
Better defending and promoting trade union rights in the public sector

Part II Country reports

—
Edited by Wiebke Warneck and Stefan Clauwaert
with Marina Monaco, Victorita Militaru and Isabelle Schömann

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**Marina Monaco
Victorita Militaru
Isabelle Schömann**

European Federation of Public Service Unions (EPSU)

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Introduction

In 2006, the ETUI was asked to provide EPSU with a background paper on European and international norms relating to trade union rights in the public sector. The focus of the research was 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 the report was thus to provide information to EPSU affiliates on:

- existing relevant European (EU and Council of Europe) and international (ILO) standards and instruments;
- the different 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 was intended to highlight, 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.

Part I of the report, *Summary of available tools and action points*, is campaign-oriented and of practical use to the trade unions. It identifies what actions could be taken at the different levels to remove obstacles and to promote trade union rights in EPSU sectors. Part II, *Country reports*, provides information on trade union rights in the public sector per country. 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 publication, and could form the subject of a subsequent report.

In the collection of the relevant information and material, the following would be 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, EIRO publications, and so on);
- (complementary) information provided by EPSU and/or its affiliates.

Information was collected until October 2007.

The ETUI research team consisted of the following persons: Wiebke Warneck (ETUI research officer), Stefan Clauwaert (ETUI senior research officer and ETUC advisor to the Council of Europe) and Isabelle Schömann (ETUI senior research officer). They received invaluable assistance in drafting this report from ETUI trainees Marina Monaco and Victorita Militaru, who did the background research on the case law of, respectively, the Social Charters and the ILO.

The country reports in this second part of the publication consist of information provided on each country extracted from the case law of the ECSR and the ILO, as well as information from the reports by the former ICFTU and now ITUC on trade union rights violations.

The opinions provided by the bodies mentioned are their assessment of alleged violations of the fundamental norms and obligations they have to interpret. They might in practice thus not necessarily be considered as problematic by the trade unions (or employers' organisations) in the country concerned.

Furthermore, some of the case law is quite old and the problem might already have been solved in the meantime. Nevertheless this information is included and for the following reasons:

- to make this report as complete as possible;
- for comparative reasons, as in other countries the same or similar problems might arise and the case law might give useful pointers.

This part of the report is structured as follows:

- i) a box summarising each country;
- ii) information on the case law of the CoE;
- iii) information on the case law of the ILO;
- iv) trade union proposals concerning what actions to take.

i. Summary

| | MEMBER STATES | |
|--|--|----------------|
| | Right to found TU | Austria |
| | | |
| | Right to join/not to join TU | |
| | | |
| | Right to form + join Police | |
| | | |
| | Right to form + join Armed Forces | |
| | | |
| | Protection TU representatives | |
| | | |
| | Joint consultation | |
| | | |
| | Voluntary negotiations | |
| | | |
| | Conciliation, arbitration | |
| | | |
| | Right to take collective action | |
| | | |
| | Right to collective action Police, Armed Forces | |
| | | |
| | Restrictions, etc. | |

| | Austria | Belgium | Bulgaria | Cyprus | Czech Republic | Denmark | Estonia |
|--|---|---|---|--|--|--|--|
| | + | + | + | + | ? | + | + |
| | + | + | + | + | ? | + | + |
| | + | + | + | + | ? | ? | + |
| | + | + | + | ? | - Security and Intelligence Service | ? | - |
| | + | + | ? | ? | ? | ? | ? |
| | + | + | 0 | + | ? | + | + |
| | + | + | + | + | + | + | + |
| | + | - | Total lack | + | + | + | + |
| | + | - | Total ban certain sectors and civil personnel of Min. of Defence; only symbolic strike is allowed | - | + | - | - |
| | + | Restrictive judicial practices; little protection against dismissals | | Requisition of workers possible; decision endorsed by trade unions | Excessive time period must elapse between failed mediation and strike action | Too broad and general prohibition, affecting railways and postal services too | General indiscriminate prohibition |
| | ? | Police (+) Armed forces (-) | + | - | Armed forces - | - | - |
| | Lockout allowed. Nothing specific for essential sectors | Minimum services in practice. Requisition of workers provided by law, never applied | Collective Complaint No. 32/2005 still pending on non-conformity with art. 6.4 | Legal provision to forbid strikes, even if never applied | Excluded: judges, prosecutors, security personnel | Civil servants denied the right to strike, irrespective of their category, grade, function | Civil servants denied the right to strike, irrespective of their category, grade, function |

| MEMBER STATES | | | | | | | | |
|---|--|--|---|---|--|--|--|--|
| Ireland | Hungary | Greece | Germany | France | Finland | | | |
| + Problems with negotiating licences | + ? | + May be restricted by legislation | + + | + + | + + | | | |
| + Garda Síochána too | + ? | + May be restricted by legislation | + + | + Not senior staff of prefectures | + + | | | |
| + Garda Síochána too | + ? | + With limitations | + + | + Allowed | + + | | | |
| ? Civilian staff, such as other civil servants; military | + ? | + Civilian staff, such as other civil servants; military | + + | + Not the Gendarmerie | + + | | | |
| - Only representative of trade unions with licence (not civil servants) | + ? | + + | + + | + + | + + | | | |
| + Not sufficient; negotiation licences | + ? | + + | - - | + + | + + | | | |
| + Only TUs with negotiation licence are granted immunity; little protection against dismissals | - Strike can only be called by trade union by agreement; applicable to civil servants | + ? | - Requirements to form a union to call a lawful strike are excessive; strikes not aimed at a collective agreement prohibited | + Wage reduction not proportional to duration of strike; only most representative trade union can call strikes | + + | | | |
| - ? | + ? | - as all civil servants | - + | - ? | - + | | | |
| Trade union activities only for trade union with licence (not for civil servants) | Lockouts prohibited | Right to bargain limited to postal and railways civil servants, even if the sectors are now private; current judicial debate | Right to bargain limited to postal and railways civil servants, even if the sectors are now private; current judicial debate | Total and permanent ban on strikes; Ministry of the Interior, prisons, judges; limits flight controllers, state radio/ TV | Legal ban on strikes for high ranking civil servants and those representing the state/employer in negotiations or agreements | | | |

| | Romania | Portugal | Poland | TheNetherlands | Malta | Luxembourg | Lithuania | Latvia | Italy | MEMBER STATES |
|--|---|-----------------|-----------------|--|-----------------------------|----------------------|---|---------------|---------------------------------------|--|
| | + Broad limitation | + | - | + | + | + | - Min. 30 members required | + | + | Right to found TU |
| | ? | + | - | + | ? | + | + Union members are protected against dismissal | + | + | Right to join/not to join TU |
| | + Member ship compulsory | + | + Restricted | ? | + But controversial | + | + | + | - Only representative bodies | Right to form + join Police |
| | Not allowed, allowed for civilian | + | - | ? | ? | + | - | - | - Only representative bodies | Right to form + join Armed Forces |
| | + | ? | ? | + | ? | + | ? | ? | + | Protection TU representatives |
| | + | + | + | + | + | + | + | ? | + | Joint consultation |
| | + | + | + | + | + | + | ? | ? | + | Voluntary negotiations |
| | + | + | + | + | Not clear who is covered | + | + | + | ? | Conciliation, arbitration |
| | + Highly restricted | + | - | - Courts may decide if striking is premature; no right to strike in minimum s. fixed by law | + | + With exclusions | - 2/3 members have to agree; total ban in certain sectors | + | + | Right to take collective action |
| | - | - | | + | - | - | - | - | - | Right to collective action Police, Armed Forces |
| | | | | Art. 6 of the Charter FORMALLY directly applicable in the internal system | | | | | On ordinances, lack of information | Restrictions, etc. |

Austria

- provisions exist on the right to organise
- civil servants and members of the armed forces are free to form and to join a trade union
- there is joint consultation
- collective bargaining works on the same basis as in the private sector

Problems:

- fewer than 1% of public sector employees are covered by collective agreements, as they are excluded from the right to conclude collective agreements
- the right to engage in collective action contained in the European Social Charter (Art. 6 IV) was not accepted
- in practice, the right to strike of civil servants is restricted due to their loyalty obligation

Actions to be taken:

- Is it feasible to extend bargaining coverage in the public sector?

At the end of 2005 the Austrian government presented plans to establish a single category of public employees in the civil service, employed on a private-law basis. This would mean that the current situation – public servants and contracted public employees – would come to an end. The trade unions were heavily opposed to the proposals, fearing for the independence of civil servants, especially judges.

I) Council of Europe

Right to organise

With regard to the right to organise, since 1973, Austria has *satisfied the provisions of Article 5* of the Charter. Civil servants and members of the armed forces in Austria are free to join a trade union of their choice or to set up their own organisations.

Right to bargain collectively

As regards the *right to bargain collectively*, and specifically *joint consultation*, the information provided concerning the public sector has been judged in conformity with ESC.

Issues related to the public service were discussed between the negotiating committee representing the national and regional authorities and the public service trade unions, three of which had formed a joint *negotiating committee*.

The regulations applicable to the conduct of bargaining are the same as in the private sector.

Matters affecting the public service in general are the subject of discussion between the employers' side and the four public sector trade unions, namely the local authority service trade union, the arts, media and free professions trade union, the union of posts and

telecommunications employees and the civil service trade union (the first three constituted the joint negotiating committee).

Within individual ministries or departments, staff associations represent employees' interests. The duties of these bodies, created by the Federal Staff Association Act, BGBl. No. 133/1967, are comparable to those of works councils in the private sector.

But fewer than 1% of public sector employees are covered by collective agreements, as they are excluded from the right to conclude collective agreements.

The employment relationships of all other public employees are governed by statute.

Negotiations take place between the representative bodies before the relevant statutes are adopted by Parliament.

With regard to the *promotion of machinery for voluntary negotiations*, even if the Committee had occasion to point out the low rate of civil servants covered by collective agreements, the situation in the public sector is considered in accordance with the statements of the Charter.

Right to take collective action

Article 6 paragraph 4 of the European Social Charter regarding the right to engage in collective action was not accepted by Austria.

The Austrian Government gave its the reasons for this in a national report to the ECSR:¹ an individual right on the part of employers and workers to collective action in cases of conflict of interest is not embodied in Austrian law, nor is there any general prohibition on strike action: state neutrality is the prevailing principle in this area.

With respect to the right to strike in the civil service, the national report states also that there are no longer any legal restrictions on the right of civil servants to strike, but that a restriction exists which in practice derives from their duty of loyalty to the employer. There is no statutory restriction applicable to essential services either. Therefore, as the Austrian government explains, in these areas too the lawfulness of industrial action must therefore be considered in light of the general statutory standards of conduct.

II) ILO

Austria has among the lowest number of strike days of any country in Europe. No cases concerning this aspect of freedom of association have been brought before the CFA, and only a few have been raised by the Committee of Experts.

Austria is not in compliance with the international principles concerning freedom of association and collective bargaining, since all public servants are excluded from exercising the trade union rights recognised by Conventions Nos 87, 98 and 151.

¹ ECSR, Seventh report on certain provisions of the Charter which have not been accepted, Council of Europe Publishing, Strasbourg, 2000.

III) Action to be taken

Right to take collective action

With respect to the right to strike in the civil service, the national report states that there are no longer any legal restrictions on the right of civil servants to strike, but that there is a restriction which in practice derives from their duty of loyalty to the employer.

What does this mean in practice? Can civil servants take collective action? There is a need for clarification in this respect.

Belgium

- the national police can form and join trade unions, under certain conditions, as can military personnel
- joint consultation procedures exist at various levels and areas
- there is a machinery for voluntary negotiations
- conciliation and arbitration procedures are satisfactory
- civil servants may take strike action

Problems:

- members of the armed forces do not have the right to strike
- members of the police do, but with certain restrictions
- judicial practice restricts the right to strike
- there is no legal prohibition on the dismissal of striking workers

Actions to be taken:

- develop social conciliation in order to prevent social conflicts
- improve the protection of contractual trade union representatives

The civil service in Belgium is a career system, with guaranteed tenure.

Employees in the public sector are divided into two categories: public servants employed on the principle of statutory public employment (this is the rule), and contractual employees under private law whose relationship with the public employer is governed by an employment contract.

Article 1 of the 1937 Decree defines a public servant as ‘any person who is permanently employed’ in the administration. Under Belgian public law, the principle of statutory public employment is the rule, while contractual employment is the exception. This principle is demonstrated by both the Royal Decree defining the position of state servants and case law. The distinction between an employee subject to private law and a public servant governed by public law depends on the nature of the document creating the employment relationship: a contract or a unilateral administrative order.

I) Council of Europe

Right to organise

The right to organise and form trade unions is guaranteed under the Belgian Constitution. Trade unions are free to organise and administer their own affairs without governmental interference. 80% of the working population is affiliated to a trade union and the social partners in Belgium represent an active force in several areas of working life.

Public servants have the right to establish trade unions and to join any civilian occupational trade union.

The general legal framework for relations with trade unions in the public sector (Act 19.12.1974 – but only operational since 1985) to a considerable extent underlies the legal framework for *police services*. It respects the freedom of affiliation (also for organisations recognised by the National Labour Council), but differs with the general legal framework mainly with regard to the possibility for trade union representatives to obtain work release for trade union activities (a fixed quota of days).

*Military personnel*¹ may join either a trade union for military personnel, or a trade union affiliated to a trade union represented on the National Labour Council (Art. 1 para. 2). In order to be approved, a trade union must defend the interests of all categories of military personnel, former military personnel or their dependants operate at national level and not pursue any object that would impede the functioning of the armed forces (Section 12).

A new legal framework was developed regarding the relations with trade unions in the *state security service* (Act 17.3.2004) and recently the royal decrees necessary for its implementation were promulgated. Therefore this framework will soon be operational (including a procedure for social intermediation).

Parliament is debating a new Act on relations with trade unions for *court registrars*, which were excluded from the general Act of 1974 (only judges remain excluded from the Act).

With respect to *trade union activities*, access to the workplace and right of assembly are granted, though subject to certain formalities. The Royal Decree of 25 September 1995 strengthened the *protection against dismissal* of trade union delegates.

The *representativeness* criteria are judged by the ECSR to be reasonable and objective: decisions concerning *representativeness* are supervised by an independent body (*Conseil d'Etat*) and regularly reviewed. Accredited but not representative trade unions may enjoy certain prerogatives and approach the authorities both in the collective interest of the staff they represent and in the individual interest of an employee.²

The trade unions represented on the National Labour Council³ are national, inter-professional federations. Three trade union organisations are currently deemed representative and have the right to sit on the three general negotiating committees.⁴

Right to bargain collectively

Joint consultation procedures exist at various levels and areas: employees' trade union representatives are involved in consultation and thus involved in decision-making. Permanent consultation committees exist at three levels. Special consultation committees

¹ Act of 11 July 1978 organising relations between the public authorities and the trade unions of military personnel, as amended by the Acts of 1 September 1980, 21 April 1994, 24 March 1999, 2 August 2002, 16 January and 27 March 2003.

² For example, to post notices on the premises and receive documentation and information concerning the legislation and regulations applicable to staff.

³ Fédération générale du travail de Belgique (FGTB), Confédération des syndicats chrétiens (CSC) and Centrale générale des syndicats libéraux de Belgique (CGSLB).

⁴ Centrale générale des services publics (CGSP), Fédération des syndicats chrétiens des services publics (FCSSP) and Syndicat libre de la Fonction publique (SLFP).

can be created for issues concerning occupational health and safety and the improvement of the working environment.

Regarding promotion of *machinery for voluntary negotiations*, the ECSR considers the situation in full conformity with the Charter: public authorities are obliged⁵ to submit any general measures they plan to take to prior negotiation or consultation (depending on the subject and importance of the measure) with the organisations representing staff.

An Act of 1991 governs the situation in the main public enterprises (railways, post offices, telecommunications and public transport). This act regulates negotiations at branch and enterprise level, but it is noted that negotiations at branch level are rare.

According to the ECSR, the use of *conciliation* could be strengthened in order to prevent social conflict.

Right to take collective action

Apart from the armed forces, civil servants in general, including policemen, are entitled to engage in strike action.

Minimum service provisions are in practice laid down by the trade unions and the authorities to maintain basic services in key sectors. Requisition of workers for essential tasks, described as ‘peace-time public-interest services’, is possible: joint committees determine and delimit the measures, activities or services to be implemented for undertakings in their specific areas when collective or individual work stoppages occur in order to cover vital necessities, carry out urgent tasks on machinery or materials or to perform certain tasks in situations of force majeure or unforeseen necessity.

The question of minimum services in the public sector is always topical, as the debate arises from time to time whether minimum services should be established in other sectors than the hospital and security services. The trade unions are opposed to this idea, as they fear restrictions on the right to strike.

Police officers are entitled to strike (rare in an EU country), with restrictions considered in conformity with the (R)ESC. A strike must be announced in advance by an accredited trade union; the reason for the strike must be discussed in advance with the competent authority in the police service negotiating committee with a view to reaching a peaceful settlement. Police officers on strike or wishing to strike can be obliged by the authorities to carry on or resume working during the period concerned in order to carry out necessary tasks in order to ensure respect for the law and the maintenance of public order and security at all times.

Members of the *armed forces* are not allowed to strike.

Nevertheless, the ECSR considers that the situation is *not in conformity with Article 6§4* on two grounds:

⁵ Act of 19 December 1974 .

1. The right to strike is not explicitly recognised by law. Several judicial practices restrict the exercise of the right to strike beyond the limits accepted in Article 31 of the RESC. The judicial practices at issue are:

- judgments, delivered on urgent (civil law) applications, forbidding – with coercive penalties – picket lines, classed as forcible methods even if the pickets do not engage in physical violence, threats or intimidation;
- the judgments referred to which rule on the strike itself and may prohibit, even as a preventative measure, a strike, amount to an abuse of rights accompanied by criminal penalties;
- judgments delivered under urgent procedure, imposing a preventive ban on strikes with draconian penalties.

A Belgian judge may thus indirectly control the behaviour of individual strikers and whether industrial claims are reasonable or not. He or she therefore rules on the appropriateness of a strike, substituting his or her assessment for that of the strikers.

Despite the proposal of a bill for the express purpose of averting disturbances to the normal course of labour–management relations by the judiciary intervening in collective labour disputes, the problem of compliance with the Charter substantively remains.

2. The ECSR also considered the Belgian law as not in conformity because it does not prohibit the dismissal of striking workers. In fact, with regard to the consequences of collective action, and in particular the nature of litigation on dismissal on substantive grounds in connection with a strike, the Committee noted that the principal decisions that form the case law of the Court of Cassation in relation to the consequences of the strike for the employment contract, were:

- in itself the strike does not terminate the employment contract (decision of 14 April 1980);
- the worker is entitled to refrain from performing the agreed work because of the strike and, by exemption from Article 1134 of the Civil Code, entitled to refrain from discharging the obligation deriving from the employment contract. Thus participation in a strike is not intrinsically an unlawful act (decision of 21 December 1981);

but

- it is not excluded that section 35 of the 1978 law on employment contracts, which contemplates the possibility of dismissal on substantive grounds, may apply in the event of a strike. The aims pursued by the strikers can enter into the court's assessment of the substantive grounds (decision of 28 January 1991);
- in assessing the seriousness of the grounds, the court cannot refer to other criteria than those prescribed by section 35 (decision of 27 January 2003).

The ECSR notes that it has always considered that Article 6§4 of the Charter implies not only that a strike has the effect of suspending a contract of employment, but also that it is prohibited to dismiss striking workers.

II) ILO

The most relevant case is Case N° 2306, Organisation of Independent Civil Servants vs the Government of Belgium⁶

The issue raised by this case concerns the granting of time off to representatives of an organisation of public employees, which is not a representative organisation, to carry out their trade union functions during working hours.

The complainant organisation alleges that there has been a violation of Convention No. 151 on Labour Relations in the Public Service.

In its conclusions, the CFA recalls that paragraph 1 of Article 6 of Convention no. 151 provides that ‘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’.

Recommendation No. 143 on Workers’ Representatives allows for certain limits: ‘*Reasonable limits may be set on the amount of time off which is granted to workers’ representatives.*’ The CFA adds that the affording of these facilities has as its corollary a guarantee of the efficient operation of the administration or service concerned.

In Belgium, the Royal Decree of 28 September 1984 provides for the granting of trade union leave and dispensations from service and determines their scope.

The CFA finds that the complainant organisation did not provide enough justification to prevent certain delegates from being considered as in a position of ‘non-activity’ for unjustified absence.

III) Action to be taken

As far as the right to take collective action is concerned, the Committee considers the situation as not in conformity with Article 6 paragraph 4 on two grounds. These are not specific to the public sector, but nevertheless are very important.

The right to strike is not explicitly recognised by law. A number of judicial practices restrict the exercise of the right to strike. A Belgian judge may thus indirectly control the behaviour of individual strikers and whether industrial claims are reasonable or not. He or she therefore rules on the appropriateness of a strike, substituting his or her assessment for that of the strikers.

Has the proposed bill (for the express purpose of avoiding disturbance of the normal course of labour–management relations by the judiciary) become law? Does it change anything in practice?

⁶ CFA Report No. 335, 2003, case no. 2306.

Bulgaria

- Public officials have the right to form and to join trade unions, including members of the police

Problems:

- Tripartite consultation is becoming increasingly inefficient; the government takes unilateral decisions without prior consultation of the social partners
- Active members of the armed forces cannot join a trade union
- Military personnel do not have the right to take collective action
- Public officials do not have the right to collective bargaining in the strict sense
- Public officials may only take symbolic strike action
- No provisions exist on conciliation, mediation or arbitration procedures

Actions to be taken:

- Trade union pressure is urgently needed to improve the situation of members of the armed forces and public officials with regard to trade union rights
- Trade unions need to insist on the usefulness of social dialogue and consultation with the social partners
- Is more trade union involvement in conciliation feasible?

The Bulgarian Constitution of 13 July 1990, as amended on 26 September 2003 and 25 February 2005, establishes the right of freedom of association for workers and employers. Article 49 stipulates that workers are free to form trade union organisations in order to defend their occupational interests. Employers may unite to defend their economic interests.

The right to strike is laid down in Article 50: workers have the right to strike in order to defend their economic and social interests. The relevant conditions and procedures are determined by law.

Article 43 of the Civil Servant Act of March 1990, in its 2000 and 2001 amended versions, establishes the right of civil servants to set up a trade union organisation of their choice and to join such an organisation.

General terms and conditions of employment and the financial framework are regulated by collective agreement. Pay mechanisms are established by the state.

I) Council of Europe

Right to organise

In their observations, in 2004 several trade unions complained about the over-general nature of the Civil Service Act, which would weaken the protection of their right to organise and make it impossible for them to take part in collective bargaining. Due to insufficient evidence to support these allegations, the ECSR asked for clarification and in

2006 it declared itself satisfied with the situation. The government had in fact specified that Section 7 of the Civil Service Act prohibits all discrimination, privileges or restrictions on the ground of trade union membership. Section 44 guarantees the right of civil servants to found, join and leave associations freely. By virtue of a decision of the Council of Ministers of 2 November 2004, disputes are examined by the National Council for Tripartite Cooperation (NCTC). The Professional Association of Civil Servants and the National Trade Union of Civil Servants also protect civil servants' professional interests. These associations are duly listed in the register of non-profit-making organisations.

Active members of the *armed forces* cannot join trade unions (Section 197 of Act No. 112/1995 on Bulgarian defence and armed forces).

In the case of the *police*, the Ministry of the Interior Act No. 122/1997, authorises its employees to associate to promote and protect their professional, social and economic rights. Officers and sergeants are not allowed to join trade unions operating outside the Ministry (Section 265.2): it is not entirely clear whether they must belong to it and/or have formed independent trade unions.

The most recent national report refers to a single national police trade union, established on 12 May 1990 by officers and sergeants from the executive staff of the Ministry of the Interior, completely independent of the managerial staff of the Ministry at all levels and registered as a non-profit-making organisation. Membership is voluntary and the aim of the union is to protect ordinary police officers' interests.

Since it was not clear whether the police trade union and any other association of police officers enjoyed such trade union prerogatives as responsibility for discussing conditions of employment and remuneration and the right of assembly, the government made it clear that, even if this is possible in principle, since 1996 the committee responsible for assessing police working conditions has no longer been able in practice to negotiate pay within the Ministry because, at the trade union's insistence, pay has been linked to the budget established for each sector.

Right to bargain collectively

The system of joint consultation is fairly well developed. Employees, employers and their organisations have established bipartite consultative bodies¹ and cooperate with and are consulted by the state on matters relating to social security and living standards, as part of the industrial relations process.² *Nevertheless, the ECSR could not determine whether joint consultative bodies exist in the public service too.*

¹ The Government refers in this respect to a 'General Framework for a National Economic and Social Pact of Bulgaria up to 2010', as well as to an 'Address to the political parties on common proposals of employers and trade unions concerning economic and social policy up to 2010', developed and signed jointly by representatives of employers' organisations and trade unions in 2005. The Committee wishes the next report to specify whether measures aimed at promoting bipartite social dialogue at national, regional and enterprise level are in place.

² The main national forum for this dialogue is the National Council for Tripartite Cooperation (see Article 3.1 of the Labour Code). This tripartite forum looks at draft legislation on labour relations, safety and health at work, employment, unemployment, vocational qualifications, health insurance, income, living standards, and so on. In addition to the NCTC, the report mentions a number of other tripartite bodies at the national level in which the social partners participate, each dealing with specific issues, inter alia, social security,

But it did note that there has recently been a restriction in the scope of topics subject to consultation within the NCTC and that a formalisation of consultation procedures occurred which led to the two largest trade union confederations – the Confederation of Independent Trade Unions and the Confederation of Labour Podkrepa – discontinuing participation in the NCTC in 2005. The ECSR further noted that the aforementioned unions had complained that, in the last few years, tripartite cooperation within the NCTC had become increasingly inefficient and that the government was taking unilateral decisions without prior consultation of the social partners.

As far as voluntary negotiations are concerned, public officials do not have the right to collective bargaining in the strict sense, but trade unions can represent and protect their interests in dealings with state authorities on employment and social security matters through recommendations, requests and involvement in the preparation of internal regulations and orders pertaining to employment matters.³

The Civil Service Act makes no provision for *conciliation, mediation or arbitration procedures* to settle conflicts of interest between government and public servants, therefore the ECSR considers that the situation in Bulgaria is *not in conformity* with Article 6 paragraph 3 of the revised Charter.

The Bulgarian Government⁴ had examined the 2004 conclusions with a view to remedying the violation. With the help of ILO technical assistance in 2002, it drew up amendments and steps had been taken to set up consultative machinery. Following this activity, a tripartite seminar had been held and a group of experts set up to revise the legislation on the public service.

The ECSR wishes to be informed concerning any development in this regard, but since the legal situation has not yet changed, it reiterates its finding of non-conformity (Conclusions 2006).

However, at the 113th Governmental Committee meeting,⁵ the Bulgarian delegate again confirmed the absence of developments in the matter. He informed those present that the conclusions of the ECSR have been brought to the attention of the new ministry responsible for the issues related to collective bargaining and collective action. Legislative amendments were to be expected shortly, but in an unspecified timeframe.

The ETUC representative pointed out that this was the second time that Bulgaria was found not to be in conformity with this fundamental right of the Revised Charter, and proposed to the Committee that it vote on a warning.

social assistance, employment promotion, vocational qualification and equal opportunities of women and men in the field of work.

The Committee has always considered the situation as in conformity with Article 6 paragraph 1 of the Charter where joint consultation takes place within the framework of tripartite cooperation bodies, as long as it brings together employers and workers or their organisations on terms of equality.

³ Section 44.3 of the Civil Service Act, No. 67/1999.

⁴ Strasbourg, 8 April 2005, Governmental Committee of the European Social Charter, Report concerning Conclusions 2004.

⁵ 113th meeting, Strasbourg, 12–14 September 2006, provisional Report prepared by the Secretariat, p. 52.

Other delegates⁶ thought that since the previous conclusion of non-conformity dates back only to 2004, it would rather be appropriate to send a strong message to the Bulgarian Government to remedy the violation.

The Governmental Committee thus urged the Government to intensify its efforts to bring the situation into conformity with the revised Charter as soon as possible.

Right to take collective action

In general, Section 50 of the Constitution grants workers and employees the right to strike to protect their economic and social interests, to be exercised in accordance with the relevant legal conditions and procedures. The relevant legislation is the Settlement of Collective Labour Disputes Act (SCLDA), No. 21/1990, as amended in 2001.

Lockouts, defined as an employer's reaction to strike action, are unlawful.

The decision to call a strike must be taken by a majority of employees in the enterprise or subsidiary concerned. *The ECSR needs more information to ensure that the voting requirements do not, in practice, make it very difficult to exercise the right to strike.* Participation in strikes is voluntary.

With regard to the restrictions *ratione personae* on the right to strike, military personnel and officers are denied this right (Section 274.2, Act No. 112/1995), in compatibility with Article 6 paragraph 4 of the Revised Charter, having regard to Article G.

With regard to procedural requirements in the event of a strike, employees and their employer are required to draw up a written agreement specifying the arrangements for the continued performance of activities whose withdrawal during the stoppage might interfere with the satisfactory provision of day-to-day public services and transport, interrupt the broadcasting of radio and television programmes, cause irreversible damage to public or private property or the natural environment or threaten public order. The agreement must be concluded at least three days before the start of the strike. In the event of disagreement, the matter must be settled by a single arbitrator or an arbitration commission appointed from a cabinet-approved list of arbitrators.

With specific regard to other workers in the essential services and public sector, the situation has clearly been *not in conformity with the Charter since the first cycle of conclusion in 2004.*

Section 16.4 of the SCLDA prohibited strikes in the *energy, telecommunications and health sectors*. This has been subject to continuous criticism from the Bulgarian trade unions. Finally, in October 2006 the Act on Changes and Amendments to the Law on the Settlement of Collective Labour Disputes was adopted, revoking the restrictions in the abovementioned sectors.

Concerning a second ground of non-conformity, public officials have a statutory right to take part *only in symbolic strikes* and are banned from collectively withdrawing their labour; in fact, Section 47 of the Civil Service Act No. 67/1999 limits the right to strike to

⁶ The Belgian, Danish, French and Finnish delegates.

wearing or displaying signs, arm-bands, badges or protest banners, without any interruption of public duties.

The ECSR recalls that Article G authorises some justified restrictions on the right to strike of certain categories of public official, but prohibiting all public servants from exercising the right to strike, by legal provisions amounting to a complete withdrawal of it, is not in conformity with the Charter.

This problem remains unsolved, even after the changes in the law in 2006.

The final ground of non-conformity with the Charter concerns *civilians employed by the Ministry of Defence, the army and establishments responsible to the Defence Ministry*, who do not have the right to strike (Section 274.2 of Act No. 112/1995).

The ECSR considers that whereas restricting military personnel's right to strike is compatible with the Charter, having regard to Article G, this does not apply to 'ordinary' employees of the Ministry of Defence and any associated bodies and establishments. These should fully benefit from the right to strike since it poses no threat to national security.

At the 2004 Governmental Committee, the Bulgarian delegate stated that the abovementioned prohibition had been dealt with by the legislation and that the Constitutional Court considered that the armed forces were required at all times to protect national security and defend the country.⁷

The situation in 2006 is still one of non-conformity on this ground. At the last Governmental Committee meeting,⁸ the Bulgarian delegate stressed that the right to strike was recognised as a fundamental right by Bulgarian legislation and that restrictions on this right for the protection of national security were permitted by the revised Charter.

He specified that the prohibition on the right to strike in relation to non-military personnel of the Ministry of Defence and any establishment responsible to that Ministry was related to the functions exercised by such personnel, closely connected to the armed forces: a work stoppage by such personnel would endanger national security.

He further drew the Committee's attention to the fact that this restriction has not been criticised by the Bulgarian trade unions within the scope of the currently pending Collective Complaint No. 32 (see below) lodged against Bulgaria.

The Governmental Committee invited the government to provide detailed information on the functions exercised by the non-military personnel prohibited from striking in its next report, deciding to await the next assessment of the ECSR.

The three grounds of non-conformity were, inter alia, also the subject of Collective Complaint No. 32/2005 – European Trade Union Confederation (ETUC), Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour 'Podkrepa'

⁷ The Belgian delegate noted, on the other hand, that Bulgaria's international commitments were also binding on the courts.

⁸ Strasbourg, 8/4/2005, Governmental Committee of the European Social Charter, Report concerning Conclusions 2004.

(CL 'Podkrepa') versus Bulgaria.⁹ The ECSR decided that Bulgaria was in violation of the provisions on all grounds.

II) ILO

Regarding the exercise of the right to strike, the Committee of Experts makes reference to Bulgarian legislation in its 2003 observations, 74th session.

Thus Article 47 of the abovementioned law restricts the right to strike to the wearing of signs, symbols and armbands and the carrying of protest placards. Restrictions on the right to strike should be limited to public servants exercising authority in the name of the state. The Committee informed the government that it wished public servants to be able to stop work rather than being restricted to symbolic strikes only.

In practice, Bulgaria puts restrictions on the trade union rights of civil servants that go beyond those acknowledged by the ILO.

III) Action to be taken

Do joint consultative bodies exist in the public service?

Information could be provided in the next report to the Committee.

The Civil Service Act makes no provision for *conciliation, mediation or arbitration procedures* to settle conflicts of interest between government and public servants. Therefore, the situation in Bulgaria is not in conformity with Article 6 paragraph 3 of the revised Charter.

What is the state of play? It would be possible to lobby the government to obtain changes.

The ECSR needs more information to ensure that the voting requirements before a strike do not, in practice, make it very difficult to exercise the right to strike.

Can you provide this information?

A collective complaint which was decided recently deals with the following points:

Section 16.4 of the SCLDA prohibits strikes in the energy, telecommunications and health sectors. Simply banning strikes, even in essential sectors, is not acceptable.

In 2004, the Bulgarian delegate informed the Governmental Committee that the government had made efforts to settle this matter and that numerous consultations had been held, particularly with the Committee on Freedom of Association. In 2003, the Ministry of Labour and Social Policy initiated the establishment of a working group comprising representatives of the government and the nationally representative organisations of employers and employees with the task of preparing and proposing amendments to the SCLDA; draft legislation had been prepared which granted the right to strike in the distribution and energy sectors, but opposition from the ministries concerned had prevented progress in the

⁹ http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/RC32_admissibility.pdf

telecommunications and health sectors. The Constitutional Court had ruled that a work interruption in the telecommunications sector could threaten people's lives and its decisions were binding on any public institution. Therefore, the bill for the amendment of the SCLDA agreed within this working group and approved by all social partners represented in the National Council for Tripartite Cooperation was not included in the bill submitted to Parliament in November 2003, and the legal situation remains unchanged.

What is the state of play with regard to the new legislation?

On a second ground of non-conformity, public officials have a statutory right to take part only in symbolic strikes and are banned from collectively withdrawing their labour; in fact, Section 47 of the Civil Service Act, No. 67/1999 limits the right to strike to wearing or displaying signs, armbands, badges or protest banners, without any interruption to public duties.

The Committee recalls that Article G authorises some justified restrictions on the right to strike of certain categories of public official, but prohibiting all public servants from exercising the right to strike, by legal provisions amounting to a complete withdrawal of it, is not in conformity with the Charter.

Changes to the law might be envisaged.

The final ground of non-conformity with the Charter regards civilians employed by the Ministry of Defence, the army and establishments responsible to the Defence Ministry, who do not have the right to strike (Section 274.2 of Act No. 112/1995).

The ECSR considers that whereas restricting military personnel's right to strike is compatible with the Charter, having regard to Article G, this does not apply to 'ordinary' employees of the Ministry of Defence and any associated bodies and establishments. These should fully benefit from the right to strike since it poses no threat to national security.

The Governmental Committee asked for detailed information on the functions exercised by the non-military personnel prohibited from striking in the next report.

Croatia

- Legislation authorises public officials to form trade unions (unless there is specific legislation to the contrary)
- Joint consultation takes place at national level in the forum: public sector
- Mediation and arbitration mechanisms are in place
- The right to strike is guaranteed, albeit with numerous restrictions on workers in government administration and public services

Problems:

- Military personnel on active service do not have the right to form trade unions, nor the right to strike
- If more than one trade union is represented in a respective area, a bargaining committee needs to be established and the employers' side must provide a certificate showing the number of members of the trade unions represented in the area in question
- Under Article 60 of the Constitution the right to strike may be restricted as regards the armed forces, the police, public administration and public services as stipulated by law; however, the legislator has not used this possibility so far
- According to the ITUC Annual Survey of Violations of Trade Union Rights (2006 and 2005), and despite general legal protection of collective bargaining, the 1993 Act on the Realisation of the Government Budget allows the government to modify the substance of a collective agreement in the public sector, if there are not sufficient funds in the budget to meet all the financial obligations arising from that agreement. This resulted in a one-day strike in December 2006 by public sector workers (including police, administration and court officials) because the government argued that the 2006 state budget could not cover pay rises of over 3 per cent
- The same report also indicates that the Act on Salaries in Public Services also limits collective bargaining rights in the public sector, by setting coefficients for the workplace, with the result that public sector workers can negotiate on their basic salaries only

Actions to be taken:

- Trade unions should be vigilant with regard to possible legal proposals which make use of the possibility of restricting the right to strike laid down in the Constitution
- It should be considered whether and how the legislation on bargaining in the public sector can be improved to overcome the abovementioned problems

I) Council of Europe

Right to organise

Article 43 of the Constitution establishes freedom of association whereby everyone is free to form, join and leave trade unions and other associations, in accordance with the law. Article 59 of the Constitution establishes freedom of association for employers.

Section 4 of the Civil Servants and Civil Service Employees Act authorises public officials to form trade unions in accordance with general labour regulations, unless there is specific

legislation stating the contrary. The first – and so far the only – national report of the Croatian government does not specify whether such legislation exists, apart from for members of the armed forces, and the ECSR wants clarification on this.

Under Article 59 of the Constitution, legal restrictions *may be placed* on the right of *members of the armed forces and police officers* to form trade unions. The *Armed Forces Act of 1995* forbids military personnel on active service from forming trade unions, but not other armed forces personnel, such as civil servants and other employees. For police officers, no restrictive legislation is provided.

Right to bargain collectively

Joint consultation at national level takes place within the Economic and Social Council, a tripartite body comprising representatives of the government and the social partners; it provides a forum for social dialogue and partnership with regard to all issues relating to economic and social policy and also gives advice to the government. In addition, it provides a forum for joint consultation in the public sector, including the civil service. Within the Economic and Social Council, tripartite expert commissions have been set up in which the social partners conduct preliminary discussions on issues of mutual interest. The ECSR needs the next report to provide further information on the Economic and Social Council: its composition, commissions and working groups, its specific competencies as set out in the agreement on its establishment, the rules of procedure adopted by it and its activities during the reference period.

Economic and Social Councils have also been established at regional and local levels as tripartite bodies to coordinate economic and social development measures in specific areas. Again, the ESCR asks that the next report provide information on the composition of these councils, especially on the meaning of local level in this context, whether joint consultation is also provided for at the sectoral level and whether representativeness criteria apply to the participation of trade unions in joint consultations at regional, sectoral and local level.

The ECSR wishes, however, to know whether joint consultation in the public sector is also provided as regards the tripartite bodies at regional and local level, and whether there are further specific consultative or representative bodies in this sector at national, regional and local level (and if so, what their structure is and how they operate).

Voluntary negotiations and collective bargaining procedures are governed by Sections 194–212 of the Labour Code. The ESCR needs clarification concerning whether these rules also apply to the public sector or what other regulations allow employee participation in the public sector in the determination of their working conditions. Pending receipt of the information requested, it deferred its conclusions.

In particular, the ESCR notes that the subject and contents of collective negotiations are left exclusively to the parties to the agreement, and it asks how collective negotiation procedures may be initiated by the social partners. If more than one trade union or higher-level trade union association are active in the area in respect of which a collective agreement is to be concluded, the employers, the employers' association or higher-level employers' association are permitted to negotiate a collective agreement solely with a bargaining committee composed of representatives of those trade unions, which decide themselves on the number of representatives and the composition of the bargaining committee. If the

trade unions do not reach a corresponding agreement, the number of members and the composition of the bargaining committee (minimum 3, maximum 9 members) shall be determined by the Economic and Social Council. The employer side¹ shall provide the Council, on the basis of the information available to it, with a certificate showing the number of members of the trade unions represented in the area in respect of which a collective agreement has to be concluded. The ECSR asks why this information is provided by the employer side rather than by the trade unions concerned.

Further information is also required on the criteria applied in practice to determine the participation of different trade unions active in the same area in a bargaining committee;² whether a decision on the composition of the bargaining committee is subject to judicial review;³ whether representativeness criteria apply in the event a single trade union wants to initiate negotiations with the employer's side; and the safeguards to ensure that the trade unions entitled to bargain collectively are independent of the employer's side.

With regard to *conciliation and arbitration*, the Labour Code defines collective labour disputes as conflicts related to the conclusion, amendment or renewal of a collective agreement or other similar disputes which could result in a strike or other form of industrial action. As indicated by statistics provided in the report, it seems that the conciliation and arbitration procedures also apply to collective conflicts which may arise between the public administration and its employees. The ECSR asks for clarification and also information on what other procedures apply in this respect.

These disputes can be solved by an obligatory mediation procedure; the decision may be rejected or may only be legally binding upon the parties with their joint consent. The ECSR wishes the next report to confirm that this understanding is correct.

Parties may also agree (and only *if they agree*) to bring the dispute before an arbitration body. No appeal is permitted against its decision, which will have the same legal force and effects as a collective agreement. Any recourse to arbitration seems to be based on a joint agreement, and the recourse to arbitration at the request of one party only is excluded. The ECSR wishes the next report to confirm that this understanding is correct.

But recourse to compulsory arbitration may be had for the purpose of *defining minimum services to be provided during strike action*.⁴

¹ The employer, the employers' association, or the higher-level employers' association.

² The ECSR recalls that in order to render the participation of trade unions in the various collective bargaining procedures effective, it is open to states to require them to meet an obligation of representativeness subject to certain general conditions. With respect to Article 6 paragraph 2 of the Charter, any requirement of representativeness must not excessively limit the possibility of trade unions participating effectively in collective bargaining.

³ This would thus offer appropriate protection against an arbitrary prohibition of a trade union being represented on such committee.

⁴ See conclusion under Article 6 paragraph 4: questions are raised in order to assess whether the restrictions on the right to strike following from compulsory arbitration in these cases fall within the limits of Article 31 of the Charter.

Right to collective action

Article 60 of the Constitution guarantees the right to strike, which may be restricted as regards the armed forces, the police, the public administration and the public services to the extent laid down by law. Nevertheless, it seems that the legislator has not made use of this authorisation with respect to employees in these sectors, who therefore have an unrestricted right to strike in accordance with the provisions of the Labour Code. The ECSR asks that the next report confirm that this principle applies not only to all employees in the public administration and the public service, but also to all civil servants.

