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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

12 June 2013

Case Document no. 1

Conseil Européen des Syndicats de Police (CESP) v. France
Complaint No. 101/2013

COMPLAINT

Registered at the Secretariat on 10 June 2013



European Council of Police Trade Unions

International Non-Governmental Organisation within the Council of Europe

Subject: Complaint lodged by the European Council of Police Trade Unions against France for the incorrect application of Articles 5 and 6 of the revised European Social Charter.

1. Admissibility

1.1. - Applicability to France of the revised European Social Charter and of the 1995 Protocol to the European Social Charter providing for a system of collective complaints

FRANCE signed the European Social Charter of 1961 on 18 October 1968 and deposited its instruments of ratification on 9 March 1973. FRANCE signed the 1995 Additional Protocol to the European Social Charter providing for a system of collective complaints on 9 November 1995 and ratified it on 7 May 1999. FRANCE signed the revised European Social Charter on 3 May 1996 and ratified it on 7 May 1999.

1.2. – Applicability to FRANCE of Articles 5 and 6 of the revised European Social Charter

According to the declarations contained in the instrument of ratification of the revised European Social Charter of 1996 deposited by FRANCE on 7 May 1999, FRANCE considers itself bound by all the Articles in Part II of the revised European Social Charter.

1.3. – Compliance by the European Council of Police Trade Unions with the requirements of the Additional Protocol

1.3.1. – Compliance with Article 1(b) of the Additional Protocol of 1995

The European Council of Police Trade Unions⁽¹⁾ is an international non-governmental organisation which holds participatory status with the Council of Europe. It appears on the list, drawn up by the Governmental Committee, of international non-governmental organisations entitled to lodge complaints.⁽²⁾

1.3.2. – Compliance with Article 3 of the Additional Protocol of 1995

The ECPTU's activities give it the necessary competence regarding the matters of which it complains.

Accordingly, Article 8 of its articles of association⁽³⁾ provides as follows:

The aim of the ECPTU is:

1. to unite the police officers who are members of its constituent organisations;
2. to fight for the full exercise of trade union rights and against any unwarranted restriction on European police officers' fundamental and statutory rights by steadfastly opposing any breach thereof;
3. to take action to enhance and harmonise the work, pay and living conditions of European police officers;

¹ - hereafter the ECPTU

² - letter of 15 May 2006 to the President of the European Council of Police Trade Unions from Mr Régis Brillat, Executive Secretary, DG II, Secretariat of the European Social Charter (appendix 1)

³ - articles of association of the ECPTU (appendix 2)

4. to defend the pecuniary and non-pecuniary interests of its constituent organisations and their members in the European institutions and courts.

The ECPTU is also committed to carrying out any other lawful activity which may be of benefit to it or its members.

It asks the Governments of its 16 member countries to take the necessary steps to sign, ratify and apply the revised European Social Charter and the additional protocol thereto.

In this connection, **it calls for all European police officers to be protected from discrimination in respect of social and human rights** (Executive Committee meeting, LILLE (FRANCE), November 1998)⁽⁴⁾.

The ECPTU takes an active part in INGO activities at the Council of Europe and is competent in areas of activity connected with social rights and the European Social Charter. It was the instigator of Collective Complaints nos. 11/2001, 37/2006, 38/2006, 40/2007, 54/2008, 57/1200 and 68/2011.

It is also a member of the INGO Groupings on Human Rights, Social Cohesion, Civil Society and Democracy.

1.4. – Compliance with Rule 1 of the rules of procedure of the collective complaints system

Article 25 of the ECPTU's articles of association states that the President is the legal representative of the ECPTU, representing it before all European and national, public and private authorities and institutions.

2. Legislation and measures adopted by France regarding the right to organise

As mentioned above, FRANCE is bound by Articles 5 and 6 of the revised European Social Charter, in which it is stated as follows:

* on the right to organise (cf. Article 5):

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

It is worth noting here Recommendation 1572 (2002) issued by the Parliamentary Assembly of the Council of Europe and the Committee of Ministers' reply adopted on 16 July 2003 at its 849th meeting, *"Right to association for members of the professional staff of the armed forces"*⁽⁵⁾.

