EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Complaint No. 5/1999

European Federation of Employees in Public Services against Portugal

Documents

Secretariat of the European Social Charter
E-mail : social.charter@coe.int http://www.esc.coe.int

September 2001

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The European Social Charter – an overview

The European Social Charter guarantees human rights and fundamental freedoms in the economic and social sphere. It is the counterpart to the European Convention on Human Rights.

The Social Charter, which was opened for signature on 18 October 1961 and entered into force on 26 February 1965, guarantees a series of rights grouped into 19 articles. The Additional Protocol of 5 May 1988, which entered into force on 4 September 1992, added four rights to the Charter.

After a thorough revision, the 1961 Charter is being gradually replaced by the revised European Social Charter[1], which was opened for signature on 3 May 1996 and entered into force on 1 July 1999, and which amended and extended the list of rights guaranteed[2].

Compliance with the commitments set out in the Charter and the revised Charter is subject to international supervision by an independent body - the European Committee of Social Rights. There are two procedures for carrying out this supervision.

Supervision procedure based on reports

Under Article 21 of the charter, states submit periodic reports on the "hardcore" provisions[3] every two years and on the non-hardcore provisions every four years. The Committee of Ministers has set a precise timetable for the submission of reports.

The supervision procedure functions as follows:

– the *European Committee of Social Rights*, made up of 12 independent experts elected by the Committee of Ministers and assisted by an observer from the International Labour Organisation, examines the reports submitted by states and issues a ruling on whether states have complied with their

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1 As at 1 July 2001, the Contracting Parties to the Charter are: Austria, Belgium, the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Iceland, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Spain, Turkey and the United Kingdom. The parties to the revised Charter are: Bulgaria, Cyprus, Estonia, France, Ireland, Italy, Lithuania, Norway, Romania, Slovenia and Sweden.

2 The revised Social Charter brings together in a single instrument the rights set out in the Charter (as amended), the rights set out in the Additional Protocol and a series of new rights grouped into eight articles.

3 The Charter's core provisions are: freedom of work (Article 1), freedom of association and the right to bargain collectively (Articles 5 and 6), the right to social security (Article 12), the right to assistance (Article 13), the rights of the family (Article 16), the rights of migrants (Article 19). The core provision of the revised charter also include: the rights of children (Article 7) and the right of women and men to equal treatment and opportunities in employment (Article 20).

commitments. Its rulings are called "conclusions". These are forwarded to states, are public.[1]

– if a state fails to act on a ruling of non-compliance by the European Committee of Social Rights, the Council of Europe's *Committee of Ministers* may issue a recommendation to the state concerned, asking it to amend its legislation or practice in order to bring it into line with the charter. The work of the Committee of Ministers is prepared by a *Governmental Committee* made up of representatives of the governments of the states parties to the charter and assisted by representatives of both sides of industry in Europe.[2]

The collective complaints procedure

The Additional Protocol Providing for a System of Collective Complaints, which was opened for signature on 9 November 1995 and entered into force on 1 July 1998,[3] sets out a collective complaints procedure whereby allegations of breaches of the Charter or the revised Charter may be submitted to the European Committee of Social Rights. This procedure is not conditional upon the exhaustion of domestic remedies.

Who may lodge a collective complaint?

– the European employers' organisations and trade unions which participate in the work of the Governmental Committee: ETUC, UNICE and IOE;

– European non-governmental organisations having consultative status with the Council of Europe[4] and included on a list drawn up for this purpose by the Governmental Committee;[5]

– national employers' organisations and trade unions from the state concerned;

– national non-governmental organisations, if the state concerned has made a declaration authorising them to do so and if they are particularly competent in their field of activity.

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1 The country reports and the decisions of the Committee are public and may be consulted on the website http://www.esc.coe.int.

2 The European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE) and the International Organisation of Employers (IOE).

3 As at 1 July 2001, 11 states have accepted the collective complaints procedure: Bulgaria, Cyprus, Finland, France, Greece, Ireland, Italy, Norway, Portugal, Slovenia and Sweden.

4 For further information on how to obtain consultative status, contact NGO-Unit@coe.int.

5 Interested organisations should send a letter to the Secretariat of the European Social Charter, Directorate General of Human Rights - DG II, Council of Europe, F-67705 Strasbourg Cedex (France). The letter should be accompanied by detailed documentation covering in particular the status of the organisation and its field of activity, objectives and working methods. This dossier will be forwarded to the Governmental Committee for a decision. The list may be consulted on the website http://www.esc.coe.int.

In what form should a complaint be lodged?

A collective complaint must be lodged in writing and must be signed by an authorised representative of the complainant organisation.

Complaints lodged by the ETUC, the UNICE and the IOE or by European non-governmental organisations must be written in one of the official languages of the Council of Europe (English or French). Complaints lodged by national trade unions and employers' organisations and by national non-governmental organisations may be written in a non-official language.

The complaint file should contain the following information:

- the name and contact details of the organisation lodging the complaint;
- in the case of non-governmental organisations, a note stating whether the organisation has consultative status with the Council of Europe and is included on the Governmental Committee list, and details of the fields of activity in which the organisation is competent;
- the state against which the complaint is being lodged, which must have accepted the collective complaints procedure;
- the Charter provisions which are alleged to have been breached, which the state in question must have accepted;
- the object of the complaint - that is, the extent to which the state in question is alleged not to have complied with the charter, and relevant arguments to support the allegation. Copies of relevant documents are required.

How does the procedure function?

The complaint is examined by the European Committee of Social Rights, which first decides on its admissibility according to the criteria listed above and its rules of procedure.

The procedure is adversarial. If the complaint is admissible, a written procedure is followed, with an exchange of documents between the parties. The procedure may become an oral one and a hearing may be organised by the committee.

The Committee then decides on the merits of the complaint. Its decision is contained in a report which it forwards to the Committee of Ministers.

At the end of the procedure, the Committee of Ministers adopts a resolution. If appropriate, it may recommend that the state in question take specific steps to bring the situation into line with the Charter.

Introduction

The aim of this monograph is to reproduce in chronological order the original documents of the procedure that was followed on the examination of the seventh complaint under the Additional Protocol to the European Social Charter providing for a system of collective complaints.

Complaint No. 5/1999 was filed on 1st September 1999 by the European Federation of Employees in Public Services. On 10 February 2000, the European Committee of Social Rights declared the complaint admissible. On 4 December 2000, the Committee adopted its decision on the merits and transmitted its report to the Committee of Ministers. On 7 February 2001, the Committee of Ministers adopted Resolution ChS (2001) 4.

Complaint filed by the European Federation of Employees in Public Services (EUROFEDOP) against Portugal

(filed with the Secretariat on 1st September 1999)

Algemeen Secretariaat • Secrétariat Général • Generalsekretariat • Secretariat General • Secretariado General

COMPLAINT LODGED BY EUROFEDOP
against Portugal according to the Additional Protocol to the European Social Charter of 1995 providing for a system of collective complaints

As mentioned in our letter to the Secretary General of the Council of Europe dated 29 July 1999, Eurofedop has lodged a complaint against Portugal with respect to Articles 5 and 6 of the European Social Charter.

I. ADMISSIBILITY OF THE COMPLAINT

1. Portugal signed the European Social Charter on 1 June 1982 and ratified on 30 September 1991. It entered into force in respect of Portugal on 30 October 1991.

2. Portugal signed the Additional Protocol of 1995 providing for a system of collective complaints on 9 November 1995 and ratified it on 20 March 1998. It entered into force in respect of Portugal on 1st July 1998.

3. According to the instrument of ratification, "Portugal considers itself bound by Articles 1, 5, 6, 12, 13, 16 and 19 ".

4. Eurofedop is an international non-governmental organisation which has consultative status with the Council of Europe. It is on the list established by the Governmental Committee of international non-governmental organisations which have the right to submit a complaint.

5. The objectives of EUROFEDOP are the defence and the promotion of the economic and social interests of European workers in the Public Services, due account being taken of their specific rights and duties.

6. According to its statute, the President and the Secretary General of Eurofedop have the competence to represent Eurofedop (see Appendix).

II MERITS OF THE COMPLAINT

7. Article 270 of the Portuguese Constitution permits restrictions to be placed on the right of members of the military to organise. By virtue of this provision Law No.29 82 of 11 December 1982 on National Defence prohibits members of the military and National Republican Guard from forming trade unions. This law allows for affiliation of members of the military to professional associations, but these associations must be concerned only with the professional code of ethics ("associations professionnelles a caractere deontologique").

8. In addition, the situation of civilian members of the Ministry of Defence is in practice not in conformity with Articles 5 and 6 of the Charter and of the Revised Charter.

Europese Federatie van het Overheidspersoneel
Fédération Européenne du Personnel des Services Publics • Europäischen Föderation der Öffentlich Bediensteten
European Federation of Employees in Public Services • Federación Europea del Personal de los Servicios Públicos
Trierstraat 33 • B-1040 Brussel • Tel. + 32 22 30 38 65 • Fax + 32 22 31 14 72
Modem: +32 2 231 96 51 • E-Mail: info@infedop-eurofedop.com

9. With regard to the task assignment of the armed forces, an important change has occurred since the beginning of the nineties, namely the one in which great priority is being given to tasks involving crisis management operations (peace-keeping, peace-enforcing and humanitarian operations), carried out or not in the context of NATO. Many operations have also the feature of aiming at restoring human rights and bringing about or restoring democracy.

10. Given the changes which have occurred, regarding the personnel structure, in the composition of the respective armed forces, given the (military) civil servant status of the defence personnel concerned, we consider it unacceptable that the professional and civilian defence personnel in the United Kingdom, France Italy, Greece, Spain and Portugal are further denied fundamental basic rights and cannot unite in free trade union organisations.

11. This personnel question also plays an important role in the future developments of a European defence force, namely in the context of a more integrated European peace and security policy.

12. In view of the advanced co-operation forms at Defence level in Europe, it seems unacceptable to us that the Personnel of Defence of certain countries would not enjoy the same rights, guaranteed by the Social Charter (Articles 5 and 6), as their colleagues whom they have to co-operate with and who have to fulfil exactly the same tasks.

Appendix – Excerpt from the Eurofedop statutes concerning the functions of the President and the Secretary General

VII. THE PRESIDENT

Article 20

1. **The President represents EUROFEDOP on all occasions**. He presides the governing bodies mentioned in Article 8. He can attend by right meetings of the Trade Councils defined in Article 8 and the Commissions and Working Groups set up by the Daily Management Board and the Executive Committee.

2. In agreement with the Daily Management Board he can, within the statutory bodies, be represented by a Vice-Chairman.

3. If the post of President becomes vacant, the presidency is assumed by one of the Vice-Chairmen nominated for the purpose by the Executive Committee. This nomination is valid until the next Congress.

VIII. THE SECRETARY GENERAL

Article 21

1. The Secretary General represents EUROFEDOP on the same basis as the President.

2. He directs the Secretariat and the staff of EUROFEDOP serving in the general secretariat as well as in the European Secretariats established by the Executive Committee. He manages the day to day affairs about which he is answerable to the Daily Management Board. the Executive Committee and the Congress.

3. He is responsible for the execution of the decisions and resolutions of Congress, the Executive Committee and the Daily Management Board. He reports on his activities, to these statutory bodies in accordance with the forms and conditions determined by them.

Written observations by the Government of Portugal on the admissibility of the complaint

(filed with the Secretariat on 6 December 1999)

TRANSLATION

MINISTRY OF NATIONAL DEFENCE

Department of Legal Affairs

INVITED TO COMMENT ON THE ADMISSIBILITY OF THE COMPLAINT LODGED BY THE EUROPEAN FEDERATION OF EMPLOYEES IN PUBLIC SERVICES (EUROFEDOP) IN ACCORDANCE WITH THE ADDITIONAL PROTOCOL TO THE EUROPEAN SOCIAL CHARTER PROVIDING FOR A SYSTEM OF COLLECTIVE COMPLAINTS, PORTUGAL SUBMITS THE FOLLOWING OBSERVATIONS:

1. Substance of the complaint

In brief, the complainant (which has appended to the complaint excerpts from its statutes and other information on its activities and membership) alleges that members of the armed forces in Portugal, France, Greece, Italy, Spain and the United Kingdom do not enjoy trade-union rights, whereas in other countries, especially in the north of Europe - Austria, Belgium, Germany, Luxembourg, the Netherlands and the Scandinavian countries - they do have those rights.

According to the complainant, the situation is now more difficult to justify, both nationally and internationally. Nationally, because the armed forces in many western European countries have been reorganised with the aim of putting an end to compulsory military service and creating a body composed exclusively of professionals, whether civilians or soldiers. Internationally, because the role of the armed forces has changed, involving new duties (in particular peace-keeping, peace-enforcement and humanitarian operations), and requiring (and looking set increasingly to require) new forms of co-operation between European countries, especially within the context of a more integrated European peace and security policy.

None the less, EUROFEDOP suggests that the countries listed above and concerned by this complaint are in conformity with Article 5 of the European Social Charter.

As regards Portugal, the grounds for complaint are the same and are based on a reading of Article 270 of the Constitution of the Republic and by Law No. 29/82 of 11 December 1982 on National Defence, which prohibits members of the armed forces and the Guarda Nacional Republicana from forming trade unions.

Lastly, EUROFEDOP refers to the situation of civilian employees of the Ministry of Defence[1], which it considers to be in breach of Articles 5 and 6 of the European Social Charter.

2. Conditions for admissibility of the complaint

The Additional Protocol sets out two conditions for a complaint to be deemed admissible.

The first, a subjective condition which relates to the legitimacy of lodging a complaint, is governed by Article 1.

The second, relating to a complaint's subject matter and the manner in which it is lodged, is governed by Article 4.

2.1 Regarding legitimacy, according to Article 1, para. b, the Contracting Parties recognise the right to submit complaints of "other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee".

The complainant claims that it meets these criteria. Whether this is so will doubtless be ascertained by the competent authorities.

2.2 Regarding the substance of the complaint, it can be concluded from Article 4 that this must both relate to a provision of the Charter accepted by the Contracting Party concerned and indicate in what respect the latter has not properly ensured the application of that provision.

It is therefore necessary to consider this matter in more detail. Accordingly:

3. Grounds for the complaint (Articles 5 and 6 of the European Social Charter)

3.1 The complainant considers that a number of Council of Europe member states - among them Portugal - place constitutional or statutory restrictions on the right of military personnel in the armed forces to form trade unions. As stated above (see section 1), the complainant considers this situation to be unacceptable.

However, it should be noted that the complainant considers no provision of the Charter to have been violated.

There are other reasons for the complaint, namely the new geostrategic situation, the new duties assigned to the armed forces and the transition from a system of compulsory military service to one based on professionalism.

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[1] We believe - for reasons which are explained in detail further on - that EUROFEDOP is referring here to civilian employees of the armed forces and not civilians in the Ministry of Defence.

Attention should also be drawn to paragraph 6 of the complainant's letter of 29 July 1999 to the Secretary General of the Council of Europe (reference EOB99.180.bvc.ef.en).

Many European countries do not grant basic rights to armed forces employees, and in particular to military personnel, who thus do not enjoy the democratic freedom to form trade unions.

The countries in question justify their position by reference to Article 5 of the European Social Charter.

The text of the complaint itself seems quite clear.

What EUROFEDOP wishes to highlight is the lack of conformity of the legal rules governing the situation of military personnel in the different member states of the Council of Europe. Specifically, the complaint refers to Portugal in the following terms (cf section II: "Merits of the complaint").

a. Article 270 of the Constitution of the Republic allows restrictions to be placed on the right of members of the military to organise.

b. Law No. 29/82 of 11 December 1982 on National Defence prohibits members of the armed forces and the Guarda Nacional Republicana from forming trade unions and permits them only to affiliate to associations concerned with the professional code of ethics.

c. The situation of civilians working for the Ministry of National Defence is not in conformity with Articles 5 and 6 of the Charter.

3.2 There follows an examination of Articles 5 and 6 of the European Social Charter.

A. Article 5 of the European Social Charter embodies one of the general principles set out in Part I of the Charter (paragraph 5). An examination of the first part of Article 5 shows that the Contracting Parties undertake, by internal legislation or its application, not to impede the right of workers and employers to form organisations for the protection of their economic and social interests or to join such organisations.

However, the second part of Article 5 makes two very important and specific provisos.

The first, relating to the police, reads: "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 second, relating to the armed forces: "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".

The key to understanding these specific provisions is to be found, clearly, in the words underlined.

Article 5, then, provides for three situations. The first relates to workers and employers generally, to whom the general principle stated in the first part applies (as already mentioned, this is embodied in paragraph 5 of Part I); that is, states recognise a large measure of freedom to form and join trade unions. In the second situation, which concerns the police, it is the principle of freedom which is stressed, but it is for states to decide to what extent this freedom is guaranteed. Lastly, a clear distinction is made regarding the situation of the armed forces: the Contracting Parties enjoy complete freedom as to whether or not to guarantee by national laws or regulations the principle - and not just the scope - of the right to organise. That is to say, there is no provision under the Charter for a minimum content or level of protection in respect of members of the armed forces. On the contrary, the issue is left entirely to the discretion of states, which may decide to establish a minimum or maximum degree of freedom, or no freedom at all.

B. In contrast, Article 6 of the European Social Charter reflects the general principle embodied in paragraph 6 of Part I on the right to bargain collectively.

There is no point in dwelling on this provision at too much length, since it is dependent on the application of the article just considered.

This is because the "right to bargain collectively" is an institutional and organic right of trade unions and workers' committees, not a personal or individual right.

Accordingly, where there is no right to organise there can be no right to bargain collectively. Consequently, the degree of freedom enjoyed by Contracting Parties to the European Social Charter under the second part of Article 5 is also valid in respect of Article 6.

3.3 Another comment by EUROFEDOP which merits consideration and has a bearing on the issue of the complaint's admissibility is the remark that the situation of civilian employees of the Ministry of National Defence is in breach of the previously mentioned provisions of Articles 5 and 6.

EUROFEDOP states in paragraph 8 of the complaint: "In addition, the situation of civilian members of the Ministry of Defence is in practice not in conformity with Articles 5 and 6 of the Charter and of the Revised Charter".

This is obviously no more than a remark since it is unfounded and there is no substantiation of the (alleged) non-conformity.

Assuming that the complainant means to say that the Portuguese state does not recognise the right of civilian employees of the armed forces to form or join trade unions (cf Article 5) or to bargain collectively (cf Article 6)[1], it must be replied that the statement is inaccurate.

In reality, existing restrictions in this respect relate only to military and militarised personnel and not to civilian employees of the armed forces, who are covered by the general rights of workers.

3.4 Moreover, given that the European Social Charter has recently been revised with no amendments to the articles in question, it can be surmised that there is a firm intention to retain the existing rules.

4. Conclusions

In the light of the above, the complaint does not meet the conditions for admissibility on the following grounds:

1. Article 4 of the Additional Protocol to the European Social Charter providing for a system of collective complaints requires that a complaint shall state which provision of the Charter accepted by the Contracting Party it concerns and indicate in what respect the Contracting Party has not ensured the satisfactory application of that provision.

2. In its complaint against Portugal (and other countries), EUROFEDOP does not claim any "violation" of Articles 5 and 6 of the European Social Charter.

3. Indeed, the complainant accepts from the beginning that national restrictions on the right of members of the armed forces to form trade unions are entirely legitimate within the meaning of the second part of Article 5 of the Charter.

4. The complaint is thus presented, on an issue of principle, as an appeal concerning the discrepancy between the various legal rules in Council of Europe member states governing the right of members of the armed forces to form trade unions - a situation which the complainant considers undesirable.

5. Furthermore, regarding civilian employees of the armed forces, the complainant does no more than suggest that their situation is in breach of Articles 5 and 6 of the European Social Charter, indicating neither the extent nor the nature of this non-conformity.

6. Under the European Social Charter, the Portuguese state is entirely justified in prohibiting members of the armed forces by constitutional or statutory means from forming or joining trade unions.

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[1] It is impossible to be entirely unequivocal, given the wording of the complaint, but it must nonetheless be seen in this light since the reference to civilian employees of the Ministry of National Defence makes no sense.

7. Restrictions on this fundamental right relate only to members and agents of the military on permanent active service and to agents of the security services and forces.

8. The right to organise in its many forms, as guaranteed to the majority of state employees, is also guaranteed to civil servants working for agencies integrated into the structure of the armed forces.

9. Lastly, attention is drawn to the fact that the European Social Charter was recently revised with no amendments to Articles 5 and 6.

In the light of the foregoing, we consider that the complaint lodged by EUROFEDOP with the Council of Europe Secretariat on 1 September and forwarded to the Permanent Representative of Portugal on 13 September 1999 must be rejected on the grounds that it does not comply with Article 4 of the Additional Protocol and does not refer to a breach by Portugal of any provision of the European Social Charter.

Lisbon, 26 November 1999

Cristina Siza Vieira
for the Ministry of National Defence

Additional observations of the Portuguese Governement

TRANSLATION

[to]

Mr. Matti MIKKOLA
Chairman of the European Committee of Social Rights
of the European Social Charter
COUNCIL OF EUROPE

No. 321

Strasbourg, 13 December 1999

Sir,

Further to my letter, No. 319 of the 6th inst., I would ask you to add to the written observations of the Portuguese authorities on the admissibility of the collective complaint brought against Portugal by the European Federation of Employees in Public Services the following:

In accordance with the provisions of Section 95 of the Institutional Act on the "Guarda Nacional Republicana" (GNR), approved by Legislative Decree No. 231/93 of 26 June 1993, civilian personnel are subject to the General Act on Public Service Staff.

Under Article 1, para. 3 of the Disciplinary Regulations of the GNR, approved by Act No. 145/99 of 1 September 1999, civilian personnel of the GNR are subject to the general disciplinary system applying to civil servants.

I remain, Sir ...

Paulo Castilho
Permanent Representative

Decision on admissibility

2000

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Decision on the admissibility of Complaint No. 5/1999 by the European Federation of Employees in Public Services against Portugal

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (hereafter referred to as "the Committee"), during its 168th session attended by:

Messrs	Matti MIKKOLA, President
	Rolf BIRK, Vice-President
	Stein EVJU, Vice-President
Ms	Suzanne GRÉVISSE, General Rapporteur
Mr	Alfredo BRUTO DA COSTA
Ms	Micheline JAMOULLE
Messrs	Nikitas ALIPRANTIS
	Tekin AKILLIOĞLU

Assisted by Mr Régis BRILLAT, Executive Secretary of the European Social Charter

Having regard to the complaint registered as number 5/1999, lodged on 13 August 1999 by the European Federation of Employees in Public Services (hereafter referred to as "EUROFEDOP") represented by its President, Mr Guy Rausner and its Secretary General, Mr Bert Van Caelenberg, requesting that the Committee find that Portugal fails to apply in a satisfactory manner Articles 5 and 6 of the European Social Charter;

Having regard to the documents appended to the complaint;

Having regard to the observations submitted on 6 and 13 December 1999 by the Portuguese Government represented by Ms Cristina Siza Vieira, Director of the Legal Affairs Department of the Ministry of National Defence;

Having regard to the European Social Charter and in particular to Articles 5 and 6 which read as follows:

"Article 5 — The right to organise

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.

Article 6 — The right to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting 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;

and recognise:

4 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."

Having regard to the Additional Protocol to the European Social Charter providing for a system of collective complaints;

Having regard to the rules of procedure adopted by the Committee on 9 September 1999 during its 163rd session;

After having deliberated on 10 February 2000;

Delivers the following decision, adopted on the above date:

1. EUROFEDOP states that, according to its statute, its objective is to defend and promote the economic and social rights of employees in European public services taking into account their specific rights and obligations.

2. It alleges that Portugal does not comply with Articles 5 and 6 of the European Social Charter in so far as members of the armed forces do not enjoy the right to organise. The complaint is based on Section 270 of the Constitution and the Act on National Defence (Act No. 29/82 of 11 December 1982) which prohibit military personnel of the armed forces and of the "Guarda Nacional Republicana" from joining a trade union but allows them to affiliate only to professional associations which must be concerned solely with the professional code of ethics. Moreover, it is alleged that the situation of civil personnel in the armed forces is not in practice in conformity with the same provisions of the Charter. EUROFEDOP emphasises that that other States, notably in Northern Europe, have granted the right to organise to

members of the armed forces. It considers that the absence of a right to organise in several States, including Portugal, is particularly unjustifiable in view of both the domestic and the international context. In many States the armed forces have been restructured in order to abolish compulsory military service and aiming to establish an army composed exclusively of professionals, civilian and military. At the international level the tasks assigned to the armed forces have changed and now include peace-keeping and humanitarian operations. They are based on co-operation between European States within the framework of a policy on peace and security. In this context it seems unacceptable that employees of the armed forces would not enjoy the same trade union rights as their colleagues from other countries.

3. The Portuguese Government does not in substance contest the conformity of the complaint with the admissibility conditions laid down in Articles 1 b) and 3 of the Additional Protocol. It refers in this respect to the control exercised by "the competent bodies".

4. However, the Portuguese Government holds the view that the complaint is inadmissible as it does not fulfil the conditions of Article 4 of the Protocol that the complaint shall indicate the provisions of which violation is alleged and in what respect the said provisions have not been satisfactorily applied.

> According to the Portuguese Government, EUROFEDOP restricts itself to invoking violation of Articles 5 and 6. The government considers that the complaint is contradictory since in reality a question of principle is at issue, namely the harmonisation of national systems which are too differentiated. It does not concern a violation by Portugal of Articles 5 and 6, because, as admitted by EUROFEDOP, Portugal may as other States provide for restrictions on the right to organise for the armed forces.
>
> As regards the civilian personnel in the armed forces, the complaint indicates neither the scope nor the nature of the non-conformity.
>
> On the basis of Article 4 of the Protocol the Portuguese Government concludes that the complaint should be declared inadmissible.

As to the conditions of admissibility laid down by the Protocol and the rules of procedure of the Committee

5. The Committee notes that, in accordance with Article 4 of the Protocol, which was ratified by Portugal on 20 March 1998 and which entered into force on 1 July 1998, the complaint has been lodged in writing and relates to Articles 5 and 6, provisions accepted by Portugal on 6 August 1991 upon its ratification of the Charter.

6. It further notes that, in accordance with Article 1 b) and Article 3 of the Protocol EUROFEDOP is an international non-governmental organisation with consultative status with the Council of Europe. It is included on the list, compiled by the Governmental Committee, of international non-governmental organisations which are entitled to lodge complaints.

7. In addition, as laid down by Rule 20 of the rules of procedure of the Committee, the complaint lodged on behalf of EUROFEDOP is signed by its President and its Secretary General who, according to the statute of the organisation, are the persons empowered to represent it.

8. The Committee considers that this organisation has lodged a complaint in a field in which it has particular competence within the meaning of Article 3 of the Protocol.

As to the objections of inadmissibility raised by the Portuguese Government

9. The Committee observes that the complaint concerns violation of Articles 5 and 6 of the European Social Charter. The alleged violation concerns norms of the Portuguese legal system. The complaint aims expressly at the provision of the Portuguese Constitution and the Act on National Defence which are alleged to contravene two provisions of the Charter by prohibiting military personnel of the armed forces and the "Guarda Nacional Republicana" from organising, except in respect of professional associations which are concerned solely with the professional code of ethics.

10. The Committee thus considers that Article 4 of the Protocol and its different conditions are fulfilled and that the reasons given in the complaint, although succinct, are sufficiently indicative of the extent to which the Portuguese Government is alleged not to have ensured the satisfactory application of the provisions concerned.

11. Consequently, the Committee considers that the objections of inadmissibility raised by the Portuguese Government cannot be sustained. It reserves the possibility of examining the different arguments put forward as well as the observations made by the Portuguese Government in so far as they relate in substance to the case and in particular to the interpretation of Article 5 of the Charter.

12. In the light of the information submitted to it, the Committee does not consider it necessary to request supplementary observations from EUROFEDOP.

13. For these reasons, the Committee, on the basis of the report presented by Ms Micheline JAMOULLE, and without prejudice to its decision on the merits of the complaint,

DECLARES THE COMPLAINT ADMISSIBLE.

In application of Article 7 para. 1 of the Protocol, requests the Executive Secretary to inform the Contracting Parties to the Charter that the present complaint is admissible.

Invites the Portuguese Government to submit in writing by 15 March 2000 all relevant explanations or information.

Invites the Contracting Parties to the Protocol to communicate to it by the same date any observations which they wish to submit.

Invites EUROFEDOP to submit in writing by a deadline which it shall fix all relevant explanations or information in response to the observations of the Portuguese Government.

In application of Article 7 para. 2 of the Protocol, requests the Executive Secretary to inform the international organisations of employers or workers mentioned in Article 27 para. 2 of the Charter and to invite them to submit their observations by 15 March 2000.

Micheline JAMOULLE Rapporteur	Matti MIKKOLA President	Régis BRILLAT Executive Secretary

Explanations and information provided by the Portuguese Government following the admission of the complaint introduced by EUROFEDOP (Article 7 para. 1 of the Additional Protocol to the European Social Charter, providing for a system of collective complaints)

(filed with the Secretariat on 29 March 2000)

TRANSLATION

MINISTRY OF DEFENCE

Department of Legal Affairs

HAVING BEEN INVITED TO PROVIDE RELEVANT EXPLANATIONS OR INFORMATION CONCERNING COMPLAINT No. 5/1999 – LODGED BY THE EUROPEAN FEDERATION OF EMPLOYEES IN PUBLIC SERVICES (EUROFEDOP) – WHICH WAS DECLARED ADMISSIBLE IN A DECISION OF 10 FEBRUARY 2000 BY THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS IN ACCORDANCE WITH ARTICLE 7, PARAGRAPH 1 OF THE ADDITIONAL PROTOCOL TO THE EUROPEAN SOCIAL CHARTER PROVIDING FOR A SYSTEM OF COLLECTIVE COMPLAINTS, PORTUGAL SUBMITS THE FOLLOWING OBSERVATIONS:

1. Substance of the complaint

In summary, the complainant (which has appended to the complaint extracts from its statutes and other information on its activities and membership) alleges that members of the armed forces in Portugal, France, Greece, Italy, Spain and the United Kingdom do not enjoy the right to organise, whereas this right is already secured to members of the armed forces in other countries, especially in northern Europe – Austria, Belgium, Germany, Luxembourg, the Netherlands and the Scandinavian countries.

According to the complainant, the situation is now more difficult to justify, both nationally and internationally: nationally, because the armed forces in many west European countries have been reorganised with the aim of ending compulsory military service and creating a body composed exclusively of professionals, whether civilians or soldiers, and internationally, because the role of the armed forces has changed and now involves new duties (in particular peace-keeping, peace enforcement and humanitarian operations) and new forms of co-operation between European countries, especially in the context of a more integrated European peace and security policy.

Nevertheless, the federation also suggests that the countries concerned by this complaint, as listed above, are acting in accordance with Article 5 of the European Social Charter.

In Portugal's case, the grounds for the complaint are the same and are embodied in Article 270 of the Constitution and the National Defence Act (Act No. 29/82 of 11 December 1982), which prohibits military personnel of the armed forces and the *Guarda Nacional Republicana* from joining a trade union.

Lastly, EUROFEDOP refers to the situation of civilian employees of the Ministry of Defence[1], which it considers to be in breach of Articles 5 and 6 of the European Social Charter.

2. Merits of the complaint (Articles 5 and 6 of the European Social Charter)

2.1. The complainant considers that a number of Council of Europe member states, including Portugal, place constitutional or statutory restrictions on the right of military personnel serving in the armed forces to join trade unions. As stated above (see page 1), the complainant considers this situation unacceptable.

However, it should be noted that the complainant does not allege that any provisions of the Charter have been breached.

There are other reasons for the complaint, namely the new geostrategic context, the new duties assigned to the armed forces and the transition from a system of compulsory military service to one based on professionalism.

Attention should also be drawn to paragraph 6 of the complainant's letter of 29 July 1999 to the Secretary General of the Council of Europe (reference EOB99.180.bvc.ef.en): "In a great number of European countries, the personnel of the armed forces – in particular the military personnel – are not given fundamental basic rights and do not have the democratic freedom of uniting in trade union organisations. The countries concerned base themselves for this on the reservation as laid down in Article 5 of the European Social Charter."

