



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITE EUROPEEN DES DROITS SOCIAUX**

5 November 2015

**Case Document No. 4**

**European Organisation of Military Associations (EUROMIL) v. Ireland**  
Complaint No. 112/2014

## **GOVERNMENT'S SUBMISSIONS ON THE MERITS**

**Registered at the Secretariat on 30 September 2015**



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS**

**Complaint Number: 112/2014**

**EUROPEAN ORGANISATION OF MILITARY ASSOCIATIONS (EUROMIL)**

COMPLAINANT

**V.**

**IRELAND**

RESPONDENT

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**OBSERVATIONS OF THE RESPONDENT ON THE MERITS**

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**30 September 2015**

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## I. INTRODUCTION AND SUMMARY

1. This collective complaint (the “Complaint”) alleges non-conformity with Articles 5 and 6 of the Revised European Social Charter (the “Charter”) in the context of associations representing members of the Defence Forces. It has been alleged that Ireland is in breach of the Charter by reason of military representative organisations being denied:

- (a) the right to join an umbrella organisation of employees such as the Irish Congress of Trade Unions (“ICTU”);
- (b) the right to take part in collective bargaining over pay and
- (c) the right to take collective action.

2. The Respondent refutes the assertions made by the Complainant in their entirety. The Complaint is misconceived as it contains certain factual assertions which are inaccurate and omits to set out how military representative associations are capable of acting in defence of the occupational and non-pecuniary interests of their members. Furthermore, it is well established that restrictions on the trade union rights of military personnel are permissible and necessary in a democratic society given the unique nature of the military and its role in maintaining national security and public order. In particular, Ireland responds as follows:

- (i) The limitation on military representations from affiliating with ICTU does not amount to a breach of Article 5 of the Charter in light of:
  - the trade union prerogatives which are afforded to PDFORRA and RACO and
  - the unique nature of the military and its role in maintaining national security and public order;

The limitation falls within the scope of a permissible restriction for the armed forces conceived by Article 5 and in the alternative within the scope of the permissible restriction contained at Article G of the Charter. If an interference with Article 5 has occurred, the interference is justified and proportionate.

(ii) The Respondent is fully compliant with Article 6(2) of the Charter. In particular:

- The Complainant's assertion that military representative organisations are unable to take part in national pay agreement discussions is factually inaccurate. Non-affiliation with ICTU has not resulted in military representative organisations being afforded less effective means of negotiating conditions on behalf of their members, in the context of public sector agreements such as the Haddington Road Agreement. These military representative associations are parties to such national pay agreements and have negotiated tangible results on behalf of members;
- In addition to the role played by military representative organisations in national pay agreement discussions, a number of mechanisms are in place to ensure that military personnel have access to processes for the negotiation of pay and conditions and for the resolution of grievances relating to pay and conditions of employment. These include the Conciliation and Arbitration Scheme for members of the Permanent Defence Force, the Redress of Wrongs Process and access to review by the independent Ombudsman for the Defence Forces. These mechanisms are unique to military personnel and serve to compensate for the limitations on their access to the normal industrial relations machinery which applies in wider society.
- The criticisms made of the Conciliation and Arbitration Scheme are factually inaccurate and unmerited;
- In the alternative, the operation of parallel processes for military personnel is a permissible restriction in accordance with Article G of the Charter.

(iii) In the context of military personnel and in this specific national context, a prohibition on the right to strike is necessary and proportionate with a view to achieving a legitimate objective.



3. It might be noted that the separate grounds raised in the Complaint involve interlinking factual and legal issues. The Respondent will, accordingly, engage in an overview of the factual and legal context, followed by an assessment of the three grounds of the Complaint.

## II. FACTUAL AND LEGAL CONTEXT

### A. Relevant domestic legislative provisions

#### Establishment of military representative associations and restriction on affiliation to trade unions

4. Section 2 of the Defence (Amendment) Act 1990 (**Appendix I**) provides as follows:

- (1) *Subject to Section 3 of this Act, the Minister may provide by regulations for the establishment of an association or associations (in this Act referred to as an “association”) for the purpose of representing members of such rank or ranks of the Defence Forces as may be specified in the regulations in relation to matters affecting their remuneration and such other matters as the Minister may specify in the regulations, but excluding matters relating to any operation and the raising, maintenance, command, constitution, organisation and discipline of the Defence Forces under the Principal Act and offences in relation to the Defence Forces and military property under that Act.*
- (2) *An association shall represent under subsection (1) of this section only members of the association.*
- (3) *An association shall be independent of and shall not, without the consent of the Minister, be associated with or affiliated to any trade union or any other body.*
- (4) *A member shall not become a member of a trade union, or of any other body (other than an association), which seeks to influence or otherwise be concerned with the remuneration or other conditions of service of members.*
- (5) *The Minister shall determine any question that arises as to whether any trade union or any other body is a trade union or body to which subsection (4) of this section applies.*

- (6) *The Minister may provide by regulations for the establishment of a system of conciliation and arbitration in respect of such matters, in relation to which an association represents members, as the Minister may specify in the regulations*
- (7) *Regulations under this section may provide for such ancillary, subsidiary and connected matters as the Minister considers necessary or expedient.*
5. In the exercise of his powers under Section 2 of the Defence (Amendment) Act 1990, the Minister for Defence provided for the establishment of representative associations within the Defence Forces by signing into effect the Defence Force Regulation S.6 (**Appendix II**).
6. Section 19 of the Regulation establishes the Complainant, the Permanent Defence Force Other Ranks Representative Association (“PDFORRA”), which represents Enlisted Personnel (Soldiers and Non-Commissioned Officers) in the Permanent Defence Force. Section 2 of Defence Force Regulation S.6 (the “Regulation”) established the Representative Association of Commissioned Officers (“RACO”), which represents Officers of the Permanent Defence Force up to the rank of Colonel.
7. Section 20 of the Regulation provides that subject to the provisions of the Defence Acts and regulations made thereunder, PDFORRA is independent in the formulation of their policies, in their deliberations and in their decision making processes.
8. In relation to the scope of representation of PDFORRA, Section 24(1) of the Regulation provides as follows:
- “(1) Subject to section 2 of the Act, the matters which shall come within the scope of representation of the Association shall be those set out in the Third Schedule to these regulations;*
- (2) To such an extent as may be set out in a scheme of conciliation and arbitration established by the Minister, in consultation with the Association, such of the matters referred to in the Third Schedule to these Regulations as may be agreed between the Minister and the Association shall be processed under such a scheme.*

(3) Such of the matters referred to in the Third Schedule to these Regulations as are not comprehended by a scheme of conciliation and arbitration referred to in subparagraph (2) hereof shall be processed at meetings at national level between representatives of the Association and representatives of the Department of Defence

(4) The matters which shall come within the scope of representation at Command and Barracks levels shall be such aspects of the matters provided for in the Third Schedule to these regulations as are of local application and as may be agreed between the Minister and the Association from time to time.

### Collective Action

9. In relation to PDFORRA, Section 28 of the Regulation provides that:

*“The Association shall not sponsor or resort to any form of public agitation as a means of furthering claims or for any other purpose whatsoever.”*

10. General provisions on employment-related dispute resolution including arrangements for strike action are set out in the Industrial Relations Act 1990. Section (8)(1) of that Act, however, excludes military personnel from its personal scope by defining a “worker” for the purposes of the Act as follows:

*“...any person who is or was employed whether or not in the employment of the employer with whom a trade dispute arises, **but does not include a member of the Defence Forces or of the Garda Síochána**<sup>1</sup>; [...].”*

## **B. Role and Strength of Defence Forces**

### Role

11. The Irish Defence Forces comprise the Army, the Naval Service and the Air Corps. The Defence Act 1954<sup>2</sup> provides the legal basis for its raising, maintenance, command,

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<sup>1</sup> Emphasis Added. The full Act is available at <http://www.irishstatutebook.ie/eli/1990/act/19/enacted/en/html>.