The Parliamentary Assembly proposed that the third sentence of Article 5 be deleted and the words "armed forces" inserted in the second sentence. Article 5 would thus have read 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 and the members of the armed forces shall be determined by national laws or regulations"

It should further be noted that the European Code of Police Ethics - Recommendation Rec (2001)10 of the Committee of Ministers to the member states of the Council of Europe⁽⁶⁾ – makes several references to the issue of freedom of association for all members of the police.

The appendix to Recommendation Rec(2001)10 on the European Code of Police Ethics provides a clearer definition of the scope of the said Code: *"This code applies to traditional public police forces or police services, or to other publicly authorised and/or controlled bodies with the primary objectives of maintaining law and order in civil society, and who are empowered by the state to use force and/or special powers for these purposes"*.

⁴ - Lille final resolution (Appendix 3)

⁵ - PACE recommendation Doc.9885 of 21 July 2003 (Appendix 4)

⁶ - Recommendation of the Committee of Ministers of the Council of Europe Rec (2001) 10 (Appendix 5)

It should likewise be noted that “*The Code applies regardless of how such police are being organised; whether centralised or locally oriented, whether structured in a civilian or military manner*”. It is stated that: “*Above all the rule of law requires that those who make, adjudicate and apply the law should be subject to that same law. In other words, the police should be subject to the self-same law that they apply and uphold*”.

In particular, mention is made of the fact that “*The European Social Charter and its case-law comprises important principles with regard to the social and economic rights of police personnel.*”

In “*IV.4 Rights of Police Personnel*”, it is stated as follows:

“31. Police staff shall as a rule enjoy the same civil and political rights as other citizens. Restrictions to these rights may only be made when they are necessary for the exercise of the functions of the police in a democratic society, in accordance with the law, and in conformity with the European Convention on Human Rights.”

In the explanatory memorandum of the recommendation, it is stated with regard to the above provisions that:

“The Articles of this section are guided by the overall principle that police in an open democratic society should have the same rights as other citizens, to the fullest possible extent. This is an important element of the rule of law and of making the police part of the society it serves.

The rights covered by the European Convention on Human Rights (civil and political rights) apply fully to all citizens in member states, including those employed by the police. Some of these rights are “absolute” in their character, whereas others may be derogated under special conditions. In this respect, reference is made to the extensive case law developed by the European Court of Human Rights.

The present Article emphasises that member states shall not deprive their police staff of any civil and political rights, unless there are legitimate reasons directly connected to the proper performance of police duties in a democratic state governed by the rule of law.”

* on the right to bargain collectively (cf. Article 6):

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

- ✓ *to promote joint consultation between workers and employers;*
- ✓ *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;*
- ✓ *to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;*
and recognise:
- ✓ *the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.”*

The case-law under the Charter in relation to Articles 5 and 6 has established that, even if there may be no unlimited right for the police to organise, **it would be a violation of the Charter** to forbid police officers to set up their own representative associations.

3. Violation by France of Articles 5 and 6 with regard to the military personnel of the National Gendarmerie

There is no question that the French Government, in deliberately making the so-called “*military*” personnel of the National Gendarmerie, i.e. officers, NCOs and volunteers of the National Gendarmerie, subject to military regulations has violated Articles 5 and 6 of the revised European Social Charter, given that the said military status precluding any right to organise is unwarranted.

The Committee of the European Social Charter cannot [*** simply consider the purely formal aspects of] the status conferred on personnel of the National Gendarmerie by the French state without examining the actual duties which they are required to perform in order to ascertain whether military status is justified under the European Social Charter.

For it should be noted that trade union rights are fundamental rights guaranteed under the European Social Charter and that only “members of the armed forces” can be exempted from them entirely.