The text of the complaint itself seems quite clear.

EUROFEDOP's intention is to highlight the discrepancies between the legal rules governing the situation of military personnel in different Council of Europe member states. The complaint makes the following specific comments concerning Portugal (see section II, "Merits of the complaint"):

a. Article 270 of the Portuguese Constitution allows restrictions to be placed on the right of members of the military to organise;

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[1] We believe – for reasons explained in detail further on – that EUROFEDOP is referring here to civilian employees of the armed forces, not civilians working for the Ministry of Defence.

b. Act No. 29/82 of 11 December 1982 (National Defence Act) prohibits members of the armed forces and the *Guarda Nacional Republicana* from forming or joining trade unions and only permits them to join associations concerned with professional ethics;

c. the situation of civilians working for the Ministry of Defence is also at variance with Articles 5 and 6 of the Charter.

2.2. Let us examine Articles 5 and 6 of the European Social Charter.

A. Article 5 of the European Social Charter embodies one of the general principles set forth in Part I of the Charter (paragraph 5). An examination of the first part of Article 5 shows that the contracting parties undertake, by internal legislation or its application, not to impede the freedom of workers and employers to form organisations for the protection of their economic and social interests or to join such organisations.

However, the second part of Article 5 makes two very important and specific provisos.

The first, relating to the police, reads: "**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 second, relating to the armed forces, reads: "**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."

Clearly, the key to interpreting these specific provisions lies in the words in bold type.

Article 5, then, provides for three situations. The first relates to workers and employers in general, who are covered by the general principle set forth in the first part (enshrined, as stated above, in paragraph 5 of Part I); that is, states grant a considerable degree of freedom to form and join trade unions. In the second situation, concerning the police, the emphasis is on the principle of freedom, but it is for states to decide to what extent this freedom is guaranteed. Lastly, a clear distinction is made regarding the situation of the armed forces: the contracting states are entirely free to decide whether or not to guarantee, through national laws or regulations, the principle – and not just the scope – of the right to organise. In other words, there is no provision under the Charter for a minimum content or level of protection in respect of members of the armed forces. On the contrary, the issue is left entirely to the discretion of states, which may decide to establish a minimum or maximum degree of freedom, or no freedom at all.

B. For its part, Article 6 of the European Social Charter reflects the general principle embodied in paragraph 6 of Part I on the right to bargain collectively.

There is no point in dwelling on this provision at too much length, since it is dependent on the application of the provision discussed above.

The right to bargain collectively is a fundamental institutional right of trade unions, not a personal or individual right enjoyed by workers.

Accordingly, where there is no right to organise there can be no right to collective bargaining. Consequently, the degree of freedom enjoyed by contracting parties to the European Social Charter in respect of the second part of Article 5 also applies here [1].

The complainant further alleges, with regard to Article 6, that the "unacceptable" situation only applies to civilian employees, since no mention is made of the situation of military personnel. As will be shown, this criticism is manifestly unfounded.

C. An examination of Articles 5 and 6 of the Charter confirms that Portugal, along with several other contracting parties, is justified in refusing to allow members of the armed forces to form or join trade unions.

The case-law of the European Committee of Social Rights is extensive in respect of the above articles, especially Article 5 (the right to organise). To quote a number of key passages[2]:

> "Examining whether the provisions by which the United Kingdom Government had deprived 7 000 of the Centre's civil servants of the right to organise were compatible with Article 5 of the Charter, the Committee 'recalled first of all that the only two categories whose right to organise could be restricted or abolished under Article 5 were police officers and members of the armed forces'."[3]
>
> "... certain restrictions to this right are however permissible under the terms of the two last sentences of Article 5 in respect of members of the police and armed forces. The Charter however lays down different rules in respect of the position of each of these two classes of workers *vis-à-vis* the right to organise..."[4]
>
> "Article 5 of the Charter is intended to guarantee the full enjoyment of the freedom to organise to, in principle, every category of employers and workers, including public officials. The terms of Article 5 only permit a few exceptions in the field of its application. For although the text of this article allows the

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1 See extracts from the committee's case-law below.

2 Lenia Samuel, *Fundamental social rights – Case-law of the European Social Charter*, Council of Europe Publishing, 1997.

3 *Op. cit.*, p. 131.

4 *Ibid.*, p. 133.

complete suppression of the right of members of the armed forces to organise..."[1]

Concerning Article 6:

"According to the case law of the Committee, paragraph 2 of Article 6 'presupposes the guarantee of a complete freedom to organise' (Conclusions IV, p. 46, Ireland).[...] Thus the interdependence of trade union rights and collective bargaining is fully established..."[2]

3. Portugal's constitutional and legal framework

Let us now consider Article 270 of the Portuguese Constitution and Act No. 29/82 of 11 December 1982 (National Defence Act).

Article 270 provides: "The law may prescribe restrictions on the freedom of expression, meetings, demonstration, association [...] of [...] members of the military [...] to the extent made necessary by their particular functions."

Pursuant to the Constitution, Section 31 of Act No. 29/82 of 11 December 1982 provides that armed forces military personnel "may not join political associations, parties or trade unions or take part in the activities of such bodies, other than associations concerned with professional ethics".

In conclusion, as far as members of the armed forces are concerned, Portugal is not in breach of Articles 5 and 6 of the European Social Charter, since these articles actually allow for the possibility of refusing them the right to organise.

4. Civilian employees

Another comment by EUROFEDOP which merits consideration is the claim that the situation of civilian employees of the Ministry of Defence is in breach of the above-mentioned provisions of Articles 5 and 6.

EUROFEDOP states in paragraph 8 of the complaint: "In addition, the situation of civilian members of the Ministry of Defence is in practice not in conformity with Articles 5 and 6 of the Charter and Revised Charter."

As Portugal has already had the opportunity to point out, this is obviously no more than an allegation since it is unfounded and there is no substantiation of the (alleged) lack of conformity with the Charter.

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[1] *Ibid.*, p. 133.

[2] *Ibid.*, p. 149.

Assuming that the complainant is claiming that Portugal does not recognise the right of civilian employees to form or join trade unions (Article 5) or to bargain collectively (Article 6)[1], it must be said that this is untrue.

Existing restrictions in this respect, as set out in Section 31 of the National Defence Act, relate only to military and militarised personnel and not to civilian employees of the armed forces, who enjoy the right to organise, like all workers, and are represented in a number of trade unions.

The remaining civilian employees of the Ministry of Defence are either civil servants or workers in public-sector firms operating under public or private law.

In other words, they are fully entitled to the right to organise and the right to bargain collectively, as enshrined firstly in Articles 55 and 56 of the Portuguese Constitution and, secondly, in Act No. 23/98 of 26 May 1998 (for firms operating under public law) or Decree-Laws Nos. 215-B/75 of 30 April 1975 and 519-C1/79 of 29 December 1979 (for firms operating under private law).

5. Conclusions

1. Under Article 4 of the Additional Protocol to the European Social Charter providing for a System of Collective Complaints, a complaint must indicate what provision of the Charter accepted by the contracting party is referred to, and in what respect the contracting party has not ensured the satisfactory application of this provision.

2. In its complaint against Portugal (and other countries), EUROFEDOP does not claim any "violation" of Articles 5 and 6 of the European Social Charter.

3. Indeed, the complainant accepts from the outset that national restrictions on the trade union rights of members of the armed forces are entirely legitimate within the meaning of the second part of Article 5 of the Charter.

4. Portugal is thus entirely justified, under the European Social Charter, in prohibiting members of the armed forces, by constitutional or statutory means, from forming or joining trade unions.

5. Such a position is, moreover, in line with the consistent, extensive case-law of the European Committee of Social Rights in respect of Articles 5 and 6 of the Charter.

6. The complaint is therefore presented as an issue of principle, concerning the discrepancy between the various legal systems of Council of Europe member states

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[1] It is impossible to be entirely unequivocal, given the wording of the complaint, but this interpretation seems plausible as the reference to civilian employees of the Ministry of Defence makes no sense. Lenia Samuel, *Fundamental social rights – Case-law of the European Social Charter*, Council of Europe Publishing, 1997.

with regard to the right of members of the armed forces to form and join trade unions – a situation which the complainant considers undesirable.

7. The question of refusing members of the armed forces the right to organise is therefore a policy issue for individual Council of Europe member states to determine in their legislation, and should not be confused with the nature of joint (exceptional) tasks or the composition of the armed forces (whether or not their members are professionals and volunteers). This comment is particularly valid given that the European Social Charter was recently revised with no amendments to Articles 5 or 6.

8. Restrictions to this fundamental right only apply to members and agents of the military on permanent active service and to agents of the security services and forces.

9. Moreover, with regard to civilian employees of the armed forces, the complainant merely suggests that their situation is not in conformity with Articles 5 and 6 of the European Social Charter and gives no indication of the scope or nature of the breach.

10. The right to organise, in its many forms, as guaranteed to the majority of government employees, is also guaranteed to all civil servants working for bodies that are administratively part of the Ministry of Defence, whether in the armed forces or elsewhere, regardless of whether their employment is governed by public or private law.

In view of the foregoing, we consider that the complaint lodged by EUROFEDOP with the Council of Europe Secretariat on 1 September 1999 and forwarded to the Permanent Representative of Portugal on 13 September must be rejected on the ground that no provisions of the European Social Charter are infringed by the Portuguese Constitution or Portuguese law.

Lisbon, 27 March 2000.

[signed]

Cristina Siza Vieira
for the Ministry of Defence

Observations of the European Trade Union Confederation (ETUC)
(Article 7 para. 2 of the Protocol providing for a system of collective complaints)

(filed with the Secretariat on 27 April 2000)

Before submitting its observations, the ETUC would like to express its congratulations to the governments of France, Italy and Portugal, for not only ratifying the Social Charter but also the Additional Protocol providing for a system of collective complaints. In this way, the governments contribute in re-enforcing the Social Charter and the fundamental social rights as well as its effectiveness by the entry into force of the Additional Protocol.

I. General Observations

The international trade union movement has always been active in the system of control of international working standards. It is in this perspective that the ETUC contributes a large importance to the European Social Charter (hereinafter 'the Charter') in general and its system of control in particular. Hereby the ETUC wants to contribute so that the Charter is a lively instrument which re-enforces fundamental social rights in the daily live. The ETUC therefore wants to ensure that the interpretation and the application of the Charter are efficient.

1. The role of the ETUC

The Charter is inspired on the experiences emerging from the International Labour Organisation (ILO). In the whole system of control of the Charter, the participation of the ETUC is important and this is well shown by Article 27 of the Charter.

The procedures of complaints that are developed in the framework of the ILO are again been at the basis of the improvements of the control mechanisms for the Charter. Here we see how the trade unions do not only use the complaints before the Freedom of Association Committee, but also the possibilities of complaints as foreseen article 24 and 25 of the Constitution of the ILO. The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158, hereinafter 'the Protocol') transposes this trade union participation.

Already in the beginning of the "relaunch of the Social Charter", dating from the beginning of the nineteen nineties, the "Final Resolution" of the Governmental Conference of the Council of Europe on the Charter (Turin, 21-22 October 1991) has clearly expressed the importance of the largest possible participation of the social partners.

The Preamble of the Protocol expresses also clearly that the collective complaints procedure also re-enforces the participation of social partners and non-governmental organisations.

Finally, the Protocol itself shows in its Article 7 para. 2 how the procedure is re-enforced by the participation of the ETUC whereby the explanatory report underlines the privileged role of the international employers and workers organisations in the control mechanism foreseen by the Charter by giving them the possibility to submit observations in relation to the collective complaints introduced by other organisations.

2. The special feature of these cases

The special feature of this case makes it necessary for ETUC to consult not only the affiliates concerned but also the European Organisation of Military Associations EU-

ROMIL, with whom the ETUC has a co-operation agreement. EUROMIL is the umbrella organisation of military associations and trade unions in Europe. Uniting 26 military associations from 19 countries, the organisation represents ca. 500.000 servicemen and their families. As non-governmental organisation, EUROMIL, has a consultative status with the Council of Europe and was admitted on the list of NGOs entitled to submit collective complaints as described in Article 1(b) of the Protocol.

II. On the interpretation of Articles 5 and 6

1. The fundamental social right character

For ETUC it is of utmost most importance that the right to join trade unions (right to organise) is the fundamental social right. It has impact for all other fundamental social rights: without this right other social rights are only guaranteed in a far less protected manner.

That is one reason why ETUC during the elaboration of the Revised European Social Charter always has asked to make the acceptance of Articles 5 and 6 compulsory if a State intends to ratify the Charter.

Even without this special protection all international human rights instruments, be they civil, political or social, require and include the right of association as a necessary basis for their implementation and application.

2. Relevant international instruments

a. United Nations

(1) The Universal Declaration of Human Rights

Article 23 para. 4 prescribes "*everyone has the right to form and to join trade unions for the protection of his interests.*"

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

This Covenant of 1966 states in its Article 8 that :

> *"1. The States Parties to the present Covenant undertake to ensure:*
>
> *(a) 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;*
>
> *(b) 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;*
>
> *(c) 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;*

(d) The right to strike. provided that it is exercised in conformity with the laws of the particular country.

2. 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.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice. or apply the law in such a manner as would prejudice. the guarantees provided for in that Convention."

(3) International Covenant on Civil and Political Rights (1976)

"Article 22

1. 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.

2. 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.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."

b. The International Labour Organisation

Two specific conventions, namely Convention n° 87 and 98, which deal with the freedom of association and the right to collective bargaining and which are recognised as belonging to the eight fundamental conventions of the ILO stipulate in relation to the specific aspect of the collective complaints concerned the following in respectively Article 9 and 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.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention."

The ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its Eighty-sixth Session in Geneva on 18 June 1998, on the other hand states that the International Labour Conference

"declares that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organisation to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely :

a) freedom of association and the effective recognition of the right to collective bargaining,..."

c. European Community

Apart from the Community Charter of Fundamental Social Rights of Workers which also guarantees freedom of association one might note that in Community social legislation servicemen in the armed forces are in general covered by the term 'worker' (if not provided for otherwise).

Furthermore, it should be noted that European Parliament has called particularly for the freedom of assocation rights in respect of members of the armed forces:

- Resolution on the right of members of the armed forces to form associations[1]
- Annual Report on respect of human rights in the European Union (1995)

"50. Urges once more[2] the Member States and the countries interested in joining the EU to introduce rules for the recognition of the right of association within the armed forces for both conscripts and regular service personnel.

51. endorses the practice of some Member States who have appointed special representatives whose main task is to ensure that human rights are respected in the armed forces and proposes that the European Ombudsman be given a similar remit"

d. Council of Europe

(1) European Convention for the Protection of Human Rights and Fundamental Freedoms

Provides in its Article 11 :

"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

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[1] PE 84.688/fin

[2] *"See documents on the right of associations for service personnel, some of which date back a long time: the European Parliament initiative of 1984, the Council of Europe initiative of 1988, the Bertens initiative of 1995, the summary record of the European Parliament hearing (question Hundt) and written question E.0282/96 to the Council by Mr Konrad of 27 February 1996. (OJ C305 of 15.10.1996, p. 6.)."*

on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

(2) Social Charter (1961)

Finally, but in no case less important because this is at the stake in the instant complaints , there is the social instrument of the Council of Europe. The Social Charter provides in Article 5 on "the right to organise" that :

"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".

Article 6 on "the right to bargain collectively" states :

"With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting 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;

and recognise:

4. 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."

These two articles which belong to the so-called "hard core provisions of the Charter" remained as being of fundamental character unchanged in the Revised Social Charter (1996).

(3) Parliamentary Assembly

The Parliamentary Assembly of the Council of Europe has dealt with the problem of the right of association in the armed forces in adopting a Recommendation and two Resolutions:

- Resolution 903 (1988) on the right to association for members of the professional staff of the armed forces in which the Parliamentary Assembly strived for granting this right,

- Resolution 1166 (1998) "Human rights of conscripts"[3]

  "8. The Assembly notes that there are, unfortunately, situations and practices within the armed forces of certain member states which contravene the European Convention on Human Rights, especially with regard to fair trial, forced labour, free speech, free association, and the ill-treatment of recruits and conscripts. Cruel treatment of new conscripts by older servicemen in violation of the military code, such as cases of dedovshchina3 in Russia, also poses a serious problem. The Assembly urgently requests the states concerned to take the necessary measures to change these situations and practices without delay."

- Recommendation 1360 (1998) on Human Rights of Conscripts.

  "The Assembly particularly recommends that the Committee of Ministers formulate strict guidelines for the member states on the way the following articles of the European Convention on Human Rights and of the case-law of the European Court on Human Rights should be applied in the specific case of conscripts:

  a. Article 3 (freedom from inhuman or degrading treatment);

  b. Article 4 (freedom from forced or compulsory labour);

  c. Articles 5 and 6 (proceedings for complaints; lawful arrest and detention; fair trial by independent and impartial courts);

  d. Articles 10 and 11 (freedom of speech, of assembly and of association)."[4]

3. *Relevant case law*

a. International Labour Organisation

(1) Committee on Freedom of Association (CFA)

Referring to the 'Digest'[5] the CFA several times confirmed that concerning Article 9 (1) of Convention n°87 the International Labour Conference intended to leave it to each State to decide on the extent to which it was desirable to grant members of the armed forces and the police the rights covered by the Convention which means that States having ratified the Convention are not required to grant these rights on the said categories of persons[6]. The Committee recalled however also on several occasions that the members of the armed forces who can be excluded should be defined in a restrictive manner.

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[3] Assembly debate on 22 September 1998 (26th Sitting) (see Doc.7979, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Jurgens); Text adopted by the Assembly on 22 September 1998 (26th Sitting).

[4] Recommendation 1380 (1998) Human rights of conscripts, para. 2; text adopted by the Assembly on 22 September 1998 (26th Sitting).

[5] *International Labour Office*, Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 4th (revised) edition, Geneva 1996

[6] paras. 219 seq.

The leading case is Case No. 1279[7] against Portugal. In its conclusions the Committee states:

> *"137. The question which arises is, therefore, to determine whether the personnel who were to have joined the union of workers in the manufacturing establishments of the armed forces can be assimilated to members of the armed forces covered by Article 9 of Convention No. 87. In the view of the Committee the members of the armed forces who can be excluded form the application should be defined in a restrictive manner.*
>
> *138. The documentation provided by the complainant shows that the workers in question perform function of a civilian nature. ...*
>
> *139. In these circumstances, the Committee considers that the civilian workers in the manufacturing establishments of the armed forces are covered by the provisions of Convention No. 87, and that consequently they should have the right to establish organisation of their own choosing without previous authorisation. ..."*

Furthermore in the Case No. 1664 against Ecuador[8] the CFA concluded in the same way:

> *"The Committee has already had occasion to point out, as did the Committee of Experts on the Application of Conventions and Recommendations, that such members of the armed forces to be excluded form the application of Convention No. 87 should be defined in a restrictive manner."*[9]

The other case referred to in the Digest is Case No. 1771 against Pakistan[10]. The conclusions of the Committee take the decision in the above-mentioned case into account:

> *"The Committee would first recall that Article 2 of Convention No. 87 provides that workers and employers,* without distinction whatsoever, *shall have the right to establish and to join organizations of their own choosing. While Article 9 of the Convention does authorise exceptions to the scope of ist provisions for police and armed forces, the Committee would recall that the members of the armed forces who can be excluded should be defined in a restrictive manner. [See 238th Report, Case No. 1279 (Portugal), para. 137.] Furthermore, the Committee of Experts on the Application of Conventions and Recommendations has observed that since this Article of the Convention provides only for exceptions to the general principle, workers should be considered as civilians in case of doubt. [See* General Survey on Freedom of Association and Collective Bargaining, *1994, ILC, 81st Session, para. 55]."*[11]

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[7] Complaint presented by the Union of Workers in the manufacturing establishments of the armed forces against the Government of Portugal, *International Labour Office*, Official Bulletin Vol. LXVIII, 1985, Series B, No. 1, Report of the Committee on Freedom of Association (238th Report), paras. 119 - 140

[8] Complaint against the Government of Ecuador presented by the Ecuadorian Confederation of Free Trade Unions (ECFTU), *International Labour Office*, Official Bulletin Vol. LXXVI, 1993, Series B, No. 1, Report of the Committee on Freedom of Association (286th Report), paras. 279 - 290

[9] para. 287

[10] Complaint against the Government of Pakistan presented by the National Labour Federation of Pakistan (NLF), *International Labour Office*, Official Bulletin Vol. LXXVII, 1994, Series B, No. 1, Report of the Committee on Freedom of Association (295th Report), paras. 482 - 501

[11] para. 499

In a recent case[12] against Columbia an Association of Public Servants employed by the Health Service of the Armed Forces and National Police (ASEMIL) complained about restrictions on activities of this organisation. Although the CFA did not yet reach final conclusions, it is obvious that the Committee did not deal with this case under Art. 9 of Convention no. 87.

(2) Committee of Experts on the Application of Conventions and Recommendations (CEACR)

In the 1994 General Survey[13] the CEACR has observed:

> *"Although Article 9 of Convention No. 87 is quite explicit, it is not always easy in practice to determine whether workers belong to the military or to the police or are simply civilians working in military installations or in the service of the army and who should, as such, have the right to form trade unions. In the view of the Committee, since Article 9 of the Convention provides only for exceptions to the general principle, workers should be considered as civilians in case of doubt."*[14]

It continued to take this view in its individual observations concerning cases such as Ecuador:

> *"the need for civilian workers in bodies associated with or dependent on the armed forces, particularly workers in the maritime transport sector of Ecuador, to enjoy the right to join trade unions of their choice, and for the Union of Ecuadorian Shipping Transport Workers (TRASNAVE) to be registered with the utmost dispatch (Case No. 1664 of the Committee on Freedom of Association). The Government indicates that the relationship between the different constitutional provisions would require the revision of the trade union's request for registration."*[15]

b. European Community

Although there is no explicit primary nor secundary EC-legislation[16] on the subject it is interesting to note the jurisprudence of the European Court of Justice (ECJ) in respect of access to the armed forces and the equality of treatment principle. First ECJ has made it perfectly clear that questions of armed forces do not fall as such outside the socpe of EC-law:

> *„Decisions taken by Member States in regard to access to employment, vocational training and working conditions in the armed forces for the purpose of en-*

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[12] Complaint against the Government of Colombia presented by the Association of Public Servants employed by the Health Service of the Armed Forces and National Police (ASEMIL), *International Labour Office*, Report No. 319, Case No. 2015, Official Bulletin Vol. LXXXII, 1999, Series B, No. 3, (interim conclusions) (Allegations: Non-compliance with a collective agreement; challenges to trade union statutes; suspension of deductions of trade union membership dues; assault against trade union officials; illegal deductions for days of strike action; refusal to negotiate)

[13] *International Labour Office*, International Labour Conference 81st Session, 1994, Report III (Part 4B) Freedom of Association, General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949, Geneva, 1994

[14] para. 55

[15] *International Labour Office*, International Labour Conference 87th Session, 1999, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), p. 234

[16] see above

suring combat effectiveness do not fall altogether outside the scope of Community law."[17]

More explicitly in respect of the Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[18] the ECJ[19] stated:

„It follows that the Directive is applicable in a situation such as that in question in the main proceedings."[20]

and came to the conclusion that the total exclusion of women from all military posts involving the use of arms was not in conformity with the relevant directive; the main reasons are quoted as follows:

„26. As was explained in paragraphs 5, 6 and 7 above, the refusal to engage the applicant in the main proceedings in the service of the Bundeswehr in which she wished to be employed was based on provisions of German law which bar women outright from military posts involving the use of arms and which allow women access only to the medical and military-music services.

27. In view of its scope, such an exclusion, which applies to almost all military posts in the Bundeswehr, cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out. However, the derogations provided for in Article 2(2) of the Directive can apply only to specific activities (see, to this effect, Commission v France, cited above, paragraph 25).

28. Moreover, having regard to the very nature of armed forces, the fact that persons serving in those forces may be called on to use arms cannot in itself justify the exclusion of women from access to military posts. As the German Government explained, in the services of the Bundeswehr that are accessible to women, basic training in the use of arms, to enable personnel in those services to defend themselves and to assist others, is provided.

29. In those circumstances, even taking account of the discretion which they have as regards the possibility of maintaining the exclusion in question, the national authorities could not, without contravening the principle of proportionality, adopt the general position that the composition of all armed units in the Bundeswehr had to remain exclusively male.

30. Finally, as regards the possible application of Article 2(3) of the Directive, upon which the German Government also relies, this provision, as the Court held in paragraph 44 of its judgment in Johnston, is intended to protect a woman's biological condition and the special relationship which exists between a woman and her child. It does not therefore allow women to be excluded from a certain type of employment on the ground that they should be given greater

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[17] Judgment 26 October 1999, (Equal treatment for men and women - Refusal to employ a woman as a chef in the Royal Marines) Case C-273/97 - Sirdar -

[18] OJ 1976 L 39, p. 40

[19] Judgment, 11 January 2000 (Equal treatment for men and women - Limitation of access by women to military posts in the Bundeswehr), Case C-285/98 - Kreil -

[20] para. 19 of the Kreil judgment

protection than men against risks which are distinct from women's specific needs of protection, such as those expressly mentioned.

31. It follows that the total exclusion of women from all military posts involving the use of arms is not one of the differences of treatment allowed by Article 2(3) of the Directive out of concern to protect women.

32. The answer to be given to the question must therefore be that the Directive precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services."[21]

c. Council of Europe

(1) European Convention on Human Right - European Court of Human Rights

Concerning the special provision in Art. 11 para. 2 of the ECHR the ECourtHR states in respect of these exemptions in the Rekvenyi case concerning for police but which are the same in respect of armed forces (the case before the Committee) the following:

„59. The last sentence of paragraph 2 of Article 11 – which is undoubtedly applicable in the present case – entitles States to impose "lawful restrictions" on the exercise of the right to freedom of association by members of the police.

Like the Commission, the Court considers that the term "lawful" in this sentence alludes to the very same concept of lawfulness as that to which the Convention refers elsewhere when using the same or similar expressions, notably the expressions "in accordance with the law" and "prescribed by law" found in the second paragraph of Articles 9 to 11. As recalled above in relation to Article 10, the concept of lawfulness in the Convention, apart from positing conformity with domestic law, also implies qualitative requirements in the domestic law such as foreseeability and, generally, an absence of arbitrariness (see paragraph 34 above).

60. In so far as the applicant criticises the basis in domestic law of the impugned restriction (see paragraph 53 above), the Court reiterates that it is primarily for the national authorities to interpret and apply domestic law, especially if there is a need to elucidate doubtful points (see the S.W. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-B, p. 42, § 36, and also the previously cited Chorherr and Cantoni judgments). In the present case, however, the prohibition on membership of a political party by police officers as contained in Article 40/B(4) of the Constitution is in fact unambiguous (see paragraph 13 above) and it would not appear to be arguable that subordinate legislation introduced some four years earlier (regulation 433 of Decree no. 1/1990 of 10 January 1990, see paragraph 19 above) was capable of affecting the scope of this prohibition. In the circumstances the Court concludes that the legal position was sufficiently clear to enable the applicant to regulate his conduct and that the requirement of foreseeability was accordingly satisfied. Further, the Court finds no ground for holding the restriction imposed on the applicant's exercise of his freedom of association

[21] paras. 26 - 32 of the Kreil judgment

to be arbitrary. The contested restriction was consequently "lawful" within the meaning of Article 11 § 2.

61. Finally, it is not necessary in the present case to settle the disputed issue of the extent to which the interference in question is, by virtue of the second sentence of Article 11 § 2, excluded from being subject to the conditions other than lawfulness enumerated in the first sentence of that paragraph. For the reasons previously given in relation to Article 10 (see paragraphs 41 and 46 to 48 above), the Court considers that, in any event, the interference with the applicant's freedom of association satisfied those conditions (see, mutatis mutandis, the previously cited Vogt judgment, p. 31, § 68).

62. In sum, the interference can be regarded as justified under paragraph 2 of Article 11. Accordingly, there has been no violation of Article 11 either."[22]

In his Dissenting Opinion Judge Fischbach went even further

"As I read the travaux préparatoires on Article 11 of the Convention (see paragraph IX, pages 18 and 19), restrictions on freedom of association must not only be lawful, as required by the second sentence of Article 11 § 2, they must also be necessary in a democratic society."[23]

(2) European Social Charter - European Committee of Social Rights

- Article 5 of the Charter

In relation to the specific case of the armed forces the jurisprudence of the Committee in relation to Article 5 that 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 and regulations. The Committee goes even that far that it decided that

"the third sentence of Article 5 permits a State to limit in any way and even to suppress entirely the freedom to organise of members of the armed forces."[24]

In Conclusions XV-1 it stated in respect of France

"Moreover, the armed forces do not have the right to organise (Section 10 0f the General Regulations to the Armed Forces)."[25]

without making any negative remarks.

- Article 6 of the Charter

One of the essential methods by which a workers' or employers' organisation protects and furthers its members' interests is through collective bargaining, as guaranteed by article 6. Although the Committee defines the right to collective bargaining as a trade union prerogative, the Committee stimulated at many occasions the joint consultation

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[22] Judgment 20 May 1999 (Application no. 25390/94) Rekvényi v. Hungary

[23] partly Dissenting Opinion of Judge Fischbach, para. 2

[24] see *Council of Europe*, The right to organise and to bargain collectively - protection within the European Social Charter, Human Rights monographs - No. 5, Strasbourg 1996, p. 43

[25] (Draft) Conclusions XV-1, page 249 (15th report - reference period 1997-1998)

between workers and employers, or their organisations on all matters of mutual interest.

Unlike article 5, article 6 lists no restrictions of the scope *ratione personae*, although certain restrictions are permitted via article 6 para. 4. Nevertheless, the Committee has always paid particular attention to the question of civil servants under Article 6 para. 2 and stated that although the right to collective bargaining can be limited for civil servants, some participation in determining their terms and conditions of work must be allowed.

4. Principles

Besides the very fundamental character of the freedom of association principle in general and of the Articles 5 and 6 of the Charter in particular there are further principles to be taken into account by intepreting its scope (and its possible exemptions).

a. References to other international instruments

For the purpose of interpreting the content of the Charter it seems important to look at the other relevant international instruments in this sphere.

But the Committee in Case No. 1/1998 did in no way refer to any other international instrument in interpreting the provision of the Charter (Art. 7 para. 1), although e.g. ETUC had referred to them in order to show the human rights character of the provision in question. One reason for neglecting these instruments might be that the result of the interpretation by the Committee seems to be sufficient to cover all important situations for the protection of the persons covered (children).

The instant case may require a more detailed look to ILO instruments and the relevant jurisprudence. This seems logical from the starting point of the Charter. There is no doubt that ILO instruments have been at the basis of many of the provisions of the Charter (and also for the RESC). And this is confirmed by the presence of an ILO representative in the European Committee of Social Rights (Art. 26 of the Charter). It should be recalled that the Report of the Fact-Finding and Conciliation Commission on Freedom of Association already in 1992 noted:

> *"many of the principles of the ILO on these subjects have passed into international customary law."*[26]

Furthermore, the ECourtHR has taken account of these developments for the purpose of interpreting the freedom of association principle:

> *"A growing measure of common ground has emerged in this area also at the international level. As observed by the Commission, in addition to the above-mentioned Article 20 para. 2 of the Universal Declaration (see paragraph 33 above), Article 11 para. 2 of the Community Charter of the Fundamental Social Rights of Workers, adopted by the Heads of State or Government of eleven member States of the European Communities on 9 December 1989, provides that every employer and every worker shall have the freedom to join or not to join*

[26] *International Labour Office*, Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, Official Bulletin, Vol. LXXV, 1992, Series B, page 2

professional organisations or trade unions without any personal or occupational damage being thereby suffered by them. Moreover, on 24 September 1991 the Parliamentary Assembly of the Council of Europe unanimously adopted a recommendation, amongst other things, to insert a sentence to this effect into Article 5 of the 1961 European Social Charter (see Parliamentary Assembly, Forty-third Ordinary Session (second part), 18-25 September 1991: Official Report of Debates, Vol. II, p. 502, and Texts adopted by the Assembly, Appendix to Recommendation 1168 (1991), p. 5). Even in the absence of an express provision, the Committee of Independent Experts set up to supervise the implementation of the Charter considers that a negative right is covered by this instrument and it has in several instances disapproved of closed-shop practices found in certain States Parties, including Iceland. With regard to the latter, the committee took account of, inter alia, the facts of the present case (see Conclusions XII-1, 1988-89, pp. 112-113, of the aforementioned committee). Following this, the Governmental Committee of the European Social Charter issued a warning to Iceland (by ten votes to four with two abstentions; see the Governmental Committee's 12th report to the Committee of Ministers of 22 March 1993, paragraph 113).