<sup>2</sup> Available at <http://www.irishstatutebook.ie/eli/1954/act/18/enacted/en/html>.

constitution and organisation. The White Paper on Defence, published in August 2015 (**Appendix III**) sets out the wide ranging roles of the Defence Forces, which include:

- To provide for the military defence of the State from armed aggression;
- To participate in multi-national peace support, crisis management and humanitarian relief operations in accordance with Government direction and legislative provision;
- To Aid the “Civil Power” – meaning in practice to assist, when requested, the national police force (“An Garda Síochána”), who have primary responsibility for law and order, including the protection of the internal security of the State;
- To contribute to maritime security encompassing the delivery of a fishery protection service and the operation of the State’s Fishery Monitoring Centre, and in co-operation with other agencies with responsibilities in the maritime domain, to contribute to a shared common maritime operational picture;
- To participate in the Joint Taskforce on Drugs interdiction;
- To contribute to national resilience through the provision of specified defence Aid to the “Civil Authority” - meaning to support lead agencies in response to major emergencies, including cyber security emergencies, and in the maintenance of essential services, as set out in Memorandum Of Understandings and Service Level Agreements agreed by the Department of Defence;
- To provide a Ministerial air transport service;
- To provide ceremonial services on behalf of Government;
- To provide a range of other supports to government departments and agencies in line with Memorandum Of Understandings and Service Level Agreements agreed by the Department of Defence, e.g. search and rescue and air ambulance services;
- To fulfil any other tasks that Government may assign from time to time.

12. An Garda Síochána is predominantly an unarmed police force and as a result the Defence Forces provide, on request, supports in Aid to the Civil Power of an ongoing and contingent nature. Historically, the provision of this support has been of critical importance in maintaining the security of the State and countering terrorism.

13. The Permanent Defence Force, accordingly, underpins Ireland's national security. Its role is not only to provide for the military defence of the State's territory, but also to contribute to domestic security and to provide other supports in the national interest and to contribute to the State's response to large scale emergencies. The armed forces are essentially the last line of the State's security infrastructure.

#### Strength

14. As of the 30 June 2015, the Defence Forces comprised 9026 personnel. Approximately 1,000 Officers are represented by RACO, and 6,754 are represented by PDFORRA. The strength of the Permanent Defence Forces, broken down by rank, gender and service is outlined at **Appendix IV**.

#### **C. Military Representative Associations**

15. RACO and PDFORRA are empowered to promote the welfare of individual members pursuing grievances on their behalf. They represent their members' interests at different levels from that of unit upwards, and consult or negotiate on collective conditions of service in the Permanent Defence Force. Subject to the Defence Acts and Regulations, the Associations are independent in their formulation of policy, in their deliberations and in their decision-making processes. They are funded by way of direct support subvention and subscriptions from their members. These associations enjoy autonomy and are accountable to their members. They accordingly speak with authority on their behalf. They are recognised by the Minister for Defence and the Minister for Public Expenditure and Reform for negotiating purposes and have high rates of participation by eligible members of the Permanent Defence Force.

#### **D. Affiliation to trade unions and other bodies**

16. As set out above, association or affiliation to any other body or trade union requires the consent of the Minister for Defence. PDFORRA made representations to the Minister for Defence on the issue of affiliation in 2002, 2009, 2012, 2014 and 2015. On each occasion, the Minister declined to consent to affiliation to ICTU. The Minister met with PDFORRA on 9 November 2012 and again on the 15 January 2015 to outline his position in this regard. In taking this position, the Minister for Defence considered that:

- The objectives of ICTU, in particular in relation to industrial action such as striking, are irreconcilable with military service;
- Members of the Defence Forces may be called upon, at the direction of the Government, to take on duties and to cross picket lines in circumstances of strikes in essential services or in situations of public protest and unrest;
- It would be untenable for any question to arise over the authority of the Government to require military personnel to serve in such circumstances and to observe the commands given by their military superiors;
- These restrictions were a factor for consideration in determining the military service allowance paid to all members of the Defence Forces, which serves as a form of financial compensation;
- Members of the Defence Forces have a range of parallel complaint and adjudication mechanisms in law to compensate for the limitations on their access to the normal industrial relations machinery which applies in wider society.

17. Both RACO and PDFORRA are, however, associated with other federations of military associations namely, EUROMIL and EUROFEDEP.

#### **E. Government engagement on pay and conditions in military context**

18. The Respondent currently engages with military employees in the determination of pay and terms and conditions in the military context in a number of ways, namely: (a) Legislation (Financial Emergency Measures in the Public Interest Acts 2009 – 2013), (b) Public Sector Agreements and (c) The Conciliation and Arbitration Scheme for members of the Permanent Defence Force.

#### Legislation

19. Since 2009, significant reductions have been made to the pay of public servants in Ireland as a result of fiscal emergency and the commitments made by the Respondent State in the Memorandum of Understanding with the EU/IMF. The Department of Public Expenditure and Reform has overarching responsibility for the development and implementation of Government public service pay policy. Reductions in pay and pensions have been introduced through a series of legislative measures, namely the Financial Emergency Measures in the Public Interest Acts of 2009-2013.

## Public Sector Agreements

20. The Public Service Agreement 2010-2014 (the “Croke Park Agreement”) was extended by the Public Service Stability Agreement 2013-2016 (the “Haddington Road Agreement”, **Appendix V**), which came into force on 1 July 2013. This Agreement applies to all public servants who are members of Grades to which a collective agreement accepting the terms of the Agreement is in place. There are particular measures applying to specific sectors of the public service including members of the Permanent Defence Force and details of these are found in the appendices in the ‘Haddington Road’ Agreement for particular groups/grades. Appendix 2 of the Haddington Road Agreement contains specific measures applicable to the Defence Sector. Both RACO and PDFORRA are parties.
  
21. In the context of concluding Haddington Road Agreement, the Respondent’s employer representatives had direct discussions with the representative associations for the Permanent Defence Force, including PDFORRA, who had the opportunity to shape and influence the required measures in the Defence sector agreement in conjunction with Defence management.
  
22. The Respondent Government recently engaged with public service unions represented by ICTU and with other non ICTU sectoral associations such as the military representative associations in parallel process meetings with a view to extending the Haddington Road Agreement and unwinding certain measures contained in the Financial Emergency Measures in the Public Interest Acts of 2009-2013<sup>3</sup>. ICTU and sectoral representative associations (such as RACO and PDFORRA) were briefed by the Government’s representatives on the fiscal situation and the EU rules regarding fiscal constraints, funding and expenditure. Discussions were facilitated by the Labour Relations Commission by way of two series of meetings, (i) discussions with the Public Service Committee of ICTU, and (ii) discussions with the representative associations at sectoral level.

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<sup>3</sup> The legislation may be consulted on [www.irishstatutebook.ie](http://www.irishstatutebook.ie).

23. The Government rejects the suggestion that the Permanent Defence Force representative associations were excluded from the scope of direct pay negotiations. There were in fact ongoing and continuous engagement and discussions with the military representative associations in respect of the proposals emerging as part of a public sector collective agreement.
24. The following is a practical example of the military representative associations exercising their opportunity to shape and influence pay determination: In the context of discussions surrounding the proposals for the Haddington Road Agreement, representative associations for the Defence Forces were asked to contribute a 5% reduction in the pay and pensions bill for the Defence Forces. This mirrored what was requested of all sectors in the public service and in practice would have resulted in a reduction of €35 million of the pay bill, thereby eliminating overall allowances in the Permanent Defence Force. Following direct engagement with the Government's employer representatives and the military representatives, the pay reduction "ask" of the military was reduced to €9.8 million. These associations, accordingly, had the opportunity to shape the outcome of the collective agreement.
25. The Complaint gives the false impression that military personnel are subject to requirements in relation to which they have had no role in negotiations. This is not accepted by the Respondent. There are many measures contained in the various public service agreements which bear no practical relevance to the Defence sector context and which have not been binding on their members.
26. For example, military personnel are not subject to the requirement to work additional hours each week. This was a requirement arising from the Haddington Agreement which applied to a number of other sectors. Certain civil servants for example are required to work an additional 2.15 hours each week and have lost flexi leave benefits. Other sectors have lost premium payments for twilight working and have seen jobs outsourced to the private sector. None of these measures apply to military personnel.

