EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Complaint No. 4/1999:

European Federation of Employees in Public Services (EUROFEDOP)

against Italy

Documents

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

October 2001

Table of contents

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

---

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]

---

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.

- 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.

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 second complaint under the Additional protocol to the European Social Charter providing for a system of collective complaints.

Complaint No. 4/1999 was filed on 13 August 1999 by the European Federation of Employees in Public Services (EUROFEDOP), an International non-governmental organisation. 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)3 regarding Complaint No. 4/1999.

Complaint filed by EUROFEDOP against Italy

(filed with the Secretariat on 13 August 1999)

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

I. ADMISSIBILITY OF THE COMPLAINT

1. Italy signed the European Social Charter on 18 October 1961 and ratified on 22 October 1965. It entered into force in respect of Italy on 21 November 1965.

2. Italy signed the Revised European Social Charter on 3 May 1996 and ratified it on 5 July 1999. It entered into force in respect of Italy on 1st September 1999.

3. Italy signed the Additional Protocol of 1995 providing for a system of collective complaints on 9 November 1995 and ratified it on 3 November 1997. It entered into force in respect of Italy on 1st July 1998.

4. According to the declaration made at the time of deposit of the instrument of ratification, "The Italian government accepts in their entirety the undertakings arising from the Charter."

5. According to a declaration contained in a Note Verbale from the Permanent Representation, handed to the Secretary General at the time of deposit of the instrument of ratification, on 5 July 1999: "Italy does not consider itself bound by Article 25 (the right of workers to the protection of their claims in the event of the insolvency of their employer) of the Charter."

6. 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.

7. 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.

8. 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

9. Articles 5 and 6 of the Charter and of the Revised Charter are not respected in Italy. Law No.382 of 11 July 1978 on Principle norms of military discipline provides in article 18 only for the establishment of bodies to represent members of the military. These bodies may only put forward proposals opinions, and requests on

terms and conditions of service. They cannot be considered as trade unions in the meaning of the Charter and of the Revised Charter.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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 Italian Government on the admissibility of the complaint

(filed with the Secretariat on 1 December 1999)

We attach our findings and relevant information on the complaint lodged by EUROFEDOP against the Italian Government for alleged violations of trade-union rights.

Briefly, it is our view that the complaint concerning civilian employees of the Ministry of Defence is clearly without foundation, since these employees enjoy the same union rights as all workers and participate, through union representation, in collective bargaining in accordance with the criteria laid down in Articles 5 and 6 of the European Social Charter.

Equally unfounded is the complaint regarding the situation of military personnel. Their "protection" is adequately regulated by Law No. 382 of 11 July 1978 and Legislative Decree No. 195 of 12 May 1995, which lay down principles and procedures for implementation which 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.

APPLICATION BY EUROFEDOP TO THE COUNCIL OF EUROPE

1. SUBSTANCE OF THE COMPLAINT

EUROFEDOP has applied to the Council of Europe with a request that Italy comply with Articles 5 and 6 of the European Social Charter and the revised Charter. According to the documents which we have received, the substance of the complaint is briefly as follows:

– the bodies for military representation, which were set up by Law No. 382 of 11 July 1978, can only put forward opinions and requests on terms and conditions of service; accordingly, they cannot be considered as trade unions within the meaning of the Charter;

– civilian employees of the Ministry of Defence do not in practice enjoy the right to organise or to bargain collectively within the meaning of Articles 5 and 6 of the Charter;

– following new duties taken on by the armed forces in crisis management operations (peace-keeping, peace-enforcement and humanitarian operations), which have entailed their reorganisation, it seems unacceptable that military professionals and civilians in countries such as Great Britain, France, Italy, Greece, Spain and Portugal should not be guaranteed the same union and bargaining rights as are enjoyed by their colleagues performing identical duties in

other countries such as Austria, Belgium, Germany, Holland, Luxembourg and Sweden.

2. RELEVANT LEGISLATION

a. Article 5 – The right to organise

Article 5 of the European Social Charter, whose ratification was authorised under Law No. 929 of 3 July 1965, and Article 5 of the revised Charter, ratified under Law No. 30 of 9 February 1999, contain analogous provisions. With a view to ensuring or promoting the freedom to organise, Contracting Parties are bound to ensure that national law does not impair the freedom of workers to form or join organisations for the protection of their economic and social interests. Subsequent passages in the same article go on to establish major exemptions in the case of the police and the military. In particular, the last part of the article reads as follows:

> "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."

b. Article 6 – The right to bargain effectively

Article 6 of the Charter, whose content is analogous, seeks to ensure the effective exercise of the right to bargain collectively and requires the Contracting Parties:

– to promote joint consultation between workers and employers;

– to promote the introduction of collective agreements through the action of organisations in the Contracting Parties;

– to promote the establishment of appropriate machinery for conciliation and arbitration for the settlement of labour disputes.

