Trade union rights in the public services

Alexander De Becker and Lissa Nissen, University of Ghent

February 2023

Report produced as part of the project: Defending and strengthening trade union rights in public services

With the financial support of the European Commission

Contents

Introduction

This report is the final product of a collaboration between three European trade union federations for public services (EPSU), police (EuroCOP) and military personnel (EUROMIL). The two-year European Commission-funded project ran from January 2021 to January 2023 and involved a launch conference in May 2021, followed by five regional meetings and a final conference in September 2022. It covered all 27 European Union Member States and what were at the time the five candidate countries. The research project's major focus was the implementation of the most important trade union rights within an international and European framework.

After the project started, it emerged that there was an unprecedented opportunity to submit a report to the Council of Europe's European Committee of Social Rights (ECSR). The annual ECSR process normally involves reports from member state governments on specific groups of trade union and social rights and so the three federations agreed with the colleagues from the University of Ghent to shift the focus of the main project deliverable from a final report to a special report to the ECSR. The report was published and submitted to the Committee on 1 July and will form the basis of future exchanges between the federations and the ECSR.

The three federations agreed that the final deliverables from the project would be a next steps document setting out proposals for future collaboration and this report – a more focused report than that anticipated at the beginning of the project. This explores the main international legal avenues available to trade unions to defend their rights and then an overview of the state of play of the main rights to organise, negotiate and take collective action.

Legal avenues for protecting trade union rights

The main legal avenues for defending trade union rights are afforded by:

- the International Labour Organisation and its Conventions,
- the Council of Europe and its European Committee of Social Rights monitoring the European Social Charter,
- the European Court of Human Rights and the European Convention of Human Rights; and
- the European Union's Charter of Fundamental Rights.

The International Labour Organisation

The key Conventions of the International Labour Organisation (ILO) on fundamental trade union rights and for trade union rights in the public services include:

- 87 on freedom of association and protection of the right to organise
- 98 on the right to organise and collective bargaining
- 151 on labour relations in the public service

Among European Union and candidate countries, Convention 151 has not been ratified by: Austria, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Ireland, Lithuania, Malta, Montenegro, Poland, Romania, Serbia. While 154 has not been ratified by: Austria, Bulgaria, Croatia, Denmark, Estonia, France, Germany, Ireland, Italy, Luxembourg, Malta, Montenegro, Poland, Portugal, Serbia, Turkey.

There is no specific convention on the right to take collective action but it has been recognised by the supervisory bodies of the ILO as an intrinsic corollary to the right to organize, protected by Convention no. 87.

The ILO has a complaint procedure, although its subsequent recommendations are not legally binding, but try to guide the national authorities into respecting the fundamental principles of ILO Conventions. National reports have to be written by countries on the implementation and the application of ILO Conventions and national trade unions can submit remarks with regard to these reports. Based on the deliberations of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), a selection of cases is referred to the ILO annual International Labour Conference and in particular the Committee of Application of Standards (CAS) for further deliberation and to decide if action is needed in the form of technical assistance, inquiry procedures, complaints, representations, etc..

There is a specific complaint procedure dealing with Conventions 87 and 98, dealt with by the ILO's Committee on Freedom of Association. The ETUC can assist national trade unions with complaints for violations of these conventions and the Committee sends observations to the member state concerned which carry a moral authority.[1]

The European Social Charter

The European Social Charter is an instrument of the Council of Europe and covers very important legal principles, such as the right to work conditions (article 3). With regard to this report, the articles 5 and 6 are key. Article 5 provides the right to organise and article 6 the right to collective bargaining (with an explicit recognition of the right to strike).

Every four years member states will send a report, containing four thematic groups. One of the groups "Labour Rights" includes reporting on the compliance with articles 4, 5 and 6 of the European Social Charter. In order to give the national social partners the opportunity to make their remarks on these reports, the member states need to send a draft to them beforehand.

A similarity with the ILO conventions is that a monitoring system is included in the European Social Charter. It implies a collective complaint procedure in case the European Social Charter is violated. This system has been ratified by 16 countries: Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia, Spain and Sweden. Furthermore, the countries also have to ratify articles 5 and 6 of the Charter.

Some countries have made an exemption for the application of article 6, §4 (right to collective action) RESC, with general exemptions in Austria, Luxembourg and Poland but exemptions specific to military staff in the Netherlands[2] and Serbia[3]. Spain declared that it will interpret and apply articles 5 and 6 of the European Social Charter, read with Article 31 and the Appendix to the Charter, in such a way that their provisions will be compatible with those of Articles 28, 37, 103(3) and 127 of the Spanish Constitution, which are all articles dealing with the rights of certain public servants.

National trade unions, associations, EuroCOP and EUROMIL are on the list of international non-governmental organisations which can file a complaint. EPSU cannot do it as social partner yet, but EPSU is a member of ETUC which can file a complaint as social partner. It is a rather informal, written procedure which focuses on violations of the European Social Charter through legislation or case law. A European trade union as ETUC can assist EPSU, EuroCOP and EUROMIL in the collective complaint procedure. EPSU, EuroCOP and EUROMIL (as well as ETUC) can also assist national trade unions.

With regard to the application of the articles 5 and 6, the European Committee on Social Rights, which deals with collective complaints, has ruled some important decisions for the studied group, i.e. the current public sector employees, police officers and military staff.