#### Conciliation and Arbitration Scheme

27. Separately, the Defence Forces' Conciliation and Arbitration Scheme (the "Scheme", **Appendix VI**) provides a range of consultation and engagement mechanisms for Defence



management to discuss with representative associations matters within their scope of representation. The Scheme was introduced in accordance with Defence Regulation S. 6, in 1998 and provides a means for both sides to discuss issues which are of importance to them and to arrive at mutually acceptable resolutions or to bring to dispute resolution matters such as pay and conditions of employment. Under the mechanism of the Conciliation and Arbitration Scheme military representative associations have secured various increases in allowances, pay awards in the form of additional increments, pension arrangement increase adjustments, extensions in length of service, increases in annual leave etc.

#### *Scope of representation*

28. In the context of the Scheme, PDFORRA and RACO may make representations to claims relating to a wide range of issues as follows:

- *Remuneration and other emoluments, whether in cash or in kind, including pay, allowances, gratuities or grants payable to a member of the Permanent Defence Force or any pension, retired pay, or gratuity for which a member may be eligible in respect of, or arising out of his/her service;*
- *The administration of remuneration;*
- *Deductions from pay in respect of accommodation, rations and welfare services.*

29. Representation may also be made in respect of other conditions of service and career development such as:

- *The criteria governing the entry of personnel into the Permanent Defence Force other than the number of such personnel;*
- *Changes in systems of performance appraisal;*
- *General criteria governing selection for overseas service;*
- *Systems and general criteria governing promotion;*
- *Allowances and the occasions of the granting of all categories of leave; and extends to medical and dental benefits provided by the Department of Defence;*
- *Standards of living accommodation officially provided and general criteria governing the allocation of married quarters;*

- *Procedures for dealing with redress of wrongs and grievances;*
- *Questions of the provision of legal representation for members of the Permanent Defence Force, against whom legal proceedings have been instituted arising out of their duties;*
- *The application of health and safety legislation;*
- *Changes in the existing scheme of third level education;*
- *Questions of the recognition by outside bodies of training and qualifications gained in service;*
- *Changes in retirement ages and the procedures regarding voluntary retirement, resignation or discharge;*
- *The application to the Permanent Defence Force of legislation which affects matters coming within the scope of representation;*
- *Amendments to the Defence Acts, Defence Force Regulations, General Routine Orders and the implementation of reports.*

30. Representation may further be made in respect of the affairs of the Associations, including:

- *The principles governing the conduct of the Association's affairs and the manner in which the members, including those serving outside the State, would best be represented;*
- *Secondment and release of personnel to an Association;*
- *Access to the media and affiliation to other bodies.*

31. Military management also engages on a bilateral basis with the representative associations on service matters through the military forum mechanism.

32. Representations are limited to matters affecting the remuneration of their members and to certain other matters. All matters relating to any operation, the raising, maintenance, command, constitution, organisation and discipline of the Defence Forces, offences in relation the Defence Forces and military property are excluded.

33. At paragraph b.4 of the Complaint, the Complainant has stated that “*If Military representative associations were to seek a general increase through the scheme, it would have to make a claim for a pay increase through its mechanisms. This alternative would not be effective in practice as the claim would be answered in the negative by referring to the general pay agreement discussions*”. Paragraph 1.27 of the Croke Park Agreement, which was extended by the Haddington Road Agreement, provided that no cost increasing claims could be made or processed during the lifetime of the Agreement. This clause was precipitated by EU/IMF commitments and the requirement on the State to reduce the public pay and pensions bill and stabilise the State’s public finances. It is submitted that this statement by the Complainant demonstrates the point that pay increases could not be awarded to public servants in recent years regardless of the mechanism used, be it the Conciliation and Arbitration Scheme, the Labour Relations Commission or the Labour Court.

*Pay claims and access to the Labour Relations Commission*

34. It is envisaged that the Labour Relations Commission can in fact play a role in the procedure for claims for review of pay and conditions under the Scheme.

35. The procedure for claims is specified in the Appendix to the Scheme. A claim for a review of pay or overall conditions of employment may be lodged by the representative association under the Scheme at intervals of 4 years. After formal presentation, it may be referred to a Sub-Committee of Conciliation Council if agreed by both sides with a view to making preparations for a review. The review involves a detailed examination of the factual basis put forward to support the claim. At the request of either side it may be referred to the Labour Relations Commission who may publish a report. If agreement cannot be reached in discussions and if both sides agree, an independent Facilitator may be appointed to support the negotiation process. If no agreement is reached it may be referred to the Arbitration Board for adjudication. Accordingly, it is not entirely correct to say that no access to the Labour Relations Commission exists under the Scheme.

36. When a claim concerning the revision of pay or other significant changes to the remuneration of the Permanent Defence Force is not agreed upon at the conciliation stage,

it may be brought to third party for adjudication or to third party arbitration. It is then dealt with by the responsible Ministers and eventually by the Parliament.

## **F. Other Mechanisms to ensure proportionate treatment of military personnel**

### Redress of Wrongs Scheme

37. In recognition of the fact that military representative associations and military personnel face certain restrictions in the context for instance of industrial action and the operation of the Industrial Relations Act 1990, a grievance procedure at individual level operates, namely the “Redress of Wrongs Scheme.” An outline of the process of the Redress of Wrongs Scheme is contained at **Appendix VII**.

### Office of the Ombudsman of the Defence Forces

38. In addition, the Office of the Ombudsman serves as an office of independent external review of serving members of the Defence Forces who must first exhaust existing grievance procedures before the ombudsman can review or examine. Where a case has not, within 28 days, been progressed in accordance with the time frames set out and the delays are not without good reason, the Ombudsman may be contacted directly. The Ombudsman (Defence Forces) Act 2004<sup>4</sup> provides the legal basis for the Office. The appointment of a person to this office is made by the President acting upon the recommendation of the Government.

## **III. RELEVANT INTERNATIONAL MATERIALS**

### **A. Council of Europe**

39. Article 11 of the European Convention of Human Rights (“ECHR”) on Freedom of assembly and association provides as follows:

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<sup>4</sup> <http://www.irishstatutebook.ie/eli/2004/act/36/enacted/en/html>

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary **in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime,** for the protection of health or morals or for the protection of the rights and freedoms of others. **This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.**"<sup>5</sup>*

40. It is well-established that States enjoy a wide margin of appreciation in cases involving restrictions of the rights of military service personnel, in light of their role in ensuring national security. In the case of *Engel* for instance, concerning a claim of violation of Article 10 ECHR, the European Court of Human Rights ("ECtHR") observed:

*"the freedom of expression guaranteed by Article 10 applies to servicemen just as it does to other persons within the jurisdiction of Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings."*<sup>6</sup>

41. Recommendation CM/Rec (2010)4 of the Committee of Ministers to member states on human rights of the armed forces recognises that restrictions can be placed on the exercise of freedom of association in the interests of national or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

## **B. The United Nations**

### **(i) The International Labour Organisation**

42. The Convention (No. 87) concerning Freedom of Association and Protection of the Right

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<sup>5</sup> Emphasis Added

<sup>6</sup> *Engel v The Netherlands* [1976] ECHR 2, paragraph 100

to Organise (adoption: 9 July 1948, entry into force: 4 July 1950; ratified by Ireland on 4 June 1955) includes the following provisions:

***Article 2***

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

***Article 5***

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

***Article 9***

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

*[...].*

43. As concerns collective bargaining, the Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (adoption: 1 July 1949, entry into force: 18 July 1951; ratified by Ireland on 4 June 1955) provides as follows:

***Article 4***

*Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers'*

*organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”*

**Article 5**

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

[...]