The Contracting Parties recognise the right of workers to take 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.

3. OBSERVATIONS

a. Situation of civilian employees

The objection made in the application in respect of the situation of civilian employees of the Ministry of Defence is in no way justified by reference to legislation in force in Italy.

On the contrary, these employees enjoy to the full both the right to form trade unions in order to protect their economic and social interests and the right to negotiate their terms and conditions of employment, which includes the right and opportunities to take action as indicated in Article 5 of the Charter.

Currently, pending reorganisation of the sector, the remuneration of senior civil servants, including those employed by the Ministry of Defence, is regulated by law (see Legislative Decree No. 29/93 and subsequent amendments).

b. Situation of military personnel

The system of military representation, as provided for in Law No. 382 of 11 July 1978, has the following characteristics:

– it is composed of a number of collegial bodies meeting at all levels of the military hierarchy and elected for a fixed term; all categories of armed forces personnel are represented at their meetings, which discuss relevant matters of a financial, legal, ethical or other nature;

– representatives are democratically elected on the basis of manifestos, which are debated in special meetings;

– when it needs to address issues of a general nature, the Central Representative Council (COCER) can also request a parliamentary hearing.

In addition, since 1995 the terms and conditions of employment - both legal and financial - of military personnel have been subject, pursuant to Legislative Decree No. 195 of 12 May 1995, to a system of "consultation" between the Government, representatives of the Defence Chief of Staff and COCER representatives. Besides appointing representatives, it falls to COCER, as a body, to approve all activities and the results of consultation.

Where consultation fails to achieve results within a given time period, the Government makes a referral to Parliament. In effect, insofar as the involvement of staff representatives and the aims of the procedure are concerned, this consultation is precisely equivalent to a collective bargaining arrangement.

Legislative Decree No. 195/95 also stipulates suitable procedures designed to prevent any dispute over the application or interpretation of measures agreed under the consultation procedure.

In the light of the foregoing, and bearing in mind that Article 5 of the European Social Charter leaves it to national law to determine 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, it is perfectly clear that the Italian state:

– has acted in this matter by means of legislation setting up a specific system of representation for military personnel which recognises, albeit through a special procedure, their right to bargain collectively;

– has complied with its international commitments by virtue of these measures (Law No. 382/78 and Legislative Decree No. 195/95).

4. CONCLUSIONS

In the light of the foregoing, the complaint lodged by EUROFEDOP may be seen to be:

– entirely without foundation insofar as it concerns the situation of civilian employees of the Ministry of Defence, since these employees enjoy to the full the same trade-union rights as all workers and participate, through their own union organisations, in collective bargaining in accordance with the criteria laid down in Articles 5 and 6 of the European Social Charter;

– without foundation insofar as it concerns the situation of military personnel, since by virtue of Law No. 382 of 11 July 1978 and Legislative Decree No. 195 of 12 May 1995, 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.

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Decision on the admissibility of Complaint No. 4/1999 by the European Federation of Employees in Public Services (EUROFEDOP)

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 4/1999, 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 Italy fails to apply in a satisfactory manner Articles 5 and 6 of the European Social Charter and of the Revised European Social Charter;

Having regard to the documents appended to the complaint;

Having regard to the observations submitted on 1 December 1999 by the Italian Government represented by the Legal Department of the Ministry of Foreign Affairs;

Having regard to the Revised 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 Italy does not comply with Articles 5 and 6 of the European Social Charter and the Revised European Social Charter in so far as members of the armed forces do not enjoy the right to organise. The complaint is based on Act No. 382 of 11 July 1978 on rules for military discipline, which in its Section 18 provides for the establishment of bodies to represent members of the armed forces. These bodies may only put forward proposals, opinions and requests on terms and conditions of service. They cannot be considered as trade unions in the meaning of the Charter and the Revised Charter. Finally, it alleges that the situation of civil personnel in the armed forces is not in practice in conformity with the same provisions of the Charter and the Revised Charter.

3. 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 Italy, 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.

4. The Italian Government does not contest the conformity of the complaint with the admissibility conditions laid down in Articles 1 b), 3 and 4 of the Additional Protocol.

5. It considers that the complaint concerning the situation of the military personnel in the armed forces is clearly without foundation. It points out that Article 5 of the Revised Charter leaves it to national law to determine whether and to what extent to apply the guarantees laid down in the provision to members of the armed forces. The Italian Government also considers that by setting up a specific system of representation of military personnel (Act No. 382 of 11 July 1978 and Legislative Decree No. 195 of 12 May 1995) which recognises, albeit through a special procedure their right to bargain collectively, it has complied with its international obligations.

6. The Italian Government considers that the complaint concerning civilian employees in the armed forces is equally without foundation, since these employees enjoy the same trade union rights as all workers and participate, through union representation, in collective bargaining in accordance with Articles 5 and 6 of the Revised Charter.