The most important decisions and reports with regard to civil servants, police officers and military staff will be summarized in this chapter.

With regard to civil servants, the general report concerning conclusions XIX-3 of the European Social Charter (2010) stated that some categories of civil servants (e.g. Internal Security Service, home workers and the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products and the Office for Forest Seed Production) did not enjoy trade union rights. This was judged to be a breach of article 5 of the European Social Charter. The same general conclusions also decided that specifically Croatia violated article 6, paragraphs 2 and 3 of the European Social Charter because the civil servants cannot negotiate with regard to their employment conditions. Furthermore, no arbitration procedure for civil servants exists.

With regard, to article 6 § 4, Denmark and Germany did not allow the right to strike for their civil servants that enjoy a specific status. Denmark has not yet changed this legislation, which leads to an ongoing breach. However, this has a limited influence given the decreasing number of actual civil servants. In Germany a similar limitation exists , however this will not be resolved in the short-term, given the fact that the German Basic law provides acceptable limitations to the right to strike for civil servants, police officers and military staff in article 33.

The major case with regard to police officers concerns the complaint procedure of EUROCOP against Ireland in 2018.

The collective complaint procedure which was used by EUROCOP led to the conclusion that the police trade union could not join national employees' unions and that an absolute prohibition of the right to strike had to be considered a breach of article 6 § 4 of the European Social Charter. The consequence was an adaptation of Irish regulation which indicates the importance of procedures before the European Committee of Social Rights (ECSR).

EUROMIL set up a similar procedure with regard to the right to join trade unions and the right to collective bargaining for military staff in Ireland. The outcome in 2018 was slightly different. The ECSR decided that there was a breach of article 5, since the entire military staff was excluded from the right to organise. Similarly, within the case of the military Guardia di Finanza in Italy, the ECSR decided that exceptions for military staff with regard to the right to organise needed to be proportionate. The staff of the Italian Guardia di Finanza needed to be included in collective bargaining procedures. Military staff should have the right (as police officers) to bargain collectively over pay issues. Moreover, the ECSR considered a general exclusion of the right to strike for military staff disproportionate.

Even if the reports and decisions of the ECSR often have an important influence on the behaviour of the Member State concerned (e.g. the adaption of the existing regulations), such decisions nor the national reports are legally binding. They do not render any binding legal consequences and therefore have to be considered as a form of soft law.

The European Convention on Human Rights

With regard to the application of the European Convention on Human Rights, the importance of the case law concerning the application of article 11 of the European Convention on Human Rights cannot be underestimated. Article 11 of the European Convention on Human Rights guarantees the freedom of association and freedom of assembly.

The main scope of the European Court of Human Rights is however fundamentally different from the collective complaint procedures within the framework of the ILO and the European Social Charter. It concerns individual cases, and can only be used after all national procedures have been exhausted. ETUC (but this also potentially includes EPSU, EuroCOP, EUROMIL) can intervene as a third party, if it can show an interest. With regard to "trade union rights", this can be considered a useful protection. Furthermore, ETUC, EPSU, EuroCOP and EUROMIL can support the national trade union by representing or assisting it before the European Court of Human Rights where European and comparative aspects can be included in the proceedings.

Since the judgment in the case of Enerji Yapi Yol Sen vs. Turkey (21 April 2009), the European Court of Human Rights decided that the right to assembly not only includes the right to organise (ECRM, Schmidt and Dahlström vs. Sweden, 6 February 1976), and to bargain collectively (ECHR, Demir and Baykara, 12 November 2008), but also the right to strike. Exceptions need to be restrictively interpreted. With regard to EUROMIL, two important cases need to be mentioned: the cases Matelly and Adefdromil (both against France) were judged on the 2 October 2014. In both cases, the Court decided that while the freedom of association of military personnel could be subject to legitimate restrictions, a blanket ban on forming or joining a trade union encroached on the very essence of that freedom and was thus a violation of article 11 of the ECvHR.[4]

The most important legal element is that the case law of the European Court of Human Rights is legally binding for the member states concerned. Obviously, the jurisprudence of the European Court of Human Rights only renders a decision in the individual pending case, but all Member States have to analyse the consequences of the case law for their own territory. It is therefore of utmost importance

that the case law of the European Court of Justice is closely monitored, since the evolution in the case law of the European Court of Human Rights may significantly influence the possibilities for collective rights in the near future.

The EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights also stipulates two important liberties which play a fundamental role in guaranteeing the right to organise, the right to bargain collectively and the right to strike. Article 12 of the EU Charter of Fundamental Rights recognises the freedom of association, while article 28 of the same Charter provides the right to negotiate and to conclude collective agreements and the right to take collective action. Article 27 stipulates the Workers' right to information and consultation within the undertaking in good time, in line with Union, national laws and practices.

The recognition of the abovementioned rights in the framework of the EU Charter of Fundamental Rights is the result of important preparatory work[5].

However, the EU Charter of Fundamental Rights does not have direct effect. The provisions are not legally binding. Regulations or Directives need to be enacted in order to provide a legal basis for the different EU-Member States.

Three fundamental rights

This section provides a summary of some of the main elements of a more detailed report that was submitted to the Council of Europe's European Committee of Social Rights.