**(ii) The International Covenant on Economic, Social and Cultural Rights**

44. The International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966; entry into force 3 January 1976, United Nations Treaty Series, vol. 993, p. 3; ratified by Ireland on 8 December 1989) includes the following provision:

**Article 8**

*The States Parties to the present Covenant undertake to ensure:*

*2. The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

*3. The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;*

*4. The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the*

*interests of national security or public order or for the protection of the rights and freedoms of others;*

*5. The right to strike, provided that it is exercised in conformity with the laws of the particular country.*

*ii. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.*

*[...].”*

### **(iii) The International Covenant on Civil and Political Rights**

45. The International Covenant on Civil and Political Rights (New York, 16 December 1966; entry into force 23 March 1976, United Nations Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407; ratified by Ireland on 8 December 1989) provides as follows:

#### ***Article 22***

*Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

*No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

*[...]*

## **C. The Organisation for Security and Cooperation in Europe**



46. In 2008, the OSCE produced a *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (**Appendix VIII**), which recognizes that military discipline implies some limitations on freedom of association. The document made the following recommendations:

- States should permit all members of the armed forces to join either a professional association or a trade union representing their interests;
- These associations or unions should enjoy the right to be consulted in discussions concerning conditions of service for members of the armed forces;
- Disciplinary action or victimization of individual members of the armed forces for participation in the activities of such professional associations or trade unions should be prohibited;
- Any restrictions on freedom of association (for example, with regard to industrial action) should be: prescribed by law, proportionate to legitimate state interests recognized in human rights treaties, and also be non-discriminatory.

#### **IV. ARTICLE 5 AND NON-AFFILIATION OF MILITARY REPRESENTATIVE ASSOCIATIONS TO THE IRISH CONGRESS OF TRADE UNIONS**

##### **A. Summary of Issue**

47. As set out above, Section 2 of the Defence (Amendment) Act 1990 prevents a military representative association such as PDFORRA from being associated with or affiliated to any trade union or any other body without the consent of the Minister for Defence. In 2002, 2009, 2012, 2014 and 2015, PDFORRA made representations to the Minister on the issue of affiliation to ICTU. On each occasion the Minister declined to consent to affiliation to ICTU for the reasons as outlined above. Such affiliation is regarded as being irreconcilable with the unique nature of military service and its role in maintaining national security and public order, public health, morals and freedom of others.

48. This Complaint complains that military representative organisations have been “*denied membership of ICTU*”<sup>7</sup> and claims that they are thus “*...not able to attend the national negotiations ICTU conducts on, inter alia, the salaries within the public service.*” The

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<sup>7</sup> Paragraph a4 of the Complaint

Complainant, however, concedes that Article 5 contains “...an exception clause concerning, *inter alia*, the Military.”<sup>8</sup> It further states that “...Ireland may choose to regulate the right of the Military to organise by a mechanism applicable only to the Military. However, such entitlement may not deprive military representative associations from expressing their demands on working conditions and pay in an appropriate and effective manner.”

49. Accordingly, even taken at its highest, the Complaint does not assert an absolute right to join ICTU. Instead, it appears to assert the right to join ICTU in circumstances where the Complainant alleges that the alternative is to deprive military associations of “...the most effective means of negotiating the conditions of employment on behalf of their members.”<sup>9</sup> The factual issues arising with respect to the alleged violation of Article 5 are accordingly interlinked with those arising in relation to the alleged violation of Article 6.

50. The Respondent submits the decision to decline to permit affiliation with ICTU does not amount to a violation of Article 5 because:

- The armed forces occupy a special position within Article 5 of the Charter and as such, Ireland is entitled to govern its application in the manner prescribed by the Defence (Amendment) Act 1990 and Defence Force Regulation S.6.
- Non-affiliation to ICTU has not had the factual effect of impairing the freedom of members of the armed forces to organise for the protection of their economic and social interests.
- In the alternative, if there has been an interference with guarantees under Article 5, such interference is prescribed by law, is necessary in a democratic society and proportionate to the legitimate aim pursued.

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<sup>8</sup> Paragraph a7 of the Complaint

<sup>9</sup> Paragraph a12

## B. Relevant Charter Provisions

51. Article 5 of the Charter on the right to organise provides as follows:

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

52. Article G of the Charter on Restrictions to rights and principles, provides as follows:

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

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

### (i) Special Position of the Armed Forces within the text of Article 5

53. The Committee has recognised that Article 5 “authorises restrictions on or the removal of the right to organise for two categories of employees, namely members of the police and members of the armed forces.”<sup>10</sup> Article 5 also distinguishes between these two

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<sup>10</sup> Conclusions XVIII-1, Poland, p.633

categories. In this regard, the provision is more permissive of restrictions applying to members of the armed forces than it is with respect to restrictions applying to the police.

54. The Committee has recalled that, under Article 5, States Parties are entitled to restrict or withdraw the right to organise in the case of members of the armed forces<sup>11</sup>. Accordingly, as set out in *European Federation of Employees in Public Services (EUROFEDEP) v. Portugal*<sup>12</sup>:

*“As the Committee has consistently held, it follows from the wording of the final sentence of Article 5 of the European Social Charter of 1961 that states are permitted to “limit in any way and even to suppress entirely the freedom to organise of the armed forces” (Conclusions I, p. 31). The Committee observes that the provision in question has been included unchanged in the revised European Social Charter of 1996.”*<sup>13</sup>

55. In this regard, it is noteworthy that in the Complaint of *European Council of Police Trade Unions (CESP) v France*<sup>14</sup> currently pending before the Committee, the Complainant has impugned the application of military status to the Gendarmerie in France on the basis that military status deprives them of their trade union rights.

56. The instant matter can be distinguished from that of *European Confederation of Police (EuroCOP) v Ireland*<sup>15</sup> which concerned the application of Article 5 to police representative organisations.

57. By providing for the establishment of PDFORRA and RACO and by providing for the restriction on affiliation to other trade unions or bodies, Section 2 of the Defence (Amendment) Act 1990 has determined both the application of principle and the extent of guarantees afforded by Article 5. The provision is at first instance, consistent with Article 5.

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<sup>11</sup> Conclusions 2014, Bosnia and Herzegovina

<sup>12</sup> *European Federation of Employees in Public Services v. Portugal*, Complaint 5/1999

<sup>13</sup> *EUROFEDEP v Portugal*, Complaint 5/1999, paragraph 26. See also *EUROFEDEP v. Italy*, Complaint 4/1999, *EUROFEDEP v Greece*, Complaint 3/1999 and *EUROFEDEP v FRANCE*, Complaint 2/1999.

<sup>14</sup> No.101/2013

<sup>15</sup> *European Confederation of Police (EuroCOP) v Ireland* 83/2012

(ii) No Restriction on Guarantees under Article 5

58. In *European Council of Police Trade Unions (CESP) v Portugal*<sup>16</sup> the Committee noted that Article 5 allows national legislation to require that professional police associations be composed exclusively of the police force<sup>17</sup> and that national legislation may require that professional associations of police personnel only be authorised to affiliate to police trade union organisations<sup>18</sup>.

59. In the recent decision of *European Confederation of Police (EuroCOP) v Ireland*<sup>19</sup>, it was held that a prohibition on police from establishing trade unions did not constitute a violation of Article 5 because police representative associations enjoyed basic trade union rights within the meaning of Article 5.<sup>20</sup> The Committee considered however that regardless of the discretion given to state parties under Article 5 with regard to the police in particular, their right to organise could not be defined independently of the requirements of Article 6<sup>21</sup>. The Committee went on to find that the restriction on the right of Garda members to affiliate to a national umbrella organisations violated Article 5 because on the basis of the facts presented, the restriction was not proportionate<sup>22</sup> and the restriction had “...*the factual effect of depriving representative associations of the most effective means of negotiating the conditions of employment on behalf of their members*” [and as such] “...*cannot be considered as a proportionate measure for achieving its purposes.*”<sup>23</sup>

60. The Respondent accordingly submits that in EuroCOP, non-affiliation to ICTU did not constitute a restriction on the right to organise *per se*.