Military personnel on active service are prohibited from strike action. Other civil servants and employees in the armed forces enjoy it in accordance with the provisions of the Labour Code. *Police officers* do not have the right to strike during a state of war, an immediate threat to the independence and unity of the state, during an armed rebellion, upheaval and other forms of violent threat to the democratic constitutional order or fundamental freedoms and human rights, in the event of a natural disaster or its imminent occurrence on the territory or in the event of other disasters and accidents obstructing normal life and compromising the safety of people and property.

With regard to the regime in *essential services*, pursuant to Section 222 of the Labour Code, upon a proposal by the employer, the trade union and the employer shall agree on the provision of those services which must not be interrupted during a strike or a lock-out, such as production maintenance services with the aim of enabling the restoration of regular work immediately after the strike, and essential services required for the prevention of risks to the life, personal safety or health of the population. It is explicitly stated that the imposition of such services may not prevent or substantially restrict the employees' right to strike. If no agreement on the determination of essential services is reached within 15 days of the employer's proposal to the trade union, one of the parties may request that they be defined by an arbitration body.⁵ If one party refuses to participate in the arbitration procedure, this shall be completed without the participation of this party, and the determination of the services to be maintained shall be effected by the chair of the arbitration board.

In order to be able to assess whether the restrictions on the right to strike in connection with the determination of minimum services fall within the limits of Article 31 of the Charter and are in conformity with Article 6 paragraph 4, the ESCR needs to know: the criteria used to determine whether a minimum service has to be introduced and what would be its scope; what the sectors concerned are; and what the possibilities of appeal against a decision rendered by the arbitration board in this respect are. It also has to be clarified whether: the decision on minimum services is a precondition for a strike to be lawful; the strike may only start after a final decision on the minimum services to be provided has been reached; the arbitration board's competences are limited to the determination of the minimum services required or it may also prohibit strike action from

⁵ This arbitration body consists of one representative of the trade union, one of the employer and an independent chair, appointed by agreement between the trade union and the employer or by the president of the court which has first-instance jurisdiction for cases related to the prohibition of strikes or lockouts. The arbitration body must render a decision on the services to be provided within 15 days following the institution of the arbitration procedure.

taking place or suspend an ongoing strike. Meanwhile, the ECSR reserved its position on this point.

With regard to the *permitted objectives of collective action*, a strike can be called in order to protect and promote the economic and social interests of trade union members or on the ground of non-payment of salary or salary compensation. Solidarity strikes are also permitted. The ECSR asks that the next report confirm that the right to strike is not limited to strikes aimed at the conclusion of a collective agreement but is guaranteed in the context of any negotiations between employers and employees in order to settle an industrial dispute.

The *entitlement to take collective action* is reserved to trade unions and their higher-level associations. It seems therefore that workers which are not members of an existing trade union are not permitted to call a strike but that the decision to call a strike can be taken only by a trade union. A trade union acquires legal personality as of the date of its registration in the register of associations. A decision on an application for registration has to be issued within 30 days of its filing.

The ECSR understands that legal personality is a prerequisite for lawfully calling a strike. In order to be able to assess whether the timeframe of the 30 days it may take for a group of workers to form a trade union for the purpose of calling a strike constitutes an excessive formality that may impede the rapid decision that strike action sometimes requires, the ECSR needs to know whether 30 days are the maximum period within which registration must take place and what is the average time period for registration in practice.

It further asks whether it is possible for unionised workers belonging to different trade unions to organise for the purpose of calling a strike, for example, by forming a strike committee.

II) ILO

No existing case law.

III) Action to be taken

The ECSR requires clarification on different aspects of the regulation of trade union rights, in particular on the following:

Section 4 of the Civil Servants and Civil Service Employees Act authorises public officials to form trade unions in accordance with general labour regulations, unless there is specific legislation stating the contrary. The first – and so far the only – national report of the Croatian government does not specify whether such legislation exists, apart from for members of the armed forces.

Further information is also needed on the Economic and Social Council: its composition, commissions and working groups, its specific competencies as set out in the agreement on its establishment, the rules of procedure adopted by it as well as on its activities during the reference period.

Economic and Social Councils have also been established at regional and local levels as tripartite bodies to coordinate economic and social development measures in specific areas. Again, the ECSR asks that the next report provide information on the composition

of these councils, especially on the meaning of local level in this context, whether joint consultation is also provided for at the sectoral level and whether representativeness criteria apply to the participation of trade unions in joint consultations at regional, sectoral and local level.

Voluntary negotiations and collective bargaining procedures are governed by Sections 194–212 of the Labour Code. Do these rules apply to the public sector or are there other regulations which allow employee participation in the public sector in the determination of their working conditions?

How may collective negotiation procedures be initiated by the social partners?

If the trade unions do not reach a corresponding agreement, the number of members and the composition of the bargaining committee (minimum 3, maximum 9 members) shall be determined by the Economic and Social Council. The employer side shall provide the Council, on the basis of the information available to it, with a certificate showing the number of members of the trade unions represented in the area in respect of which a collective agreement has to be concluded. The ESCR asks why this information is provided by the employer side rather than by the trade unions concerned.

Further information is also required on the criteria applied in practice to determine the participation of different trade unions active in the same area in a bargaining committee; whether a decision on the composition of the bargaining committee is subject to judicial review; whether representativeness criteria apply in the event a single trade union wants to initiate negotiations with the employer's side; and the safeguards to ensure that the trade unions entitled to bargain collectively are independent of the employer's side.

Any recourse to arbitration seems to be based on a joint agreement, and recourse to arbitration upon the request of only one party is excluded. The ECSR wishes the next report to confirm that this understanding is correct.

Article 60 of the Constitution guarantees the right to strike, which may be restricted as regards the armed forces, the police, the public administration and the public services to the extent laid down by law. Nevertheless, it seems that the legislator has not made use of this authorisation with respect to employees in these sectors, who therefore have an unrestricted right to strike in accordance with the provisions of the Labour Code. The ECSR asks that the next report confirm that this principle applies not only to all employees in the public administration and the public service, but also to all civil servants.

In order to be able to assess whether the restrictions on the right to strike in connection with the determination of minimum services fall within the limits of Article 31 of the Charter and are in conformity with Article 6 paragraph 4, the ESCR needs to know: the criteria used to determine whether a minimum service has to be introduced and what would be its scope; what the sectors concerned are; and what the possibilities of appeal against a decision rendered by the arbitration board in this respect are. It also has to be clarified whether: the decision on minimum services is a precondition for a strike to be lawful; the strike may only start after a final decision on the minimum services to be provided has been reached; the arbitration board's competences are limited to the determination of the minimum services required or it may also prohibit strike action from taking place or suspend an ongoing strike.

Information is also needed to confirm that the right to strike is not limited to strikes aimed at the conclusion of a collective agreement but is guaranteed in the context of any negotiations between employers and employees in order to settle an industrial dispute.

The ECSR understands that legal personality is a prerequisite for lawfully calling a strike. In order to be able to assess whether the timeframe of the 30 days it may take for a group of workers to form a trade union for the purpose of calling a strike constitutes an excessive formality that may impede the rapid decision that strike action sometimes requires, the ECSR needs to know whether 30 days are the maximum period within which registration must take place and what is the average time period for registration in practice. It further asks whether it is possible for unionised workers belonging to different trade unions to organise for the purpose of calling a strike, for example, by forming a strike committee.

Cyprus

- The Public Service law guarantees to all public employees freedom of association and the unhampered exercise of the related rights
- Members of the police force have the right to join a trade union
- Joint consultation bodies are functioning properly

Problems:

- In the armed forces no more than two associations are allowed by law and the statutes of such associations are subject to the approval of the Minister of Defence
- Members of the armed forces and police do not have the right to strike
- In Article 27 II of the Constitution the possibility is foreseen of extending this prohibition to the public service as a whole; this possibility has not yet been used by the legislator
- The decision to call a strike must be endorsed by the executive committee of a trade union as laid down by law

Action to be taken:

- Armed forces: the law restricting the right of association (Law No. 55 (I) of 2005) should be changed – trade union pressure on the legislators could be an option
- Strike ballot: legislative changes were supposed to take place – did this happen? Again, trade union pressure on the legislators could be an option

The centrepiece of labour legislation is the Law on Trade Union Organisations of 1969, which broadly reflects the guidelines and orientations of the International Labour Organisation. The right to strike is guaranteed by the Constitution of 6 August 1960.

I) Council of Europe

Right to organise

Since 6 June 1980, regulations in Cyprus have been *in line with Article 5* of the Social Charter. The Public Service Law guarantees to all public employees freedom of association and the unhampered exercise of the related rights: to join organisations not exclusively composed of civil servants and, in particular, to choose the technical and professional framework in which they wish to organise.

In conformity with the Charter, members of the police force also have the right to join trade unions or to freely set up their own professional bodies or associations. They enjoy a full right of assembly for the protection of their interests and to (re-)negotiate their conditions of service and remuneration. Law No. 55(I) of 2005 amending the Laws concerning the armed forces (1990–2003) provides for the establishment of no more than

two professional associations comprising only members of the armed forces. Constitutions and by-laws of such associations are subject to approval by the Minister of Defence.¹

As the working conditions of public employees are determined by law and collective agreements, it is particularly important that joint consultation bodies function properly in all the main public services:

- at national level, the Labour Advisory Board and the Economic Consultative Committee discuss policy issues relating to economic growth, unemployment, inflation, and so on;
- at local level joint committees exist for consultation purposes;
- a Tripartite Contact Committee, composed of members of the House of Representatives, the government and the civil service trade union, meets for information and consultation purposes, participates in collective bargaining and acts as a permanent contact and communication mechanism between the House of Representatives (where a decision requires approval by the House) and the two sides of the Joint Personnel Committee in order to avoid decisions made in the Joint Personnel Committee of the Public Service being rejected.

In recent years, the *promotion of machinery for voluntary negotiations* has successfully focused on excluding or substantially reducing possible rejections or modifications of civil service collective agreements by Parliament, by the action of the Tripartite Contact Committee. Since its establishment, the House of Representatives has, on matters with important financial implications, generally always respected and neither cancelled nor amended any collective agreement freely concluded between the Civil Servants' Trade Union and the government, though it still had this power.

A procedure established in 1987 provides for *conciliation* and non-binding *arbitration mechanisms* for labour disputes in the public sector in conformity with the requirements of the Charter.

Right to take collective action

With specific regard to the *right to strike*, the ECSR took note of the measures taken by the government aimed at bringing the situation into conformity.

- Article 27 paragraph 2 of the Constitution provides, *inter alia*, that a law may extend the prohibition on the right to strike for the armed forces and the police to the members of the public services. This provision has never been applied; members of the public service have gone on strike on many occasions. Furthermore, section 63 of the 1990 Public Service Law provides that '*the freedom of association and the unhampered exercise of the rights related to it are guaranteed for public officials*'. On confirming that section 63 of the aforesaid law guaranteed the right to strike for civil servants, the government affirmed '*that the power conferred on the legislature under Art. 27 (2) of the Constitution to adopt legislation to prohibit public servants from striking, which has never been used, is at present of no relevance*'. Nevertheless it is still there.

¹ http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=CYP&p_classification=02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY

- The ECSR concludes that the situation in Cyprus is not in conformity with Article 6 paragraph 4 of the Revised Charter on the ground that, in accordance with the Trade Union Laws 1965–1996, although all employees, whether unionised or not, had the right to strike, the decision to call a strike must be endorsed by the executive committee of a trade union.

Civil servants take the decision to strike by secret ballot and the decision normally has to be approved by the Public Servants Union. Approval is required because normally trade unions have many branches, and a strike by one of them may conflict with the interests of the others. Thus if a branch of the union decides, following a ballot, to resort to a strike, the executive committee should examine whether such action benefits the trade union as a whole and therefore the law requires that the executive committee approve any action.

The government has brought the issue to the attention of the Labour Advisory Board with a view to modifying the relevant provisions of the Trade Union Laws 1965–1996. The most recent national report states that the relevant provisions of the Trade Union Laws 1965–1996 are the subject of a draft amendment law endorsed by the Labour Advisory Board and were before the Law Office of the Republic for verification. It was expected that the amending law would be adopted by Parliament in 2005. At the September 2006 meeting of the Governmental Committee, the information that the new legislation was being adopted and translated was welcomed. It must now be awaited whether the ECSR considers the new rules in conformity with the Charter.

The social partners have signed an agreement that was countersigned by the Minister of Labour and Social Security in March 2004 regulating the right to strike in essential services. The agreement included a strict definition of what constituted an essential service in accordance with the requirements of the ECSR and the ILO Committee of Experts. It lays down the procedures to be followed in case of deadlock in a dispute in essential services and provides for a minimum service.

Moreover, the legal service of the Republic had been requested to repeal Regulations 79A and 79B, which were considered to infringe the Charter.

Changes to the legislation have apparently occurred. At the September 2006 meeting of the Governmental Committee, it was announced and welcomed that the Council of Ministers had approved on 22 June 2006 a new regulation abolishing Regulations 79A and 79B. The next assessment of the ECSR is now awaited to see whether the situation is indeed in conformity.

II) ILO

2000: CFA Report no. 325, case no. 2110

Pancyprian Public Employees Trade Union (PASYDY) vs the Government of Cyprus

This case concerns the government's refusal to engage in negotiations in good faith with public employees (prior to submitting draft legislation establishing a national health scheme that would affect the economic and social interests of over 4,000 public servants). The complainant trade union claimed that this is contrary to the principle of free association.

In its conclusions, the CFA stresses that where a government seeks to alter bargaining structures in which it acts directly as employer, it is particularly important to follow an adequate consultation process with all parties concerned, in keeping with the principles established in Recommendation No. 113 on Consultation at Industrial and National Levels. Paragraph 5 of this Recommendation states that such consultation must take place particularly in the preparation and implementation of legislation affecting their interests. This implies that such consultations must take place in good faith. Priority must always be given to collective bargaining.

1989: CFA Report No. 268, case no. 1493

Pancyprian Public Employees Trade Union (PASDYD) vs the Government of Cyprus

This case entailed a complaint against the Government of Cyprus for issuing an Order in Council ending a strike in the port authority and ordering a return to work.

In its conclusions, the CFA recalls that the right to strike is one of the legitimate means whereby workers may promote their occupational interests. Restriction or prohibition of the right to strike can only be justified in a limited number of situations, such for as civil servants and workers providing essential services in the strict sense of the term, provided that satisfactory procedures are followed such as conciliation and arbitration (§ 664). In a vital sector of the economy, a prolonged strike might cause a situation in which the life, health or safety of the population could be endangered. In these circumstances an order to return to work would be lawful. However, ordering a return to work in other circumstances is contrary to the principle of freedom of association (Report No. 256, case no. 1430, § 189, Canada).

III) Action to be taken

Law No. 55 (I) of 2005 amending the laws concerning the armed forces (1990–2003) provides for the establishment of no more than two professional associations comprising only members of the armed forces. Statutes and by-laws of such associations are subject to approval by the Minister of Defence.

It should be considered whether this is in conformity with the right to organise, as it considerably restricts the number of associations. Furthermore, trade union statutes do not need approval from a state body; this interferes with the right to organise. It is thus essential to change Law No. 55 in this respect.

Article 27 paragraph 2 of the Constitution provides, *inter alia*, that a law may extend the prohibition on the right to strike for the armed forces and the police to the members of the public services.

Although it has never been applied, legal certainty might benefit from changes to this article.

The Trade Unions Laws 1965–1996 stipulate that although all employees, whether unionised or not, have the right to strike, the decision to call a strike must be endorsed by the executive committee of the trade union. Those laws are supposed to be amended and endorsed by the Labour Advisory Board and have been before the Law Office of the Republic for verification. At the September 2006 meeting of the Governmental Committee, the information that the new legislation was being adopted and translated was

welcomed. It must now be awaited whether the ECSR considers the new rules in conformity with the Charter.

When this change is made, the relevant information should be sent to the ECSR (and ETUC) explaining the changes made and the trade union position on it.

Moreover, the legal service of the Republic had been requested to repeal Regulations 79A and 79B, which had been considered to infringe the Charter. At the September 2006 meeting of the Governmental Committee, it was announced and welcomed that the Council of Ministers had approved on 22 June 2006 a new regulation abolishing Regulations 79A and 79B. The next assessment of the ECSR is now awaited to see whether the situation is indeed in conformity.

When this change is made, the relevant information should be sent to the ECSR (and ETUC) explaining the changes made and the trade union position on it.

Czech Republic

- Machinery for voluntary negotiations exists
- Mediation, conciliation and arbitration procedures are provided
- Strikes can only be called by a trade union

Problems:

- Members of the Security and Intelligence Service are not permitted to form trade unions or any other form of association to protect their economic and social interests
- The following categories of workers are excluded from the right to strike: judges, prosecutors, members of the armed forces and of security corps employees in nuclear power stations and oil and natural gas pipelines, air traffic controllers, fire fighters
- The following categories of workers have restrictions on the right to strike: health care and social care, telecommunication operations
- The right to strike is allowed only with regard to disputes related to the conclusion of a collective agreement
- The requirement of approval of strike action by 2/3 of the workers concerned is considered excessive by the ECSR
- According to the ICTU Annual Survey 2006 and 2005, collective bargaining in the public sector is regulated by the Labour Code and implementing regulations. However, those regulations strictly define employees' salaries. Other than minor exceptions, no collective bargaining on salaries is possible. The same apparently applies, essentially, to certain other public sector worker entitlements. A new act was due to come into force on 1 January 2005, but it has been postponed for budgetary reasons until 2007.
- 30 days must elapse before mediation attempts are deemed to have failed and strike action can be taken; this is excessive

Actions to be taken:

- Concerning groups of workers excluded from the right to strike: is trade union pressure for legislative changes, at least with regard to minimum services, feasible?
- Concerning strike ballots and cooling-off periods: is trade union pressure for legislative changes feasible?

I) Council of Europe

Right to organise:

Members of the *Security and Intelligence Service* are not permitted to form trade unions or any other form of association to protect their economic and social interests. The structure, mission and duties of this body are defined by Act No. 154/1994. It seeks out information on activities intended to undermine the fundamental democratic principles, sovereignty and territorial integrity of the Czech Republic, on foreign intelligence services and on activities posing a threat to state secrets, having consequences which pose a threat to the Czech Republic's national security and economic interests or linked to organised crime or terrorism.

Since, under Article 5 of the Charter, national legislation or regulations may exclude persons who defend national territory from the benefit of the rights guaranteed in this Article if they have military status and perform genuine military duties, and since it has not been exactly specified by the government what proportion of its tasks are civilian in nature and what proportion are military, the ECSR has not been able to assess the situation up to now.

Right to bargain collectively

The *promotion of machinery for voluntary negotiations* is based on the Collective Bargaining Act No. 2/1991, applicable to the public sector, and the Public Service Act No. 219/2002, which together form the statutory basis for collective agreements with the state as employer. These laws are considered in conformity with Article 6, paragraph 2 of the Charter. For employees in the public sector, the law limits the matters that can be covered by collective bargaining. Public sector workers and their trade unions may sign collective agreements on working conditions but not on pay.

Mediation, conciliation and arbitration procedures are provided by the same Act No. 2/1991, and are in conformity with the Charter. Parties to the dispute can jointly opt for arbitration. If no agreement is reached on the choice of arbitrator, either party can request that the Ministry of Labour and Social Affairs designate one. Arbitrators have never been appointed against the wishes of either party. To the ECSR, however, it is not yet clear whether this means that a party which accepted arbitration, but does not agree with the designated arbitrator, may opt out of arbitration.

Right to take collective action

The ECSR is not satisfied with the information provided on this right so far, as it does not allow a judgment about the conformity of the legislation with the Charter.

Article 27 paragraph 4 of the Czech Charter of Fundamental Rights and Freedoms expressly provides for the right to strike, under conditions laid down by law, *but* excludes:

- judges
- prosecutors
- members of the armed forces and security corps

Moreover, strikes are unlawful also for certain other categories of workers listed in Section 20 (g) to (k). These include:

- employees in nuclear power stations
- air traffic controllers
- fire-fighters

Restrictions exist on the right to strike also of the following groups:

- employees of health care and social care establishments
- employees working in telecommunications operations

These strike bans prescribed by law may be justified by the nature of the workers' responsibilities, where work stoppages by these categories of workers could threaten citizens' lives, health or property, national security and/or public health. However, for the ECSR,

simply prohibiting these workers from striking, without distinguishing between their particular functions, cannot be considered proportionate to the particular circumstances of each of the sectors concerned, and thus necessary in a democratic society. At the very most, establishing a minimum service in these sectors could be considered in conformity with Article 6 paragraph 4 of the Charter.

Other restrictions on the right to strike imposed by Act No. 2/1991, regard the *permitted objectives of collective action*. In principle, the fact that there is no statutory right to strike outside of the context of collective bargaining, and that strikes could be called only in connection with disputes about collective agreements,¹ is, according to the ECSR, not in conformity with the Charter.

The government indicated that strikes in other situations are not necessarily illegal, by virtue of the basic principle that *'anybody may do anything not prohibited by law'*. The legality of any strike can only be established by the courts on a case by case basis. The existing case law (four judgments in the last decade), in the absence of specific legal authority, prove that the courts do in principle recognise the right to strike outside the context of collective bargaining.

Strikes can be called only by trade unions, whereas in the Charter the term 'workers' does not specify which groups are authorised to call strikes. This restrictive approach is admissible only if the formation of trade unions is possible at all levels and is not subject to excessive formalities that would hinder the sometimes rapid decision-making necessitated by strike action. Czech law satisfies these conditions.

For the ECSR, the situation in the Czech Republic is *not in conformity* with the Charter on two grounds regarding restrictions on *the right to take collective action*:

1. The requirement that the *strike action must be approved* by more than half the workers concerned is excessive. Such a majority for strikes within individual undertakings and at higher levels, and for solidarity strikes, is considered as a substantial impairment of the right to take collective action.

At the last assessment of the ECSR, an amendment to Section 17 of Act 2/1991 was still under discussion but had not yet been adopted. Therefore the ECSR wishes to know which workers are entitled to participate in the vote necessary for a trade union to call a strike and whether the vote is open to all the workers concerned or only to trade union members. Meanwhile, it reserved its position on this point.

As of 1 January 2007 the very strict limitations on calling a strike no longer apply and the new provisions (Section 17 of Act 2/1991 on collective bargaining) make it somewhat easier to declare a strike. The new legislation requires a 50 per cent quorum for a strike ballot, and a two-thirds majority vote to call a strike. A list of strikers or trade union officers representing them is also no longer required. The workers entitled to participate in the vote are all the workers of the employer who are to be covered by the collective agreement, excluding workers stipulated in Section 20 letters g), h), i), j), k) of Act 2/1991.² This new change in the law has not been evaluated by the ECSR

¹ Collective Bargaining Act No. 2/1991 (Sections 16(1) and 20(d)).

² g) Employees of health and social care facilities if the strike might endanger the lives or health of inhabitants;

and it is not clear whether the Czech Republic is now in conformity with the Charter on this point.

2. Strikes starting before the prescribed mediation are unlawful by virtue of Section 20 (a) of the Collective Bargaining Act: the problem is that the time that must elapse before mediation attempts are deemed to have failed and strike action can be taken (30 days) is excessive. For the ECSR, this mediation requirement is in fact considerably more onerous than a cooling-off period and therefore not in conformity with the Charter.

II) ILO

The ILO also noted that the right to strike is prohibited for judges, security personnel, employees of nuclear power stations and telecommunications officers. It finds that these bans go far beyond the possible restrictions authorised by the ILO.

CFA Report No. 297, case no. 1762

The Czech-Moravian Chamber of Trade Unions (CMKOS) vs the Government of the Czech Republic

In a communication dated 8 March 1994, the Czech-Moravian Chamber of Trade Unions (CMKOS) submitted a complaint of violations of freedom of association against the Government of the Czech Republic.

The Complainant's allegations

In its complaint of 8 March 1994 CMKOS alleged that the draft law on the conditions of service of certain categories of public servants (the Civil Service Act), which was submitted to the House of Deputies of the Parliament of the Czech Republic, constitutes a violation of basic trade union rights. Principle No. 51 of this draft law provides that state employees do not have the right to strike and, according to the complainant, it applies without distinguishing between categories to all state employees covered by the draft legislation. Furthermore, Principle No. 52 prohibits trade union activity in the public services. The complainant asserts that the right to establish and to join trade union organisations is meaningless if these organisations cannot act to defend the economic and social interests of their members. Moreover, the effect of this ban would be to utterly prevent the trade unions from determining their working conditions by collective bargaining. The coverage of the draft legislation is very broad and would apply to approximately 60,000 persons.

The government's reply

The then Prime Minister of the Czech Republic stated that there is absolutely no restriction or violation of trade union rights in the public service or the state administration. He added that the draft legislation on the working conditions of state employees had just been drawn up and was currently being discussed in both the

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- h) Employees operating nuclear power-stations, facilities containing fissile material and oil or gas pipelines;
 - i) judges, public prosecutors, members of the armed forces and air-traffic controllers;
 - j) fire-fighters, employees in company fire-brigades and emergency corps working under special provisions for those workplaces and employees in telecommunications, if the strike might endanger the lives or health of inhabitants or property.
 - k) employees working in areas hit by natural disasters, in which emergency measures were taken at the command of the state administration.

legislature and the executive. This discussion will also include whether the draft legislation is in accordance with the international agreements that are binding on the Czech Republic.

The Committee's conclusions

The CFA noted that, when dealing with precise and detailed allegations regarding draft legislation, the fact that such allegations relate to a text that does not have the force of law should not in itself prevent the CFA from expressing its opinion on the merits of the allegations made.

First, regarding the scope of the draft legislation, the CFA notes that, according to Principle No. 1, the legislation covers some public servants in ministries and other administrative agencies related to the public service. Principle No. 4 excludes from the scope of the Act a number of categories of workers, in particular Czech National Bank employees and persons working in certain public services (ministries or administrative agencies covered by the legislation), but who are not engaged in administration of the state or in managing public affairs. According to the explanation given in the explanatory memorandum to Principles Nos. 1 to 4, this legislation is also not intended to apply to teachers, state railway workers, or administrative officials of public authorities, although pursuant to specific regulations they do carry out public administration duties delegated to them. Nor does it cover auxiliary workers or service personnel in ministries or other administrative agencies, such as drivers, typists, maintenance workers, cleaners, and so on.

Concerning Principle No. 51 which prohibits the right to strike for civil servants covered by the legislation, the CFA, while noting that this prohibition is limited to those who are engaged in the administration of the state or in managing public affairs, observes that, according to the complainants, 60,000 persons will be affected by it. In this regard, the CFA has admitted that the right to strike may be restricted or even prohibited in the civil service. However, like the Committee of Experts on the Application of Conventions and Recommendations, the CFA considers that an excessively broad definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers. The prohibition of the right to strike in the public service should be limited to public servants exercising authority in the name of the state.

As concerns Principle No. 52, which bans trade union activity in the public services covered by the legislation, the CFA recalls that freedom of association implies not only the right of workers and employers to freely form associations of their own choosing, but also the right, for the professional associations themselves, to pursue lawful activities for the defence of their occupational interests. Since public employees should, like workers in the private sector, be able to establish organisations of their own choosing to promote and defend the interests of their members, and these organisations should be entitled to organise their activities, the CFA considers that Principle No. 52 is not in conformity with the principles of freedom of association. The Government has therefore been requested to take the necessary measures to delete Principle No. 52 from the draft legislation and to keep the CFA informed of the steps taken in this regard.

As concerns the complainant's allegation that Principle No. 52 violates the right to collective bargaining guaranteed by Convention No. 98 (ratified by the Czech Republic), the CFA recalls that, while this Convention, and in particular Article 4 concerning the encouragement and promotion of collective bargaining, applies both to the private sector

and to nationalised undertakings and public bodies, it is possible to exclude from its scope public servants engaged in the administration of the state. The scope of the legislation seems to be compatible with this principle.

III) Action to be taken

Members of the Security and Intelligence Service are not permitted to form trade unions or any other form of association to protect their economic and social interests.

Since, under Article 5 of the Charter, national legislation or regulations may exclude persons who defend national territory from benefiting from the rights guaranteed in this article if they have military status and perform genuine military duties, and since it has not been exactly specified by the government what proportion of its tasks are civilian in nature and what proportion are military, the ECSR has not been able to assess the situation up to now.

Information on this point should thus be provided.

Article 27 paragraph 4 of the Czech Charter of Fundamental Rights and Freedoms expressly provides for the right to strike, under conditions laid down by law, *but* excludes:

- judges
- prosecutors
- members of the armed forces and security corps

Moreover, strikes are unlawful also for certain other categories of workers listed in Section 20 (g) to (k). These include:

- employees in nuclear power stations
- air traffic controllers
- fire-fighters

Restrictions exist on the right to strike also of the following groups:

- employees of health care and social care establishments
- employees working in telecommunications operations

These strike bans prescribed by law may be justified by the nature of the workers' responsibilities, where work stoppages by these categories of workers could threaten citizens' lives, health or property, national security and/or public health. However, for the ECSR, simply prohibiting these workers from striking, without distinguishing between their particular functions, cannot be considered proportionate to the particular circumstances of each of the sectors concerned, and thus necessary in a democratic society. At the very most, establishing a minimum service in these sectors could be considered in conformity with Article 6 paragraph 4 of the Charter.

It must be ascertained whether changes in the law can be considered or in what way regulations on minimum services can be laid down.

The fact that there is no statutory right to strike outside the context of collective bargaining, and that strikes can only be called in connection with disputes about collective agreements, is not in conformity with the Charter.

Are problems encountered in practice? If so, how can this be remedied in legal terms?

The requirement that the *strike action must be approved* by more than half the workers concerned is excessive. Such a majority for strikes within individual undertakings and at higher levels, and for solidarity strikes, is considered as a substantial impairment of the right to take collective action. At the last assessment of the ECSR, an amendment to Section 17 of Act 2/1991 was still under discussion but had not yet been adopted. *In the meantime, changes have been made in the law and it must be awaited whether these changes are, according to the ECSR, in line with the Charter.*

Strikes starting before the prescribed mediation are unlawful by virtue of Section 20 (a) of the Collective Bargaining Act: the problem is that the time that must elapse before mediation attempts are deemed to have failed and strike action can be taken (30 days) is excessive. The ECSR regards this mediation requirement as considerably more onerous than a cooling-off period and therefore not in conformity with the Charter.

Changes to this regulation should thus be considered.

Denmark

- Denmark is in general in conformity with international standards with regard to the right to organise
- Joint consultation procedures are functioning
- All employees in the public sector are covered by collective agreements
- The conciliation and arbitration machinery is finely tuned

Problems:

- Civil servants employed under the Civil Servants Act are denied the right to strike
- The following groups of workers are also denied the right to strike: members of the armed forces, the navy and the police, the judiciary, other employees, for example, railway and postal services

Action to be taken:

- If considered a problem, trade unions should actively fight against the general exclusion of civil servants from the right to strike

The term ‘public sector worker’ applies to all workers in the public sector employed under a contract of employment and covered by a collective agreement. The status of most public sector employees is the same as those in the private sector. The only exception is the category of Crown servants who are covered by the Crown Servant Act. This term applies to employees in government departments, certain judges, members of the police force and all army officers.

I) Council of Europe

Right to organise

Paragraph 78 of the Danish Constitution stipulates that all citizens have the right to form organisations of their choosing without intervention by the authorities.

The undertakings deriving from Article 5 have always been fulfilled. Closed-shops,¹ legal in the private sector, are not permitted in the public sector.

Right to bargain collectively

Denmark has a long tradition of collective agreements and consultation.

With regard to joint consultation procedures, the situation is in conformity with the Charter. To ensure active and constructive cooperation between staff and management special agreements provide the establishment (in all workplaces with more than 25 employees) with joint consultative committees. Employees and employers are equally represented in those committees and have responsibilities of information, deliberation and codetermination.

¹ Denmark considers that Article 5 of the Charter concerns only a ‘positive’ right to organise.

Negotiation procedures have been halted on a number of occasions by government intervention due to the serious economic situation: for example, in October 1982 automatic wage indexation was abolished for five months. Expiring collective agreements were re-negotiated in the normal way and renewed for two years, with pay increases not exceeding 4%.² In March 1985, widespread industrial action threatened to cause serious disruption of the country's economy, therefore the Parliament passed an Act³ calling a halt to industrial action, extending the validity of collective agreements for two years and limiting pay rises.⁴ Such a serious measure as temporary restriction of the exercise of the right to collective bargaining was considered as being taken only for the time needed to return to a normal situation, and only justifiable according to the conditions laid down in Article 31 of the Charter. The March 1985 Act ceased to have effect as of March 1987 when most workers' and employers' organisations could negotiate new collective agreements, but the Danish government intervened again⁵ in certain sectors to end industrial action and prolong existing agreements for four years. Certain pay-related items could be negotiated in those sectors in spring 1989, when there were *some* negotiations covering practically all agreements.⁶ In 1991, management and labour in those sectors recovered their freedom to negotiate and collective agreements were renewed in 1993 with wage increases of 4%.

The Danish report also indicated that all employees in the public sector are covered by collective agreements or adhesion agreements (agreements between trade unions and non-confederated employers referring to existing agreements in the sector concerned), but the report did not specify how many agreements were concerned.

The conciliation and arbitration machinery is finely tuned, nevertheless, updated information on the settlement of disputes of interest under the amended Official Conciliators' Act is requested by the ECSR.

Right to collective action

Regarding collective action and the right to strike the situation is *not in conformity*. Civil servants employed under the Civil Servants Act are denied the right to strike. This ban covers:

- members of the army, navy, police
- the judiciary and high-ranking civil servants
- other employees, for example in the railway and postal service

As, for the ECSR, this takes the form of a general prohibition, as such not authorised under the terms of Article 31 of the Charter, in 1995 a Recommendation⁷ was addressed to Denmark on this point.

² Limit set in order to reduce inflation.

³ No. 123 of 31 March 1985, whereby all collective bargaining was suspended during the compulsory two-year extension of existing collective agreements.

⁴ To 1.75% in the first year and 1.25% in the second year.

⁵ Act No. 246 of 1987 for junior hospital doctors, Act No. 542 for computer workers, Act No. 657 for the seamen running the only island ship service for the state-owned company 'Bornholms trafikken' and Act No. 289 for ambulance drivers and emergency fire-service workers.

⁶ Although on limited items, and the parties agreed on average wage increases of 2.5%.

⁷ Recommendation No. R ChS (95)2.

<https://wcd.coe.int/ViewDoc.jsp?id=534271&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

The line envisaged by the Danish Government to solve the issue is to restrict the usage 'civil servants' to certain specified groups of posts, otherwise granting the right to strike with the exception of certain categories.⁸ Since it is not possible to force employees currently employed under the Civil Servants Act to renounce their status as civil servants, in 2001 a circular letter⁹ planned to restrict use of the civil servant category in future. Persons employed under the Civil Servants Act before that date may retain their status of civil servants as part of a transitional arrangement, but in the future such positions will not be occupied by civil servants.

The gradual reduction in the number of civil servants proper should lead to a situation 'over a number of years'¹⁰ in which only groups of employees covered by Article 31 of the Charter (for example, high-ranking senior executives) would have the status of civil servants.

A number of measures have thus been taken:

1. new civil servants are recruited only for senior level posts and in what could be termed essential sectors;
2. the Ministry of Finance has issued a circular pursuant to which civil servants cannot be required to perform work affected by a strike by contract employees;
3. all civil servants had the option of changing their status to contract employee.

Over the years, the Governmental Committee¹¹ has also been monitoring the situation. For the Committee, the Danish approach, though considered pragmatic by some delegates, nevertheless requires too long a transitional period, taking into account the substantial number of workers concerned.

Civil servants are therefore still denied the right to strike, irrespective of which category they belong to and which grade they hold, and this violation of Article 6 paragraph 4 has still not been remedied. But Recommendation RecChS(1995)2 is still in force.

II) ILO

The ILO too has noted that civil servants do not have the right to strike, unlike contractual public employees. Teachers with civil servant status also come into the former category.

CFA Report No. 311, case no. 1950

*Danish Union of Teachers and the Salaried Employees' and Civil Servants' Confederation vs the Government of Denmark*¹²

The first issue raised by this case concerned the restriction of the right to strike of certain teachers who are covered by civil service legislation and regulations. The second issue related to fines imposed on the trade union organisations.

⁸ Such as members of the police, the armed forces, the judiciary and certain high-ranking civil servants.

⁹ Issued by the Ministry of Finance on 11 December 2000, entered into force on 1 January 2001.

¹⁰ As for the time this would still require, the Danish delegate replied at the Governmental Committee in 2002 that it is 'difficult to say with any degree of precision, but it would be a period of some years'.

¹¹ See Conclusions XVI-1, Report 2002, para 253-263, p. 40-41; Report 2004 and 2006; http://www.coe.int/t/e/human_rights/esc/3_reporting_procedure/3_follow%2Dup_to_the_conclusions/Full_report_2002.pdf

¹² This complaint was submitted on 22 January 1998.

Articles 2 (1), 3 (3), 53 (1 and 2) and 54 of the Danish Act on Civil Servants prohibit teachers who are employed as civil servants from taking collective industrial action.

The CFA noted in its conclusions that the right to strike is a fundamental right of workers and their organisations: it is one of the essential means by which they may promote and defend their occupational interests. This right can only be restricted for public servants exercising authority in the name of the state¹³ and those providing essential services. Teachers do not fall into either category.

The CFA requested that the government take the necessary measures to ensure that teachers enjoy the right to strike.

With regard to the fine (100,000 Danish crowns), the CFA noted that no one should be penalised for carrying out or attempting to carry out a legitimate strike. Sanctions may be imposed only where the prohibitions in question are in conformity with the principles of freedom of association.

III) Action to be taken

The conciliation and arbitration machinery is finely tuned, nevertheless, updated information on the settlement of disputes of interest under the amended Official Conciliators' Act are requested by the ECSR.

You should ensure that this information is given in the next report.

Regarding collective action and the right to strike the situation is not in conformity. Civil servants employed under the Civil Servants Act are denied the right to strike.

This ban covers:

- members of the army, navy and police;
- the judiciary and high-ranking civil servants;
- other employees, for example in the railway and postal service.

The line envisaged by the Danish Government to solve the issue is to restrict the usage 'civil servants' to certain specified groups of posts, otherwise granting the right to strike with the exception of certain categories. The gradual reduction in the number of civil servants should lead to a situation 'over a number of years' in which only groups of employees covered by Article 31 of the Charter (for example, high-ranking senior executives) would have the status of civil servants.

Is this a way forward to which the trade unions can agree? Instead of changing the legal regulations, the government is trying to change the situation itself. But a change from the status of civil servant to that of contractual employee surely has repercussions in relation to many other working conditions and may not necessarily be a positive development.

¹³ Report No. 294, case no. 1629 §262.

Estonia

- In principle, there is full enjoyment of the right to organise
- Specific consultative or representative bodies exist
- Conciliation and arbitration procedures are provided
- No restriction on the right to organise for the police service

Problems:

- Members of the armed forces on active service are not allowed to found or join trade unions
- Virtually no civil servants enjoy the right to strike
- Groups of workers prohibited from taking strike action: members of the armed forces, the police and prison officers
- The use of strikes can be declared illegal by the courts for the following groups: enterprises which satisfy the primary needs of the population and economy; government agencies, other state bodies and local authorities (this is even extended to support staff such as drivers and electricians – changes have been promised since 2000 but only at the end of 2005 were legislative proposals presented); defence forces; courts; fire fighting and rescue services

Actions to be taken:

- Trade union action is needed on the nearly general exclusion of civil servants from the right to strike

The Constitution of Estonia, adopted by referendum on 28 June 1992, states in paragraph 29 that all Estonians are free to join associations and trade unions of their choice.

There are three categories of employees in the public sector:

1. public servants working in accordance with the law on civil servants, with special employment guarantees;
2. technical personnel;
3. temporary workers.

I) Council of Europe

Right to organise

After ratification of the revised European Social Charter, the ECSR declared the conformity of the Estonian system which provides civil servants and other persons employed by other public central or local institutions full enjoyment of the right to organise.

Members of the armed forces on active service are not allowed to found or join trade unions, but reservists are free from that restriction.

Estonian law provides for a spokesperson for conscripts, who represents their interests on service-related issues before their commanding officers.¹ But regular members of the Defence Forces **on active service cannot** be members of political parties or organisations or trade unions.²

The *Police Service Act*³ does not contain any restriction as regards the right to organise. The Trade Union of Police Employees, which any police employee may join, has been active in Estonia for five years and has encountered no problems in connection with the right to organise.

There are specific *consultative or representative bodies* in the public service: civil servants and local government officials are represented by ROTAL (the Confederation of the Trade Unions of Employees of the State and Local Government). The government can assume the role of classic social partner as employer, but in tripartite relations it has a balancing role, ensuring and promoting minimum standards (in which case it does not act as a representative of employers or employees).

Conciliation and arbitration procedures are provided. Committees are established within the relevant employers' or employees' federations, and there are conciliators, independent experts appointed by the government.⁴ If the parties do not reach agreement on the basis of the conciliator's proposed compromise, the conciliation procedure is terminated.⁵

Right to take collective action

According to the ECSR, Estonian law denies almost all civil servants the right to strike and is therefore not in conformity with Article 6 paragraph 4 of the Revised Charter. The use of strikes, considered as an exceptional method of enforcing demands in Estonia, can be declared illegal by the Courts⁶ in the following cases:

- in enterprises and agencies which satisfy the *primary needs of the population and the economy* (a list has been established by the government⁷) if the body which calls a strike or locks out employees does not ensure essential services or production (which shall be determined by agreement of the parties or, in case of disagreement, by the public conciliator⁸)

and for employees of

- government agencies and other state bodies and local authorities;
- defence forces and other national defence organisations;

¹ Section 631 of the Defence Forces Service Act.

² Section 181 of the Defence Forces Service Act.

³ Adopted on 14 May 2003.

⁴ Section 2.1 and Section 8 of the Collective Labour Disputes Resolution Act of 5 May 1993.

⁵ Under Clause 20 of the Conciliation Statutes.

⁶ Section 23 of the Collective Labour Disputes Resolution Act of 5 May 1993.

⁷ Section 21.4 of the Act, Regulation No. 187 of 16 September 1991.

⁸ Section 21.3 of the Collective Labour Disputes Resolution Act.

- the judiciary;⁹
- fire fighting and rescue services.

Other public officials are also prohibited from taking part in picketing or related actions:¹⁰

- members of the armed forces;
- police officers;
- prison officers.

In the government's view, collective labour disputes should be resolved by negotiations, through the mediation of a conciliator or in court (and strikes that interfere with the activities of the courts are unlawful) and any agreement concluded during the conciliation process is compulsory for both parties.

At the 112th meeting of the Governmental Committee, May 2006, it was announced that a draft act had been elaborated and discussed by the government in November 2005. This draft was apparently strongly supported by the social partners with a view to bringing the situation into conformity with the Charter. Furthermore, public sector workers were to regain their most effective tool – the right to strike – in wage negotiations. The draft was not accepted by the Parliament, however, because it seemed too far-reaching. A new draft has been elaborated and discussed in relation to a general new assessment and reform of civil services, but it is unclear whether this has yet been adopted.