The right to organise

In general, it can be stated that while civil servants enjoy the right to organise, the execution in practice may be more complicated.

Some minor positive evolutions can be indicated. While police officers in Turkey do not have a right to establish or to join a trade union, civilian and unarmed personnel working in auxiliary services in the police may be trade union members.[6] In this context, two labour unions were established, however, the number of members and rate of representation are very low.

In a judgement of 13 June 2018, the Italian Constitutional Court concluded it was unconstitutional to ban the right to organise for military personnel and that they should be allowed to form and join associations with a trade union character. While the existing legislation was not been adapted yet, several associations of Italian soldiers have been recognised in the meantime by the Defence minister as "associations with a trade union character". Recently, the Act of 28th April 2022 changed the code of military order in the sense that military staff can now form and join an association with a trade union character. Nevertheless, a prior consent for registration of the Minister of Defence is still required, which fundamentally weakens the reform.

Civil servants

The right of senior government officials exercising decision-making powers, to be elected at steering bodies of trade unions is still denied in Albania and Poland. The current Albanian Act on civil servants (in force since 2014) contains a prohibition for civil servants from the senior management to be elected members of the steering bodies of trade unions or professional associations. Also, with regard to Poland some civil servants exercising public powers (listed in section 52 of the Act on civil servants) are prohibited from holding a position within a trade union. The current legislation has not changed since.

According to the Bulgarian Act on the Ministry of Interior civil servants working in the Ministry of Interior are not allowed to join or affiliate with national trade unions outside the Ministry of Interior. The ECSR has consistently held that article 5 implies for the organisations themselves, the right to establish and join federations. We hereby also refer to the decision of the ECSR of 12 September 2017 following the Complaint No. 112/2014 (EUROMIL v. Ireland, §§ 47-49).

In the case of Malta, the Prime Minister has the power to declare a certain office in the public service to be an office whereof the holder may not be a member of a trade union because he may be required to represent or advise the Government in industrial relations with the trade union or unions. The holder of this office may not become, or ceases to be a member of a trade union. This prohibition to join a trade union is an implied term of the contract of employment. Although the Employment and Industrial Relations Act limits the number of such offices whereof the holder may not be a member of a trade union, it implies a discretionary power of the Prime Minister to choose which holders of office are excluded from their right to organise.

In addition to the existence of trade unions for civil servants, the faculty of Hungarian Government officials was created by law, which plays an important role concerning the right to consultation. This is a professional body consisting out of government officials within the public administration and which is a separate legal entity that can self-govern. The MKK operates on the basis of compulsory membership. The government official becomes a member of the MKK upon appointment. The MKK, among others, protects the authority of the Faculty of Government Officials, the interests of its bodies and members, and the rights of government officials. The MKK is not a trade union, but performs similar tasks in practice and is therefore competitive with the trade unions. The Hungarian affiliate confirmed that politically the possibility to freely organise and form trade unions is limited.[7]

Police officers

In general, it can again be stated that police officers enjoy the right to organise. However, limitations to the exercise of this right can be set up within the limitations of article 5 ESC and article 11 ECvHR, which means when they are prescribed by law, necessary in a democratic society and are proportionate to achieve this legitimate aim. Some countries however have enacted legislation that goes a lot further.

Turkey still has an absolute prohibition on police officers exercising any trade union rights. They are not allowed to establish or join a trade union. Related to this, they do not have a right to collective bargaining and no right to strike.

The Act on State Police in Albania prescribes the monopoly of one existing trade union: the State Police Union. Members of the Greek police force have the right to become a member of a trade union, but can only be member of the primary trade union organization of the Police Directorate or of the district where they serve. Although police officers in Cyprus are free to join a trade union, the number of trade unions allowed is limited to two: one for the senior offices and one for the other ranks.

In Hungary, in addition to the existence of trade unions of police officers, another entity was created by law that plays an important role for the right to consultation: the faculty of law enforcement staff. The same reasoning as for civil servants above can be repeated.

In its decision of 2 December 2013 following the Complaint No. 83/2012 (EUROCOP v. Ireland) the ECSR considered that the prohibition in Irish legislation against police representative associations from joining national employees' organisations was a violation of article 5, because it had the factual effect of depriving them of the ability to negotiate on pay, pensions and service conditions as represented

by national organisations. In its 3rd assessment of the follow-up the ECSR found that the regulations had been amended and that the police associations now can take part in national public service pay negotiations.

EuroCOP confirmed that Irish police officers lack the possibility to join and form a real trade union, since they are only allowed to join a representative association. However, the affiliates indicated that as of 2019 the Irish police have access to the industrial relations mechanism of the Industrial Relations Act, which grants them a limited ability to participate (not directly but indirectly) in collective bargaining and the opportunity to go to court. Furthermore, the affiliates indicated that since 2020 a new dispute resolution procedure exists, which grants the opportunity for internal conciliation with management.[8] However, the major issue of not being allowed to form and join a real trade union remains.