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<sup>16</sup> *European Council of Police Trade Unions (CESP) v Portugal*, Complaint No. 11/2001, Decision on the Merits of 22 May 2002, paragraph 35

<sup>17</sup> *European Council of Police Trade Unions (CESP) v Portugal*, Complaint No. 11/2001, Decision on the Merits of 22 May 2002, paragraph 35

<sup>18</sup> *European Council of Police Trade Unions (CESP) v Portugal*, Complaint No. 11/2001, Decision on the Merits of 22 May 2002, paragraph 37

<sup>19</sup> *European Confederation of Police (EuroCOP) v Ireland* 83/2012

<sup>20</sup> *European Confederation of Police (EuroCOP) v Ireland* 83/2012, paragraph 85

<sup>21</sup> *European Confederation of Police (EuroCOP) v Ireland* 83/2012, paragraph 83

<sup>22</sup> *European Confederation of Police (EuroCOP) v Ireland* 83/2012, paragraph 120

<sup>23</sup> *European Confederation of Police (EuroCOP) v Ireland* 83/2012, paragraph 121

61. Even if Article 5 equates the position of the police to that of the armed forces, which is denied, it would be necessary for the Complainant to establish that the factual effect of non-affiliation is to deprive representative associations of an effective means of negotiating the conditions of their employment. As the Respondent denies that there has been a violation of Article 6 of the Charter, it is submitted that this Complaint in relation to Article 5 must also be rejected.

(iii) Justification and Proportionality

62. In the event that the Committee considers that there has been a restriction on rights guaranteed under Article 5, it is submitted that such a limitation is established by law and pursues legitimate objectives, is narrowly tailored to achieve these objectives and is proportionate to them<sup>24</sup>. Such a restriction accordingly falls within the scope of both the exception contained in Article 5 and the permissible restriction for which Article G of the Charter provides.

*Established by law*

63. The contested restriction is based on Section 2(3) of the Defence (Amendment) Act, 1990 according to which “...an association shall be independent of and shall not, without the consent of the Minister, be associated with or affiliated to any trade union or any other body”. Section 2(4) provides that “A member shall not become or be a member of a trade union, or of any other body (other than an association), which seeks to influence or otherwise be concerned with the remuneration or other conditions of service of members.” Section 2(5) further provides that “The Minister shall determine any question that arises as to whether any trade union or any other body is a trade union or body to which subsection (4) of this section applies”. The restriction is accordingly established by law and this does not appear to be contested by the Complainant.

*Legitimate Objective and Necessary in a Democratic Society*

64. Section 2 of the Defence (Amendment) Act 1990, the arrangements set out in Defence Regulation S.6 and the Minister’s decision to refuse to accede to affiliation with ICTU all pursued a legitimate objective because Ireland considered membership or affiliation with

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<sup>24</sup> *European Confederation of Police (EuroCOP) v Ireland* 83/2012, paragraph 79

ICTU would conflict with the unique nature of the military and its role in the protection of public interest, national security, public health, or morals. This was for the following reasons:

- The restriction is intended to ensure the operational effectiveness of the armed forces and military discipline. Members of a union may act collectively or on the instruction of union officials and as such may give rise to a rival source of authority or allegiance. This conflicts with the chain of command within the military. The problem is particularly acute in circumstances where the body in question is a civilian congress of unions. It is crucial for military representative associations to remain unbound by decisions of entities as ICTU whose members are not subject to military law and discipline if they engage in industrial action. It should also be noted in this regard that in the Irish context, a person subject to military law is prohibited from endeavouring to persuade, or from conspiring with any other person to endeavour to persuade, a member of the Defence Forces to join a trade union or other body, other than a recognised representative association (Section 6 of the Defence (Amendment) Act 1990).
- The Defence Forces play a unique role in the maintenance of national security and the prevention of armed aggression. It also plays a vital role in public safety in terms of Aid to the Civil Power, meaning in practice to assist An Garda Síochána, who have primary responsibility for law and order, including the protection of the internal security of the State. It also plays a vital role in contributing to the provision of defence Aid to the Civil Authority. It further supports lead agencies in response to major emergencies and provides a range of other supports to government departments and agencies, e.g. search and rescue operations and air ambulance services etc. It is crucial for military representative associations to remain unbound by decisions of such outsider entities as ICTU, which do not need to consider similar factors in their decision-making.
- As is explained below in relation to the alleged breach of Article 6(4), strike action is inconsistent with the role of the Irish Permanent Defence Force. The

first stated objective of ICTU, however, is: *“To uphold the democratic character and structure of the Trade Union Movement, to maintain the right of freedom of association and the right of workers to organise and negotiate and all such rights as are necessary to the performance of trade union functions **and in particular, the right to strike.**”* A condition of affiliation to ICTU is that the trade union’s objects and policy must be in harmony with the Constitution of ICTU. Article 4 of the ICTU Constitution provides that *“A Trade Union desiring to affiliate to Congress shall satisfy the Executive Council that its rules, objects and policy are in harmony with the Constitution of Congress and undertake to abide by its provisions.”* Public agitation on the part of PDFORRA and RACO, however, is proscribed by Defence Regulation S.6. In this respect, the Respondent submits that there is a clear conflict between strike action and military discipline. Moreover, industrial action (as is explained below) could disrupt vital operations in a way that threatens national security, public order, public health, morals and the freedom of others. As such, the objects and policies of the two organisations cannot be considered to be aligned.

- The interference is justified by the need to prevent the Permanent Defence Force from being destabilised by protest movements within organisations such as the Irish Congress of Trade Unions. Even if they were permitted to voluntarily forswear industrial action, their members would be open to risks of external influence and industrial militancy in such arrangements. This is in conflict with the esprit de corps of the armed forces.
- In circumstances where the Defence Forces could be called upon to Aid the Civil Authority, as has happened in the past a clear conflict of objects and policy arise. For instance, this might give rise to members of the Permanent Defence Force having to cross picket lines. This can be demonstrated with concrete examples in the following illustrative list of military deployments and standby during threatened strikes/industrial disputes:

| Date      | Situation                            | Deployment/Standby                                 |
|-----------|--------------------------------------|--|
| June 1967 | Dublin Corporation Tradesmen dispute | Military personnel manned Sewage Pumping Stations. |



|                                |  |  |
|--------------------------------|--|--|
| Apr-May 1968                   | Dublin Corporation Tradesmen dispute   | Military personnel manned Sewage Pumping Stations.   |
| Aug 1968                       | Dublin Corporation dispute- Ambulance, Fire Fighting Services and Sewage Services dispute                | Army Ambulances and Fire Engines were operated by Military personnel. Military Personnel manned Sewage Pumping Stations.   |
| Feb-April 1974                 | Dublin Corporation Dispute   | Military personnel manned Sewage Pumping Stations.   |
| Feb 1976                       | Postal strike  | Assistance given to all Government Departments including distribution and recovery of exam papers for the Department of Education. Provision of cipher and radio operations for the Department of Foreign Affairs. |
| April 1976                     | Meath Co. Council Fire Service   | Military personnel operated Civil Defence Fire Tenders.  |
| May 1976                       | Galway Co. Council Fire Service  | Military personnel operated Civil Defence Fire Tenders.  |
| 28 June 1976 to 31 August 1976 | Bank strike  | Military Guards on Post Offices during   |
| July 1977                      | Clare Co. Co.<br>Kerry Co. Co.   | Military personnel made available to maintain services.  |
| September 1977                 | Clare Co. Co.<br>Kildare Co. Co.<br>Longford Co. Co.<br>Mayo Co. Co.<br>Sligo Co. Co.<br>Tipperary North | Military Personnel made available to maintain services.  |