In granting military status to members of the National Gendarmerie, however, the French Government is deliberately violating the provisions of Articles 5 and 6 of the European Social Charter by wrongly conferring on them a status that is in no way justified by the duties they perform, 95% of which are the same as those carried out by members of the national police force.

Before examining this violation, it is worth looking at the history of the National Gendarmerie, the current status of its members, staffing levels and the duties it performs.

3.1. – History of France’s National Gendarmerie

France’s National Gendarmerie is descended from a body of troops who were responsible for maintaining public order. This body, created in 1373, operated under the command of the Constable of France and, after this office was abolished in 1626, the Marshals of France. It was known first as the Constabulary and later as the Marshalcy, therefore. In 1536, the Edict of Paris spelt out its missions, including notably policing the main highways. Members of the Marshalcy bore the title “*prévôt des maréchaux*” and were divided into brigades (with four to five men every 15 to 20 km) from 1720 onwards.

The term “gendarmerie” comes from “gens d’arme”, meaning “men-at-arms” and was used from the Late Middle Ages until the beginning of the modern era to refer to the heavy cavalry. With the decline of the cavalry, the Gendarmerie de France became a body of troops attached to the Household of the King (*Maison du Roi*). In 1720, the Marshalcy was symbolically placed under the administrative authority of the Gendarmerie de France, which led to it being renamed the “*gendarmerie nationale*” on 16 February 1791.

The modern-day gendarmerie really came into existence with the legislation of 16 February 1791, followed by the Law of the 28 Germinal Year VI (April 17 1798) which stated that the Gendarmerie’s role was “*to ensure within the Republic the maintenance of order and the execution of the laws*”. The Gendarmerie was reorganised under the Ordinance of 29 October 1820. The Law of 1850 set the target of one brigade for every canton, thus confirming a process that had begun a decade earlier. There was a further reorganisation under the decree of 1 March 1854, and then again under the decree of 20 May 1903, which governed the National Gendarmerie for almost a century.

The law of 29 August 2002 on the future direction of internal security (*loi d’orientation et de programmation sur la sécurité intérieure*) handed responsibility for setting national guidelines on security policy to the Ministry of the Interior and gave it authority over the Gendarmerie for implementing these guidelines. The same law resulted in a new distribution of the Gendarmerie and the police in France within the framework of an urban police force (*police d’agglomération*). The Directorate-General of the National Gendarmerie remains under the purview of the Ministry of Defence, however, as does its personnel.

As of 1 January 2009, the budgets of the Gendarmerie and the police have been managed by the Ministry of the Interior. The law of 3 August 2009⁽⁷⁾, followed by a series of decrees, confirmed the National Gendarmerie’s new affiliation to the Ministry of the Interior while allowing it to maintain some links with the Ministry of Defence.

Today, however, the personnel of the National Gendarmerie are governed by the provisions of the Defence Code introduced by Ordinance No. 2004-1374 of 20 December 2004, ratified by Law No. 2005-1550 of 12 December 2005 amending various provisions on defence.

3.2. – Special status of members of the National Gendarmerie

With regard to the provisions of the revised European Social Charter, the great majority of members of the National Gendarmerie are covered by rules that derogate from the rights enshrined in the said Charter for the simple reason that the French Government has assigned them the status of “armed forces” under the Charter, referred to in French law as “military status” defined by the Defence Code.

Article L. 3225-1 of this Code⁽⁸⁾ determines how the National Gendarmerie is to be organised, stating that:

“Without prejudice to the powers of the judiciary for the purpose of performing its criminal investigation tasks, and those of the Ministry of the Interior for the purpose of performing its civilian tasks, the National Gendarmerie shall be placed under the authority of the Minister of Defence for the purpose of performing its military tasks, in particular where it is participating in operations by the armed forces outside the national territory.”