A difficult locus standi also currently exists in Malta. The Malta Police Association has been transformed to the Malta Police Union. The Maltese affiliate indicated that the possibility to become a member of a registered trade union of their choice is, in practice, impossible.[9]

Military staff

In the current position of the Committee Article 5 RESC allows States Parties to impose restrictions upon the right to organise of members of the armed forces and grants them a wide margin of appreciation in this regard, subject to the terms set out in Article G of the Charter. However, these restrictions may not go as far as to entirely suppress the right to organise, such as the blanket prohibition of professional associations of a trade union nature and of the affiliation of such associations to national federations/confederations.[10]

In several of the researched countries it is still forbidden for military staff to form and/or to join *a trade union*: Croatia, Cyprus, Czech Republic (including the Security and Intelligence Service)[11], Estonia, France, Ireland, Latvia (including state security institutions), Lithuania, Poland, Romania, Spain and Turkey.

In Ireland for the purpose of representing members in relation to matters affecting remuneration and such other matters as the Minister may specify in regulation, an association can be established. Such an association cannot be affiliated to any trade union. The associations, even if they are not trade unions, have joined the ICTU but under certain conditions. In determining whether these professional associations are compatible with Article 5, the Committee already noted that it is not bound by the categorisation adopted by the national authorities of a representative body, or its official name (whether a “trade union” or a “professional association”), when determining whether the requirements of Article 5 have been fulfilled. Each time it is necessary to examine whether in the concrete situation the representative body has the basic trade union rights (the right to express demands with regards to working conditions and pay, the right of access to the working place, as well as the right of assembly and speech- ECSR decision 2nd December 2013, Complaint No. 83/2012, EUROCOP v. Ireland, §76-80).[12]

In the case of Portugal,[13] EUROMIL has launched a complaint with the European Committee on Social Rights within the framework of the European Social Charter. For military staff, the current Defense Act stipulates a right to join and form professional military associations but they cannot constitute full trade unions.

The right to collective bargaining

The right to collective bargaining has been judged as a part of the freedom of association as guaranteed by article 11 ECvHR (ECtHR, Demir and Baykara, 12 November 2008, nr. 169). Following this judgment of the European Court on Human Rights, which implied a violation of article 11 ECvHR, the Turkish Act No. 4688 on Public Servants' Unions and collective bargaining was amended in 2012. Although the right to collective bargaining was enshrined by this amendment in article 19 of Act No. 4688, in practice this right does not appear to mean much. The conviction by the European Court on Human rights thus only had a partially positive effect.

The impact of this case law may not be underestimated. The European Court of Human Rights has recently confirmed its case law for the public sector stating that freedom of association, the right to collective bargaining and the right to strike are all legally linked to article 11 ECvHR.[14]

Civil servants

In Albania in the services of vital importance, no real collective bargaining, nor a right to strike exists since the interruption of work in these services would jeopardize the life, the personal security or the health of a part or the entire population.[15] In the event of collective conflicts in these services of vital importance and following unsuccessful mediation and reconciliation attempts, a compulsory arbitration procedure with a binding decision of a Court of Arbitration shall resolve the dispute.

While national legislation recognizes the right to collective bargaining of civil servants, it seems that it is strongly limited in practice in Bulgaria, Hungary, Lithuania, Poland and Turkey. In each country this is caused by different factors and therefore these specific cases are discussed separately below.

In Bulgaria, it has been caused by the adjustment of the civil servants act in 2016. It is not clear whether real collective bargaining is possible today.

While the Hungarian Constitution enshrines the right to collective bargaining, in practice real collective bargaining does not exist. First of all, the conclusion of collective agreements is not allowed for civil servants. Hungarian legislation only provides the possibility to consult trade unions. The Hungarian affiliate however indicated that the Hungarian government opposes the right to consultation for trade unions and it uses specific decrees in order to circumvent the right to consult the trade unions.[16] Cultural and health care workers were outsourced without any prior social dialogue, while modifications in the status of child care workers were made without the consultation of trade unions.

In Poland, members of the civil service corps and employees of state offices employed on the basis of appointment are excluded from the provisions of the labour code relating to collective agreements. In a judgment of 17 November 2015, the Polish Constitutional Court decided that this was not unconstitutional nor incompatible with ILO convention no. 98. According to this court a distinction can be made between the 'stronger' right of freedom of association and other related trade union rights, including the right to collective bargaining. Restrictions on these other trade union freedoms can, according to the Polish Constitutional court, be more far-reaching than restricting the fundamental freedom of coalition itself. Since the Polish trade union act provides for the possibility of consultation and expression of opinions by trade unions in the broader process of determining the conditions of employment of members of the civil service corps, the Court found no violation of the constitutional right to collective bargaining.

In the case of Turkey: although civil servants' unions and confederations have a right to be parties to collective agreement negotiations within the framework of Act No. 4688, in practice for several reasons this right seems only to exist on paper. Firstly, only the confederation with the most members

(in practice: a pro-government trade union) is authorized to conclude a collective agreement. Other trade unions only have an observer status at the negotiation table. In practice there also cannot be genuinely free collective bargaining, because civil servants still do not have a right to strike and in the event of disagreement in the process of collective bargaining they are subject to compulsory arbitration according to articles 33 and 34 Act No. 4688. In this procedure the Board of Arbitration is composed of mostly government-appointed members.[17]

While collective bargaining through the conclusion of collective agreements is allowed for civil servants (including police officers and military staff) in Romania, it is not allowed for topics concerning renumeration and financial topics. Only when wage rights are set by special laws between minimum and maximum limits, concrete rights may be determined by collective bargaining, but only within the legal limits.