Furthermore, according to the practice of the Freedom of Association Committee of the Governing Body of the International Labour Office (ILO), union security measures imposed by law, notably by making union membership compulsory, would be incompatible with Conventions Nos. 87 and 98 (the first concerning freedom of association and the right to organise and the second the application of the principles of the right to organise and to bargain collectively; see Digest of decisions and principles of the said committee, 1985, paragraph 248)."[27]

Looking at the elements referred to by the ECourtHR one will notice the comparability with the 'relevant international instruments' and the 'relevant case-law' metioned above.

b. Restrictive interpretation of exemptions

The jurisprudence of the ILO quoted above has shown that the CFA as well as the CEACR and the ECourtHR follow a restrictive approach in assessing the situations in respect of armed forces. They clearly see the danger arising when depriving a large category of workers from the very fundamental social right, the right to organise. The restrictive approach is followed by the ECJ in the Kreil case.

That is why, in principle, members of the armed forces should throughout be regarded as falling as much as possible under Article 5 of the Charter.

c. The Charter as a 'living instrument'

Just in respect of Article 11 of the ECHR the jurisprudence of the ECourtHR has pointed out that the ECHR is a 'living instrument'.

"In this connection, it should be recalled that the Convention is a living instrument which must be interpreted in the light of present-day conditions."[28]

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[27] *ECourtHR* Case of Sigurdur A. Sigurjónsson c. Iceland (24/1992/369/443), Judgement 30 June 1993, para. 35

[28] *ECourtHR* Case of Sigurdur A. Sigurjónsson c. Iceland (24/1992/369/443), Judgement 30 June 1993, para. 35 (referring to the Soering v. United Kingdom judgment of 7 July 1989, Series A no. 161, p. 40, para. 102)

This meant for the Court that historic interpretations might perhaps not be the correct approach for determining the content of the ECHR today.

The same principle should apply even more for the Charter: it is the social development which is changing faster and faster. This includes legislation in the Member States in the social field. Even if there are no changes in the wording of international instruments the content might change due to the developments in the Member States in general or in the Contracting Parties more particularly.

One will have to look into the reasons for exemptions from a different angle than at the time of adoption. This is all the more true in respect of the changing nature of armed forces in respect of a more multinational and even European approach as well as new acitities (e.g. peace-keeping missions).

d. References to developments in the Contracing Parties to the Charter

Until now there are practically no references to national developments for the purpose of interpreting provisions of the Charter [29]. This is very important because an approachlike this easily could undermine the content of the Charter. That is why in principle the Committee should continue to refrain from looking to national developments when interpreting provisions of the Charter or assessing national situations[30].

Nevertheless, when interpreting exemptions to basic provisions of the Charter this approach could become necessary. The legal basis would derive from the preamble of the Charter itself:

> *"Considering that the aim of the Council of Europe is the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms ..."*[31]

There we find the aim of 'greater unity' between its Member States linked directly to the further realisation of human rights and fundamental freedoms. If one aim of the Charter is to achieve greater unity in the Member States in respect of fundamental social rights the development of furthering trade union rights in the Member States should lead the Committee to look more in detail to developments in Members States in general and Contracting Parties in particular whether they are further realising freedom of association.

e. Conclusion: functional approach

In the end all elements described above lead to a functional approach when interpreting the notion of 'member of the armed forces'. Apart from civilian workers in the armed

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[29] unlike the jurisprudence of ECJ in respect of Article 220 EC (ex-Article 164) (The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.) which refers to the constitutional practices in the Member States. (See Kreil-case above, para. 28).

[30] See *European Committee of Social Rights*, Complaint No. 1/1998, Report, para. 24: 'It observes however that the examination of the present complaint does not entail any comparison between the case of Portugal and that that of the other states which have ratified the Charter, nor any assessment of the situation in these states in respect of Article 7 para. 1.'

[31] Emphasis added

forces who would be given the right to organize without restrictions, there are many categories of servicemen who cannot be regarded as being part of the 'members of the armed forces' in the strict sense of the term.

III. Conclusions

1. Art. 5 ESC - The right to organise

a. Civilian personnel

The first remark would be directed to the civilan personnel. All three governments assure that there is no conflict with Article 5 neither in legislation nor in practice.

b. Military personnel

The most important question under Article 5 of the Charter is whether the reference of all three governments to the wording of its third sentence is sufficient to show that the situation in legislation is in conformity with the requirements of the right to organise.

(1) The arguments of the Governments

- France:

  "This situation cannot be seen as conflicting with Article 5 of the Revised Social Charter, since the article clearly affords a state with the possibility fo establishing in its domestic legislation, the principle that the right to organise does not apply to military personnel."[32]

- Italy:

  "... are perfectly compatible with the last part of Article 5 of the Charter, where it is left to national law whether and to what extent to apply the same guarantees to members of the armed forces as are enjoyed by the workforce as a whole."[33]

- Portugal

  "L'État Portugais est tout à fait légitimé, à la lumière de la Charte Social Eu1ropéenne,. pour consacrer constitutionnellement et légalement la défense de constitution de syndicats ou de défendre les membres des Forces Armées da s'y inscrire."[34]

(2) The ETUC arguments

In order to conretise the 'principles' referred to above, it should be noted:

- fundamental rights: freedom of association is the fundamental social right,
- other international instruments and relevant case-law: they strive for a restrictive interpretation of the exemption and to a larger extent for protection of freedom of association in the armed forces,
- 'living instrument' and reference to developments in the Contracting Parties:

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[32] Oberservations of the French Government, 22 December 1999 (Translation, page 5)
[33] Oberservations of the Italian Government, 30 November 1999 (Translation , page 3)
[34] Oberservations du Gouvernement Portugais, 27 Mars 2000 page 8, point 4))

- the new function of 'armed forces': The traditional concept of the armed forces, as referred to in the French report, has changed considerably since the beginning of the nineties. Indeed greater priority is being given to tasks involving crisis management operations (peace-keeping, peace-enforcement, humanitarian operations and protection of human rights) carried out or not in an international framework.

  Further developments in Europe towards Combined Joint Task Forces, a European Rapid Reaction Forces and eventually maybe a European Army might be already taken into consideration.

- the need for harmonisation in order to further realise human rights and fundamental freedoms: It must be noted that indeed in some Contracting Parties, such as Germany, Austria, Belgium, Netherlands, Luxembourg and the Scandinavian countries, the military personnel and their trade unions enjoy complete trade union rights. Seen the new functions and recent developments in the European security framework towards multinational corps (e.g. Eurocorps, German-Dutch Corps etc.) etc. the problem arises ever more frequently that servicemen from different countries have to conduct the same tasks side by side, yet do not enjoy the same fundamental social rights. Their harmonisation would

  - further the realisation of fundamental social rights
  - improve the working climate and avoid problems and misunderstandings at the working place and
  - considerably contribute to the inner stability (the smooth functioning of the multinational corps, see e.g. the German-Danish-Polish corps in Stettin.). These human factors are absolutely necessary for the effective functioning of these multinational corps and joint missions.

- Developments on the national level concerning the members of the armed forces:

  - Professionalisation of the armed forces
  - Reduction of the defence budgets having a prior impact on the working conditions of the servicemen
  - Continuous reduction of the armed forces with implications for the professional perspectives and family security.

  These developments which are comparable to the development in the free market economy, therewith calling for equal social conditions for servicemen and their families as the rights enjoyed by other civilians.

(3) Conclusion

As pointed out above, the term 'members of the armed forces' should be interpreted in a restrictive and, thereby, functional way. This would mean that all functions with a more technical task should be given the right to organise. A possible borderline could be drawn from the two judgments of the ECJ[35].

[35] Sirdar-situataion: Article 5, third sentence; Kreil situation: Article 5 first sentence

This would lead the Committee to conclude that the total exclusion of all servicemen in all three casses would not be in compliance with Artivcle 5 of the Charter..

2. *Art. 6 ESC - The right to bargain collectively*

a. Civilian personnel

The first remark would be directed to the civilan personnel. All three governments assure that there is no conflict with Article 6 neither in legislation nor in practice, because all civilian personnel enjoys all rights guaranteed under Article 6.

Neverthless some doubts should be expressed. For example, the Italian Government is stating:

> *"Currently, pending reorganisation of the sector, the remuneration of senior civil servants, including those employed by the Ministry of Defence, is regulated by law ..."*[36]

Here we find a reference to a unilateral regulation (by law and not by free collective bargaining). This situation should be looked upon more thouroughly.

b. Military personnel

In this respect the relationship to Article 5 is at stake. We have to note that there is no restriction *ratione personae* in Article 6.

(1) The arguments of the Governments

The main argument of the Governments is limiting the scope of Article 6 to the scope of Article 5: if there is no right under Article 5, no conformity problem under Article 6 arises (France, Portugal). The defense of the Italian Government is mainly relying on the alternative participation structures (also France). France is, furthermore, justifying the denial of collective bargaining rights by referring to the requirements of military discipline.

- France

  In its conclusions France is giving two reasons:

  "It should first be pointed out that the situation of military personnel connot be compared to that of ordinary workers and that, consequenty, the armed forces may legitiately be denied the use of collective machinery.

  Furthermore, the right to collecitve bargaining is merely one element of the right to organise secured in Article 5 of the Charter - which provides that the armed forces may be excluded. If military personnel are not entiled to the right to organise, by the same token they may justifiably be excluded form the fulf scope of the right to collective bargaining."[37]

- Italy

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[36] Oberservations of the Italian Government, 30 November 1999 (Translation , page 5)

[37] Oberservations of the French Government, 22 December 1999 (Translation, page 5)

"... the Italian Government has fulfilled its obligations under Articles 5 and 6 of the European Social Charter by establishing principles and procedures which are perfectly compatible with the provisions of the Charter."[38]

- Portugal

"... le droit à la négociation collective est un droit institutionnel et organique, dont les associations syndicales sont titulaires et non un droit individuel et subjectif des travailleurs.

D'où, s'il n'y a pas de droit syndical il n'y a pas non plus le droit à la négociation collective; de ce fait, la marge de liberté dont jouissent les Etats contractants de la Charte Social Européenne consacrée à la deuxième partie de l'article 5 mentionné, est aussi valable en ce qui concerne ce sujet."[39]

(2) The arguments of ETUC

In principle the situation in the three countries against which a complaint was lodged is currently very different. Nevertheless, in respect of assessing the general compliance with the Charter there are common elements:

- Relation between Articles 5 and 6

If the Committee is following the line of interpretation described under Article 5, it is clear that Article 6 applies for many categories of servicemen and by following the case-law of the Committee an infrigement of Article 5 would, automatically, entail a negative conclusion under Article 6 para. 2.

If it would not follow these lines, it should draw the right conclusions from the fact that, unlike Article 5, Article 6 does not list any category of persons upon whom restrictions may be imposed.

- Sufficient guarantees

The right to collective bargaining must in some way or the other thus be guaranteed to all workers, including members of the armed forces. It will be up to the Committee to decide whether the established participation forms a sufficient guarantee of the right to collective bargaining.

Italy and France report on the alternative participation form which they established and regard as sufficient and effective. In this respect we would like to point at the following:

Firstly, that an effective representation of all levels and echelons of the armed forces in the concerned bodies does in itself not guarantee a sufficient and effective consultation.

Secondly, as in the case of France for example, the system can not be regarded sufficient and effective. It only allows the right to propose. In case of disagreement then with the decision taken it only provides a possibility for a recourse to the competent minister or - even worse - to call for an extra-ordinary meeting of the competent participation body for the consideration of their status.

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[38] Oberservations of the Italian Government, 30 November 1999 (Translation, page 6, Conclusions)

[39] Oberservations du Gouvernement Portugais, 27 Mars 2000 (page 4)

Thirdly, all alternative systems providing "social structures" within the armed forces automatically pose the question of "independence and neutrality" of those people in the structure, since they are part of the military hierarchy themselves.

- Military discipline

  The situation in countries like e.g. Germany, Hungary, the Netherlands, the Scandinavian countries etc. clearly show, that the declaration of France e.g. "that the right to join a trade union is incompatible with the military discipline" is not legitimate since it proves that an effective functioning of the armed forces is in no way jeopardised by the existence of independent and fully-established military trade unions.

(3) Conclusions

The denial of the right to collective bargaining to all military personnel is not in conformity with Article 6 para. 2 because of the non-compliance with Article 5. If the Committee would not follow this line, the guarantees for effective participation are not sufficient.

3. Final conclusions

Notwithstanding the necessity of an individual approach towards all three countries because of their different systems indutrial/professional relations, there are important common elements in the three complaints:

a. In respect of Article 5

As pointed out above, the term 'members of the armed forces' should be interpreted in a restrictive and, thereby, functional way. This would mean that all functions with a more technical task should be given the right to organise. A possible borderline could be drawn from the two judgments of the ECJ[40].

This would lead the Committee to conclude that the total exclusion of all servicemen in all three casses would not be in compliance with Artivcle 5 of the Charter.

b. In respect of Article 6

The denial of the right to collective bargaining to all military personnel is not in conformity with Article 6 para. 2 because of the non-compliance with Article 5. If the Committee would not follow this line, the guarantees for effective participation are not fully effective and sufficient.

IV. Recommendations

Having concluded that the Contracting Parties concerned have not ensured the satisfactory application of Articles 5 and 6 of the Charter, the Committee should in its Report to the Committee of Ministers not only reach the conclusions but also propose recommendations to the Committee of Ministers which the latter could include in its final deci-

[40] Sirdar-situataion: Article 5, third sentence; Kreil situation: Article 5 first sentence

sion (in case of a Recommendation under Article 9 para. 1 of the Complaint Procedure Protocol).

ETUC would i.a. propose the following recommendations to the Governments:

- to change the situation in legislation and practice so as to conform with the requirements of the Europeach Social Charter
- to report on the measures taken and envisaged (combined with a timetable)
- to start a constructive dialogue in particular with the representative trade unions.

V. Observations on the procedure

1. Organisation of a hearing

The complex factual situation and the difficult legal implications would warrant a hearing (provided for in Article 7 para. 4 of the Complaint Procedure Protocol).

It might also lead to a constructive dialogue which might in the end also lead to solutions.

2. Information and participation of ETUC

ETUC would ask the Committee to keep it informed on all developments in respect of complaints under the Complaint Procedure Protocol and continue to offer it all possibilities in partcipating in the procedure.

Written observations on the merits submitted by EUROFEDOP

(filed with the Secretariat on 15 May 2000)

EUROFEDOP wishes to underline in the first place that it very much appreciates that the countries concerned (France, Italy and Portugal) have signed and ratified the European Social Charter and the Additional Protocol.

EUROFEDOP also thanks the Committee for its acceptance of the admissibility of the complaints and for the possibility of further explaining our points of view.

EUROFEDOP wishes to underline the following elements :

- The Charter dates from 1961 (coming-into-force in 1965) and consequently, should as regards its contents, also be interpreted in accordance with the spirit of that time. Since that period, the democratic developments have know an enormously rapid, and positive evolution. This evolution has also strongly influenced the organisation and structures of the armed forces in Europe. Thus we note a clear conversion of an army, primarily consisting of conscripts, into an army of professionals. Moreover, the initial mission of "national defence" has been influenced to a large extent by the ever increasing importance of international and intercontinental co-operation relations (such as WEU, NATO, the Eurocorps as well as the German-Dutch army corps) and by the humanitarian tasks. The "army," in the narrow sense of the word, is no longer merely the military apparatus, but has developed itself into a multifunctional, professional corps which is engagable for various tasks (peace-keeping, peace-enforcing, humanitarian tasks).

- One of these tasks is unmistakeably the enforcement, the defence and the restoration of basic rights, in places where these rights are endangered. Therefore, it is also surprising having to notice that those who have to execute this task, do not possess these fundamental rights themselves. The fact that nowadays we speak of "professional armies", implies that all the people exercising this profession should, in our opinion, be allowed to enjoy the same basic rights and duties as their colleagues in other armed forces and public services. (Many countries have subscribed to this position: Belgium, Netherlands etc. so that the necessary , democratic deliberation structures are now existing within the armed forces of these countries.

EUROFEDOP has taken note of the exception with regard to Article 5 and 6 of the Charter. Nevertheless, a modification of these Articles is required. The initiative for this can emanate from different parties: on the one hand, there is the Council of Europe itself, which can insist of a modification of the articles in question and, on the other, the countries concerned can adapt on their own initiative, their vision on the exception clauses with regard to Defence and Police.

In this way, a sort of universal interpretation of the fundamental basic rights of the personnel of Police and Defence could emerge. Which would correspond to the views of EUROFEDOP in this respect.

EUROFEDOP bases itself, for the above-mentioned interpretation, on the following relevant conventions and legislation:

1. the UNO

In its Universal Declaration of Human Rights, Article 23 states that 'everyone has the right to form and to join trade unions for the defence of his interests.'

Here, it is also underlined that this refers to trade unions of one's own choice, by which of course the neutrality is guaranteed. This is of importance in the present complaint, as France e.g. has set up a system of dialogue within its armed forces by which the free choice is not guaranteed (see justification of France with respect to violation of Article 6 of the Charter).

2. The International Labour Organisation (ILO, BIT)

The ILO has also included in its fundamental conventions (8 in all), under the numbers 87 and 88, the freedom of association and collective bargaining.

Of course, the remark has to be made that here also (just as in the Social Charter of the Council of Europe), one mentions the restrictions which are imposed on the personnel of the armed forces and the police services. The national law comes here before the international law.

– The Committee on Freedom of Association (CFA), resorting under the ILO, declared in 1996 that the States which based themselves on their national legislation for granting trade union rights to the military personnel, should clearly describe which tasks would possibly not fall under this restriction, because there are tasks which can be defined as being rather of a "civil" nature. Thus there has been the case with number 1279 (dating from 1985) against Portugal, whereby the question was raised if certain military personnel fulfil tasks which can be considered as being rather of a civil nature and therefore, would not fall under the national restrictions of Article 87 and 88.

– The Committee of Experts on the Application of Conventions and Recommendations (CEACR), resorting under the ILO, made the following remark in 1994: that, in the case there is doubt about the nature of the function of a member of the military personnel or a member of the police services, these workers should be considered as civilians (in other words, members of the armed forces should be considered as much as possible as falling under Article 5 of the Charter).

3. The European Union

In various reports, the EU has referred to the respect for human rights in relation to the right to association for the personnel of Defence and Police.

In 1995, a clause was inserted in the annual report of the European Parliament, whereby this Institution insisted that the right to association would be granted to the personnel of the armed forces, by countries which have the intention of joining the EU.

If such advice is expressed towards "future" members, then it certainly should be applicable o the present member states (in cases France, Italy and Portugal).

4. The Council of Europe

As mentioned before (see ILO), the national law also comes here first, with regard to Articles 5 and 6, where the personnel of Defence or Police are concerned.

Nevertheless, the parliamentary assembly has already expressed its support, in 1988 (in resolution 903), for the aim of establishing trade union rights for the personnel of Defence.

The European Court of Human Rights has made a very important declaration, in a case of law of Sigurdur A. Sigurjonsson versus Iceland 24/1992/369, namely that the 'European Convention on Human Rights' is a "living instrument" which should be interpreted in the light of present realities.

EUROFEDOP is of the opinion that this vision should also be applied to the Charter (see introductory note).

With the preceding argumentation, EUROFEDOP has wished to sketch the general framework within which it wants to situate the interpretation of Articles 5 and 6 of the Social Charter. EUROFEDOP also underlines that the countries concerned (France, Italy and Portugal), in spite of the fact that they have signed and ratified the Charter, are still seized by this complaint, whereas countries which have not done so, remain totally out of reach (United Kingdom, Greece, Spain). In these countries, trade union freedoms are of a wholly different order than in the first group. The Council of Europe could exercise pressure on these countries, so that they proceed to ratification (or, as is the case for Greece, that they drop their restrictions towards Articles 5 and 6).

EUROFEDOP consequently appeals to the wisdom of the Committee for taking into consideration the following arguments with respect to Article 5 of the Charter:

1. all fundamental international institutions recognise the "freedom of association" as a fundamental social right;

2. the Charter should be a "living instrument" which adapts to a changing environment;

3. the military apparatus is an organism which has changed in such a way that it could serve as example for a "living instrument";

4. the lack of clarity which exists in many countries with respect to the definition of "military" or "civilian" functions within the armed forces, leads to confusion in the interpretation of Articles 5 and 6 of the Charter.

EUROFEDOP launches an appeal to the counties concerned, for removing this "lack of clarity" by giving a functional description of the notion of "member of the armed forces."

As regards Article 6 ("collective bargaining"), the following observations of EUROFEDOP are relevant to the this complaint:

1. Civilian personnel

Italy states that, within the framework of present reforms, the remuneration of "senior civil servants" has been regulated in its legislation.

In our view, the principle of "free collective bargaining" has not been applied here.

2. Military personnel

EUROFEDOP is of the opinion that the right, described under Article 6 of the Charter, should be approved for all workers. It is for the Committee to judge, in its wisdom, if this is the case in the countries concerned.

Indeed, it is not enough to install an alternative form of "deliberation" (see France and Italy), with a view to meeting the notion of "collective deliberation", especially not as (e.g. France) only the right is mentioned to "make proposals" which can only be exercised by workers of the military hierarchy itself.

EUROFEDOP concludes from this that the denial of the right to collective bargaining to the military personnel is not in compliance with the provisions of Article 6 para. 2.

EUROFEDOP wishes that there will be a hearing.

Guy Rasneur
President Secretary General

Bert Van Caeleberg

Information to the Portuguese Government and EUROFEDOP about the organisation of a hearing

(Letters dated 8 June 2000)

Letter to Mr Van Caelenberg, Secretary General - EUROFEDOP

Dear Mr Van Caelenberg,

I have the honour to inform you that the European Committee of Social Rights, having taken note of the information and observations submitted by the parties to the above complaint and by the European Trade Union Confederation (ETUC), has decided on 24 May 2000 in accordance with Article 7 para. 4 of the Protocol providing for a system of collective complaints to organise a hearing with the representatives of the parties during the week of its 171st session (11-15 September 2000).

For the purpose of the hearing the above complaint will be joint with complaints Nos. 2 and 4/1999 EUROFEDOP v. France and Italy, respectively.

In accordance with Rule 29 para. 2 of its Rules of Procedure, the Committee has decided to invite the ETUC to the hearing.

For the further preparation of the case for the hearing, the Portuguese Government has been invited to submit observations before 4 July 2000 in response to those submitted by EUROFEDOP on 15 May 2000 and by the ETUC on 26 April 2000.

As the Portuguese Government has referred, in its initial observations, to Act No. 29/82 as well as to Act No. 23/98 and to the Legislative Decrees Nos. 215-B/75 and 519-C1/79, the Committee has requested it to submit, in one of the official languages of the Council of Europe, the text in full of the said instruments as well as the text of any other statutes, legislative decrees etc. that may be relevant to the case and in particular those to which the Government may wish to refer in the context of the hearing.

When the Portuguese Government's observations have been received EUROFEDOP will be invited to submit further observations within a time limit of four weeks, ie. before 1 August 2000.

In those observations the Committee requests EUROFEDOP to clarify the argument developed in its observations of 15 May 2000, ie. that not all categories of personnel associated with the military forces should be adduced to 'members of the armed forces' in the terms of Article 5 of the European Social Charter. In particular, it requests EUROFEDOP to indicate clearly the categories of personnel concerned and elaborate on which grounds they, in EUROFEDOP's view, cannot be considered as 'members of the armed forces' for the purposes of Article 5 of the European Social Charter.

Furthermore, having noted that EUROFEDOP argues that 'free collective bargaining' in accordance with Article 6 of the European Social Charter is not satisfactorily applied to neither 'military personnel' nor to 'civilian personnel', the Committee request EUROFEDOP to:

- clearly indicate on which counts and for which reasons the guarantees of Article 6 in its view are not satisfactorily applied for each of the categories of personnel concerned;

- clearly indicate which categories of personnel, their legal status and functions etc., that are considered by EUROFEDOP as 'civilian personnel' for the purposes of the present complaint.

As a last stage in the preparation of the hearing, the Portuguese Government will be invited to submit its final pre-hearing observations in writing within a time-limit of four weeks, ie. before 30 August 2000.

Yours sincerely,
Régis BRILLAT

Letter to Mrs SIZA VEIEIRA, Director of the Department of legal Affairs – Ministry of Defence

Madam,

I have the honour to inform you that the European Committee of Social Rights, having taken note of the information and observations submitted by the parties to the above complaint and by the European Trade Union Confederation (ETUC), has decided on 24 May 2000 in accordance with Article 7 para. 4 of the Protocol providing for a system of collective complaints to organise a hearing with the representatives of the parties during the week of its 171st session (11-15 September 2000).

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As a last stage in the preparation of the hearing, the Portuguese Government will be invited to submit its final pre-hearing observations in writing within a time-limit of four weeks, ie. before 30 August 2000.

Yours sincerely,
Régis BRILLAT

Additional observations of the Portuguese Government (article 7 para. 3 of the Protocol of the European social Charter providing for a system of collective complaints)

(filed with the Secretariat on 28 July 2000)

TRANSLATION

Dear Sirs,

I. Please find enclosed Portugal's reply to the observations of the European Trade Union Confederation (ETUC) and EUROFEDOP concerning Complaint No. 5/1999, which were received on 2 May and 12 June respectively.

II. With regard to your request for the full text of Law 29/82 of 11 December 1982 and Law 23/98 of 26 May 1998 in one of the official languages of the Council of Europe, please note the following:

1. The sections of Law No. 29/82 (National Defence and Armed Forces Act) relevant to the complaint have been translated, illustrating the case in point, particularly Section 31, which is doubtless the most important provision in respect of the matter at issue. It should be noted, however, that the translation provided is a free translation.

2. As far as the other legislation is concerned, none applies specifically to the civilian staff of the armed forces; it does, however, embody the general system of freedom of association and collective bargaining (Legislative Decrees Nos. 215-B/75 of 30 April 1975 and 519-C1/79 of 29 December 1979); the content of these decrees has already been submitted to the Council of Europe on several occasions, in the context of the reports submitted, in keeping with Article 21 of the European Social Charter, on Articles 5 and 6 of the Charter.

Law No. 23/98 of 26 May 1998 (laying down the conditions governing collective bargaining and freedom of association of government administrative staff under public law) was referred to only to explain that administrative staff have the same rights and freedoms as any other category of public servants; we shall therefore not dwell on the full text (which would be too long and too costly to translate). Instead, we enclose a copy of the law as published in our country's official gazette, the "Diário da República".

I take this opportunity to enclose a copy of Legislative Decree No. 84/99 of 19 March 1999, which guarantees freedom to join trade unions, inter alia for public servants in administrative posts.

III. In response to the questions asked in your letter of 4 July, we inform you that:

a. the "Guarda Nacional Republicana" (GNR) is a military branch of the police like the "Gendarmerie Nationale" in France. So there are not two different entities in Portugal with the same functions.

b. Professional military personnel - the armed forces and the GNR - and young conscripts are not allowed to join political, party or union associations or to take part in their activities, with the exception of associations concerned with professional ethics.

c. The freedom of association of civilian staff working for the armed forces, whatever the actual jobs they do, is regulated by Legislative Decree No. 84/99 of 19 March 1999, and they are not concerned by the restrictions imposed on military personnel, as has been stated several times. The civilian staff concerned (doctors, nurses, administrative staff, secretarial staff, etc) are free to join their respective trade organisations.

d. As for people employed in military production plants, the statute of their trade union, which, like any other union, has the right to bargain collectively in addition to all the other rights generally attributed to trade unions, was published in the Labour and Employment Bulletin, 3rd series, No. 15 of 15 August 1989.

Yours faithfully,

Cristina Siza Vieira

(Director of the Legal Affairs Department, representing the Government)

Having been invited to reply to the observations made by EUROFEDOP and by the European Trade Union Confederation (ETUC) concerning Complaint No. 5/99 lodged by EUROFEDOP against Portugal, the Portuguese Government submit the following:

I. The preliminary question of admissibility

1. The admissibility of the complaint was addressed in Portugal's replies of 26 November 1999 and 27 March 2000.

2. It was argued that the complaint was inadmissible because Article 4 of the Additional Protocol to the European Social Charter providing for a system of collective complaints requires the complaint to relate to a provision of the Charter and to indicate in what respect it has not been satisfactorily applied.

3. However, EUROFEDOP does not accuse Portugal of having "violated" Articles 5 and 6 of the European Social Charter; instead the complaint is based on the existence of several different (and sometimes contrasting) legal systems in the Council of Europe's member states concerning freedom of association of members of the armed forces, a situation the applicant Federation considers undesirable.

4. Even on the question of civilians employed by the armed forces the complaint is inconclusive, as it merely suggests that their situation is not in conformity with Articles 5 and 6 of the European Social Charter.

5. Accordingly, we reaffirm our conviction that the complaint should not be admitted, in disagreement with the decision reached by the European Committee of Social Rights. The arguments now put forward by the applicant and the European Trade Union Confederation (ETUC) confirm this conviction.

II. The observations submitted by the European Trade Union Confederation (ETUC) on 26 April 2000

1. Most of this organisation's comments do not concern Articles 5 and 6 of the European Social Charter.

The ETUC cites the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights of the United Nations, International Labour Organisation Conventions Nos. 87 and 98, a Resolution of the European Parliament on the right of members of the armed forces to form associations, and the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms.

2. As violation by Portugal of the provisions of the above international instruments is not the issue here, we shall not go into this in detail. Suffice it to say that the instruments concerned provide in most cases for the law to place restrictions on the right of association of the armed forces or the police (see Article 8 para. 2 of the International Covenant on Economic, Social and Cultural Rights, Article 22 para. 2 of the International Covenant on Civil and Political Rights and Article 11, para. 2 of

the European Convention for the Protection of Human Rights and Fundamental Freedoms).

3. The case law presented does not generally appear to question the application of the corresponding Articles of the European Social Charter. Decisions of the International Labour Organisation's Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations are cited, as are rulings of the European Court of Justice. However, the International Labour Organisation itself acknowledges the legitimate right of states not to allow members of the armed forces to form associations, stating simply that the "members of the armed forces" concerned should be defined restrictively. And as to the decisions concerning the application of Articles 5 and 6 of the European Social Charter, the European Committee of Social Rights itself agrees that these articles permit states to limit and even to suppress entirely the freedom to organise of members of the armed forces.

4. The ETUC concludes that there is a lack of harmony in the legislation of various Council of Europe member states. It is true that there are differences between the rules governing freedom of association and collective bargaining in multinational forces, but this is no argument as the effects of the rules concerned are felt in the countries of origin and not on missions to other countries.

5. Furthermore, we do not know what the ETUC means by "functional interpretation" of the term "member of the armed forces". The ETUC no doubt knows that in addition to their usual work, military personnel may at all times be called into combat, with a resulting increase in salary. This means that their military status takes precedence over the office or post occupied by a member of the armed forces at a given time. So whether they are technical staff or not is irrelevant.[1]

6. To conclude on the ETUC's observations, it is not possible to make an interpretation based on the model proposed, (a) because the reasons that led the Portuguese Government to limit the rights of association and collective bargaining of military personnel have to do with the duties inherent in their status, which is the same for all, whatever their function, and (b) because the simultaneous references to legal standards other than the European Social Charter cannot be taken into account. The issue here is purely and simply whether or not there has been a violation of Articles 5 and 6 of the European Social Charter.