In fact, since 1996, the Trade Unions of Employees of State and Self-government Institutions Workers (ROTAL) have informed and consulted with international organisations about the situation regarding civil servants industrial action in Estonia. According to ROTAL, the current system of conflict resolution in these organisations is not sufficient to provide solutions. If an agreement is not concluded during the conciliation process, there are no legal options for civil servants to protect their rights. Given the current law, the Confederation of Estonian Trade Unions and ROTAL have no legal tools by means of which to bring pressure on the Government in the collective bargaining process. On 1 March 2006, trade unions held a protest in front of the National Library in Tallinn, where the Ministry of Social Affairs had organised a conference aimed at finding a compromise on the new draft version of the Employees' Representatives Act, which was to change the procedure of electing employee representatives. Trade unions in the health and transport (including railways) sectors protested against the government's draft version of the act and also against the continuing ban on strikes in the public sector. The trade unions demanded tripartite negotiations to discuss and resolve the ongoing issue surrounding strike action. All parties were in agreement on the need for negotiations, but so far none have taken place. In mid-March 2006, the government rejected the new draft act proposed by the Estonian Social Democratic Party, which would have removed restrictions on strike action for many public sector employees. The proposed amendment would have made it possible for all public servants to strike unless they directly exercise public authority or are responsible for public safety. As a result, all support staff, technical workers and most officials would have been entitled to take part in strike action. The Ministry of Justice did

⁹ Section 22 of the Collective Labour Disputes Resolution Act.

¹⁰ Section 21. of the Collective Labour Disputes Resolution Act.

not support the draft act since the government believes that severe problems could arise if the public sector stopped working. On the other hand, the Chancellor of Justice has pointed out that the current law is not in accordance with the Estonian Constitution and violates international law and should thus be changed immediately.

II) ILO

No existing case law.

III) Action to be taken

According to the ECSR, Estonian law denies almost all civil servants the right to strike and is therefore not in conformity with Article 6 paragraph 4 of the Revised Charter.

What is the state of play as regards amendment of the legislation?

Finland

- Public servants, including members of the police and the armed forces, are guaranteed the right to organise and enjoy protection against all forms of discrimination on the ground of trade union membership
- Joint consultation and participation
- Negotiation machinery

Problems:

- Civil servants and municipal officials can only call a strike in pursuance of objectives which may be regulated in a collective agreement
- Furthermore, they may only take part in strikes that have been called by trade unions

Actions to be taken:

- Depending on whether in practice it is considered problematic, appropriate action should be taken to overcome the abovementioned problems

Finnish public servants are defined by the duties they perform in the public administration. Nevertheless, as in other countries, certain posts in the administration fall within the career system, such as the police, armed forces and foreign affairs.

In a law of August 1994, the legislators aimed to standardise the position of employees in the central administration. Article 1 paragraph 2 of this law provides that '*the employment relationship in the public service is a relationship under public law in which the State is the employer and the public servant executes the work*'. Of the 130,000 employees in the administration in 2002, 20% had a private law contract with their employer. The rest of the staff had public servant status. Most posts in the central administration are for an indefinite period. Nonetheless, fixed-term appointments are perfectly lawful if required by the nature of the work.

Public servant status is governed by public law, but the regulations applying to public servants are the same as for employees in the private sector. Terms and conditions of employment for public servants may be established by collective agreement. Collective agreements must be approved by the government. But the general framework is established by law and collective agreements must not depart from it. This governs conditions for dismissal, rights and obligations, and conditions for transfer and secondment.

I) Council of Europe

Right to organise

According to the ECSR, public servants, including *members of the police force and the armed forces*, are guaranteed the right to organise and protection against all forms of discrimination on the grounds of trade union membership, in a framework of full conformity with the Charter.

The legal criteria which must be satisfied in order to set up and register a trade union¹ are subject to a right of appeal before the courts against any decision to deny registration.

Right to bargain collectively

Joint consultation and participation occur at two levels: central and individual state agency.

Negotiation machinery is provided on pay and all other conditions of employment, with the exception of issues concerning organisation of services, creation or abolition of jobs, required job qualifications for a post and for promotion, civil servants' duties and pensions.² General terms of agreements are negotiated and agreed centrally.

Right to collective action

In 2006, the ECSR considered the Finnish situation as *not in conformity with the Charter* on the ground of the *permitted objectives of collective action*, since civil servants and municipal officials cannot call a strike in pursuance of objectives which are not covered by a collective agreement.

In accordance with the provisions of the Civil Servants Collective Agreements Act (Law No. 644/1970), strikes may be called only in the event of disputes regarding issues which may be regulated in a collective agreement. Actions pursuing objectives other than those covered by the collective agreement, such as sympathy strikes, are *in practice* prohibited.³ The ECSR considers that the right to strike should be guaranteed in the context of any negotiation between employers and employees in order to settle an industrial dispute. Therefore prohibiting strikes not aimed at concluding a collective agreement is not in conformity with Article 6 paragraph 4.

The ECSR, in the XV Supervision Cycle, also had the opportunity to address the comments submitted by the Central Organisation of Finnish Trade Unions (SAK). The restrictions on the right to strike for civil servants who merely exercise technical functions effectively prevents them from taking protest action against the government's economic and social policy or against the budget policy of municipalities aiming to make savings in personnel costs.⁴

During the September 2006 meeting of the Governmental Committee, the situation seemed unchanged in substance. As the Finnish delegate could not provide all required information at the meeting, the ECSR requested that it be put in the next national report in order to avoid misunderstandings on the legislation applicable and to be able to assess conformity to the Charter.

¹ Including the fulfilment of 'accepted moral standards' and respect for 'public decency'.

² By the Collective Agreements for State Civil Servants Act and the Collective Agreements for Local Government Officers Act.

³ The report on which Conclusions XVII-1 are based instead specified that a strike pursuing objectives which are not covered by a collective agreement, is lawful provided that the aim of a strike is not to conclude a new collective agreement, but also confirmed that strikes are prohibited if they pursue objectives which are not covered by the collective agreement.

⁴ SAK is further of the opinion that the restrictions on those matters that may be the subject of a civil servants' collective agreement are excessive.

In general, the Collective Agreements for State Civil Servants prohibited a civil servant from taking collective action other than a complete work stoppage. This restriction, however, applies only in respect of existing employment relationships, whereas it is possible for an organisation of civil servants to take other forms of action directed against employment relationships not yet established.⁵ In principle, all types of industrial action that are not forbidden (overtime bans, go-slows, blockades, boycotts, mass resignations, picketing) are allowed. Only strike action (and lockouts) is subject to the rules on advanced notice.

A number of *other 'core topics' and restrictions* not always found to be clear in the national reports but considered *in conformity* with the Charter include:

- *The entitlement to take collective action*: in Conclusions XVII-1 the ECSR found the situation not in conformity on the ground that state civil servants and municipal officials may only take part in strikes that have been called by trade unions, whereas the wording of Article 6 paragraph 4 and the reference to 'workers' relate to those entitled to take part in collective action without specifying who is empowered to call a strike. Since trade unions or associations may be formed without excessive or undue formalities (such as might impede the rapid decisions sometimes needed in strike action) or requirements for the purpose of initiating collective action, the situation is in conformity with the Revised Charter in this respect.
- A three-week *cooling-off period* provided by the Act on Mediation in Labour Disputes, compatible with Article 6 paragraph 4, since the Minister of Labour *can*, on a proposal by the conciliator or the state board for investigating disputes, forbid a strike for such a period, if the strike affects vitally important functions or causes serious harm to the public good.
- A *prohibition on any collective action during the period covered by a collective agreement*, imposed by the Collective Agreements Act, applicable only to issues settled by collective agreements, is considered compatible with Article 6 paragraph 4, inasmuch as it relates to conflicts of right '*concerning the existence, validity or interpretation of a collective agreement, or its violation*'.⁶
- Civil servants considered as employers for the purpose of representing the state in collective agreements⁷ do not enjoy the right to strike. Most of them are high-ranking, while others, although not of the highest rank, are employed in personnel departments throughout the various ministries and government agencies. This restriction has been found acceptable in accordance with Article 31 of the Charter.

⁵ For example, by prohibiting its members from applying for a newly established post or by advising them not to perform duties belonging to the job in question.

⁶ In almost every case concerning unlawful action examined by the Labour Court, the collective action in question was directed against the provisions in the collective agreement concerning remuneration, working time or the employer's right to direct and supervise, therefore, as the cases deemed to have been unlawful concerned disputes over rights which are not covered by Article 6 paragraph 4, the Committee finds the situation in conformity.

⁷ Decree of 28 June 1996.

II) ILO

For the ILO, Finnish legislation and practices do not comply with the ILO Conventions as regards the legislation on collective agreements which imposes excessive restrictions on the right to strike of public servants, local government officials and members of the clergy who do not exercise authority in the name of the state.⁸

Although public servants have the right to take strike action as laid down in Law No. 644/1970 on collective agreements for employees of the public administration, there are significant restrictions on this right. As far as the Finnish government is concerned, these restrictions are justified as being in the general interest, as well as being indispensable to guarantee the continuity of administration activities, to protect the constitutional rights of citizens and to meet their essential needs.

III) Action to be taken

Civil servants and municipal officials cannot call a strike in pursuance of objectives which are not covered by a collective agreement. This is not in conformity with the Charter.

Legislative changes should be envisaged.

In general, the Collective Agreements for State Civil Servants prohibited a civil servant from taking collective action other than a complete work stoppage. This restriction, however, applies only in respect of existing employment relationships, whereas it is possible for an organisation of civil servants to take other forms of action directed against employment relationships not yet established.

This seems to limit considerably the right to take collective action. How is this restriction experienced in practice?

⁸ CEACR 2005/76th session

France

- Civil servants and public workers benefit from trade union freedom under the same conditions as employees in the private sector
- Police staff benefit from trade union freedom
- Joint consultation
- Voluntary negotiations: the resulting ‘agreements’ have no legal force and come into operation only if incorporated in legislation or regulations
- Conciliation and arbitration machinery

Problems:

- The names of trade union members who nominated a given trade union representative shall be provided at the employer’s request
- Senior staff of prefectures do not have the right to organise
- Military personnel and the Gendarmerie do not have the right to form trade unions
- Security police, other police bodies, communications personnel of the Ministry of the Interior, employees of local departments of the prison service, members of the judiciary and the armed forces are prohibited from striking
- Also prohibited from striking are due to case law are staff in positions of authority (considered part of the government apparatus) and employees whose presence at the workplace is necessary to ensure uninterrupted operation of public services
- Consequences for public employees when exercising the right to strike: wage deductions are not always proportionate to the duration of the strike
- The new legislation giving the management the right to insist on a secret ballot after one week of strike action in order to ascertain whether the strike should continue, and the notice period for individual workers

Action to be taken:

- Disclosure of names of trade union members: what is the reason for this and how can effective protection be ensured?
- Trade union action is needed to ensure the right to form trade unions for military personnel and the Gendarmerie and to raise awareness concerning the restriction on the right to strike for certain groups

The French public service, in the broad sense, encompasses all persons who are permanently employed by the state, local authorities and most public institutions.

In France, the public service has three major branches: (i) the state or central public service, (ii) the territorial public service and (iii) the public service in the hospital sector. These branches are established on the basis of a general statute common to them all which sets out their rights and obligations. Each branch is governed by specific national provisions. The unity of the three public service branches is guaranteed by the Law of 13 July 1983, which constitutes Title 1 of the General Statute for Public Servants. This title

lays down the rights and obligations of public servants and applies to all three branches of the public service.

Article 4 of Title 1 of the General Statute for Public Servants provides that ‘*a public servant is in a statutory and regulatory position vis-à-vis the administration*’. A public servant is thus subject to the rights and obligations provided for in this statute and supplementary regulations.

The concept of public servant covers all persons employed by the state to serve the general interest. It encompasses established civil servants who enjoy significant guarantees, and non-established employees such as contractual staff.

Public-servant status is granted to persons appointed to a permanent post and established within a grade. A further condition essential to public-servant status is the public nature of the person appointing and employing the public servant. Appointment is by means of a unilateral administrative order. Public servants are in a unilateral relationship and not a contractual one, unlike employees in the private sector. Under no circumstances can they negotiate their terms and conditions of employment or avail themselves of acquired rights. But the principle of participation granted to public servants and recognised by the General Statute does something to ameliorate the apparent rigidity of the system.

In addition to the General Statute for Public Servants, there are specific statutes. The purpose of these is to establish the specific rules or regulations that apply in particular to each corps of the public service.

Public servants are divided into corps. These encompass public servants who, on the basis of their qualifications, may occupy similar posts. The specific statutes of the corps have two purposes: (i) they define the posts that corps members may occupy and the arrangements for access to the corps, and (ii) they establish the minimum career path guaranteed to corps members. The career system is so called because of this minimum career path guaranteed to all public servants.

I) Council of Europe

Right to organise

The freedom of collective industrial organisation in France is a constitutional principle,¹ protected in the individual, collective and positive/negative dimensions. The establishment of civil servants' trade unions is subject to the relevant rules of ordinary law laid down in Chapter I of Title I of Book IV of the Labour Code. Civil servants and public workers benefit from trade union freedom under the same conditions as employees in the private sector.

As regards *trade union activities*, various operational facilities are provided;² some rights are subject to representativity requirements (see below).³

¹ Strictly, since it specifically covers organizations possessing the legal form of a ‘*syndicat*’, this freedom relates to employers' organisations, as well as to trade unions. In practice, it tends to be used in the sense of what is often termed ‘trade union freedom’, notably as regards its exercise by employees within the enterprise.

² For state employees, Decree No. 82-447 of 28 May 1988; for employees of regional and local authorities, Decree No. 85-397 of 3 April 1985; for hospital employees, Decree No. 86-660 of 19 March 1986.

With regard to *protection against reprisals* for trade union activities as regards civil servants, employees of regional and local authorities and hospital employees, the ECSR noted that⁴ the names of trade union members who have nominated a trade union representative shall be supplied to the employer on request, if no danger of reprisals is detected or if the court sees no such danger, even if the members have asked not to have their identities revealed. The ECSR wonders why disclosure of names is indispensable in this context and how the trade union members in question are effectively protected against reprisals. No answer has been provided yet.

*Representativity criteria*⁵ are provided for trade unions when putting forward candidates in the first round of elections⁶ to joint advisory bodies.⁷ Representativeness is assessed by the administrative authority organising the elections. A special procedure in the administrative courts⁸ is available for challenging the administrative authority's decision to accept or

³ Among the rights not subject to representativity requirements are: the right to display and circulate trade union documents and to collect contributions on the administrative authority's premises; the right to hold legally required or information meetings on the administrative authority's premises; the right to between 10 and 20 official days' leave per year for trade union representatives to attend the union's legally required meetings or its congresses.

⁴ Pursuant to two judgments of the Social Chamber of the Court of Cassation on 12 January and 4 May 1993.

⁵ Section 9bis of Act No. 83-634 of 13 July 1983 on the rights and obligations of public servants: trade unions or trade union federations are presumed to be representative if they have at least one seat on each of the boards (*conseils supérieurs*) of the national public service, the local public service and the hospital public service or receive at least 10% of the total vote in elections to Joint Administrative Committees (CAPs) of representatives of staff categories governed by the Act and at least 2% of the votes cast in the same elections in each public service. Under Section 14 of Act No. 84-16 of 11 January 1984, all trade unions properly affiliated to a trade union grouping fulfilling the conditions laid down in Section 9bis of Act No- 83-634 of 13 July 1983 on the rights and obligations of public servants are regarded as representative. A trade union which does not fulfil the above requirements may still, if it meets the requirements of Article L 133-2 of the Labour Code (number of members, independence, membership fees, level and length of experience), prove that it is representative and be allowed to take part in elections.

⁶ The monopoly of representative trade unions in this phase is, according to the French national report, for the purpose of avoiding that the vote is scattered among a large number of trade unions, some representing very small staff categories and likely to receive only a few votes, because such an arrangement would not be conducive to effective bargaining between the authorities and staff representatives. In this connection, the Conseil d'Etat ruled, in a decision of 9 April 1999, that the requirement of representativity for putting forward candidates in elections was compatible with Article 11 of the European Human Rights Convention.

⁷ A collective complaint (No. 23/2003 Syndicat occitan de l'éducation v. France) lodged on 18 November 2003, relating to Articles 5 and 6, alleged that the prohibition on non-representative professional organisations from putting up candidates in professional elections violates these provisions. The SOE maintains that the criteria of representativity laid down in Act No. 84-16, used to determine whether trade unions are eligible to stand in elections to joint administrative councils, are not in conformity with Article 5 because these criteria do not allow new trade unions to stand for election to public service consultative bodies. Moreover, certain criteria in Article L. 133-2 of the Labour Code (in particular, number of members and length of experience) are not quantifiable and are thus left open to the judgement of the authorities. The ECSR considers that in order to make the participation of trade unions in various procedures of consultation and collective bargaining efficacious, it is open to states to require them to meet an obligation of representativity subject to certain general conditions. If any requirement of representativity does not amount, directly or indirectly, to a hindrance to the formation of trade unions, Article 5 is respected. With respect to Article 6 paragraph 1, any requirement of representativity must not excessively limit the possibility of trade unions to participate effectively in consultation. In this case, the ECSR found the criteria prescribed by law objective and reasonable.

⁸ Conseil d'Etat and the Court of Cassation.

reject a trade union's candidature.⁹ If a second round of voting is needed – for example, if the turnout was too low in the first round – all public servants' trade unions can take part. Representativity requirements for the purpose of obtaining the operating facilities provided for in trade union legislation are governed both by the criteria in Article L.133-2 of the Labour Code and by election results. Only the most representative trade unions in each authority are provided with the premises and equipment needed for carrying out their trade union activities. Moreover, only information meetings held by the most representative trade unions entitle staff to leave of absence. The ECSR wants to know, however, whether there are restrictions on the possibilities of non-representative trade unions to represent their members in court proceedings.¹⁰

With regard to the scope of *ratione personae*, senior staff of prefectures do not have the right to organise,¹¹ but they may set up associations.

Police staff benefit from trade union freedom.

The trade union rights of military personnel are restricted by the Law of 13 July 1972 establishing the general statute for military personnel. Collective action to defend their occupational interests undertaken by military personnel is restricted by Articles 10 and 11 of the general statute:

- Article 10 prohibits them from establishing occupational trade unions or joining occupational associations.
- Article 11 prohibits the right to strike.

Nonetheless, there is scope for the expression of collective interests in the internal consultation bodies specific to the armed forces. The Higher Military Council (Conseil supérieur de la fonction militaire, CSFM), established by the Law of 21 November 1969, is the national consultation body for military personnel.

The *Gendarmerie*, besides standard administrative police work and criminal investigation,¹² performs an important role in national defence, both in peacetime and in time of crisis or conflict and important military duties.¹³ The nature of these duties and the necessary

⁹ In Collective Complaint (No. 26/2004 Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France); 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 in the choice of the representatives of this consultation body. The Committee hold that where States Parties establish various consultation bodies that are not directly concerned with the essential trade union prerogatives such as collective bargaining they have a wide margin of appreciation in determining the composition of the bodies in question.

¹⁰ In Collective Complaint No. 29/2005 Syndicat des hauts fonctionnaires (SAIGI) v. France it was 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 ECSR declared the complaint inadmissible.

¹¹ Section 18 of Decree No. 64-260 of 14 March 1964 which refers to sub-prefects and Section 15 of Decree No. 64-805 of 29 July 1964 which refers to prefects.

¹² Road traffic, mountain rescue, murder, armed robbery, burglary, sexual assaults and drugs offences.

¹³ The Gendarmerie helps to ensure France's national defence and helps the government to control its strategic nuclear forces. It is also responsible for the operational defence of the country in the event of a crisis and can be called on, just like the other armed forces, to take part in foreign operations (Act No. 72-662 of 13 July 1972).

readiness to serve them require gendarmes to be governed by the conditions of service of military personnel, and as a result they are not entitled to form trade unions.

Right to bargain collectively

Joint consultation takes place within the framework of the joint institutions¹⁴ (CAP, CTP and CHS) with a view to encouraging the development of local branches through them.

With regard to the *promotion of machinery for voluntary negotiations*, there exist procedures of ‘concertation’, almost amounting to a negotiating policy, in drawing up the rules for civil servants.¹⁵ This dialogue, which does not involve the participative institutions, primarily takes the form of pay negotiations; it is more akin to consultation than to collective bargaining insofar as the ‘agreements’ it may result in, unlike private-sector collective agreements, have no legal force and come into operation only if incorporated in legislation or regulations.¹⁶ As the procedures are not formalised, there is no representativity condition for the participation of trade union organisations.

Conciliation and arbitration machinery exists both for special statute public enterprises and public institutions (conciliation) and also in the civil service (concertation). Nevertheless, in Conclusions XV-1, the ECSR observed that in the civil and local government service there is no regulatory procedure for conciliation, mediation or arbitration to settle conflicts of interest which may arise between the administration and its employees. The French national reports state that the settlement of conflicts of interest is the responsibility of the administration alone which, however, takes its decisions only after dialogue and negotiations with the representatives of the employees concerned. Furthermore, on many occasions the government appointed a ‘mediator’ in recent cases of conflicts of interest, although the parties involved were not required to accept the conclusions of the mediator. These only had legal force if accepted by the government, which then introduced the regulations, or even legislation, necessary for their enforcement. The government generally accepted the conclusions of the mediator appointed by it.

Right to collective action

In France, the right to strike is laid down in Article 7 of the Preamble to the Constitution of the Fourth Republic of 1946, which states that the right to strike shall be exercised within the framework of the laws that regulate it.

The right to strike in the public service is applied in conjunction with the principle of the uninterrupted operation of the public service and the principle of the protection of the

¹⁴ Subjects covered by consultation are: career development of civil servants, organisation and operation of the services, occupational health and safety, working conditions, remuneration, vocational training and the drafting of and amendments to staff regulations. The four participative institutions are nevertheless only consultative bodies, the power of decision resting with the administration: Council for the State Public Service (CSFPE, established pursuant to Section 13 of Act No. 84-16 of 11 January 1984), Joint Administrative Committees (CAP, referred to in Section 14 of the same Act), Technical Committees (CTP, Section 15 of the Act) and Health and Safety Committees (CHS, Section 16 of the Act), for which provision was made in Act No. 83-634 of 13 July 1983, Act 8 No. 4-16 of 11 January 1984, Act No. 84-53 of 26 January 1984 and Act No. 86-33 of 9 January 1986.

¹⁵ Section 8 of the Act of 13 July 1983.

¹⁶ In legislation, if the agreement's subject matter falls within the scope of parliament, or in all other cases via regulations.

health and safety of persons and the protection of property which, like the right to strike, are principles which rank as constitutional law.¹⁷

In France, there is also no precise legislation or regulations on a minimum service except in public broadcasting, aviation safety services and, since August 2007, in public transport. Otherwise, it is the administrative authority that organises a minimum service through 'regulatory' circulars. The new law on minimum services foresees that the trade union must give strike notice and notify the employer of the reasons for which it intends to go on strike. Negotiations must take place before the strike action. The agreements must indicate how the continuity of service will be ensured. Non-strikers can be redeployed if foreseen in those agreements, which may also be concluded at sectoral level.

Individual workers wanting to go on strike need to inform the employer of their intention 48 hours before the start, if not, they are liable to sanctions (not laid down in the law).

Furthermore, the employer may, after one week of strike action, impose a secret ballot asking whether the strike should continue or not.

The trade unions consider this new law as not useful and are particularly opposed to the strike notice imposed on individual workers and to the strike ballot.

The negotiation of the right to strike and the guarantees accompanying it, the measures imposed by law in order to secure the continuity of the functioning of public services and the strictly necessary administrative measures that the administrative judge may allow the administration to take in order to ensure a minimum service in essential public services, have generally been considered as in conformity with the Charter. Nevertheless, the ECSR has often raised questions concerning the *way* in which the relevant laws are applied in the public service and on the adequacy of the restrictions which may be imposed on the grounds of public interest (within the meaning of Article 31 of the Charter).

With regard to the restrictions *ratione personae*, as for statutory provisions, state security police, other police bodies, communications personnel of the Ministry of the Interior, employees of the local departments of the prison service, members of the judiciary and the armed forces are prohibited from striking.

According to the *case law* of the *Conseil d'Etat*, the following are also prohibited:

- staff in a position of authority who, because of their major responsibilities and their place in the hierarchy, are considered to be part of the government apparatus;
- employees at whatever hierarchical level whose presence at their workplace is necessary to ensure the uninterrupted operation of public services within the limits defined above and may be requisitioned in the event of a concerted work stoppage, given the duty of the administrative authority to ensure the uninterrupted operation of public services; the main criterion governing the possibility of requisition is thus the post filled rather than the person's grade. The decision is made on a case-by-case basis.

¹⁷ Decisions of the Constitutional Council 79-105 of 25 July 1979 and 80-117 of 22 July 1980. The current regulations derive mainly from Act No. 63-777 of 31 July 1963, incorporated in Articles 521-2 to 6 of the Employment Code and applicable also to the employees of regional and local authorities and hospital workers.

The situation is currently *not in conformity* with the Charter on the ground of the consequences of the exercise of the right to strike by a public employee, since deductions from the wages of striking state employees¹⁸ are not always proportionate to the duration of the strike. Act No. 87-588 of 30 July 1987 provides in fact for a deduction of 1/30th of the monthly wage for strikes of less than one working day (a wage deduction increased in respect of that stipulated in the Act of 19 October 1982).

The French government asserts the rule of the indivisible thirtieth, according to which salary deductions are assessed in daily thirtieths, whether the civil servant works for a day or an hour, and which makes possible deductions in salary larger than the length of the strike; but the fact that this is an accounting rule and not a financial penalty is not acceptable for the ECSR, which considers it as a form of sanction not compatible with the free exercise of the right to strike.¹⁹

Moreover, the rule of the indivisible thirtieth allowed deductions also in relation to non-working days (weekend) – during which the civil servants are not supposed to have duties or functions to perform – if these days are included in the period during which the civil servants were on strike.²⁰

At the 2004 and the 2006 meetings of the Governmental Committee of the European Social Charter,²¹ the French delegate again explained the accounting rule confirmed by the Constitutional Council in 1987 and alleged that in practice no public sector strikes lasted less than a day. The representative of the ETUC remarked that, on the contrary, the rule had been strictly applied in the education sector, where a one-hour strike had been treated as corresponding to a day.

At the meeting of the Governmental Committee of September 2006,²² the French delegate did not provide for any new information on this recurring ground of non-conformity, but further stated that in practice no strike in the public sector lasted less than one day and that the level of strike action in the public sector shows that the rule does not deter employees from striking. In addition, she underlined that the rule has never been contested by the trade unions. She further specified that striking workers are not compensated by trade unions for the wage deductions due to the strike action.

¹⁸ Employees of the state administration and state public bodies of an administrative nature; since the application of this rule to officials in other public services was considered unconstitutional, these officials are still covered by Act No. 82-889 of 19 October 1982.

¹⁹ The rule of the indivisible thirtieth was abolished by the Act of 19 October 1982, which made the amount of the salary deduction proportionate to the length of the strike.

²⁰ A strike lasting from 25 October to 6 November led to a deduction in the wages of all the thirtieths included in this period, regardless of whether they were non-working days (weekend) (*ARRÊT OMONT STATUTS, DROITS, OBLIGATIONS ET GARANTIES. Droit de grève. Décompte des retenues pour absence de service fait (1). RÉMUNÉRATION. Questions d'ordre général. Décompte des retenues pour absence de service fait (1). 7 JUILLET 1978 (7 juillet. = 03.918. Omont - M. J. Théry, rapp. ; Mme Hagelsteen, c. du g.)*).

²¹ Report concerning Conclusions 2004, Examination of national situations on the basis of conclusions 2004 of the ECSR, para 98-10; working document prepared by the Secretariat, European Social Charter (revised), Conclusions 2006, renewed conclusions of non-conformity, Article 6 paragraph 4, France.

²² 113th meeting of the Governmental Committee of the European Social Charter, Strasbourg, 12–14 September 2006.

Although some national delegates pointed out that, although the rule constitutes a violation of the revised Charter, in practice it does not seem to prevent the workers concerned from striking, the ETUC representative noted that there is no intention on the part of the government to change the rule and that the situation is more ambiguous in reality than indicated by the submissions of the French delegate. Amongst other things, he pointed out that the system being criticised applied only in the public sector, and not to the private sector, which in a way could also be considered discriminatory in respect of public workers. He observed that the situation has not been in conformity with the Charter for a long time and therefore proposed that the Governmental Committee should vote on issuing a warning. The Governmental Committee did not accept this proposal but urged the government to reconsider its position and to bring the situation into conformity as soon as possible.

Act No. 87-588 of 30 July 1987, moreover, provides that no service is rendered and that therefore there shall be no remuneration when a state employee is present at the workplace but does not discharge all or part of his or her duties. The question is, how is it possible to establish that a civil servant present at the workplace is not discharging his or her duties²³ and whether there is a risk that these measures might prove prejudicial to civil servants who are prevented from discharging their duties because their colleagues are on strike? The French government explained that heads of department draw up a record of staff members on strike, usually on the basis of declarations made by those concerned, and ensure that staff prevented from working for *reasons beyond their control* did not incur a deduction. What are considered by the courts and in practice as *reasons beyond one's control (force majeure)* in the case of strike action has still to be clarified.

A second ground of non-conformity concerns the entitlement to take collective action and to conduct strikes: only the most representative trade unions have the right to lodge the necessary preliminary notification and call strikes in the public sector,²⁴ while Article 6 paragraph 4 states that '*all workers and employers have the right to bargain collectively*'.²⁵ In the private sector strikes do not have to be led by a trade union.²⁶

²³ The ECSR noted that the 1987 Act could be lawfully enforced only when failure to discharge the duties attaching to a post was '*sufficiently manifest to be ascertained objectively without there being any need for assessment of the official's conduct*'. But there was no information on how this condition was applied in practice.

²⁴ The Act covers not only personnel employed in essential services in the strict sense of the term, but also civilian personnel of the state, the *départements* and the *communes*, civil servants and public employees and 'private law' employees of public or private establishments, bodies and companies charged with providing public services, as well as employees of public industrial or commercial companies with special status.

²⁵ The Committee considers that the reference to 'workers' in Article 6 paragraph 4 relates to those who are entitled to take part in collective action. In other words, this provision does not require states to grant any group of workers authority to call a strike but leaves them the option of deciding which groups shall have this right and thus of restricting the right to call strikes to trade unions. But such restrictions are only compatible with Article 6 paragraph 4 if there is complete freedom to form trade unions and the process is not subject to excessive formalities that would impede the rapid decisions that strike action sometimes requires.

²⁶ Section L 521-3 of the Labour Code regulates the lodging of strike notifications. The formality must be complied with for a concerted stoppage of work to be legal and for striking staff not to be open to disciplinary measures, and it can be done only by the trade unions which are most representative at national level, in the professional category or in the firm, organisation or department concerned. The aim of the provision is to reconcile the right to strike with the legitimate concern to ensure continuity of public services (which could be seriously disrupted by the proliferation of minority protest actions), to give the

The low unionisation rate is not counterbalanced by the rule that trade unions which are not considered as representative can combine with one fulfilling the representativeness requirements in order to issue a lawful strike notice. The fact that, of the many strike notices issued each year, only a few strikes were challenged by public employers on this ground also does not appear to be sufficient to counterbalance the impact of this restriction.

The French national reports state that all employees in the sector covered by a strike notice can take part in the action, whether or not they are members of the union calling the strike. They also illustrate this point with reference to the large number of hours lost each year in the public sector as a result of strikes (1,650,338 in 2000, for the state sector). Finally, it was pointed out that the requirement to give notice of strikes in the public sector and the period of five clear days before the start of the strike were introduced to give an opportunity to settle conflicts by negotiation and, where necessary, organise a minimum level of service.

At the 2004 and 2006 meetings of the Governmental Committee of the European Social Charter,²⁷ the French delegate referred to the principle of continuity of public service, which had to be reconciled with the right to strike, and expressed surprise that the ECSR had not taken into account the fact that a locally representative trade union could also issue a strike notice without having to establish its national representativity.

II) ILO

CFA Report no. 332, case no. 2233

*National Union of Bailiffs vs the Government of France*²⁸

The issue raised by this case is the failure to respect the right of bailiffs, as employers, to establish and join an organisation of their own choosing, and the failure to respect their right to free and voluntary collective bargaining, by virtue of their compulsory membership of the National Chamber of Bailiffs and its exclusive competency in the area of collective bargaining.

The CFA recalls that Article 2 of Convention No. 87 provides that employers have the right to establish and join an organisation of their own choosing. Order No. 45-2592 of 2 November 1945, and an opinion of the Council of State denying bailiffs the right to establish professional organisations of their own choosing, are contrary to the principles of freedom of association. Regarding the right to collective bargaining, the CFA recalls that this right represents a fundamental aspect of freedom of association. Compulsory membership of the National Chamber of Bailiffs and its participation in the collective bargaining process is an infringement of the right of bailiffs as employers to choose the organisation responsible for representing their interests in the context of collective bargaining.²⁹

parties to a dispute the time to negotiate in order to avoid a work stoppage and to facilitate the role of the administrative authority for which it is easier to negotiate with trade union representatives than with little-known groups.

²⁷ Report concerning Conclusions 2004, Examination of national situations on the basis of conclusions 2004 of the ECSR, para 90-97.

²⁸ Complaint submitted on 12 November 2002.

²⁹ Report No. 327, case no. 2146, §897.

III) Action to be taken

The ECSR noted that the names of trade union members (employees of regional and local authorities and hospital employees) who have nominated a trade union representative shall be provided at the employer's request, if no danger of reprisals is discerned or if the court sees no such danger, even if the members have asked not to have their identities revealed.

It is essential to clarify the situation. Why should the names be provided and how can effective protection be ensured?

The ECSR asks whether there are restrictions on the possibilities of non-representative trade unions representing their members in court proceedings.

The ECSR also observed that in the civil and local government service, there is no regulatory procedure for conciliation, mediation or arbitration to settle conflicts of interest which may arise between the administration and its employees.

How are conflicts settled? Are problems encountered in practice? Are legislative changes feasible and necessary?

The situation is currently not in conformity with the Charter on the ground of the consequences of the exercise of the right to strike by a public employee, since deductions from the wages of striking state employees are not always proportionate to the duration of the strike. Act No. 87-588 of 30 July 1987 provides in fact for a deduction of 1/30th of the monthly wage for strikes of less than one working day (a wage deduction increased in respect of that stipulated in the Act of 19 October 1982).

Act No. 87-588 of 30 July 1987, moreover, provides that no service is rendered and that therefore there shall be no remuneration when a state employee is present at the workplace but does not discharge all or part of his or her duties. The question is, how is it possible to establish that a civil servant present at the workplace is not discharging his or her duties and whether there is a risk that these measures might prove prejudicial to civil servants who are prevented from discharging their duties because their colleagues are on strike? The French government explained that heads of department draw up a record of staff members on strike, usually on the basis of declarations made by those concerned, and ensure that staff prevented from working for *reasons beyond their control* did not incur a deduction. What are considered by the courts and in practice as *reasons beyond one's control (force majeure)* in the case of strike action has still to be clarified.

Are problems encountered in practice? Are legislative changes feasible and necessary?

Only the most representative trade unions have the right to lodge the necessary preliminary notification and call strikes in the public sector, while Article 6 paragraph 4 states that '*all workers and employers have the right to bargain collectively*' and in the private sector strikes are not required to be led by a trade union.

What is the current state of play? Are legislative changes feasible and necessary?

Germany

- The right to form and join trade unions is granted to all public servants, including members of the police and armed forces

Problems:

- Strikes not linked to a collective agreement are prohibited
- An absolute strike ban applies to civil servants, irrespective of their function
- According to the ITUC Annual Surveys of 2006 and 2005, teachers in the public sector still do not have the right to collective bargaining, despite repeated ILO criticisms

Action to be taken:

- Continue pressure for fewer restrictions with regard to the right to strike in the public sector concerning civil servants
- Continue pressure for the establishment of collective bargaining rights for teachers in the public sector

In Germany the concept of ‘civil servant’ is very broad, and the effect of this is to restrict or even prohibit strikes and collective bargaining for a large number of public sector workers who do not exercise authority in the name of the state. At federal level, the position of public servants is essentially regulated by the Law on the Public Service in its version of 31 March 1999 (*Bundesbeamtengesetz*). The *Länder* also have legislation specific to the public service in their territory; however, this is established within the framework of, and in compliance with, the Constitution and federal legislation.

I) Council of Europe

Right to organise

The right to form and join trade unions is granted to all public servants (both career civil servants – ‘*Beamte*’ – and public sector employees), including members of the police and armed forces.¹ No civil servant may be treated more or less favourably or be subjected to disciplinary action on grounds of membership or non-membership of trade unions and the carrying out of trade union activities.²

¹ Section 57 of the Civil Servants Framework Act, Section 91 of the Federal Civil Servants Act, and corresponding acts at *Land* level.

² In Supervision Cycle XII-2, the ECSR noted that in public services civil servants had on several occasions been requisitioned to replace striking employees and manual workers in those services. It considered such intervention in lawful strike action as a restriction on the rights and freedoms guaranteed by Article 5, particularly in cases where unionised civil servants were required to replace employees or manual workers belonging to the same trade union. However, in Supervision Cycle XIII-2, the ECSR noted with interest the judgment of 2 March 1993 in which the Constitutional Court held that this requisitioning practice was incompatible with the German Constitution unless the matter was expressly regulated by law. It referred to its observations under Article 6 paragraph 4.

Right to bargain collectively

With regard to *joint consultation*, trade unions and employers' organisations have some role in the preparation and adaptation of regulations on working conditions: they are heard at the early stages of all legislative procedures (making reference to cooperation with the social partners within the framework of the Pact for Employment, Vocational Training and Competitiveness).³

With regard to the *promotion of machinery for voluntary negotiations*, in 1961⁴ Germany officially declared that civil servants are excluded from the right to bargain collectively, in conformity with the Charter.

The ECSR, however, came to consider the situation as one of non-conformity when it realised that civil servants employed by the German railways (*Deutsche Bundesbahn*) and postal services (*Deutsche Bundespost*) were still denied this right, although these establishments had been privatised. Since the Constitution and the complementary regulations do not provide for differentiations in terms of the notion or status of civil servants and related rights and duties, an employee of the privatised post and rail enterprises who chose to keep his civil servant status would in principle be regarded as a civil servant assigned to the privatised undertaking without prejudice to his or her rights and the duties following from this status. It should be noted that, in the meantime, all new employees of the railways and the postal services have been recruited within the framework of a normal employment relationship and therefore enjoy the right to collective bargaining. Consequently, wages and terms for civil servants have been, as for all other civil servants, governed by law; no collective bargaining has taken place, but the central organisations of civil servants' trade unions participated in the preparation of the regulations pertaining to laws on civil servants. The German government pointed out that, in connection with privatisation, each civil servant was given the option of maintaining his or her civil servant status or entering into a private employment relationship.

Up to Supervision Cycle XVII-1, the ECSR considered that abolishing the right to collective bargaining could only be justified in the case of officials who exercise public authority, and therefore concluded that the situation was not in conformity with Article 6, paragraph 2.⁵

The situation changed in consequence of a Federal Administrative Court decision of 7 June 2000, stating that the restrictions normally applied to civil servants on eligibility for the rights embodied in Article 6 paragraphs 2 and 4 of the Charter could not be imposed on civil servants now employed by privatised companies.

But the number of civil servants working for the privatised German railway and postal service enterprises is constantly falling: new vacancies are filled only by salaried employees

³ Section 47 of the joint rules of procedure of the Federal Ministries.

⁴ Germany entirely accepted Articles 5 and 6, but presented a Declaration contained in a letter from the Permanent Representative of the Federal Republic of Germany, dated 28 September 1996, indicating that the provisions of items 2 and 4 of Article 6 were not applicable to civil servants.

⁵ The same conclusions were reached with regard to the ban on the right to strike of Article 6 paragraph 4 (see below).

so that gradually and in accordance with the age distribution, all civil servants will be replaced by salaried employees.⁶

In Conclusions XVIII-1, the ECSR asked whether the scope of application of the court decision actually extends to all post and rail employees with civil service status who do not exercise public authority or whether there are civil servants assigned to posts in privatised enterprises who have not been granted leave to take up work under a private law contract and who are denied the right to collective bargaining and collective action. Meanwhile, pending receipt of the information requested, the ECSR deferred its conclusion.

Right to take collective action

The right to strike is widely recognised by the German state, provided that the issues raised can be settled by collective agreement. But the terms and conditions of employment for public servants are established by legislation and, as a consequence, all public servants are excluded from enjoyment of this right. Article 33 of the Constitution is interpreted as prohibiting the right to strike for public servants where it states that ‘the exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service *who stand in a relationship of service and loyalty defined by public law*’.

With regard to the right to take collective action, there are *two grounds of non-conformity*:

1. Strikes not aimed at achieving a collective agreement are prohibited, pursuant to Article 9 paragraph 3 of the Constitution as currently interpreted by the courts: these strikes would be of no practical importance in Germany, and a change of legislation in this respect, which would in fact call for a codification of the right to collective action, is not envisaged since for the time being such codification would not be supported by a consensus in German society. However, as regards the relevant jurisprudence, the most recent German report makes reference to a decision of the Federal Labour Court of 10 December 2002 explicitly referring to the ECSR’s conclusions. The Court states in this decision that ‘*the generalized statement that strikes are only permitted in order to achieve collective agreement objectives, may require a review in the light of Part II Article 6§4 of the European Social Charter*’. According to the report this decision could be an indication that the courts might review their present case-law on the scope of lawful strikes. The ECSR wishes to be informed concerning any development in this respect.

At the 112th meeting of the Governmental Committee in May 2006, it was stated again that, in the government’s opinion, the situation was in conformity with Article 6 paragraph 4 of the Charter since the wording of this provision, read in conjunction with Article 6 paragraph 1, referred to a close connection between a strike and collective bargaining.

2. The ECSR is of the opinion that the requirements that a given group of workers must meet in order to form a union entitled to call a lawful strike are so difficult to satisfy

⁶ The number of civil servants working for *Deutsche Bahn* fell from approximately 58,000 (31 December 2002) to approximately 50,000 (February 2005). The Postal Services still had approximately 160,000 civil servants working for them as of June 2004.

that they constitute an excessive restriction on the right to strike:⁷ as things stand, a group of workers may not easily form a union for the purpose of a strike.⁸

On both grounds, Recommendation RecChS(98)2 was addressed to the German government. The Governmental Committee noted that this was still in force, expressed its concern about the continued violation of such a fundamental right as the right to strike and urged the government to bring the situation into conformity with Article 6 paragraph 4.