However, also in Romania, collective bargaining with trade unions of civil servants does not lead to legally binding collective agreements. The Romanian affiliate described a worrying evolution.[18] The legal consequence is that Romanian authorities are not obliged to transpose the results of consultations into legally binding agreements. Romanian trade unions do not have legal means to sue the non-transposition in court. Romanian legislation complicated the position of trade unions even further. Before 2011, trade unions could participate in consultations when they represented a third of employees. Since 2011, trade unions have to represent at least 50% +1 of the employees. Alongside this modification, the Act of 2011 also limited the number of civil servants enjoying the right to strike.

Police officers

Since police officers in Turkey do not have a right to unionize, they don't have a right to collective bargaining.

While the Hungarian Constitution enshrines the right to collective bargaining, it is not possible for civil servants (including police officers and military staff) to enter into collective bargaining negotiations.

Irish police officers remain restricted from a full exercise of the right to collective bargaining. They have a limited possibility to bargain collectively because they are just associations and not real trade union. The do not have a status of "associated membership" of a trade union. Irish police officers do not know a right to strike which implies that the *ultimum remedium* cannot be used. Since 2016 the Irish associations have been invited on an ad hoc basis to negotiate with the Department of Justice. Before 2019 there was no legal foundation for this habit, but since the Irish police associations gained access to the industrial relations mechanism of the Industrial Relations Act they have obtained a limited possibility to negotiate and the possibility to start a trial. There also is an internal conciliation procedure with the management of the Irish police based on a dispute resolution procedure since 2020. Even if the situation has only partially been resolved, the complaint of EuroCOP with regard to the legal status of the Irish police officers has led to some important reforms. The complaint[19] n° 83/2012 to the European Committee of Social Rights was considered to be well-founded on 16 January 2014 (see here). It initiated the reform which was described above.[20] The Irish affiliates confirmed during the final conference the big impact of this complaint on the Irish legislator.

A major concern for the future is the situation in Malta. Maltese legislation allows police trade unions to be consulted and even to sign binding collective agreements. However, since 2015, the number of collective agreements is very low. It took until 2018 for the first sectoral collective agreement to be signed concerning the reduction of working hours. The trade unions were forced to accept a significant diminution of vacation leave in order to reduce the working hours. The next collective agreement should be signed in 2023 but currently, the Maltese affiliate indicates that no real collective bargaining

is taking place. Disputes, concerns and proposals are very often ignored.[21] The change from the Maltese Police Association to the Maltese Police Union has brought more responsibilities but it has not broadened the impact of the trade unions of police officers in Malta. The Maltese affiliate confirmed during the regional conference the difficulties for the Maltese police officers.

Military staff

Since in several of the researched countries military staff do not have a right to unionize, an immediate consequence of this is that they have no right to collective bargaining. This is the case for example in Lithuania, Poland and Turkey.

The Irish situation is very particular as a real right to collective bargaining still exists. Furthermore, the associations only have little ability to influence decisions by the Irish authorities. Irish associations have the right to submit claims via Conciliation and Arbitration Scheme. The associations have the right to consult with management. However, this does not resolve the major issue as the determination of pay and allowances is centralised through the Public Services Committee (PSC) within the Irish Congress of Trade Unions (ICTU). The military associations PDFORRA and RACO are specifically excluded from membership of ICTU. As a consequence, trade unions have no possibility to have any input on pay and allowances for the military staff. Currently, in 2022, PDFORRA and RACO are temporary "associate members" of ICTU without any voting rights. The only possibility to weigh on the negotiations is to give their input to the PSC. The PSC is now allowed to advance matters on behalf of military staff at national pay talks. This leads to the conclusion that the influence of the military associations remains very limited but it has improved in comparison to the situation before.[22]

In Portugal, military staff has the right to form and to join a professional association. However, the law limits their trade union rights by prohibiting trade union activities and denying them the right to collective bargaining. Besides the fact that the law provides for the right for professional military associations to be heard, these associations are barely consulted in practice. The Act of 2001 thus recognizes the freedom of association but prohibits trade union activities and denies a full right to collective bargaining. Military professional associations have the right to be heard (law in the books), but the affiliate indicates that they are hardly consulted in practice. The Portuguese government makes it very difficult for those associations in practice to even submit comments on proposals. EUROMIL has therefore submitted complaint no. 199/2021, which is currently pending at the European Committee of Social Rights, because Portuguese military staff cannot enter into a meaningful dialogue or negotiation. In short, the affiliate called the current situation window-dressing by the Portuguese government.[23] The Portuguese affiliate stressed during the final conference that it is hard to accept that the

The right to take collective action

The right to take collective action is very often not (fully) granted in the public sector, with the rights of police and military personnel most often restricted.

In most of the researched countries the regulations only mention the right to strike, whereas the concept of 'collective action' is mostly unknown. It seems that most Member States do not focus on other possibilities. Denmark may be quoted as an exception. The possibility for compulsory arbitration has been researched.[24]

Among the more positive developments, in its Act on civil servants in 2014, Albania repealed the general ban on strike for civil servants and introduced a basic right to strike. Nevertheless, this

regulation still contains many exceptions. In Turkey the Constitutional Court cancelled the general strike ban in the banking sector and in the public transport services in 2014.