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[1] Note in this respect the 26 October 1999 ruling of the Court of Justice of the European Communities (SIRDAR case), mentioned in part 1.b.(3) of the conclusions to the ETUC's observations, where the "interoperability" rule was defended. This means that whatever the person's everyday job - cook in the case in point - all members of the unit should be prepared to go into action in the front line (ie into active combat).

III. The observations submitted by EUROFEDOP on 15 May 2000 and received on 12 June

1. EUROFEDOP acknowledges that Articles 5 and 6 of the European Social Charter permit exceptions to the right to freedom of association and collective bargaining, particularly for members of the armed forces.

2. In its observations the Federation clearly requests the amendment of these articles, on the initiative of the Council of Europe and the countries concerned. This is therefore not a matter of examining a possible violation of rights enshrined in the European Social Charter, but an attempt to have it amended.

3. The fact that EUROFEDOP considers that the right embodied in Article 6 of the Charter must be enjoyed by all workers, including the armed forces, is simply an opinion which is not supported in the text or in the spirit of the treaty.

4. So, if EUROFEDOP is correct in its interpretation of Articles 5 and 6 of the Charter and we accept that the provisions thereof give precedence to domestic law in the case of the armed forces and the police,[1] the Federation is contradicting itself when it claims that denying military personnel the right to collective bargaining is an infringement of Article 6 paragraph 2.

IV. Conclusions

1. The complaint lodged by EUROFEDOP should be dismissed as it is not in conformity with Article 4 of the Additional Protocol to the European Social Charter providing for a system of collective complaints.

2. EUROFEDOP acknowledges that Articles 5 and 6 of the European Social Charter allow Contracting Parties to restrict or even deny the right to freedom of association and collective bargaining in respect of members of the armed forces.

3. This is also confirmed in the ample case-law of the European Committee of Social Rights concerning the interpretation of these two articles.

4. The Portuguese Government is therefore perfectly within its rights vis-à-vis the European Social Charter in including provisions in its Constitution or its domestic law prohibiting members of the armed forces from forming trade unions.

5. There is no violation by Portugal of Articles 5 or 6 of the Charter.

6. What EUROFEDOP wants and requests is the amendment of the above articles, on the initiative of the Council of Europe and the countries concerned.

7. The Committee of Independent Experts referred to in the Protocol to the European Social Charter providing for a system of collective complaints has no authority to consider this request.

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[1] See part 4 of the observations presented by EUROFEDOP.

8. Amendments to the Charter must follow the procedure set forth in Article 36 thereof, the Committee of Independent Experts being responsible only for the subsequent monitoring of the application of the provisions of the Charter.

9. With reference to the observations made by the ETUC, a functional interpretation of the term "members of the armed forces" is not acceptable as the reasons that led the Portuguese Government to limit the right of association and, consequently, of collective bargaining in respect of military personnel have to do with the duties inherent in their status, which is the same for all, whatever their function or the tasks they actually perform; similarly, the legal parallels drawn (such as the case law of the ILO and the Council of Europe itself) in support of a "modern" interpretation are not grounded in the content of the treaty.

10. Finally, with regard to civilians employed by the armed forces, we repeat what we have already said, namely that Portuguese law effectively guarantees freedom of association and collective bargaining.

In view of the above, we consider that the complaint lodged by EUROFEDOP against Portugal should be declared unfounded, as the Constitution and laws of Portugal are not at variance with Articles 5 and 6 or any other article of the European Social Charter.

Lisbon, 30 June 2000

Cristina Siza Vieira

(representing the Ministry of Defence)

Law No. 29/82 of 11 December 1982

(National Defence and Armed Forces Act)

Section 17

(National defence and armed forces)

It shall be the duty of the armed forces to defend the Republic by military means, in keeping with the Constitution and the laws in force.

Section 18

(Exclusivity principle)

1. The military component of national defence shall be provided exclusively by the armed forces, with the exception referred to in Section 9 para. 6 and in the following paragraph.

2. The security forces shall contribute to the implementation of national defence policy, in conformity with the law.

3. Armed, militarised, military-type and paramilitary associations shall not be authorised.

Section 19

(Obedience to the organs of government)

The armed forces shall obey the competent organs of government, in conformity with the Constitution and the law.

Section 20

(Composition and organisation)

1. The armed forces shall be composed exclusively of Portuguese citizens.

2. The organisation of the armed forces shall be based on voluntary military service and shall be the same throughout the national territory.

Section 21

(Structure of the armed forces)

1. The armed forces shall comprise the Military Command organs and the three branches of the armed forces - the Navy, the Army and the Air Force.

2. The Military Command organs of the armed forces shall be the Commander-in-Chief of the Armed Forces and the Commanders-in-Chief of the Army, Navy and Air Force. The procedures for their appointment and their powers are defined herein.

3. The general bases of the organisation of the branches of the armed forces shall be submitted to the approval of the Assembly of the Republic; they shall be embodied in a legislative decree and regulated by government decree.

Section 22

(Functioning of the armed forces)

1. The country and in particular the armed forces shall be kept in a state of permanent preparation to defend the nation.

2. In peace time the armed forces shall maintain their preparedness to ward off an attack or a threat from outside the country.

3. The armed forces, acting in accordance with the Constitution and the laws in force, shall execute the official national defence policy, in conformity with the officially approved national defence strategy, in such a way as to comply with the standards and guidelines laid down in respect of:

a. Military strategy concept;
b. Missions of the armed forces;
c. Force systems;
d. Deployment.

Section 30

(Political neutrality)

1. The armed forces shall be at the service of the Portuguese people and shall be strictly non-partisan.

2. Members of the armed forces shall not use their weapons, posts or functions for any political intervention.

Section 31

(Restrictions on rights of military personnel)

1. The freedom of expression, assembly, demonstration, association and collective bargaining and the eligibility of military personnel and staff of permanent bodies in active service shall be subject to the restrictions listed in the following paragraphs.

2. The citizens referred to in paragraph 1 above shall not make public statements of a political or other nature likely to jeopardise the cohesion and

discipline of the armed forces or which do not respect the duty of political neutrality and the ban on membership of political parties.

3. The citizens referred to in paragraph 1 above shall not make public statements about the armed forces without the authorisation of their superiors, with the exception of purely technical articles written for publications produced by the armed forces by authors who are military personnel in permanent post within the department or editorial team concerned.

4. The citizens referred to in paragraph 1 above shall not convene or attend political, party or trade union meetings when in uniform; nor shall they speak or perform other duties.

5. The citizens referred to in paragraph 1 above shall not convene or take part in political, party or trade union demonstrations.

6. The citizens referred to in paragraph 1 above shall not join political, party or trade union associations or take part in their activities, with the exception of those concerned with professional ethics and then only in connection with that activity.

7. The provisions of paragraphs 4, 5 and 6 above do not apply to participation in official ceremonies or public conferences or debates organised by institutes or associations with no political connotations.

8. The citizens referred to in paragraph 1 above shall not promote or present collective petitions to the organs of government or their hierarchical superiors concerning political matters or the armed forces.

9. The citizens referred to in paragraph 1 above shall not be elected President of the Republic, or elected to the Assembly of the Republic, the Azores or Madeira Regional Assemblies, the Legislative Assembly of Macao or the regional Assemblies or their executive bodies or those of popular organisations at local level.

10. An application for transfer into the reserves with a view to standing for one of the posts mentioned in the preceding paragraph may not be rejected in peace time.

11. The constitutional guarantees concerning the rights of workers shall not apply to the citizens referred to in paragraph 1 above.

12. Citizens engaged in compulsory military service shall not take part in political, party or trade union activities.

Sábado 29 de Dezembro de 1979 I Série — Número 299

DIÁRIO DA REPÚBLICA

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3.º SUPLEMENTO

SUMÁRIO

MINISTÉRIO DO TRABALHO

Decreto-Lei n.º 519-C1/79

de 29 de Dezembro

O regime jurídico das relações colectivas de trabalho decorre, presentemente, dos preceitos do Decreto-Lei n.º 164-A/76, de 28 de Fevereiro, e do conjunto de diplomas que, subsequentemente, o vieram alterar e complementar.

A abundante produção legislativa nesta matéria tem procurado, assim, acompanhar a evolução de uma realidade social extremamente complexa e delicada, na tentativa de obtenção de um tendencial equilíbrio entre os princípios de livre negociação colectiva internacionalmente reconhecidos e consagrados na lei constitucional portuguesa e a intervenção do Governo, tida ainda como necessária, mas que, gradualmente, se tem vindo a procurar restringir e aperfeiçoar.

A prática dos últimos anos, no que representa de inovação e de enriquecimento de experiência para os parceiros sociais e para o próprio Governo e o carácter fundamental da negociação colectiva como instrumento responsável de progresso social, justificam a prioridade dada à revisão do normativo regulador desta área jus-laboral extremamente sensível.

Pelo presente diploma visa estabelecer-se um sistema inovador e coerente de relações colectivas de trabalho, baseado em duas opções fundamentais que nele encontram tradução: por um lado, a tentativa de devolução às partes do processo negocial, dotado agora de regras mais claras e rigorosas em ordem à sua maior responsabilização na auto-regulamentação dos interesses em presença; por outro lado, a aceleração, simplificação e melhoramento das instâncias de intervenção do Governo nesta matéria.

Assim, e para além de numerosas melhorias de técnica jurídica, prevê-se, designadamente, a definição precisa dos intervenientes e destinatários do processo negocial, a fundamentação das propostas e contrapropostas com base em elementos de informação efectivamente disponíveis para as partes, e a fixação, em novos moldes, do prazo mínimo de vigência obrigatória das convenções colectivas por forma a evitar a negociação permanente.

Por outro lado, a intervenção do Governo, quando necessária, é assumida em termos inovadores, não só pela fixação de prazos para o depósito das convenções colectivas e para o funcionamento das comissões técnicas encarregadas dos estudos preparatórios das portarias de regulamentação de trabalho como e fundamentalmente pela adopção de medidas que permitam, em cada momento, habilitar o Governo com informação actualizada e capacidade de resposta imediata às questões que lhe são postas. Assim, preconiza-se solução inovadora e que se crê pragmática para a articulação interdepartamental entre os vários Ministérios interessados e o Ministério do Trabalho, atribuindo-se, em exclusivo, aos Ministérios da tutela ou responsáveis por sectores económicos a intervenção nos processos de regulamentação colectiva e a necessária articulação com os Ministérios das Finanças e da Coordenação Económica e do Plano e criando-se simultânea e convergentemente um esquema funcional de consulta e participação permanente, pela designação, anual, de responsáveis por questões jus-laborais, a nível de cada Ministério da tutela ou responsável por sector económico.

O Governo, para dar cumprimento à Lei n.º 16/79, de 26 de Maio, e ao n.º 2 do artigo 231.º da Constituição, publicou em separata do *Boletim do Tra-*

ASSEMBLEIA DA REPÚBLICA

Lei n.º 23/98

de 26 de Maio

Estabelece o regime de negociação colectiva e a participação dos trabalhadores da Administração Pública em regime de direito público

A Assembleia da República decreta, nos termos dos artigos 161.º, alínea *c*), 165.º, alínea *b*), e 166.º, n.º 3, e do artigo 112.º, n.º 5, da Constituição, para valer como lei geral da República, o seguinte:

Artigo 1.º

Objecto

1 — O presente diploma regula as condições do exercício dos direitos de negociação colectiva e de participação dos trabalhadores da Administração Pública em regime de direito público.

2 — Os direitos de negociação colectiva e de participação têm por objecto, no âmbito do presente diploma, a fixação ou alteração do estatuto dos trabalhadores da Administração Pública, bem como o acompanhamento da sua execução.

3 — Os direitos de negociação colectiva e de participação dos trabalhadores da Administração Pública, em regime de direito privado, regem-se pela legislação geral referente à regulamentação colectiva das relações de trabalho.

Artigo 2.º

Legitimidade

Os direitos de negociação colectiva e de participação, no que respeita às organizações sindicais, apenas podem ser exercidos através daquelas que, nos termos dos respectivos estatutos, representem interesses de trabalhadores da Administração Pública e se encontrem devidamente registadas.

Artigo 3.º

Princípios

1 — A Administração e as associações sindicais respeitam os princípios da boa fé, nomeadamente respondendo com a máxima brevidade quer aos pedidos de reunião solicitados, quer às propostas mútuas, fazendo-se representar nas reuniões destinadas à negociação ou participação e à prevenção ou resolução de conflitos.

2 — As consultas dos representantes da Administração e dos trabalhadores, através das suas organizações sindicais, não suspendem ou interrompem a marcha do procedimento de negociação ou participação, salvo se as partes nisso expressamente acordarem.

3 — Cada uma das partes pode solicitar à outra as informações consideradas necessárias ao exercício adequado dos direitos de negociação colectiva e de participação, designadamente os estudos e elementos de ordem técnica ou estatística, não classificados, que sejam tidos como indispensáveis à fundamentação das propostas e das contrapropostas.

Artigo 4.º

Cláusula de salvaguarda

A Administração e as associações sindicais devem assegurar a apreciação, discussão e resolução das questões colocadas numa perspectiva global e comum a todos os serviços e organismos e aos trabalhadores da Administração Pública no seu conjunto, respeitando o princípio da prossecução do interesse público e visando a dignificação da função pública e a melhoria das condições sócio-económicas dos mesmos trabalhadores.

Artigo 5.º

Direito de negociação colectiva

1 — É garantido aos trabalhadores da Administração Pública em regime de direito público o direito de negociação colectiva do seu estatuto.

2 — Considera-se negociação colectiva a negociação efectuada entre as associações sindicais e a Administração das matérias relativas àquele estatuto, com vista à obtenção de um acordo.

3 — O acordo, total ou parcial, que for obtido consta de documento autónomo subscrito pelas partes e obriga o Governo a adoptar as medidas legislativas ou administrativas adequadas ao seu integral e exacto cumprimento, no prazo máximo de 180 dias, sem prejuízo de outros prazos que sejam acordados, salvo nas matérias que careçam de autorização legislativa, caso em que os respectivos pedidos devem ser submetidos à Assembleia da República no prazo máximo de 45 dias.

Artigo 6.º

Objecto de negociação colectiva

São objecto de negociação colectiva as matérias relativas à fixação ou alteração:

a) Dos vencimentos e das demais prestações de carácter remuneratório;
b) Das pensões de aposentação ou de reforma;
c) Das prestações da acção social e da acção social complementar;
d) Da constituição, modificação e extinção da relação de emprego;
e) Das carreiras de regime geral e especial e das integradas em corpos especiais, incluindo as respectivas escalas salariais;
f) Da duração e horário de trabalho;
g) Do regime das férias, faltas e licenças;
h) Do regime dos direitos de exercício colectivo;
i) Das condições de higiene, saúde e segurança no trabalho;
j) Da formação e aperfeiçoamento profissional;
k) Do estatuto disciplinar;
l) Do regime de mobilidade;
m) Do regime de recrutamento e selecção;
n) Do regime de classificação de serviço.

Artigo 7.º

Procedimento de negociação

1 — A negociação geral anual deverá iniciar-se a partir do dia 1 de Setembro, com a apresentação, por uma das partes, de proposta fundamentada sobre qualquer das matérias previstas no artigo anterior, procedendo-se seguidamente à calendarização das negociações, de forma que estas terminem tendencialmente antes da votação final global da proposta do Orçamento, nos termos constitucionais, na Assembleia da República.

2 — As matérias sem incidência orçamental constantes do artigo anterior podem ser objecto de negociação a qualquer momento, desde que as partes contratantes nisso acordem, e desde que não tenham sido discutidas na negociação geral anual precedente.

3 — As partes devem fundamentar as suas propostas e contrapropostas, impendendo sobre elas o dever de tentar atingir, em prazo adequado, um acordo.

4 — Das reuniões havidas são elaboradas actas, subscritas pelas partes, donde constará um resumo do que tiver ocorrido, designadamente os pontos em que não se tenha obtido acordo.

5 — As negociações sectoriais iniciam-se em qualquer altura do ano e têm a duração que for acordada entre as partes, aplicando-se-lhes os princípios constantes dos números anteriores.

Artigo 8.º

Convocação de reuniões

A convocação de reuniões dentro do procedimento negocial tem de ser feita sempre com a antecedência mínima de cinco dias úteis, salvo acordo das partes.

Artigo 9.º

Resolução de conflitos

1 — Terminado o período da negociação sem que tenha havido acordo poderá abrir-se uma negociação suplementar, a pedido das associações sindicais, para resolução dos conflitos.

2 — O pedido para negociação suplementar será apresentado no final da última reunião negocial, ou por escrito, no prazo de cinco dias úteis, contado a partir do encerramento de qualquer dos procedimentos de negociação previstos no artigo 7.º, devendo dele ser dado conhecimento a todas as partes envolvidas no processo.

3 — A negociação suplementar, desde que requerida nos termos do número anterior, é obrigatória, não podendo a sua duração exceder 15 dias úteis, consiste na tentativa de obtenção de um acordo e tem como consequência que não pode ser encerrado qualquer procedimento negocial em curso sobre as mesmas matérias com qualquer outra entidade.

4 — Na negociação suplementar a parte governamental será constituída por membro ou membros do Governo, sendo obrigatoriamente presidida pelo que for responsável pela Administração Pública e, no caso das negociações sectoriais, pelo que for responsável pelo sector.

5 — Finda a negociação suplementar sem obtenção de acordo, o Governo toma a decisão que entender adequada, sem prejuízo do disposto no n.º 3 do artigo 5.º

Artigo 10.º

Direito de participação

1 — É garantido aos trabalhadores da Administração Pública o direito de participarem, através das suas associações sindicais:

a) Na elaboração de programas de emprego;
b) Na fiscalização e implementação das medidas relativas às condições de higiene, saúde e segurança no trabalho;
c) Na gestão das instituições de segurança social dos trabalhadores da função pública e de outras organizações que visem satisfazer o interesse dos trabalhadores, designadamente as obras e serviços sociais, a ADSE e a Caixa Geral de Aposentações;
d) Nas alterações ao Estatuto da Aposentação;
e) Na definição da política de formação e aperfeiçoamento profissional da Administração Pública;
f) No controlo de execução dos planos económico-sociais;
g) No domínio da melhoria da qualidade dos serviços públicos;
h) Nas auditorias de gestão efectuadas aos serviços públicos;
i) Na elaboração dos pedidos de autorização legislativa sobre matéria sujeita à negociação ou participação;
j) Na elaboração da regulamentação interna relativa às condições específicas de trabalho de cada serviço;
l) Na definição do regime de acidentes de serviço e doenças profissionais;
m) Na elaboração da legislação respeitante ao regime geral ou especial da função pública que não for objecto de negociação.

2 — A participação na elaboração de programas de emprego tem a natureza de consulta e tem como referência o plano anual de actividades previsto no Decreto-Lei n.º 183/96, de 27 de Setembro.

3 — A participação na fiscalização das medidas relativas às condições de higiene e segurança faz-se nos termos da lei.

4 — A participação nas instituições de segurança social dos trabalhadores da função pública e de outras organizações que visem satisfazer o interesse dos trabalhadores consiste no direito de ser informado sobre a gestão daquelas instituições pelos respectivos órgãos e no de lhes fazer recomendações visando a melhoria dos serviços prestados, regendo-se, quanto ao mais, pelo disposto na lei.

5 — A participação na definição da política de formação e aperfeiçoamento profissional faz-se, designadamente, no âmbito da comissão intersectorial de formação e dos conselhos consultivos.

6 — A participação no controlo da execução dos planos económico-sociais faz-se de acordo com o disposto na lei.

7 — A participação na melhoria da qualidade dos serviços públicos envolve a consulta das associações sindicais sobre a elaboração dos programas de qualidade e o acompanhamento da sua execução.

8 — A participação nas auditorias de gestão faz-se através da consulta dos respectivos relatórios finais e emissão de sugestões, podendo as associações sindicais propor fundadamente a realização daquelas auditorias.

9 — A participação nas alterações ao Estatuto da Aposentação e na elaboração da legislação respeitante ao regime geral ou especial da função pública, que não for objecto de negociação, tem a natureza de consulta, oral ou escrita, pressupondo, caso a iniciativa seja do Governo, a existência de documento escrito a apresentar por este.

10 — A participação na legislação prevista nas alíneas *l*) a *m*) do n.º 1 tem a natureza de consulta, oral ou escrita, podendo para o efeito constituir-se comissões técnicas especializadas, segundo regulamento a adoptar caso a caso.

11 — Das reuniões das comissões técnicas especializadas que vierem a ser constituídas serão lavradas actas nos termos do n.º 4 do artigo 7.º

12 — O prazo para apreciação escrita dos projectos de diploma por parte das associações sindicais nunca pode ser inferior a 20 dias a contar da sua recepção por parte da associação sindical, salvo acordo expresso em contrário.

13 — O prazo previsto no número anterior é, porém, contado a partir do dia útil imediatamente seguinte ao do recebimento das informações solicitadas ao abrigo do n.º 3 do artigo 3.º

Artigo 11.º

Casos especiais

Ao pessoal com funções de representação externa do Estado, bem como ao que desempenhe funções de natureza altamente confidencial, é aplicado, em cada caso, o procedimento negocial adequado à natureza das respectivas funções, sem prejuízo dos direitos reconhecidos no presente diploma.

Artigo 12.º

Matérias excluídas

A estrutura, atribuições e competências da Administração Pública não podem ser objecto de negociação colectiva ou de participação.

Artigo 13.º

Informação sobre política salarial

As associações sindicais podem enviar ao Governo, até ao fim do 1.º semestre de cada ano, a respectiva posição sobre os critérios que entendam dever orientar a política salarial a prosseguir no ano seguinte.

Artigo 14.º

Interlocutor da Administração nos processos de negociação e participação

1 — O interlocutor pela Administração nos procedimentos de negociação colectiva e de participação que revistam carácter geral é o Governo, através daquele dos seus membros que tiver a seu cargo a função pública, que coordena, e do Ministro das Finanças, os quais intervêm por si ou através de representantes.

2 — O interlocutor pela Administração nos procedimentos de negociação colectiva e de participação que revistam carácter sectorial é o Governo, através do ministro responsável pelo sector, que coordena, do Ministro das Finanças e do membro do Governo que tiver a seu cargo a função pública, nos quais intervêm por si ou através de representantes.

3 — Compete à Direcção-Geral da Administração Pública apoiar o membro do Governo que tiver a seu cargo a função pública nos procedimentos de negociação colectiva e de participação referidos nos números anteriores.

Artigo 15.º

Representantes das associações sindicais

1 — Consideram-se representantes legítimos das associações sindicais:

a) Os membros dos respectivos corpos gerentes portadores de credencial com poderes bastantes para negociar e participar;

b) Os portadores de mandato escrito conferido pelos corpos gerentes das associações sindicais, do qual constem expressamente poderes para negociar e participar.

2 — A revogação do mandato só é eficaz após comunicação aos serviços competentes da Administração Pública.

Artigo 16.º

Transcrição oficiosa do registo das associações sindicais

A Direcção-Geral da Administração Pública deve requerer ao Ministério do Trabalho e da Solidariedade a transcrição oficiosa do registo das associações sindicais que representem interesses dos trabalhadores da Administração Pública e comunicá-la às Regiões Autónomas.

Artigo 17.º

Aplicação à administração regional autónoma

1 — O presente diploma aplica-se a todo o território nacional.

2 — Os órgãos de governo próprio das Regiões Autónomas dos Açores e da Madeira observam, relativamente às administrações regionais e no âmbito das suas competências, o regime previsto no presente diploma.

Artigo 18.º

Revogação

É revogado o Decreto-Lei n.º 45-A/84, de 3 de Fevereiro, com excepção do artigo 10.º

Artigo 19.º

Entrada em vigor

A presente lei entra em vigor no dia imediato ao da sua publicação.

Aprovada em 2 de Abril de 1998.

O Presidente da Assembleia da República, *António de Almeida Santos.*

Promulgada em 8 de Maio de 1998.

Publique-se.

O Presidente da República, JORGE SAMPAIO.

Referendada em 14 de Maio de 1998.

O Primeiro-Ministro, *António Manuel de Oliveira Guterres.*

Sector	Referências — Datas — Títulos	Extractos do conteúdo
Readmissão	SCH/Com.-ex. (96), decl. 7, rev. — 27 de Junho de 1996.	Declaração do Comité Executivo relativa à política de transferência e readmissão entre Estados Schengen.

Declaração das Partes na Convenção de Schengen

Na sequência da denúncia do presente Acordo ou se este cessar em aplicação do disposto no 2.º parágrafo do seu artigo 10.º, os controlos de pessoas na fronteira com o Estado ou os Estados em causa serão efectuados em conformidade com o disposto na Convenção de Schengen.

Declaração da República da Islândia e do Reino da Noruega

1 — As reservas formuladas em conformidade com o artigo 13.º da Convenção Europeia para a Represssão do Terrorismo não serão aplicadas à extradição entre os Estados signatários do presente Acordo.

2 — A República da Islândia e o Reino da Noruega declaram que não invocarão, perante os Estados membros de Schengen que garantam tratamento igual, as suas declarações nos termos do n.º 1 do artigo 6.º da Convenção Europeia de Extradição como fundamento para recusar a extradição de residentes de Estados não nórdicos.

PRESIDÊNCIA DO CONSELHO DE MINISTROS

Decreto-Lei n.º 84/99

de 19 de Março

O exercício da liberdade sindical por parte dos trabalhadores em geral encontra-se regulado no Decreto-Lei n.º 215-B/75, de 30 de Abril, estando remetido para lei especial o exercício da liberdade sindical dos trabalhadores da Administração Pública.

Porém, passados mais de 20 anos e não obstante a Constituição da República Portuguesa reconhecer a todos os trabalhadores, incluindo os da Administração Pública, o direito de liberdade sindical, «condição e garantia da construção da sua unidade para defesa dos seus direitos e interesses», a lei especial anunciada no Decreto-Lei n.º 215-B/75, de 30 de Abril, ainda não foi publicada.

Na falta daquela lei especial, passaram as disposições do Decreto-Lei n.º 215-B/75, de 30 de Abril, a ser aplicadas, com as necessárias adaptações, à função pública, mediante a adopção de normas de natureza não legislativa.

No acordo salarial para 1997, o Governo assumiu com a organização sindical dele subscritora (a FESAP — Frente Sindical da Administração Pública) o compromisso de colmatar aquela ausência de regulamentação legal expressa, «consolidando os direitos já adquiridos pelos trabalhadores».

No quadro daquele compromisso, o Governo e as organizações sindicais (incluindo as que não subscreveram o acordo salarial para 1997: a Frente Comum de Sindicatos da Administração Pública e o Sindicato dos Quadros Técnicos do Estado) consensualizaram integralmente posições.

Inserindo-se a matéria na reserva relativa de competência da Assembleia da República, a esta o Governo submeteu a necessária proposta de autorização legislativa.

Após alargada discussão pública, a Assembleia da República concedeu ao Governo a necessária autorização legislativa, a qual se encontra vazada na Lei n.º 78/98, de 19 de Novembro.

E assim, tendo sido também ouvidos os órgãos de governo próprio das Regiões Autónomas, a Associação Nacional de Municípios Portugueses e a Associação Nacional de Freguesias, é aprovado o presente decreto-lei, que assegura a liberdade sindical dos trabalhadores da Administração Pública e regula o seu exercício, garantindo, desta forma, o direito constitucionalmente reconhecido a todos os trabalhadores.

De igual modo é reconhecida às associações sindicais legitimidade processual para defesa colectiva dos direitos e interesses colectivos e para defesa colectiva dos direitos e interesses individuais legalmente protegidos dos trabalhadores que representam, beneficiando da isenção da taxa de justiça e das custas, e salvaguarda-se da caducidade a normação não legislativa anterior, na parte em que não colida com o presente diploma.

Assim:

No uso da autorização legislativa concedida pelo artigo 1.º da Lei n.º 78/98, de 19 de Novembro, e nos termos da alínea *b*) do n.º 1 do artigo 198.º da Constituição, o Governo decreta, para valer como lei geral da República, o seguinte:

CAPÍTULO I

Objecto e âmbito

Artigo 1.º

Objecto

O presente diploma assegura a liberdade sindical dos trabalhadores da Administração Pública e regula o seu exercício.

Artigo 2.º

Âmbito pessoal

1 — Para efeitos do presente diploma, consideram-se trabalhadores da Administração Pública os que, com subordinação à hierarquia e disciplina e mediante retribuição, desempenham funções próprias do serviço, de natureza permanente ou transitória, ainda que sujeitos ao regime do contrato individual de trabalho.

2 — Exceptua-se do disposto no número anterior o pessoal militar, o pessoal militarizado da Polícia Marítima, o pessoal com funções policiais da Polícia de Segurança Pública e o pessoal integrado nos quadros de oficiais,

sargentos e praças da Guarda Nacional Republicana, que será objecto de lei especial.

Artigo 3.º

Âmbito institucional

1 — O presente diploma é aplicável a todos os serviços da administração pública central, regional e local, às associações públicas, às fundações públicas e aos institutos públicos, nas modalidades de serviços personalizados e de fundos públicos.

2 — O presente diploma aplica-se ainda aos serviços e organismos que estejam na dependência hierárquica e funcional da Presidência da República, da Assembleia da República e das instituições judiciárias.

CAPÍTULO II

Direitos e garantias fundamentais

Artigo 4.º

Direitos fundamentais

1 — É assegurada aos trabalhadores da Administração Pública a liberdade sindical, nos termos constitucionalmente reconhecidos.

2 — São assegurados, ainda, os direitos de exercício colectivo, nos termos constitucionalmente consagrados e legalmente concretizados.

3 — É reconhecida às associações sindicais legitimidade processual para defesa dos direitos e interesses colectivos e para a defesa colectiva dos direitos e interesses individuais legalmente protegidos dos trabalhadores que representem, beneficiando da isenção do pagamento da taxa de justiça e das custas.

4 — A defesa colectiva dos direitos e interesses individuais legalmente protegidos prevista no número anterior não pode implicar limitação da autonomia individual dos trabalhadores.

Artigo 5.º

Garantias

1 — Nenhum trabalhador da Administração Pública pode ser prejudicado, beneficiado, isento de um dever ou privado de qualquer direito em virtude dos direitos de associação sindical ou pelo exercício da actividade sindical.

2 — Os membros dos corpos gerentes e os delegados sindicais, na situação de candidatos, já eleitos e até dois anos após o fim do respectivo mandato, não podem ser transferidos do local de trabalho sem o seu acordo expresso e sem audição da associação sindical respectiva.

3 — O disposto no número anterior não é aplicável quando a transferência resultar de extinção do serviço, for uma implicação inerente ao desenvolvimento da respectiva carreira ou decorrer de normas legais, de carácter geral e abstracto, aplicáveis a todo o pessoal.

CAPÍTULO III

Organização sindical

Artigo 6.º

Constituição, organização e alterações estatutárias

A constituição, organização e alterações estatutárias das associações sindicais de trabalhadores da Administração Pública rege-se pelo disposto no presente diploma e, subsidiariamente, pelo Decreto-Lei n.º 215-B/75, de 30 de Abril.

Artigo 7.º

Documentação

O Ministério do Trabalho e da Solidariedade remeterá, oficiosamente, ao membro do Governo que tiver a seu cargo a Administração Pública cópia da convocatória da assembleia constituinte da associação sindical, dos respectivos estatutos, da acta da assembleia geral eleitoral e da relação contendo a identificação dos titulares dos corpos gerentes.

Artigo 8.º

Sede

As associações sindicais têm obrigatoriamente sede em território nacional.

Artigo 9.º

Quotizações sindicais

1 — As quotizações sindicais são obrigatoriamente descontadas na fonte, procedendo à sua remessa às associações sindicais interessadas, nos termos dos números seguintes.

2 — O sistema previsto no número anterior apenas produzirá efeitos mediante declaração individual de autorização do trabalhador da Administração Pública a enviar, por meios idóneos e seguros, ao serviço processador e à associação sindical.

