-	-	23/10/00	-
Sweden	18/10/61	17/12/62	5/5/88	5/5/89	21/10/91	18/3/92	9/11/95	29/5/98	3/5/96	29/5/98
Turkey	18/10/61	24/11/89	5/5/98	-	6/10/04	**	-	-	6/10/04	27/06/07
UK	18/10/61	11/7/62	-	-	21/10/91	**	-	-	7/11/97	-

\* Date of signature by the Czech and Slovak Federal Republic.

\*\* State whose ratification is necessary for the entry into force of the protocol.

(a) State having ratified the European Social Charter (revised).

(b) State having accepted the rights (or certain of the rights) guaranteed by the Protocol by ratifying the European Social Charter (revised).

(c) State having accepted the collective complaints procedure by a declaration made in application of Article D paragraph 2 of Part IV of the European Social Charter (revised).

(d) State having signed the European Social Charter (revised).

## Annex 2:

### Acceptance of the ‘trade union rights’ articles (Articles 5 and 6) by EU and EEA member states and EU candidate countries

(State of play December 2007)

Member State	Article 5	Article 6.1	Article 6.2	Article 6.3	Article 6.4
Austria	x	X	x	X	-
Belgium	x	X	x	x	x
Bulgaria	x	X	x	x	x
Croatia	x	X	x	x	x
Cyprus	x	X	x	x	x
Czech Republic	x	X	x	x	x
Denmark	x	X	x	x	x
Estonia	x	X	x	x	x
Finland	x	X	x	x	x
France	x	X	x	x	x
FYROM	x	x	x	x	x
Germany (*)	x	X	x	x	x
Greece	-	-	-	-	-
Hungary	x	X	x	x	x
Iceland	x	X	x	x	x
Ireland	x	X	x	x	x
Italy	x	X	x	x	x
Latvia	x	X	x	x	x
Liechtenstein <sup>72</sup>	-	-	-	-	-
Lithuania	x	X	x	x	x
Luxembourg	x	X	x	x	-
Malta	x	X	x	x	x
Netherlands (*)	x	X	x	x	x
Norway	x	X	x	x	x
Poland	x	X	x	x	-
Portugal	x	X	x	x	x
Romania	x	X	x	x	x
Slovak Republic	x	X	x	x	x
Slovenia	x	X	x	x	x
Spain (*)	x	X	x	x	x
Sweden	x	X	x	x	X
Turkey	-	-	-	-	-
United Kingdom	x	X	x	x	x

<sup>72</sup> Liechtenstein has only signed the ESC so far.

(\*) Countries with (\*) their names are countries that, although they ratified articles 5 and 6, made some reservations as to the application of these articles in particular in relation to public servants.

## **Annex 3:**

### **ILO Conventions/Recommendations relating to trade union rights for the public sector workers:**

#### **Convention no. 87 on Freedom of Association and Protection of the Right to Organise**

##### *Article 2*

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

##### *Article 3*

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

##### *Article 4*

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

##### *Article 5*

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

##### *Article 7*

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

##### *Article 9*

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

##### *Article 10*

In this Convention the term *organisation* means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

## **Convention no. 98 on the Right to Organise and Collective Bargaining**

### *Article 1*

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to
  - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
  - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

### *Article 2*

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

### *Article 4*

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

### *Article 5*

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

### *Article 6*

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

## **Convention no. 151 on Labour Relations (Public Service)**

### *Article 1*

1. This Convention applies to all persons employed by public authorities, to the extent that more favourable provisions in other international labour Conventions are not applicable to them.
2. The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations.
3. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

### *Article 2*

For the purpose of this Convention, the term *public employee* means any person covered by the Convention in accordance with Article 1 thereof.

### *Article 3*

For the purpose of this Convention, the term *public employees' organisation* means any organisation, however composed, the purpose of which is to further and defend the interests of public employees.

### *Article 4*

1. Public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to:
  - (a) make the employment of public employees subject to the condition that they shall not join or shall relinquish membership of a public employees' organisation;
  - (b) cause the dismissal of or otherwise prejudice a public employee by reason of membership of a public employees' organisation or because of participation in the normal activities of such an organisation.

### *Article 5*

1. Public employees' organisations shall enjoy complete independence from public authorities.
2. Public employees' organisations shall enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration.
3. In particular, acts which are designed to promote the establishment of public employees' organisations under the domination of a public authority, or to support public employees' organisations by financial or other means, with the object of placing such organisations under the control of a public authority, shall be deemed to constitute acts of interference within the meaning of this Article.