Until an amendment of the Act on civil servants in 2016, civil servants in Bulgaria were only allowed to engage in a symbolic action and were prohibited from collectively withdrawing their labour. Now all civil servants have a right to strike, with the exception of some senior civil servants.[25]

Civil servants

A total prohibition to strike for civil servants still exists in Estonia, Germany (but only for the appointed civil servants, not for civil servants with contracts of employment), Poland and Turkey.

In Hungary, the right to strike in the civil service is restricted by special regulations (referred to in section 3 (2) of strike Act 1989). These special regulations are fixed in an agreement, dated 1994, between the government and the trade unions. According to this agreement the right to call a strike is restricted to trade unions which are parties to this agreement and a strike can only be initiated by a trade union with approval of a majority of the staff concerned. Furthermore, an agreement on the minimum service needs to be struck between the authorities and the trade unions concerned. The State as Employer is however not open to negotiation on minimum service which, according to the affiliate,[26] subsequently leads to a big psychological pressure on the employees not to strike. The State in practice does not want to agree with the trade unions on setting out what the minimal services are. If no agreement can be reached, tribunals and courts have to decide over the minimal services. Concerning the latest strike in the social care sector, it took three years before an agreement was reached on the minimum service. This undermines the right to strike.

Other countries, such as Romania face a growing gap between theory and practice. In the case of Romania, a trade union can only take collective action if it meets representativeness criteria and if the strike is approved by at least half of the respective trade union's members. The affiliate indicates a major problem for prison officers (who still legally have the right to strike but where the reform of the Act on Social Dialogue in 2011 has undermined the right to strike by making the social dialogue in practise almost impossible).[27]

Many countries use a system of minimum service in case of a strike of civil servants. These countries include North Macedonia, Albania, Montenegro and Serbia. The affiliates of these countries confirmed during the final conference confirmed these systems.

Police officers

A strike ban for police officers still exists in the following researched countries: Albania, Bulgaria, Cyprus, Czech Republic, Estonia, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Spain and Turkey.

As mentioned before, the European Committee on Social Rights (within the Council of Europe) has stated multiple times that - regarding police officers - an absolute prohibition on the right to strike can be considered in conformity with Article 6 §4 RESC, but only if there are *compelling reasons* justifying it. An important illustration of this is the decision of the ECSR on the collective complaint no. 83/2012 (EUROCOP v. Ireland). The ECSR observed that the Irish government did not demonstrate the existence of a concrete pressing social need that could justify that the legitimate purpose of maintaining national security could not be achieved by establishing restrictions on the exercise of the right to strike rather than by imposing an absolute prohibition.[28] The situation still is not resolved. Affiliates indicate the only possibility of collective action is to "work to rule".[29]

Malta still does not know a right to take collective action for police officers and an absolute prohibition to take collective action of any kind is still in force. The affiliate indicates that there is no negotiation possible on this topic, nor is there any reaction to the request of the implementation of a minimum service. The absence obviously affects the possibility to enforce the existing legal right to negotiate.

It is important to emphasise that the European Court on Human Rights has accepted an absolute prohibition of the right to strike of the police in Spain in the case ER.N.E. v. Spain on the grounds that the specific nature of their activities justify a very large margin of appreciation.[30]

Many other countries have put specific restrictions to the right to take collective action for prison officers into place. This include Croatia, North Macedonia, Slovenia, Belgium, and Montenegro.

Military staff

When it comes to members of the armed forces, the ECSR finds that the margin of appreciation for Member States is greater than that in respect of the police. Most of the Member States of the Council of Europe still prohibit members of the armed forces from striking. Regarding the specific nature of the tasks carried out by members of the armed forces, the special circumstance of operating under a system of military discipline, and the potential that any industrial action could disrupt operations in a way that threatens national security, the Committee considered in its decision on the collective complaint no. 112/2014 that there is a justification for the imposition of the absolute prohibition on the right to strike.[31] However, the ECSR did not accept an absolute prohibition on the right to strike for the *Guardia di Finanza* in the collective complaint no. 140/2016. In this case the Committee concluded that minimum services in the event of a strike are not organised in Italy in the national defence and public safety sector, unlike other public sectors, and that a lack of effectiveness of the collective bargaining regarding the *Guardia Di Finanza* existed.[32] With this decision the Committee stated clearly that, although the margin of appreciation is greater than that afforded to states in respect of the police, a general ban on the right to strike cannot simply be put into place.

This was an important step towards a right to take collective action, including a minimal right to strike for military staff. However, as mentioned, the report is not legally binding, which leads to the conclusion that many countries still know a total prohibition to strike: Albania, Belgium, Bulgaria (only for active military staff), Croatia (only active military staff), Cyprus, Estonia, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Serbia, Slovenia (only for military staff), Spain and Turkey.

The Netherlands grants some right to collective action to military staff. While strike law is not regulated in general in statutory law in the Netherlands, specific legislation exists for military staff. Military servants in active service do not have a right to strike. But in principle they do have the right to participate in other forms of collective action, unless participation in this other form of collective action is likely to disturb or disrupt the operational capacity of the armed forces.