3 — A declaração de autorização, que pode ser feita a todo o tempo e conterá o nome e assinatura do trabalhador da Administração Pública, a associação sindical em que está inscrito e o valor da quota, produzirá efeitos no mês seguinte ao da sua entrega.

4 — As declarações de autorização e de revogação por parte de trabalhador da Administração Pública invisual ou que não possa escrever serão assinadas, a rogo, por outra pessoa e conterão os elementos de identificação de ambos.

CAPÍTULO IV

Exercício da actividade sindical

Artigo 10.º

Disposição geral

1 — Os membros dos corpos gerentes das associações sindicais e os delegados sindicais têm o direito de exercício da actividade sindical e, designadamente, o de faltar ao serviço para o exercício das suas funções, nos termos do presente diploma e, subsidiariamente, do Decreto-Lei n.º 215-B/75, de 30 de Abril.

2 — O pessoal abrangido pelo presente diploma tem o direito de participar nos processos eleitorais que, de acordo com os respectivos estatutos, se desenvolvam no âmbito da associação sindical, sob a forma de actividades pré-eleitoral, de exercício do direito de voto e de fiscalização.

3 — A actividade sindical dentro das instalações é exercida nos termos do presente diploma e, subsidiariamente, do Decreto-Lei n.º 215-B/75, de 30 de Abril.

SECÇÃO I

Corpos gerentes e faltas dos seus membros

Artigo 11.º

Corpos gerentes

1 — Consideram-se corpos gerentes da associação sindical os estatutariamente consagrados e cuja competência abranja o âmbito, pessoal e territorial, estatutariamente definido.

2 — Para os efeitos do presente diploma não se consideram corpos gerentes a assembleia geral, o congresso ou outros órgãos equivalentes, bem como quaisquer outros de funções consultivas, de apoio técnico ou logístico.

Artigo 12.º

Faltas dos membros dos corpos gerentes

1 — Sem prejuízo do disposto no número seguinte, as faltas dadas pelos trabalhadores membros dos corpos gerentes para o exercício das suas funções consideram-se justificadas e contam, para todos os efeitos legais, como serviço efectivo, salvo quanto à remuneração.

2 — Os trabalhadores referidos no número anterior têm, contudo, direito a um crédito de quatro dias remunerados por mês para o exercício das suas funções, que podem utilizar em períodos de meio dia.

Artigo 13.º

Extensão

1 — O disposto no artigo anterior é extensivo aos membros das comissões directivas, ou equiparadas, das associações sindicais já registadas mas que ainda não tenham provido os respectivos corpos gerentes, nos termos estatutariamente previstos.

2 — O disposto no artigo anterior é aplicável até um máximo de cinco membros de corpos gerentes de órgãos dirigentes estatutariamente equiparados aos corpos gerentes, mas cuja área territorialmente abrangida seja, pelo menos, igual à de município.

Artigo 14.º

Formalidades

1 — A associação sindical interessada comunicará, por meios idóneos e seguros, aos serviços de que dependem os membros dos órgãos referidos nos artigos anteriores as datas e os números de dias de que os mesmos necessitam para o exercício das respectivas funções.

2 — A comunicação prevista no número anterior será feita com um dia útil de antecedência ou, em caso de impossibilidade, num dos dois dias úteis imediatos.

Artigo 15.º

Acumulação de créditos

O crédito de faltas de cada membro dos corpos gerentes da associação sindical pode, por ano civil, ser acumulado ou cedido a outro membro da mesma associação, ainda que pertencente a serviço diferente.

Artigo 16.º

Formalidades para a acumulação

1 — A utilização dos créditos acumulados ou transferidos entre membros dos corpos gerentes pertencentes ao mesmo serviço deve ser comunicada pela associação sindical ao serviço de que ambos dependam com a antecedência de dois dias sobre o início da respectiva utilização.

2 — Se os interessados pertencerem a serviços e ou administração diferentes, a associação sindical do membro cedente informará os serviços deste da cedência do seu crédito, não podendo a utilização deste crédito iniciar-se antes de decorridos três dias sobre a data da recepção da comunicação no serviço de que depende o utilizador do crédito.

Artigo 17.º

Limites

1 — Cada associação sindical deverá enviar ao gabinete do membro do Governo responsável pela Administração Pública, por meios idóneos e seguros, até 15 de Janeiro de cada ano ou até 60 dias após a realização de acto eleitoral, uma lista dos membros efectivos e suplentes dos respectivos corpos gerentes que podem acumular e ceder créditos.

2 — No caso de as associações sindicais não abrangerem, exclusivamente, trabalhadores da Administração Pública, o número de membros dos corpos gerentes que podem acumular e ceder créditos não pode ultrapassar o número de membros efectivos que sejam trabalhadores da Administração Pública.

3 — Para efeitos do disposto no número anterior, e sem prejuízo do estatuído no n.º 1 do artigo 2.º e no n.º 1 do artigo 3.º, são considerados trabalhadores da Administração Pública os dos serviços públicos abrangidos pelo regime de contrato individual de trabalho bem como nos casos identificados em lei como regime de direito público privativo.

Artigo 18.º

Interesse público

1 — A acumulação ou cessão de créditos só pode ser recusada por razões de grave prejuízo para a realização do interesse público, por despacho fundamentado do membro do Governo que superintenda ou tutele o serviço ou organismo a que pertença o interessado.

2 — A pretensão considera-se deferida se sobre ela não for proferido despacho expresso em contrário no prazo de 15 dias após a sua apresentação e notificado à associação sindical interessada.

3 — A competência prevista no n.º 1 do presente artigo é na administração local detida pelas entidades referidas no n.º 2 do artigo 35.º

SECÇÃO II

Faltas dos delegados sindicais

Artigo 19.º

Faltas

1 — Os delegados sindicais têm direito a um crédito de não trabalho de doze horas remuneradas por mês, para o exercício das suas funções, que conta, para todos os efeitos legais, como serviço efectivo.

2 — Em cada unidade orgânica, os delegados sindicais podem gerir, em cada mês, o crédito de horas de que dispõem, transferindo livremente para outros os seus créditos não utilizados.

3 — Sem prejuízo do disposto do número anterior, o crédito poderá ser gerido pelas direcções das associações sindicais mediante:

a) Acumulação num delegado sindical do crédito de outros;
b) Acumulação num mesmo mês do crédito de outros meses do mesmo ano, desde que os respectivos delegados sindicais exerçam tarefas na mesma unidade orgânica.

Artigo 20.º

Formalidades

1 — As associações sindicais devem comunicar, por meios idóneos e seguros, aos serviços a identificação dos delegados e dos suplentes, se existirem, devendo idêntico procedimento ser adoptado no caso de substituição ou cessação de funções.

2 — Os delegados sindicais devem informar os seus serviços, sempre que possível, com vinte e quatro horas de antecedência da utilização do crédito de que dispõem.

3 — O prazo previsto no número anterior é computado nos termos do artigo 279.º, alínea *b*), do Código Civil.

Artigo 21.º

Limites

O número de delegados sindicais que podem gozar do direito a que se referem os artigos anteriores é, por associação sindical, o seguinte:

a) Um, por unidade orgânica com menos de 50 trabalhadores sindicalizados;
b) Dois, por unidade orgânica com 50 a 99 trabalhadores sindicalizados;
c) Três, por unidade orgânica com 100 a 199 trabalhadores sindicalizados;
d) Seis, por unidade orgânica com 200 a 499 trabalhadores sindicalizados;
e) Seis, acrescendo um por cada 200 trabalhadores sindicalizados ou fracção, nos restantes casos.

SECÇÃO III

Actos eleitorais

Artigo 22.º

Processos eleitorais

1 — Para a realização de assembleias constituintes de associações sindicais ou para efeitos de alteração dos estatutos ou eleição dos corpos gerentes, os trabalhadores da Administração Pública gozam dos seguintes direitos:

a) Dispensa de serviço para os membros da assembleia geral eleitoral e da comissão fiscalizadora eleitoral, num total de sete membros, num máximo de 10 dias úteis, com possibilidade da utilização de meios dias;
b) Dispensa de serviço para os elementos efectivos e suplentes que integram as listas candidatas num máximo de seis dias úteis, com possibilidade da utilização de meios dias;
c) Dispensa de serviço para os membros da mesa, até ao limite de três ou até ao limite do número de listas concorrentes, se o número destas for superior a três, por período não superior a um dia;
d) Dispensa de serviço aos trabalhadores com direito de voto, pelo tempo necessário para o exercício do respectivo direito;
e) Dispensa de serviço aos trabalhadores que participem em actividades de fiscalização do acto eleitoral durante o período de votação e contagem de votos.

2 — A solicitação das associações sindicais ou das comissões promotoras da respectiva constituição, é permitida a instalação e funcionamento de mesas de voto nos locais de trabalho durante as horas de serviço.

3 — As dispensas de serviço previstas no n.º 1 anterior não são imputadas noutros créditos previstos no presente diploma.

4 — As dispensas de serviço previstas no n.º 1 são equiparadas a serviço efectivo, para todos os efeitos legais.

5 — O exercício dos direitos previstos no presente artigo só pode ser impedido com fundamento, expresso e por escrito, em grave prejuízo para a realização do interesse público.

6 — Do acto previsto no número anterior cabe recurso hierárquico necessário, a interpor para o membro do Governo competente no prazo de setenta e duas horas após a sua notificação.

7 — A interposição do recurso hierárquico suspende a execução da decisão e devolve ao membro do Governo a competência para decidir definitivamente.

Artigo 23.º

Formalidades

1 — A comunicação para a instalação e funcionamento das mesas de voto deve ser, por meios idóneos e seguros, apresentada ao dirigente máximo do serviço com antecedência não inferior a 10 dias, e dela deve constar:

a) A identificação do acto eleitoral;
b) A indicação do local pretendido;
c) A identificação dos membros da mesa ou substitutos;
d) O período de funcionamento.

2 — A instalação e funcionamento das mesas de voto considera-se autorizada se nos três dias imediatos à apresentação da comunicação não for proferido despacho em contrário e notificado à associação sindical.

Artigo 24.º

Votação

1 — A votação decorre dentro do período normal do funcionamento do serviço.

2 — O funcionamento das mesas não pode prejudicar o normal funcionamento dos serviços.

Artigo 25.º

Votação em local diferente

Os trabalhadores que devam votar em local diferente daquele em que desempenham funções só nele podem permanecer pelo tempo indispensável ao exercício do seu direito de voto.

Artigo 26.º

Extensão

1 — No caso de consultas eleitorais estatutariamente previstas ou de outros respeitantes a interesses colectivos dos trabalhadores, designadamente congressos ou outras de idêntica natureza, poderão ser concedidas facilidades aos trabalhadores em termos a definir, caso a caso, por despacho do membro do Governo que tiver a seu cargo a Administração Pública.

2 — As facilidades previstas no número anterior são, na administração local, concedidas pelo órgão da respectiva autarquia competente para a gestão e superintendência de pessoal.

SECÇÃO IV

Actividade sindical nos serviços

Artigo 27.º

Princípio geral

1 — É garantido o direito de exercer a actividade sindical nas instalações dos serviços.

2 — O exercício do direito referido no número anterior não pode comprometer a realização do interesse público e o normal funcionamento dos serviços.

Artigo 28.º

Reuniões fora das horas de serviço

1 — Os trabalhadores gozam do direito de reunião nos locais de trabalho, fora das horas de serviço, a convocação do órgão competente da associação sindical ou dos delegados sindicais.

2 — Os membros dos corpos gerentes das associações sindicais podem participar nas reuniões referidas no número anterior, sem prejuízo de lhes poder ser exigida a respectiva identificação de qualidade.

3 — A realização das reuniões deve ser comunicada ao dirigente máximo do serviço com a antecedência mínima de vinte e quatro horas, incumbindo a este designar a sala, ou salas, a que o público não tenha acesso, em que a reunião terá lugar.

4 — Na comunicação da realização da reunião deve ser revelado o número de membros dos corpos gerentes das associações sindicais que nelas pretendam participar.

5 — Se no serviço for praticado o regime de horário flexível, ainda que não pela totalidade dos trabalhadores, as reuniões previstas no n.º 1 só poderão realizar-se fora dos períodos previstos para as plataformas fixas.

6 — As reuniões não poderão prejudicar o normal funcionamento dos serviços, no caso de trabalho por turnos ou trabalho extraordinário.

Artigo 29.º

Reunião durante as horas de serviço

1 — Por motivos excepcionais, as associações sindicais, ou os respectivos delegados, poderão convocar reuniões dentro do horário normal de funcionamento dos serviços.

2 — Cabe exclusivamente às associações sindicais reconhecer a existência das circunstâncias excepcionais que justificam a realização da reunião.

3 — As reuniões referidas no n.º 1 não podem exceder a duração de quinze horas anuais por cada serviço e associação sindical, que contarão para todos os efeitos legais como serviço efectivo.

4 — É aplicável às reuniões durante as horas de serviço o disposto no n.º 2 do artigo anterior.

Artigo 30.º

Formalidades

A convocação das reuniões deve ser comunicada, por meios idóneos e seguros, com a antecedência mínima de vinte e quatro horas e ser acompanhada dos seguintes elementos:

a) Ordem de trabalhos;
b) Declaração confirmativa do carácter excepcional da reunião;
c) Indicação do número de membros dos corpos gerentes da associação sindical que, pressupostamente, participarão na reunião, se for caso disso.

Artigo 31.º

Limites

A realização das reuniões referidas no artigo 29.º não pode comprometer o funcionamento dos serviços de carácter urgente.

Artigo 32.º

Distribuição e afixação de documentos

1 — É autorizada a distribuição de comunicados e de quaisquer outros documentos subscritos pelas associações sindicais, bem como a respectiva afixação em locais próprios, devidamente assinalados.

2 — Incumbe ao dirigente máximo do serviço definir e disponibilizar os locais, com normal acesso à generalidade dos trabalhadores, para o exercício do direito referido no número anterior.

Artigo 33.º

Requisição

1 — As associações sindicais podem requerer a requisição de funcionários dos serviços e organismos referidos no artigo 3.º para nelas prestarem serviço.

2 — O requerimento referido no número anterior será instruído com declaração expressa do funcionário manifestando o seu acordo.

3 — A requisição efectua-se mediante despacho conjunto do membro do Governo competente e do que for responsável pela Administração Pública.

4 — A competência referida no número anterior é, na administração local, detida pelo órgão da respectiva autarquia competente para a gestão e superintendência de pessoal.

5 — À requisição aplica-se, subsidiariamente, o disposto no artigo 27.º do Decreto-Lei n.º 427/89, de 7 de Dezembro.

Artigo 34.º

Licença especial para desempenho de funções

1 — A requerimento da associação sindical interessada, e para nela prestar serviço, pode ser concedida licença a funcionário que conte mais de três anos de antiguidade.

2 — O requerimento previsto no número anterior é instruído com declaração expressa do funcionário manifestando o seu acordo.

3 — A licença prevista no n.º 1 do presente artigo caracteriza-se por:

a) Ser por um ano, sucessiva e tacitamente renovável, e sem vencimento;

b) Não abrir vaga no quadro de origem, nem prejudicar a normal progressão e promoção do funcionário.

4 — Sem prejuízo do disposto no número anterior, à licença é, subsidiariamente, aplicável o regime geral da licença sem vencimento por um ano.

CAPÍTULO V

Disposições finais

Artigo 35.º

Correspondência de cargos

1 — Para efeitos deste diploma, as competências atribuídas aos órgãos da administração central devem considerar-se reportadas aos correspondentes órgãos próprios da administração regional.

2 — As competências atribuídas no presente diploma aos dirigentes máximos dos serviços são, na administração local, cometidas:

a) Ao presidente da câmara municipal, nas câmaras municipais;
b) Ao presidente do conselho de administração, nas associações de municípios e nos serviços municipalizados;
c) À junta de freguesia, nas juntas de freguesia;
d) Ao presidente da mesa da assembleia distrital, nas assembleias distritais.

Artigo 36.º

Salvaguarda

Mantêm-se em vigor, na parte em que não colida com o presente diploma, todas as disposições anteriores de natureza não legislativa, designadamente:

a) A circular de 7 de Abril de 1978, do ex-Ministério da Reforma Administrativa;
b) O despacho de 4 de Fevereiro de 1985 do Secretário de Estado da Administração Pública.

Artigo 37.º

Entrada em vigor

O presente diploma entra em vigor no dia 1 do mês seguinte ao da sua publicação.

Visto e aprovado em Conselho de Ministros de 23 de Dezembro de 1998. — *António Manuel de Oliveira Guterres — António Luciano Pacheco de Sousa Franco — Jorge Paulo Sacadura Almeida Coelho — João Cardona Gomes Cravinho — José Eduardo Vera Cruz Jardim.*

Promulgado em 3 de Março de 1999.

Publique-se.

O Presidente da República, JORGE SAMPAIO.

Referendado em 10 de Março de 1999.

O Primeiro-Ministro, *António Manuel de Oliveira Guterres.*

Decreto-Lei n.º 85/99

de 19 de Março

Estando em desenvolvimento o projecto Loja do Cidadão no quadro de uma estrutura de missão leve e flexível, permanecem as razões que estiveram na origem da publicação do Decreto-Lei n.º 56/98, de 16 de Março, no sentido da definição de um regime especial para a realização de despesas.

Assim:

Nos termos da alínea *a*) do n.º 1 do artigo 198.º da Constituição, o Governo decreta o seguinte:

Artigo 1.º

Mantém-se em vigor, até 31 de Dezembro de 1999, o regime previsto no Decreto-Lei n.º 56/98, de 16 de Março.

Artigo 2.º

O presente diploma produz efeitos a partir de 1 de Janeiro de 1999.

Visto e aprovado em Conselho de Ministros de 21 de Janeiro de 1999. — *António Manuel de Oliveira Guterres — António Luciano Pacheco de Sousa Franco — Jorge Paulo Sacadura Almeida Coelho.*

Promulgado em 10 de Março de 1999.

Publique-se.

O Presidente da República, JORGE SAMPAIO.

Referendado em 10 de Março de 1999.

O Primeiro-Ministro, *António Manuel de Oliveira Guterres.*

MINISTÉRIO DA ADMINISTRAÇÃO INTERNA

Decreto-Lei n.º 86/99

de 19 de Março

O Decreto do Presidente da República n.º 39/98, de 1 de Setembro, convocou um referendo para o dia 8 de Novembro de 1998.

Nos termos da Lei Orgânica do Referendo (Lei n.º 15-A/98, de 3 de Abril), torna-se necessário fixar os valores dos factores que integram a fórmula constante do artigo 184.º desse diploma legal.

Assim:

Nos termos da alínea *a*) do n.º 1 do artigo 198.º da Constituição, o Governo decreta, para valer como lei geral da República, o seguinte:

Artigo único

1 — Para o referendo de 8 de Novembro de 1998 os valores, em escudos, da verba por município (V) e dos coeficientes de ponderação (a) e (b) são os seguintes:

V=39 500$;
a=4$10;
b=6600$.

balho e Emprego três projectos de diplomas sobre relações colectivas de trabalho.

Referindo de uma maneira sucinta as principais críticas recolhidas, dir-se-á o seguinte:

Continua a estabelecer-se a regulamentação de trabalho por via administrativa para os trabalhadores das instituições de previdência, uma vez que, caminhando-se para a sua integração na função pública, outra não poderia ser a solução adoptada.

No que se refere às comissões paritárias, não obstante se entender que será possível ir mais longe, considerando os princípios da OIT, optou-se pela manutenção da legislação em vigor, com ligeiras alterações.

Continua, igualmente, a ser fixado na lei um prazo mínimo obrigatório de vigência dos instrumentos de regulamentação colectiva, embora, a nível de princípios, tal não seja aconselhável. Considerou-se, no entanto, que não há ainda um perfeito entendimento entre as partes, por forma que as vantagens superassem os inconvenientes da ausência da sua fixação, embora se defenda o carácter transitório da medida.

Apesar das críticas, entende-se ainda que não existe nos fundamentos da recusa de depósito uma usurpação dos poderes dos tribunais. Com efeito, a impugnação de cláusulas ilegais só pode ser feita judicialmente e a existência daquelas não é fundamento de recusa de depósito.

Não se abandona, ainda, o recurso às portarias de regulamentação de trabalho, por se considerar não existirem ainda condições para a sua substituição por outros instrumentos mais adequados aos princípios informadores deste campo. Criam-se, no entanto, os condicionalismos para que essa via seja expedita e adequada às realidades sócio-económicas.

Foram acolhidas as críticas relativas à morosidade e burocratização do processo negocial, criando-se dispositivos que permitem o seu aceleramento, dispositivos esses já atrás, genericamente, referidos.

Respeitando as sugestões recolhidas sobre a matéria, não ficou consagrado no diploma o serviço nacional de mediação e arbitragem. Entendeu o Governo que se justificavam as críticas que foram tecidas a tal serviço pelas associações sindicais de cúpula.

Na sequência da discussão pública, pronunciou-se, ainda, uma associação patronal.

Acolhendo uma das suas sugestões, tornou-se obrigatória a indicação do aumento de encargos com remunerações complementares.

Por outro lado, deixou de se fixar na lei o recurso para o Conselho de Ministros para os Assuntos Económicos, acolhendo-se, assim, a sugestão feita nesse sentido.

Deixou de se exigir no entanto, para efeitos de depósito, a indicação do prazo de vigência, por se entender que tal não é aconselhável. Na verdade, fixando a lei um prazo mínimo de vigência obrigatória, a prática demonstrou que as partes se limitavam a repeti-lo.

Foi ainda criticado o facto de, nos termos deste diploma, da adesão não poder resultar modificação no conteúdo da convenção. Entende o Governo, no entanto, que só assim deixa de ser pervertido o instituto da adesão, que tem como característica essencial o ser um expediente rápido. Por outro lado, as partes não são de forma alguma prejudicadas, pois que têm sempre a possibilidade de, embora acordando num novo instrumento, adoptar grande número das cláusulas de um qualquer outro que contemple a sua realidade laboral.

Por último, refira-se que, relativamente às portarias de extensão, se optou, com ligeiras alterações, pelo regime já em vigor.

Nestes termos, o Governo decreta, ao abrigo da alínea *a*) do n.º 1 do artigo 201.º da Constituição, o seguinte:

CAPÍTULO I

Âmbito de aplicação

Artigo 1.º

1 — O presente diploma regulamenta as relações colectivas de trabalho que se estabeleçam entre trabalhadores e entidades patronais através das respectivas associações ou entre associações sindicais e entidades patronais.

2 — O regime estabelecido neste diploma não se aplica aos funcionários e agentes do Estado, autarquias locais e serviços municipalizados, os quais serão objecto de lei especial, nos termos da alínea *m*) do artigo 167.º da Constituição da República Portuguesa, nem aos institutos de direito público.

3 — O presente diploma aplica-se às empresas públicas e de capitais públicos, com ressalva do disposto na respectiva regulamentação legal e nos estatutos de cada uma delas.

4 — O regime jurídico de regulamentação colectiva de trabalho para os trabalhadores das instituições de previdência será objecto de diploma específico dos Ministérios da Administração Interna, das Finanças, do Trabalho e dos Assuntos Sociais.

5 — Às pessoas colectivas de direito privado e utilidade pública aplica-se o disposto no n.º 2 do artigo 36.º

Artigo 2.º

1 — A regulamentação colectiva das relações de trabalho é feita por convenção colectiva, por decisão arbitral ou por acordo de adesão.

2 — A regulamentação colectiva das relações de trabalho pode também ser feita por via administrativa, nos termos dos artigos 29.º e 36.º

3 — Para os efeitos deste diploma, designam-se por contratos colectivos as convenções celebradas entre associações sindicais e associações patronais; acordos colectivos, as outorgadas por associações sindicais e uma pluralidade de entidades patronais para uma pluralidade de empresas; acordos de empresa, as subscritas por associações sindicais e uma só entidade patronal para uma só empresa.

CAPÍTULO II

Capacidade negocial

Artigo 3.º

1 — Apenas têm capacidade para celebrar convenções colectivas de trabalho:

a) As associações sindicais;
b) As entidades patronais e as associações patronais.

2 — Só as associações sindicais e patronais registadas nos termos do respectivo regime jurídico podem celebrar convenções colectivas de trabalho.

3 — Nos sectores em que existam empresas públicas ou de capitais públicos poderá ser determinada, por despacho conjunto do Ministro do Trabalho e do Ministro da tutela, a autonomização do processo de negociação quanto a elas, devendo esse processo em qualquer caso abranger todos os trabalhadores ao seu serviço.

Artigo 4.º

1 — Sob pena de nulidade, as convenções colectivas serão celebradas por escrito e assinadas pelos representantes das associações sindicais e, conforme os casos, pelos representantes das associações patronais ou das entidades patronais interessadas.

2 — Para efeitos do disposto no número anterior, só se consideram como representantes legítimos:

a) Os membros das direcções das associações sindicais e patronais com poderes bastantes para contratar;
b) Os portadores de mandato escrito conferido pelas direcções das associações acima referidas, do qual constem expressamente poderes para contratar;
c) Os administradores, gerentes, representantes ou mandatários das entidades patronais com poderes para contratar;
d) No caso das empresas públicas e nacionalizadas, os membros dos conselhos de gerência ou órgãos equiparados, ou os detentores de mandato escrito de que expressamente constem poderes para contratar.

3 — A revogação do mandato só é eficaz após comunicação à outra parte e ao Ministério do Trabalho.

CAPÍTULO III

Objecto da regulamentação colectiva

Artigo 5.º

As convenções colectivas de trabalho podem regular:

a) As relações entre as partes outorgantes, nomeadamente no que toca à verificação do cumprimento da convenção e aos meios de resolução de conflitos decorrentes da sua aplicação e revisão;
b) Os direitos e deveres recíprocos dos trabalhadores e das entidades patronais vinculados por contratos individuais de trabalho, nomeadamente aqueles cuja fixação a lei remete para a regulamentação colectiva.

Artigo 6.º

1 — Os instrumentos de regulamentação colectiva de trabalho não podem:

a) Limitar o exercício dos direitos fundamentais constitucionalmente garantidos;
b) Contrariar normas legais imperativas;
c) Incluir qualquer disposição que importe para os trabalhadores tratamento menos favorável do que o estabelecido por lei;
d) Estabelecer regulamentação das actividades económicas, nomeadamente no tocante aos períodos de funcionamento das empresas, ao regime fiscal e à formação dos preços;
e) Estabelecer e regular benefícios complementares dos assegurados pelas instituições de previdência;
f) Conferir eficácia retroactiva a qualquer das suas cláusulas, salvo o disposto no artigo 13.º

2 — A restrição constante da alínea *e*) do número anterior não afecta a subsistência dos benefícios complementares anteriormente fixados por convenção colectiva, os quais se terão por reconhecidos, no mesmo âmbito, pelas convenções subsequentes, mas apenas em termos de contrato individual de trabalho.

CAPÍTULO IV

Efeitos das convenções colectivas

SECÇÃO I

Âmbito pessoal

Artigo 7.º

1 — As convenções colectivas de trabalho obrigam as entidades patronais que as subscrevem e as inscritas nas associações patronais signatárias, bem como os trabalhadores ao seu serviço que sejam membros quer das associações sindicais celebrantes, quer das associações sindicais representadas pelas associações sindicais celebrantes.

2 — As convenções outorgadas pelas uniões, federações e confederações obrigam as entidades patronais empregadoras e os trabalhadores inscritos, respectivamente, nas associações patronais e nos sindicatos representados nos termos dos estatutos daquelas organizações, quando outorguem em nome próprio ou em conformidade com os mandatos a que se refere o artigo 4.º

Artigo 8.º

Para os efeitos deste diploma, consideram-se abrangidos pelas convenções colectivas os trabalhadores e as entidades patronais que estivessem filiados nas associações signatárias no momento do início do processo negocial, bem como os que nelas se filiem durante o período de vigência das mesmas convenções.

Artigo 9.º

Em caso de cessão, total ou parcial, de uma empresa ou estabelecimento, a entidade patronal cessionária ficará obrigada a observar, até ao termo do respectivo prazo de vigência, o instrumento de regulamentação colectiva que vincula a entidade patronal cedente.

SECÇÃO II

Âmbito temporal

Artigo 10.º

1 — Os instrumentos de regulamentação colectiva de trabalho entrarão em vigor após a sua publicação, nos mesmos termos das leis.

2 — Considera-se que a data da publicação dos instrumentos de regulamentação colectiva é a da distribuição do *Boletim do Trabalho e Emprego* em que sejam inseridos.

Artigo 11.º

1 — As convenções colectivas e as decisões arbitrais vigoram pelo prazo que delas constar expressamente.

2 — O prazo de vigência não poderá ser inferior a dois anos, salvo o disposto no número seguinte.

3 — As tabelas salariais poderão ser revistas anualmente.

4 — Sem prejuízo do disposto no n.º 2, o processo de revisão de convenções colectivas terá de coincidir sempre com um processo de revisão das tabelas salariais.

5 — A convenção colectiva ou a decisão arbitral mantêm-se em vigor até serem substituídas por outro instrumento de regulamentação colectiva.

6 — Ainda que depositados e publicados, os instrumentos de regulamentação colectiva de trabalho só podem entrar em vigor após decorrido o prazo de vigência obrigatória das convenções que pretendam alterar ou substituir.

Artigo 12.º

A entrada em vigor de um instrumento de regulamentação colectiva das relações de trabalho num ramo de actividade faz cessar automaticamente a vigência das convenções cujo âmbito se define por profissão ou profissões relativamente àquele ramo de actividade e aos trabalhadores também abrangidos por aquele instrumento.

Artigo 13.º

Pode ser atribuída eficácia retroactiva às tabelas salariais, até à data em que se tenha esgotado o prazo de resposta à proposta de negociação ou, no caso de revisão de uma convenção anterior, até ao termo da vigência mínima obrigatória desta.

SECÇÃO III

Concorrência e sucessão de convenções

Artigo 14.º

1 — A regulamentação estabelecida por qualquer dos modos referidos no artigo 2.º não pode ser afastada pelos contratos individuais de trabalho, salvo para estabelecer condições mais favoráveis para os trabalhadores.

2 — Sempre que numa empresa se verifique concorrência de instrumentos de regulamentação colectiva aplicáveis a alguns trabalhadores, serão observados os seguintes critérios de prevalência:

a) Sendo um dos instrumentos concorrentes ou um acordo colectivo ou um acordo de empresa, será esse o aplicável;

b) Em todos os outros casos, prevalecerá o instrumento que for considerado, no seu conjunto, mais favorável pelo sindicato representativo do maior número dos trabalhadores em relação aos quais se verifica a concorrência desses instrumentos.

3 — No caso previsto na alínea *b*) do número anterior, o sindicato competente deverá comunicar por escrito à entidade patronal interessada e à Inspecção do Trabalho, no prazo de trinta dias a contar da entrada em vigor do último dos instrumentos concorrentes, qual o que considera mais favorável.

4 — Caso a faculdade prevista no número anterior não seja exercida pelo sindicato respectivo no prazo consignado, tal faculdade defere-se aos trabalhadores da empresa em relação aos quais se verifique concorrência, que, no prazo de trinta dias, deverão, por maioria, escolher o instrumento mais favorável.

5 — A declaração e a deliberação previstas nos números anteriores são irrevogáveis até ao termo da vigência efectiva do instrumento por elas adoptado.

6 — Na ausência de escolha, quer pelos sindicatos quer pelos trabalhadores, será aplicável o instrumento de publicação mais recente.

Artigo 15.º

1 — As condições de trabalho fixadas por instrumento de regulamentação colectiva só podem ser reduzidas por novo instrumento de cujo texto conste, em termos expressos, o seu carácter globalmente mais favorável, sem prejuízo do disposto nas alíneas *a*), *b*) e *c*) do n.º 1 do artigo 6.º

2 — A redução prevista no número anterior prejudica os direitos adquiridos por força de instrumento de regulamentação colectiva de trabalho substituído, com ressalva do disposto no n.º 2 do artigo 6.º

CAPÍTULO V

Processo de negociação

Artigo 16.º

1 — O processo de negociação inicia-se com a apresentação da proposta de celebração de uma convenção colectiva.