An absolute strike ban applies to career civil servants pursuant to the abovementioned declaration of 1968. As regards the absolute strike ban applied to civil servants employed in *privatised* postal and rail undertakings, in respect of the decision of the Federal Administrative Court of 7 June 2000 stating that a civil servant who has been granted leave to take up work under a private law contract with the privatised companies of the German Mail and Railways 'is generally not subject to a prohibition to strike', the ECSR also wished to know whether the scope of application of the court decision extends to all post and rail employees with civil service status who do not exercise public authority or whether there are civil servants in privatised enterprises who are denied the right to collective action. Meanwhile, it reserved its position on this point.

Labour court injunctions can be issued, under certain circumstances, with the aim of prohibiting strikes. In order to determine whether the possibility of such injunctions fetters the right to strike, the ECSR asked for more details on the reasons for the injunctions, how often they were issued, under what circumstances and whether they had been contested by strike organisers and with what results. Pending receipt of this information, the ECSR deferred its conclusion on this point.

II) ILO

Based on the reports from Germany, the Committee of Experts has identified several violations relating to freedom of association and collective bargaining:

- prohibition of strikes for certain categories of workers who are not public servants exercising authority in the name of the state (teachers, postal workers, and so on);

⁷ Criteria established in German case law which a trade union must fulfil in order to enjoy the protection deriving from Article 9 paragraph 3 of the Constitution, including in respect of the right to take collective action: 1) it must constitute a voluntary association of workers at supra-enterprise level (that is, it must organise workers from more than one enterprise) – single-enterprise unions are, however, recognised for the railways and the postal service; 2) it should constitute a permanent association of a substantial number of workers, that is, its existence should be independent of incidental fluctuations in the size of the membership; it must be able to exercise real pressure and counter-pressure and it must be taken seriously by its counterparts, in other words, it must have a certain social power; 3) it must perceive itself as a counterpart or opponent to the other social partner and it cannot therefore include both workers and employers in its membership (although the membership of single employers or single persons representing employers would probably not be a problem); 4) its internal organisation and decision-making must be based on democratic principles; and 5) it must consider itself bound by collective labour law and it must have as its objective the conclusion of collective agreements promoting the social and economic interests of its members.

⁸ At the 112th meeting of the Governmental Committee of May 2006, the German delegate explained that under German law collective action is subject to the '*ultima ratio*' principle. Apart from collective bargaining law, further legal provisions related to the so-called works constitution and codetermination at the company level provided for the possibility of early participation of workers via their representatives in works councils and supervisory boards for the solution of conflicts arising in the employer–employee relationship, often making the recourse to strike action unnecessary.

- a broad interpretation of ‘essential services’;
- prohibition of the right to strike in the public service;
- the exclusion of public servants from Article 4 of Convention No. 98 on the right to collective bargaining.

Nonetheless, the Committee of Experts welcomed the initiative taken by the German government in which it embarked upon a sweeping reform of the public service in 2005. Within the framework of this process, public service trade unions were involved in the debate for the first time.⁹

CFA Report No. 277, case no. 1528

German Confederation of Trade Unions (DGB) and the Educational and Scientific Trade Union (GEW) vs the Government of Germany

The issue raised by this case¹⁰ concerns the total ban on the right to strike applied to civil servants in education in Germany.

The Complainants' allegations:

On the basis of ILO Convention No. 87, the trade unions allege that the ban on the right to strike of teachers who have the status of civil servants is a violation of this Convention. They assert that teachers in the public service are not agents of the public authority and do not provide an essential service.

The Government's allegations:

Conventions Nos. 87 and 98 do not regulate the right to strike and therefore cannot be invoked in this case. Moreover, Convention No. 87 does not apply to civil servants, who are not included in the category of ‘workers’ in Article 2. If this were not the case, Convention No. 151 on labour relations in the public service would not be necessary.

Conclusions of the CFA:

Regarding the concept of ‘workers’, the CFA noted that Article 2 of Convention No. 87 stipulates that the right to freedom of association is guaranteed to ‘*workers without distinction whatsoever*’.

Regarding the right to strike, the CFA reaffirms its position that the right to strike is one of the essential and legitimate means through which workers and their organisations may promote and defend their occupational interests.¹¹

⁹ CEACR 2005/ 76th session.

¹⁰ The complaint was lodged by the German Confederation of Trade Unions on 12 March 1990; on 16 July 1990 the Educational and Scientific Trade Union added its complaint to that of the German Confederation of Trade Unions.

¹¹ Digest of Decisions and Principles of the Freedom of Association Committee, 3rd edition, 1985, §§362 and 363.

This basic principle can be restricted only in three situations:

1. acute national crisis;
2. where essential services are affected;
3. where public servants are acting in their capacity as agents of the public authority.¹²

The CFA has always considered that teachers with the status of civil servants are not included in categories 2 and 3 of public servants who may have their right to strike restricted.

But for the first time the CFA draws a distinction between teachers with the status of civil servants and school principals and deputy principals. Teachers who are civil servants must not be prohibited from exercising the right to strike. School principals and deputy principals, on the other hand, exercise the prerogatives of the public authority: for this reason they may have their right to strike restricted or even prohibited.

CFA Report No. 291, case no. 1692

*German Confederation of Trade Unions (DGB) and the German Postal Workers' Union (DPG) vs the Government of Germany*¹³

The issue raised by this case concerns the requisitioning of civil servants in the postal services to perform tasks abandoned by employees and workers in the federal postal services during a lawful strike. Civil servants in the postal services were penalised because of their participation in the strike action. Civil servants in the postal services consider that there has been a violation of Articles 3 and 10 of Convention No. 87.¹⁴

In its conclusions, the CFA recognised that, while a stoppage in services such as the postal service could disrupt the normal life of the community, it was difficult to concede that such a stoppage was by definition likely to bring about an acute national crisis. Civil servants who are not acting on behalf of the public authorities must have the right to organise their activities and formulate their programmes to defend their economic, social and occupational interests, including by recourse to strike action, without any hindrance by the public authorities.

The CFA also noted that the imposition of sanctions on public servants on account of their participation in a strike is not conducive to the development of harmonious industrial relations.

III) Action to be taken

In 1961, Germany officially declared that civil servants were excluded from the right to bargain collectively.

The ECSR, however, came to consider the situation as one of non-conformity when it realised that civil servants employed by the German railways (*Deutsche Bundesbahn*) and

¹² Digest of 1985, §§ 394 and 423.

¹³ Joint complaint presented on 23 December 1992.

¹⁴ Article 3: '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'. 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.'

postal services (*Deutsche Bundespost*) were still denied this right, although these establishments had been privatised. Since the Constitution and the complementary regulations do not provide for differentiations in terms of the notion or status of civil servants and related rights and duties, an employee of the privatised post and rail enterprises who chose to keep his civil servant status would in principle be regarded as a civil servant assigned to the privatised undertaking without prejudice to his or her rights and the duties following from this status.

As regards the absolute strike ban applied to civil servants employed in *privatised* postal and rail undertakings, in respect of the decision of the Federal Administrative Court of 7 June 2000 stating that a civil servant who has been granted leave to take up work under a private law contract with the privatised companies of the German Mail and Railway 'is generally not subject to a prohibition to strike', the ECSR wishes to know whether the scope of application of the court decision extends to all post and rail employees with civil service status who do not exercise public authority or whether there are civil servants in privatised enterprises who are denied the right to collective action. Meanwhile, it reserves its position on this point.

What is the state of play regarding these problems? Can changes be envisaged?

One problem not specific to the public sector, in the view of the ECSR, is that the requirements imposed upon a group of workers wishing to form a union that can call a lawful strike are so difficult to satisfy that this constitutes an excessive restriction on the right to strike. As things stand, a group of workers may not easily form a union for the purpose of a strike.

Are any changes feasible and/or appropriate?

Labour court injunctions can be issued under certain circumstances with the aim of prohibiting strikes. In order to determine whether the possibility of such injunctions fetters the right to strike, the ECSR asked for more details on the reasons for the injunctions, how often they were issued, under what circumstances and whether they had been contested by strike organisers and with what results.

The ECSR must be provided with this information.

Greece

- Articles 5 and 6 of the European Social Charter have not been ratified by Greece
- Civil servants have the right to freedom of association and to strike, but it can be restricted by legislation
- Civil servant trade union officials are protected against reprisals
- Armed forces: civilian staff have the right to form and join trade unions; military staff also have the right, but subject to certain restrictions
- Members of the police may form and join trade unions

Problems:

- Prohibited from striking: members of the police, the judiciary, security corps

Action to be taken:

- Envisage further action to ensure the ratification of Articles 5 and 6 of the RESC
- Take appropriate action to ensure the right of strike for currently excluded groups

I) Council of Europe

Greece signed the European Social Charter on 18 October 1961 and ratified it on 6 June 1984, but it does not consider itself bound by Articles 5 and 6 on trade union rights.

According to the information contained in the seventh report on certain provisions which have not been accepted, submitted in 1999 to the ECSR, within the framework of the procedure required by Article 22 of the Charter,¹ it appears that the delay in the acceptance of Articles 5 and 6 by Greece is due, in particular, to restrictions on the right to join trade unions, the prohibition of lockouts and the possibility of arbitration being imposed.

Right to organise

Civil servants are defined as the 'salaried civil employees of the state and permanent and short-term employees of the local self government agencies, institutes of higher education, ecclesiastical public bodies, and all other public bodies that are legal entities and employees who are parties to a relationship in private law and who hold management posts, in accordance with section 103 subsection 3 of the Constitution'.

Civil servants have the right of freedom of association and to strike (under the Constitution and the New Civil Service Code 2683/99). But Article 12 paragraph 4 of the Constitution permits the adoption of legislation to restrict the right of civil servants to join and form unions.

¹ ECSR, Seventh report on certain provisions of the Charter which have not been accepted, Council of Europe Publishing, Strasbourg, 2000.

Act No. 1264/82 provides that this act shall apply to civil servants, but excludes civil servants from the protection against reprisals on the ground of trade union activities.

A *primary* organisation may become an affiliate of only one secondary organisation (section 30, subsection 3).²

With regard to *trade union activities*, the expression '*secondary* trade union organisations of civil servants' applies to:

- federations of trade unions for the different branches and specialisations whose members are organisationally subordinate to one or two or more ministries or public bodies;
- federations of trade unions whose members are organisationally subordinate to the same ministry, the same public legal entities or to a group of public legal entities operating under the supervision of the same ministry.

A civil servant may be an ordinary member of only one trade union organisation of the kind composed of a number of branches and specialisations and of one organisation representing his or her sector of employment.

Civil servant trade union officials are guaranteed special protection against reprisals.

As far as members of the *armed forces* are concerned, civilian staff serving in the Ministry of National Defence have the right to join and form unions that are regulated in the same way as for civil servants. As regards *military staff*, they may form trade unions but subject to certain restrictions.

Members of the *police* are entitled to form:

- One police employee union for each prefecture for officers up to the rank of second lieutenant and one union in each administrative district for officers. Only those civil servants within the limits of the respective prefecture or administrative district may join these unions.
- Second degree organisations (federations), one for the unions of police employees and one for the unions of officers.
- One confederation (third degree organisation).

² According to the Greek national report, Act No. 1712/87 as amended by section 9 of Act 208/92 governs affiliation, as does Act 1264/82. Trade union organisations are classified in terms of three groups: primary, secondary and tertiary (section 1 of Act No. 1264/82). Primary trade unions include basic trade unions; local branches, as provided for in their rules, of trade union organisations for a larger area or for the whole of Greece, but only as regards the right to become members of the corresponding labour centre; associations of persons (one for each establishment, undertaking, public service, public body corporate or local self government agency), founded by at least ten workers, on the condition that the number of workers does not exceed 40 and there is no basic trade union with at least half that membership. The expression '*secondary* trade union' means federations or labour centres, and the expression '*tertiary* trade union organisations' means confederations (associations of federations or labour centres). Labour centres are associations of at least two basic trade unions or local branches. Federations are associations of at least two primary trade unions in the same branch or related branches of economic activity or the same occupation or related occupations and at least six other first degree professional organisations of related professions. A confederation must have at least eight trade union federations and at least 12 federations or other professional organisations. The law requires that employer confederations be composed of eight federations.

There are approximately 60 primary trade unions of police employees and officers, as well as two corresponding federations.

Members of the police are prohibited from:

- striking;
- becoming members of other professional unions, apart from international police unions;
- becoming '*involved in matters related to the administration of services*'. Interference in the management of services applies to situations in which, hypothetically, police trade unions or their members might intervene to influence the administration to modify a decision or refrain from issuing it.

Members of the police are, however, afforded special leave in order to attend union meetings or, in the case of officials, in order to perform their trade union duties.

Right to bargain collectively

According to the Greek national report, the administration is not obliged to negotiate the working conditions and remuneration of police officers.

Since the adoption in 2000 of Law No. 2738/99 on collective bargaining in the public administration and on recruitment of public servants and contractual employees for an indefinite period, public servants have been permitted to negotiate their terms and conditions of employment in collective bargaining (Article 1). This right is also granted to all public servants of the state, local authorities, legal persons subject to public law and staff on employment contracts governed by private law. Pay for public servants is nevertheless determined annually by law.

Right to collective action

Article 23 paragraph 2 of the Constitution and section 19 of Act No. 1264/82 guarantee the right to strike. They provide that a strike constitutes a workers' right which is exercised by the trade union organisations:

- as a means of preserving and promoting the economic, labour, trade union and social insurance interests of the workers, and as a manifestation of solidarity in relation to these objectives;
- as a manifestation of solidarity on the part of workers of undertakings or establishments which are subsidiaries of multinational companies with workers in other undertakings or establishments or at the head office of the same multinational company, on condition that the outcome of the strike by the latter workers would directly affect the economic or labour interests of the former.

Subject to a guaranteed minimum service, strike action is permitted by staff employed under private law in the public service, in local authorities, and by legal persons under public law or of a public utility whose functioning is of vital importance in satisfying the essential needs of the community. This provision has also applied to public servants since 1994.

There are restrictions on the right of public employees to strike and relating to essential services. According to Article 23 of the Constitution, strikes are prohibited for members of the judiciary and those serving in the security corps.

The right of civil servants to strike is guaranteed by Act No. 1264/82.

Primary, secondary or tertiary trade union organisations of civil servants may call a strike on the same conditions as other strikes, provided that the strike does not take place until four full days have elapsed since the relevant bodies have been notified in writing concerning the demands and the reasons for them.

Legislation provides that any period during which civil servants are on strike is regarded as a period of actual public service, provided that no remuneration is payable in respect of such period.

As regards workers in essential services, strikes shall be authorised by workers who are party to employment relationships in private law with the state, local self government agencies, public bodies, public companies or public utilities whose operation is vital to the basic needs of society as a whole.

The expression 'public companies and public utilities whose operation is vital to the basic needs of society as a whole' applies to companies or establishments engaged in:

- the provision of health services by any kind of curative institution;
- the purification and distribution of water;
- the generation and distribution of electricity or combustible gas;
- the production or refining of crude oil;
- the transport of persons and goods by land, sea or air;
- telecommunications and postal services, radio and television;
- the drainage of sewage and waste water, the elimination of waste and the collection and disposal of solid refuse;
- the loading and unloading and storage of merchandise imports;
- the services of the Bank of Greece, civil aviation, and all other services responsible for paying the salaries of persons employed in the public sector.

Prior to a strike in the services listed above, the trade union organisation calling the strike is obliged to invite the employer to discuss the relevant issues. The invitation must be made in writing and discussions must take place within 48 hours of the invitation being made.

The discussions take place with a mediator, who is obliged, if no settlement is reached, to draw up a report.

In the event of a strike in the services listed above, the trade union that called it is obliged to make available the necessary personnel to safeguard the installations of the company and to prevent damage or accidents. In addition, it must make available personnel to ensure that the basic needs of society are met. The personnel to be made available are determined by agreement between the employer and representative trade union at the works level. The agreement may also state the specific needs of society which are to be met and the consequences should the agreement be violated. Agreements are drawn up annually and remain in force for a year. They must be submitted to the Ministry of Labour within 5 days of being signed by the parties concerned.

If no agreement is reached or the correct procedure not followed, the parties are obliged to request the services of a mediator. If mediation does not result in the conclusion of an agreement, each party has the right to put the matter forward to a committee composed of: the President of first instance court judges in the area in which the worker performs his or her work, a representative of the Chamber of Industry and Commerce for the area and a representative of the workers who should be appointed by the most representative tertiary organisation. Appeals may be made to a second committee with a similar composition, taking into account that a regular or deputy member of the primary committee cannot be appointed to or participate in the second committee. The second committee's decision is an administrative act which can be appealed before the State Legal Council.

According to the Greek national report, forced labour imposed by the state as a punishment for participation in strikes is prohibited by virtue of Article 1 of the ILO Convention 105 (1957) on the Abolition of Forced Labour which has been ratified by Greece, and by virtue of Article 4 paragraph 2 of the Treaty of Rome.

Lockouts are prohibited by virtue of section 22 of Act 1264/82.

II) ILO

CFA Report No. 286, case no. 1632

*The Greek General Confederation of Labour vs the Government of Greece*³

The issue raised here concerned the prohibition of collective bargaining and the abolition of wage increases for workers in the public sector in the broad sense of the term, in public utility undertakings, in local authority organisations and in state banks, following the adoption of Law No. 2025 of 1992. The government justifies this on economic grounds.

The CFA has already acknowledged that, for compelling reasons of national economic interest and of stabilisation, a government may decide that wage rates shall no longer be fixed freely through collective bargaining. This is imposed as an exceptional measure and only to the extent that is necessary, which must not exceed a reasonable period and be accompanied by adequate safeguards to protect workers' living standards. Repeated recourse to such legislative restrictions and frequent intervention by the legislators to suspend or terminate the exercise of rights granted to unions and their members may, however, damage the atmosphere of industrial relations.

III) Action to be taken

Greece has not yet ratified Articles 5 and 6 of the ESC.

By what changes can this be remedied?

The rights of public employees are restricted. For example, Article 23 of the Constitution prohibits strikes for members of the judiciary and those serving in the security corps.

Are any changes feasible and/or considered necessary?

³ Complaint submitted on 6 March 1992.

Hungary

- Police officers and military personnel have the right to form trade unions and are protected against discrimination due to trade union affiliation
- Consultation at national level
- Collective bargaining falls under stricter conditions in the public sector and therefore there is less scope

Problems:

- According to the ITUC Annual Survey 2006, recently adopted legislation setting new criteria for union membership levels and recognition in the public sector may prove problematic as the rules on membership levels are no longer connected to the results of works council elections. A single trade union or joint delegation of unions in the public sector has to comprise at least 25% of the workforce to conclude a collective agreement. The law also changes the rules on union recognition at all levels
- Mediation and arbitration rules only apply to public sector employees but not to civil servants
- Strike action is prohibited for the judiciary, the armed forces, organs of law enforcement, civil national services and officials with a 'basic function'
- For the state administration the right to strike is established via special regulations laid down in an agreement between the government and the trade unions concerned
- Strikes can be called only by a trade union party to the agreement concluded
- Strikes must be approved by a majority of the civil servants concerned

I) Council of Europe

Right to organise

Public sector trade unions are entitled to operate within the public administration, to communicate information to members and to represent them before a court of law or other body.¹

Police officers (part of the 'armed services'), and *military personnel*, pursuant to Regulation 46 of 1996, have a right to form trade unions,² cannot be ordered to disclose their affiliation and are protected against discrimination due to their union affiliation.

With regard to *trade union autonomy and activities*, trade union representatives should be entitled to access the workplace.³ But according to the comments submitted by the Hungarian

¹ The employer is required by law to cooperate with trade unions, provide them with relevant information and make premises available for trade union activities.

² These unions are entitled to request information, express their position, initiate consultations, represent their members before relevant bodies, including courts, and to monitor service and working conditions.

³ They are entitled: once they have given advance notice to the employer, to enter the premises of an enterprise if the union is represented among the workforce; to the use of rooms or premises within the

Trade Union Confederations to the Hungarian national report, public sector trade unions are not expressly entitled to enter a workplace.

Specific criteria are provided for the recognition of trade unions as representative.⁴

Right to bargain collectively

Consultation at national level in the public sector takes the form of tripartite social dialogue, mainly within the National Public Sector Interest Reconciliation Council (OKÉT) and the National Interest Reconciliation Council of Public Employees (KOMT),⁵ for employees of public institutions.

In 2005, a new law was adopted introducing a new method for assessing union *representativity* in the public sector based on the union's share of members with public employee status and which might have an impact on the trade union's information and consultation rights. The ECSR wishes that the next report provide information on these legislative amendments.

As regards the *promotion of machinery for voluntary negotiations*, collective agreements may normally come within one of four categories,⁶ but there is less scope for bargaining in the public service on account of the more detailed provisions of the Act on public employees and the stricter conditions it lays down for derogating from them (any provision of a collective agreement that is inconsistent with the law is null and void).

The arrangements for mediation and arbitration in collective disputes in the private sector contained in Sections 195 and 196 of the Labour Code are applicable only to public sector employees under the Act on the Legal Status of Public Employees (Act XXXIII of 1992),⁷ but not to civil servants covered by Act on the Legal Status of Civil Servants (Act XXIII of 1992). In other words, these sections are in effect for persons employed by central government or local governments, providing some service at public institutions (such as health care, education and social welfare), but not for persons who exercise state power

enterprise during or after working hours, with the agreement of the employer (meetings may be held on the same basis).

⁴ Its candidates must have received at least 10% of the votes cast in the previous works council elections, which are held every three years. Alternatively, a trade union will be deemed representative if it represents more than two-thirds of the workforce. It may take legal proceedings in relation to the outcome of works council elections, as well as any refusal on the part of an employer to recognise its representativity.

⁵ National wage negotiations for the entire public sector take place at the National Public Sector Interest Reconciliation Council (OKÉT, Civil Servants Law, Section 65/A.): subject to discussion are the government's main economic policy targets, such as the planned wage policy, changes in the public sector salary system, planned employment measures, and so on. In December 2004, a comprehensive salary agreement covering public employees, civil servants and persons employed to provide public services was reached by OKÉT (four plenary meetings in 2003 and 11 in 2004). The National Interest Reconciliation Council of Public Employees (KOMT) has held 13 sessions since its foundation in 2001 dealing with issues such as amendments to the public employees' salary system.

⁶ Agreements about procedural matters; rules pertaining to industrial relations; rules pertaining to employment conditions and social protection; and rules concerning labour disputes.

⁷ The Act gives an exhaustive list of the articles of the Labour Code not applicable to public sector employees; since this list does not include Articles 195 and 196, this means that they apply to public employees covered by the Act. The ECSR therefore considers the situation to be in conformity with the Charter in this respect.

within the public administration (such as ministries or authorities), or employees of national, regional or local governmental agencies.

Special forums and rules for the resolution of disputes occurring in the civil service are regulated under Section 66 of Act XXIII of 1992. Collective labour disputes shall be dealt with by the head of the given agency and the representative of the trade union or any other body representing the employees.⁸ The ECSR finds, however, that it is not clear whether the conciliation system provided by Section 66 takes the form of consultation only or that of conciliation, mediation and/or arbitration procedures for resolving conflicts, and asked that the next report clarify this point. Meanwhile, it reserved its position.

Act XXIII of 1992 on Civil Servants also provides for the right of the negotiating parties to involve experts in the reconciliation procedure; it can be interpreted as an authorisation to use mediators, including the possibility to have recourse to the Labour Mediation and Arbitration Service (MKDSZ). The application of this provision is nevertheless not clear to the ECSR, which asked for further information necessary to the assessment of conformity. In fact, the ECSR understands that, according to the Organisational and Operating Procedures, the MKDSZ (operating pursuant to Subsection 2 g of Government Decree 143/2002) is competent to settle any kind of labour dispute arising in connection with industrial relations, including those relating to public employees as well as to civil servants, whenever it is requested to participate in the resolution of such labour and collective disputes by way of conciliation, mediating or arbitration. Nevertheless, the arbitration procedure before the MKDSZ itself is governed by Sections 196–98 of the Labour Code, not applicable to civil servants, in contrast to Act XXIII 1992; therefore, the ECSR deferred its conclusions on this point.

Right to take collective action

The right to strike, provided by the Constitution (Article 70 C(2)) and the Strike Act (Act VII of 1989), is not limited to the context of collective bargaining.

In addition to legal restrictions (strike action is forbidden in organs of the judiciary, armed forces, armed corps, organs of law enforcement and the civil national services; in organs of state administration, the right to strike may be exercised according to special regulations laid down in the agreement between the government and the trade unions concerned),⁹ certain restrictions are laid down in agreements between public service unions and the Ministry of the Interior.¹⁰

⁸ At national level, a representative of the public services is a member of the most comprehensive forum for tripartite negotiations, the National Interest Reconciliation Council (OÉT), which has jurisdiction over all issues related to the world of work, including taxes, contributions and budget issues that influence the economy, employment and incomes, including the right to debate draft legislation. The OKÉT (see above) is responsible for interest reconciliation on labour, employment, wages, and income policy issues for civil servants, public employees, and for professional and career members of the armed forces (soldiers). Members consist of national union federations and local government interest organisations. The Interest Reconciliation Council of Civil Servants, the National Interest Reconciliation Council of Civil Servants of Local Governments, the National Labour Council of Public Employees and the Law Enforcement Organisations' Inter-Ministerial Interest Reconciliation Forum all continue to operate at sectoral level.

⁹ Article 3. 2 of the Strike Act (Act VII of 1989).

¹⁰ A strike by civil servants must not interfere with national and local elections, plebiscites, national defence and protection against natural catastrophes. It may not disrupt urgent business or frustrate the implementation

The situation is *not in conformity* with the Charter on the ground that in the civil service, a strike can be called *only by a trade union that is party to the agreement concluded between the government and the public servants' trade unions concerned*.

The agreement is in principle open to all civil service trade unions, but this is possible only if the union wishing to join accepts as binding the rules of procedure laid down in the agreement (despite the fact that these rules were negotiated and agreed by the initial signatories without its participation); this may in practice deter the union from joining, thereby making it impossible for it to initiate a strike. According to the ECSR, this condition unduly restricts the right to strike of trade unions not having acceded to the agreement. At the Governmental Committee, the Hungarian delegate declared¹¹ that the content of the agreement reflects a compromise regarding exercise of the right to strike, its aim being to maintain the operations of government agencies in the event of strikes. The agreement is applicable to *civil servants only*, which means employees who exercise the authority of the state, in total not more than about 100,000 persons (roughly 3% of all employees in the country). More recently,¹² the Governmental Committee was informed that an interministerial Committee had been established to examine the issue and to propose remedies. Any amendment in this respect would need a tripartite accord between the government and the social partners.

As a *second ground of non-conformity*, pursuant to the abovementioned 1994 agreement, *strikes must be approved by a majority of the civil servants concerned*. The ECSR considers that this threshold is so high as to unduly restrict the right of employees organised in such trade unions to take collective action. The Hungarian national report stated in this context that given the unusual operational order of the public administration, a strike by a minority could prevent people who did not want to join the strike from doing their work, but the ECSR considered that this explanation was not sufficient to make it reconsider its conclusion of non-conformity on this point.¹³

With regard to *the third ground of non-conformity*, pursuant to the same 1994 agreement, *officials with 'a basic function' are forbidden to strike*, essentially officials exercising management functions, that is, with the power to appoint and dismiss staff and to initiate disciplinary proceedings. In the ECSR's view, the criteria used to define officials who are denied the right to strike manifestly go beyond the scope of Article 31 of the Charter. The Hungarian delegate at the Governmental Committee stated in this respect¹⁴ that civil servants with management functions are excluded from the right to strike because their role is fundamental in the continuous operation of government agencies; moreover, the estimated number of civil servants to which these criteria apply is around 10–15% of all

of decisions of government, Parliament, a body of representatives or a general assembly of local government that have significant social impact. These situations have to be approved on a case by case basis by the two sides before strike action begins. The parties are also legally required to agree and determine, by prior negotiations, on providing a minimum service.

¹¹ Governmental Committee of the European Social Charter, Report concerning Conclusions XVII-2, para. 36–39.

¹² Governmental Committee of the European Social Charter, Report concerning Conclusions XVIII-2, 112th meeting, 2–4 May 2006, Report prepared by the Secretariat.

¹³ 'Approval by a majority of the civil servants concerned' means the majority of civil servants at the respective workplace.

¹⁴ Governmental Committee of the European Social Charter, Report concerning Conclusions XVII-2.

civil servants, that is, approximately between 10,000 and 15,000 persons. The Governmental Committee recently¹⁵ expressed its concern once more about the violation of such a fundamental right and urged the Hungarian government to use all its efforts in consultation with the social partners to bring the situation into conformity with the Charter.

II) ILO

CFA Report No. 327, case no. 2118

*Trade Union of Hungarian Railwaymen vs the Government of Hungary*¹⁶

The complainant alleged violations of the right to strike, acts of anti-union discrimination, violations of the right to collective bargaining and acts of interference by the employer in the trade union's affairs.

The CFA noted that it should be possible for employers' and workers' organisations to have their voices heard and to present their arguments before a decision that affects them is taken.

Furthermore, the CFA has always recognised the right to strike of workers and their organisations as a legitimate means of defending their economic and social interests, and the interpretation of the law should not impede workers from exercising their right to strike for the renewal of a collective agreement.

The CFA also noted that the conditions to be fulfilled under the law in order to render a strike lawful must be reasonable and in any event not such as to impose a substantial restriction on the means of action open to trade union organisations.

III) Action to be taken

In the civil service, a strike can be called only by a trade union that is party to the agreement concluded between the government and the public servants' trade unions concerned. The agreement is in principle open to all civil service trade unions, but this is possible only if the union wishing to join up accepts as binding the rules of procedure laid down in the agreement. This may in practice deter the union from joining, thereby making it impossible for it to initiate a strike. This condition unduly restricts the right to strike of trade unions that have not signed up to the agreement.

Recently, the Governmental Committee was informed that an interministerial committee had been established to examine the issue and to propose possible remedies. Any amendment in this respect would need a tripartite accord between the government and the social partners.

What is the state of play in this regard?

Strikes must be approved by a majority of the civil servants concerned. The ESCR considers that this threshold is so high as to unduly restrict the right of employees organised in such trade unions to take collective action.

¹⁵ Governmental Committee, 112th meeting, 2–4 May 2006.

¹⁶ Complaint submitted on 28 February 2001.

Are changes to remedy this envisaged, feasible and/or appropriate?

Officials with ‘a basic function’ are forbidden to strike, essentially officials exercising management functions, that is, with the power to appoint and dismiss staff and to initiate disciplinary proceedings. In the ECSR's view, the criteria used to define officials who are denied the right to strike manifestly go beyond the scope of Article 31 of the Charter.

Are changes to remedy this envisaged, feasible and/or appropriate?

Ireland

- Right to organise only granted to associations inside the *Garda Síochána* (national police)
- Joint consultation procedures are in place
- Conciliation and arbitration is foreseen for certain categories of the public sector
- Right to strike is guaranteed in all branches of the public sector except the *Garda Síochána* and the armed forces

Ireland is the only state in the European Union with a Constitution that does not contain provisions on the public service. A 1924 Act (the Civil Service Regulation Act), amended on numerous occasions, constitutes the regulatory framework for the civil service. This Act had two aims: on the one hand, it established the legal basis for the structure and organisation of the central administration by defining the scope of ministerial responsibility, and on the other, it created the departments of state and divided public service activities between them.

The Irish civil service system is acknowledged to be a career system.

The Ministers and Secretaries Act of 1924 states that the minister 'is' the ministry and is solely and ultimately 'accountable and responsible' to Parliament and, by extension, to the country for the actions of civil servants in the ministry. The same principle is found to some extent in the United Kingdom.

The 1924 Act was amended by the Public Service Management Bill of 6 March 1997. This new Act was justified by the need to introduce new methods of human resources management into the public sector, mainly with regard to training, improving administrative efficiency and providing a better service for users. But there was no change to the general structure of the civil service.

As in many other European countries, the state plays a major part in the organisation of the civil service. The Ministry of Finance is responsible for regulating the central civil service and for overseeing all the rules and regulations adopted by other public employers. Its role also includes determining the state budget, thereby establishing the management framework for the entire public sector.

At national level, the Ministry of Finance is the employer of those working in the central administration. The notion of a civil servant of the central administration is a fairly narrow one in that it covers only members of the civil service working in the ministries. Teachers, the police, and hospital and local authority staff are not strictly considered to be civil servants.

The only officials who can be called civil servants in the strict sense of the term are those working in the central administration. They may be established civil servants or non-established civil servants. They are employed by the Ministry of Finance and occupy permanent posts in the central administration.

In addition, the Irish civil service contains four sub-groups of employees, each with its own statute. These are the civil service in the health sector, the police, social security and public institutions. The different statutes have many aspects in common since they are partly based on unilateral provisions, particularly in matters of recruitment. The remaining provisions are derived from collective agreements.

Local authorities can be considered as public employers, although they are largely subject to state authority. Indeed, the Ministry of Finance has general competence for the whole of the civil service. Moreover, the Ministry of the Environment is responsible for regulating the local civil service. It establishes terms and conditions of employment and retains control over the pay and number of local employees. The local civil service is composed primarily of staff governed by a standard statute for which a general framework is established by law. These are the local government officers and employees, and their position is regulated by the Local Government Act of 1941.

D) Council of Europe

Right to organise

The right to organise of the *national police (Garda Siochána)*¹ is granted by the 1977 Garda Siochána Act which allows members of the police to form representative organisations. Nevertheless, it prohibits affiliation to police associations outside the Garda Siochána – if incompatible with the status and duties of members of a disciplined police force – except in cases authorised by the Minister of Justice.

Another open issue concerns the circumstances in which authorisations by the Minister of the affiliation of authorised associations with bodies outside the Garda Siochána are granted or refused: they are not always clear, and the restrictions pronounced by the Minister seem arbitrary.²

Right to bargain collectively

Social dialogue in Ireland has intensified significantly since the ‘social partnership’ was established in 1987. This partnership is based on collective bargaining every three years. In general, the government participates only in the final stage of negotiations to facilitate progress on the most sensitive issues or to provide specific public service guarantees.

These agreements, applying to workers in the private and public sectors, make it possible to keep industrial disputes to a minimum.

The ECSR considers the situation in Ireland *not in conformity with the Charter* on the ground that, *in order to engage in collective bargaining, a trade union must be authorised and must hold a negotiation licence.*³

¹ This is effectively under the civilian control of the Minister of Justice and has primary responsibility for internal security. Since the police are an unarmed force, the army acts in their support when necessary, the latter under the effective civilian control of the Minister of Defence.

² For example, affiliation was granted between the *Garda* associations and the ICPSA (Irish Conference of Professional Service Associations), as well as to international police organisations; it was not authorised, however, with the Irish Congress of Trade Unions.

³ As required under section 6 of the Trade Union Act 1941.

The situation is *only partly relevant from the point of view of the public sector*: so called *excepted bodies* are exempted under the Trade Union Acts from obtaining a negotiation licence and may also engage in negotiations on wages and other conditions of employment. These 'excepted bodies' include civil service staff associations, staff associations whose members are all confined to the same employment and organisations which have been designated excepted bodies by the Minister.⁴ These bodies, mentioned in section 6.3 of the Trade Union Act 1941, pursuing functions of public interest, may be trade unions or other representative organisations.

With regard to the *joint consultation procedures*, the situation in Ireland is up to now in conformity with Article 6 paragraph 1 of the Charter.

The *promotion of machinery for voluntary negotiations* is considered as *not sufficient* because the conditions under which negotiation licences are granted are not compatible with the freedom to form or join trade unions. The ECSR has been pointing out for a long time that this incompatibility extended not only to the right to organise, but also to the right to bargain collectively provided for under Article 6, paragraph 2, since this provision, which provides that Contracting Parties undertake to 'promote', where necessary and appropriate, machinery for voluntary negotiations, presupposes a *guarantee of complete freedom to organise*.

In the public sector a prominent distinction is made between those groups which have access to the Labour Relations Commission and the Labour Court and those which do not but instead are covered by Conciliation and Arbitration (C&A) schemes. These C&A schemes include the civil service (the largest category), Garda (police) up to Commissioner's rank, most teachers, some health board staff and the officer grades of local authorities.

The conciliation and arbitration machinery for members of the Garda Síochána, and the arbitration scheme, is *sui generis*: the representative associations pursued claims for their members in the context of the Garda Conciliation and Arbitration. A C&A scheme set up in 1993 provided that should disagreement persist at conciliation, certain claims, including pay, allowances and hours of work, could be referred from the Conciliation Council to an arbitration board and decided by an independent arbitrator.

The ECSR found these schemes, including the one applied to the police, in conformity; nevertheless, it wishes to be kept informed of all proposals for a revised scheme.

In 2004 Ireland planned to launch a new mediation and a voluntary arbitration service as from 2005, in addition to the existing conciliation machinery; the ECSR wanted to be informed on any development in this respect.

⁴ These excepted bodies include: bodies which carry on negotiations for the fixing of the wages and other conditions of employment of its own (but no other) employees; civil service staff associations recognised by the Minister of Finance; teachers' organisations recognised by the Minister of Education; Joint Labour Committees; bodies in respect of which for the time being an order is in force under subsection 6 of this section; bodies all the members of which are employed by the same employer and which carries on negotiations for the fixing of the wages or other conditions of employment of its own members (but of no other employees). Examples of excepted bodies are the Banks' Staff Relations Committees, the Association of Hospital and Public Pharmacists, the Irish Dental Association, the Incorporated Law Society of Ireland, the Veterinary Medical Association of Ireland, the Irish Hospital Consultants Association and the Institute of Chemistry in Ireland. The Irish Nurses' Organisation held excepted body status until it obtained a negotiation licence and joined the Irish Congress of Trade Unions in 1990.

Right to take collective action

Following the entry into force of the 1982 Trade Disputes (Amendment) Act (now the 1990 Industrial Relations Act) the right to strike was guaranteed in all branches of the public sector except the Garda Síochána and the armed forces. Immunities extended to industrial action cover only officials and members of authorised trade unions with negotiation licences.

In 2006 the Committee concluded that the situation in Ireland is still not in conformity with Article 6, paragraph 4 of the Revised Charter on the following grounds:

- Only authorised trade unions – that is, trade unions holding a negotiation licence – their officials and members are granted immunity from civil liability in the event of a strike; this circumstance does not affect civil servants organised in bodies excepted from the need for the negotiation licence. At the September 2006 meeting of the Governmental Committee, it was noted that nothing had changed and that a group was still at work to study possible developments. Due to the long-term state of non-conformity, the Governmental Committee voted and adopted a warning.
- Under the Unfair Dismissals Act, an employer may dismiss all employees for taking part in a strike. The dismissal of a striking employee will be deemed unfair only if the employer dismisses certain employees or selectively rehires certain employees. The Governmental Committee was informed at the meeting of September 2006 that the new legislation regulating the matter in line with the Charter was going to be adopted at the end of 2006.

The Code of Practice on Voluntary Dispute Resolution and the Industrial Relations Amendment Act 2001 regulate and to some extent restrict industrial action. The Code is principally concerned with disputes for the *maintenance of 'essential' services during industrial action*.

Defining essential services as those *'whose cessation or interruption could endanger life, or cause major damage to the national economy, or widespread hardship to the Community and particularly: health services, energy supplies, including gas and electricity, water and sewage services, fire, ambulance and rescue services and certain elements of public transport'*, the Code of Practice recommends that dispute procedures in industries which provide essential services should contain a final stage which the parties would accept as providing a settlement. Three alternative stages are suggested, one of which is third-party intervention (representing compulsory binding arbitration). It should be noted that the Conspiracy and Protection of Property Act 1875 contains provisions which effectively make strikes in water, gas or electricity a criminal offence and these provisions are still in force,⁵ even if they are not applied.

⁵ 'Every person, however, commits a misdemeanour ... who, having otherwise assumed the duty of supplying any place with gas or water, wilfully and maliciously breaks a contract of service or hiring, knowing, or having reasonable cause to believe, that the probable consequence of his so doing, alone or in combination with others, will be to deprive the inhabitants of that place, wholly or in part, of their supply of gas or water.' Section 4 imposes criminal liability on persons employed by a municipal authority or any gas or water supplier who break their contract. This provision was extended to electricity workers by section 110 of the Electricity Supply Act 1927.

II) ILO

No existing case law.

III) Action to be taken

The affiliation to police associations outside the *Garda Síochána* – if incompatible with the status and duties of members of a disciplined police force – is prohibited except in cases authorised by the Minister of Justice.

The circumstances in which authorisations by the Minister of the affiliation of authorised associations with bodies outside the *Garda Síochána* are granted or refused is not always clear. The restrictions pronounced by the Minister seem arbitrary.

So-called excepted bodies are exempt under the Trade Union Acts from obtaining a negotiation licence and may also engage in negotiations on wages and other conditions of employment. These 'excepted bodies' include civil service staff associations, staff associations whose members are all confined to the same employment and organisations which have been designated excepted bodies by the Minister.

Is this a problem in practice?

In 2004 Ireland planned to launch a new mediation and a voluntary arbitration service as from 2005, in addition to the existing conciliation machinery.

Did this take place and is it working? Information should be included in the next report.

In 2006 the ECSR concluded that the situation in Ireland is still not in conformity with Article 6, paragraph 4 of the Revised Charter on the following grounds:

- only authorised trade unions – that is, trade unions holding a negotiation licence – their officials and members are granted immunity from civil liability in the event of a strike; this circumstance does not affect civil servants organised in bodies excepted from the need for a negotiation licence;
- under the Unfair Dismissals Act, an employer may dismiss all employees for taking part in a strike. The dismissal of a striking employee will be deemed unfair only if the employer dismisses certain employees or selectively rehires certain employees.

These two last points apply to the private sector; are they of concern also in the public sector?

Italy

- Members of the police and the armed forces can elect representative bodies
- Collective bargaining takes place at national and decentralised level
- The minimum service arrangements during collective action have to be set out in a collective agreement

Problems:

- No collective bargaining for judges, diplomats and prefects and only certain forms of negotiations for armed forces and police
- The government has the power to restrict strikes in essential public services
- The notification period for a strike in essential public services is excessive

Action to be taken:

- Trade union action is required to get changes in legislation with regard to the restrictions on the right to strike in the essential public services

In 1993 Italy carried out a thoroughgoing reform of its public service. Legislative Decree No. 29 of February 1993 approved a change of the status of virtually all public servants, putting them on a contract under private law governed by the Civil Code.

The main aspects of the reform are:

- most public servants becoming subject to private law (with the exception of directors-general, prefects, diplomats, and so on);
- the granting of competence to ordinary judges in disputes concerning public servants;
- enlargement of the scope of collective bargaining to include all matters not covered by law or regulations; the public partner in collective bargaining shall in future be an agency.

Within the staff of the administration, however, some categories of personnel have not been brought under private law in order to preserve their autonomy (judges and prosecutors, university professors, military personnel and police officers, diplomats and prefectural corps). These categories are defined as non-contractual public employees, as opposed to contractual/'privatised' employees.

But the public law regulations continue to apply in matters of recruitment, incompatibility and accumulation of posts.

The Italian public service system is thus now considered to be a system of employment and no longer a career system.