In North Macedonia, the right to strike in the Armed Forces may be exercised only in conditions in which the combat readiness of the Armed Forces and the life and health of the members of the Armed Forces are not endangered. In Denmark, trade unions have an agreement with the Ministry of Defense that military personnel will abstain from the right to strike. In Sweden, military staff has the right to strike but they have never used it.

Conclusions

Fundamental rights, such as the right to form and join a trade union, the right to collective bargaining and the right to take collective actions are recognised at ILO-level, at the level of the Council of Europe (within the European Social Charter and the ECvHR) and at EU-level in the articles 12, 27 and 28 of EU-Charter of Fundamental Rights.

However, these rights are not absolute. Each of the Conventions allows limitations to be set on the execution of these rights. Limitations within the legal framework are often set up but equally often they are not in conformity with existing international legal framework.

In general, legal evolutions with regard to trade union rights for **civil servants** may be considered rather positive as far as the right to form or join a trade union are concerned. Most of the researched countries recognise the right to form and join a trade union. Nevertheless, the execution of this fundamental right leads to difficulties, mainly for senior civil servants. With regard to the right to form and join a trade union **for police officers**, the situation of police officers in Albania, Greece and Cyprus is inferior, since trade unions can be joined legally, but not in practice. For the other countries researched, it becomes clear that most of them actually respect the right to join and form a trade union. More specifically, the report of the European Social Committee has enlarged the possibility to form and join a trade union for police officers in Ireland. The impact of the Decision of 2 December 2013 on the collective complaint from EUROCOP may lead to an improvement of the foundation of the right to join and form a trade union for police officers.

The situation is the worst for **military staff**, since many of the researched countries still do not recognise the right to join or form a trade union for military staff. The European Court of Human Rights however decided in 2014 that a total prohibition for military staff to join a trade union was in breach of article 11 of the European Convention of Human Rights. This caselaw has a direct effect in all the countries studied.

The major concerns with regard to the right to collective bargaining for civil servants exist in countries where the distinction between the law in practice and the law in books is the largest. This seems to be the case in Hungary and Romania, according to the analysis of members concerned. Legal issues remain in Bulgaria, Poland and Turkey, where the right to collective bargaining is under pressure. These existing regulations are more and more at odds with the evolution in international and EU law.

Solutions can be found in directing a complaint before the European Committee of Social Rights within the Council of Europe. Even if this procedure does not grant a legally binding result, it may have an important influence. This has been done for **police officers** in Ireland with a certain degree of success. The situation in Ireland remains blurry as trade unions for police officers sometimes (on an ad hoc basis) have the possibility to negotiate with the Department of Justice. **For military staff,** the situation remains difficult as many countries do not grant the right to collective bargaining, although it has been recognised by the ECtHR, based on article 11 ECvHR. In many countries, military staff still form associations which are not considered to be trade unions to consult or to negotiate with.

The **right to take collective action**, including **the right to strike**, **for civil servants** is the right which is the most limited out of the three fundamental rights for civil servants. This matches perfectly with the findings of the legal framework as the right to strike is not considered to be absolute. Minimal services are often installed and this often to the extent that this leads to a full limitation of the right to strike. The situation in Estonia, Poland and Turkey is the most difficult as a full prohibition for civil servants to strike exists. The debate gets more difficult when it concerns the right to take collective action, including the right to strike, for **police officers**. Many of the studied countries know a full prohibition

of the right to strike. The European Committee on Social Rights and the European Court of Human Rights have indicated that a prohibition should be based on compelling grounds. Collective complaints could modify this situation.

Military staff do not enjoy the right to strike - although it is a fundamental right- and a total ban cannot be accepted according to the European Committee of Social Rights in the CGIL vs. Italy case. In North Macedonia armed forces can strike but only in conditions in which the combat readiness of the Armed Forces and the life and health of the members of the Armed Forces are not endangered. The Netherlands does not provide a right to strike for armed forces but they have the right to participate in other forms of collective action. Sweden is the only country which knows a full right to strike for their armed forces.

Bibliography and sources

Regulation

ILO-Conventions n° 87, 98 and 151 can be found on the following website: https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm
The European Social Charter of 1996 can be found on https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=163
The EU Charter of Fundamental Rights can be found on https://fra.europa.eu/en/eu-charter
The European Convention of Human Rights can be found on https://eur-lex.europa.eu/EN/legal-content/glossary/european-convention-on-human-rights-echr.html
Information on the EU Social Dialogue can be found on https://ec.europa.eu/social/main.jsp?langId=en&catId=329.

Case law

ECtHR, Schmidt and Dahlström vs. Sweden, 6 February 1976
ECtHR, Demir and Baykara vs. Turkey, 12 November 2008
ECtHR, Matelly vs. France, 2 October 2014
ECtHR, Adefromil vs. France, 2 October 2014

