



The right to strike in the public sector

Portugal

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This factsheet reflects the situation in October 2018 and was elaborated by Coralie Guedes (independent expert) and reviewed by EPSU/ETUI; no comments were received from the Portuguese EPSU affiliates.

1. Legal basis

International level

Portugal has ratified:

UN instruments¹

International Covenant on Economic, Social and Cultural Rights

(ICESCR, Article 8)

International Covenant on Civil and Political Rights

(ICCPR, Article 22)

ILO instruments²

Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise

(ratification on 25 May 1957)

Convention No. 98 concerning the Right to Organise and to Bargain Collectively

(ratification on 25 February 1957)

Convention No. 151 concerning Labour Relations (Public Service)

(ratification on 26 July 1982)

Portugal did not ratify

Convention No. 154 concerning the Promotion of Collective Bargaining

European level

Portugal has ratified:

Article 11 (the right to freedom of assembly and association) of the European Convention on Human Rights

(ratification and entry into force on 09 November 1978)

The Revised European Social Charter of 1996

(signature on 30 May 2002); with the declaration that the obligation under Article 6 does not prejudice, with respect to paragraph 4, the prohibition of lockouts, as specified in paragraph 4 of Article 57 of the Constitution

The Collective Complaints Procedure Protocol

National level

The legal provisions governing the public service in Portugal are not set out systematically in a single, 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, firefighters, 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**.

The Constitution of Portugal

The basic right to strike is guaranteed by the 1976 Constitution (Article 57³) and is regulated by detailed legislation.

The **right to strike** was formally recognised by Decree-Law No. 392/74 of 27 August 1974. Law No. 65/77 lay down regulations on strike action and the rights and obligations associated with it, with particular regard to the provision of essential services. This Law was subsequently amended in 1992. A law adopted on 27 April 2003 has tightened the conditions applicable to the provision of a minimum level of service.

The law does not provide for the possibility of seeking an injunction to restrain strike action. Nevertheless, the action must remain within the limits set by law.

2. Who has the right to call a strike?

The right to strike is a fundamental right of workers regardless of the sector of activity – be it public or private – of the legal nature of the employing entity and the contractual relationship with that entity, and of trade union membership.

3. Definition of strike

A strike is defined as a concerted abstention from work by employees for the purpose of exerting pressure in order to obtain decisions favourable to the collective interests of the striking employees.

Allowed types of collective action are amongst others:

- **picketing** (non-violent)
- **boycott**
- **go-slow**

A **solidarity strike** is considered legal by both legal scholars and the courts. This is due to the extremely broad terms in which the right to strike is enshrined in the Portuguese Constitution. Therefore, it is not possible to prevent employees from imposing this right against their employer. The only condition is that the primary action should itself be lawful and legitimate.

On the other hand, and although no specifically regulated in law, political strikes and wild-cat strikes are prohibited.

4. Who may participate in a strike?

The rules of the '*Lei da Greve*' are applicable to **all Portuguese workers except military or para-military personnel, civilians working in military establishments and in the civil service.**

When a strike is declared in any of the following public service sectors, the organisers are obliged by law to provide a minimum level of service:

- postal service and telecommunications
- medical services
- public health, including funerals
- power supply, mines and fuel
- water supply
- firefighting
- public transport of cattle, public perishable foods and essential goods.

Minimum services are normally agreed between employers and unions and can be stipulated or changed by collective agreements. An arbitration board determines minimum services, if they fail to agree.

Where a situation is considered to be sufficiently grave, the Government is empowered to guarantee the provision of minimum services during a strike by means of a procedure called civil requisition.

The Government can issue a ministerial order to bring any of a wide range of activities into temporary, **obligatory public service**, such as: food production and distribution, public transport, pharmaceutical production, ship construction and repair, banking and national defence production.

According to Portuguese jurisprudence (Supreme Administrative Court), the Government can only resort to civil requisition after the strike and once it is found that indeed the minimum services are not being provided. The mere threat by trade unions of not providing the minimum services or a presumption founded in any other factors are not enough ground to issue the ministerial order.

On the other hand, civil requisition can be ordered only when one knows the true extent of the effects of the strike and that knowledge results in the finding that minimum services are not being provided and, therefore, when it is possible to identify the means required to achieve them.

5. Procedural requirements

The **peace obligation** resulting from collective action applies in Portugal.

Provisions in individual employment contracts to limit the right to strike are, on the contrary, unlawful.

If the action is taken without a trade union, strikers may be represented by an elected **strike committee**. In that case, the decision to strike must be taken by secret ballot at a meeting called by at least 20% of the workers involved, or at least 200 workers. The decision is held to be valid only if the meeting was attended by a quorum of 51% and the action approved by a majority vote of the assembly.

Strike notice must be given five working days in advance, except in public utility services where it is 10 working days. Worker representatives must evaluate the impact of the strike, and designate the workers who will perform minimum service duties 48 hours before the beginning of the strike action.

The employer is prohibited from employing new workers during a strike or from replacing workers on strike.

6. Legal consequences of participating in a strike

A strike suspends the rights and duties of the contract of employment.

Taking part in a strike in violation of the rules applicable to the exercise of the right to strike is considered as 'unjustified absence'. Accordingly, it leads to punitive salary deduction, suspension of seniority rights for the duration of the strike, and disciplinary sanctions (including dismissal).