I) Council of Europe

Right to organise

The right to organise is generally protected by Article 39 of the Constitution, and Act No. 300/1970 (the Workers' Statute). Act 165/20011 regulates the employment relationship with a public authority as employer. The public sector employees' trade unions are registered on the basis of the active application of representativeness criteria fixed by law.

The Police Act (1 April 1981, No. 121) allows the election of representative bodies of police personnel entitled to express their opinion in a direct way; nevertheless, they do not have the right to affiliate or establish organisational and associative links with national and international organisations.

In the case of *military personnel* the law provides for elected representative bodies with rights to be consulted on and to promote employees' interests in matters relating to pay and conditions. On this point, there are some internal legislation bills¹ and an important court decision;² in addition, EUROFEDOP raised a collective complaint.³

Right to bargain collectively

As for Legislative Decree No. 165/2001, collective bargaining shall take place at national and also at decentralised level (within limits laid down by national agreements).

At national level, the Agency for the Representation of Public Administration in Collective Bargaining (ARAN)⁴ negotiates with those trade unions that are allowed to lead negotiations since they meet the minimum requirements laid down by law.⁵ ARAN has the

¹ For example, Bill No. 6485, Chamber of Deputies, presented on 21/10/1999.

² Consiglio di Stato, ord. 2/6/1998: the Council of State – the jurisdictional body for the internal laws applicable to the state administration – judged that the preclusion of the exercise of the right to organise laid down in Article 8, paragraph 1 of Act No. 382/1978 could be considered as contrary to the constitutional principle of equality and reasonableness, since this right should be granted to *all citizens*, and its preclusion could cause worse treatment, working conditions not being properly addressed. The Council of State referred the decision to the Constitutional Court.

³ Collective Complaint No. 4/1999 European Federation of Employees in Public Services (EUROFEDOP) v. Italy following which the Committee of Ministers adopted Resolution ResChS(2001)3 on 7 February 2001. Italy was alleged not to comply with Articles 5 and 6 as members of the armed forces do not enjoy the right to organise, and, as it follows, the right to bargain collectively. In fact, the bodies allowed by Act No. 382 of 11 July 1978 could not be considered as trade unions. The Italian government pointed out that Article 5 leaves it to national law to determine whether and to what extent to apply the guarantees laid down in the said provision to members of the armed forces; it also stated that the provided system of military representation has the characteristic, in effect, that, insofar as the involvement of staff representatives and the aims of the procedure are concerned, this consultation is precisely equivalent to a collective bargaining arrangement. The ECSR noted the wording of the final sentence of Article 5, permitting states to '*limit in any way and even to suppress entirely the freedom to organize of the armed forces*', and dismissed the complaint.

⁴ A special public law body, established in 1993 to represent employers in collective bargaining in the public sector, supported in its work by Sectoral Committees established within each sector of public administration which establish the directives on the basis of which ARAN conducts collective bargaining in the respective sector.

⁵ In order to qualify as representative for the purpose of collective bargaining in the public sector, a trade union must represent 5% of trade union members within the sector concerned, calculated on the basis of the 'average associative rate' and on the basis of the percentage obtained at the workers' representatives' elections at the respective level (Section 47 of Legislative Decree No. 29 of 1993).

responsibility of assessing the representativity of the parties, with the possibility of judicial review as a protection against arbitrary refusals.

The armed forces and police are formally excluded from collective bargaining, but these employees have different forms of negotiation. Judges, diplomats and prefects are excluded entirely from collective bargaining.

With regard to *negotiation procedures*, according to the Italian national report, collective negotiations are initiated by ARAN, and the ECSR asked what the possibilities for trade unions to start collective negotiations are.

A 1998 law⁶ provides for a mandatory extra-judicial *conciliation procedure* in a labour dispute of a legal nature before formal judicial proceedings can be initiated. The ECSR understands from the report that the dispute resolution mechanisms⁷ relate only to individual disputes and not to conciliation, mediation or arbitration procedures for the resolution of collective conflicts. The ECSR asked for the next report to clarify whether this understanding is correct.

A variety of mechanisms are incorporated in collective agreements at national level with the aim of preventing collective disputes: a procedure for the ‘cooling-off of conflicts’ during negotiations on collective agreements at decentralised levels; a system of ‘authentic interpretation of agreements’, laid down by law, providing for reconciliation between the parties in the event of a dispute on the interpretation of collective agreements; the possibility of establishing bilateral commissions or observers to help achieving a common understanding of the parties regarding the topics covered by existing collective agreements, thereby preventing future conflicts.

The ECSR understands that the latter two procedures deal with conflicts of rights, that is, related to the application and implementation of an existing collective agreement, which do not fall within the scope of Article 6, paragraph 3 of the revised Charter. It further asked that the next report provide updated information on mechanisms of conciliation, mediation and arbitration instituted by law or industrial practice to facilitate the resolution of collective conflicts.

Right to collective action

The law of 11 April 2000 requires a balance between the right to strike and the continuity of public services. The explanatory memorandum states that *‘the purpose of this law is not to deprive anyone of the right to strike, but to guarantee a minimum level of essential public services’*.

In Italy there are no particular restrictions on the trade union rights of public servants. The right to strike is prohibited only for military personnel and the state police.

Minimum-service arrangements have to be set out in collective agreements. The Guarantee Committee is an independent body which assesses the appropriateness of the minimum

⁶ Legislative Decree No. 80/1998 on new regulations on employment relationships in the public sector, on jurisdiction in labour disputes and on administrative jurisdiction.

⁷ The national framework collective agreement dated 23 January 2001 as amended on 14 July 2003 regulates resolution of labour disputes in the public sector.

services set out in collective agreements and, if necessary, orders further measures. The powers of the Guarantee Committee have been strengthened by the new law (Law 83/2000).⁸ It can now also penalise the conduct of trade unions, employers and self-employed workers in connection with collective action. The ECSR asked that the next report provide detailed information on practical implementation of the new powers granted to the Committee.

The situation in Italy is *not in conformity* with Article 6, paragraph 4 on the grounds that:

- The ECSR is not able to assess whether the government's right to issue ordinances restricting strikes in essential public services⁹ falls within the limits of Article G of the revised Charter. The proclamation of the strike has to be sent to the offices specifically created within the competent authority: the Prime Minister or a delegated Minister in case of national or interregional conflict or the Prefects in case of local conflicts. These authorities, also upon the initiative of the Guarantee Committee, have the power to adopt contingent ordinances indicating the proper measures to adopt in order to ensure the proper functioning of minimum services. This applies in cases of a real and imminent danger of serious infringements of personal freedoms guaranteed by the Constitution due to non-functioning of services of a general (public) interest and if conciliation efforts have proven unsuccessful. These authorities also have the power to adopt ordinances imposing deferment of the strike.

Since 1996, the ECSR conclusions on Article 6, paragraph 4 have been deferred pending receipt of precise and detailed information on the power of public authorities to issue ordinances and its consequences. Meanwhile, the ECSR considers that nothing establishes that the restrictions on the right to strike following from the government's power to define minimum services in essential public services fall within the limits of Article G of the revised Charter.¹⁰

- *The requirement to notify the duration of strikes concerning essential public services prior to strike action*, introduced by Decree No. 83/2000, *is excessive*. At the 112th meeting

⁸ The Guarantee Committee can intervene and formulate proposals for agreements to the parties, itself adopt a provisional regulation and order further measures, such as temporary regulations guaranteeing certain services at certain periods (which may at any time be overruled by an agreement between the social partners); it may also issue an 'arbitration judgment' on the interpretation of minimum service agreements, and take action if the minimum service rules are not met. Its decisions may, however, be challenged before the Labour Court.

⁹ Essential services as defined in Section 1 of Act 146 of 1990: services relating to the protection of life, health, personal freedom and safety of the environment and artistic and historical heritage; civil protection, the collection and disposal of domestic refuse; services relating to the protection of freedom of movement, namely urban and other public transport networks, railways, air traffic and airports; services relating to social welfare and insurance; services relating to education; nurseries, kindergartens included; services relating to freedom of communication; postal and telecommunications services and public radio and television news services. An explanatory memorandum states that '*the purpose of the Act is not to deprive anyone of the right to strike but to guarantee the operation of a minimum service in essential public services*'. Nowadays, the restrictions are only referred to the particular procedure provided by law and by the agreements between the trade unions' representatives and management.

¹⁰ With regard to this ground of non-conformity, the ECSR underlined that 'the current report includes a list of cases where ordinances have been issued; the list which is based on a survey of prefectures only relates to strikes at local level. Moreover, the report fails to specify the circumstances in which these ordinances were issued' (Working document prepared by the Secretariat for the Governmental Committee of the European Social Charter, regarding Conclusions 2006 of the ECSR on the revised Charter; Strasbourg, 2 April 2006, T-SG (2006)4).

of the Governmental Committee of May 2006, the Italian delegate promised to submit new information in order to allow the ECSR to properly assess the situation.

As regards *procedural requirements*,¹¹ a minimum notice period of ten days, which may be prolonged by agreement, has to be given to the employer concerned, as well as to the administrative authority competent for deciding about ordinances. Users have to be given notice of minimum service timetables, too. Trade unions and the individual workers participating in a strike must provide information on its duration, form and reasons. Compulsory cooling-off and conciliation procedures prior to strike action are regulated by the aforementioned agreements on the provision of essential services. Cooling-off periods between consecutive strike actions in the same sector must be respected. The ECSR wished the next report to provide detailed information on the functioning of these cooling-off and conciliation mechanisms, as well as their implementation in practice.

II) ILO

No existing case law.

III) Action to be taken

With regard to negotiation procedures, collective negotiations are initiated by ARAN, and the ECSR asked about what possibilities are available to trade unions to start collective negotiations.

The powers of the Guarantee Committee have been strengthened under the new law (83/2000). It can now also penalise the conduct of trade unions, employers and self-employed workers in connection with collective action. The ECSR asked that the next report provide detailed information on the implementation in practice of the new powers granted to the Commission.

Information on restrictions on the right to strike following from the government's power to define minimum services in essential public services should also be reported to the ECSR.

The requirement to notify the duration of strikes concerning essential public services prior to strike action, introduced by Decree No. 83/2000, is considered to be excessive by the ECSR.

Are/ can legislative changes be considered/feasible?

¹¹ These provisions, in theory protecting users, have nonetheless failed to prevent a proliferation of short wildcat strikes on the initiative of small autonomous unions (especially in transport, the weak point of the public services). The penalties announced have often not been applied. It is essentially the major groups of affiliated trade unions that take users into account. From the 1980s onwards, the main ones (UIL, CGIL, CISL) adopted 'ethical codes' to limit the inconvenience caused by industrial disputes. The results of the minimum service are on the whole positive in Italy, particularly since there are quite effective dispute prevention procedures. Unions, however, find the pre-strike procedures particularly complicated. In addition, the Guarantee Committee is considered by some to have no real teeth and therefore to be ineffective.

Latvia

- Public sector consultation takes place in the National Tripartite Cooperation Council
- Conciliation, mediation and arbitration procedures are in place
- Collective action may be taken
- Minimum service has to be guaranteed in essential services

Problems:

- Members of the armed forces are prohibited from forming and joining a trade union and from negotiating – they may appoint representatives
- No promotion of collective bargaining in the public sector at national level
- Prohibited from striking are: judges, prosecutors, members of the police, fire-fighters, border guards, members of state security service, prison warders and members of the armed forces

Action to be taken:

- Can changes be envisaged with regard to the lack of trade union rights in the armed forces?
- Prohibition from striking: these exclusions are too general, no distinctions are made; changes must be envisaged to the relevant legislation

I) Council of Europe

Right to organise

The situation is *not in conformity* with regard to the right to organise on the ground that *members of military forces and police, as armed and 'militarised' authorities, are denied the fundamental trade union prerogatives*, including the right to form or join trade unions, to negotiate pay and conditions of service and to convene meetings of members, although delegates may be appointed in each unit to represent the personnel. They are authorised only to form or join associations relating to sport and culture.

In April 2005, amendments¹ to the Police Act providing for the right of police officers to form and join trade unions were accepted by the Parliament of Latvia and entered into

¹ In 2004, several employees at the State Police filed complaints with the Ministry of the Interior concerning the injustice experienced by police officers in the field of social guarantees in comparison with other civil servants. Several police officers went to court. In order to prevent the aggravation of the situation and the threat of a strike the government promised that police officers would be entitled to establish trade unions from 1 January 2006. The first step in this direction was renewal of the Police Society. The Latvian Parliament ('Saeima') approved amendments to the Law on the Police, which allow police officers to unite in trade unions to protect their labour and other social and economic rights and interests. The amendments to the Law come into force as of 1 January 2006. At the end of 2004 the National Human Rights Office ('Valsts Cilvēktiesību birojs', VCB) had submitted a statement of claim to the Constitutional Court ('Satversmes tiesa') on declaring invalid the prohibition to form trade unions stipulated by the Law on the Police. If the Constitutional Court had examined this issue in a timely fashion, the police officers would have been entitled to establish trade unions before 1 January 2006.

force on 1 January 2006. The ECSR is now to make a new assessment of the conformity of the situation.

In Latvia, the right to strike is recognised without distinction for workers in the private sector and public sector workers. Article 108 of the Latvian Constitution of 15 February 1922, as amended by a law of 30 April 2002, provides that '*employees have the right to conclude collective agreements and the right to strike. The state protects trade union freedom.*'

Right to bargain collectively

With regard to *joint consultation*, the main forum for social dialogue is the National Tripartite Cooperation Council;² however, the ECSR has asked whether it is also responsible for public sector consultation, and if not how this is organised.

With regard to the machinery for voluntary negotiations, it is not clear whether employment conditions, including remuneration, in the civil service are subject to collective bargaining and if so what the procedures are. The state is required to take necessary and appropriate steps to *promote* collective bargaining. It is clear from the statistics on the coverage of collective agreements that Latvia must make further efforts to encourage them. Therefore the ECSR, in order to be able to assess the situation in terms of conformity, needs more information on all the steps that are being taken to meet this obligation.

The *conciliation, mediation and arbitration procedures* laid down in the Labour Disputes Act apply both in the private and in the public sector, providing a system of dispute settlement by the intervention of either a parity conciliation commission or arbitration tribunals, in conformity with the Charter.

Right to take collective action

The law of 24 October 2002 on security and fire fighting lays down that personnel in the fire service and rescue services can establish and join trade unions. However, with respect to dispute settlement, the law makes a distinction depending on fire fighters' status: those with public servant status do not have the right to use the dispute settlement procedure, since Article 35(5) of the same law stipulates that labour relations provisions do not apply to public servants. The other categories of fire fighters have the right to settle their disputes according to the law on labour disputes.

As for the Labour Disputes Act, the Constitution and the Strike Act,³ collective action may be taken to secure an outcome to a collective dispute over economic and occupational interests and obtain satisfaction of demands.

² This was established in 1998 and comprises representatives of the state, the Free Trade Union Confederation of Latvia and the Employers' Confederation of Latvia to facilitate and promote national cooperation between them on all aspects of social and industrial relations. It looks at all draft programmes, legislation and other regulations, and can propose changes in a range of areas, such as social security, key aspects of the national budget, national and regional economic development strategy, health promotion, the development of general education and vocational training, employment and occupational classifications. The Council has four sub-committees, on employment, social security, health and vocational training and education. It meets every two or three months.

³ Act on Strikes of 23 April 1998.

Procedural requirements: not later than 10 days before the start of a strike the strike committee must submit to the employer, the Labour Inspectorate and the National Tripartite Cooperation Council a strike declaration specifying the date and place of the strike, reasons, demands, number of strikers and composition of the strike committee. In order to assess the conformity of this provision with Article 6, paragraph 4, the ECSR asked whether this restriction is general, that is, is provided for in all cases of strike action.

Restrictions ratione personae to the exercise of the right to strike declared as in conformity are laid down by the Strike Act⁴ which prevents judges, prosecutors, members of the police, fire-fighters, frontier guards, members of the state security service, prison warders and members of the armed forces from striking.

Employers and strike committees must guarantee a *minimum service* when strikes are called in *essential services*, undertakings, organisations and institutions necessary to the community, where the interruption of activity could threaten national security or the security, health or life of the entire population, certain groups of inhabitants or particular individuals;⁵ the sectors involved are medical and emergency care, public transport, drinking water supplies, electricity and gas production, air traffic control, safety of transport, refuse and sewage collection and treatment, storage, use and monitoring of radioactive substances and waste and civil defence. On the other hand, Section 21§5 of the Labour Disputes Act prohibit lockouts in services and undertakings considered necessary to the community, as defined in the Strike Act. The ECSR considers that this restriction is in conformity with Article 6, paragraph 4 of the Charter.

The ECSR, however, would like to receive information on practical examples of the criteria used to decide whether to introduce a minimum service.

The ECSR has also deemed in conformity with Article 6, paragraph 4 the *restrictions applied in the event of natural disasters, major accidents or epidemics*, in the light of Article 31; in these cases the Labour Inspectorate can postpone or interrupt strikes by emergency personnel for up to three months.

II) ILO

No existing case law.

III) Action to be taken

According to the ECSR the situation is not in conformity with regard to the right to organise on the ground that members of military forces and police, as armed and ‘militarised’ authorities, are denied the fundamental trade union prerogatives, including

⁴ Section 16.

⁵ The employer and the strike committee are responsible for the continuation of work. If necessary, at least three days before the commencement of a strike, the employer and the strike committee have to agree on a certain number of employees who will perform the work and specify the amount of work to be done. The refusal of an employee to perform such work is regarded as a violation of work procedures. If the employer and the strike committee are not able to ensure that the minimum amount of work is continued, the State Labour Inspection has a right to give a binding order for continuation of the work and to determine the number of employees who have to perform the work. (Source: European Foundation for the Improvement of Living and Working Conditions (2004), *Social dialogue and conflict resolution in Latvia*, p. 5 – available at: <http://www.eurofound.eu.int/pubdocs/2004/50/en/1/ef0450en.pdf>).

the right to form or join trade unions, to negotiate pay and conditions of service and to convene meetings of members, although delegates may be appointed in each unit to represent the personnel. They are only authorised to form or join associations relating to sport and culture. In April 2005 amendments to the Police Act providing for the right of police officers to form and join trade unions were accepted by the Parliament of Latvia and entered into force on 1 January 2006.

What is your impression in practice? Are further changes needed? And are similar changes feasible with regard to military forces?

The main forum for social dialogue is the National Tripartite Cooperation Council. Is it also responsible for public sector consultation? If not, how is joint consultation in the public sector organised?

The state is required to take necessary and appropriate steps to promote collective bargaining. It is clear from the statistics on the coverage of collective agreements that Latvia must make further efforts to encourage them.

What steps are being taken to meet these obligations?

The Strike Act prevents judges, prosecutors, members of the police, fire-fighters, and frontier guards, members of the state security service, prison warders and members of the armed forces from striking.

Is this a general prohibition? Are no distinctions made? Is there no reference to minimum services? You should report on this.

Lithuania

- Civil servants may join a trade union, as well as police officers
- Mechanisms for joint consultation exist at national, sectoral and enterprise level
- Mechanisms of conciliation and arbitration are in place

Problems:

- The freedom to organise is being undermined: the threshold of 30 persons required to form a trade union is excessive
- Members of municipal councils, managers and deputies at statutory establishments within the sphere of internal affairs may not join a trade union, nor can personnel of the armed forces
- Normal social dialogue barely exists in the public sector; also problematic is the lack of employer representatives
- No collective bargaining in the armed forces; the ITUC Annual Survey 2006 highlights that collective bargaining rights are not provided for 'all government employees involved in law enforcement and security-related work', which seems to cover a group of workers much larger than the 'armed forces'
- To go on strike, a strike ballot is needed: the threshold of a 2/3 majority of all company employees agreeing on strike action is considered excessive
- Strikes are still forbidden in the following sectors: public electricity, district heating, gas supply (despite CoE and ILO criticism)
- Prohibited from striking are also: heads of department and senior civil servants, employees in internal affairs, national defence and state security

Action to be taken:

- The right to form and join a trade union should be guaranteed to all workers in the public sector – trade union pressure for legislative changes is needed

I) Council of Europe

Right to organise

Article 50 of the Lithuanian Constitution of 25 October 1992 provides that 'trade unions shall organise themselves freely and function independently. They shall defend the occupational, economic and social interests of the workers. All trade unions shall have equal rights.'

According to the ECSR, the situation in Lithuania is *not in conformity with Article 5* of the Revised Charter on two grounds:

1. *The minimum requirement of 30 members for the formation of a trade union is excessive and undermines the freedom to organise.* Measures to develop social partnership and to bring the trade union legislation in conformity with the Charter were approved by the tripartite board of Lithuania on 25 January 2005, and the ECSR wishes to be informed of developments.

2. *Unionised employees enjoy a privilege that infringes the right not to belong to a trade union*: in fact, section 21 of the Trade Union Act¹ prohibits employers from dismissing members of trade unions in legally specified cases without the prior agreement of the committee of the union to which they belong. This is considered a form of pressure not in compliance with Article 5 of the Revised Charter.²

Civil servants,³ except for members of a municipal council, enjoy the right of trade union membership; those exercising *functions at statutory establishments* within the sphere of internal affairs may also establish trade unions, but *managers and deputies* of such institutions⁴ are not allowed to participate in the operations of such trade unions.

*Police officers*⁵ can form professional unions and take part in organisational matters relating to their union. They are allowed up to ten hours of paid working time per month for such activities.

Professional military servicemen cannot be members of trade unions.⁶

Right to bargain collectively

Mechanisms for joint consultation at the national, sectoral and enterprise levels are in conformity with the requirements of the Charter. Joint consultation at national level takes place within the Tripartite Council of the Republic of Lithuania,⁷ by which trade unions and employers' organisations may be authorised also to participate in the drafting of legislation.

As for Section 59.3 of the Labour Code, specific features of collective agreements concerning national defence, Internal Service and Police are to be established by law. The ECSR asked whether such specific legislation has been enacted and what are the rules governing the procedures for their collective negotiations.

Since *professional military servicemen* cannot be members of trade unions, therefore they have no right to collective bargaining.⁸

Draft regulations on collective bargaining and its implementation, as well as on tripartite cooperation were being drafted by the social partners⁹ and were to be submitted to the

¹ No. I-2018 of 21 November 1991.

² Under Article 134 of the Labour Code, employees elected to employee representative bodies may not be dismissed during their term of office without these bodies' approval. The Committee considers that this is compatible with the Revised Charter.

³ Law of the Republic of Lithuania on Public Services, Article 16, par. 1.7.

⁴ Statute of the Republic of Lithuania on Internal Services, Art. 43.

⁵ Police Act and Internal Service Act.

⁶ They 'may participate in any other non-political activity, provided that such participation does not interfere with military duties'; Law of the Republic of Lithuania on the Organisation of the National Defence System and Military Service, Article 36, para. 8 and 3.

⁷ This was set up in May 1995 by agreement between the government and the social partners.

⁸ Article 36, paragraph 8 of the Law on the Organisation of the National Defence System and Military Service (No VIII-723 of 5 May 1998).

⁹ Within the framework of the Plan of Measures for the Development of Social Partnership.

Tripartite Council for approval; the ECSR asked to be informed about any development in this respect and, pending receipt of the information requested, deferred its conclusion on this point.

In December 2006, the LPSK (Lithuanian Trade Union Confederation) organised a conference to discuss the development of social dialogue in the public sector, inviting the respective ministers. According to the Minister of the Interior the difficulty lies in the identification of the social partners and a number of statutory regulations are required to solve this problem.

As for the *mechanisms of conciliation and arbitration*,¹⁰ disputes are referred to the Conciliation Commission (mandatory phase) or, if it fails to reach a decision, to other arbitration bodies¹¹ whose final decisions are binding. The situation not being entirely clear, the ECSR asked for confirmation that decisions of the Conciliation Commission are binding and that in particular recourse to arbitration may be made only with the joint consent of both parties to the dispute; pending receipt of the information requested, it deferred its conclusions.

Right to collective action

The ECSR finds that the situation is *not in conformity* on the following grounds:

- *Trade unions may initiate collective action only if a two-thirds majority of the undertaking's employees¹² vote in favour of a strike, which is an undue restriction on trade unions' right to collective action, or, in the case of a 'subdivision of an undertaking', two-thirds of that subdivision's employees and half of the employees of the undertaking (Article 77.1 of the Labour Code).*

The ECSR also asks that the next report specify the meaning and scope of the term 'subdivision of an undertaking' and what the applicable rules are in this respect

Strikes may also be called at branch, territorial and national level, and the ECSR asks under what conditions.¹³

At the September 2006 meeting, the Governmental Committee noted that discussions on amendment of the legislation are still ongoing. The social partners asked that discussions be postponed until they are able to submit their own draft proposal.

¹⁰ Sections 68 et seq. of the Labour Code.

¹¹ Arbitration bodies competent in relation to labour arbitration procedures and the third-party courts dealing with arbitrage procedures, which are alternative bodies; the Conciliation Commission or the parties to the collective dispute decide which body to refer to for the resolution of the dispute.

¹² Or, in the case of a 'subdivision of an undertaking', two-thirds of that subdivision's employees and half of the employees of the undertaking (Article 77, paragraph 1 of the Labour Code). The ECSR also asks that the next report specify the meaning and scope of the term 'subdivision of an undertaking' and what the applicable rules are in this respect.

¹³ The Governmental Committee (Report concerning Conclusions 2004, para 103–107) discussed the Lithuanian situation. The Lithuanian delegate explained that Article 77.1 of the Labour Code, also criticised by the ILO, had been introduced after a major strike of bus and tram drivers, after long negotiations and consultations with the Tripartite Council. The matter might be reviewed but as yet there had been no high-level discussions on the subject. The ETUC representative found that this important situation in principle called for a warning. Since this was a first-time negative conclusion, he asked that the situation should be brought into conformity within a short time-frame.

- *Strikes are forbidden in public electricity, district heating and gas supply enterprises (Article 78, paragraph 1 of the Labour Code). Simply prohibiting all their employees from striking is not proportionate to the requirements of these sectors.* The most that could be considered consistent with Article 6, paragraph 4 would be to establish a minimum service in these sectors.

The ECSR noted that section 80.1 of the Labour Code already establishes an obligation to provide minimum services to meet the immediate needs of the community in the event of strikes in undertakings and sectors covered by Section 77.4 of the same Labour Code, including, *inter alia*, strikes in energy enterprises. On the other hand, Section 78.1 of the Labour Code, concerns electricity, district heating and gas supply enterprises where strikes are prohibited.

Therefore, the ECSR asked to specify the relationship between Section 77.4 and Section 78.1 insofar as energy enterprises are concerned, and in particular what the difference is between energy enterprises within the meaning of Section 77 para. 4 – for which minimum services shall be determined – and electricity, district heating and gas supply enterprises where strikes are prohibited pursuant to Section 78.1. *From the comments of the Lithuanian delegate at the Governmental Committee in 2004, the absolute strike ban in Section 78 para. 1 of the Labour Code applies only to public/centralised enterprises, whereas employees of privatised firms in these sectors have the right to strike.*¹⁴ But the following Lithuanian national report also did not provide any specifications and the ECSR thus reiterated its finding of non-conformity with Article 6, paragraph 4 of the Revised Charter in this respect.¹⁵

As stated above, Article 80.1 of the Labour Code establishes an obligation to provide *minimum services* in case of strikes in undertakings and sectors covered by Article 77.4.¹⁶ Such minimum services are determined either by the government (after consultation with the Tripartite Council) or by the relevant municipal executive (after consultations with the parties to the collective dispute). The criteria applied to determine whether a minimum service should be introduced (and on which the ECSR needs to be further informed) are determined with regard to the conclusion of a specific authority or branch ministry to be submitted for approval to the Tripartite Board and then to the Government.

As regards health care, the report referred to a list of minimum services.¹⁷ The ECSR asks for a copy of this list and whether such lists also exist with respect to the other services enumerated in Section 77.4 of the Labour Code.

Other civil servants who do not have the right to strike¹⁸ are *heads of department and senior civil servants, plus employees in the internal affairs, national defence and state security sectors*. In respect to the latter, the ECSR stated that simply prohibiting all such

¹⁴ Report concerning Conclusions 2004.

¹⁵ Report concerning Conclusions 2006.

¹⁶ The following sectors are concerned: railways and public transport, civil aviation, communications and energy, health care and pharmaceutical institutions, food, water, sewage and waste disposal enterprises, oil refineries, enterprises with a continuous production cycle and other enterprises where work stoppages would result in grave and hazardous consequences for the community or human life and health.

¹⁷ Approved in Resolution No. 1025 of 16 September 2005.

¹⁸ Under Section 21 of the Public Service Act, No. VIII-1316 of 8 July 1999.

employees from striking, without any distinction as to function or the nature of their duties, cannot be considered proportionate, and therefore necessary in a democratic society.

At the request of the ECSR, the last national report specified that, by law,¹⁹ strikes are prohibited only as regards *officers, statutory servicemen and managers of subdivisions at institutions (agencies), and high ranking officials*. *Public security officers* are also prohibited from participating in strikes.²⁰ Nevertheless, the ECSR wished to receive confirmation of the situation and clarification on which officials are covered by the category of public security officers within the meaning of the Statute of the Public Security Department; in the meanwhile, it reserves its position.

On the other hand, for the ECSR, the strike ban in *emergency medical services* is clearly within the scope of Article G of the RESC.

Strikes are prohibited in *natural disaster areas* or areas where *martial law* or a *state of emergency* has been declared, in accordance with statutory procedures, until the consequences of the natural disaster have been removed or martial law or the state of emergency has been lifted. The ECSR points out that if such situations occur, the Lithuanian government should inform the Secretary General in accordance with the procedure laid down by Article F of the Revised Charter.

In relation to *procedural requirements*, employers must be given written notice of strikes at least seven days before the start date. In the case of specified undertakings and sectors,²¹ Article 77.4 extends the notice period to 14 days. The strike decision must specify demands made, start date and body leading the action (trade union or strike committee set up by the union).

II) ILO

No existing case law.

III) Action to be taken

The situation in Lithuania is not in conformity with Article 5 of the Revised Charter on two grounds, which are not specific to the public sector:

1. The minimum requirement of 30 members to form a trade union is excessive and undermines the freedom to organise. Measures to develop social partnership and to bring trade union legislation in conformity with the Charter were approved by the tripartite board of Lithuania on 25 January 2005, and the ECSR wishes to be informed of developments.
2. Unionised employees enjoy a privilege that infringes the right not to belong to a trade union: in fact, section 21 of the Trade Union Act prohibits employers from dismissing members of trade unions in legally specified cases without the prior agreement of the committee of the union to which they belong. This is considered a form of pressure not in compliance with Article 5 of the Revised Charter.

¹⁹ Law No IX-1538 of 29 April 2003 concerning the Approval of the Statute of the Internal Service.

²⁰ Article 1, paragraph 6 of Law No IX-1042 of 5 July 2002 on the Approval of the Statute of the Public Security Department.

²¹ See note 224.

What is the situation in the public sector with regard to these problems? Should you take this into consideration in your trade union work?

Professional military servicemen cannot be members of trade unions.

As for Section 59.3 of the Labour Code, specific features of collective agreements concerning national defence, Internal Service and Police are to be established by law.

The ECSR asked whether such specific legislation has been enacted and what the rules are governing the procedures for their collective negotiations.

Trade unions may only initiate collective action if a two-thirds majority of the undertaking's employees vote in favour of a strike, which is an undue restriction on trade unions' right to collective action. Strikes may also be called at branch, territorial and national level, and the Committee asks under what conditions.

Does this also apply to the public sector?

Strikes are totally forbidden in public electricity, district heating and gas supply enterprises (Article 78, paragraph 1 of the Labour Code) Simply prohibiting all their employees from striking is not proportionate to the requirements of these sectors. The most that could be considered consistent with Article 6, paragraph 4 would be to establish a minimum service in these sectors.

Could regulations be envisaged for the minimum services in those sectors?

From the comments of the Lithuanian delegate within the Governmental Committee, the absolute strike ban in Section 78 para. 1 of the Labour Code only applies to public/centralised enterprises, whereas employees of privatised firms in these sectors have the right to strike.

Is this correct? If not, the ECSR should be informed on this.

Health care is subject to a list of minimum services. The ECSR asks for a copy of this list and whether such lists also exist with respect to the other services enumerated in Section 77.4 of the Labour Code.

Information should also be provided on this.

Other civil servants who do not have the right to strike are heads of department and senior civil servants, plus employees in the internal affairs, national defence and state security sectors. In respect of the latter, the ECSR stated that simply prohibiting all such employees from striking, without any distinction as to function or the nature of their duties, cannot be considered proportionate and therefore necessary in a democratic society. At the request of the ECSR, the last national report specified that, by law, strikes are prohibited only in relation to officers, statutory servicemen, managers of subdivisions at institutions (agencies), and high ranking officials. Public security officers are also prohibited from participating in strikes.

The ECSR wishes to receive confirmation of the situation and clarification on which officials are covered by the category of public security officers within the meaning of the Statute of the Public Security Department.

Luxembourg

- Civil servants and public employees have the freedom to organise
- The right to form and join trade unions is granted to members of the armed and police forces
- Trade union delegates enjoy special employment protection related to their activity
- Joint consultation procedures exist at national level
- Conciliation and arbitration procedures are in place
- The right to strike is in principle guaranteed in the public sector

Problems:

- Foreign nationals are not fully eligible to sit on works councils
- Prohibited from striking are: diplomats, judiciary, senior civil servants and managers, the armed forces, the police, medical and security personnel when providing essential services

Action to be taken:

- It is a matter of urgency that the rules on the eligibility of foreign nationals to sit on works councils be changed

In Luxembourg, state servants (that is, those working in the central administration, with the exception of public institutions) are divided into three categories: civil servants, employees and workers.

Article 1 of the amended law of 16 April 1979 establishing the general status of state civil servants gives a definition of the term 'civil servant'. Another definition is found in Article 1 of the amended law of 22 June 1963 establishing the pay regime for state civil servants. These two definitions describe a civil servant as follows:

- A state civil servant is a person to whom this title is expressly attributed by law, a person who is employed at management level in the state administration, and a person who has been appointed to a post established on the basis of legal provisions.
- A civil servant is in a unilateral and statutory relationship with his or her employer.

The classification of posts laid down in the amended law of 22 June 1963 contains the following seven categories: (i) general administration, (ii) magistrature, (iii) forces of law and order, (iv) education, (v) churches, (vi) special posts and (vii) customs.

A new law of 19 May 2003, which entered into force on 1 July 2003, reformed the status of civil servants. Today it is the basic reference text.

I) Council of Europe

The ECSR has at its disposal no updated information and no detailed reports on the public sector.

It should indeed be noted that Luxembourg is amongst the EU member states that very often report only after a considerable delay, thereby clearly undermining supervisory mechanisms. And this despite various warnings and recommendations addressed to it for failure to report or belated reporting.

Right to organise

Freedom to organise, the positive and negative right of association, is granted at different levels of domestic law,¹ also acknowledging important international legislation² and covering also state *civil servants* and *public employees*.³

Members of the armed forces are constitutionally granted freedom of association and freedom to organise, therefore they are free to set up and join trade unions.

Members of the police force (who are state civil servants) also enjoy freedom of association, the right to assembly and the right to negotiate their conditions of service and remuneration without any restrictions.

With regard to *trade union activities*, during their term of office, trade union delegates⁴ enjoy special employment protection related.⁵ Delegates are entitled freely to display trade union notices on reserved boards, to disseminate trade union publications and leaflets to the workers and to collect trade union membership fees on the premises, provided that they do not adversely affect the functioning of the establishment.

The criteria⁶ to be fulfilled in order that a trade union may be deemed *representative* at the national level are both qualitative and quantitative: it must both have a significant number of members and be active and independent. One trade union has so far been recognised as representative in the public sector, namely the Confédération Générale de la Fonction Publique (OGB-L).

According to Conclusions XVIII-1, Luxembourg is *not in conformity with Article 5 of the Charter* because national law does not permit trade unions to freely choose their candidates in joint works council elections, regardless of nationality: foreign nationals are therefore not fully eligible to sit on works councils.⁷ This is not permissible. Luxembourg has adopted the principles of the Treaty of Rome that guarantees free access to employment for all Community nationals, without discrimination based on nationality, but as in many other countries there have been instances in which the European Court of Justice has

¹ Articles 11 and 26 of the Constitution; Freedom of Association Act of 11 May 1936.

² In 1958 Luxembourg also ratified ILO Conventions Nos. 87 (Freedom of Association and Protection of the Right to Organise) and 98 (Right to Organise and Collective Bargaining).

³ Section 36 of the Act of 16 April 1979 defining the general status of government servants.

⁴ That is, delegates who are elected from a list put forward by a trade union organisation which is nationally representative.

⁵ Contracts of Employment Act of 24 May 1989.

⁶ Section 2 of Law of 12 June 1965 on Collective Labour Agreements.

⁷ The constitutional requirement of Luxembourgian nationality as a general qualification for the status of civil servant was the subject of a European Court of Justice ruling, and in 1997 the government announced its intention to introduce legislation bringing this situation into line with the principle of freedom of movement for workers.

ruled against Luxembourg's interpretation of the public-service exception allowed under Article 48, paragraph 4 of the Treaty.

Right to bargain collectively

Joint consultation procedures in the civil service, public sector and transport sector exist at national level within the Economic and Social Council. The professional organisation for civil servants and public employees can make proposals to the government. Its opinion has to be sought on all legislative acts, all grand ducal regulations and all grand ducal and ministerial decrees relating to its particular area of activity. Staff delegations⁸ may be set up by ministerial order within state departments and services, as well as in state schools. Workers' representatives on the boards of directors of public limited companies are provided for⁹ in order to uphold the employees' interests by giving their opinions and making proposals relating to working conditions, workplace safety and social issues.

Even if neither the 1979 Act on the general status of state civil servants nor the 1972 Act governing the status of state employees referred explicitly to a collective bargaining procedure, Luxembourg does arrange for state civil servants, through their representatives, to participate in the drafting of regulations which are to apply to them, especially in the field of employment conditions. *Promotion of machinery for voluntary negotiations* takes place in practice every two years between the government and the most representative trade unions in the public sector. Those not considered representative are consulted on the various matters which are the subject of wage negotiations. When wage negotiations culminate in a wage agreement, the latter is confirmed by law.

Conciliation and arbitration procedures for the settlement of disputes are regulated by an act¹⁰ requiring disputes to be referred to a conciliation committee (comprising a judge as chair, five representatives of the public authorities and five employee representatives). If conciliation fails, the dispute is referred, at the request of one of the parties and within 48 hours, to the President of the Council of State, who acts as mediator. If the conciliation procedure and mediation (if any) fails, strike action has to be preceded by written notification.

The ECSR, which had concluded that Luxembourg satisfied this provision of the Charter,¹¹ asked for updated information on the rules governing conciliation and arbitration procedures in respect of these categories of employees and has to defer its conclusions.¹²

⁸ Set up and governed under a Grand Ducal regulation, ex Section 36, para. 3 of the Act of 16 April 1979 on the general status of state civil servants.

⁹ This concerns companies with more than 1,000 employees over a reference period of three years or benefiting from state financing of at least 25% or from a state concession concerning their principal activity (Act of 6 May 1974); staff delegates have to be elected by 15 employees on employment contracts (Act of 18 May 1979 reforming staff delegations, as amended by the Acts of 3 April 1980 and 3 November 1983).

¹⁰ The Strikes (State Departments and Public Establishments under Direct State Control) Regulation Act of 16 April 1979.

¹¹ Addendum to Conclusions XIII-3.

¹² Conclusions XVIII-1.

Right to take collective action

Regarding the right to strike, in principle all those in the service of the state and of public institutions enjoy the right to collective action: civil servants, trainees, employees and auxiliary staff.

But a certain number of public servants are excluded from the right to strike because they fulfil particular functions, as follows:

- government advisors whose duties are established on the basis of Article 76 of the Constitution;
- special envoys, plenipotentiary ministers, legation councillors as well as diplomats if they act abroad as head of mission in a permanent or temporary capacity;
- magistrates;
- directors of administration and their deputies;
- staff of the judicial administration and administration of the prison system;
- members of the forces of law and order;
- security guards and staff responsible for security in the public service.

Luxembourg has not ratified Article 6, paragraph 4 of the Charter concerning the right to collective action. The Constitution provides for the right to strike, which was extended to the public sector under the Law of 16 April 1979, but still excludes the abovementioned groups.

II) ILO

No existing case law.

III) Action to be taken

National law does not permit trade unions to freely choose their candidates in joint works council elections, regardless of their nationality: foreign nationals are therefore not fully eligible to sit on works councils.

Is this also true of the public sector?

The ECSR requested updated information on the rules governing conciliation and arbitration procedures.

Luxembourg has not ratified Article 6, paragraph 4 of the Charter concerning the right to collective action. The Constitution provides for the right to strike, which was extended to the public sector under the Law of 16 April 1979, but still excludes certain groups (see above).

What is the state of play on this point? Have any changes occurred?

Malta

- Police may form associations and bargain collectively

Problems:

- Members of the police force and the army are excluded from freedom of association
- Do the tripartite consultation bodies cover public officers?
- Unclear whether conciliation and arbitration procedures exist for all workers/employees in the public sector
- No general negotiating body for public officers
- Restriction of the right to strike: doctors, surgeons, armed forces, police, fire-fighters, prison officers, air traffic controllers

Action to be taken:

- Trade unions should become more involved in collective bargaining in the public sector
- Changes should be envisaged in the too general restrictions on the right to strike

I) Council of Europe

Right to organise

The issues at stake in the Council of Europe under Article 5 of the Charter are all related to members of the *police force*. Under the *Police Act* as amended in 2002,¹ police officers may form associations² to promote the welfare and professional competence of their members, and are permitted to address such subjects as working hours, leave, pay and allowances, pensions and other conditions of service and disciplinary rules in general, and to defend individuals in disciplinary proceedings. Membership is voluntary, but restricted to the police. Such associations may affiliate with similar international police organisations or collaborate with a Maltese association of retired police officers (Articles 25 and 26). Professional associations must be registered with the Commissioner of Police, who may not refuse the registration if the association's statute is not in conflict with the Act.³ Reflecting the size of the Malta Police Force, to date only one association has been registered, and there have been no other requests.⁴

¹ The 2002 Act brought into conformity a situation that had long been found not to comply with the Charter.

² Officers of the rank of inspector and above may form one professional association, while the police officers of other ranks may form another (Article 24.1).

³ If the association represents not less than 15% of the whole force or 15% plus one more member of any of the categories listed in Article 24(1) (Article 27).

⁴ Until another association is formed the Malta Police Association will continue to operate under the statute set forth in the second schedule to the Act; this statute repeats the goals and other features outlined above and establishes rules regarding the status of members, subscriptions and organisation. Under Article 29 of the Act, the replacement statute will be established once it has been approved by the Commissioner and then by a majority of votes of all the association members present and voting.