Some key articles

DAVIES, A.C.L., "The Right to Strike versus Freedom of Establishment in EC Law: The Battle Commences" 35 Industrial Law Journal 2006, 75-86.
DE BECKER, A. "The Legal Status of Public Employees or Public Servants: Comparing the Regulatory Frameworks in the UK, Belgium, France and the Netherlands" Comparative Labor Law and Policy Journal 2011/3, 949-990.
DE BECKER, A., "We are keeping a secret: The Increasing Equivalence of Civil-Service Concepts in the European Union", European Labour Law Journal 2011/4, 356-378.
DELARUE, R. "ILO-EU cooperation on employment and social affairs" in J. WOUTERS, F. HOFFMEISTER and T. RUYS (eds.), The United Nations and the European Union: An Ever Stronger Partnership, The Hague, TMC Asser, 2006, 93-114.
HOGEDAHL, L. K. and IBSEN, F. "New terms for collective action in the public sector in Denmark", Journal of Industrial Relations 2017, 1-16.
HUMMEL, N., *De bijzondere rechtpositie van de militair,* The Hague, Celsus Juridische Uitgevers, 2020, 794p.
YSAS, H., "Conditions for Restricting Freedom of Association and Collective Bargaining Rights of Military and Police Personnel: European Council of Police Trade Unions (cesp) v France", *International Labor Rights Case Law* 2017, 54-58.

List of interviews – August-September 2022

Irish EUROMIL affiliate Gerard Guinan (23 August), Irish EUROMIL affiliate Derek Priestley (24 August), Hungarian EPSU affiliate Viktoria Szucs (31 August), Irish EuroCOP affiliate John Parker (31 August), Maltese EuroCOP affiliate Neville Mercieca (1 September), Irish EuroCOP affiliate Antoinette Cunningham (2 September), Portuguese EUROMIL affiliate Antonio Coelho (6 September) and Romanian EPSU affiliate Razvan Gae (15 September)

Notes and references

1 R. Delarue, "ILO-EU cooperation on employment and social affairs" in J. Wouters, F. Hoffmeiser and T. Ruys (eds.), *The United Nations and the European Union: An Ever Stronger Partnership,* The Hague, TMC Asser, 2006, 93-114.
2 Exemption for military personnel and civil servants employed by the Ministry of Defence.
3 Exemption for professional military personnel of the Serbian Army.
4 ECtHR, Mattelly vs. France, 2 October 2014 and Adefromil vs. France, 2 October 2014 both at: https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22002-10230%22]}
5 Queries arose to what extent the recognition of these fundamental rights did not exceed the powers of the Union, read on this topic: N. Coghlan and M. Steiert (eds), *The Charter of Fundamental Rights: the travaux préparatoires and selected documents: chapter 4*, Florence, EUI 2020, 38 available at https://hdl.handle.net/1814/68959.
6 https://www.resmigazete.gov.tr/eskiler/2015/01/20150127-10.pdf
7 Interview with Viktoria Szucs on 31 August 2022.
8 Interview with Antoinette Cunningham on 2 September 2022.
9 Interview with Neville Mercieca on 1 September 2022.
10 ECSR 12 September 2017, Decision on the merits, Collective complaint 112/2014, EUROMIL v. Ireland, §47.
11 The ECSR already concluded in its conclusions XXI-3 (2019) that the Czech Republic was not in conformity with article 5 RESC because of the prohibition for the Security and Intelligence Service to join a trade union and to form any type of association to protect their economic interests. The same prohibition exists for the civil national security services in Hungary (§333 (1) Act XLII of 2015 on the service relationship of the professional staff of law enforcement organisations)
12 Interviews with Gerard Guinan and Derek Priestley, respectively on 23 August 2022 and 24 August 2022.
13 Interview with Antonio Coelho on 6 September 2022.
14 ECtHR, Association of Civil Servants and Union for Collective Bargaining and Others vs. Germany, 5 July 2022. The Court recognises the link but decides that domestic difference can be made with regard to restrictions on the representativeness of trade unions.
15 The following services are considered to be of vital importance: a) indispensable medical and hospital services; repealed; repealed; d) air traffic control services; e) indispensable services of protection from fire; f) services at prisons. Water supply services and electricity supply services are more recently removed from this list.
16 Interview with Viktoria Szucs on 31 August 2022.
17 Information provided by Turkish professor Aziz Celik on 27 June 2022 through e-mail.
18 Interview with Razvan Gae on 15 September 2022.
19 https://hudoc.esc.coe.int/eng#{%22sort%22:[%22ESCPublicationDate%20Descending%22],%22ESCDcIdentifier%22:[%22cc-83-2012-dadmissandmerits-en%22]}
20 Interview with John Parker on 31 August 2022.
21 Interview with Neville Mercieca on 1 September 2022.
22 Interview with Derek Priestley on 24 August 2022.
23 Interview with Antonio Coelho on 6 September 2022.
24 L.K. Hogedahl and F. Ibsen, "New terms for collective action in the public sector in Denmark", *Journal of Industrial Relations* 2017, 15.
25 Art. 47 Act on civil servants 27 August 1999, https://lex.bg/laws/ldoc/2134673408.
26 Interview with Viktoria Szucs on 31 August 2022.
27 Interview with Razvan Gae on 15 September 2022.
28 ECSR 2 December 2013, decision on the merits, collective complaint no. 83/2012, EUROCOP v. Ireland, §209.
29 Interview with John Parker on 31 August 2022.
30 ECHR 21st April 2015, no. 45892/09, ER.N.E. v. Spain, §39-43.
31 Euromil v. Ireland, Complaint No. 112/2014, §115-118.
32 ECSR 22nd January 2019, decision on the merits, Complaint no. 140/2016, CGIL v. Italy, §152.