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|-----------------------|--|--|
| May 1978              | Dundalk Fire Service                             | Military personnel made available to maintain services.  |
| October-November 1978 | Local Authorities Dispute-Water services         | Military personnel gave limited assistance   |
| March 1979            | Sligo Fire Services                              | Military personnel made available to maintain services.  |
| June-October 1979     | Dublin Corporation Refuse Workers strike         | Military personnel and vehicles made available.  |
| December 1979         | Dublin Co. Co. Water and sewage services dispute | Military personnel assisted in repairing burst water pipes.  |
| October 1980          | Petrol strike                                    | Military personnel assisted in emergency oil and petrol distribution in order to maintain essential services.  |
| 20-30 July 1981       | Bus strike                                       | Skeleton bus service provided in greater Dublin area.  |
| February 1982         | Dublin sewage services                           | Military personnel maintained pumping stations and provided maintenance crews.   |
| May 1983              | Castlebar Psychiatric Hospital strike            | Military personnel provided catering services and general duties for the period of the strike.   |
| November 1983         | Prison Officers strike                           | Military personnel provided admin support at Mountjoy and Portlaoise prisons. Additional Personnel were on standby in case of an escalation of the dispute |

|                  |  |  |
|------------------|--|--|
| July 1984        | Bus strike   | Limited bus service provided between suburbs and Dublin inner city.  |
| December 1984    | Waterford Corporation Fire Service                                   | Military personnel provided crews to man Civil Defence tenders   |
| June 1985        | Bus strike   | Military assistance requested by Government for Dublin area.   |
| May 1986         | Strike by Department of Agriculture staff at meat plants nationwide. | Military assistance requested with supervisory duties at 40 plant locations nationwide.                                  |
| May 1986         | Limerick City. Public utilities strike                               | Military personnel provided emergency cover for sewage treatment plants, fire services and water supply.                 |
| June 1986        | Dublin and Cork bin strike   | Military personnel provided emergency refuse disposal service.   |
| January 1988     | Dublin-Ambulance and Fire Brigade strike                             | Military personnel provided emergency fire and ambulance service.  |
| March 1988       | Prison Officers strike   | Military personnel provided full catering service, outer perimeter patrols, maintenance personnel and medical orderlies. |
| June-August 1998 | Wicklow/Arklow Ambulance dispute                                     | Emergency Ambulance cover provided.  |
| August 1998      | Dublin Corporation Ballymun –Lifts Strike                            | Non technical assistance to residents.   |
| September 1998   | Dublin Corporation Ballymun –Lifts Strike                            | Technical assistance given to repair lifts.  |
| December 1999    | Kilrush Hospital-Ambulance strike                                    | Military personnel provided emergency cover.   |

|                            |  |  |
|----------------------------|--|--|
| October 2000               | East Coast Area Health Board-Ambulance strike  | Military personnel on standby to assist.                                       |
| April 2001                 | Emergency Ambulance Service – East Coast Area Health Board   | Military personnel on standby to assist.                                       |
| December 2001              | Ambulance Personnel strike Navan   | Military personnel on standby to assist.                                       |
| January 2002               | Ambulance Personnel strike Navan   | Military personnel on standby to assist.                                       |
| November 2002              | Donegal Fire Service (Cover required due to strike in Northern Ireland which provides cover for Donegal) | Military personnel on standby to assist.                                       |
| December 2002-January 2003 | Dublin Corporation Ballymun –Lifts Strike  | Technical assistance given to repair lifts.                                    |
| January 2003               | Donegal Fire Service (Cover required due to strike in Northern Ireland which provides cover for Donegal) | Military personnel on standby to assist.                                       |
| December 2002-March 2003   | Midland Health Board-Emergency Medical Technicians dispute   | Emergency cover provided.  |
| May 2003-July 2003         | South Eastern Health Board-Emergency Medical Technicians dispute   | Emergency cover provided.  |
| September-2003             | Irish Prison Service   | Contingency Plans put in place for expected disruption in January 2004/standby |
| June- August 2004          | Irish Prison Service-Prison Doctors dispute  | Medical Corps cover.   |

|                        |   |   |
|------------------------|---|---|
| April-August 2005      | Irish Prison Service                          | Contingency Plans put in place in case of disruption/standby                              |
| December 2007          | Ennis Fire Brigade dispute                    | Military personnel on standby to assist/standby   |
| December 2007          | Irish Prison Service                          | Contingency Plans being put in place in case of disruption/standby                        |
| December 2009          | Irish Prison Service                          | Contingency Plans put in place in case of disruption/standby                              |
| May-June 2010          | Dublin City Council<br>Ballymun –Lifts Strike | Technical assistance given to repair lifts.   |
| November/December 2011 | Roscommon Fire Brigade Dispute                | Military personnel on standby to assist.  |
| March 2013             | Irish Prison Service                          | Contingency Plans put in place in case of disruption/standby                              |
| April 2014             | Irish Prison Service                          | Contingency Plans put in place in case of disruption/standby                              |
| March 2015             | Irish Prison Service                          | Prison Officers Association serve notice of industrial action/ Defence Forces on standby. |

- The Defence Forces can also be called up or put on standby to assist the Civil Authority and Civil Power at times of industrial action in the interest of national security. For example, in the context of domestic security operations carried out as an Aid to the Civil Power, the Defence Forces may need to carry out bomb disposal. In order to set out a full picture of the role of the Defence Forces as an Aid to the Civil Power, a list of domestic security operations carried out as an Aid to the Civil Power is set out at **Appendix IX**.

65. The Respondent, accordingly, submits that this restriction is justified and legitimate as it is prescribed by law and is necessary for the protection of the rights and freedoms of others and for the protection of public interest, national security, public health and morals.
66. Furthermore, by establishing representative organisations which exercise most trade union prerogatives as set out in these observations and which are permitted to affiliate to other organisations such as EuroMIL and EuroFEDEP, the restriction imposed on the freedom of association of the military is a minimal one in nature and sufficiently precise in scope in order to meet the requirements of Article G.
67. Accordingly, the Respondent submits that the restriction on the military representative associations from affiliating to ICTU does not constitute an interference with Article 5 of the European Social Charter, and in the alternative is a permissible restriction under Article G of the Charter.

## **V. PAY AGREEMENT DISCUSSIONS AND THE OPERATION OF ARTICLE 6(2)**

### **A. Summary of Issue**

68. The Complainant firstly alleges that military representative associations are unable to take part in national pay agreement discussions and have no bargaining rights with regard to general pay increases. In this regard, it is alleged that the parallel process for military personnel involves effectively no official input from military representative associations.
69. The Complainant secondly submits that the Conciliation and Arbitration Scheme is ineffective and slow and suggests that Article 6 would be satisfied in the event that military representative associations were granted access to the Labour Relations Commission and the Labour Court.
70. The Respondent will explain that the Complainant's assertions both with respect to national pay agreement discussions and the Conciliation and Arbitration Scheme are factually inaccurate and unmerited. Furthermore, various mechanisms have been put in place, which are unique to the military for the negotiation of pay and conditions and for the resolution of grievances relating to pay and conditions of employment. The Respondent refutes the assertion that any interference with Article 6 has occurred which

does not require identical processes and procedures to other employees. However, even if the operation of parallel processes for military personnel constitutes an interference with Article 6(2), this is a justified and proportionate restriction in accordance with Article G of the Charter.

## **B. Relevant Charter Provisions**

71. Article 6 of the Charter (revised) provides as follows:

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

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

*[...].”*

72. In accordance with the Committee’s reasoning in *European Confederation of Police (EuroCOP) v Ireland* 83/2012, it is appropriate to examine, based on practical examples whether military representative associations have been consulted and their opinions taken into account<sup>25</sup>. The Respondent accepts that military representative associations are entitled to take part in processes which are directly relevant for the procedures applicable to them<sup>26</sup>.