Right to bargain collectively

The 1976 Industrial Relations Act provided for the establishment of a *tripartite consultation body* as an industrial tribunal and a *Joint Negotiating Council* for matters concerning the conditions of service of public servants. *Non-conformity with the Charter is due to the lack of information provided by the government about the Council's modus operandi and the public officers covered by it.*

Collective bargaining is restricted in the police force, the army and a few other categories of employee.

With regard to *conciliation and arbitration procedures*, setting up the Joint Negotiating Council under the new Employment and Industrial Relations Act (EIRA) *did not bring the situation into conformity with the Charter*. The Council⁵ seems to have the authority to arbitrate for certain categories of public sector *workers* (providing the services listed in Article 64.6, laying down essential services) in trade disputes concerning working conditions other than matters falling within the responsibility of the Public Service Commission, which instead covers public services *employees*.⁶

In Supervision Cycle XVIII-1, the ECSR had to defer its conclusions since it is not clear what precise category of employees is covered by the term 'public service employees' and what conciliation and arbitration procedures are available to these employees. The ECSR asked for confirmation that the conciliation and arbitration procedure under the EIRA applies to all employees in the public sector who do not fall within the responsibility of the Public Service Commission⁷ or the Joint Negotiating Council.

There are no general *negotiating bodies* for public officers. Employees in the public sector have access to collective bargaining through their unions. Since the government envisaged creating a legal framework for negotiating salaries and working conditions where such are fixed by governmental authorities, trade unions have been involved in discussions regarding reform of the civil service and were expected (at the time of Conclusions XII-2) to sign the subsequent agreement concerning terms and conditions of employment.

With specific regard to *police officers' right to bargain collectively* the procedures provided by the new Police Act (Articles 21 to 23) for the establishment of a police negotiating board concerned with such matters as working hours, pensions, leave, pay and allowances are now in conformity with the Charter, though the ECSR still has to examine how the new legislation is applied in this regard.

⁵ The Council comprises four members representing the government and four representing the trade union with the largest number of members providing the essential service involved in the dispute (Article 72.2). Decisions are taken by unanimous vote. Where agreement cannot be reached, the Chair refers the matter to the Industrial Tribunal, which must reach a final decision within two months of referral, unless the Chair of the Industrial Tribunal considers that a longer period is necessary.

⁶ 13th Maltese national report.

⁷ The Public Service Commission is an independent body established by section 109 of the Constitution of Malta. Its primary role is to give advice and to make recommendations to the Prime Minister in the making of appointments to public offices, in the removal of persons from such offices and in the exercise of disciplinary control over public officers. It has a duty to ensure that recruitment into and all promotions or appointments within the public service are made in an equitable and impartial manner; are free from patronage and discrimination and are based on the principle of merit. It is also the duty of the Commission to ensure that disciplinary action against public officers is fair, prompt and effective. (<http://www.psc.gov.mt/start.htm>)

Right to take collective action

The ECSR considers that restrictions on the right to strike of some public servants, such as doctors and surgeons, are in line with its case law,⁸ as is their abolition with regard to so-called 'disciplined forces' (armed forces, the police, fire-fighters, prison officers).

It should be noted that in Malta air traffic controllers have military status and as such may not belong to any trade union or take strike action. The ECSR highlighted that in many countries air traffic controllers would be allowed to unionise and to take collective action.

II) ILO

CFA Report No. 244, case no. 1349

*The International Federation of Free Teachers' Unions and the World Confederation of Organisations of the Teaching Profession vs the Government of Malta*⁹

The first issue raised by this case is the absence of machinery for collective bargaining for teachers with the status of civil servants.

The CFA noted that this is contrary to Article 4 of Convention No. 98 (promotion and development of collective bargaining procedures).

Secondly, the complainants alleged that the teachers who had participated in the strike action had been penalised.

The CFA drew the government's attention to the principle that protection against acts of anti-union discrimination should cover not only hiring and dismissal but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker (Article 1 of Convention No. 98).

The CFA therefore concluded that Malta was not in compliance with the provisions of Convention No. 98 on the right to organise and the right to collective bargaining.

III) Action to be taken

In Malta there is a *tripartite consultation body* in the form of an industrial tribunal and a Joint Negotiating Council for matters concerning the conditions of service of public servants. Information has been requested by the ESCR concerning the latter's *modus operandi* and the public officers covered by it.

It is not clear what category of employees is covered by the term 'public service employees' and what the conciliation and arbitration procedures are available for these employees.

Do the conciliation and arbitration procedures under the EIRA apply to all employees in the public sector who do not fall within the responsibility of the Public Service Commission or the Joint Negotiating Council?

⁸ Conclusions XIII-2.

⁹ Complaint submitted on 2 and 7 October 1985 respectively.

How is the new Police Act (Articles 21 to 23) for the establishment of a police negotiating board concerned with such matters as working hours, pensions, leave, pay and allowances working in practice?

Maltese air traffic controllers have military status and as such may not belong to any trade union or take strike action. A strike by air traffic controllers in March 1995 was therefore illegal. The Committee notes that in many countries air traffic controllers would be allowed to unionise and to take collective action.

Can changes to the legislation be envisaged?

The Netherlands

- Joint consultation mechanisms are in place
- Works council regulation was extended to the public sector, except for defence and partly also education
- Collective bargaining takes place on individual rights and remuneration schemes for civil servants
- Conciliation and arbitration procedures are in place
- Through case law, the right to strike was also given to civil servants

Problems:

- Judges may determine whether recourse to a strike is premature

The public service in the Netherlands is an employment system. Although public servants enjoy job security, they have no guaranteed career path.

The Netherlands favours a functional approach to the definition of public servants: public servants are persons working in the public sector. But there are a number of different definitions:

A first definition is relatively narrow, covering only public servants working directly for the ministries, and provincial and local authorities. The term can, however, be extended to include the whole of the public service, including judges, military personnel and teachers. The most extended definition would include the staff of all institutions that receive public funding and operate in the public service. Depending on the definition used, the coverage of the term 'public servant' ranges between about 3% and 26% of the Dutch working population.

Since reform in 1989, the substance of the statute governing civil servants has been similar to that governing employees under private law. But civil servant status remains subject to public law (unilateral appointment) and the competent court in the event of disputes is the administrative court. There is little difference, therefore, from the private sector, and recruitment is carried out not by competitive examination but by traditional recruitment interviews, with the exception of employees in the Ministry of Foreign Affairs. The homogeneity of the public and private sector was further increased by reform in 1994.

I) Council of Europe

Right to organise

Under Dutch law, the *formation and functioning of collective industrial organisations* is governed by the general constitutional rules on freedom of association.

In respect of registration and fees, the right of trade unions to choose their members and representatives, to organise their administration and activities and to affiliate with national or international organisations has always been found to be compatible with Article 5 of the Charter.

Trade union access to enterprises and the facilities available for trade union representatives are governed by collective agreements.

From comments submitted by the Dutch Trade Union Confederation (FNV) to the Dutch governmental report, it seems that the government has often excluded provisions in collective agreements on trade union representation and facilities within the undertaking from being declared generally applicable at the request of the parties: such provisions were considered to ‘impinge on the employer’s territory’. Other provisions, such as those protecting the legal status of trade union officials, however, are applicable to all eligible organised employees.

Protection against dismissal on grounds of trade union activities is laid down in the Flexibility and Security Act of 1 January 1999. Provisions protecting the employment rights of trade union members are to be found in collective agreements.

As far as *protection against acts of discrimination other than dismissal* is concerned, Section 611 of the Civil Code lays down a general obligation for the employer to behave fairly. FNV further commented that it has insisted without success on the introduction of explicit legal protection against this kind of act.

Employees who have been involved in codetermination through the works councils are protected against discrimination with regard to their position with the enterprise under Section 21 of the Works Councils Act.

With regard to the *trade union rights of military personnel and police officers*, military personnel can establish trade unions and freely join any trade union or central civilian trade union organisation. They have access to internal consultation bodies specific to the armed forces.

Right to bargain collectively

In respect of *joint consultation*, at national level general policy discussions take place between the government and the social partners twice a year. Further consultation takes place throughout the year within specific policy areas. The Minister of Social Affairs and Employment may declare provisions of industry-level collective agreements generally applicable (at the request of one or more of the parties) on condition that the agreement already applies to the ‘significant majority’ of workers in the industry concerned.

The Works Councils Act¹ (WC Act) valid for the private sector has been extended to the public sector,² excluding defence and, partly, education.³ Enterprise-level employee consultation is based on works councils which have a range of information, consultation and consent rights. The Dutch trade union FNV criticised the fact that the WC Act does not grant trade unions the right to nominate persons to the consultative body. Such a body must be set up by any enterprise with at least 10 employees (and up to 50 employees) at

¹ Adopted in 1971 and several times amended.

² Formerly, joint consultation was based on a variety of regulations.

³ For primary and secondary education institutions, codetermination procedures are laid down in the special Education Codetermination Act 1992. In higher education, in 1996 the Works Councils Act was declared applicable to the open universities, the public teaching hospitals, the Royal Dutch Academy of Sciences, the Royal Dutch Library and the Organisation for Applied Scientific Research, and in 1997 to the ordinary universities.

the request of the majority of the employees; the Act says nothing about its term of office and the filling of vacancies. The rules governing the consultative body have not changed, despite the demands of the FNV; nevertheless, the ECSR considers that this is not decisive for the assessment of conformity with Article 6, paragraph 1.

For years the questions on *negotiations* in the civil service remained unanswered by the Dutch national reports. Since 1 April 1993, negotiations on terms of employment in the civil service have been decentralised for eight sectors.⁴

In other branches, terms of employment are dealt with at national level by the Minister of Home Affairs.

Conditions of employment and the regulation of social dialogue for civil servants and contract staff are based on legislation, as well as other regulations laid down by central and local government. The form of social dialogue depends on the subject: where the individual rights of civil servants and remuneration schemes are concerned, bargaining takes place and an agreement must be reached.

An initial evaluation of the 'sectoral model' in 1996 reported that the social partners appeared satisfied with its operation. Discussions on reforming the system of social dialogue in the public sector, which should culminate in the introduction of a labour relations system similar to that in the private sector, are apparently still under way.

The situation in respect of *conciliation and arbitration procedures* has always been considered to be satisfactory. Arrangements for independent advice or voluntary arbitration are provided in all sectors of the civil service.⁵

Right to collective action

With specific regard to civil servants, the Kingdom of the Netherlands considers itself bound by Article 6 in general, but it expressly excludes civil servants from the application of Article 6, paragraph 4.⁶ The report submitted by the Dutch government in the 12th Supervision Cycle indicated that this reservation would be lifted and that in practice the courts granted the right to strike also to civil servants, within the limits stipulated by Article 6, paragraph 4 and Article 31 of the Charter. The ECSR⁷ noted afterwards with regret that there have been no developments in this connection. In view of the fundamental importance of this provision and of the fact that the large majority of the Contracting

⁴ That is, the central government, defence, the judiciary, education and science, the police, municipalities, the provinces and the water control corporations.

⁵ In general, in potential cases of conflict between parties within the framework of negotiations on the conclusion of a collective agreement, it is possible to request that the Foundation of Labour contact one or two 'prud'hommes' (industrial tribunals). The request has to be made by both parties with preference indicating which person(s) they propose to contact from the list of experts drawn up by the Foundation of Labour.

⁶ Declaration contained in a letter from the Ministry of Foreign Affairs of the Netherlands, dated 31 March 1980, handed to the Secretary General at the time of deposit of the instrument of ratification, on 22 April 1980 (<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=035&CM=1&DF=10/31/2006&CL=ENG&VL=1>)

⁷ With reference to the FNV's observations on this point, the ECSR made it clear that it was not within its competence to suggest that a government withdraw a reservation formulated at the time of ratifying the Charter.

Parties (see section 6.1) grant the right to strike also to civil servants, lifting the reservation would represent significant progress.

The Netherlands is one of the few countries in which military personnel and police officers have the right to stop work.

With regard to essential services, no specific legislation recognises the right of workers to take collective action in cases of conflict of interest. But this right is recognised in practice, and the domestic courts have set down certain principles aimed at regulating it. In particular, the Supreme Court judgment of 30 May 1986 ruled that, by virtue of Article 93 of the Constitution, *Article 6, paragraph 4 and Article 31 of the European Social Charter are directly applicable in domestic law*. This decision bestowed the force of law on these two provisions and afforded workers and employers the right to take legal action in the national courts to have them applied. In fact, the power of the courts to apply and combine between them the principles of Article 31 (determining when and how the right to strike can be reasonably restricted) and those of the Civil Code has not always been exercised without debate and in line with ECSR case law. There are in fact no statutory safeguards under Dutch law regulating the limits of possible court intervention in the right to strike.⁸

In fact, the Dutch situation is considered *not in conformity with the Charter* on the ground that a Dutch judge may determine whether recourse to a strike is premature; for the ECSR this constitutes an infringement of the very substance of the right to strike as it allows the judge to exercise the trade unions' prerogative of deciding whether and when a strike is necessary.⁹

As for the reasonable nature of Dutch court interventions, the ECSR intends to continue to monitor decisions restricting the right to strike on this basis. According to the report, during the last reference period the courts did not hand down any rulings in relation to strike action coming within the scope of Article 6, paragraph 4. The ECSR asked to be informed on any development in this respect. The Governmental Committee discussed the case again in September 2006. The Dutch delegate underlined that ECSR case law is carefully examined and taken into account. The Supreme Court indeed took the ECSR criticism into account and this is proven by the fact that, since 2000, no case like that has been verified. Since the situation has changed in practice, this matter is no longer considered a priority.

⁸ In the previous supervision cycles, this conclusion of non-conformity was referred to the courts by the Minister of Justice in order to inform the judiciary once again of the ECSR's objections to court rulings on the exercise of the right to collective action. However the situation has not changed in the meantime.

⁹ In a Supreme Court decision of 28 January 2000, the FNV and CNV recognised an unofficial strike following discussions with an employer about his possible withdrawal from distribution activities and the employees' concerns about their continued employment. The lower court had forbidden the strike on the grounds that it was premature, in view of the employer's obligation to consult the trade unions and works councils once it had been decided not to maintain the *status quo*. The decision was confirmed on appeal by the Supreme Court, which in deciding whether the strike was premature particularly took into account the employer's announced intention, in response to the employees' reactions, to reconsider what steps should be taken. In its observations, the FNV criticised this decision: the lower courts did not observe their duty of restraint in assessing whether the use of the strike weapon was a last resort, and the Supreme Court's reasoning amounted to direct interference in trade union strategy. The courts should in fact confine themselves to deciding whether the trade union has sought to settle the dispute through collective bargaining and whether it can reasonably be concluded that the employer has refused to respond accordingly. The ECSR considered that the judicial practices concerned restricted the right to strike by their very nature, and that they went beyond the restrictions admissible under Article 31 of the Charter.

As for Article 1401 of the Civil Code (now Article 162, civil responsibility of a person acting unlawfully), a *strike* is considered to be *illegal* by the Dutch courts *if it undermines the rights of third parties or the general public to such an extent that restrictions on the right to strike become necessary in the interests of society*. In making their decision, the courts seem to resort to a proportionality criterion by balancing the interests in the exercise of the right to strike against those which are infringed. This proportionality criterion does not in itself undermine the right to strike as it is essential for determining whether a restriction is necessary in a democratic society, in accordance with Article 31. Nevertheless, the FNV has often repeated the criticism that in practice the courts are too inclined to forbid or limit strikes in the interests of third parties or the community as a whole, without considering whether such restrictions are necessary in a democratic society.¹⁰

II) ILO

No existing case law.

III) Action to be taken

With specific regard to civil servants, the Kingdom of the Netherlands considers itself bound by Article 6 in general, but it expressly excludes civil servants from the application of Article 6, paragraph 4. The report submitted by the Dutch government in the 12th Supervision Cycle indicated that this reservation would be lifted and that in practice the courts granted the right to strike also to civil servants, within the limits stipulated by Article 6, paragraph 4 and Article 31 of the Charter. The ECSR noted afterwards with regret that there have been no developments in this connection. In view of the fundamental importance of this provision and of the fact that the large majority of the Contracting Parties (see section 6.1) grant the right to strike also to civil servants, lifting the reservation would represent significant progress, but the situation remains unchanged.

What is the current state of play?

There are in fact no statutory safeguards under Dutch law regulating the limits of possible court intervention in the right to strike.

A Dutch judge may determine whether recourse to a strike is premature. This constitutes an infringement of the very substance of the right to strike as it allows the judge to exercise the trade unions' prerogative of deciding whether and when a strike is necessary.

Can legal changes be envisaged?

¹⁰ The Supreme Court judgement of 22 November 1992, concerning a conflict between public health sector trade unions and the associations defending patients' and consumers' interests, was based on Article 1401 on *limiting a collective action in time*, and considered that damages caused to third parties could render the strike unlawful. Moreover, on the basis of Article 1401 of the Civil Code, first instance courts had limited the means or duration of collective action on the grounds of financial losses sustained by an employer. With regard to the Supreme Court case 1995/152 of 11 November 1994, the FNV had commented to the Dutch national report that *'the Supreme Court was too willing to accept under Article 31 of the Social Charter that third parties and general public interests may be successfully invoked by the employer-plaintiff in order to obtain a prohibition order against strike action'*.

Poland

- Machinery for voluntary negotiations is in place
- Joint consultation is foreseen
- Mediation and arbitration for all public servants is in place

Problems:

- The following categories are prohibited from forming or joining trade unions: civil servants employed on the basis of appointment; officials of the Internal Security Agency; president of the supreme chamber of control and his advisers, as well as vice presidents and directors general; the organisational units of the Supreme Chamber of Control; members of the National Council of Radio and Television; judges; the commissioner of citizens' rights; the president of the national bank; professional soldiers, soldiers on active duty and those serving in the civil defence corps
- Employees in the state administration and self-governments; judges and prosecutors; police officers and prison officers are denied the right to bargain collectively
- Members of the armed forces, the police, the border guard and the prison service can only organise in one trade union; like civil servants, they are denied the right to strike
- According to the ITUC Annual Survey (2006 and 2005), many workers in state-owned enterprises, such as in the health sector, water and forestry, have had their employment contracts terminated and replaced by individual contracts, as a result of which they cannot form or join trade unions

Action to be taken:

- The regulations excluding such a large number of workers from the right to form and join trade unions must be changed – trade union pressure is needed
- Civil servants should also enjoy the right to strike, at least within certain limits; changes should be envisaged

I) Council of Europe

Right to organise

The right to form and join trade unions is granted by the Constitution¹ and the Trade Union Act.² Nevertheless, the situation in Poland is still³ *not in conformity* with Article 5 of the Charter on the grounds that:

1. The Act on the Civil Service prevents public officials from performing trade union functions. The Trade Union Act is valid for all government employees, but higher ranking government employees whose activities are connected with policy making or who perform managerial functions or functions of a classified nature, are also covered by the *Act on the*

¹ Article 58 and 59.

² Act of 23 May 1991; Section 2 para. 1 of the Trade Union Act.

³ Conclusions XVIII-1 Volume 2.

*Civil Service*⁴ and therefore are subject to a *prohibition on 'the performance of trade union functions'* by civil servants employed on the basis of appointment.⁵

The ECSR considered that this restriction impairs both the right of appointed civil servants to organise and the right of trade unions of which they are members to freely elect their representatives, and therefore concluded that the situation in Poland was not in conformity with Article 5 of the Charter.⁶ The Governmental Committee⁷ recently discussed the issue: no direct strong action has been taken, but more efforts were strongly urged in order to put the situation in line with the ECSR.

2. *Officials of the Internal Security Agency* (hereafter ISA),⁸ set up under the Act of 24 February 2002, *are denied entirely the right to organise*. This service is *not part of the armed forces* but a separate armed service with its own special legal status, whose role in identifying, preventing and eliminating threats to Poland's territorial integrity and defending the state means that it is indirectly involved in national defence. ISA members are not employees within the meaning of the Labour Code:⁹ they are armed and carry out their duties in uniform; the internal structure is based on principles of hierarchical subordination, discipline, loyalty – incompatible with the granting of trade union rights, such as the right to strike.¹⁰

On the ground of Article 31 of the Charter, although the restrictions are prescribed by law (ISA Act) and the purpose – national security – is lawful, the ECSR concludes that simply removing ISA members' right to organise cannot be deemed necessary in a democratic society. Therefore the situation is not in compliance with Article 5 of the Charter.

The Governmental Committee¹¹ found it fundamental to determine how closely the status of ISA staff resembled that of military personnel. It recognised the crucial role of ISA and other Security Agencies, which is not always deeply understood by the ECSR. Therefore no measures were taken against Poland, other than a request for new information.

Other categories of workers are not entitled to form or join trade unions: the President of the Supreme Chamber of Control and his advisers, as well as vice presidents, directors general, directors and vice directors of organisational units of the Supreme Chamber of Control;¹² members of the National Council of Radio and Television;¹³ judges of common

⁴ They had no right to form or join trade unions until 1998 when the Parliament adopted this new law.

⁵ Section 69 para. 4 of the Act; it was not clear whether in practice appointed civil servants were deprived entirely of the right to organise, above all since the national reports stated that all posts in the civil service can be held on the basis of appointment.

⁶ Since the freedom of appointed civil servants to organise is restricted by the statutory prohibition on their performing trade union functions.

⁷ Working document based on Conclusions XVII-1 of the ECSR, May 2006.

⁸ Which replaced the State Security Office (UOP) in 2002.

⁹ Candidates must be Polish nationals, undertake not to disclose official secrets and be physically and psychologically suited to serving in armed formations requiring a particular discipline.

¹⁰ But a series of rights associated with trade union activities, concerning working conditions and social benefits, are secured by legislation and subject to review by the administrative courts.

¹¹ Meeting of May 2006.

¹² Section 86 para. 2 of the Act of 23 December 1994 on the Supreme Chamber of Control as amended.

¹³ Section 3, no. 2 of the Act of 29 December 1992 on Radio and Television as amended.

courts and special courts, judges of the Constitutional Court;¹⁴ the Commissioner of Citizens' Rights; and the President of the National Bank of Poland. However, *ex Article 31*, for the ECSR the situation in this respect is not contrary to Article 5 of the Charter.

The situation as regards *military personnel* is compatible with Article 5, although the Trade Union Act does not protect the right to organise of career soldiers;¹⁵ soldiers on active duty (conscripts);¹⁶ or members of the youth voluntary labour brigade serving their term of service in the civil defence corps.¹⁷

With respect to *members of the police*,¹⁸ the situation is in conformity with the Charter: they can organise only in one police trade union, which may affiliate with national and international trade unions with similar objectives, and may give opinions only on questions submitted to it by the Minister of the Administration and the Interior – who are not bound; membership is voluntary. Its members may not strike. The police union affiliated to the Trade Union Forum federation in April 2002 and is a member of the European Council of Police Unions.

Similar restrictions, in conformity with Article 5, apply also to *border guards*. *Prison officers are subject to* the same rules as the police, plus that the fact that the trade union cannot pursue any activity aimed at restricting the rights of inmates.

Right to bargain collectively

There are some *open issues* regarding:

- *Employees in the nationalized sector*,¹⁹ once banned from concluding collective agreements, while these can now be concluded also in public enterprises; the Committee asks for confirmation that the employees in the nationalized sector actually enjoy the same collective bargaining rights as in the private sector.
- *Machinery for voluntary negotiations*: the situation is in conformity with the Charter, although, pursuant to the Labour Code,²⁰ civil servants forming part of the civil service corps (workers appointed in the state administration and self-government, and judges and prosecutors) are denied the right to bargain collectively. At the enterprise level collective agreements may be concluded for workers, 'with the exception of those employed in units under the state budget'.

The exclusion of civil service employees working on an employment contract from any kind of collective bargaining was considered to constitute a denial of their right to participate

¹⁴ They may join professional associations and be members of the Association of Polish Lawyers.

¹⁵ Section 70, para. 1 of the Act of 30 June 1970 on the Military Service of Career Soldiers.

¹⁶ For the period of active duty, however, they may continue to participate in the activities of their trade union with the consent of the regimental commander; Section 65 para. 5 of the Act of 21 December 1967 on the Universal Duty to Defend the Republic of Poland.

¹⁷ New draft legislation on military service retains the ban on forming trade unions, but regular soldiers will be authorised to set up representative bodies whose organisation and operating arrangements will be laid down by the Ministry of Defence.

¹⁸ Act of 6 April 1990.

¹⁹ As for the repealed version of article 241 of the Labour Code repealed under the law of 9 November 2000

²⁰ Article 239 §3 par.1; Section 239 para. 3; Section 241-22.

in the determination of their salaries and working conditions not in conformity with the Charter (Conclusions XVI-1, Volume 2).²¹

As things stand, the Committee wishes to receive confirmation that this ban does not include public service employees working under a contract.²²

Joint consultation takes place in state enterprises through the general assemblies of enterprise workers and works councils which address important matters, express opinions, submit recommendations and exert control over the operations of the enterprise.

In *state enterprises subject to restructuring*, social dialogue is provided within tripartite bodies established for a particular sector by a decision of the responsible minister – *inter alia*, in the defence, energy, maritime and railway sectors – and deal with questions regarding employment, social security and the environment and may give an opinion on any draft legislation and restructuring programmes affecting their sector.

Members of the police force and prison service are not entitled to conclude collective agreements but the police trade union has the right to give opinions on draft legislation concerning police officers' salaries and status.

The border guards' trade union negotiates pay, participates in health and safety committees and elects labour inspectors.

Mediation and arbitration are provided for *all* public servants, including civil service employees employed on the basis of a contract;²³ *voluntary arbitration* is also possible by submitting the dispute to a social arbitration committee of a provincial court or of the Supreme Court in case of disputes pertaining to more than one establishment.

Right to take collective action

Poland does not consider itself bound by Article 6, paragraph 4, and therefore does not participate in the reporting and supervision procedure.

Nevertheless, in the Seventh report on certain provisions of the ESC which have not been accepted,²⁴ the ECSR takes note of the information provided in the view of the procedure as for Article 22.

²¹ 'While it is possible to draw up proper collective agreements for civil servants subject to regulations, Article 6§2 nonetheless entails the obligation to arrange for the participation of those concerned, through the intermediary of their representatives' (*Conclusions III*, p. 39, noted in *Conclusions XVI-1 Volume 2*).

²² The last national report underlines some consultation activities: the Minister responsible for the civil service conducts the consultations – mainly related to the development of legislation amending the law regulating the status of the civil service – with the trade unions active in the public administration. In December 2004 a Committee for Dialogue between the social partners was established by the Minister responsible for the civil service, whose activities include information of the social partners concerning the functioning of the civil service, consultation on solutions for problems occurring in the civil service, and consultation on amendments of the legislation applicable to the civil service, as well as its implementation.

²³ *Conclusions XVI-1, Volume 2*; with the exception of those civil servants who are deprived of the right to organise (see conclusions under Article 5 and Article 6, paragraph 2).

²⁴ ECSR, Seventh report on certain provisions of the Charter which have not been accepted, Council of Europe Publishing, Strasbourg, 2000.

According to the information contained in the report, it appears that the delay in Poland's acceptance of Article 6, paragraph 4 is due in particular to the fact that only trade unions have the right to call a strike and only with the aim of concluding collective agreements, and to the fact that *all categories of civil servants are denied the right to strike*.

The Polish report states that the Act of 23 May 1991 on the settlement of collective labour disputes guarantees the right to strike. *This act applies to both the public sector and the private sector.*

Participation in an unlawful strike may lead to dismissal without notice for breach of contract. Polish legislation does not regulate the right of employers to impose a lockout. According to the Labour Code, a lockout is regarded as a work stoppage brought about by the employer and employees have the right to continue receiving their wages during the stoppage. There have been no cases of lockout in practice.

With specific regard to the public sector, restrictions on the right to strike apply when a work stoppage entails a danger to human life, to public health or to state security; there is a prohibition of the right to strike in certain sectors (police, border guards, armed forces, fire-fighters).

II) ILO

No existing case law.

III) Action to be taken

Government employees whose activities are connected with policy making or who perform managerial functions or functions of a classified nature, are also covered by the Act on the Civil Service and therefore are subject to a prohibition on 'the performing of trade union functions' by civil servants employed on the basis of appointment.

The ECSR considered that this restriction impairs both the right of appointed civil servants to organise and the right of the trade unions of which they are members to freely elect their representatives (Conclusions XVI-1, Volume 2), therefore and concluded that the situation in Poland was not in conformity with Article 5 of the Charter.

Officials of the Internal Security Agency are denied the right to organise. This situation is not in compliance with Article 5 of the Charter.

The Governmental Committee found that it would be crucially important to determine how closely the status of staff of ISA resembled that of military personnel.

Clear information should be provided to the ESCR.

The Trade Union Act does not protect the right to organise of career soldiers, soldiers on active duty (conscripts) or members of the youth voluntary labour brigade serving their term of service in the civil defence corps.

Do employees in the nationalised sector enjoy the same collective bargaining rights as those in the private sector?

Civil servants forming part of the civil service corps (workers in the state administration and self-government, and judges and prosecutors) are denied the right to bargain collectively. At the enterprise level collective agreements may be concluded for workers 'with the exception of those employed in units under the state budget'.

The exclusion of civil service employees working on an employment contract from any kind of collective bargaining was considered to amount to a denial of their right to participate in the determination of their salaries and working conditions not in conformity with the Charter.

Can you envisage any legal changes?

Portugal

- Public servants have the right to organise
- Consultation takes place
- Members of the Polícia de Segurança Pública (Public Security Police – the Portuguese police force that operates in large urban areas) participate in collective bargaining (but see the list of collective complaints on page X regarding problems in practice) and members of the armed forces may be consulted
- Machinery for voluntary negotiations operating for all employees in the public service
- Dispute settlement procedures are in place
- Right to strike is recognised for all workers, including public employees

Problems:

- Members of the armed forces may form associations, but not trade unions
- Police officers may form professional associations, but only police officers may be members
- Collective bargaining in the police force is problematic in practice
- Collective bargaining is not permitted for members of the armed forces
- The timeframe necessary to form a trade union is excessive
- Members of the armed forces and the police are prohibited from striking

Action to be taken:

- Can the rules concerning the forming of a trade union be changed?
- Have the problems highlighted in the collective complaints to the Council of Europe been solved in practice in the meantime? If not, appropriate action should be envisaged

The legal provisions governing the public service in Portugal are not gathered in one systematic and coherent text, but in several pieces of legislation at different levels: laws, statutory orders, regulations and circulars.

Civil servants are administrative officials who are appointed to permanent posts and paid from the budget of the public authority they serve. After appointment and official designation, they are in a unilateral, statutory position. The term ‘civil servant’ also extends to military personnel, fire-fighters, judges and prosecutors and staff of local and regional authorities.

The Portuguese civil service is organised as a career system, divided into a number of different administrations. But there are also special corps, such as the diplomatic corps and the armed forces, the security services, and the teaching and medical professions.

The law lays down the conditions for the provision of services necessary for security and the maintenance of equipment and installations, as well as for minimum services.

I) Council of Europe

Right to organise

The right to organise is guaranteed to all citizens by the Portuguese Constitution, Legislative Decree No. 215-C/75 and the Labour Code.

Any agreement intended to make a worker's employment conditional on membership or non-membership of a trade union is deemed null and void.¹

Further legislation stating the right to organise of public servants² and regulating their trade union activity was promulgated in 1999.

Members of the armed forces are free to form an association, including professional associations, other than ones with political, partisan or trade union purposes. Act No. 4/2001 provides for freedom of assembly and expression, and the rights to demonstrate, collective petition and to stand for election of members of the armed forces on active service and permanent, voluntary and contractual military staff.³

Police officers' right to form professional associations – but composed solely of police officers – is granted by Act No. 6/1990.

Right to bargain collectively

The provisions regulating the exercise of the right to bargain collectively and to strike foresee the possibility of the government taking unilateral and final decisions. For example, wage negotiations are important, but if no agreement is reached the government can decide wage increases by administrative procedure.

With the new Legislative Decree No. 23/98, *consultation* is foreseen for such matters as employment programmes, health and safety, management of social security institutions, retirement regulations, human resources policy, quality improvements, external auditing, and so on.

Exercise of the right of participation in collective bargaining by members of the Public Security Police with police duties (in contrast to office staff) is provided for in Act No. 14/2002: they can submit proposals on working conditions or on the activities of different departments.⁴

¹ Failure to comply with this provision carries a fine and/or a prison sentence. The report gave several examples of legal decisions in this connection. In particular, a decision of the Court of second instance of Lisbon of 29 June 1983 ruled that provisions allowing trade unions to establish rules imposing conditions on the exercise of vocational activities were in violation of the principle of freedom and the right to work (Conclusions XIV-1).

² Legislative Decree No. 84/99 of 19 March 1999: in institutional terms it applies to the public service at the central, regional and local levels, and to public associations, foundations and institutions.

³ Collective Complaint No. 5/1999 (European Federation of Employees in Public Services (EUROFEDOP) v. Portugal): the complaint related to Articles 5 and 6, alleging that the armed forces were denied these rights. The European Committee of Social Rights declared the complaint admissible but concluded that there was no violation of the Charter.

⁴ Decision on the merits of Complaint No. 11/2001 (European Council of Police Trade Unions v. Portugal, decision of 21 May 2002); the complaint related to Articles 5 and 6, alleging that members of the Polícia

The Right of Professional Association Act No. 3/2001, under Section 2b, states that legally constituted professional associations of military personnel may be consulted on matters relating to their members' professional status, pay and social conditions.⁵

With regard to the *promotion of machinery for voluntary negotiations*, Legislative Decree No. 23/98 replaced the 1984 Public Service Collective Bargaining Act, laying down precise procedures for the conduct of negotiations valid for all public service employees, except members of the armed forces.

The Decree introduced many changes: first, any agreement resulting from collective bargaining between the trade unions and the public service must now be adopted by the government through legislation or administrative measures within 180 days. Secondly, the material scope of bargaining has been significantly widened.⁶

But until the enactment of the abovementioned legislation (in the period 2000–2001), agreements resulting from collective bargaining had the status of recommendations, lacking the status of a collective agreement and so without, per se, any legal effect, their applicability depending on the government's adoption of the outcome by incorporating it in appropriate acts and regulations. Moreover, the material scope of bargaining was restricted to pay and such pay-related issues as retirement pensions, non-wage benefits and welfare benefits.

The government and the unions entered into negotiations over the annual pay rise for civil servants and staff of central, local and regional authorities for 2000, but, following the failure of the initial and of subsequent negotiations, the government set the wage level and reorganised wage structures.⁷

The ECSR considers that, although the machinery for unblocking the situation *does* authorise the government to take unilateral decisions, the length of the procedure and the obligation to engage in a second round of negotiations means that this system is likely to promote collective bargaining and that the situation is in conformity with Article 6, paragraph 2.

More recently, a partial agreement was concluded in 2001 with the UGT trade union federation. As noted in the previous supervision cycles, unsuccessful negotiations were settled unilaterally by the government.⁸

de Segurança Pública are not guaranteed these rights. The ECSR declared the complaint admissible but concluded that there was no violation of the Charter. Seven trade union associations were formed during the reference period 2002–2003.

⁵ Collective Complaint No. 5/1999 (European Federation of Employees in Public Services (EUROFEDOP) v. Portugal). The complaint, lodged on 13 August 1999, relates to Articles 5 (the right to organise) and 6 (the right to bargain collectively) of the European Social Charter. It is alleged that the armed forces are denied these rights. The European Committee of Social Rights declared the complaint admissible on 10 February 2000 but concluded that there was no violation of Articles 5 and 6.

⁶ The only issues excluded from bargaining now relate to the structure and competence of the public service.

⁷ During the 1999–2000 reference period, there were no collective agreements in the public sector.

⁸ No agreements were reached in 2002 either, and, following further unsuccessful negotiations and in order to contain the public deficit, the government unilaterally set the levels of the annual up-rating of public

It has not yet been clarified whether the entry into force of the new Labour Code in 2004 amended the rules governing collective bargaining in the public sector.

Legislative Decree No. 23/98 of 26 May 1998 finally⁹ established a special *dispute settlement procedure*: where negotiations have not resulted in an agreement, trade unions should now request additional negotiations within five days of the last meeting; additional negotiations are mandatory and should last no longer than 15 working days. If an agreement is still not reached, the government takes the measures it considers appropriate.

Right to take collective action

The situation is currently *not in conformity* with the Charter because *the excessive timeframe necessary to form a trade union deprives non-affiliated workers of the effective exercise of their right to strike*. In fact, Article 10 of Legislative Decree No. 215-B/75 confers legal personality on trade unions, and thus grants them the right to call strikes, once their statutes have been published in the official gazette. Publication must be within 30 days of the statutes' registration with the Ministry of Labour and Solidarity.

Strikes can also be called by workers' assemblies in firms in which the majority of employees are not represented by trade unions.¹⁰ The result is that non-unionised workers can exercise this right only in undertakings in which the majority of employees do not belong to a union, when all workers should have the right to call a strike, even outside the framework of trade unions.

At the September 2006 meeting of the Governmental Committee,¹¹ it was stated that the relevant section of the Labour Code had not been applied in recent years and that the problem therefore no longer existed. In any event, 30 days was the maximum period for the publication of a trade union's statutes and would only apply if there had been no administrative decision on an application lodged by a trade union before expiry of this period.

The Governmental Committee invited the Portuguese government to provide all relevant information on how the regulation is applied in practice in its next report and decided to await the next ECSR assessment.

employees' pay, current salary scales, expenses, meal allowances and travel costs, and retirement and reversion pensions.

⁹ Before 1998 no conciliation or arbitration body existed for 'workers in public administration' (all central government civil servants and employees, with the exception of members of the armed forces): trade unions could only request additional negotiations, a procedure that required government approval and might lead to a recommendation. The only existing provision concerned public enterprises which were parties to the dispute, as in this case, when voluntary settlement of disputes failed, arbitration was an obligation by an Economic and Social Council recommendation. As mentioned above, nevertheless, a procedure exists according to which trade union organisations may ask for additional negotiations in order to resolve a dispute occurring in the course of collective bargaining. The government decides whether the additional negotiations will take place. This kind of procedure has been used effectively in practice.

¹⁰ In the latter case, the assembly has to be expressly convened for that purpose by at least 20% of the workforce or 200 employees.

¹¹ 113th meeting, Strasbourg, 12–14 September 2006, Provisional report prepared by the Secretariat, p. 54.

The *right to strike* is enshrined in the Constitution and regulated in the new 2004 Labour Code; it is recognised for all workers – including public employees – other than members of the armed forces and the police. *Lockouts* are prohibited.¹²

In the public sector, absence due to strike action entails a loss of salary corresponding to the number of days or hours lost, but without prejudice to social insurance, occupational accident or employees' accumulated pension rights.

Employers are prohibited from replacing strikers. In addition, any actions adversely affecting or discriminating against workers because of their participation or non-participation in a strike are legally null and void.¹³

Before the new Labour Code, the Right to Strike Act. No. 65/77 – now repealed – in Section 8¹⁴ enabled the government to define minimum services by issuing orders. Now they may be set by agreement between workers' and employers' organisations, but also, if no such agreement is reached, by the government.¹⁵

Provision of the *minimum essential services* indispensable for the satisfaction of society's immediate and essential social needs must be guaranteed,¹⁶ *inter alia*, in posts and telecommunication, health, public hygiene, energy and mining (including provisioning of combustibles), water supply, fire-fighting and transport.

The Committee noted that the number of sectors in which the Labour Code requires maintenance of minimum levels of service is rather broadly defined. If the relevant collective agreement does not already contain regulations on the specification of these services, they must be specified by joint agreement between workers' and employer's representatives before the ten-day notice is given of strike action.

At least 48 hours before the beginning of a strike, the trade union involved has to designate the workers necessary for providing the minimum services, failing which the employer may designate them. If the obligation to ensure the provision of minimum services is not observed, the government may requisition the workers required for providing the services.

¹² In ratifying the Charter, Portugal entered a reservation (deposited on 30 September 1991), according to which 'the obligations entered into under paragraph 4 of Article 6 shall in no way invalidate the prohibition of lockouts, as specified in paragraph 3 of Article 57 of the Constitution of the Portuguese Republic'.

¹³ Workers who considered that their rights had been infringed could seek legal redress.

¹⁴ In spite of Judgment No. 868/96 which had declared it as unconstitutional.

¹⁵ In any event, prior to a determination of minimum services by the government, consultations take place with the two sides of industry to determine the scope of services and considerations imposed by constitutional principles reflecting those contained in Article G of the revised Charter are taken into account when defining minimum services.

¹⁶ The Constitution states that any restriction of constitutional rights is permissible only to the extent necessary to safeguard the rights of others or other rights protected by the Constitution: therefore the Labour Code requires that any minimum services imposed have to be necessary, adequate and proportional.

In the event of a strike concerning services provided by state enterprises or direct state administration, the minimum services required are defined by an arbitration committee established within the Economic and Social Council.

Trade unions calling a strike in one of these sectors and the workers participating are obliged also to guarantee the security and maintenance of the equipment in the enterprises concerned.¹⁷ The proposed definition of the services necessary for the security and maintenance of equipment must be included in the notice issued by the trade unions calling the strike.

The Committee wished to know whether the determination of minimum services is subject to administrative or judicial review. Meanwhile, it reserved its position on this point.

II) ILO

CFA Report No. 335, case no. 2325

*The Occupational Association of Professional Police Officers vs the Government of Portugal*¹⁸

The trade unions allege a lack of dialogue on the part of the Minister of Internal Administration with the Occupational Association of Professional Police Officers. They also allege a lack of consultation prior to the adoption of legislation directly affecting the interests of police officers.

The question is whether this constitutes a violation of Convention No. 98.

The CFA noted the terms of Article 5 of Convention No. 98 which provides that national legislation shall determine the extent to which the guarantees provided for in the Convention shall apply to the armed forces and the police. The International Labour Conference wished to leave it to each state to decide the extent to which it is appropriate to grant the rights provided for in the Convention to members of the armed forces and the police.¹⁹

CFA Report No. 238, case no. 1279

*The Union of Workers in the Manufacturing Establishments of the Armed Forces vs the Government of Portugal*²⁰

This case concerns the refusal by the Portuguese government to register a trade union of civilian workers in the manufacturing establishments of the armed forces.

The CFA noted that Article 2 of Convention No. 87 provides that workers, without distinction whatsoever, have the right to establish organisations of their own choosing without prior authorisation. Article 5 of Convention No. 98 allows states to determine the

¹⁷ The national report specifies that such an obligation arises only if the number of non-striking workers is not sufficient to ensure the minimum services required.

¹⁸ Complaint submitted on 1 March 2004.

¹⁹ Report No. 332, case no. 2240, Argentina.

²⁰ Complaint submitted on 2 May 1984.

extent to which the guarantees provided for in the Convention shall apply to the armed forces and the police.

The question is, therefore, whether such personnel should be classified as members of the armed forces.

In this case, the documentation provided by the complainant shows that the workers in question perform functions of a civilian nature, and this is not denied by the government.

The Committee concluded that the workers in the manufacturing establishments of the armed forces should have the right to establish organisations of their own choosing without prior authorisation.

III) Action to be taken

The situation is currently not in conformity with the Charter because the excessive timeframe necessary to form a trade union deprives non-affiliated workers of the effective exercise of their right to strike (see Report).