7. Case law of international/European bodies on standing violations

ILO

Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016) on Convention n° 87

Requisition of striking workers.

The Committee takes note that, in response to the allegations by the ITUC that the Government may in grave situations issue a ministerial order on a wide range of sectors to requisition striking workers, the Government states that requisition is only possible if minimum services indispensable for the satisfaction of vital social needs are not complied with during a strike, an exceptional measure that is rarely applied.

The Committee requests the Government to provide further information on the application in practice of this possibility, including examples as to when it has been resorted to.

Council of Europe

Collective complaints procedure

As to date, the ECSR did not take any decisions yet under this procedure against Portugal on article 6§4.

ECSR Conclusions

Conclusions 2014

Portuguese legislation is found to be not in conformity with Article 6(4) on the grounds that the right to call a strike is primarily reserved for trade unions, and the establishment of a trade union is subject to an excessive time frame.

The Committee recalls that workers who are not affiliated to an existing trade union where the majority of the workers in the enterprise are affiliated may exercise the right to strike only if they establish a trade union for that purpose. However, it could take up to 30 days to establish a trade union, and the Committee considers that this time frame is excessive.

In the case of a state-owned company, an arbitral tribunal formed in accordance with a specific law governing compulsory arbitration defines the minimum services. The Committee considers that it has not been established that compulsory arbitration is necessary for the protection of the rights and freedoms of others or for the protection of the public interest, national security, public health or morals and that it therefore falls within the limits of Article G of the Charter.

The Committee therefore considers that the situation is not in conformity with Article 6(4) of the Charter on the ground that it has not been established that recourse to compulsory arbitration to define minimum services in the case of a state-owned company falls within the limits set by Article G of the Charter.⁴

Conclusions 2016

The report submitted by Portugal in response to the Committee's 2014 Conclusions states that minimum services and the means needed to ensure them are defined only by ministerial order or an arbitration tribunal, as applicable, as a last resort. Further, it highlights that, '*in order to ensure that the State is not at one and the same time party to and arbiter in the setting of minimum services, in the absence of an IRCT provision or an agreement with the workers' representatives, the Labour Code gives the competence to define minimum services (...)*' to a tribunal, whenever a strike is decided at an enterprise belonging to the State Business Sector. '*This guarantees the impartiality and independence of the entity taking the decision.*'

The Committee takes note of the explanation of the situation. It confirms that, in certain cases, it may be legitimate that a body other than the parties to the dispute defines the level of minimum services to be guaranteed. However, the actual decision of any body deciding on the level of minimum services to be guaranteed must be in conformity with Article G of the Charter. The Committee asks to be kept informed of any such decisions.

Pending receipt of the information requested, the Committee concludes that the situation in Portugal is in conformity with Article 6(4) of the Charter on this point.⁵

8. Recent developments

No such relevant developments were reported.

9. Bibliography

- Clauwaert, S. (2016) *Le droit à l'action collective du point de vue de la Charte sociale européenne*, Revue de Droit du Travail, No. 6 – June 2016, pp. 438-447.
- Clauwaert, S. and Warneck, W. (2008) *Better defending and promoting trade union rights in the public sector. Part I: Summary of available tools and action points*, Report 105, Brussels: ETUI (<https://www.etui.org/Publications2/Reports/Better-defending-and-promoting-trade-union-rights-in-the-public-sector2>).
- Clauwaert, S. and Warneck, W. (2009) *Better defending and promoting trade union rights in the public sector. Part II: Country reports*, Report 108, Brussels: ETUI (<https://www.etui.org/Publications2/Reports/Better-defending-and-promoting-trade-union-rights-in-the-public-sector>).
- Novitz, T. (2017) The Restricted Right to Strike: “Far-Reaching” ILO Jurisprudence on the Public Sector and Essential Services, Comparative Labour Law and Policy Journal, 38(3/ p. 353-374.
- Warneck, W. (2007) *Strike rules in the EU27 and beyond: A comparative overview*, Report 103, Brussels: ETUI (<https://www.etui.org/Publications2/Reports/Strike-rules-in-the-EU27-and-beyond>).
- Miscellaneous:
<http://www.ugt.pt/faqs2011grevegeral.pdf>
https://www.senat.fr/lc/lc50/lc50_mono.html#toc44
<http://www.assemblee-nationale.fr/12/pdf/europe/rap-info/i1274.pdf>

Notes

¹ Status of ratification by Portugal of UN instruments:

https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang_=en.

² Status of ratification by Portugal of ILO conventions:

https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102815 .

³ 1. *The right to strike shall be safeguarded.*

2. *Workers shall be entitled to decide what interests are to be protected by means of strikes. The sphere of such interests shall not be restricted by law.*

3. *Lockouts shall be prohibited.*

⁴

[http://hudoc.esc.coe.int/eng#{%22tabview%22:\[%22document%22\],%22ESCDcIdentifier%22:\[%222014/def/PRT/6/4/EN%22\]}](http://hudoc.esc.coe.int/eng#{%22tabview%22:[%22document%22],%22ESCDcIdentifier%22:[%222014/def/PRT/6/4/EN%22]})

⁵ http://hudoc.esc.coe.int/app/conversion/pdf?library=ESC&id=CR_2016_PRT_ENG&filename=CR_2016_PRT_ENG.pdf