2 — As convenções colectivas e as decisões arbitrais não podem ser denunciadas antes de decorridos vinte ou dez meses, conforme se trate das situações previstas, respectivamente, nos n.ºs 2 e 3 do artigo 11.º

3 — A proposta deve revestir forma escrita e só se terá por válida se contiver os seguintes elementos:

a) Designação das entidades que subscrevem a proposta em nome próprio e em representação de outras;

b) Indicação da convenção que se pretende rever, sendo caso disso.

4 — A proposta deve ser apresentada na data da denúncia, sob pena de esta não ter validade.

5 — Das propostas, bem como da documentação que deve acompanhá-las, nomeadamente a fundamentação económica, serão enviadas cópias ao Ministério do Trabalho.

Artigo 17.º

1 — As entidades destinatárias da proposta devem responder nos trinta dias seguintes à recepção daquela, salvo se prazo diverso tiver sido convencionado.

2 — A resposta deve revestir forma escrita e conter os elementos referidos na alínea *a*) do n.º 3 do artigo 16.º e dela será enviada cópia ao Ministério do Trabalho.

3 — Da resposta deve ainda constar contraproposta relativa a todas as cláusulas da proposta que não sejam aceites.

4 — A falta de resposta no prazo fixado no n.º 1 e nos termos dos n.ºs 2 e 3 legitima a entidade proponente a requerer conciliação, nos termos do artigo 31.º

Artigo 18.º

1 — As propostas e as respostas serão fundamentadas mediante a ponderação da evolução dos índices de preços no consumidor, dos de produtividade e de capacidade económica das empresas ou sectores, dos volumes de vendas, do aumento de encargos com remunerações complementares, bem como das condições de trabalho praticadas em empresas e sectores afins e em actividades profissionais idênticas ou similares, devendo, ainda, sempre que possível, conter indicações referentes ao número de trabalhadores por categoria abrangida e ao aumento de encargos directos e indirectos resultantes das tabelas salariais.

2 — Na falta de fundamentação da proposta ou da resposta, a parte destinatária poderá, legitimamente, recusar-se a negociar com base nela.

Artigo 19.º

1 — As negociações deverão ter início nos quinze dias seguintes à recepção da resposta à proposta, salvo se outro prazo tiver sido convencionado.

2 — As partes deverão fixar, por protocolo escrito, o calendário e as regras a que obedecerão os contactos negociais.

3 — Do protocolo a que se refere o número anterior será remetida cópia ao Ministério do Trabalho e ao Ministério responsável pelo sector de actividade ou da tutela.

4 — No início das negociações, os representantes das partes deverão identificar-se e trocar os respectivos títulos de representação.

Artigo 20.º

Na preparação das propostas e contrapropostas e durante as negociações, o Ministério do Trabalho e o Ministério responsável pelo sector da actividade ou de tutela fornecerão às partes todo o apoio técnico que por elas seja requerido.

Artigo 21.º

1 — As partes deverão, sempre que possível, atribuir prioridade à matéria da retribuição de trabalho, tendo em vista o ajuste do acréscimo global de encargos daí resultante.

2 — A inviabilidade do acordo inicial sobre a matéria referida no número anterior não justifica a ruptura de negociação.

Artigo 22.º

1 — As associações sindicais, as associações patronais e as entidades patronais devem respeitar, no processo de negociação colectiva, os princípios de boa fé, nomeadamente respondendo com a máxima brevidade possível às propostas e contrapropostas, respeitando o protocolo negocial e fazendo-se representar em reuniões e contactos destinados à prevenção ou resolução de conflitos.

2 — Os representantes legítimos das associações sindicais e patronais deverão, oportunamente, fazer as necessárias consultas aos trabalhadores e às entidades patronais interessadas, não podendo, no entanto, invocar tal necessidade para obterem a suspensão ou interrupção do curso do processo.

3 — Cada uma das partes do processo deverá, na medida em que daí não resulte prejuízo para a defesa dos seus interesses, facultar à outra os elementos ou informações que ela solicitar.

4 — Não pode ser recusado no decurso de processos de negociação de acordos colectivos e acordos de empresa o fornecimento dos relatórios e contas das empresas já publicados e, em qualquer caso, do número de trabalhadores por categoria profissional envolvidos no processo que se situem no âmbito da aplicação do acordo a celebrar.

Artigo 23.º

O texto final das convenções colectivas e das decisões arbitrais deverá referir obrigatoriamente:

a) A designação das entidades celebrantes;
b) A área e âmbito de aplicação;
c) A data da celebração.

CAPÍTULO VI

Depósito e publicação

Artigo 24.º

1 — As convenções colectivas, as decisões arbitrais e os acordos de adesão são entregues para depósito nos serviços competentes do Ministério do Trabalho (Direcção-Geral do Trabalho).

2 — O depósito considera-se feito se não for recusado nos quinze dias seguintes à entrada dos instrumentos nos serviços referidos no número anterior.

3 — O depósito será recusado:

a) Se os instrumentos não obedecerem ao disposto no artigo 23.º;
b) Se não forem acompanhados dos títulos de representação exigidos no artigo 4.º;
c) Se, envolvendo empresas públicas ou de capitais públicos, não forem acompanhados de documento comprovativo de autorização ou aprovação tutelar, emanado do Ministério da tutela, que, para o efeito, articulará com os demais Ministérios competentes;
d) Se não tiver decorrido o prazo mínimo legal de vigência da convenção que se visa alterar ou substituir;
e) Nos demais casos expressamente previstos na lei.

4 — No caso de o instrumento substituir ou alterar vários instrumentos de regulamentação colectiva com prazo de vigência diversos, poderá ser depositado, desde que tenha decorrido um dos prazos mínimos de vigência, sem prejuízo do disposto no n.º 5 do artigo 11.º

5 — O despacho de recusa do depósito, com a respectiva fundamentação, será imediatamente notificado às partes.

Artigo 25.º

1 — Só por acordo das partes, e enquanto o depósito não for efectuado, pode ser introduzida qualquer alteração formal ou substancial ao conteúdo das convenções entregues para esse efeito.

2 — A alteração referida no número anterior interrompe o prazo de depósito.

Artigo 26.º

1 — É obrigatória a publicação das convenções, das decisões arbitrais e dos acordos de adesão depositados nos termos do artigo 24.º

2 — Os instrumentos referidos no número anterior são publicados no *Boletim do Trabalho e Emprego* nos quinze dias seguintes ao depósito.

CAPÍTULO VII

Extensão de convenções colectivas

Artigo 27.º

O âmbito de aplicação definido nas convenções colectivas pode ser entendido, após a sua publicação, por acordo de adesão e por portarias de extensão.

Artigo 28.º

1 — As associações sindicais, as associações patronais e as entidades patronais podem aderir a convenções colectivas publicadas.

2 — A adesão opera-se por acordo entre a entidade interessada e aquela ou aquelas que se lhe contraporiam na negociação da convenção, se nela houvessem participado.

3 — Da adesão não pode resultar modificação do conteúdo da convenção, ainda que destinada a aplicar-se somente no âmbito da entidade aderente.

4 — Aos acordos de adesão aplicam-se as disposições referentes ao depósito e à publicação das convenções colectivas.

Artigo 29.º

1 — Ouvidas as associações sindicais e as associações ou entidades patronais interessadas, pode, por portaria conjunta dos Ministros do Trabalho, da tutela ou Ministro responsável pelo sector de actividade, ser determinada a extensão total ou parcial das convenções colectivas ou decisões arbitrais a entidades patronais do mesmo sector económico e a trabalhadores da mesma profissão ou profissão análoga, desde que exerçam a sua actividade na área e no âmbito naquelas fixados e não estejam filiados nas mesmas associações.

2 — Pode, por portaria conjunta dos mesmos Ministros, e sob sua iniciativa, ser determinada a extensão de convenções colectivas a empresas e a trabalhadores do sector económico e profissional regulado, que exerçam a sua actividade em área diversa daquela em que a mesma convenção se aplica, quando não existam associações sindicais ou patronais e se verifique identidade ou semelhança económica e social.

3 — Quando as portarias de extensão abrangerem empresas públicas ou de capitais públicos, compete ao Ministério da tutela assegurar, previamente à emissão, o cumprimento das disposições legais e estatutárias referentes à intervenção dos Ministérios das Finanças e da Coordenação Económica e do Plano.

4 — As portarias de extensão, salvo referência expressa em contrário, não são aplicáveis às empresas relativamente às quais exista regulamentação colectiva específica.

5 — Para os efeitos dos números anteriores, o Ministro do Trabalho mandará publicar um aviso no *Boletim do Trabalho e Emprego*, definindo o âmbito e a área da portaria a emitir.

6 — Nos quinze dias seguintes ao da publicação do aviso, podem os interessados no processo de extensão deduzir oposição fundamentada.

7 — Aplica-se às portarias de extensão o disposto neste diploma sobre a publicação e entrada em vigor das convenções colectivas de trabalho.

CAPÍTULO VIII

Conflitos colectivos de trabalho

SECÇÃO I

Conflitos relativos à celebração ou revisão de convenções colectivas

SUBSECÇÃO I

Conciliação

Artigo 30.º

1 — Os conflitos colectivos de trabalho que resultem da celebração ou revisão de uma convenção colectiva podem ser solucionados por conciliação.

2 — Na falta de regulamentação convencional da conciliação, aplicam-se as disposições constantes dos artigos seguintes.

Artigo 31.º

1 — A conciliação pode ser promovida em qualquer altura:

a) Por acordo das partes;

b) Por uma das partes, no caso de falta de resposta à proposta de celebração ou de revisão, ou, fora desse caso, mediante pré-aviso de oito dias, por escrito, à outra parte.

2 — A conciliação será efectuada pelos serviços de conciliação do Ministério do Trabalho, assessorados, sempre que necessário, pelos serviços competentes de qualquer outro Ministério que tenha interesse directo na resolução do diferendo.

3 — No processo conciliatório será sempre dada prioridade à definição das matérias sobre as quais o mesmo irá incidir.

Artigo 32.º

Nos casos previstos no n.º 1 do artigo anterior, as partes serão convocadas para o início do processo de conciliação dentro dos quinze dias seguintes à apresentação do pedido no Ministério do Trabalho.

SUBSECÇÃO II

Mediação

Artigo 33.º

1 — A todo o tempo as partes podem acordar em submeter a mediação, ou, na falta dessa definição, nos termos dos números seguintes, os conflitos colectivos que resultem da celebração ou revisão de uma convenção colectiva.

2 — O mediador será escolhido pelas partes e deverá remeter a estas a sua proposta por carta registada no prazo de vinte dias a contar da sua nomeação.

3 — Para a elaboração da proposta, o mediador poderá solicitar às partes e a qualquer departamento do Estado os dados e informações que considere necessários.

4 — A proposta do mediador considerar-se-á recusada se não houver comunicação escrita de ambas as partes a aceitá-la no prazo de dez dias a contar da sua recepção.

5 — Decorrido o prazo fixado no número anterior, o mediador comunicará, em simultâneo, a cada uma das partes, no prazo de cinco dias, a aceitação ou recusa das partes.

6 — Até ao termo do prazo referido no número anterior, o mediador poderá realizar todos os contactos, com cada uma das partes em separado, que considere convenientes e viáveis no sentido da obtenção de um acordo.

7 — O mediador está obrigado a guardar sigilo de todas as informações colhidas no decurso do processo que não sejam conhecidas da outra parte.

SUBSECÇÃO III

Arbitragem

Artigo 34.º

1 — A todo o tempo as partes podem acordar em submeter a arbitragem nos termos que definirem ou, na falta de definição, segundo o disposto nos números seguintes, os conflitos colectivos que resultem da celebração ou revisão de uma convenção colectiva.

2 — A arbitragem será realizada por três árbitros, um nomeado por cada uma das partes e o terceiro escolhido pelos árbitros de parte.

3 — Não podem ser árbitros os gerentes, administradores, representantes, empregados, consultores e todos aqueles que tenham interesse financeiro directo nas entidades interessadas na arbitragem ou nas empresas das entidades patronais interessadas ou dos associados das organizações interessadas e ainda os cônjuges, parentes e afins em linha recta ou até ao 2.º grau da linha colateral, adoptantes e adoptados das pessoas indicadas.

4 — Os árbitros poderão ser assistidos por peritos e têm direito a obter das partes e de qualquer departamento do Estado todos os dados e informações que considerem necessários.

5 — A decisão arbitral será tomada por maioria.

6 — As decisões arbitrais não podem diminuir direitos ou garantias consagrados em convenções colectivas de trabalho anteriores.

7 — Os árbitros enviarão o texto da decisão às partes e ao Ministério do Trabalho no prazo de quinze dias.

8 — A decisão arbitral tem os mesmos efeitos jurídicos da convenção colectiva.

Artigo 35.º

1 — Nos conflitos colectivos inerentes à celebração ou revisão de uma convenção colectiva aplicável a empresas públicas ou de capitais públicos poderá ser tornada obrigatória a realização de arbitragem por despacho dos Ministros do Trabalho e da tutela.

2 — No caso previsto no número anterior, o eventual desacordo entre as partes quanto à nomeação do terceiro árbitro poderá ser suprido por despacho do Ministro da tutela.

SUBSECÇÃO IV

Portarias de regulamentação de trabalho

Artigo 36.º

1 — Nos casos em que seja inviável o recurso à portaria de extensão prevista no artigo 29.º, poderá ser emitida pelos Ministros do Trabalho e da tutela ou responsável pelo sector de actividade uma portaria de regulamentação de trabalho sempre que se verifique uma das seguintes condições:

a) Inexistência de associações sindicais ou patronais;

b) Recusa reiterada de uma das partes em negociar;

c) Prática de actos ou manobras manifestamente dilatórias que, de qualquer modo, impeçam o andamento normal do processo de negociação.

2 — Serão igualmente reguladas por portaria, emitida pelos Ministros do Trabalho e da tutela ou responsável pelo sector de actividade, as relações de trabalho em que sejam partes pessoas colectivas de direito privado e utilidade pública.

3 — Para efeitos do disposto nos números anteriores, compete ao Ministro da tutela assegurar, previamente à emissão, o cumprimento das disposições legais e estatutárias referentes à intervenção dos Ministérios das Finanças e da Coordenação Económica e do Plano.

4 — Para os efeitos do disposto nos n.ºs 1 e 2, será constituída por despacho do Ministro do Trabalho uma comissão, à qual competirá a elaboração dos estudos preparatórios da portaria.

5 — Na comissão técnica serão incluídos, sempre que se mostre possível assegurar a necessária representação, assessores designados pelas entidades patronais e pelos trabalhadores interessados.

6 — O número dos assessores será fixado no despacho constitutivo da comissão.

7 — Nos casos previstos nas alíneas *b*) e *c*) do n.º 1, o Ministro do Trabalho promoverá, previamente, uma tentativa de conciliação entre as partes, salvo se, quanto ao ponto litigioso, já tiver sido realizada tal diligência.

8 — Sempre que a portaria de regulamentação de trabalho contenha matérias de natureza pecuniária, será ouvido o Conselho Nacional de Rendimentos e Preços.

Artigo 37.º

1 — Entre a data do despacho estabelecido no n.º 3 do artigo anterior e o termo dos trabalhos da comissão técnica não poderão decorrer mais de noventa dias.

2 — O prazo previsto no número anterior só poderá ser prorrogado por requerimento fundamentado do representante do Ministério do Trabalho, na comissão técnica, ao Ministro do Trabalho.

Artigo 38.º

A entrada em vigor de uma convenção colectiva aplicável no âmbito de uma portaria de regulamen-

tação de trabalho faz cessar automaticamente a vigência desta relativamente aos trabalhadores e entidades patronais abrangidos pela convenção.

Artigo 39.º

As portarias de regulamentação de trabalho são publicadas no *Boletim do Trabalho e Emprego* e entram em vigor após a publicação, nos termos previstos para as convenções colectivas de trabalho.

Artigo 40.º

As infracções aos preceitos das portarias de regulamentação de trabalho são punidas nos termos definidos na lei relativamente às convenções colectivas de trabalho e às decisões arbitrais.

SECÇÃO II

Conflitos sobre a aplicação das convenções

Artigo 41.º

1 — As convenções colectivas devem prever a constituição de comissões formadas por igual número de representantes de entidades signatárias com competência para interpretar as suas disposições.

2 — O funcionamento das comissões referidas no número anterior reger-se-á pelo disposto nas convenções colectivas.

3 — As comissões paritárias só podem deliberar desde que esteja presente metade dos membros efectivos representantes de cada parte.

4 — As deliberações tomadas por unanimidade consideram-se para todos os efeitos como regulamentação do instrumento a que respeitem e serão depositadas e publicadas nos mesmos termos das convenções colectivas.

5 — As deliberações tomadas por unanimidade são automaticamente aplicáveis às entidades patronais e aos trabalhadores abrangidos pelas portarias de extensão das convenções que forem interpretadas ou integradas.

6 — A pedido da comissão poderá participar nas reuniões, sem direito a voto, um representante do Ministério do Trabalho.

CAPÍTULO IX

Disposições finais

Artigo 42.º

1 — Os Ministérios da tutela ou responsáveis pelos sectores de actividade deverão, para cada ano civil, indicar ao Ministério do Trabalho, até 30 de Janeiro, um representante efectivo e um representante suplente para acompanhar os processos de regulamentação de trabalho de cada ramo.

2 — Os representantes designados nos termos do número anterior integrarão as comissões técnicas constituídas para regulamentação de trabalho nos respectivos sectores de actividade.

Artigo 43.º

As associações sindicais e patronais, bem como os trabalhadores e entidades patronais interessados, podem propor acção de anulação, perante os tribunais do trabalho, das cláusulas dos instrumentos de regulamentação colectiva de trabalho que tenham por contrárias à lei.

Artigo 44.º

1 — Sem prejuízo das sanções especialmente previstas na lei, as entidades patronais que infringirem os preceitos dos instrumentos de regulamentação colectiva de trabalho serão punidas com multa de 500$ a 3000$ por cada trabalhador em relação ao qual se verificar a infracção.

2 — Quando a infracção respeitar a uma generalidade de trabalhadores, a multa aplicável será de 15 000$ a 150 000$.

3 — As infracções aos preceitos relativos a retribuições serão punidas com multa, que poderá ir até ao dobro do montante das importâncias em dívida.

4 — Conjuntamente com as multas, serão sempre cobradas as indemnizações que forem devidas aos trabalhadores prejudicados, as quais reverterão a favor dos referidos trabalhadores.

5 — Sem prejuízo da aplicação de pena mais grave prevista pela lei geral, sempre que a infracção for acompanhada de coacção, falsificação, simulação ou qualquer meio fraudulento, será a mesma punida com multa de 15 000$ a 150 000$, e a tentativa, com multa de 3000$ a 30 000$.

6 — No caso de reincidência, as multas serão elevadas ao dobro.

7 — A infracção ao disposto no n.º 4 do artigo 16.º e no n.º 2 do artigo 18.º será punida com multa de 3000$ a 30 000$.

8 — O produto das multas reverterá para o Fundo de Desemprego.

Artigo 45.º

1 — Este diploma entra imediatamente em vigor, mas só se aplica aos processos de negociação colectiva que venham a ter início após a sua publicação.

2 — Relativamente aos instrumentos já entregues para depósito à data da entrada em vigor do presente diploma, o prazo referido no n.º 2 do artigo 24.º conta-se a partir daquela data.

3 — É revogado o Decreto-Lei n.º 164/76, de 28 de Fevereiro, com as alterações introduzidas pelos Decretos-Leis n.ºs 887/76, de 29 de Dezembro, e 353-G/77, de 29 de Agosto.

Visto e aprovado em Conselho de Ministros de 11 de Dezembro de 1979. — *Maria de Lourdes Ruivo da Silva Matos Pintasilgo — Jorge de Carvalho Sá Borges.*

Promulgado em 20 de Dezembro de 1979.

Publique-se.

O Presidente da República, ANTÓNIO RAMALHO EANES.

MINISTÉRIO DA HABITAÇÃO E OBRAS PÚBLICAS

Decreto-Lei n.º 519-D1/79

de 29 de Dezembro

1. O Laboratório Nacional de Engenharia Civil, criado em 1947, vem sendo regido por uma lei orgânica que data de 1961 (Decreto-Lei n.º 43 825), a qual somente sofreu pequenos complementos e modificações, respectivamente, em 1967 (Decreto-Lei n.º 47 627) e em 1971 (Decreto-Lei n.º 55/71).

definitivos, a elaborar nos termos e condições que a lei sindical determinar.

Art. 3.º Este decreto-lei entra imediatamente em vigor.

Visto e aprovado em Conselho da Revolução.

Promulgado em 30 de Abril de 1975.

Publique-se.

O Presidente da República, FRANCISCO DA COSTA GOMES.

Decreto-Lei n.º 215-B/75

de 30 de Abril

Considerando a necessidade de definir as bases do ordenamento jurídico das associações sindicais, ainda que, de momento, em moldes provisórios, sujeitos a ulterior revisão;

Tomadas em conta, por um lado, as inovações que a nova ordem democrática inscreveu no regimento da liberdade de associação e, por outro, as determinantes circunstanciais do processo revolucionário em curso;

Nestes termos:

Usando os poderes conferidos pelo artigo 6.º da Lei Constitucional n.º 5/75, de 14 de Março, o Conselho da Revolução decreta e eu promulgo, para valer como lei, o seguinte:

CAPÍTULO I

Disposições preliminares

Artigo 1.º O presente diploma regula o exercício da liberdade sindical por parte dos trabalhadores e será revisto dentro do prazo máximo de um ano, a contar da data da sua publicação.

Art. 2.º Para efeitos do presente diploma, entende-se por:

a) Trabalhador — aquele que, mediante retribuição, presta a sua actividade a outra pessoa sob direcção desta;
b) Sindicato — associação permanente de trabalhadores para defesa e promoção dos seus interesses sócio-profissionais;
c) Associação sindical ou organização sindical — sindicato, união, federação ou confederação geral;
d) Federação — associação de sindicatos de trabalhadores da mesma profissão ou do mesmo ramo de actividade;
e) União — associação de sindicatos, de base regional;
f) Confederação geral — associação nacional dos sindicatos;
g) Categoria — conjunto de trabalhadores que exercem a mesma profissão, ou se integram na mesma actividade, ou que exercem profissões ou se integram em actividades de características globalmente afins entre si e diferenciadas de todas as demais;
h) Secção sindical de empresa — conjunto de trabalhadores de uma empresa ou unidade de produção filiados no mesmo sindicato;
i) Comissão sindical de empresa — organização dos delegados sindicais do mesmo sindicato na empresa ou unidade de produção;
j) Comissão intersindical de empresa — organização dos delegados das comissões sindicais da empresa ou unidade de produção.

CAPÍTULO II

Da organização sindical

Art. 3.º É assegurado aos trabalhadores o direito de associação sindical para defesa e promoção dos seus interesses sócio-profissionais.

Art. 4.º Compete às associações sindicais defender e promover a defesa dos direitos e interesses sócio-profissionais dos trabalhadores que representam e, designadamente:

a) Celebrar convenções colectivas de trabalho;
b) Prestar serviços de carácter económico e social aos seus associados.

Art. 5.º — 1. As associações sindicais não carecem de autorização para adquirir bens móveis e imóveis a título oneroso.

2. São impenhoráveis os móveis e imóveis cuja utilização seja estritamente indispensável ao funcionamento das associações sindicais.

Art. 6.º — 1. É proibido às entidades e organizações patronais ou a quaisquer organizações não sindicais promover a constituição, manter ou subsidiar, por quaisquer meios, associações sindicais ou, de qualquer modo, intervir na sua organização e direcção.

2. As associações sindicais são independentes do Estado, dos partidos políticos e das instituições religiosas, sendo proibida qualquer ingerência destes na sua organização e direcção, bem como o seu recíproco financiamento.

3. É incompatível o exercício de cargos em corpos gerentes de associações sindicais com o exercício de quaisquer cargos de direcção em partidos políticos ou instituições religiosas.

Art. 7.º — 1. Os sindicatos podem associar-se em uniões e federações e numa confederação geral.

2. As uniões, federações e a confederação geral representarão exclusivamente os sindicatos que tenham aprovado a sua constituição ou que a elas venham a aderir posteriormente, em ambos os casos por deliberação favorável tomada em assembleia geral.

3. Os sindicatos e as demais associações sindicais não podem filiar-se em associações ou organizações sindicais estrangeiras ou internacionais, mas podem manter relações e cooperar com elas.

Art. 8.º — 1. A assembleia constituinte de qualquer associação sindical deve ser e mostrar-se convocada em termos de ampla publicidade, com menção de hora, local e objecto, e a antecedência mínima de quinze dias.

2. A assembleia constituinte de qualquer sindicato deve realizar-se de modo a possibilitar a todos os interessados a livre expressão das suas opiniões e só poderá funcionar e deliberar validamente desde que reúna, no mínimo, 10 % ou 2000 dos trabalhadores a abranger, devendo as presenças, após a necessária identificação, ser registadas em documento próprio, com termos de abertura e encerramento assinados pela respectiva

mesa. As deliberações de constituir o sindicato e de aprovar os respectivos estatutos têm de ser tomadas por maioria simples dos trabalhadores presentes, e ainda a primeira por escrutínio secreto.

3. A assembleia constituinte de qualquer união ou federação só poderá funcionar e deliberar validamente desde que reúna, no mínimo, um terço do total dos sindicatos da região ou da categoria, conforme o caso, devendo as deliberações de constituir a associação e de aprovar os respectivos estatutos ser tomadas por sindicatos que representem a maioria dos trabalhadores filiados nos sindicatos a abranger.

Art. 9.º A confederação geral será constituída por deliberação de um congresso nacional de sindicatos convocado por aqueles que, uma vez publicados os seus novos estatutos, representem a maioria dos trabalhadores sindicalizados. As deliberações, em congresso, de constituir a confederação geral e de aprovar os respectivos estatutos deverão ser tomadas por sindicatos que representem a maioria dos trabalhadores sindicalizados em todo o País.

Art. 10.º — 1. As associações sindicais adquirem personalidade jurídica pelo registo dos seus estatutos no Ministério do Trabalho.

2. O requerimento do registo de qualquer associação sindical será acompanhado de certidão ou fotocópia autenticada da acta da assembleia constituinte, das folhas de presenças e respectivos termos de abertura e encerramento e dos estatutos que tiverem sido aprovados.

3. Após o registo, o Ministério do Trabalho mandará proceder à publicação dos estatutos no *Diário do Governo*, por forma que a publicação se faça dentro dos trinta dias posteriores à sua recepção, e remeterá certidão ou fotocópia autenticada da acta da assembleia constituinte, das folhas de presenças e respectivos termos de abertura e encerramento e dos estatutos, acompanhados de uma apreciação fundamentada sobre a legalidade da associação e dos estatutos, dentro do prazo de oito dias a contar da publicação destes, em carta registada, ao agente do Ministério Público junto do tribunal da comarca da sede da associação de que se trate.

4. No caso de a associação ou os estatutos se não mostrarem conformes à lei, o agente do Ministério Público promoverá, dentro do prazo de quinze dias, a contar da sua recepção, a declaração judicial de extinção da associação em causa.

5. As associações sindicais só poderão iniciar o exercício das respectivas actividades depois da publicação dos seus estatutos no *Diário do Governo*.

6. As alterações dos estatutos ficam de igual modo sujeitas a registo. As que implicarem alteração dos requisitos mencionados nas alíneas *a*), *d*), *g*) e *h*) do artigo 14.º ficam ainda sujeitas ao formalismo e processamento previstos no artigo 8.º e no n.º 2 deste artigo, com as necessárias adaptações, além do mais previsto nos estatutos.

Art. 11.º — 1. Não pode constituir-se qualquer associação sindical que vise representar trabalhadores cuja categoria se encontre já representada por uma associação sindical do mesmo tipo que abranja a respectiva área, com a única excepção das situações decorrentes da aplicação do artigo 12.º

2. A infracção ao disposto no número anterior confere a qualquer associação sindical legitimidade para, no prazo de um mês, a contar da data da publicação dos estatutos da associação infractora, requerer ao juiz do tribunal da comarca da sede desta associação a respectiva declaração judicial de extinção.

Art. 12.º — 1. A sindicalização de um ramo de actividade, quando já existam sindicatos das respectivas categorias, pode ser feita por iniciativa desses sindicatos, mediante a criação de um novo sindicato ou a integração em um dos sindicatos existentes das categorias até então por ele não representadas.

2. Para a criação do novo sindicato ou a integração bastará que assim o deliberem as assembleias gerais dos sindicatos interessados ou, quando estes também representem categorias profissionais de outros ramos de actividade, as assembleias dos trabalhadores pertencentes ao ramo cuja sindicalização se pretende fazer, o mesmo se observando no caso de existirem categorias ainda não sindicalizadas.

3. As assembleias referidas no número anterior terão de ser convocadas nos termos do n.º 1 do artigo 8.º e só poderão funcionar e deliberar validamente desde que reúnam 10 % ou 2000 dos respectivos trabalhadores sindicalizados ou, no último caso, dos trabalhadores pertencentes à categoria profissional, devendo as presenças ser registadas nos termos do n.º 2 do artigo 8.º

4. Efectuado o registo do novo sindicato ou das alterações aos estatutos do sindicato transformado, a um ou a outro ficará a competir a representação das categorias de trabalhadores que deliberaram a constituição ou transformação e daquelas que, nos termos dos n.os 2 e 3, decidirem posteriormente a ele aderir.

5. Os sindicatos constituídos nos termos deste artigo poderão manter a representação dos associados não incluídos no novo âmbito, enquanto outras medidas de reestruturação os não abrangerem.

Art. 13.º As associações sindicais regem-se por estatutos e regulamentos por elas celebrados, devendo os seus corpos gerentes ser eleitos livre e democraticamente de entre os associados.

Art. 14.º Com os limites dos artigos seguintes, os estatutos conterão e regularão:

a) A denominação, a localidade da sede, o âmbito subjectivo, objectivo e geográfico, os fins e a duração, quando a associação se não constitua por período indeterminado;
b) A aquisição e perda da qualidade de sócio, seus direitos e deveres;
c) O regime disciplinar;
d) A composição, a forma de eleição e funcionamento da assembleia geral e dos corpos gerentes;
e) O regime de administração financeira, o orçamento e as contas;
f) A criação e o funcionamento de secções ou delegações ou outros sistemas de organização descentralizada;
g) O processo de alteração dos estatutos;
h) A extinção, dissolução e consequente liquidação e destino do respectivo património.

Art. 15.º A denominação deve permitir a identificação do âmbito subjectivo, objectivo e geográfico da associação e não pode confundir-se com a denominação de outra associação existente.

Art. 16.º — 1. É direito do trabalhador inscrever-se no sindicato que na área da sua actividade represente a categoria respectiva.

2. Nenhum trabalhador pode ser simultaneamente representado a título da mesma profissão ou actividade por sindicatos diferentes.

3. Pode manter a qualidade de sócio de um sindicato o trabalhador que deixe de exercer a sua actividade mas não passe a exercer outra não representada pelo mesmo sindicato ou não perca a condição de assalariado.

4. O trabalhador tem direito de retirar-se a todo o tempo do sindicato em que esteja filiado, mediante comunicação por escrito ao presidente da direcção, sem prejuízo do direito de o sindicato exigir o pagamento da quotização referente aos três meses seguintes ao da comunicação.

Art. 17.° — 1. A gestão das associações sindicais deve respeitar os princípios de gestão democrática, nomeadamente as regras dos números seguintes.

2. Todo o sócio no gozo dos seus direitos sindicais tem o direito de participar na actividade da associação, incluindo o de eleger e ser eleito para os corpos gerentes e ser nomeado para qualquer cargo associativo, sem prejuízo de poderem estabelecer-se requisitos de idade e de tempo de inscrição.

3. O voto será sempre directo, e ainda secreto, quando se trate de eleições e de deliberação sobre integração noutras organizações sindicais ou associação com elas.