Does this give rise to problems in practice?

Romania

- Employees and civil servants are entitled to set up and join trade unions
- With regard to voluntary negotiations, public service employees enjoy the same rights as employees in the private sector: they can bargain, in principle, on all matters except salaries, which are set by government
- Labour dispute resolution is in place

Problems:

- The right to organise is not granted to:
senior civil servants, persons holding management positions or high public office, judges, public prosecutors and personnel of the Ministry of Justice, the National Intelligence Service, the 'Protection and Guard Service', the Foreign Intelligence Service, the Special Telecommunication Service or their subordinate bodies
- Membership of the National Police Association is compulsory; the Association does not have trade union rights
- Military personnel on active service are not permitted to join a trade union
- Representatives of the Economic and Social Council must have Romanian nationality
- A trade union may take collective action only if it fulfils the representativity criteria
- The votes of more than 50% of trade union members are required for strike action – this is excessive
- Public servants in the Ministry of Defence and the Ministry of the Interior do not have the right to strike
- According to the ITUC Annual Survey 2006, employees in sanitary services, pharmacies, schools, communications, radio and television, transport and the supply of essential services (gas, electricity, and so on) must provide a minimum service of one-third of normal activity in the event of a strike

Action to be taken:

Trade union action is needed to push for legislative changes with regard to:

- the right to organise – too many groups of workers are excluded
- compulsory membership of the National Police Association
- the Romanian nationality requirement as regards ECOSOC membership
- reducing the vote threshold in a strike ballot

I) Council of Europe

Right to organise

The situation in Romania with regard to the article of the Charter applying to civil servants has always been problematic. Since Supervision Cycle 2002 (Romania's first), several grounds of non-conformity have been pointed out by the ECSR. In recent years, the situation has changed to some extent, but a number of important tasks remain to be fulfilled.

Under section 2§1 of the new Trade unions act (No. 54/2003) employees and civil servants are entitled to set up and join trade unions. Furthermore, section 27 of the new Law on the status of civil servants (No. 344/2004) guarantees the freedom to organise.¹

Nevertheless, restrictions remain on civil servants' trade union rights:

1. The ESCR finds that section 27 of the new Act on the status of civil servants is too general and hence that the situation is still not in conformity: in fact, the right to organise is granted to all civil servants '*except senior civil servants, because the public interest takes precedence over individual interest*'.
2. Under section 4 of the Trade Union Act, the following categories of persons are not entitled to form trade unions: persons holding management positions or high public office, judges, public prosecutors and personnel of the Ministry of Justice, the National Intelligence Service, the Protection and Guard Service, the Foreign Intelligence Service, the Special Telecommunications Service or their subordinate bodies.

With regard to *persons holding management positions or high public office*, the ECSR considers that under Article G of the Charter, *section 4 of the Trade Union Act is incompatible with Article 5 of the Revised Charter because it is too general*.

With regard to *judges, public prosecutors and members of staff of the Ministry of Justice*, the Committee needs more information to explain why they are denied the right to form or join trade unions and how their right to organise to defend their economic and social interests is protected.

With regard to the *National Intelligence Service, the Protection and Guard Service, the Foreign Intelligence Service, the Special Telecommunications Service and their subordinate bodies*, the ECSR needs more information on the organisation, aims and functions of these services in order to be able to assess whether the situation is in conformity with Article 5.

Act No. 360/2002 of 6 June 2002 on the status of *police officers* entitles them to belong to a national professional association, the National Police Association, an organisation set up as a public-law entity on a professional, autonomous, apolitical and non-profit-making basis, which protects police officers' interests and rights. Nevertheless, the ECSR finds (as already in 2004²) that the *situation is not in conformity* with the Charter on the grounds that *membership of the National Police Association is compulsory and it does not enjoy real trade union-type rights and powers* (freedom of association, the right to negotiate salaries and working conditions, and so on³).

¹ Amending Act No. 188/1999.

² At the 2004 meeting of the Governmental Committee, the Romanian delegate stated that the police forces had been demilitarised, with the exception of certain special forces. Coupled with the new legislation on public servants, this change should have improved the situation of the police force with regard to Article 5 (Strasbourg, 8 April 2005, Governmental Committee of the European Social Charter, report concerning Conclusions 2004).

³ Cf. European Council of Police Trade Unions v. Portugal, Collective Complaint No. 11/2001, decision on the merits of 22 May 2002, available at: http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/List_of_collective_complaints/default.asp#TopOfPage

Members of the armed forces are not allowed to join trade unions. Civilian personnel within the Ministry of Defence are not affected by this prohibition. Drafted or mobilised military personnel may retain trade union membership for the duration of their service, although they may not participate in trade union activities.

The Committee considers that the situation is not compatible with the Revised Charter since the condition of Romanian nationality required for management and labour representatives on the Economic and Social Council infringes Article 5: it prevents non-national workers from enjoying full trade union membership rights and infringes the right of trade unions to freely select the representatives of their choice. At the December 2002 meeting of the Governmental Committee,⁴ the Romanian delegate explained that Act 109/1997 was under amendment. The last Romanian national report confirmed that 1997 Act had been amended and consolidated by Act No. 58/2003. Nonetheless, the section requiring labour and management representatives on the Economic and Social Council to be Romanian nationals is still in place.

Right to bargain collectively

Over three supervision cycles, the national reports have not included detailed information on measures to promote joint consultation in the public sector, including the civil service.

With regard to the joint consultation system in general, the ECSR took note of the new legislation regulating the matter and, though waiting for further information, concludes that the situation in Romania is in conformity with Article 6, paragraph 1 of the Revised Charter.

In Romania there is no bargaining on pay in central government; wage levels and increases are established by government regulation.

Joint consultation at the national level takes place within the Economic and Social Council, a tripartite body comprising nine representatives each from government, the employers and the trade unions, respectively. The Council examines the economic and social situation in the country and makes recommendations to the government and parliament.

Social dialogue committees exist at ministerial and territorial level, with a consultative role regarding legal, economic and social initiatives in ministries' areas of responsibility, and the aim of promoting tripartite consultation between the social partners and the public administration.

As regards joint consultation at the enterprise/unit level, a new Labour Code was adopted in 2003 which significantly increased employees' information and consultation rights.⁵

The ECSR has already deferred its conclusions twice as there was no evidence that the government had taken steps to promote effective social dialogue. In order to ensure efficient joint consultation procedures in the public sector the ECSR demands up-to-date information on how the various legislative measures are being implemented in practice.

⁴ Strasbourg, 19 December 2002, Governmental Committee of the European Social Charter, Conclusions 2002, p. 11.

⁵ For further information, see: I. Schömann, S. Clauwaert and W. Warneck, *Information and consultation in the European Community*.

With regard to *voluntary negotiations*, the legal status of collective agreements is confirmed both in Article 38, paragraph 5 of the Constitution and in Section 7§2 of Act No. 130/1996 on collective agreements, which provides that public service employees enjoy the same rights as private sector employees. Those public officials whose right to join trade unions is restricted may nonetheless elect representatives to participate in collective bargaining.

According to the ECSR the situation in Romania is therefore in conformity with Article 6, paragraph 2 of the Revised Charter.

Act No. 168/1999 on the *resolution of labour disputes* provides for three separate mechanisms in case of conflict of interest: (i) *conciliation*, which the parties must undertake at the outset of the conflict; (ii) *mediation*, which may take place only with the agreement of both parties, with a mediator chosen by consensus and involving a procedure requiring no longer than 30 days; and (iii) *arbitration*, which may take place only with the agreement of both parties and requires a decision within eight days.

Section 62 of the Act allows only the employer to refer the dispute to arbitration, on condition that a strike has lasted for more than 20 days, no agreement has been reached with the workers and the continuation of the strike would affect ‘humanitarian interests’. The fact that only one party can refer a dispute to arbitration constitutes for the ECSR a restriction on the right to bargain collectively, unless the situation comes under Article G of the Revised Charter.⁶

The Committee underlines that, in the absence of an agreement, the imposition of compulsory arbitration can terminate strike action. In view of the restriction on the right to strike this provision may entail, the Committee assessed its conformity with the requirements of the Revised Charter in its Conclusion under Article 6, paragraph 4.

Right to collective action

Article 43 of the Constitution – as amended in 2003 – guarantees employees the right to strike for the purpose of protecting their professional, economic and social interests. Any limitation or prohibition of the right to strike is possible only if explicitly permitted by law. The modalities of exercising the right to strike are governed by Act No. 168/1999 on the settlement of labour disputes.

The situation is *not in conformity* with Article 6, paragraph 4 since Article 42 of Act No. 168/1999 unduly restricts the right of trade unions to take collective action, requiring that the latter meet certain representativity criteria for the purpose of collective bargaining.⁷ Workers should instead be free to exercise their right to collective action through their trade union, irrespective of whether it is representative for the purpose of collective bargaining.

A second ground on which the situation is *not in conformity* concerns Section 42 of the 1999 Act which provides that a representative trade union may declare a strike only if more than 50% of their members vote in favour.⁸ This threshold is so high as to unduly restrict the right of workers in such trade unions to take collective action.

⁶ On the notion of ‘humanitarian interests’ see Conclusions under Article 6, paragraph 4.

⁷ Stipulated in Act No. 130/1996.

⁸ Where there is no representative trade union, a decision to strike may be taken by the workers themselves by secret ballot if more than one quarter of the workforce agrees.

A number of restrictions on strikes are provided for in the 1999 Act with specific regard to public servants and certain essential/public services:

- With regard to the restrictions *ratione personae*, the situation is not in conformity due to a repeated failure to provide information. In fact, several categories of public servants, especially those in the Ministry of Defence and the Ministry of the Interior,⁹ are not permitted to take strike action under Section 62 of the Act on the settlement of labour disputes. The Committee is unable to assess the conformity of the situation in this respect because it is still not clear, in the case of both ministries, whether the prohibition on strike action covers all staff or only staff who, given the nature or level of their responsibilities, are most directly concerned with national security and the public interest.
- With regard to the *nature of the sector*, as already mentioned with regard to paragraph 3, in case continuation of a strike would affect ‘humanitarian interests’, Section 62 of Act No. 168/1999 on the settlement of labour disputes allows only the employer to refer a dispute to arbitration, if a strike has lasted for more than 20 days and no agreement has been reached with the employees. It is also for management to decide whether a threat to ‘humanitarian interests’ exists.¹⁰

The notion of ‘humanitarian interests’, in practice and in law, does not apply to all undertakings and organisations but only to the following categories: sanitary services, social assistance, telecommunications, public radio and television, railways, public transport and salubrity services, gas supply, electricity, heating and water supply, employees in the national energy system, including nuclear power, and units operating 24 hours.

It is still not clear whether the mere fact that a strike takes place in one of these sectors allows a referral to compulsory arbitration, even if basic needs are secured by the provision of minimum services during strike action, or whether further conditions have to be met to qualify such a referral as necessary in terms of ‘humanitarian interests’.

Meanwhile, the ECSR reserved its position on this point. It further reiterated its question concerning whether employers could have recourse to arbitration in the case of strikes lasting more than 20 days without there being a threat to ‘humanitarian interests’.¹¹

- Other restrictions related to essential services: certain services, such as health services, social assistance and public transport, must be maintained during a strike at the level of at least one-third of normal activity and must be sufficient to satisfy the vital needs of the community.

With regard to the applicable sanctions and the possibilities for appeal if these requirements are not met, the Act stipulates that if an employer considers that a strike was called or is continuing in violation of the law, he may lodge a complaint with the local court asking that the strike be terminated. In such cases the court renders a binding emergency decision.

⁹ The latter following its merger with the Ministry of Public Administration in 2003 and now called the Ministry of Administration and the Interior.

¹⁰ The competent arbitration commission is made up of one representative each of management, the representative trade unions – or, as the case may be, the employees’ representative – and the Ministry of Labour and Social Solidarity.

¹¹ Should no such information be provided in the next report, the ECSR would not be able to assess the conformity of the situation with the requirements of the Revised Charter in this respect.

The procedure before the court or an appeal against its decision is subject to the rules on the resolution of labour disputes, but the Committee has asked that the next report specify what the rules are in this respect.

The report further states that if the court rules that a strike is illegal and orders its termination, it may also require the party that called the strike to pay damages.

The Committee asks that the next report confirm that the requisitioning of striking workers to provide minimum services is not provided for under Romanian law.

There are a number of other restrictions – also applicable to the public sector – regarding general procedure in the exercise of the right to strike:

- Section 55 of Act No. 168/1999 allows employers to seek a court order to postpone or suspend strikes by up to 30 days, but such a request for suspension may be made only if the calling or continuation of a strike endangers lives or health.

In order to be able to assess whether court intervention falls within the limits of Article G, the Committee needs detailed information on any corresponding decision.

- Both parties to the conflict must maintain the operation of tools and machines the stoppage of which would endanger the life or health of others.

The Committee asks how this provision is applied when the parties are unable to agree on the level and forms of service to be maintained.

II) Action to be taken

The Committee finds that section 27 of the new Act on the status of civil servants is too general and hence that the situation is still not in conformity: in fact, the right to organise is granted to all civil servants ‘*except senior civil servants, because the public interest takes precedence over individual interest*’.

With regard to persons holding management positions or high public office, the ECSR considers that under Article G of the Charter, section 4 of the Trade Union Act is incompatible with Article 5 of the Revised Charter because it is too general.

The Committee asks that the next report explain why judges, public prosecutors and members of staff of the Ministry of Justice are denied their right to form or join trade unions and how the right to organise to defend their economic and social interests is protected.

With regard to the National Intelligence Service, the Protection and Guard Service, the Foreign Intelligence Service, the Special Telecommunications Service and their subordinate bodies, the Committee needs more information on their organisation, aims and functions.

Can you provide information on this in the next report?

Nevertheless, the Committee finds (as already in 2004) that the situation is not in conformity with the Charter on the ground that membership of the National Police Association is compulsory and it does not real trade union powers.

The condition of Romanian nationality required for management and labour representatives on the Economic and Social Council infringes Article 5: it prevents non-national workers from enjoying full trade union membership rights and infringes the right of trade unions to freely select the representatives of their choice. At the December 2002 meeting of the Governmental Committee, the Romanian delegate explained that Act 109/1997 was under amendment. The last Romanian national report confirmed that 1997 Act had been amended and consolidated by Act No. 58/2003. Nonetheless, the section requiring labour and management representatives on the Economic and Social Council to be Romanian nationals is still in place.

What is the situation today?

Information on the joint consultation system in general should be provided to the ECSR.

Up-to-date information is also required on how the various legislative measures are being implemented in practice, with a view to ensuring efficient joint consultation procedures in the public sector.

Section 62 of the Act allows only the employer to refer the dispute to arbitration, on condition that a strike has lasted for more than 20 days, no agreement has been reached with the workers and the continuation of the strike would affect 'humanitarian interests'. The fact that only one party can refer a dispute to arbitration constitutes for the ECSR a restriction on the right to bargain collectively, unless the situation comes under Article G of the Revised Charter.

The Committee underlines that, in the absence of an agreement, the imposition of compulsory arbitration can terminate strike action.

The notion of 'humanitarian interests', in practice and in law, does not apply to all undertakings and organisations but only to the following categories: sanitary services, social assistance, telecommunications, public radio and television, railways, public transport and salubrity services, gas supply, electricity, heating and water supply, employees in the national energy system, including nuclear power, and units operating 24 hours.

It is still not clear whether the mere fact that a strike takes place in one of these sectors allows a referral to compulsory arbitration, even if basic needs are secured by the provision of minimum services during strike action, or whether further conditions have to be met to qualify such a referral as necessary in terms of 'humanitarian interests'.

The situation is not in conformity with Article 6, paragraph 4 since a trade union may take collective action only if it fulfils the representativity criteria stated for the purpose of collective bargaining. Workers should instead be free to exercise their right to collective action through their trade union, irrespective of whether it is representative for the purpose of collective bargaining.

A second ground on which the situation is *not in conformity* concerns Section 42 of the 1999 Act which provides that a representative trade union may declare a strike only if more than 50% of their members vote in favour. This threshold is so high as to unduly restrict the right of workers in such trade unions to take collective action.

Several categories of public servants, especially those in the Ministry of Defence and the Ministry of the Interior, are not permitted to take strike action under Section 62 of the Act on the settlement of labour disputes. The Committee is unable to assess the conformity of the situation in this respect because it is still not clear, in the case of both ministries, whether the prohibition on strike action covers all staff or only staff who, given the nature or level of their responsibilities, are most directly concerned with national security and the public interest.

Section 55 of Act No. 168/1999 allows employers to seek a court order to postpone or suspend strikes by up to 30 days, but such a request for suspension may be made only if the calling or continuation of a strike endangers lives or health.

Can you provide information on all these points in the next report?

Slovak Republic

- Protection against reprisals due to trade union activities exists in legislation, but problems persist in practice
- Joint consultation and voluntary negotiations for civil servants, as well as conciliation and arbitration take place

Problems:

- Military personnel on active service and officers in the Intelligence Service may not form trade unions
- Negotiations do not take place with police trade unions, nor are the mechanisms on dispute resolution applied
- The right to collective action is restricted in social services, health care, telecommunications, gas and oil production and the nuclear sector
- The Constitution imposes restrictions on the following groups:
judges, prosecutors, members of the armed forces and armed corps, fire-fighters, air traffic controllers
- Strikes must be linked to a collective agreement

Action to be taken:

- The restrictions on the right to take collective action are much too broad; trade union action is needed to bring about legislative changes

I) Council of Europe

Right to organise

The situation regarding state servants and other persons employed in the state service at central or local levels¹ is generally *in conformity* with Article 5. Nevertheless, in some fields the ECSR was unable to assess conformity because of lack of information and a number of pending questions.

The Constitution guarantees the right of all persons to freely associate with others to protect their economic and social interests, with no restrictions on their number and no encouragement of specific unions in certain companies or industries. *Information about the measures taken to protect trade unions from interference by employers and by the state has been requested.*

With regard to *the effectiveness of the right to organise*, the Committee noted from the Confederation of Trade Unions that there are cases in which employers do not recognise the trade union rights of employees and exert indirect pressure on employees not to form

¹ Report on the Slovak Republic's progress in its integration into the European Union, September 1999–June 2000: legislation on state and civil service is currently under preparation.

unions.² *As these practices may represent violations of the Charter, the ECSR asks to receive the Government's observations and information on legal or other measures taken to combat them.*

As for Act No. 83/1990, *members of the armed forces on active duty cannot form or join trade union organisations. The Committee has asked for specification of the categories of personnel covered by this prohibition.*

The right of *police officers* (a term which also covers members of the Slovak Intelligence Service, the Corps of Prison Wardens, the Judiciary Guards and the Railway Police) to form and join 'qualified' trade unions and to actively participate in their activities is specifically set out by Act No. 73/1998; it also provides for the protection of police officers occupying elected positions in a trade union.

Since the part of the Act concerning trade union activities does not apply to the Slovak Intelligence Service, the ECSR asked whether and to what extent the right to organise is guaranteed for members of this service. Up to now (Conclusions XVIII-1) an answer has not been provided.

With specific regard to *protection against reprisals* on the ground of involvement in trade union activities, KOZ³ pointed out that in practice there are cases in which employers put indirect pressure on employees not to form trade unions and employees who are not union members enjoy certain financial benefits or opportunities for leisure activities. But such conduct is difficult to prove since employees wishing to report such facts to the Labour Inspectorate or similar authorities are likely to suffer discrimination. *In the absence of information on this subject, the Committee considered that there was no foundation for these statements and that the situation was compatible with the Charter.*

Right to bargain collectively

With regard to *joint consultation*⁴ Act 585/2004⁵ established the Council of Economic and Social Partnership of Slovakia (CESP). This consists of state representatives and an equal number of employers' and employees' representatives. Its aim is to achieve agreement on, *inter alia*, issues of economic and social development, proposals for labour legislation and the state budget.

The Committee considers the situation in conformity with Article 6, paragraph 1, although it needs more information on the activities of the CESP.

² Moreover, there has been a reported increase in violations of trade union rights, such as non-payment to unions of union dues, obstructing the organisation of trade unions and union activities at the work place and wage discrimination against union officials (International Confederation of Free Trade Unions, Slovak Republic: Annual Survey of Violations of Trade Union Rights (2000), www.icftu.org).

³ The largest employee organisation, the Confederation of Trade Unions of the Slovak Republic (KOZ), comprises 42 affiliate trade unions. Estimates of the unionisation rate range from about 50% to 65–70% of the workforce.

⁴ Also in the field of joint consultation it may be assumed that the information is valid for both the private and the public sectors.

⁵ On the organisation of the activities of government and central state administrative organisations.

*Voluntary negotiations*⁶ in the civil service, regulated by Act 312/2001, cover the terms and conditions of performance of civil servants' duties, reduction of working time, leaves, salary scales and social security coverage.

A negotiation proposal is submitted by the parties each calendar year and must be concluded before the end of May so that the agreement can then be incorporated in the draft state budget.

The Collective Bargaining Act, moreover, enables civil service offices and relevant trade union bodies not only to conclude sectoral collective agreements but also collective agreements at corporation/office level aimed at establishing better terms and conditions for civil servants than those agreed in sectoral collective agreements (as happened in 2004 and 2005).

But the ECSR found that Act No. 312/2001 does not fully apply to negotiations between the Minister of the Interior and the *police trade unions*, and so it asked what the applicable regulations are and deferred its conclusions.

Conciliation and arbitration within the civil service are regulated by Act No. 313/2001. Disputes over the negotiation of collective agreements are resolved through the appointment of an arbitrator. If no agreement can be reached through the arbitrator, the parties may appoint a six-member arbitration committee with parity of representation between government and trade unions. The decision of the arbitration committee is then included in the draft state budget to be submitted to the Parliament.

Thanks to the amendments to the Collective Bargaining Act, it seems to the ECSR that these provisions *do* apply in the same way as in the private sector. Nevertheless, the ECSR still requires confirmation and meanwhile reserved its position on this point.

It further notes that the rules on dispute resolution can only partially be applied with respect to collective conflicts between the Minister of the Interior and the *police trade unions*, so pending receipt of the requested information, it declared the situation in conformity with Article 6, paragraph 3.

Right to collective action

The ECSR declared 'the situation *not in conformity since it has not been possible to assess whether the restrictions on the right to strike applying to certain categories of civil servants and employees such as, inter alia, workers employed in the social, health, telecommunication and nuclear fields, fall within the limits of Article 31 of the Charter*'.

Restrictions are in fact imposed by the *Constitution* (judges, prosecutors, members of the armed forces and armed corps, fire-fighters, employees working in the field of air traffic control and safety, plus civil servants in offices specified by law and those working in areas immediately involving the protection of life and health) and the *Collective Bargaining Act* (strikes are illegal for: employees operating nuclear power plant equipment or equipment

⁶ The right to collective bargaining is guaranteed in Article 37 of the Constitution, and in Act No. 2/1991 (Collective Bargaining Act). Other legal texts: the Labour Code, Act No. 120/1990 on certain relations between trade unions and employers, Act No. 1/1992 on wages, etc., and Act No. 143/1992 on salaries in the public sector.

using fission materials or crude oil/gas pipelines; those responsible for the operation of telecommunications in situations in which a strike would endanger the life or health of citizens or of property; employees working in regions stricken by a natural disaster when emergency measures have been proclaimed by qualified authorities of the state; employees of health care or social care establishments in situations when a strike would endanger the life or health of citizens; strikes are also illegal in the case of a national military alert and in connection with the introduction of emergency measures). The ECSR wishes to know how these provisions are applied in practice, and particularly how ‘minimum services’ are organised.⁷

Other points regarding the right to strike on which the ECSR needs further information in order to assess the situation:

- A strike may lawfully be called if related to the conclusion of a collective agreement,⁸ but under the Charter the right to strike cannot be restricted solely to strikes aimed at the conclusion of a collective agreement.
- *Solidarity strikes* are legal depending on the strength of interest in the primary conflict of the party conducting the solidarity strike, taking into account mainly economic considerations. The ECSR have asked for the case law on solidarity strikes and clarification as to whether there are situations in which strikes pursuing ‘other objectives’ may be lawful, even during the period of validity of a collective agreement.⁹
- Participation in a lawful strike is regarded as excused absence from work, with no entitlement to wages, compensation or sickness insurance benefits.¹⁰ The ECSR requested confirmation that entitlement to reimbursement of health care expenses (for example, doctor’s fees and medicines) is not affected by participation in a strike and confirmation that participation in a lawful strike cannot be just cause for the dismissal of a worker.¹¹
- With regard to the *right to take collective action*, strikes shall be decided upon and declared by trade unions, at enterprise or higher level, otherwise they are illegal. Since a ban on strikes not called or endorsed by a trade union is in breach of Article 6, paragraph 4, the ECSR has requested clarification as to whether a group of workers without specific legal status¹² may lawfully call a strike and, if not, whether such workers may easily and without undue delays or formalities form a trade union for the purpose of calling a strike.

⁷ From the comments of KOZ it appears that the lawfulness of the restrictions on the right to strike of employees in the healthcare sector is currently being considered by the Constitutional Court of Slovakia.

⁸ It is illegal if it is called or continues in breach of the procedural requirements laid down by the Collective Bargaining Act; after the conclusion of an agreement; where the required mediation procedure stipulated by the Collective Bargaining Act has not been observed; and during arbitration proceedings.

⁹ For instance, in situations in which the health and safety of workers is at stake or mass redundancies are imminent or being announced.

¹⁰ But for pension insurance purposes participation in a lawful strike will be considered as the performance of work.

¹¹ Even if it seems that a strike does not terminate the employment contract.

¹² That is, not constituting the ‘trade union body’ within the meaning of the Collective Bargaining Act.

II) ILO

The excessively broad definitions of ‘public servant’ and ‘essential services’ go beyond the definitions of the ILO, particularly with regard to military personnel and fire-fighters, and oil and gas production as essential services.

CFA Report No. 326, case no. 2094

The Trade Union Association of Railwaymen vs the Government of Slovakia

In communications dated 18 July 2000 and 26 July 2001, the Trade Union Association of Railwaymen submitted a complaint of violation of freedom of association against the Government of Slovakia.

This case relates to allegations concerning legislation which would restrict the right to strike, as well as allegations of intimidation and violation of trade union rights within the Railways Company of the Slovak Republic (ZSR).

The Committee's conclusions

With regard to the legislative aspect of the case, the Committee observes that in 1999 the Committee of Experts on the Application of Conventions and Recommendations formulated observations on certain provisions of Law No. 2/1991 on collective bargaining. The Committee notes that following these observations, the Government proposed amendments to the Law, in particular with regard to Article 17(1), which originally provided that the number of votes needed in support of a strike must be more than half of the workers covered by the collective agreement, and 17(5), which required the trade union to provide the employer with a list of the names of the striking workers. The Committee notes that, according to the Government, the new amendments to Article 17 reflected a compromise reached after consultations and negotiations with the social partners. While the complainant organisation declared that its proposal to amend the Law was rejected in March 2000, which led to the lodging of the complaint in July 2000, the Committee notes that, according to the Government, such consultations did take place in early 2001, resulting in the compromise on the current draft amendments which had to be submitted to the Slovak Parliament at the end of May 2001. This was later acknowledged by the complainant organisation in a communication in July 2001. The Committee notes that, according to the new Article 17(1), a strike must be approved by the absolute majority of workers participating in the strike ballot, which is in conformity with the principles of freedom of association.

With regard to Article 17(5), while taking good note of the Government's willingness to bring its legislation into full conformity with Conventions nos. 87 and 98, the Committee observes that Article 17(8)(c), as amended, requests trade unions to provide the employer with a list of the names of representatives of the respective trade union authorised to represent participants in the strike. While acknowledging that this provision is an improvement, since previously the trade union had to provide a list of all participants in the strike, the Committee nevertheless considers that the practical implementation of the provision could lead to discrimination and reprisals against the trade union representatives on the list. The Committee recalls that protection against all acts of anti-union discrimination is particularly desirable in the case of trade union officials in order for them to be able to perform their trade union duties in full independence. In addition, the Committee must insist on the fact that the occupational and economic interests which

workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to political, economic and social questions and problems facing the undertaking that are of direct concern to the workers (Digest of Decisions and Principles of the Committee on Freedom of Association, 4th edition, 1996, paras. 479 and 724).

Therefore the Committee requests the government to take full account of these principles in the drafting of amendments to Article 17 in order to bring its legislation into full conformity with the principles of freedom of association. The Committee trusts that all the relevant amendments to Law No. 2/1991 on collective bargaining will be adopted in the near future and requests the Government to keep it informed in this regard. It draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the case.

Concerning the allegations of intimidation and violation of trade union rights within the ZSR, the Committee takes note of the government's statement according to which an inquiry took place between December 2000 and January 2001 on selected premises of the ZSR. This inquiry, which was conducted in collaboration with the social partners, was not able to demonstrate that these allegations were well founded. Nevertheless, in view of the public statements made by the management of the ZSR, and in view of the new allegations of intimidation in the context of the restructuring of the ZSR, the Committee must recall that no one should be penalised for carrying out or attempting to carry out a legitimate strike. In addition, while respect for the principles of freedom of association requires that the public authorities exercise great restraint in relation to intervention in the internal affairs of trade unions, it is even more important that employers exercise restraint in this regard and ensure that no person is prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities.

III) Action to be taken

The Constitution guarantees the right of all persons to freely associate with others to protect their economic and social interests, with no restrictions on their number and no encouragement of specific unions in certain companies or industries.

Information about the measures taken to protect trade unions from interference by employers and by the state has been requested.

There are cases in which employers do not recognise the trade union rights of employees and exert indirect pressure on employees not to form unions.

As these practices may represent violations of the Charter, the ECSR has asked for the government's observations and information on legal or other measures taken to combat them.

You should ensure that the information regarding practice is provided in the next report.

Members of the armed forces on active duty cannot form or join trade union organisations. The Committee asks for specification of the categories of personnel covered by this prohibition.

Can you provide the information in the following report?

Since the part of the Act concerning trade union activities does not apply to the Slovak Intelligence Service, the ECSR asked whether and to what extent the right to organise is guaranteed for members of this service. So far, (Conclusions XVIII-1) an answer has not been provided.

Can you provide an answer in the next report?

KOZ pointed out that in practice there are cases in which employers apply indirect pressure on employees not to form trade unions, while employees who are not union members enjoy certain financial benefits or opportunities for leisure activities. But such conduct is difficult to prove since employees wishing to report such facts to the Labour Inspectorate or similar authorities are likely to suffer discrimination. In the absence of information on this subject, the Committee considered that there was no foundation for these statements and that the situation was compatible with the Charter.

Can you confirm this and provide information?

Rules on dispute resolution can only be partially applied with respect to collective conflicts between the Minister of the Interior and the police trade unions.

Since amendments to the Collective Bargaining Act have been made, it seems to the ECSR that the provisions on conciliation and arbitration do apply in the public sector as in the private sector. However, the ECSR requires confirmation of this and meanwhile it has reserved its position.

Can you provide information?

The ECSR declared the situation ‘not in conformity since it has not been possible to assess whether the restrictions on the right to strike applying to certain categories of civil servants and employees such as, inter alia, workers employed in the social, health, telecommunication and nuclear fields, fall within the limits of Article 31 of the Charter’.

What are those restrictions? Can you provide information?

The ECSR wishes to know how ‘minimum services’ are organised in practice.

- A strike may lawfully be called if related to the conclusion of a collective agreement, but under the Charter the right to strike cannot be restricted solely to strikes aimed at the conclusion of a collective agreement.
- Solidarity strikes are legal depending on the strength of interest in the primary conflict of the party conducting the solidarity strike, taking into account mainly economic considerations. The ECSR has asked for the case law on solidarity strikes, and clarification as to whether there are situations in which strikes pursuing ‘other objectives’ may be lawful, even during the period of validity of a collective agreement.
- Participation in a lawful strike is regarded as excused absence from work, with no entitlement to wages, compensation or sickness insurance benefits. The ECSR has requested confirmation that entitlement to reimbursement of health care expenses (for example, doctor’s fees and medicines) is not affected by participation in a strike and confirmation that participation in a lawful strike cannot be just cause for a worker’s dismissal.

- With regard to the right to take collective action, strikes shall be decided upon and declared by trade unions, at enterprise or higher level, otherwise they are illegal. Since a ban on strikes not called or endorsed by a trade union is in breach of Article 6, paragraph 4, the ECSR requests clarification as to whether a group of workers without specific legal status may lawfully call a strike and, if not, whether such workers may easily and without undue delays or formalities form a trade union for the purpose of calling a strike.

Can you provide information on this point?

Slovenia

- Public sector employees are guaranteed the right to associate
- No restrictions on the right to form or join a trade union for the police or the armed forces
- Joint consultation, voluntary negotiations and conciliation and arbitration take place

Problems:

- Strikes are not permitted where they are not related to the negotiation or amendment of a collective agreement
- Only national or local branches of a trade union are legally entitled to call a strike
- Prohibited from striking are: judges, prosecutors, members of the armed forces, fire-fighters, air traffic controllers
- Prohibited or limited by law: police, criminal prosecutors, emergency health care, customs and rail transport

I) Council of Europe

Right to organise

The situation in Slovenia is **in conformity with Article 5** of the Revised Charter (Conclusions XVI-2, Volume 2). Public sector employees are guaranteed the right to associate in accordance with the State Employees Act and the Basic Rights stemming from the Employment Act (BRSEA). No restrictions are provided by law on the right of members of the police or the armed forces to found or join trade unions.

Employment protection is afforded to trade union *representatives*.

The activity and formation of trade unions may be restricted by law where this entails a measure which is necessary in a democratic society to protect national security, the public interest or the freedom and the rights of others. In this respect, the Committee has requested information on the measures which may be taken against the formation and activities of trade unions, on what grounds, by what authorities and following which procedures.

With regard to *joint consultation*, the situation in the public sector is in conformity with Article 6, paragraph 1 of the Revised Charter.

The 1996 Institutes Act (which still regulates the matter, since the new Collective Agreement Act remains under discussion) establishes employees' right to participate in management via the relevant institute's councils, representing the founder, the institute's workers and users, or the interested public. The state, municipalities or towns may participate in the founding of these councils. They adopt the institute's statutes or rules and other general regulations, approve its work and develop programmes and monitor their implementation, draw up financial plans and propose changes to and the development of their activities.

Other forms of joint consultation are provided for in the public sector.¹

The statutory basis for collective bargaining and the *promotion of machinery for voluntary negotiations* derives from the BRSEA and the Employment Act, valid also for the public sector, in which the state is the employer.

Collective agreements are negotiated at all levels by the relevant trade unions on the civil servants' side and by government-appointed representatives on the employer's side.

Conciliation and arbitration within the civil service are governed by Act No. 313/2001 on the public service, pursuant to which disputes over the negotiation of collective agreements are resolved through the appointment of an arbitrator or a six-member, parity-based arbitration committee, whose decision is then included in the draft state budget to be submitted to Parliament.

In Conclusions XVI-2, the Committee requested confirmation that in the context of civil service the arbitrators are appointed according to the same rules that govern arbitration in the private sector, and what the consequences of arbitration committees failing to reach a decision are.

Right to take collective action

Since Supervision Cycle XVI-2, the conclusions in this connection are that there is *non-conformity with Article 6, paragraph 4* on two grounds, also affecting public utilities employees:

- Strikes are not permitted if not related to the negotiation or amendment of a collective agreement.

Pursuant to the Collective Bargaining Act, strikes are permitted only in limited circumstances, such as during the negotiation of collective agreements, but only as an ultimate means of exerting pressure, the parties having failed to reach an agreement and provided that the required conciliation and arbitration procedures have been adhered to.

After conclusion of the agreement, strikes are permitted only if their aim is the modification of the agreement and only if the parties have explicitly provided for such a possibility in the agreement itself. In all other cases to call a strike is illegal.

Solidarity strikes are legal as long as the calling party can prove a sufficiently strong economic interest in the primary conflict.

Workers should have the right to cease work or carry out other forms of collective action on all other occasions involving some form of collective bargaining. In particular, workers should have a right to strike where their health and safety are at stake or where there is a threat of collective redundancies.

- Groups of workers have no right to call a strike: pursuant to Section 17 of the Collective Bargaining Act, depending on the geographical scope of the collective agreement in

¹ In accordance with the Collective Agreement on Non-Economic Activities (CANEA), the management should consult the workers on particular issues: workers are invited to submit their opinions within a certain period after the issue of the management proposal; after this period has expired, the person responsible may make the decision him- or herself; if it does not take the opinions of the workers into account, reasons must be given.

question. Only national or local branches of trade unions are legally entitled to call a strike. But ‘the principal means of collective action’ must be guaranteed also to groups of workers who are not collectively organised in a trade union or in any other legal form.

Other restrictions are declared compatible with Article 6, paragraph 4. The Constitution guarantees all workers *the right to strike*, with the *exception* of judges, prosecutors, members of the armed forces, fire-fighters and air traffic controllers.

Strike action in the sectors of defence, police, criminal prosecution, emergency health care, air navigation, customs and rail transport is forbidden or limited by law.

Where strikes are permitted, 10 days’ notice must be given, which should also indicate how the minimum service required by law will be ensured. Strike action in the public service may not put at risk the functioning of state bodies, and seven days’ notice must be given, again indicating how the minimum service will be ensured.

Restrictions apply to civil servants and workers in the social, health, telecommunication and nuclear fields, in which a strike could endanger people’s life or health; the minimum service requirement applies to all public officials, the duties that must be carried out during a strike being defined in general regulations or collective agreements (failure to comply with these requirements is punishable by a fine).

In order to assess the situation, the Committee needs detailed information on each case in which a minimum service requirement is imposed, including the scope and duration of the strike, the nature of the service in question, the consequences of disrupting it and the proportion of workers requisitioned to perform the minimum service.

With regard to instances and consequences of strikes in the police force, the defence forces, aviation, customs and railway transport, as well as other areas in which maintenance of a minimum level of activity is required, in recent years in practice there have been no such strikes, disputes having been resolved by negotiation following the prior announcement of a strike.

II) Action to be taken

Right to organise

The activity and formation of trade unions may be restricted by law (see report).

Provide information on the measures which may be taken against the formation and activities of a trade union, on what grounds, by what authorities and following what procedures.

Provide information on whether, in the context of civil service, arbitrators are appointed according to the same rules as govern arbitration in the private sector, and on what the consequences are if arbitration committees fail to reach a decision.

Right to take collective action

Strikes are not permitted where they are not related to the negotiation or amendment of a collective agreement.

But the Committee considers that workers should have the right to cease work or carry out other forms of collective action on all other occasions involving some form of collective bargaining. In particular, workers should have a right to strike where their health and safety are at stake or where there is a threat of collective redundancies.

To change this situation changes to the law are needed. Of course, this problem is not specific to the public sector, but applies to all sectors and therefore is of concern to all trade unions.

Regarding minimum services, information is needed on each case in which a minimum service requirement is imposed, including the scope and duration of the strike, the nature of the service in question, the consequences of disrupting it and the proportion of workers requisitioned to perform the minimum service.

Spain

- The right to form and join a trade union is recognised
- Consultation, voluntary negotiations (similar to the private sector) and dispute resolution mechanisms are in place
- Civilian employees of the armed forces are entitled to negotiate

Problems:

- Judiciary, magistrates, judges and public prosecutors can join professional associations, but not trade unions
- Officers of the national police can form trade unions, but only members of the national police may join
- Conscripts in the armed forces, members of the Civil Guard, the national police and some regional police forces are not allowed to join unions and can participate in trade union activities only when if they take place outside military establishments and not in uniform
- Prohibited from striking: members of the armed forces and the Civil Guard, judges, magistrates and district attorneys
- The government has statutory powers to impose arbitration to end a strike in exceptional circumstances

Article 28 of the Spanish Constitution provides that '[a]ll have the right to unite freely. The law may limit or except from the exercise of this right the armed forces or military institutes or the other corps subject to military discipline and shall regulate the peculiarities of its exercise for public servants'.

Paragraph 2 of this Article states: 'The right of workers to strike in defence of their interests is recognised. The law which regulates the exercise of this right shall establish the necessary guarantees to ensure the maintenance of essential community services'.

The Law on urgent measures for the reform of the civil service of 2 August 1984 is the principal legislation governing the position of civil servants.

No distinction is made in Spain between the central and local civil services since the same legal provisions apply to all civil servants and public sector workers.

The Spanish government has the power to establish the basis and principles of these regulations, but their scope may be limited, enlarged or specified by relevant standards issued by the Autonomous Communities.

This means that, while the Law of 2 August 1984 reforming the civil service applies to the civil service both nationally and locally, the same law also states that within this legislative framework the Autonomous Communities may introduce provisions applying to their own civil service.

Similarly, Law No. 7 of 2 April 1985, which establishes the basis for the local civil service, stipulates that the Autonomous Communities may legislate on the recruitment and training of their civil servants and those of the provinces and municipalities in their respective territories.

The legislation of 1963–64 distinguishes between the various categories of staff in the Spanish public administration:

1. career civil servants in the service of the state;
2. career civil servants in the service of territorial authorities;
3. ‘employed’ civil servants;
4. contractual workers.

1) *Career civil servants* whose salaries or pay comes from the general state budget are those who, by virtue of legal appointment, occupy permanent posts either in the central administration consisting of the different ministries and their independent bodies or in the devolved administrations.

Members of staff who are assigned to work in constitutional bodies are also civil servants. They serve the General Judicial Council, the Parliament, the Constitutional Court, the Defender of the People (ombudsman) and the Court of Auditors. These employees enjoy particular status deriving in part from the general legislation applying to civil servants.

Military personnel in the armed forces are also civil servants, although the legal provisions applying to the military are specific to a closed public service system with a hierarchical structure, which limits the exercise of certain rights, mainly relating to political or trade union activities.

Civil servants in the police at state, Autonomous Community or local level are subject to special treatment which differs from that stipulated by the Law on security forces and personnel.¹ This subjects all police officers to an organisational system and hierarchical structure.

Finally, others with special status are civil servants in corporate administration and secretaries of official chambers of commerce, industry, shipping and urban cleaning, whose career path is regulated by the central administration.

2) *Career civil servants in the service of territorial administrations* are themselves divided into the following three categories:

- (i) civil servants from the central administration, transferred to work for Autonomous Communities;
- (ii) civil servants with national accreditation who work in the local administrations in the following three positions of responsibility: (a) secretary-general, (shall be) treasurer and (c) chief finance officer responsible for the economic and budgetary management of the local authority;
- (iii) civil servants of a specific local authority, recruited directly by the Autonomous Communities, provinces and municipalities, are divided into several groups: general

¹ Law No. 2/1986.

administration (administrative duties), special administration (engineers, architects, culture and health professions) and special services (municipal police, fire brigade).

3) '*Employed civil servants*' is a term describing two categories of employee who do not occupy permanent posts and consequently are not, strictly speaking, civil servants. They are:

- (i) temporary staff appointed at national and local level to occupy permanent posts in an emergency or as required until a career civil servant can be permanently appointed to the post;
- (ii) staff appointed and dismissed on a discretionary and personal basis to posts of a political nature or to provide special assistance; these employees are obliged to leave their posts at the same time as the national or local political authority that appointed them.