⁷ - Appendix 7

⁸ - Appendix 7

The Minister of Defence shall participate in the management of the human resources of the national gendarmerie in the manner laid down by decree of the Conseil d'État and shall exercise disciplinary powers over the military personnel of the national gendarmerie."

One notable consequence of the conferral of such military status on members of the National Gendarmerie is that they are prohibited from engaging in any trade union activity, as stipulated in Article L. 4121-4 of the said Code which reads:

"The exercise of the right to strike shall be incompatible with military status.

The existence of military professional associations of a trade union nature and the affiliation of serving military personnel to such associations shall be incompatible with the rules of military discipline.

Commanders at all levels shall have a responsibility to look after the interests of their subordinates and to report, through the chain of command, any problem of a general nature which might come to their attention."

It is important to note, however, that since the introduction of Law No. 2009-971 of 3 August 2009⁽⁹⁾, the Gendarmerie has been attached, for employment purposes, to the Ministry of the Interior which, since 1 January 2009, has also been responsible for its budget.

Although it has kept its military status, with lawmakers referring to it as one of the "armed forces", the fact remains that the legislation in question expressly provided for the National Gendarmerie to be placed under the budgetary and operational control of the Ministry of the Interior.

3.3. – Current tasks of the National Gendarmerie

Article L. 421-1 of the Code of Internal Security⁽¹⁰⁾ defines the National Gendarmerie's tasks as follows:

"The National Gendarmerie shall be an armed force established to ensure the execution of laws.

Criminal investigation shall be one of its core missions.

The National Gendarmerie shall be designed to ensure public security and public order, in particular in rural and out-of-town areas and on communication routes.

It shall contribute to the intelligence and information mission of the public authorities, action against terrorism and protecting the public.

All of its civilian duties shall be performed throughout the national territory and beyond in accordance with France's international undertakings."

The Ministry of the Interior website⁽¹¹⁾, furthermore, describes the National Gendarmerie as follows:

"A 98,000-strong force under the authority of the Ministry of the Interior, the national Gendarmerie is a military institution whose role is to ensure peace and security for our fellow citizens, and to protect their property.

It performs tasks relating to criminal investigation, assistance and law enforcement and participates in the defence of the nation, including in external theatres of operation.

In dedicating themselves to these noble purposes, our gendarmes can be relied upon to deal with life's dramas calmly and humanely, anytime and anywhere, whether in France or abroad.

With its vast experience and willingness to adapt to changes in society, this centuries-old institution draws on the diversity of its officers' skills and their professionalism to safeguard the population, territory and movements of every kind within its area of responsibility."

⁹ - Appendix 6

¹⁰ - Appendix 8

¹¹ - Appendix 9

In addition, in the appendix to the Finance Act for 2013 ⁽¹²⁾ presented to parliament by the French Government, the activities of the National Gendarmerie are described by General MIGNAUX, the organisation's Director-General, as follows (cf. pages 74 and 75 of the appendix):

"In order to satisfactorily meet the growing expectations of the public in matters relating to security, the National Gendarmerie will pursue its activities in 2013 with a fresh goal in mind, namely to improve security for everyone, everywhere. Technical, legal and demographic changes will be factored into its general strategy so as to anticipate and prevent as effectively as possible variations and new forms of insecurity.

Action firmly geared towards meeting public needs and expectations

The gendarmerie will maintain its close, trust-based relationship with the population, which is growing fast in peri-urban areas and stagnating or even declining in rural areas. The availability of its personnel, combined with the country-wide network provided by its units, will enable it to continue providing a local service, both in France and overseas. The quality of the service delivered to users will thus continue to rest on the visibility of military personnel who are attentive to their fellow citizens and local elected officials.

The gendarmerie will adapt to current realities and threats, making a special effort in areas of high crime and the "priority security zones" (ZSPs) set up at the end of 2012.

The gendarmerie will also continue to invest in community policing, and in its crime control and prevention role. It will strive even harder to work in partnership with all the other parties involved and with dedicated structures, such as "urban social cohesion contracts" (CUCSs) and "local security and crime prevention contracts" (CLSPDs).