4. Deve ser possibilitado a todos os sócios o exercício efectivo do direito de voto, podendo os estatutos prever para tanto a realização simultânea de assembleias gerais por áreas regionais ou secções de voto, ou ainda sistemas de urna aberta ou outros compatíveis com as deliberações a tomar.

5. Serão asseguradas iguais oportunidades a todas as listas concorrentes às eleições para os corpos gerentes, devendo constituir-se para fiscalizar o processo eleitoral uma comissão eleitoral composta pelo presidente da mesa da assembleia geral e por representantes de cada uma das listas concorrentes.

6. Com as listas, os proponentes apresentarão o seu programa de acção, o qual, juntamente com aquelas, deverá ser amplamente divulgado, por forma que todos os associados dele possam ter conhecimento prévio, nomeadamente pela sua exposição em lugar bem visível da sede da associação durante o prazo mínimo de oito dias.

7. O mandato dos corpos gerentes não pode ter duração superior a três anos, sendo permitida a reeleição para mandatos sucessivos.

8. As assembleias gerais deverão ser convocadas com ampla publicidade, indicando-se a hora, local e objecto, e devendo ser publicada a convocatória com antecedência mínima de três dias em um dos jornais da localidade da sede da associação sindical ou, não o havendo, em um dos jornais aí mais lidos.

9. A convocação das assembleias gerais para alteração de estatutos ou eleição dos corpos gerentes deve obedecer ao prazo fixado no n.° 1 do artigo 8.°

10. A convocação das assembleias gerais compete ao presidente da respectiva mesa, por sua iniciativa ou a pedido da direcção, ou de 10 % ou 200 dos associados.

11. Os corpos gerentes podem ser destituídos por deliberação da assembleia geral, devendo os estatutos regular os termos da destituição e da gestão da associação sindical até à eleição de novos corpos gerentes.

Art. 18.° O regime disciplinar deve salvaguardar sempre o processo escrito e o direito de defesa do associado, e a pena de expulsão deve ser reservada para os casos de grave violação dos seus deveres fundamentais.

Art. 19.° Em caso de dissolução de uma associação sindical, os respectivos bens não poderão ser distribuídos pelos associados.

Art. 20.° — 1. Os elementos de identificação dos membros dos corpos gerentes, bem como cópia da acta da assembleia eleitoral, devem ser enviados ao Ministério do Trabalho no prazo de dez dias após a eleição, para publicação num dos dois números imediatos no respectivo *Boletim*.

2. O envio dos elementos referidos no número anterior cabe ao presidente da mesa da assembleia eleitoral.

Art. 21.° — 1. Incumbe à entidade patronal proceder à cobrança e remessa aos sindicatos das quotas sindicais dos trabalhadores sindicalizados, deduzindo o seu montante das respectivas remunerações, salvo se as associações sindicais deliberarem diversamente.

2. As convenções colectivas poderão regular de modo diferente a cobrança e remessa da importância das quotas.

Art. 22.° — 1. As faltas dadas pelos membros da direcção das associações sindicais para desempenho das suas funções consideram-se faltas justificadas e contam para todos os efeitos, menos o da remuneração como tempo de serviço efectivo.

2. Para o exercício das suas funções cada membro da direcção beneficia do crédito de quatro dias por mês, mantendo o direito à remuneração.

3. A direcção interessada deverá comunicar, por escrito, com um dia de antecedência, as datas e o número de dias de que os respectivos membros necessitam para o exercício das suas funções, ou, em caso de impossibilidade, nas quarenta e oito horas imediatas ao primeiro dia em que faltarem.

Art. 23.° Os membros dos corpos gerentes das associações sindicais não podem ser transferidos de local de trabalho sem o seu acordo.

Art. 24.° — 1. O despedimento dos trabalhadores candidatos aos corpos gerentes das associações sindicais, bem como dos que exerçam ou hajam exercido funções nos mesmos corpos gerentes há menos de cinco anos, com início em data posterior a 25 de Abril de 1974, presume-se feito sem justa causa.

2. O despedimento de que, nos termos do número anterior, se não prove justa causa dá ao trabalhador despedido o direito de optar entre a reintegração na empresa, com os direitos que tinha à data do despedimento, e uma indemnização correspondente ao dobro daquela que lhe caberia nos termos da lei, do contrato de trabalho ou da convenção colectiva aplicável, e nunca inferior à retribuição correspondente a doze meses de serviço.

CAPITULO III

Do exercício da actividade sindical na empresa

Art. 25.° Os trabalhadores e os sindicatos têm direito a desenvolver actividade sindical no interior da empresa, nomeadamente através de delegados sindicais, comissões sindicais e comissões intersindicais.

Art. 26.° Os trabalhadores podem reunir-se nos locais de trabalho, fora do horário normal, mediante

convocação de um terço ou cinquenta dos trabalhadores da respectiva unidade de produção, ou da comissão sindical ou intersindical, sem prejuízo da normalidade da laboração, no caso de trabalho por turnos ou de trabalho extraordinário.

Art. 27.º — 1. Com ressalva do disposto na última parte do artigo anterior, os trabalhadores têm direito a reunir-se durante o horário normal de trabalho até um período máximo de quinze horas por ano, que contarão, para todos os efeitos, como tempo de serviço efectivo, desde que assegurem o funcionamento dos serviços de natureza urgente.

2. As reuniões referidas no número anterior só podem ser convocadas pela comissão intersindical ou pela comissão sindical, conforme os trabalhadores da empresa estejam ou não representados por mais do que um sindicato.

Art. 28.º — 1. Os promotores das reuniões referidas nos artigos anteriores são obrigados a comunicar à entidade patronal e aos trabalhadores interessados, com a antecedência mínima de um dia, a data e hora em que pretendem que elas se efectuem, devendo afixar as respectivas convocatórias.

2. Os dirigentes das organizações sindicais respectivas que não trabalhem na empresa podem participar nas reuniões mediante comunicação dirigida à entidade patronal com a antecedência mínima de seis horas.

Art. 29.º — 1. Os delegados sindicais, titulares dos direitos atribuídos neste capítulo, serão eleitos e destituídos nos termos dos estatutos dos respectivos sindicatos, em escrutínio directo e secreto.

2. Nas empresas em que o número de delegados o justifique, ou que compreendam várias unidades de produção, podem constituir-se comissões sindicais de delegados.

3. Sempre que numa empresa existam delegados de mais de um sindicato podem constituir-se comissões intersindicais de delegados.

Art. 30.º — 1. Nas empresas ou unidades de produção com cento e cinquenta ou mais trabalhadores a entidade patronal é obrigada a pôr à disposição dos delegados sindicais, desde que estes o requeiram, e a título permanente, um local situado no interior da empresa, ou na sua proximidade, e que seja apropriado ao exercício das suas funções.

2. Nas empresas ou unidades de produção com menos de cento e cinquenta trabalhadores a entidade patronal é obrigada a pôr à disposição dos delegados sindicais, sempre que estes o requeiram, um local apropriado para o exercício das suas funções.

Art. 31.º Os delegados sindicais têm o direito de afixar, no interior da empresa e em local apropriado, para o efeito reservado pela entidade patronal, textos, convocatórias, comunicações ou informações relativos à vida sindical e aos interesses sócio-profissionais dos trabalhadores, bem como proceder à sua distribuição, mas sem prejuízo, em qualquer dos casos, da laboração normal da empresa.

Art. 32.º — 1. Cada delegado sindical dispõe, para o exercício das suas funções, de um crédito de horas que não pode ser inferior a cinco por mês, ou a oito, tratando-se de delegado que faça parte de comissão intersindical.

2. O crédito de horas atribuído no número anterior é referido ao período normal de trabalho e conta, para todos os efeitos, como tempo de serviço efectivo.

3. Os delegados, sempre que pretendam exercer o direito previsto neste artigo, deverão avisar, por escrito, a entidade patronal com a antecedência mínima de um dia.

Art. 33.º — 1. O número máximo de delegados sindicais a quem são atribuídos os direitos referidos no artigo anterior é determinado da forma seguinte:

a) Empresa com menos de 50 trabalhadores sindicalizados — 1;
b) Empresa com 50 a 99 trabalhadores sindicalizados — 2;
c) Empresa com 100 a 199 trabalhadores sindicalizados — 3;
d) Empresa com 200 a 499 trabalhadores sindicalizados — 6;
e) Empresa com 500 ou mais trabalhadores sindicalizados — o número de delegados resultante da fórmula $6+\frac{n-500}{200}$, representando n o número de trabalhadores.

2. O resultado apurado nos termos da alínea *e*) do número anterior será sempre arredondado para a unidade imediatamente superior.

Art. 34.º Os delegados sindicais não podem ser transferidos de local de trabalho sem o seu acordo e sem o prévio conhecimento da direcção do sindicato respectivo.

Art. 35.º — 1. O despedimento de trabalhadores que desempenhem funções de delegados sindicais, ou que as hajam desempenhado há menos de cinco anos, com início em data posterior a 25 de Abril de 1974, presume-se feito sem justa causa.

2. Não se provando justa causa de despedimento, aplicar-se-á o disposto no n.º 2 do artigo 24.º

Art. 36.º — 1. As direcções dos sindicatos comunicarão à entidade patronal a identificação dos delegados sindicais, bem como daqueles que fazem parte de comissões sindicais e intersindicais de delegados, por meio de carta registada com aviso de recepção, de que será afixada cópia nos locais reservados às informações sindicais.

2. O mesmo procedimento deverá ser observado no caso de substituição ou cessação de funções.

CAPÍTULO IV

Disposições gerais e transitórias

Art. 37.º É proibido e considerado nulo e de nenhum efeito todo o acordo ou acto que vise:

a) Subordinar o emprego do trabalhador à condição de este se filiar ou não se filiar numa associação sindical ou de se retirar daquela em que esteja inscrito;
b) Despedir, transferir ou, por qualquer modo, prejudicar um trabalhador por motivo da sua filiação ou não filiação sindical ou das suas actividades sindicais.

Art. 38.º — 1. As entidades ou organizações que violarem o disposto no artigo anterior e no artigo 6.º, n.ºs 1 e 2, serão punidas com multa de 10 000$ a 1 000 000$.

2. Os administradores, directores ou gerentes, e os trabalhadores que ocupem lugares de chefia, responsáveis pelos actos referidos no número anterior, serão punidos com pena de prisão de três dias a dois anos.

3. Perdem as regalias que lhes são atribuídas por este diploma os dirigentes sindicais ou delegados sindicais que forem condenados nos termos do número anterior.

Art. 39.° A entidade patronal que deixar de cumprir qualquer das obrigações que pelo presente diploma lhe são impostas ou que impedir ou dificultar o legítimo exercício da actividade sindical na respectiva empresa será punida com multa de 1000$ a 200 000$, de acordo com a gravidade da infracção.

Art. 40.° As infracções a este diploma não especialmente previstas serão punidas com multa de 1000$ a 20 000$.

Art. 41.° O produto das multas aplicadas ao abrigo dos artigos anteriores reverterá para o Fundo de Desemprego.

Art. 42.° — 1. As associações sindicais constituídas até à entrada em vigor do presente diploma procederão, obrigatoriamente, sob pena de extinção, à revisão dos respectivos estatutos dentro do prazo de sessenta dias, e à eleição dos respectivos corpos gerentes dentro do prazo de cento e vinte dias, a contar, em ambos os casos, da data da entrada em vigor deste diploma.

2. O disposto no número anterior não se aplica à eleição dos corpos gerentes sempre que as associações sindicais a ela hajam procedido depois de 25 de Abril de 1974, com observância, comprovada pela respectiva acta, das regras consignadas no presente diploma.

3. Os novos estatutos das associações sindicais, uma vez aprovados, deverão ser registados nos termos e com as formalidades e consequências previstas no artigo 10.°

4. A revisão dos estatutos e a eleição dos corpos gerentes das associações sindicais impostas pelo n.° 1 ficam sujeitas às regras de gestão democrática estabelecidas no artigo 17.° e ao constante dos artigos seguintes, consoante o tipo de associação sindical.

Art. 43.° — 1. As assembleias gerais para revisão dos estatutos dos sindicatos já constituídos só poderão deliberar validamente desde que reúnam, no mínimo, 10 % do total ou 2000 dos respectivos associados, e as deliberações só serão válidas quando tomadas por maioria simples do total dos votos dos associados presentes.

2. Quer a direcção, quer grupos não inferiores a 10 % do total dos respectivos sindicalizados, ou a 100, terão a faculdade de apresentar nas assembleias gerais, para ali serem discutidos e votados, projectos de novos estatutos, desde que deles tenham feito entrega ao presidente da mesa da assembleia geral, ou quem as suas vezes fizer, com a antecipação mínima de dez dias relativamente à data marcada para a reunião da assembleia, a fim de que este os mande afixar em lugar bem visível da sede da associação de que se trate, por forma que todos os associados deles possam ter conhecimento prévio. Nos novos estatutos poderão ser consagradas quaisquer das medidas de reestruturação sindical previstas neste diploma.

3. As listas completas de candidatos aos lugares da direcção, da mesa da assembleia geral e do conselho fiscal, se o houver, ou dos órgãos correspondentes, serão apresentadas ao presidente da mesa da assembleia geral, ou quem as suas vezes fizer, até dez dias antes da data marcada para a reunião, sendo atribuída a cada lista a letra correspondente à ordem alfabética da sua apresentação.

Art. 44.° A revisão dos estatutos das uniões e federações e da confederação geral já constituídas deverá obedecer, respectivamente, ao dispostos no n.° 3 do artigo 8.° e no artigo 9.°

Art. 45.° Até à publicação dos novos estatutos das associações sindicais de que tratam os artigos anteriores não poderão registar-se novas associações sindicais, excepto as resultantes das medidas de reestruturação sindical previstas na parte final do n.° 2 do artigo 43.° e do artigo 12.° deste diploma.

Art. 46.° As associações sindicais ficam sujeitas ao regime geral do direito de associação em tudo o que não for contrariado pelo presente diploma.

Art. 47.° — 1. O *contrôle* da legalidade das associações sindicais competirá aos tribunais, nos termos da lei.

2. Das decisões proferidas cabe recurso para o competente tribunal da relação, que julgará em definitivo.

Art. 48.° O registo das associações sindicais só poderá ser cancelado mediante prévia comunicação e prova da sua extinção judicial ou voluntária.

Art. 49.° — 1. As questões que surgirem sobre o enquadramento de trabalhadores nas categorias, ou destas na organização sindical, terão de ser, antes de os interessados recorrerem aos tribunais, submetidas por eles, mediante requerimento fundamentado, a parecer do órgão competente do Ministério do Trabalho.

2. O parecer deverá ser notificado aos interessados dentro de trinta dias, a contar da data da entrada do requerimento no Ministério. Se o não for, ou qualquer dos interessados não concordar com ele, poderá então recorrer aos tribunais.

Art. 50.° Lei especial regulará o exercício da liberdade sindical dos servidores do Estado, das autarquias locais e dos institutos públicos que não sejam empresas públicas ou estabelecimentos de natureza comercial ou industrial.

Art. 51.° O número de trabalhadores de qualquer categoria profissional ou ramo de actividade será o constante das estatísticas do Ministério do Trabalho, que terá de o fornecer às entidades interessadas sempre que, para efeitos deste diploma, tal lhe seja requerido.

Art. 52.° O que no presente diploma se dispõe não prejudica o estabelecido em cláusulas convencionais mais favoráveis às associações sindicais e aos trabalhadores.

Art. 53.° — 1. Fica revogada a legislação sobre associações sindicais, nomeadamente a que vincula os trabalhadores não sindicalizados ao pagamento obrigatório de quotas, ressalvado o disposto no n.° 4 do artigo 16.°

2. Ficam ainda revogadas as normas relativas à representação profissional contidas na regulamenta-

ção das Casas do Povo e respectivas federações e das Casas dos Pescadores.

Visto e aprovado em Conselho da Revolução.

Promulgado em 30 de Abril de 1975.

Publique-se.

O Presidente da República, FRANCISCO DA COSTA GOMES.

Decreto-Lei n.º 215-C/75

de 30 de Abril

Considerando a necessidade de estabelecer para as associações patronais regime jurídico de acordo com os princípios da liberdade de constituição, inscrição, organização democrática interna e independência face ao Estado;

Considerando que a fixação de remunerações e restantes direitos e obrigações decorrentes do contrato de trabalho, pela via de convenção colectiva, exige a regulamentação dos requisitos a que devem obedecer os respectivos sujeitos, em termos de se garantir a sua representatividade e, em geral, a liberdade de associação;

Considerando a conveniência de o estatuto de associação patronal, ou seja, a legitimidade para a participação em processos de negociação colectiva pelas entidades patronais, ser aberto a associações empresariais porventura constituídas com base no regime geral do direito de associação, estabelecido pelo Decreto-Lei n.º 594/74, de 7 de Novembro;

Nestes termos:

Usando dos poderes conferidos pelo artigo 6.º da Lei n.º 5/75, de 14 de Março, o Conselho da Revolução decreta e eu promulgo, para valer como lei, o seguinte:

Artigo 1.º — 1. As entidades patronais têm o direito de constituir associações patronais para defesa e promoção dos seus interesses empresariais.

2. Para efeitos do presente diploma entende-se por:

a) Entidade patronal — a pessoa, individual ou colectiva, de direito privado, titular de uma empresa que tenha, habitualmente, trabalhadores ao seu serviço;
b) Federação — organização de associações patronais do mesmo ramo de actividade;
c) União — organização de associações patronais, de base regional;
d) Confederação — associação de federações e/ou uniões e/ou associações patronais;
e) Categoria — conjunto de entidades patronais que exercem a mesma actividade económica ou actividade de características globalmente afins entre si e diferenciadas de todas as demais.

Art. 2.º As associações patronais elaboram os seus estatutos e regulamentos, elegem os seus corpos gerentes, organizam a sua gestão e actividade e formulam o seu programa de acção.

Art. 3.º — 1. As associações patronais podem reunir-se em uniões, federações e confederações.

2. Os estatutos das uniões, federações ou confederações podem admitir a possibilidade de representação directa de entidades patronais não representadas em associações patronais.

Art. 4.º As associações patronais, bem como as uniões, federações e confederações, não podem filiar-se sem autorização do Ministério do Trabalho em associações ou organizações patronais de outros países, de âmbito nacional, regional e internacional, mas podem manter relações e cooperar com elas.

Art. 5.º — 1. Compete às associações patronais, suas uniões, federações e confederações:

a) Celebrar convenções colectivas de trabalho;
b) Prestar serviços aos seus associados ou criar instituições para esse efeito;
c) Defender e promover a defesa dos direitos e interesses das entidades patronais representadas.

2. Os organismos referidos no número anterior, sem prejuízo do disposto na alínea *b*), não podem dedicar-se à produção ou comercialização de bens ou serviços ou de qualquer modo intervir no mercado.

Art. 6.º — 1. As associações patronais podem adquirir, sem autorização, a título gratuito ou oneroso, bens móveis e imóveis necessários para a consecução dos seus fins.

2. Os móveis e imóveis cuja utilização seja estritamente indispensável ao seu funcionamento são impenhoráveis.

Art. 7.º — 1. As associações patronais adquirem personalidade jurídica pelo registo dos seus estatutos no Ministério do Trabalho.

2. O requerimento do registo das associações patronais, acompanhado da acta da assembleia constituinte e dos estatutos, será assinado por um quarto das entidades patronais a abranger, de acordo com o âmbito naqueles definido, não se exigindo, em qualquer caso, um número de assinaturas superior a vinte.

3. O requerimento do registo das uniões será assinado pelas associações interessadas e o das federações e confederações será assinado por, pelo menos, 30 % das associações interessadas.

4. Após a recepção do pedido de registo, o Ministério do Trabalho mandará proceder à publicação, no prazo de trinta dias, dos estatutos no *Diário do Governo* e remeterá certidão ou fotocópia autenticada da acta da assembleia constituinte, dos estatutos e do pedido de registo, acompanhados de uma apreciação fundamentada sobre a sua legalidade, dentro do prazo de oito dias a contar da publicação, em carta registada, ao agente do Ministério Público junto do tribunal da comarca da sede da associação de que se trate.

5. No caso de o pedido, a acta da constituição ou os estatutos se não mostrarem conformes à lei, o agente do Ministério Público promoverá, dentro do prazo de quinze dias a contar da sua recepção, a declaração judicial da extinção da associação em causa.

6. As associações patronais, suas uniões, federações e confederações, objecto de registo, só poderão ser declaradas judicialmente extintas com fundamento na ilegalidade dos respectivos actos de constituição, estatutos e pedido de registo, e só poderão iniciar o exercício das respectivas actividades decorrido o prazo para o pedido da declaração judicial da sua extinção ou após o trânsito da declaração judicial confirmatória da legalidade da sua constituição, dos seus estatutos ou do seu registo, nos casos em que

Follow-up reply from EUROFEDOP

(filed with the Secretariat on 29 August 2000)

Follow-up Reply to the Complaint Lodged with the Council of Europe about Defence

Since the commission asked us to give an exact definition of "persons belonging to the military", we would like to elaborate our points of view in this matter:

1. Eurofedop is of the opinion that workers belonging to the military can be divided into 2 categories: military and civilian personnel. In our opinion it is only logical that both groups should enjoy all fundamental rights, including the right to organise. We, as an organisation, find that in the countries, against which the complaint was lodged, there is a part of the personnel, working in the defence ministry, that are denied the right to join a representative national trade union. This group is explicitly called "personnel belonging to the military".

2. The way Eurofedop sees this, is that these countries not only reject a minimal interpretation of the principle included in Art. 5 of the Charter, but reject the principle as a whole, although it is a basic right for each and every employee.

Concerning Art. 6 of the Charter, the countries against which the complaint was lodged, say that "personnel belonging to the military" take part in collective bargaining anyway. For Eurofedop this is a contradiction in terms. The countries themselves state that collective bargaining is an institutional basic right of all workers. For Eurofedop however, this basic right is only valid if it is linked with trade union organisations that are holder of this right. This means that art. 6 of the charter is null and void if art. 5 is not principally applied.

Additionally we would like to point out that the Geneva Convention incontestably describes the concept "military personnel".

In its "Report of the Committee of Experts" the ILO (Geneva) states the following, concerning the right to join and establish organisations:

Europese Federatie van het Overheidspersoneel
Fédération Européenne du Personnel des Services Publics • Europäische Föderation der Öffentlich Bediensteten
European Federation of Employees in Public Services • Federación Europea del Personal de los Servicios Públicos
Trierstraat 33 • B-1040 Brussel • Tel. + 32 2 230 38 65 • Fax + 32 2 231 14 72
Modem: + 32 2 231 96 51 • Internet E-Mail: info@infedop-eurofedop.com

The only exceptions authorised by Convention No. 87 are the members of the police and armed forces (Art. 9), such exceptions being justified on the basis of their responsibility for the external and internal security of the State. Most countries deny the armed forces the right to organise, although in some cases they may have the right to group together, with or without certain restrictions, to defend their occupational interests[1]. As regards members of the police and security forces, it is frequently the case that countries which deny this right to members of the armed forces include the police under the same heading and generally apply the same legal provisions in both cases. Sometimes, members of the police are restricted to the right to establish and join their own organisations[2], although in some countries they have the same right to organise as other categories of public servants or are entitled to do so under separate legislation[3]. Although Art. 9 of Convention No. 87 is quite explicit, it is not always easy in practice to determine whether workers belong to the military or to the police or are simply civilians working in military installations or in the service of the army and who should, as such, have the right to form trade unions[4]. In the view of the committee, since Art. 9 of the Convention provides only for exceptions to the general principle, workers should be considered as civilians in case of doubt[5].

France

The answers of the French government, although correct, are incomplete.
It is true that the same pension laws and regulations apply to both military and civilian personnel, and their wages are based on the same index number.
When trade unions negotiate wages of civilian personnel, the outcome also goes for military personnel, although they do not have the right to join a trade union and consequently have no say in these negotiations.
The same goes for evolutions in pension law (which is called: pension legislation for civilian and military personnel).
This legislation is negotiated with the official trade unions (excluding, yet again, all military personnel).

Italy

The Italian situation is quite unclear because it is hard to draw the line between police and the military. The "Arma dei Carabinieri" for example, have special duties that fall under

[1] For example: *Austria, Denmark, Finland, Germany, Luxembourg, Norway, Sweden*
[2] For example: *Cyprus*
[3] For example: *Australia, Austria, Belgium, Côte d'Ivoire, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malawi, Netherlands, New Zealand, Niger, Norway, Portugal, Senegal, Spain, Sweden, Tunisia, United Kingdom, United States*
[4] This problem arose, for example, in the *United Kingdom* in the case of workers at the Government Communications Headquarters (GCHQ) in Cheltenham, which has been the subject of observations by the Committee for several years.
[5] See Also CFA, 238th Report, Case No. 1279 (*Portugal*), para. 137; 286th Report, Case No. 1664 (*Ecuador*), para 287.

military hierarchy. The duties of the "Guardia di Finanza", are far from "military", they don't even resemble "policing", their structure is nevertheless quite military. In march 2000, the Italian government, heavily opposed by the trade unions, voted a law (nr. 78) that made the situation even more unclear. The "Arma dei carabinieri" will be divided into 4 "armed forces", all resorting under the ministry of defence.

Does this law put the security of the people under military jurisdiction? This would undermine democratic control, provided in art. 5 & 6.

Finally we also have to say that the chairperson of COCER, the official consultative committee, is a non-elected senior official. Although the Italian government would like us to think otherwise, the COCER is just an advisory body that can not enter into any contractual obligations, neither with the government, nor with any administration.

Bert Van Caelenberg
Secretary General Eurofedop

Report of the European Committee of Social Rights to the Committee of Ministers

2000

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Report by the European Committee of Social Rights to the Committee of Ministers

(Strasbourg, 4 December 2000)

1. Introduction

1. In accordance with Article 8 para. 2 of the Protocol providing for a system of collective complaints, the European Committee of Social Rights, committee of independent experts of the European Social Charter (hereafter referred to as "the Committee") transmits to the Committee of Ministers its report in respect of complaint No. 5/1999. The report contains the decision of the Committee on the merits of the complaint (adopted on 4 December 2000). The decision as to admissibility (adopted on 10 February 2000) is appended.

2. The Protocol entered into force on 1 July 1998 and has been ratified by Cyprus, Finland, France, Greece, Italy, Norway, Portugal and Sweden. Bulgaria, Ireland and Slovenia are also bound by this procedure, in accordance with Article D of the revised European Social Charter of 1996.

3. When examining this complaint, the Committee followed the procedure laid down in the Rules of Procedure adopted on 9 September 1999.

4. It is recalled that in accordance with Article 8 para. 2 of the Protocol, the present report will not be published until the Committee of Ministers adopts a resolution or, at the latest, four months after its transmission to the Committee of Ministers on 12 April 2001.

2000

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

The European Committee of Social Rights, ECSR, committee of independent experts established under Article 25 of the European Social Charter (hereafter referred to as "the Committee"), during its 174th session, composed of:

Messrs.	Matti MIKKOLA, President
	Rolf BIRK, Vice- President
	Stein EVJU, Vice-President
Ms	Suzanne GRÉVISSE, General Rapporteur
Mr	Konrad GRILLBERGER
Ms	Micheline JAMOULLE
Messrs.	Nikitas ALIPRANTIS
	Tekin AKILLIOĞLU

Assisted by Mr Régis Brillat, Executive Secretary to the European Social Charter;

In the presence of Ms Anna-Juliette Pouyat, observer of the International Labour Organisation;

In the absence of Mr Alfredo Bruto da Costa who, having been prevented from participating in the hearing and the deliberations held on 9 October 2000, did not participate in the adoption of the decision;

On the basis of the oral hearing held on 9 October 2000;

After having deliberated on 9 October and 4 December 2000;

On the basis of its deliberations;

Delivers the following decision adopted on 4 December 2000:

PROCEDURE

1. On 10 February 2000, the Committee declared the complaint admissible.

2. In accordance with Article 7 paras. 1 and 2 of the Protocol providing for a system of collective complaints and with the Committee's decision of 10 February 2000 on the admissibility of the complaint, the Executive Secretary to the European Social Charter communicated, on 17 February 2000, the text of the admissibility decision to the Portuguese Government and to the European Federation of Employees in Public Services, the complainant organisation (hereafter referred to as EUROFEDOP). On 18 February 2000, he communicated the text of the decision to the Contracting Parties to the Protocol, as well as to the European Trade Union Confederation (ETUC), to the Union of Industrial and Employers' Confederations of Europe (UNICE) and to the International Organisation of Employers (IOE), inviting them to submit their observations on the merits of the complaint. The Executive Secretary also communicated the text of the decision to the Contracting Parties to the Charter and the revised Charter for their information.

3. The Portuguese Government submitted its observations on the merits on 29 March 2000. The ETUC submitted observations on 26 April 2000. EUROPFEDOP submitted its observations on the merits on 15 May 2000. The Portuguese Government submitted supplementary observations on 25 July 2000.

4. In accordance with Article 7 para. 3 of the Protocol, each party received the information and supplementary observations of the other.

5. In accordance with Article 7 para. 4 of the Protocol and Rule 29 para. 1 of its Rules of Procedure, the Committee decided on 24 May 2000 to organise a hearing. For the purpose of the hearing the complaint was combined with complaints Nos. 2 and 4/1999, EUROFEDOP against France and Italy, respectively. The ETUC was invited to the hearing in accordance with Rule 29 para. 2 of the Committee's Rules of Procedure.

6. Additional written observations were requested from the parties in preparation of the hearing. EUROFEDOP submitted such observations on 28 August 2000.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on 9 October 2000.

At the hearing the complainant organisation, EUROFEDOP, was represented by:

Mr Bert Van Caelenberg, Secretary General;
Mr Ludo Vekemans, Project Manager;
Mr Pim Gooijers, Chairman of the Trade Council Defence.

The ETUC, acting in support of the complainant, was represented by:

Mr Gérard Fonteneau, legal advisor;
Mr Ulrich Hundt, Secretary General, EUROMIL;
Mr Stefan Clauwaert, legal advisor.

The respondent Government, the Portuguese Government, was represented by:

Ms Cristina Siza Viera, Director of Legal Affairs at the Ministry of National Defence;
Ms Ana Mendes Godinho, legal advisor, Directorate of Legal Affairs of the Ministry of National Defence ;
Ms Cristina Coelho, Professor, Faculty of Law of the University of Lisbon.

The French Government was represented by:

Mr Pierre Boussaroque, Judge seconded to the Directorate of Legal Affairs of the Ministry of Foreign Affairs.

The Italian Government was represented by:

Mr Antonio Caracciolo, Inspector General, Ministry of Labour and Social Security;
Mr Raffaello Di Cuonzo, Ministry of Defence;
Colonel Vittorio Manconi.

SUBSTANCE OF THE COMPLAINT

8. EUROFEDOP alleges that Portugal does not comply with Articles 5 and 6 of the European Social Charter in so far as members of the armed forces do not enjoy the right to organise and as it follows that there is no right to bargain collectively. Articles 5 and 6 read as follows:

Part II

"Article 5 - The right to organise

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.

Article 6 - The right to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting 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;

and recognise:

4. 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."

SUBMISSIONS OF THE PARTICIPANTS IN THE PROCEDURE

a) The complainant organisation, EUROFEDOP

9. In its initial complaint and in subsequent written observations, EUROFEDOP alleged that in practice, the situation of civilian members of the Ministry of Defence in Portugal is not in conformity with the above mentioned provisions of the Charter. However, this part of the complaint was not maintained. At the hearing, EUROFEDOP conceded that domestic law grants civilian personnel all rights required pursuant to Articles 5 and 6 of the Charter. The complainant organisation alleged that there is a lack of clarity in defining civilian as opposed to military tasks and appealed to the respondent government to alleviate this.

10. EUROFEDOP maintains its complaint as regards members of the armed forces in Portugal. The complaint is based on Section 270 of the Constitution and the Act on National Defence (Act No. 29/82 of 11 December 1982) which prohibit military personnel of the armed forces and of the "Guarda Nacional Republicana" from joining a trade union but allows them to affiliate only to professional associations which must be concerned solely with the professional code of ethics.