4) *Contractual workers* constitute more than half of the workforce in the Spanish public administration. These are employees under private law who are subject to the labour legislation that applies to employees in private sector companies.

New developments: In May 2006 a new Civil Service Statute was agreed between the Ministry of Public Administration and the trade unions FSP (State Federation of Public Services) and FSAP (Trade Union Federation of the Public Administration). This statute introduces a unified approach to employment conditions in the public sector, such as career paths, code of conduct and collective bargaining. Parliament backed the statute, which should have come into force in the meantime.

The statute recognises the right to strike as a full right, but demands that essential community services are maintained, without specifying them.

Some smaller trade unions have criticised the statute on a number of points, such as the failure to limit the proportion of temporary staff in the total workforce, the rules on the right to strike, the lack of promotion from non-civil to civil service staff and the introduction of a management category that falls outside collective agreements.

I) Council of Europe

Right to organise

The right to form and to join (and *not* to join) trade union organisations is recognised, *inter alia*, by Article 28 of the Constitution, by Act No. 19 /1977 and by Institutional Act No. 11/1985.

Under Section 401 of Act 6/1985 on the judiciary, *magistrates, judges and public prosecutors* can join professional associations but they are not entitled to engage in political activities or have links with political parties or trade unions.

Act 2/86 on security corps and forces allows *police officers in town council departments* to organise without any restriction. Officers of the *national police* (Article 18.2) can form trade unions with the sole participation of members of the national police; they are entitled to federate with other trade unions constituted solely of members of the national police or similar international trade unions.

Military conscripts and members of the *Civil Guard* (Instituto armado de la Guardia Civil)² may participate in political and trade union activities when they are outside military establishments and not in uniform, provided that these activities do not have repercussions for the armed forces and military service as such (Act No. 8/1998).

Right to bargain collectively

General terms and conditions of employment for civil servants are established by collective agreement, but pay mechanisms are set by the state. Spanish civil service legislation stipulates that agreements made between trade unions and the administration must be incorporated into a legal framework in order to take effect. The same procedure is found in Greece, the Netherlands and Portugal.

Act 9/1987 on the representative organs of civil servants and Act No. 7/1990 of 19 July 1990 grant civil service representatives (staff delegates and staff committees) a consultative role in respect of a whole range of questions.

As regards the *promotion of machinery for voluntary negotiations*, the bargaining procedure applied to civil servants has become more and more similar to the one used in the private sector, although certain restrictions remain stemming from the employer's status as public law subject. 'Negotiating tables' (Act 9/87) to determine civil servants' pay and working conditions produce two types of agreement: (i) directly applicable 'pacts' and (ii) 'agreements' to which the competent government bodies subsequently have to give 'formal consent'.

After an improper governmental intervention despite an existing collective agreement in 1997,³ normal bargaining procedures for public employees have been restored.⁴

Civilian employees of the armed forces are entitled to negotiate with the authorities on the basis of the relevant provisions of the Workers' Statute, subject to considerations of national security.

² The Civil Guard has military status and so is subject to the same legal regime as the armed forces with respect to trade union rights, although it performs standard police functions and is under the joint authority of the Defence and Interior Ministries.

³ Complaint brought before the ILO Committee on Freedom of Association by the General Workers Union (UGT) in 1997: the government imposed a wage freeze for 1997 despite the existence of a collective agreement between the public administration and the trade unions for the period 1995–97, providing for annual wage increases in accordance with specified criteria. The amount of the increase was not stated but, according to the agreement, should have been fixed through annual bargaining. The government maintained that the public administration had honoured its bargaining obligation, but that it was impossible to reach an accord; it further stated that the decision to impose a wage freeze was taken by Parliament when it passed the Act on the General State Budgets. The ECSR observed that, where a general agreement has been concluded and duly adopted by the authorities as in the given case, any unilateral intervention in its terms could be justified only with reference to Article 31, which did not seem to cover the wage freeze in question, though prescribed by law.

⁴ An extensive public sector agreement for the period 2003–2004 was signed on 13 November 2002 aiming at modernising and improving the public service. Furthermore, on 21 September 2004 a Declaration for Social Dialogue in the Public Administration determined as its objectives the promotion of stable employment, improving working conditions and beginning a process of negotiations to reform the Statute of Public Sector Employees and to reinforce workers' participation and negotiation rights in the public administration.

The creation of the office of mediator to find solutions to *disputes* over civil servants' working conditions is laid down in Act No. 9/87 and Act No. 7/1990, pursuant to which, if no agreement can be reached in negotiations, the public authorities and trade unions now themselves appoint the mediator(s) by joint agreement.

The right to collective action

The right to strike does not apply to members of the armed forces, members of the Civil Guard, judges, magistrates and district attorneys.

In the absence of specific regulations governing strikes in essential services, the Constitution,⁵ the case law of the Constitutional Court⁶ and the disciplinary rules for civil servants apply, as do the rules contained in Royal Legislative Decree 17/1977.⁷

No list of essential services or objective criteria for their definition exists: both the Constitution and the current legislation require *certain services essential* to the community to be maintained during a strike, but the power to define such services more precisely lies with the government (or with regional executive organs, where appropriate) and the Constitutional Court's case law. The Spanish authorities have supplied many examples of decisions which declared various services to be essential in case of industrial action⁸ and the method adopted by the courts seems to preclude *a priori* decisions on the nature of services.⁹

But only once the strike has been called and the decision has been made by the authorities to order the establishment of minimum services may this decision be appealed before the

⁵ Articles 28.2 and 37.

⁶ Main features of the case law of the Constitutional Court stemming, inter alia, from Decision 11/1981: the obligation to maintain certain essential services for the public during a strike concerns not only civil servants but also private-sector workers engaged in activities of particular importance to the life of the community; what constitutes an essential service can be defined only on a case by case basis. It lies with the government and not with employers themselves to draw up a plan of minimum services. But this plan is subject to appeal, including an appeal to the Constitutional Court. In exercising this power to define essential services, the government must consider not so much the nature of the service itself as the nature of the interests catered for by the service. The expression 'essential services' is not equivalent to 'normal performance of duties' (Decision 51/1986 FJ/5). The strike must not be deprived of all consequence or effect but must be calculated to enable pressure to be brought on the employer without the harm done to the community becoming, in turn, an additional means of pressure for the employer.

⁷ Article 10, paragraph 2, as interpreted by the Constitutional Court's judgment of 8 April 1981 (Supreme Court judgment of 10 May 1986): 'the competent governmental authority shall take the necessary steps to ensure the continued operation of the services of those undertakings responsible for public services in general, services acknowledged to be absolutely necessary, and in particularly serious circumstances'.

⁸ In 1988, during a strike in the non-university public education sector, the Spanish government, considering such education an essential service, imposed – unilaterally and without consulting the professional organisations – a minimum service which, according to the Trade Union Confederation of Workers' Committees (CC.OO), deprived all non-university teachers of the right to strike. According to supplementary information submitted by the Spanish government (Conclusions XV-1, Volume 2) the provision (Resolution of 21 April 1997) of minimum services in non-university educational centres of the Ministry of Education and Culture in which strikes were on-going was the only instance in which the decision to establish minimum services was taken. The resolution stipulates that directors of the centres concerned must ensure that the centres are open and specify in each case what minimum services are necessary.

⁹ In Judgment 948/93, the High Court itself observed that the approach taken in the case law 'requires the establishment of mechanisms which will allow the decisions to enforce minimum services to be subjected to immediate legal supervision'.

civil (administrative and litigation) courts, with the possibility of suspension of the effects of the appealed act as a mechanism for ‘immediate legal supervision’.

The Constitutional Court, however, has imposed certain restrictions on the notion of essential services. In particular, the level of service required must not be out of proportion to the breach of fundamental rights threatened by the strike.¹⁰

Judicial review and negotiations between government and the two sides of industry to determine what staff should be co-opted to provide minimum services are fundamental safeguards of the right to strike in essential public and economic services.

*At present, the situation is not in conformity with the Charter on the ground that section 10.1 of Royal Legislative-Decree No. 7/1977 allows recourse to arbitration to end a strike in cases that go beyond the requirements set out in Article 31 of the Charter: according to the law in question, the government has statutory powers to impose arbitration to end a strike in exceptional circumstances, namely when it considers that there is a threat to the rights and freedoms of others because a strike has gone on too long, the parties' positions are irreconcilable and too much damage is being done to the national economy.*¹¹

The information provided with respect to some cases of interference by the government does not show that the imposition of binding arbitration to end a strike is necessary within the meaning of Article 31.¹²

II) Action to be taken

The government has statutory powers to impose arbitration to end a strike in exceptional circumstances, namely when it considers that there is a threat to the rights and freedoms of others because a strike has gone on too long, the parties' positions are irreconcilable and too much damage is being done to the national economy.

Are you experiencing problems in this respect in practice?

¹⁰ For example, on 22 February 2000 the Supreme Court ruled that the imposition of an exceptionally high level of minimum service in the Galician railway system was justified by the fact that local elections were scheduled for that day.

¹¹ Under a Supreme Court judgment of 9 May 1988, it was stated that the situation has to be exceptional or there has to be a cumulative series of circumstances, all of which have to be considered by the government before the latter can make use of its exceptional discretionary power.

¹² The Governmental Committee of the European Social Charter (112th meeting, Strasbourg, 2–4 May 2006) invited Spain to bring the situation into conformity with the Charter.

Sweden

- The right of association is guaranteed
- Voluntary negotiations and conciliation and arbitration procedures are in place
- Industrial action is permissible as in the private sector

Problems:

- Industrial action has to be called by an organisation

Article 17 of the Swedish Constitution of 1 January 1975 stipulates that: ‘Unless a law or convention decides otherwise, workers' organisations, and employers and employers' organisations, have the right to take measures leading to a labour dispute’.

As in Finland, collective agreements are largely used to define the mechanisms of freedom of association.

The Swedish central administration consists of 270 agencies that in principle are independent of the government. This principle of independence from central governmental authorities was introduced at the beginning of the seventeenth century. Parliament and the government set the objectives and allocate a budget to each agency.

The structure and process of decision-making in the central administration is also highly decentralised. The state's powers as an employer are generally delegated to agency directors.

Terms and conditions of employment for employees in the central administration are very similar to those for employees in the private sector. The differences have to do with the exercise of public authority by the agency, the employer.

The majority of public administration employees in Sweden can be considered as contractual employees. Their status is governed by public law. Nevertheless, the rules applying to them are those applicable to employees in the private sector. A number of specific laws, such as Law No. 1994 on the Public Service, set a framework for the responsibilities of certain posts and for labour disputes. But the terms and conditions of employment (pay, training, pensions, and so on) are settled by collective bargaining and collective agreement.

The Swedish public service system is based on the employment model, with the exception of the judiciary (judges and prosecutors), the police and diplomats, who enjoy special status and have access to a traditional career path.

The law on codetermination at work applies to the central administration. As a consequence, the agencies have a duty to provide the trade unions with information on both the financial management of the agency and personnel management. Representative trade unions must be regularly consulted in the event of significant changes to these. Nothing, however, prevents agency directors from subsequently taking unilateral decisions. In fact, the obligation to negotiate applies as soon as decisions affect the agencies and the administration, as employer, in their relationship with the employees.

Since 1994 the state has no longer been an employer. It has delegated its powers to the Swedish Agency for Government Employers (SAGE). This agency, consisting of 80 representatives elected by the agencies and appointed by the government, is supervised and financed by its members (membership is compulsory). Its purpose is to coordinate its members' interests and to represent them in collective bargaining at central level. It also provides technical support and a cooperation structure for its members.

I) Council of Europe

Right to organise

The Codetermination Act of 1976 on industrial relations, which still regulates the subject in conformity with the Charter, in Section 7 states that: 'right of association means the right of employers and employees to belong to an organisation of employers or employees, to benefit from their membership, as well as to work for an organisation or for the founding of one'. All workers' organisations normally enjoy the same powers and, in particular, the general right of negotiation on matters concerning relations between employers and workers or their respective organisations (Article 10 of Act No. 380/1976).

Sections 11 and 13 of the 1976 Act on the Joint Regulation of Working Life, as well as information provided by the ILO, permit the Committee to conclude, without reservation, that Sweden satisfies its obligations under Article 5.

Nevertheless, no legal safeguards protect the negative freedom of association (the right *not* to join a union).¹

Right to bargain collectively

With regard to joint consultation, the 1965 reform of the right to bargain collectively introduced a comprehensive right for public employees in Sweden to bargain and to conclude collective agreements.

On the other hand, the 1976 Codetermination Act contains an implied exclusion from regulation by collective agreement in matters involving considerations of political democracy and the exercise of public authority: in order to exclude such issues from regulation by collective agreement and industrial action, the parties in the public sector of the labour market also concluded the Special Basic Agreement for the Public Sector.²

Nevertheless the same Codetermination Act introduced a degree of participation for public employees as well, so that some 'codetermination agreements' were immediately concluded in the public sector.

In 1993, a special advisory committee was set up within the National Labour Market Board to cooperate with employers' and employees' representatives in matters connected

¹ And therefore unorganised workers have no protection against pressure to join a trade union in order to obtain employment: the practice of pre-entry closed shops, affecting part of the private sector and constituting a ground for an assessment of non-conformity with the Charter, still exists, but *it does not affect the public sector*.

² The Labour Court has on more than one occasion played down the importance of political democracy in view of the fact that the right to negotiate constitutes only a right to participate in discussions and does not amount to actual involvement in decision-making.

with the organisation and activities of the public employment service; similar committees have also been established within the county labour boards.

With regard to *voluntary negotiations*, in 2002 the Swedish report stated that cooperation agreements have been concluded for the national government sector and the local government sector, with the aim of enabling the parties in the national government sector to *carry out constructive bargaining without resorting to collective action*.

Similarly, the local government agreement is aimed at 'creating the best possible opportunities for conducting central negotiations on pay and general conditions of service with results which are economically reasonable for the sector', that is, with pay developments in harmony with developments 'in the world at large'. The local government agreement also contains rules on mediation and on notice of collective action.

As far as *conciliation and arbitration procedures* are concerned, on 1 June 2000, the National Mediation Office was established: in addition to mediating in labour disputes it shall also promote the efficiency of wage formation, for instance by summoning parties to discussions or by otherwise apprising itself of impending or current collective negotiations.

The National Mediation Office may, with the consent of the bargaining parties, appoint one or more negotiation leaders or mediators. If industrial action is imminent or has already started, the Office may appoint a mediator without the consent of the parties, unless the parties are bound by a registered agreement containing rules on mediation.

The mediator shall endeavour to bring about an agreement between the parties; he or she may put forward settlement proposals; where it is deemed to facilitate the resolution of a dispute, he or she may order a party to postpone impending action for up to 14 days (such an order may be issued only once per mediation). Collective action taking place in violation of a postponement order may entail liability.³

Agreements concluded for the state sector and the local government sector provide for rules on negotiation procedures, on the obligation to give notice and to participate in mediation and on cooling-off periods.

Right to take collective action

Under Swedish law industrial action is in principle lawful unless specifically prohibited. Any trade union and employer or association of employers shall be entitled to take collective action unless otherwise provided by law or by agreement.

Secondary or sympathy action is also lawful provided its objective is to support collective action that is lawful and ongoing.

In Sweden the right to strike is virtually unlimited. Nevertheless, in the private and public sectors, the parties to collective agreements may not initiate labour disputes on the issues covered by the agreements during their period of validity: this is the 'statutory peace obligation'.

³ With respect to the high level of the fines, the situation is currently not in conformity. See below, under paragraph 4.

In the case of the public sector, nowadays industrial action is permissible in accordance with the same principles as those applying in the private sector.

Certain restrictions imposed by the 1994 Public Employment Act are not very extensive:

- For *public employees engaged in work involving decision-making*, the only permissible forms of collective action are strikes, refusal of overtime work or boycott of new employees: the employer may lock out these employees.⁴
- For *workers involved in the exercise of public authority* (for example, in the courts), one of the prohibitions is that the only form of limited action permitted is an overtime ban.
- For *work other than that involving exercise of public authority*, the only restriction is that industrial action must not be directed at influencing Sweden's political situation.

The rules specified in the Act are supplemented by provisions laid down in a basic agreement restricting, for example, the right to take industrial action in connection with issues for which regulation by collective agreement could be regarded as detrimental to political democracy.

The police and other emergency services may take strike action, but if they do they are obliged to guarantee a minimum service.

In addition, the Swedish Parliament can pass a law in order to end a dispute considered to be harmful to society.

With regard to who is entitled to take collective action, in the case of public sector employees the law expressly requires industrial action to be called by an organisation.⁵ Since there is complete freedom to form trade unions and the process is not subject to excessive formalities that would impede the rapid decisions that strike action sometimes requires, and also taking into account the high rate of trade union membership, the ECSR considers that the situation is in conformity with the Revised Charter.

The period of notice of collective action is seven working days. Moreover, as mentioned above, the National Mediation Office may order a party to postpone impending action for up to 14 days. The Committee considers these 'cooling-off' periods to be in conformity with the Charter.

What instead was the object of strict observation by the Committee is the failure by a party to give requisite notice of collective action, which may lead to a relatively high fine (*varselavgift*);⁶ action in violation of a postponement order may then entail liability.⁷ The situation was *not in conformity* with the Charter up to the last cycle, on the ground that the fines imposed on the trade unions concerned, decided by a district court (*tingsrätt*) at the request of the National Mediation Office, were considered to be disproportionate.

⁴ Various forms of collective action are lawful, if not specifically prohibited by law: work stoppage (strike or lock-out), blockade, boycott, refusal to work overtime, work-to-rule, partial actions.

⁵ In 2000, since only those entitled to be a party to a collective agreement can lawfully call a strike, and a group of non-unionised workers does not have this right, the situation was considered to be not in conformity.

⁶ Between 30,000 and 100,000 Swedish kronor (SEK) (3,301–10,831 euros).

⁷ Ranging from 300,000 SEK (33,008 euros) to a maximum of one million SEK (108,310 euros).

An evaluation of the activities of the National Mediation Office for the period 2000–2004 has recently been carried out and is supposed to assess, *inter alia*, the National Mediation Office's power to levy the abovementioned notice charge.

At the outcome of the investigation, expected for spring 2006, the Committee wishes to be informed of any development in this respect; it above all wishes the next report to specify in particular whether, following the aforementioned evaluation, fines may still be imposed, under what circumstances, with respect to which employees' and employers' organisations, and what their amount may be.

II) Action to be taken

For public employees engaged in work involving decision-making, the only permissible forms of collective action are strikes, refusal of overtime work or boycott of new employees: the employer may lock out these employees.

For workers involved in the exercise of public authority (for example, in the courts), one of the prohibitions is that the only form of limited action permitted is an overtime ban.

For work other than that involving exercise of public authority, the only restriction is that industrial action must not be directed at influencing Sweden's political situation.

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At the outcome of the investigation, expected for spring 2006, *the Committee wishes to be informed of any development in this respect; it above all wishes the next report to specify in particular whether, following the aforementioned evaluation, fines may still be imposed, under what circumstances, with respect to which employees' and employers' organisations, and what their amount may be.*

Can you provide information?

Turkey

- Civil servants are free to form and join trade unions; but according to the ITUC Annual Surveys 2006/2005, the Public Employees Trade Unions Act PETU excludes numerous workers from joining trade unions. This covers, among others: employees of the National Assembly and Presidents' General Secretariat; high ranking members of the legal profession (for example, Supreme Court judges) and the teaching profession (for example, presidents of universities and directors of higher schools); top ranking civil administration officials; members of the armed forces; employees in the Ministry of National Defence and of the National Intelligence Service; state budget and state personnel experts; security personnel in public institutions; teachers in private education.
- Joint consultation is in place

Problems:

- Turkey has not ratified Articles 5 and 6 of the European Social Charter
- Too many (categories of) public employees are excluded from joining a trade union
- The PETU Act does also not provide for the concept of collective bargaining, but only 'collective consultative talks'. The issues covered by these talks are limited to financial matters (salaries, allowances, bonuses and compensation), apparently excluding other working conditions
- A complete strike ban applies in the public sector, despite the recent amendment of the PETU Act
- The list of essential services is also too extensive according to the ILO: for example, it should not cover the production, refining and distribution of natural gas and petroleum

Action to be taken:

- Continue pressure for Turkey to ratify Articles 5 and 6 of the European Social Charter
- Changes are needed with regard to the strike ban in the public sector

Of all the constitutions of the states surveyed, the Turkish Constitution of 27 December 1947 is the only one to have such detailed provisions governing the position of public servants.

Article 51 of the Constitution, as amended on 17 October 2001, establishes the right of workers and employers to organise in trade unions and associations in order to protect and develop their economic and social rights and interests.

With regard to public servants, Article 128, paragraph 2 stipulates that 'the law regulates the qualifications, appointment, functions and attributions, rights and obligations and pay and allowances of civil servants and other public sector workers, and other matters relating to their status'.

Article 1 of Law No. 4275 of 12 June 1997 stipulates that 'state civil servants are permitted to establish trade unions and other higher professional organisations and to join these in accordance with the arrangements defined in the Constitution and special laws'.

Article 27 prohibits the right to strike for these workers: 'It is prohibited for state civil servants ... to organise, declare or publicise a strike ... state civil servants may not take part in a strike ... may not support or provoke the continuation of a strike'.

I) Council of Europe

Turkey does not consider itself bound by these provisions; therefore it does not participate in the reporting and supervision procedure.

Nevertheless, in the Seventh report on certain provisions of the ESC which have not been accepted, the ECSR takes note of the information provided in the view of the procedure as for Article 22.¹

Right to organise

Although civil servants are now free to form and join trade unions or 'higher bodies', these will be exclusively composed of civil servants.

The report contains no information on the right of *police officers* to form and join trade unions. The committee assumes that the expression 'members of the security forces' also covers the police, who would therefore be banned from forming or joining a trade union.

Joint consultation

The report states that joint consultation is carried out within permanent or *ad hoc* joint committees, which meet at different levels in both the private and the public sectors. Reference may also be made to the Social and Economic Council, the Labour Agency and the Minimum Wages Commission. At company level, meetings are held by health and safety committees and annual paid holiday committees. In addition, the social partners may hold consultations whenever they consider it necessary.

Right to collective action

Although the Act amending the Constitution has recognised the right of public servants to bargain collectively (Article 53 of the Constitution), a complete ban continues to exist as far as strikes are concerned.

Prohibition and suspension of strike action

Free trade zones

Act No. 32/8 of 15 June 1985 on free trade zones stipulates in the first provision (transitional) that strikes are prohibited in free trade zones for 10 years following their creation. Conflicts of interest arising during this period are resolved by the Supreme Arbitration Board.

Activities and services

Strikes and lockouts are prohibited in the following activities and services (Section 29 of Act No. 2822 on collective agreements, strikes and lockouts):

- operations for saving life and property;
- funeral and mortuary services;

¹ ECSR, Seventh report on certain provisions of the Charter which have not been accepted, Council of Europe Publishing, Strasbourg, 2000.

- exploration, production, refining or purification and distribution of water, electricity, gas, coal, natural gas and petroleum;
- banking services and public notaries;
- fire-fighting and land, sea, railway and other urban public transportation by rail;
- health institutions such as hospitals, clinics, sanatoria, health care centres, pharmacies, or establishments which prepare vaccinations and serums, with the exception of institutions manufacturing medicines;
- education or training centres, nurseries, and old-age retirement homes;
- cemeteries;
- establishments run by the Ministry of Defence, Chief Constabulary or Coast Guard Command.

Furthermore, anyone who calls a strike or lockout in the services listed above risks a term of imprisonment of up to two years (Section 72 of Act No. 2822 of 1983).

Temporary prohibition of strike action

Section 31 of Act No. 2822 of 1983 provides for the prohibition of strike action or locking-out during wartime or during a general or partial mobilisation. Moreover, 'when the life of the community is paralysed due to disasters caused by fire, flooding, landslides, avalanches or earthquakes', the Council of Ministers may issue an order prohibiting any strikes or lockouts in areas or branches or activity they consider necessary.

Suspension of strikes

According to Section 33 of Act No. 2822 of 1983, the Council of Ministers may suspend for a period of 60 days any lawful strike or lockout that has been called, ordered or commenced if it is likely to be prejudicial to public health or national security. An appeal can be lodged with the Council of State in order to cancel the order issued by the Council of Ministers.

II) ILO

On several occasions the Committee of Experts and the Committee on Freedom of Association have drawn the attention of the Turkish government to significant violations of the freedom of association of civil servants, particularly the right to collective bargaining, both in legislation and in practice.

CFA Report No. 338, case no. 2366

The Confederation of Public Employees' Trade Unions (KESK) and Education International (EI) vs the Government of Turkey²

This case concerns the court action taken by the Attorney-General of Ankara requesting the court to order the dissolution of the Trade Union of Public Servants in the Education Branch because its statutes stated as one of the trade union's purposes the 'defence of the right of all citizens to education in their mother tongue and the development of their culture'.

² Complaint submitted on 9 July 2004 by the Confederation of Public Employees' Trade Unions and joined on 1 September 2005 by Education International.

In its conclusions, the CFA emphasises that measures to dissolve a trade union should be applied with the utmost caution and only *where serious acts have been duly proven* (§1303).

II) Action to be taken

*What is the situation today in Turkey with regard to trade union rights in the public sector?
Can changes be envisaged and how?*

United Kingdom

- There is a right to form and join a trade union
- Joint consultation, voluntary negotiations and conciliation and arbitration are in place

Problems:

- Members of the police force are obliged to join a specific organisation
- Trade unions are restricted in their right to determine membership conditions: they can only exclude members on the ground that they have taken part in the activities of a given political party
- Trade unions may not indemnify a member for a penalty imposed by a court
- Collective action is limited to disputes between workers and their employer
- The requirement to give notice to the employer of a ballot on industrial action is excessive, as strike notice is to be given before taking action in any case
- Employment protection when taking part in industrial action is insufficient, as workers are only protected for 12 weeks and the strike has to be lawful and official (authorised by a trade union)

Action to be taken:

- Trade unions should not be restricted in their rights; the issues mentioned above should only be a question of trade union statutes – changes should be envisaged
- Can changes be envisaged with regard to employment protection?

The British civil service is a limited concept, consisting of civil servants who are servants of the Crown. These are exclusively officials working for ministries or their executive agencies. The other significant category of public servants is that of local authority employees. They are employed on a contractual basis and covered by general labour legislation. Their terms and conditions of employment are extremely variable from one local authority to another and within the same authority.

Staff in prisons, the health service and other public services are subject to common labour law and are not considered as civil servants in the strict sense of the term.

Since 1995 the general framework of working conditions for civil servants is set out in the Civil Service Management Code by an Order in Council, which contains the rules relating to human resources management.

The constitutional framework of rights and duties of civil servants is set out in a Civil Service Code that came into force on 1 January 1996. It was revised on 13 May 1999 to take account of devolution for Scotland and Wales.

The legislation might indicate that this is a career system, but the New Public Management implemented in the civil service leads us to believe that it is now an employment system, particularly for high-ranking civil servants.

The United Kingdom does not have specific provisions on the right to strike in public services, and so the general regulations apply.

Up to 1980, trade unions enjoyed total immunity in the event of civil court actions pursued in the wake of a strike (this immunity being based on the 1906 Trade Disputes Act).

Since 1981 a number of laws have restricted this right:

- the conditions for calling a strike have changed;
- only lawful disputes continue to be exempt from civil liability;
- the concept of lawful disputes has been defined and an exhaustive list of lawful disputes established;
- non-strike clauses have been introduced;
- requisitioning is possible in order to ensure the continuity of public services.

The Emergency Powers Act of 1920 authorises the government to declare a state of emergency and to take measures to guarantee the ‘essential needs of the community’ if there is a threat to the supply and distribution of food, water, fuel and electricity or to the transport system. After seven days, Parliament must approve the declaration of a state of emergency.

I) Council of Europe

Right to organise

The situation of *members of the police force*, obliged by statute to join a special organisation and forbidden to set up or to join any other trade union,¹ has not been satisfying for years.

Only in the tenth cycle of conclusions did the Committee agree not to revert to this matter any longer, since compulsory affiliation of police officers below the rank of superintendent to the police staff associations did not entail the obligation to pay subscriptions to such associations, and non-payment of a subscription did not carry any penalty.

The role of the Police Federation remained substantially the same with the entry into force of the Police Act 1996. In particular, a person who was a member of a trade union before joining the police may be permitted to retain their membership.

Military personnel may establish and join any occupational trade union or central civilian trade union organisation. There is no internal consultation body for the army.

With reference to the case of Government Communications Centre (GCHQ) at Cheltenham, where the government had deprived 7,000 of the Centre's civil servants of the right to

¹ A Committee of Inquiry, led by Lord Edmund-Davies, had been established to investigate the position of members of the police force, the associations they are entitled to form and the legislation applicable to them, with a view to possible revision in light of developments in the field of industrial relations. But the report of the Commission recommended that no statutory change be made, so that the committee could not reach conclusions different from those adopted during previous supervisions: the automatic affiliation of all the staff to associations clearly indicated that they are bodies of a corporate type, subject to regulations which could not guarantee the minimum of freedom of association.

organise, in conformity with the Charter,² the ECSR was not able to assess whether the government's decision denoted a 'restriction or limitation' of the right to organise in accordance with Article 31, or a total abolition of that right, which would be contrary to the Charter.

It is not forbidden to *form trade unions*. Once a trade union has been deemed to conform to a basic definition, it can apply for a *voluntary list*, which is a precondition for a *certificate of independence*: it confers, among other benefits, that a trade union may benefit from the statutory rights and guarantees afforded to trade unions, for example, the right to take part in trade union activities, to obtain information for collective bargaining and for members to take time off for trade union duties and activities.

No restrictions are imposed on the right of a trade union to affiliate to national or international organisations.

The *right to join or not to join a trade union* is protected against dismissal and selection for redundancy.

But the law does not cover discrimination by omission (treating someone less favourably by failing to act on the grounds on trade union membership).

The concept of *representativity* does not apply under UK law, and so no formal procedures for determining representativity exist.³

UK has not been in conformity with the Charter for a long time on the ground of the right of a trade union to choose its own members and representatives. Under Section 174 of the Employment Relations Act⁴ trade unions are entitled to exclude members for reasons linked *exclusively* or *mainly* to the fact that they have taken part in the activities of a political party, not because they were affiliated to the party. This *narrows the grounds upon which a trade union may refuse admission to or expel an individual, as an excessive restriction on the right of a trade union to determine its conditions for membership, and goes beyond what is required to secure the individual right to join a trade union.*

In the 112th meeting of the Governmental Committee⁵ the UK delegate informed those present that granting more freedom to trade unions to exclude or expel political activists had received the support of the same trade unions consulted on the drafting of the new provisions.

The ETUC representative proposed a recommendation taking into consideration the repeated conclusions of non-conformity, but the President pointed out that this was the first non-conformity assessment after the amendment of Section 174.

The Committee took note of the legislative development which had occurred and urged the government to bring the situation into conformity.

² Because of the legal provision and the essential role of the Centre for the National Security.

³ The Employment Relations Act 1999 creates a statutory procedure for trade union recognition where a majority of the workforce wishes it.

⁴ As amended in 2004.

⁵ Strasbourg, 2–4 May 2006.

A *second ground of non-conformity* is due to two provisions representing unjustified incursions into the autonomy of trade unions: Section 65 of the 1992 Act severely restricts the grounds on which a trade union might lawfully discipline members;⁶ Section 15 of the TU LR(C)A makes it unlawful for a trade union to indemnify an individual union member for a penalty imposed for an offence or contempt of court.⁷

The UK delegate recently⁸ stated that it was the government's firm belief that Section 15 encourages union officials to act responsibly and prudently; moreover, by deterring reckless and unlawful behaviour by union officials, union funds are safeguarded. On the other hand, the law does provide considerable scope for unions to discipline their members and the government considers the rules in this respect excessively restrictive.

The Committee invited the government to intensify its efforts, bearing in mind the importance of Article 5 and the Recommendation previously addressed to the United Kingdom. In the meantime, it decided to await the next assessment of the ECSR.

Right to bargain collectively

Joint consultation with trade unions, worker representatives or joint consultation committees is more common in the public sector (82% of workplaces) than in the private sector (43% of firms). There is a common law giving the right of consultation to a public authority union where a previous practice of consultation has existed between a public body and a union representing workers of that body.

The last national report refers to a Civil Service Code of Practice on Information and Consultation which was drawn up by the Cabinet Office and published in April 2005.⁹

The Committee would like the next report to provide information on the content and implementation of this Code of Practice, and concludes that the situation in the UK is in conformity with the Charter.

With regard to the *machinery for voluntary negotiations*, pay agreements reached under these long-term arrangements are endorsed by the respective union executive committees and accepted by staff through a ballot. The majority of the civil service conditions of service, including pay, are the responsibility of the individual government departments and agencies.

In the case of the Senior Civil Service (approximately 3,000 posts), pay is determined centrally by the government following recommendations made to it annually by the independent Senior Salaries Review Body (SSRB). Both the government and the unions submit information for assessment to this body.

For conditions of service other than pay, the unions have the same collective bargaining rights as the rest of the service.

⁶ The purpose of this measure would be to protect union members against potential victimisation by their union.

⁷ Trade union members should themselves bear the consequences of any actions for which they are personally responsible, otherwise this could encourage reckless or irresponsible behaviour and place the union's funds at unnecessary risk.

⁸ 112th meeting of the Governmental Committee, Strasbourg, 2–4 May 2006.

⁹ That is, outside the last reference period.

The new legislation on *trade union recognition*, the Employment Relations Act 1999 (ERA), is also applicable to the civil service.¹⁰

Trade unions representing a majority of the workforce concerned may be granted recognition for the purpose of collective bargaining pursuant to a statutory recognition procedure. If the employer refuses, or fails to meet a union and discuss pay, working time and holidays, a binding procedure may be imposed by the Central Arbitration Committee. According to updated information provided in the report, over a thousand agreements have been reached since this statutory recognition procedure was introduced.

The UK has a very advanced *conciliation, arbitration and enquiry system*.

In 1992, the collective agreements in the civil service provided that access to arbitration on pay disputes shall be only on an agreed basis.¹¹ In cases of disagreement of one party in submitting a pay dispute to arbitration, either could suggest alternative means to resolve a dispute.

In designated essential services the procedure differs: if a trade dispute in a designated essential service exists or is envisaged, and the life, health or personal safety of the whole or part of the community are endangered, the government may issue a directive which increases the cooling-off period, makes an order for the continued supply of goods or services and must appoint a Court of Inquiry. The Court of Inquiry investigates the dispute and makes a written decision which is binding on the parties. To date no designated essential services order has been made. However, the ECSR wishes to be kept informed of any such orders and any incidences of arbitration being imposed in essential services.

Right to take collective action

The Employment Act of 1982 imposes extremely stringent conditions on the right to strike. In 2004, the revised Employment Relations Act 1999 (ERA) brought in some changes. Nevertheless, the *situation is still one of non-conformity on three grounds*.

A collective action is lawful if limited to disputes between workers and *their employer* – not even the *de facto* employer if this was not the immediate employer.¹² The Committee therefore considered that the *scope for workers to defend their interests* through lawful collective action *is excessively circumscribed*.

The UK delegate recently¹³ stated that the government did not agree with the conclusion of the ECSR, and consequently did not take any measure: the existing situation matched the needs of the British industrial relations system. The Committee adopted a second

¹⁰ Section 148 of the Trade Union Law Reform Consolidation Act (TULR (C) A) 1992, which it has consistently found to be in breach of Article 6, paragraph 2. This, in effect, permits employers to offer better terms and conditions to employees if they relinquish union recognition and negotiation. It provides employers with an exemption from liability as long as the purpose includes the furthering of a 'change in his relationship with all or any class of his employees' (XV-1, Volume 2).

¹¹ Rather than on a unilateral basis as was previously the case.

¹² In this respect, for example, British courts excluded collective action concerning a future employer and future terms and conditions of employment in the context of a transfer of part of a business (University College London NHS Trust v UNISON).

¹³ In the 112th meeting of the Governmental Committee, Strasbourg, 2-4 May 2006

warning and urged the government to bring the situation into conformity as soon as possible.

The requirement to give notice to an employer of a ballot on industrial action has always been found excessive, since in any case unions must issue an additional strike notice before taking action. The government considers that notices are useful in order to show employers that the situation has moved closer to possible strike action and to allow time for more efforts on both sides to try to resolve the dispute without strike action.

At the 112th meeting of the Governmental Committee,¹⁴ the UK delegate noted that a number of improvements had been made to the Employment Relations Act 2004 to simplify and clarify pre-industrial action notices. However, the requirement that unions have to give notice to an employer of industrial action remains. The government was satisfied that the law in this area did not represent major difficulties for the trade unions, and it therefore saw no reason to change the law.

The ETUC representative said that on this point the British trade unions were not satisfied with the situation. The Committee expressed concern at the continued violation of the Charter on this point and urged the government to reconsider its position with a view to bringing the situation into conformity as soon as possible.

With regard to the *consequences of collective action, the protection of workers against dismissal when taking industrial action is insufficient.* Workers participating in industrial action are protected against dismissal for 12 weeks,¹⁵ beyond which those concerned lose their employment protection.¹⁶ The Committee still regards such a time period as an arbitrary criterion for protection against dismissal. Moreover, employment protection is only granted in the event that the strike, in addition to being *lawful*, is also *official* (that is, authorised or endorsed by a trade union). The Committee further noted that it was not lawful for a trade union to take industrial action in support of workers dismissed in such circumstances, which it held to be a serious restriction on the right to strike.

At the 112th meeting of the Governmental Committee,¹⁷ the UK delegate referred to the distinction between official and unofficial action: the government contested the view that individuals taking unofficial industrial action should be accorded the same protection as those taking official action.

The Committee, while referring to Recommendation RecChS(2005)1, expressed concern at the continued violation of the Charter on this point and urged the government to reconsider its position with a view to bringing the situation into conformity as soon as possible.

¹⁴ In the 112th meeting of the Governmental Committee, Strasbourg, 2 – 4 May 2006

¹⁵ Days on which employees are locked out from their workplace by their employer do not count towards the protected period.

¹⁶ employers are obliged to take all reasonable procedural steps to resolve the dispute with the union before dismissing any employees after the end of the protected period (employment tribunal case Mr J Davies v Friction Dynamics)

¹⁷ Strasbourg, 2 – 4 May 2006

II) ILO

CFA Report No. 336, case no. 2383

*The Prison Officers' Association vs the Government of the United Kingdom*¹⁸

At issue in this case is the violation of ILO principles by section 127 of the Criminal Justice and Public Order Act of 1994, which prohibits prison officers from taking industrial action.

In justifying this prohibition, the British government asserts that prison officers exercise authority in the name of the state and guarantee essential services, and that in return they have adequate compensatory guarantees.

With regard to the exercising of *authority in the name of the state*, the CFA recognises that officials working in the administration of justice are officials who exercise this kind of authority. Their right to strike may therefore be restricted or even prohibited.

On the issue of essential services, the CFA considers that the prison service is clearly one in which the interruption of the service could give rise to an imminent threat to the life, health or safety of the whole or part of the prison population or the general public. The prison service constitutes an essential service in the strict sense of the term. The right to strike may therefore be restricted or prohibited by the government.

With regard to compensatory guarantees, the CFA emphasises that they are insufficient in this case, in particular for prison officers from the private sector to whom certain functions of the prison service are contracted out.

III) Action to be taken

The situation of members of the police force, obliged by statute to join a special organisation and forbidden to set up or to join any other trade union, has not been satisfying for years.

The UK has not been in conformity with the Charter for a long time on the ground of the right of a trade union to choose its own members and representatives. Under Section 174 of the Employment Relations Act trade unions are entitled to exclude members for reasons linked *exclusively* or *mainly* to the fact that they have taken part in the activities of a political party, not because they were affiliated to the party. This narrows the grounds upon which a trade union may refuse admission to or expel an individual, *as an excessive restriction* on the right of a trade union to determine its conditions for membership, and goes beyond what is required to secure the individual right to join a trade union.

At the 112th meeting of the Governmental Committee the UK delegate informed those present that granting more freedom to trade unions to exclude or expel political activists had received the support of the same trade unions consulted on the drafting of the new provisions.

¹⁸ Complaint submitted on 20 August 2004

The ETUC representative proposed a recommendation taking into consideration the repeated conclusions of non-conformity, but the President pointed out that this was the first non-conformity assessment after the amendment of Section 174.

Section 65 of the 1992 Act severely restricts the grounds on which a trade union might lawfully discipline members. Section 15 of the TU LR(C)A makes it unlawful for a trade union to indemnify an individual union member for a penalty imposed for an offence or contempt of court.

The Committee invited the government to intensify its efforts, bearing in mind the importance of Article 5 and the Recommendation previously addressed to the United Kingdom. In the meantime, it decided to await the next assessment of the ECSR.

The last national report refers to a Civil Service Code of Practice on Information and Consultation which was drawn up by the Cabinet Office and published in April 2005.

Could you provide this information in the next report?

A collective action is lawful if limited to disputes between workers and their employer. The Committee therefore considered that the scope for workers to defend their interests through lawful collective action is excessively circumscribed.

The UK delegate recently stated that the government did not agree with the conclusion of the ECSR, and consequently did not take any measure: the existing situation matched the needs of the British industrial relations system. The Committee adopted a second warning and urged the government to bring the situation into conformity as soon as possible.

The requirement to give notice to an employer of a ballot on industrial action has always been found excessive, since in any case unions must issue an additional strike notice before taking action.

At the 112th meeting (2006) of the Governmental Committee the UK delegate noted that a number of improvements had been made to the Employment Relations Act 2004 to simplify and clarify pre-industrial action notices. But the requirement that unions have to give notice to an employer of industrial action should remain. The government was satisfied that the law in this area did not represent major difficulties for the trade unions, and it therefore saw no reason to change the law.

The ETUC representative said that on this point the British trade unions were not satisfied with the situation. The Committee expressed concern at the continued violation of the Charter on this point and urged the government to reconsider its position with a view to bringing the situation into conformity as soon as possible.

What action is/can be envisaged?

With regard to the consequences of collective action, the protection of workers against dismissal when taking industrial action is insufficient. Workers participating in industrial action are protected against dismissal for 12 weeks, beyond which the workers lose their employment protection. The Committee still regards such a time period as an arbitrary criterion for protection against dismissal. Moreover, employment protection is only granted in the event that the strike, in addition to being *lawful*, is also *official* (that is,

authorised or endorsed by a trade union). The Committee further noted that it was not lawful for a trade union to take industrial action in support of workers dismissed in such circumstances, which it held to be a serious restriction on the right to strike.

What is the state of play?

**European
Trade Union Institute**

Bd du Roi Albert II, 5
1210 Brussels
Belgium

Tel.: +32 (0)2 224 04 70
Fax: +32 (0)2 224 05 02
etui@etui.org
www.etui.org

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