Keeping pace with the changing face of crime

In order to deal with the multiple forms of crime, which is both mobile and inventive, and with the wide-ranging and sometimes brutal methods employed, the gendarmerie will begin by stepping up policing of areas and flows so as to restrict criminals' freedom of movement. The deployment of CCTV cameras in critical areas, together with all the available resources (departmental gendarmerie supported by the mobile gendarmerie and the reservists) will provide one of the main levers for action.

The gendarmerie will accordingly favour an operational approach based on regular analysis of criminal phenomena, in order to take targeted action designed to deliver long-term results in terms of both prevention and investigation. Priority will be given to the most effective and efficient methods of operation. When it comes to fighting the criminal networks responsible for the rising number of thefts and burglaries, the gendarmerie will seek to exploit complementarities between the territorial units and the research units that specialise in the most complex criminal investigations, and will press ahead with plans to develop its capacity in terms of forensics.

Everyone will prepare and then conduct an operation tailored to the local or even regional realities that are appropriate to its particular level of activity, adjusting it to the human, material and budgetary resources available.

Co-ordinated action with the national and municipal police forces and the customs authorities will be developed further.

Last but not least, the gendarmerie will identify the new threats facing vulnerable groups, and will endeavour to address these as effectively as possible, in particular where crime related to new information and communication technologies is concerned.

Decisive action to reduce the number of deaths on the roads

The gendarmerie will continue its efforts to improve road safety, by targeting the types of behaviour that are responsible for the most serious accidents in order to further reduce the risk of death on the roads. Its expertise will allow it to adopt an approach that is discerning yet firm, and that combines prevention and enforcement. The system of specialised units has been reoriented to provide more effective monitoring of those départemental roads where most of the accidents occur. The worst instances of irresponsible behaviour will be detected through greater use of unmarked vehicles and centralised use of the automatic licence plate reader system.

¹² - Appendix 10

Cutting-edge tools and skills

The gendarmerie will continue to develop new tools and to introduce new generation equipment in its various units. Optimal use of high-performance information systems – the public security database (BDSP), Puls@r software and the judicial proceedings/criminal records database (TPJ-TAJ) – will contribute to greater effectiveness on the ground. The statistical interpretation of crimes will benefit from readings based on the town where they were committed and identification of the type of offence according to a system of reference shared with the judiciary. At the same time, the dissemination on the ground of forensic techniques and their centralised and shared use with the police will enable the gendarmerie to improve its clear-up rate. In the interest of victims and respect for the right of defence, in-service training for criminal investigation officers and staff will lead to proficient use of state-of-the-art methods and enable any changes in the law to be swiftly taken into account. Compliance with the legal principles governing the use of computer files will receive particular attention.

Performance based on streamlining and sharing

In 2013 the gendarmerie will maintain its operational units' performance by taking care to make optimum use of the resources available.

It will continue its streamlining efforts and will pursue, in keeping with its identity and whenever they generate savings or a better standard of service, synergies and pooling arrangements with the national police in the operational sphere and in training and support.

In addition, reducing non-core tasks will free up more resources for tackling insecurity.”

It is clear from this description that the vast majority of, if not virtually all, the tasks entrusted to the National Gendarmerie pertain exclusively to criminal investigation or administrative tasks within the national territory.

This fact is reflected in the breakdown of authorised expenditure of National Gendarmerie funds, as stated in the appendix (cf. page 95 of the appendix):

Number and title of activity / sub-activity	Total for 2013
01 – Public order and security	€3,219,547,904
02 – Road safety	€817,399,809
03 – Criminal investigation and co-operation with the judiciary	€1,762,847,355
04 – Command, human resources and logistics	€1,858,474,654
05 – Performance of military duties	€193,406,206
TOTAL	€7,851,675,928

A close look at this breakdown shows that the funds allocated to military duties account for only **2.46%** of authorised expenditure whereas in the case of policing activities proper (tasks 01 to 03), the figure is **73.9%**, i.e. 30 times greater than the amount allocated to military duties.