11. EUROFEDOP alleges that it is a contradiction in terms to say that military personnel takes part in collective bargaining. In EUROFEDOP's view, the basic right to collective bargaining is respected only if bargaining can be exercised by trade unions as holders of this right. It asserts that Article 6 of the Charter cannot in effect be complied with if Article 5 is not applied in the first place.

12. EUROFEDOP emphasises that other States, notably in Northern Europe, have granted the right to organise to members of the armed forces. It considers that the absence of a right to organise in several States, including Portugal, is particularly unjustifiable in view of both the domestic and the international context. In many States the armed forces have been restructured in order to abolish compulsory military service and aiming to establish an army composed exclusively of professionals, civilian and military. At the international level the tasks assigned to the

armed forces have changed and now include peace-keeping and humanitarian operations. They are based on co-operation between European States within the framework of a policy on peace and security. EUROFEDOP asserts that, in this context it seems unacceptable that employees of the armed forces of some countries do not enjoy the same trade union rights as their colleagues from other countries.

13. EUROFEDOP asserts that, like the European Convention on Human Rights, the European Social Charter is a "living instrument" which should be interpreted in the light of present realities. As a consequence, EUROFEDOP submits that a modification of Articles 5 and 6 is required and requests that amendments to include armed forces be initiated by the Council of Europe and by the governments of the countries concerned. According to EUROFEDOP, such amendments would allow for a universal interpretation of fundamental rights in the armed forces.

b) The European Trade Union Confederation (ETUC)

14. The ETUC, referring to the fundamental nature of Articles 5 and 6 of the Charter and to the regulation of the various points at issue in the complaint in other international instruments and in case law developed under those instruments, submits that the term "members of the armed forces" in Article 5 should be interpreted in a restrictive and functional way. If thus construed, this would imply that military personnel with more technical tasks must be accorded the right to organise.

15. With respect to Article 6, the ETUC asserts that if the Committee would apply such a construction of Article 5, the categories of personnel excluded from the right to organise in Portugal are in fact too broadly defined and, pursuant to the Committee's case law, the resulting infringement of Article 5 automatically entails a violation of Article 6 para. 2.

16. Alternatively, the ETUC submits that there is no restriction *ratione personae* in Article 6 and hence, the right to collective bargaining must in some way be guaranteed to all workers, including members of the armed forces.

17. At the hearing, the ETUC requested the Committee to undertake a study on the right to organise of military personnel in Europe together with the ILO with a view to harmonisation of legislation in the Contracting Parties. It also invited the Committee to hold an exchange of views on the subject with governments, with management and labour and other interested bodies.

c) The Portuguese Government

18. The Portuguese Government alleges that the complaint introduced by EUROFEDOP does not give grounds for finding a violation of Articles 5 and 6 of the Charter.

19. It underlines that Article 5 of the Charter recognises the freedom of states to determine the principle as well as the extent of the application of the guarantees contained therein to the members of the armed forces. The suppression of trade union rights is thus authorised by Article 5 of the Charter, which is not contested by

the complainant organisation. In addition, the Portuguese Government points out that this interpretation has been confirmed by the case law of the European Committee of Social Rights and that it was not challenged during the process of revision of the Charter and the adoption of the revised Charter.

20. In addition, the Portuguese Government considers that the complaint under Article 6 should be dismissed as this provision has no autonomy from Article 5, the right to bargain collectively being invested in trade unions and not being an individual and subjective right of workers.

21. According to the Portuguese Government, the complaint raises a question of principle and has as its objective a revision of the articles concerned. It considers, however, that the European Committee of Social Rights is not competent to address a matter of this nature.

22. As regards the functional approach to the armed forces invoked by the complainant organisation and the ETUC, the Government rejects such an interpretation. In its view, the duties inherent in military status do not differ according to the task in question.

ASSESSMENT OF THE COMMITTEE

23. The Committee, by way of introduction, notes that as the case now stands, it is not in dispute that for civilian personnel in the defence sector the situation in Portugal is compatible with Articles 5 and 6 of the Charter. While taking note of the submissions of EUROFEDOP and the ETUC as to the delineation of the concept "members of the armed forces" in Article 5 of the Charter, the Committee notes that in the present proceedings no concrete submissions have been made, nor has any evidence been presented, in respect of any particular group or category of workers which in the view of the complainant or the ETUC should be deemed not to fall within the scope of the exception clause in Article 5. Hence, there are no grounds for the Committee to elaborate on this point in the present case.

24. The point at issue in the present complaint concerns, firstly, the construction of the exception clause in the final sentence of Article 5 as regards military personnel. The Committee recalls that according to this provision, "[t]he principle governing the application to the members of the armed forces of" the guarantees set out in Article 5 "and the extent to which they shall apply to persons in this category shall [...] be determined by national laws and regulations".

25. The Committee notes that the complainant organisation, on the one hand, alleges that there is a violation of Articles 5 and 6 of the Charter as military personnel employed by the armed forces in Portugal – and in the other states against which complaints have been lodged – do not enjoy the right to organise and bargain collectively, while on the other hand, the complainant holds that amendment of Articles 5 and 6 is requisite with a view to the safeguarding of rights for this category of personnel and that reform for that purpose should be initiated by the Council of Europe and by the governments concerned.

26. 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.

27. The Committee considers that no argument has been brought forward by EUROFEDOP, nor by the ETUC, of a nature giving grounds for a change in the interpretation of Article 5. The Committee underlines that the well-established interpretation of Article 5 is based on the wording of the provision. Further, as to EUROFEDOP's submission that this interpretation should be modified as the tasks assigned to the armed forces now include peace-keeping and humanitarian operations and are based on co-operation between European States, the Committee points out that co-operation between the armed forces of the Contracting Parties to the Charter, or some of them, in no way is a new phenomenon.

28. Secondly, the Committee takes note of EUROFEDOP's submission that the basic right to collective bargaining is respected only if bargaining can be exercised by trade unions as holders of this right, and of the ETUC's assertion that there is no restriction *ratione personae* in Article 6 and that, consequently, the right to collective bargaining must in some way be guaranteed to all workers, including members of the armed forces.

29. While recognising that provisions in Article 6 of the Charter may be held to have application also in respect of workers excluded from the scope of Article 5, the Committee considers that these are issues which in the context of a collective complaint cannot be assessed in the abstract. The issues to which the relationship between Article 5 and Article 6 may give rise need to be considered on a concrete, case-by-case basis. The Committee is obliged to note, however, that the complainant organisation's submissions on this point have not been specified or elaborated on, nor is there evidence at hand in the present case to substantiate the submissions. In view of this, and without prejudice to any subsequent assessment of issues concerning the relationship between Articles 5 and 6 of the Charter, the Committee, in the context of the present complaint, does not find grounds for holding that there is a violation of Article 6.

30. Finally, with regard to the request made by EUROFEDOP that Articles 5 and 6 be amended; the Committee is obliged to note that this is a matter beyond the scope of its competence in the present context. The role of the Committee as defined in the 1995 Protocol providing for a system of collective complaints is, solely, to assess whether the Contracting Party concerned by a complaint "has ensured the satisfactory application of the provision of the Charter referred to in the complaint" (Article 8 of the Protocol). Having regard to this, the Committee considers that it would be inappropriate in the present context to express itself on EUROFEDOP's request and, similarly, on the ETUC's proposal to undertake a study of the said provisions together with the ILO.

31. On the above grounds, the Committee has reached the following:

CONCLUSION

The complaint lodged by EUROFEDOP against Portugal is dismissed.

Micheline JAMOULLE	Matti MIKKOLA	Régis BRILLAT
Rapporteur	President of the Committee	Executive Secretary

In accordance with Rule 30 of the Committee's Rules of Procedure, a separate opinion of Ms Micheline JAMOULLE, Rapporteur, is appended to the decision.

Appendix
Decision on admissibility. The text of the decision on admissibility which is annexed to the Report by the European Committee of Social Rights to the Committee of Ministers can be found on page 27 of this monograph.

SEPARATE OPINION of Ms Micheline JAMOULLE

The Rapporteur found no violation of Article 5 and 6 of the Charter by Portugal, but believed this conclusion should not have been reached on the basis of the approach and certain reasons of the majority of the Committee.

The Rapporteur is of the opinion that the object of the written complaint by EUROFEDOP, supported by subsequent representations could not be modified by an oral hearing, which is an optional procedure under the Protocol providing for a system of collective complaints.

The Rapporteur regrets that the principle according to which questions which are raised in the framework of a collective complaint "cannot be assessed in the abstract" was affirmed. It is for the Committee to define the meaning and scope of the text invoked, and to interpret it, so as to create a case law consistent with the principle of effectiveness.

Resolution ResChS(2001)4 of the Committee of Ministers

on Collective complaint No. 5/1999
European Federation of Employees in Public Services against Portugal

(adopted by the Committee of Ministers
on 7 February 2001
at the 740th meeting of the Ministers' Deputies)

The Committee of Ministers, [1]

Having regard to Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints,
Taking into consideration the complaint introduced on 13 August 1999 by the European Federation of Employees in Public Services against Portugal,

Having regard to the report transmitted to it on 12 December 2000 in accordance with Article 8 of the Additional Protocol containing the conclusion of the European Committee of Social Rights that Portugal has not failed to ensure the satisfactory application of the provisions of the Charter referred to in the complaint,

Takes note of the report.

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[1] In conformity with Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints, the Deputies in their composition restricted to the Representatives of Contracting Parties to the European Social Charter or the revised European Social Charter participated in the vote, that is Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey and the United Kingdom.

Appendices

Appendix I

Additional Protocol to the 1995 European Social Charter providing for a system of collective complaints

Preamble

The member States of the Council of Europe, signatories to this Protocol to the European Social Charter, opened for signature in Turin on 18 October 1961 (hereinafter referred to as "the Charter");

Resolved to take new measures to improve the effective enforcement of the social rights guaranteed by the Charter;

Considering that this aim could be achieved in particular by the establishment of a collective complaints procedure, which, *inter alia*, would strengthen the participation of management and labour and of non-governmental organisations,

Have agreed as follows:

Article 1

The Contracting Parties to this Protocol recognise the right of the following organisations to submit complaints alleging unsatisfactory application of the Charter:

a. international organisations of employers and trade unions referred to in para. 2 of Article 27 of the Charter;

b. other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee;

c. representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.

Article 2

1. Any Contracting State may also, when it expresses its consent to be bound by this Protocol, in accordance with the provisions of Article 13, or at any moment thereafter, declare that it recognises the right of any other representative national non-governmental organisation within its jurisdiction which has particular competence in the matters governed by the Charter, to lodge complaints against it.

2. Such declarations may be made for a specific period.

3. The declarations shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the Contracting Parties and publish them.

Article 3

The international non-governmental organisations and the national non-governmental organisations referred to in Article 1.b and Article 2 respectively may submit complaints in accordance with the procedure prescribed by the aforesaid provisions only in respect of those matters regarding which they have been recognised as having particular competence.

Article 4

The complaint shall be lodged in writing, relate to a provision of the Charter accepted by the Contracting Party concerned and indicate in what respect the latter has not ensured the satisfactory application of this provision.

Article 5

Any complaint shall be addressed to the Secretary General who shall acknowledge receipt of it, notify it to the Contracting Party concerned and immediately transmit it to the Committee of Independent Experts.

Article 6

The Committee of Independent Experts may request the Contracting Party concerned and the organisation which lodged the complaint to submit written information and observations on the admissibility of the complaint within such time-limit as it shall prescribe.

Article 7

1. If it decides that a complaint is admissible, the Committee of Independent Experts shall notify the Contracting Parties to the Charter through the Secretary General. It shall request the Contracting Party concerned and the organisation which lodged the complaint to submit, within such time-limit as it shall prescribe, all relevant written explanations or information, and the other Contracting Parties to this Protocol, the comments they wish to submit, within the same time-limit.

2. If the complaint has been lodged by a national organisation of employers or a national trade union or by another national or international non-governmental organisation, the Committee of Independent Experts shall notify the international organisations of employers or trade unions referred to in para. 2 of Article 27 of the Charter, through the Secretary General, and invite them to submit observations within such time-limit as it shall prescribe.

3. On the basis of the explanations, information or observations submitted under para.s 1 and 2 above, the Contracting Party concerned and the organisation which lodged the complaint may submit any additional written information or

observations within such time- limit as the Committee of Independent Experts shall prescribe.

4. In the course of the examination of the complaint, the Committee of Independent Experts may organise a hearing with the representatives of the parties.

Article 8

1. The Committee of Independent Experts shall draw up a report in which it shall describe the steps taken by it to examine the complaint and present its conclusions as to whether or not the Contracting Party concerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint.

2. The report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the organisation that lodged the complaint and to the Contracting Parties to the Charter, which shall not be at liberty to publish it.

   It shall be transmitted to the Parliamentary Assembly and made public at the same time as the resolution referred to in Article 9 or no later than four months after it has been transmitted to the Committee of Ministers.

Article 9

1. On the basis of the report of the Committee of Independent Experts, the Committee of Ministers shall adopt a resolution by a majority of those voting. If the Committee of Independent Experts finds that the Charter has not been applied in a satisfactory manner, the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned. In both cases, entitlement to voting shall be limited to the Contracting Parties to the Charter.

2. At the request of the Contracting Party concerned, the Committee of Ministers may decide, where the report of the Committee of Independent Experts raises new issues, by a two-thirds majority of the Contracting Parties to the Charter, to consult the Governmental Committee.

Article 10

The Contracting Party concerned shall provide information on the measures it has taken to give effect to the Committee of Ministers' recommendation, in the next report which it submits to the Secretary General under Article 21 of the Charter.

Article 11

Articles 1 to 10 of this Protocol shall apply also to the articles of Part II of the first Additional Protocol to the Charter in respect of the States Parties to that Protocol, to the extent that these articles have been accepted.

Article 12

The States Parties to this Protocol consider that the first paragraph of the appendix to the Charter, relating to Part III, reads as follows:

"It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof and in the provisions of this Protocol."

Article 13

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Charter, which may express their consent to be bound by:

   a. signature without reservation as to ratification, acceptance or approval; or

   b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. A member State of the Council of Europe may not express its consent to be bound by this Protocol without previously or simultaneously ratifying the Charter.

3. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 14

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of one month after the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 13.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of one month after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 15

1. Any Party may at any time denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of twelve months after the date of receipt of such notification by the Secretary General.

Article 16

The Secretary General of the Council of Europe shall notify all the member States of the Council of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. the date of entry into force of this Protocol in accordance with Article 14;

d. any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 9th day of November 1995, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Appendix II

Rules of Procedure of the European Committee of Social Rights (extract relating to the collective complaints procedure)

Part VII: Collective complaints procedure

Rule 19: Lodging of complaints

Collective complaints submitted under the 1995 Additional Protocol providing for a system of collective complaints shall be addressed to the Secretary to the Committee acting on behalf of the Secretary General of the Council of Europe.

Rule 20: Signature

Complaints shall be signed by the person(s) with the competence to represent the complainant organisation. The Committee decides on any questions concerning this matter.

Rule 21: Languages

1. Complaints made by the organisations listed in Article 1 paras. a and b of the Protocol shall be submitted in one of the official languages of the Council of Europe.

2. Complaints made by organisations listed in Article 1 para. c and Article 2 para. 1 of the Protocol may be submitted in a language other than one of the official languages of the Council of Europe. For these complaints, the Secretary to the Committee is authorised in his correspondence with the complainants to use a language other than one of the official languages of the Council of Europe.

Rule 22: Representatives of the States and of the complainant organisations

1. The states shall be represented before the Committee by the agents they appoint. These may have the assistance of advisers.

2. The organisations referred to in paras. 2 and 3 of the Protocol shall be represented by a person appointed by the organisation to this end. They may have the assistance of advisers.

3. The names and titles of the representatives and of any advisers shall be notified to the Committee.

Rule 23: Order in which to handle a complaint

Complaints shall be registered with the Secretariat of the Committee in chronological order. The Committee shall deal with complaints in the order in which they become ready for examination. It may, however, decide to give precedence to a particular complaint.

Rule 24: Rapporteurs

1. For each complaint a member of the Committee shall be appointed by the President to act as Rapporteur.

2. The Rapporteur shall follow the proceedings. He or she shall inform the Committee at each of its sessions of the progress of the proceedings and of the procedural decisions taken by the President since the previous session.

3. The Rapporteur shall elaborate a draft decision on admissibility of the complaint for adoption by the Committee, followed by, as the case may be, a draft report for the Committee of Ministers as provided for in Article 8 of the Protocol.

Rule 25: Role of the President

1. The President shall take the decisions provided for in Rules 26 to 29.

2. The President shall set the time limits mentioned under Article 6 and under Article 7 paras. 1, 2 and 3 of the Protocol. He or she may grant, in exceptional cases and following a well-founded request, an extension of these time limits.

3. The President may, in the name of the Committee, take any necessary measures in order that the procedure may be correctly carried out.

4. The President may especially, in order to respect a reasonable time limit for dealing with complaints, decide to convene additional sessions of the Committee.

Rule 26: Observations on the admissibility

1. Before the Committee decides on admissibility, the President of the Committee may ask the State concerned for written information and observations, within a time limit that he or she decides, on the admissibility of the complaint.

2. The President may also ask the organisation that lodged the complaint to respond, on the same conditions, to the observations made by the State concerned.

Rule 27: Admissibility assessment

1. The Rapporteur shall within the shortest possible time limit elaborate a draft decision on admissibility. It shall contain:

   a. a statement of the relevant facts;

   b. an indication of the issues arising under the Charter in the complaint;

   c. a proposal on the admissibility of the complaint.

2. The Committee's decision on admissibility of the complaint shall be accompanied by reasons and be signed by the President, the Rapporteur and the Secretary to the Committee.

3. The Committee's decision on admissibility of the complaint shall be made public.

4. The States party to the Charter or the revised Charter shall be notified about the decision.

5. If the complaint is declared admissible, copies of the complaint and the observations of the parties shall be transmitted, upon request, to States party to the Protocol and to the international organisations of employers and trade unions referred to in para. 2 of Article 27 of the Charter. They shall also have the possibility to consult the appendices to the complaint at the Secretariat.

Rule 28: Assessment of the merits of the complaint - written procedure

1. If a complaint has been declared admissible, the Committee asks the State concerned to make its observations on the merits of the complaint within a time limit that it decides.

2. The President then invites the organisation that lodged the complaint to respond, on the same conditions, to these observations and to submit all relevant written explanations or information to the Committee.

3. The States party to the Protocol as well as the States having ratified the revised Social Charter and having made a declaration under Article D para. 2 shall be invited to make comments within the same time limit as that decided above under para. 1.

4. The international organisations of employers and trade unions referred to in Article 27 para. 2 of the Charter shall be invited to make observations on complaints lodged by national organisations of employers and trade unions and by non-governmental organisations.

5. The observations submitted in application of paras. 3 and 4 shall be transmitted to the organisation that lodged the complaint and to the State concerned.

6. Any information received the by the Committee in application of Article 7 paras. 1, 2 and 3 of the Protocol shall be transmitted to the State concerned and to the complainant organisation.

Rule 29: Hearing

1. The hearing provided for under Article 7 para. 4 of the Protocol may be held at the request of one of the parties or on the Committee's initiative. The Committee shall decide whether or not to act upon a request made by one of the parties.

2. The State concerned and the complainant organisation as well as the States and organisations referred to under Article 7 of the Protocol that have submitted written observations during the proceedings shall be invited to the hearing.

3. The hearing shall be public unless the President decides otherwise.

Rule 30: The Committee's decision on the merits

1. The Committee's decision on the merits of the complaint contained in the report provided for in Article 8 of the Protocol shall be accompanied by reasons and be signed by the President, the Rapporteur and the Secretary to the Committee. Any dissenting opinions shall be appended to the Committee's decision at the request of their authors.

2. The report containing the decision in question shall be transmitted to the Committee of Ministers and to the Parliamentary Assembly.

3. The Committee's decision on the merits of the complaint shall be made public at the moment of the adoption of a resolution by the Committee of Ministers in conformity with Article 9 of the Protocol or at the latest four months after the report was transmitted to the Committee of Ministers.

4. When the Committee's decision has become public, all documents registered with the Secretariat shall be accessible to the public unless the Committee decides otherwise following a proposal by the Rapporteur.

Part VIII: Amendment to the Rules of Procedure

Rule 31: Amendments

Any rule may be amended upon motion made after notice by one of its members when such motion is carried, at a session of the Committee, by a majority of all its members. Notice of such a motion shall be delivered in writing at least two months

before the session at which it is to be discussed. Such notice of motion shall be communicated to all members of the Committee at the earliest possible moment.

Appendix III

Signatures and ratifications of the Charter, its Protocols and the revised Charter – the situation as of 1 July 2001

Member states	European Social Charter 1961		Additional Protocol 1988		Amending Protocol 1991		Collective Complaints Protocol 1995		Revised European Social Charter 1996	
	Signature	Ratification	Signature	Ratification	Signature	Ratification	Signature	Ratification	Signature	Ratification
Albania	(1)	—	(1)	—	(1)	—	(1)	—	21/09/98	—
Andorra	(1)	—	(1)	—	(1)	—	(1)	—	4/11/00	—
Armenia	—	—	—	—	—	—	—	—	—	—
Austria	22/07/63	29/10/69	04/12/90	—	07/05/92	13/07/95	07/05/99	—	07/05/99	—
Azerbaïjan	—	—	—	—	—	—	—	—	—	—
Belgium	18/10/61	16/10/90	20/05/92	—	22/10/91	21/09/00	14/05/96	—	03/05/96	—
Bulgaria	(2)	(2)	(3)	(3)	(2)	(2)	(4)	(4)	21/09/98	07/06/00
Croatia	08/03/99	—	08/03/99	—	08/03/99	—	08/03/99	—	—	—
Cyprus	22/05/67	07/03/68	05/05/88	(3)	21/10/91	01/06/93	09/11/95	06/08/96	03/05/96	27/09/00
Czech Republic	27/05/92*	3/11/99	27/05/92*	17/11/99	27/05/92*	17/11/99	—	—	4/11/00	—
Denmark	18/10/61	03/03/65	27/08/96	27/08/96	—	**	09/11/95	—	03/05/96	—
Estonia	(2)	(2)	(3)	(3)	(2)	(2)	(2)	—	04/05/98	11/09/00
Finland	09/02/90	29/04/91	09/02/90	29/04/91	16/03/92	18/08/94	09/11/95	17/07/98	03/05/96	—
France	18/10/61	09/03/73	22/06/89	(2)	21/10/91	24/05/95	09/11/95	07/05/99	03/05/96	07/05/99
Georgia	(1) —	(1)	—	(1)	—	(1)	—	30/06/00	—	
Germany	18/10/61	27/01/65	05/05/88	—	—	**	—	—	—	—
Greece	18/10/61	06/06/84	05/05/88	18/06/98	29/11/91	12/09/96	18/06/98	18/06/98	03/05/96	—
Hungary	13/12/91	08/07/99	—	—	13/12/91	**	—	—	—	—
Iceland	15/01/76	15/01/76	05/05/88	—	—	**	—	—	04/11/98	—
Ireland	18/10/61	07/10/64	(3)	(3)	14/05/97	14/05/97	4/11/00	4/11/00	4/11/00	4/11/00
Italy	18/10/61	22/10/65	05/05/88	26/05/94	21/10/91	27/01/95	09/11/95	03/11/97	03/05/96	05/07/99
Latvia	29/05/97	—	29/05/97	—	29/05/97	—	—	—	—	—
Liechtenstein	09/10/91	—	—	—	—	—	—	—	—	—
Lithuania	(2)	(2)	(3)	(3)	(2)	(2)	(2)	—	08/09/97	29/06/01
Luxembourg	18/10/61	10/10/91	05/05/88	—	21/10/91	**	—	—	11/02/98	—
Malta	26/05/88	04/10/88	—	—	21/10/91	16/02/94	—	—	—	—
Moldova	(1)	—	(1)	—	(1)	—	(1)	—	03/11/98	—
Netherlands	18/10/61	22/04/80	14/06/90	05/08/92	21/10/91	01/06/93	—	—	—	—
Norway	18/10/61	26/10/62	10/12/93	10/12/93	21/10/91	21/10/91	20/03/97	20/03/97	07/05/01	07/05/01
Poland	26/11/91	25/06/97	—	—	18/04/97	25/06/97	—	—	—	—
Portugal	01/06/82	30/09/91	(1)	—	24/02/92	08/03/93	09/11/95	20/03/98	03/05/96	—
Romania	04/10/94	(2)	(3)	(3)	(2)	(2)	(2)	—	14/05/97	07/05/99
Russia	(1)	—	(1)	—	(1)	—	(1)	—	14/09/00	—
San Marino	—	—	—	—	—	—	—	—	—	—
Slovakia	27/05/92*	22/06/98	27/05/92*	22/06/98	27/05/92*	22/06/98	18/11/99	—	18/11/99	—
Slovenia	11/10/97	(2)	11/10/97	(3)	11/10/97	(2)	11/10/97	(4)	11/10/97	07/05/99
Spain	27/04/78	06/05/80	05/05/88	24/01/00	21/10/91	24/01/00	—	—	23/10/00	—
Sweden	18/10/61	17/12/62	05/05/88	05/05/89	21/10/91	18/03/92	09/11/95	29/05/98	03/05/96	29/05/98
Switzerland	06/05/76	—	—	—	—	—	—	—	—	—
"The former Yugoslav Republic of Macedonia"	05/05/98		05/05/98	—	05/05/98	—	—	—	—	—
Turkey	18/10/61	24/11/89	05/05/98	—	—	**	—	—	—	—
Ukraine	02/05/96	—	(1)	—	(1)	—	(1)	—	07/05/99	—
United Kingdom	18/10/61	11/07/62	—	—	21/10/91	**	—	—	07/11/97	—

* Date of signature by the Czech and Slovak Federal Republic.

** State whose ratification is necessary for the entry into force of the protocol.

(1) State having signed the revised Social Charter.

(2) State having ratified the revised Social Charter.

(3) State having accepted the rights (or certain of the rights) guaranteed by the Protocol by ratifying the revised Charter.

(4) State having accepted the collective complaints procedure by a declaration made in application of Article D para. 2 of Part IV of the revised Social Charter.

Appendix IV

International non-governmental organisations entitled to submit collective complaints[1]

Conference of European Churches (CEC)
Conférence des églises européennes (KEK)

Council of European Professional Informatics Societies (*1 January 2001*)
Conseil des associations européennes des professionnels de l'informatique (CEPIS) (*1 janvier 2001*)

Education International (EI) (*1 January 1999*)
Internationale de l'éducation (IE) (*1 janvier 1999*)

Eurolink Age

European Action of the Disabled (*1 January 2000*)
Action européenne des handicapés (AEH) (*1 janvier 2000*)

European Antipoverty Network
Réseau européen des associations de lutte contre la pauvreté et l'exclusion sociale (EAPN)

European Association for Palliative Care
Association européenne de soins palliatifs (EAPC-Onlus)

European Association for Psychotherapy (EPA) (*1 January 2001*)
Association européenne de psychothérapie (EAP) (*1 janvier 2001*)

European Association of Railwaymen
Association européenne des cheminots (AEC)

European Centre of the International Council of Women (ECICW)
Centre européen du Conseil international des femmes (CECIF)

European Council of Police Trade Unions
Conseil européen des syndicats de police

European Council of WIZO Federations (ECWF) (*1 January 2000*)
Conseil européen des fédérations WIZO (CEFW) (*1 janvier 2000*)

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[1] List established by the Governmental Committee following the decision of the Committee of Ministers on 22 June 1995 (see para. 20 of the explanatory report to the Protocol). The organisations are registered on this list - in English alphabetical order - for a duration of four years as from the date of entry into force of the Protocol (1 July 1998), with the exception of five NGOs for which it is indicated that the duration of four years begins on 1 January 1999 or 1 January 2000.

European Disability Forum (EDF) (*1 January 2001*)
Forum européen des personnes handicapées (FEPH) (*1 janvier 2001*)

European Federation of Employees in Public Services
Fédération européenne du personnel des services publics (EUROFEDOP)

European Federation of National Organisations Working with the Homeless
Fédération européenne d'associations nationales travaillant avec les sans-abri (FEANTSA)

European Federation of the Elderly (*1 January 1999*)
Fédération européenne des personnes âgées (EURAG) (*1 janvier 1999*)

European Forum for Child Welfare
Forum européen pour la protection de l'enfance (EFCW)

European Movement
Mouvement européen

European Non-Governmental Sports Organisation (*1 January 1999*)
Organisation européenne non gouvernementale des sports (ENGSO) (*1 janvier 1999*)

European Ombudsman Institute
Institut européen de l'Ombudsman (EOI)

European Organisation of Military Associations
Organisation européenne des associations militaires (EUROMIL)

European Regional Council of the World Federation for Mental Health
Conseil régional européen de la Fédération Mondiale pour la santé mentale

European Union Migrant's Forum (*1 January 2001*)
Forum des migrants de l'Union européenne (EMF) (*1 janvier 2001*)

European Union of Rechtspfleger (*1 January 1999*)
Union européenne des greffiers de justice (EUR) (*1 janvier 1999*)

European Women's Lobby
Lobby européen des femmes

Eurotalent

International Association Autism-Europe (IAAE)
Association internationale Autisme-Europe (AIAE)

International Association of the Third-Age Universities
Association internationale des universités du 3^{e} âge (AIUTA)

International Catholic Society for Girls
Association catholique internationale de services pour la jeunesse féminine (ACISJF)

International Centre for the Legal Protection of Human Rights (INTERIGHTS)

International Commission of Jurists (ICJ)
Commission internationale de juristes (CIJ)

International Confederation of Catholic Charities (*1 January 2000*)
Confédération internationale des charités catholiques (CARITAS INTERNATIONALIS) (*1 janvier 2000*)

International Council of Environmental Law (ICEL) (*1 January 2000*)
Conseil international du droit de l'environnement (CIDE) (*1 janvier 2000*)

International Council of Nurses (ICN)
Conseil international des infirmières (CII)

International Council on Social Welfare (ICSW)
Conseil international de l'action sociale (CIAS)

International Federation of Educative Communities
Fédération internationale des communautés éducatives (FICE)

International Federation of Human Rights Leagues
Fédération internationale des ligues des Droits de l'Homme (FIDH)

International Federation of Musicians
Fédération internationale des musiciens (FIM)

International Federation of Settlements and Neighbourhood Centres
Fédération internationale des centres sociaux et communautaires (IFS)

International Federation for Hydrocephalus and Spina Bifida
Fédération internationale pour l'hydrocéphalie et le spina bifida (IFHSB)

International Federation for Parent Education (IFPE) (*1 January 1999*)
Fédération internationale pour l'éducation des parents (FIEP) (*1 janvier 1999*)

International Human Rights Organization for the Right to Feed Oneself (*1 January 2001*)
Organisation internationale des droits de l'homme pour le droit à l'alimentation (FIAN) (*1 janvier 2001*)

International Humanist and Ethical Union (IHEU)
Union internationale humaniste et laïque (UIHL)

International Movement ATD - Fourth World
Mouvement international ATD - Quart Monde

International Planned Parenthood Federation – European Network
Fédération internationale pour le planning familial – Réseau européen (IPPF)

International Road Safety
La prévention routière internationale

International Scientific Conference of Minorities for Europe of Tomorrow
Conférence scientifique internationale sur les minorités dans l'Europe de demain (ISCOMET)

Marangopoulos Foundation for Human Rights (MFHR) (*1 January 2000*)
Fondation Marangopoulos pour les droits de l'homme (FMDH) (*1 janvier 2000*)

Public Services International (PSI)
Internationale des services publics (ISP)

Quaker Council for European Affairs
Conseil quaker pour les affaires européennes (QCEA)

Standing Committee of the Hospitals of the European Union
Comité permanent des Hôpitaux de l'Union européenne (HOPE)

World Confederation of Teachers
Confédération syndicale mondiale de l'enseignement