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<sup>25</sup> *European Confederation of Police (EuroCOP) v Ireland* 83/2012, paragraph 159 and Conclusions XVII-1 (2005), Poland

<sup>26</sup> *European Confederation of Police (EuroCOP) v Ireland* 83/2012, paragraph 174

## C. Application

### National Pay Agreements

73. Non-affiliation with ICTU has not resulted in military representative organisations being afforded less effective means of negotiating conditions on behalf of their members, in the context of public sector agreements such as the Haddington Road Agreement. These military representative associations are parties to such national pay agreements and have negotiated tangible results on behalf of members. This is set out under Section II of these observations.
74. Pay and conditions of service of the military were negotiated by the military representative organisations for the Public Service Agreement 2010-2014 (“*Croke Park Agreement*”), as well as for the Public Service Stability Agreement 2013-2016 (“*Haddington Road Agreement*”) and more recently with the *Lansdowne Road Proposals*. The associations were fully involved in these discussions and indeed were parties to the agreements concluded in 2010 and 2013. The Lansdowne Road Proposals are under presently under consideration by the associations.
75. Discussions with the Representative Associations for the Permanent Defence Force in parallel with discussions with ICTU affiliated unions are required under the terms of the Public Service Agreements 2010 – 2016. Under these parallel process arrangements representatives of the Department of Defence, Military Management, the Department of An Taoiseach and the Department of Public Expenditure & Reform meet separately and collectively with the Representative Associations.
76. Talks on an extension to the current Public Service Agreement 2014-2016 took place in 2015 and there was direct negotiation with the military associations with the Respondent employer. It is not the case that the Representative Associations of members of the Permanent Defence Force, RACO and PDFORRA, were not consulted in past pay talks until a prospective deal had been concluded with ICTU.
77. The Respondent stresses that while negotiations with the military associations ran parallel to negotiations with ICTU, this did not make these negotiations any less real.



78. In past pay talks, discussions on a Defence Sector agreement were held between Defence Sector civil and military management and the military representative associations in parallel with discussions which were held with the public sector trade unions affiliated to ICTU. The military representative associations were also informed, in tandem with other unions and associations, of the proposals which emanated directly from Government. Military representative associations had an opportunity to influence and shape the outcome in the best interests of their members by negotiation and discussion with their management counterparts.
79. This is evidenced by the specific measures applicable to the Defence Sector, for instance at Appendix 2 of the Haddington Road Agreement and the practical example of a tangible result set out at paragraph 24 of these observations, namely the pay reduction “ask” of the military being reduced from €35 million to €9.8 million following direct engagement between the Government’s employer representatives and the military representatives.
80. The Respondent submits that the parallel process of meetings is no less real than the negotiations which take place with ICTU. It takes into account the unique nature of the Permanent Defence Force in that their personnel do not have set hours or work. They are liable for duty on an ongoing basis and accordingly receive a special and unique Military Service Allowance. Conditions of employment which might be standard for other public service employees are not appropriate for military personnel, who are subject to a unique code of military discipline and military law. They have different and somewhat unique pay structures of allowances and additional pay in addition to basic pay which take account of the wide range of duties and employments and rank structure across the three services, the Army, Naval Service and Air Corps. It is accordingly appropriate that engagement is carried out by way of a parallel process.
81. It should be pointed out that the Public Service Agreements are not the only sole mechanisms through which general issues relating to conditions of service of military personnel are factually negotiated. For example, in the Defence Forces context, PDFORRA lodged a claim through the Conciliation and Arbitration Scheme to extend the length of service of members who had been engaged with the condition that they had to retire at 21 years service if they did not reach the rank of Sergeant. In that instance extensive dialogue took place over a series of meetings. This led to an Adjudication

finding by a third party Adjudicator on 12 February 2015, which was accepted by the Minister for Defence and the Minister for Public Expenditure and Reform.

### The Scheme

82. In line with the requirements of Article 6§1, permanent bodies and arrangements have been established for the purpose of promoting joint consultation between workers and employers. These are the Conciliation Council, the Arbitration Board and the Adjudicator, which jointly constitute the Scheme. The Scheme is applicable to all ranks up to the rank of Colonel.
83. The aim of the Scheme as set out in Section 1 is to provide means for the determination of claims and proposals on the conditions of service, as well as to secure the fullest co-operation between the state and the military. Matters within its mandate are exclusively dealt with within the Scheme. Claims are discussed in the Conciliation Council or its various sub-committees for the purpose of finding agreement through negotiation.
84. In line with the provisions of the Scheme, the Respondent submits that at the Conciliation stage, a matter is usually dealt with as follows: the claim is lodged by either side and then formally presented at the next Council meeting, where the other side is given an opportunity to make an initial response. In normal practice the matter would then be adjourned so that full consideration can be given to the submission. At the next Council meeting the other side may respond to the claim, or raise queries in relation to the claim. If the query is complex, one side can adjourn the claim and make a response to the query at the next Council. Depending on the claim and queries this process can be repeated, and in some cases where there is a cost analysis involved or further research on the issue the length of time to reach a conclusion can vary. Unresolved matters may be referred to adjudication or arbitration.
85. As concerns the alleged partiality of the Chairperson of the Conciliation Council, the following should be noted: Firstly, the Chairperson may not be appointed without the agreement of the representative associations. Secondly, the function of the Chairperson is to facilitate discussion as well as to record agreement or disagreement; the Chairperson is not empowered to determine the merits of matters discussed at the Council.

86. Employees and employers are equally represented in any joint consultations under the Scheme within the meaning of Article 6(1). In this respect, it should be noted that questions of admissibility have thus far been resolved in equal measure in favour of the employee and the employer. In addition, a liberal and flexible attitude has been adopted to any requests from employee representatives to bring forward additional subjects for discussion.
87. The Respondent submits that the submissions by the Complainant on the length of time for claims to be processed through the Scheme are not borne out by the facts. A dispute may be resolved in three months when both sides are in agreement. An agreed claim will be implemented in full, whereas a disagreed one will not be implemented. Disagreed claims may however, where appropriate and at the request of the claimant, be brought forward to arbitration and adjudication.
88. In any event, the length of proceedings is not indicative of the success of the negotiation process, as it is also possible to make a claim for the purpose of discussing it at a later date.
89. Access to the Labour Relations Commission and the Labour Court is not necessary for compliance with Article 6 of the Charter. The requirements of the Article are sufficiently fulfilled by the existing recourse mechanisms.
90. Both the Scheme and the Labour Relations Commission mechanisms are voluntary in nature and provide for consensus-based solutions, which may be reached through negotiation or by means of agreements facilitated between the parties. The Respondent therefore contests the argument that access to the Labour Relations Commission and the Labour Court would constitute a better mechanism for safeguarding the right to collective bargaining of the Permanent Defence Force. The Respondent further recalls that members of the Permanent Defence Force have access to the Labour Relations Commission in respect of a broad range of issues as set out above.
91. With regard to promoting the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes within the

meaning of Article 6§3, the Respondent submits that disputes are resolved within the Scheme. It is the procedure enacted for the purpose of resolving conflicts between the public administration and its employees.

92. The Respondent accordingly submits that the access of the military representative associations to sufficient collective bargaining mechanisms in general and to pay negotiations in particular has been effectively guaranteed within the meaning of Article 6 of the Charter.

93. Finally, with respect to the Complainant's assertion at para b.6 of the Complaint that access to the Labour Court would fulfil the requirement of Article 6, the Respondent notes the conclusions of the Committee in the EUROCOPI case that "*access to a particular dispute resolution mechanism cannot be required for the fulfilment of the requirements of Article 6*".<sup>27</sup>

94. If the operation of parallel processes for military personnel is not consistent with Article 6(2), which is denied, it pursues the legitimate aim of safeguarding the unique role of the armed forces in the protection of the public interest, national security, public health or morals. Insofar as parallel processes arises because of non-affiliation with ICTU, the reasons for why this measure is concerned with the pursuit of this legitimate aim mirror those set out at Section IV above. Insofar as the parallel processes are unconnected with the question of affiliation with ICTU, they arise because of the need for a separate system of dispute resolution and collective bargaining in circumstances where military personnel are excluded from the application of the Industrial Relations Act 1990 and exigencies arising from the unique circumstances of military personnel in terms of their code of military discipline and law as well as the unique pay structure and allowances which take into account the nature of their duties and service. The reasons accordingly mirror those set out below in relation to permissible restrictions on industrial action.