The breakdown of staffing levels by task in full-time equivalent (cf. pages 101 and 102 of the appendix) tells a similar story.

Number and title of activity / sub-activity	Full-time equivalent
01 - Public order and security	44,936
02 – Road safety	11,677
03 - Criminal investigation and co-operation with the judiciary	23,993
04 - Command, human resources and logistics	14,308
05 - Performance of military duties	2,179
TOTAL	97,093

It will be seen from this breakdown that military duties account for just **2.24%** of full-time equivalent posts in the National Gendarmerie whereas the figure for policing duties (tasks nos. 01 to 03) is **83.01%**.

With regard to this percentage of full-time equivalent staff assigned to military duties, the appendix (cf. page 118) further states that “*Activity 5 (ACTIVITY No. 05 Performance of military duties), comprises 2 179 full-time equivalent posts, whose share is determined by the employment figures for staff in the multidisciplinary units participating in military missions carried out both within the national territory and abroad.*”

3.3. - Violation of Articles 5 and 6 of the revised European Social Charter

It is clear from the above that:

- ✓ since the introduction of Law No. 2009-971 of 3 August 2009, the Gendarmerie has come under the budgetary and operational control of the Ministry of the Interior;
- ✓ military duties account for only 2.46% of the National Gendarmerie's total authorised expenditure and only 2.24% of its staff (in full-time equivalent) whereas spending on policing duties accounts for 73.9% of the total budget and 83.01% of the staff.

It appears from this objective information provided by the Ministry of the Interior that France's National Gendarmerie is almost exclusively engaged in policing and that its military duties are very much a fringe activity in terms of both funding and manpower.

That being the case, under no circumstances may the French Government plead military status in order to deny members of the National Gendarmerie the benefit of the rights enshrined in the European Social Charter given that their duties are identical to those performed by the police, whose officers, with some exceptions, do enjoy the rights guaranteed under the Charter.

There is no question, therefore, that in choosing to confer military status on members of the National Gendarmerie, the French Government is in deliberate breach of Articles 5 and 6 of the revised European Social Charter.

4. - Conclusion

Accordingly, the object of this complaint lodged by the European Council of Police Trade Unions is that:

- ✓ the Committee find a violation by FRANCE of Articles 5 and 6 of the revised European Social Charter by conferring on virtually all members of the National Gendarmerie military status such as to prevent the said officers from exercising the trade union rights guaranteed under the aforementioned articles;
- ✓ FRANCE, in order to comply with the Charter, apply to officers of the National Gendarmerie the same rules as those applied to serving members of the national police force, i.e. the opportunity to exercise trade union rights except for the right to strike.



Branko PRAH

Président du CESP

Appendices to the complaint

Appendix 01: Letter of 15 May 2006 to the President of the ECPTU from Mr Régis Brillat, Executive Secretary, DG II, Secretariat of the European Social Charter (appended to the complaint)

Appendix 02: Articles of association of the European Council of Police Trade Unions

Appendix 03: ECPTU final resolution (LILLE - 1998)

Appendix 04: Parliamentary Assembly of the Council of Europe Recommendation 1572 (2002) Doc. 9885 21 July 2003 – Right to association for members of the professional staff of the armed forces

Appendix 05: European Code of Police Ethics, Recommendation Rec (2001) 10 of the Committee of Ministers to member states

Appendix 06: Law No. 2009-971 of 3 August 2009

Appendix 07: Articles L. 3225-1 and L. 4121-4 of the Defence Code

Appendix 08: Article L. 421-1 of the Code of Internal Security

Appendix 09: Description of the National Gendarmerie on the Ministry of the Interior website – <http://www.interieur.gouv.fr/A-votre-service/Nos-metiers>

Appendix 10: Appendix to the draft Finance Act for 2013 – Security