### *Article 6*

1. Such facilities shall be afforded to the representatives of recognised public employees' organisations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work.



2. The granting of such facilities shall not impair the efficient operation of the administration or service concerned.
3. The nature and scope of these facilities shall be determined in accordance with the methods referred to in Article 7 of this Convention, or by other appropriate means.

#### *Article 7*

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.

#### *Article 8*

The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.

#### *Article 9*

Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.

### **Convention no. 154 on Collective Bargaining**

#### *Article 1*

1. This Convention applies to all branches of economic activity.
2. The extent to which the guarantees provided for in this Convention apply to the armed forces and the police may be determined by national laws or regulations or national practice.
3. As regards the public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice.

#### *Article 2*

For the purpose of this Convention the term *collective bargaining* extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for--

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.

### *Article 3*

1. Where national law or practice recognises the existence of workers' representatives as defined in Article 3, subparagraph (b), of the Workers' Representatives Convention, 1971, national law or practice may determine the extent to which the term *collective bargaining* shall also extend, for the purpose of this Convention, to negotiations with these representatives.

2. Where, in pursuance of paragraph 1 of this Article, the term *collective bargaining* also includes negotiations with the workers' representatives referred to in that paragraph, appropriate measures shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the workers' organisations concerned.

### *Article 5*

1. Measures adapted to national conditions shall be taken to promote collective bargaining.

2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:

(a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;

(b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention;

(c) the establishment of rules of procedure agreed between employers' and workers' organisations should be encouraged;

(d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;

(e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

### *Article 6*

The provisions of this Convention do not preclude the operation of industrial relations systems in which collective bargaining takes place within the framework of conciliation and/or arbitration machinery or institutions, in which machinery or institutions the parties to the collective bargaining process voluntarily participate.

### *Article 7*

Measures taken by public authorities to encourage and promote the development of collective bargaining shall be the subject of prior consultation and, whenever possible, agreement between public authorities and employers' and workers' organisations.

### *Article 8*

The measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining.

### **Recommendation no. 159 on Labour Relations (Public Service)**

1. (1) In countries in which procedures for recognition of public employees' organisations apply with a view to determining the organisations to be granted, on a preferential or exclusive basis, the rights provided for under Parts III, IV or V of the Labour Relations (Public Service) Convention, 1978, such determination should be based on objective and pre-established criteria with regard to the organisations' representative character.
- (2) The procedures referred to in subparagraph (1) of this Paragraph should be such as not to encourage the proliferation of organisations covering the same categories of employees.
2. (1) In the case of negotiation of terms and conditions of employment in accordance with Part IV of the Labour Relations (Public Service) Convention, 1978, the persons or bodies competent to negotiate on behalf of the public authority concerned and the procedure for giving effect to the agreed terms and conditions of employment should be determined by national laws or regulations or other appropriate means.
- (2) Where methods other than negotiation are followed to allow representatives of public employees to participate in the determination of terms and conditions of employment, the procedure for such participation and for final determination of these matters should be determined by national laws or regulations or other appropriate means.
3. Where an agreement is concluded between a public authority and a public employees' organisation in pursuance of Paragraph 2, subparagraph (1), of this Recommendation, the period during which it is to operate and/or the procedure whereby it may be terminated, renewed or revised should normally be specified.
4. In determining the nature and scope of the facilities which should be afforded to representatives of public employees' organisations in accordance with Article 6, paragraph 3, of the Labour Relations (Public Service) Convention, 1978, regard should be had to the Workers' Representatives Recommendation, 1971.

### **Recommendation no. 163 on Collective Bargaining**

#### *I. Methods of Application*

1. The provisions of this Recommendation may be applied by national laws or regulations, collective agreements, arbitration awards or in any other manner consistent with national practice.

#### *II. Means of Promoting Collective Bargaining*

2. In so far as necessary, measures adapted to national conditions should be taken to facilitate the establishment and growth, on a voluntary basis, of free, independent and representative employers' and workers' organisations.
3. As appropriate and necessary, measures adapted to national conditions should be taken so that
  - (a) representative employers' and workers' organisations are recognised for the purposes of collective bargaining;
  - (b) in countries in which the competent authorities apply procedures for recognition with a view to determining the organisations to be granted the right to bargain

collectively, such determination is based on pre-established and objective criteria with regard to the organisations' representative character, established in consultation with representative employers' and workers' organisations.