95. The measures are proportionate. The Respondent established representative organisations which exercise trade union prerogatives. It further established a variety of mechanisms in order to ensure access to processes for the negotiation of pay and conditions and for

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<sup>27</sup> Paragraph 182

the resolution of grievances in relation to pay and conditions of employment. These include the Conciliation and Arbitration Scheme for members of the Permanent Defence Force, the Redress of Wrongs Process and access to review by the independent Ombudsman for the Defence Forces. These mechanisms are unique to military personnel and serve to compensate for their exclusion from the application of the Industrial Relations Act 1990. As such, if there is a restriction on Article 6 (which is denied), it is a minimal one in nature and sufficiently precise in scope in order to meet the requirements of Article G.

## **VI. ARTICLE 6(4) AND THE RIGHT TO STRIKE IN A MILITARY CONTEXT**

### **A. Summary of Issue**

96. Military representative associations are excluded from the scope of the right to strike, as the Industrial Relations Act 1990, setting out the general right to collective action does not apply to members of the Defence Forces. The Complainant accepts that the prohibition on the right to collective action on the part of military personnel is prescribed by law but does not accept that such a restriction pursues a legitimate aim.

97. It is the Respondent's position that a prohibition on strikes by members of the armed forces pursues the legitimate aim of guarding against work stoppage and/or public agitation which could threaten national security, the public interest and public order. An absolute prohibition is necessary in a democratic society and is proportionate in the light of other collective bargaining mechanisms available to the military which have been highlighted in these observations.

### **B. Relevant Charter Provisions and Legal Principles**

98. Article 6 of the Charter provides as follows:

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

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

[...]

*and recognise:*

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

99. The following provision is included in the Appendix to the European Social Charter (revised), Part II:

***“Article 6, paragraph 4***

*It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G.”*

100. It is well established that the right to strike of certain categories of public servants may be restricted including members of the armed forces<sup>28</sup>.

101. It is further established that “...a ban on strikes in sectors that are deemed essential to the life of the community they are presumed to pursue a legitimate aim if a work stoppage could threaten the public interest, national security and/or public health.”<sup>29</sup> It is clear therefore that an absolute prohibition on the right to strike is permissible under certain circumstances.

**C. Application**

102. At the outset, it is recalled that the factual and legal issues surrounding the three grounds of this claim are interlinked. Many of the arguments and examples which are pertinent to the Respondent’s justification for prohibiting strikes on the part of military personnel have

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<sup>28</sup> Conclusions I, Statement of Interpretation on Article 6(4), pp. 38-39

<sup>29</sup> Conclusions I (1969), Statement of Interpretation on Article 6§4 and Confederation of Independent Trade Unions in Bulgaria, Confederation of Labour “Podkrepa” and European Trade Union Confederation v. Bulgaria, Complaint No. 32/2005, decision on the merits of 16 October 2006, §24

already been ventilated above. In any event, the Respondent makes the following additional observations:

103. The issue of collective action on the part of the Permanent Defence Forces representative associations raises complex questions from a legal, operational and management perspective. It is the considered position of the Respondent however that a prohibition on strikes by military personnel is necessary. This restriction pursues the legitimate aim of seeking to maintain public order, national security and the rights and freedoms of others by ensuring that the Permanent Defence Force remains fully operational at all times. The Respondent considers that industrial action such as a strike, on the part of military personnel has the capacity to disrupt vital operations or threaten national security.
104. The Respondent submits that striking is irreconcilable with the role which the Defence Forces play in the context of the Irish State. Members of the Defence Forces may be called upon, at the direction of the Government, to take on duties and to cross picket lines in circumstances of strikes in essential services or in situations of public protest and unrest.
105. As set out above, the Permanent Defence Force plays a unique role in assisting the Civil Power and Civil Authority. The social need for a Defence Force becomes particularly acute at times of industrial action. In this regard, the Respondent again refers to the illustrative list set out at paragraph 66 above of occasions when the Defence Forces have been called up or put on standby to assist in security threats arising from industrial action.
106. It is also a requirement that given the unique wide ranging roles carried out by the Army, Naval Service and Air Corps set out above, the Defence Forces must be fully operational at all times. Military personnel are the last line of the State's defence infrastructure.
107. In circumstances where the Defence Forces could be called upon to Aid the Civil Authority, as happens on a regular basis, the potential for serious difficulties could arise in circumstances where this results in members of the Permanent Defence Force having to cross picket lines. The right to strike could therefore potentially disrupt vital operations

for instance such as the air ambulance service or in the provision of fire services and ground ambulance crew.

108. Furthermore, the taking of industrial action conflicts with military discipline. The disciplined nature of the Defence Forces requires that military orders must be obeyed.
109. The prohibition accordingly pursues a legitimate aim as the Defence Forces are charged with tasks affecting the rights and freedoms of others, national security, or public health or morals and are encompassed by Article G. The prohibition on collective action is particularly necessary in Ireland as military personnel are responsible not just for state security (for instance in the disposal of bombs) but also as an aid to the Civil Authority. The Respondent suggests that wide ranging roles of the Defence Forces as set out above and in the Defence White Paper in this regard should be noted. Unlike many other states, Ireland does not have multiple State forces which might be relied upon in the event of a strike by the national police force. The contested restriction is accordingly a strictly necessary one.
110. The Respondent notes the Committee's observation in *EUROCOP* that “...*the right to strike is intrinsically linked to the right to collective bargaining*”. As set out above, however, the Respondent has endeavoured to provide for freedom of association and processes of collective bargaining to alleviate any disadvantage which might arise by reason of the prohibition on the right to strike.
111. For these reasons, an absolute prohibition does not go further than is necessary for the achievement of the legitimate aim. In order to alleviate disadvantages which might arise from this restriction on the right to collective action, the Respondent has sought to provide for a variety of collective bargaining mechanisms and grievance procedures (which are unique to the military), a military service allowance and military representative associations capable of defending the occupational and non-pecuniary interests of members. These associations enjoy the right to be consulted in discussions concerning conditions of service or pay for members of the Permanent Defence Forces. As such, the prohibition on the right to strike is proportionate.



112. Such limitations or differences in treatment for military personnel are not unique to Ireland, and Ireland is not unique in imposing limitations on rights of association for military personnel. The Organisation for the Security and Co-operation in Europe (OSCE) has stated that “*It is common in many countries for the freedom of association of public servants, including members of the Defence Forces to be limited*”<sup>30</sup>. There are many examples of countries in which members of the military forces are legally prohibited from engaging in strikes. Examples include Poland, Hungary, Germany, Romania, Belgium and Sweden.
113. Finally, the Respondent wishes to point out that the prohibition on the right to strike is in place as long as the legislature considers that this is appropriate. Given the current role and context of the military which is defined in statute, and the social need arising therefrom, it is considered appropriate and necessary to ban strikes. Were these factors to change, the possibility of legislative amendment to lessen restrictions on the freedom of association or collective action could arise. Indeed, a private members bill namely the *Industrial Relations (Members of the Garda Síochána and the Defence Forces) Bill 2015* was recently considered by the Oireachtas. During Parliamentary Debates, the Minister for Justice and the Minister for Defence set out reasons for which restrictions were necessary in relation to military personnel.<sup>31</sup>
114. The Respondent suggests that it falls to states to decide, in light of the circumstances of a given national system, whether a prohibition on the right to strike of the military is truly necessary and proportionate with a view to achieving the legitimate objective pursued. The Respondent is of the view that the specific examples where the Permanent Defence Force have been called on protect the rights and freedoms of others, national security, or public health or morals fall within the margin of appreciation as envisaged by Article G of the Charter and that they demonstrate the existence of a concrete pressing social need. In this regard the Respondent argues that it has demonstrated compelling reasons as to why an absolute prohibition on the right to strike is justified in the specific national context in question, as distinct from the imposition of restrictions as to the mode and form

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<sup>30</sup> Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel page 66.

<sup>31</sup> The debate is available at

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015042400003?openDocument#A00100>.

of such strike action.

## **VII CONCLUSION**

115. For the reasons set out above, it is submitted that the Committee should declare this Complaint without merit.