4. (1) Measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels.  
(2) In countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is co-ordination among these levels.
5. (1) Measures should be taken by the parties to collective bargaining so that their negotiators, at all levels, have the opportunity to obtain appropriate training.  
(2) Public authorities may provide assistance to workers' and employers' organisations, at their request, for such training.  
(3) The content and supervision of the programmes of such training should be determined by the appropriate workers' or employers' organisation concerned.  
(4) Such training should be without prejudice to the right of workers' and employers' organisations to choose their own representatives for the purpose of collective bargaining.
6. Parties to collective bargaining should provide their respective negotiators with the necessary mandate to conduct and conclude negotiations, subject to any provisions for consultations within their respective organisations.
7. (1) Measures adapted to national conditions should be taken, if necessary, so that the parties have access to the information required for meaningful negotiations.  
(2) For this purpose:
  - (a) public and private employers should, at the request of workers' organisations, make available such information on the economic and social situation of the negotiating unit and the undertaking as a whole, as is necessary for meaningful negotiations; where the disclosure of some of this information could be prejudicial to the undertaking, its communication may be made conditional upon a commitment that it would be regarded as confidential to the extent required; the information to be made available may be agreed upon between the parties to collective bargaining;
  - (b) the public authorities should make available such information as is necessary on the over-all economic and social situation of the country and the branch of activity concerned, to the extent to which the disclosure of this information is not prejudicial to the national interest.
8. Measures adapted to national conditions should be taken, if necessary, so that the procedures for the settlement of labour disputes assist the parties to find a solution to the dispute themselves, whether the dispute is one which arose during the negotiation of agreements, one which arose in connection with the interpretation and application of agreements or one covered by the Examination of Grievances Recommendation, 1967.

## Annex 4:

### Useful web links

#### EU:

Eurlex

<http://eur-lex.europa.eu/en/index.htm>

The European Union Agency for Fundamental Rights (FRA)

<http://eumc.europa.eu/fra/index.php>

The Charter of Fundamental Rights of the European Union

[http://ec.europa.eu/justice\\_home/unit/charte/index\\_en.html](http://ec.europa.eu/justice_home/unit/charte/index_en.html)

[http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm)

Information and Consultation of Workers

[http://ec.europa.eu/employment\\_social/labour\\_law/directives\\_en.htm#Infocons](http://ec.europa.eu/employment_social/labour_law/directives_en.htm#Infocons)

#### Council of Europe:

European Social Charter

[http://www.coe.int/T/E/Human\\_Rights/Esc/](http://www.coe.int/T/E/Human_Rights/Esc/)

European Committee of Social Rights

[http://www.coe.int/T/E/Human\\_Rights/Esc/2\\_ECSR\\_European\\_Committee\\_of\\_Social\\_Rights/](http://www.coe.int/T/E/Human_Rights/Esc/2_ECSR_European_Committee_of_Social_Rights/)

Reporting Procedure

[http://www.coe.int/t/e/human\\_rights/esc/3\\_Reporting\\_procedure/default.asp#TopOfPage](http://www.coe.int/t/e/human_rights/esc/3_Reporting_procedure/default.asp#TopOfPage)

Collective Complaints

[http://www.coe.int/T/E/Human\\_Rights/Esc/4\\_Collective\\_complaints/](http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/)

#### International:

ILO - ILOLEX

<http://www.ilo.org/ilolex/english/>

Committee on Freedom of Association

[http://www.ilo.org/global/What\\_we\\_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CFA/lang--en/WCMS\\_CON\\_TXT\\_ILS\\_APP\\_FRE\\_EN/index.htm](http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CFA/lang--en/WCMS_CON_TXT_ILS_APP_FRE_EN/index.htm)

Cases of the Committee on Freedom of Association

<http://www.ilo.org/ilolex/english/caseframeE.htm>

Digest of Decisions of the Committee on Freedom of Association

<http://www.ilo.org/ilolex/english/digestq.htm>

LibSynd (database on all Committee on Freedom of Association cases)

<http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1>

**ETUC:** [www.etuc.org](http://www.etuc.org)

**ITUC:** [www.ituc.org](http://www.ituc.org)

## Annex 5:

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