7. The Committee notes that, in accordance with Article 4 of the Protocol, which was ratified by Italy on 3 November 1997 and entered into force for this State on 1 July 1998, the complaint has been lodged in writing. It relates to Articles 5 and 6, provisions accepted by Italy on 22 October 1965 upon its ratification of the Charter and on 5 July 1999 upon its ratification of the Revised Charter, in alleging that there is no right in the armed forces to form and join trade unions and consequently no right to bargain collectively.

8. Since the entry into force of the Revised European Social Charter in respect of Italy on 1 September 1999, this country is bound by Articles 5 and 6 of the Revised Charter and the complaint, therefore, will be examined in respect of these provisions of the Revised Charter;

9. 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 entitled to lodge complaints.

10. In addition, as laid down in 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.

11. 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.

12. The Committee considers that in the present case, the Italian Government's allegation that the complaint is manifestly ill-founded, relates to the substance of the complaint and should not be considered at the stage of admissibility.

13. For these reasons, the Committee, on the basis of the report presented by Mr Stein EVJU, 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 Italian Government to submit in writing by 15 March 2000 all further 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 Italian 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.

signed: Matti MIKKOLA, President of the Committee

signed: Stein EVJU, Rapporteur

signed: Régis BRILLAT, Executive Secretary

Written observations on the merits of the complaint submitted by the European Trade Union Confederation (ETUC)

(filed with the Secretariat on 26 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

---

[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.

---

[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]

---

[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-*

---

[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

---

[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

---

[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 custumary 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 CE-ACR 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]

---

[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

---

[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:

---

[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

---

[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.

---

[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 the European Federation of Employees in Public Services (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 <u>fundamental</u> 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.

Observations of the Confederazione Generale Italiana del Lavoro (CGIL)

(filed with the Secretariat on 14 June 2000)

Opinion on the Italian systems and their consistency with European legislation on trade union freedom in the armed forces.

Please find enclosed the opinion on the pertinency of the petition relating to the above captioned matter.

LEGISLATIVE REFERENCES

Following are the references on which this opinion is grounded:

1. The ILO International Conventions from 1921 to 1970
2. The Italian Constitution, approved on 27 December 1947;
3. The European Council Convention of 1950;
4. The Universal Declaration of the Rights of Man of 1966;
5. Law No. 382/1978 relating to *"Principles of military discipline"*;
6. The Decree of the President of the Republic No. 691, issued on 4 November 1979 relating to the "*Regulations for the enforcement of the law on representation in the armed forces*" (hereinafter referred to as RARM);
7. The Ministerial Decree of 9 October 1985 relating to the "*Internal regulations for the organization and enforcement of the law on representation in the armed forces* " (hereinafter referred to as RIRM);
8. Law No. 216/92 relating to "*procedures regulating the employment of servicemen in the police and armed forces* ";
9. The Legislative Decree No. 195/1995 relating to the "*implementation of article 2 of Law No. 216/92*";
10. Order No. 1142, issued by the Council of State on 2 June 1998, relating to the *"petition claiming the unconstitutionality of article 8 of Law No. 382/78"*;
11. The European Social Charter of 1961, and the revised European Social Charter (effective in Italy from 1 September 1999);
12. The Italian Constitutional Court ruling No. 449, issued on 17 December 1999, relating to the "*opinion on the unconstitutionality of article 8 of the Law No. 382/78, requested by the Council of State* ".

DEDUCTIONS

With reference to Law No. 382/78

The problems in Italy associated with the exercise of the rights of representation by the members of the armed forces are objectively due to the artificial introduction of these rights in a law regulating "the principles of military discipline", rather than associating them with the implementation of the constitutional principles on the democratic rights of servicemen as free citizens (*article 2 of the Italian Constitution).*

The first part of Law No. 382/78, in fact, introduces preliminary concepts that limitedly condition representation in the armed forces *(Article 18).*

Moreover, *article 6 (2)* of this Law prohibits uniformed servicemen in military facilities from participating in meetings even vaguely political in nature.

Uniformed servicemen, or members of the armed forces simply qualifying themselves as such, are even forbidden to take part in meetings outside military facilities *(Article 7 (2)),* and this is the provision that is generally enforced to justify any reprisals.

Significantly, the prohibition forbidding members of the armed forces to establish trade union organizations is contained in a law on military discipline, and not in the legislation governing representation *(Article 8 (1)).*

These restrictions, relating only the forming of associations or organizations within the military institution, which, in any case, are subject to the prior approval of the Ministry of Defense *(Article 8 (3)),* constitute the legal grounds on which the military commands currently repress even the slightest activities of the associations, especially when their aim is the cultural enhancement of servicemen, in connection with the preliminary discussion on the recognition of the constitutional and trade union rights of members of the armed forces.

On trade union freedom

Following the abolition of the Fascist corporativist constitution, the Constitution of the newly founded Italian Republic sanctioned that "labour union organization is free" *(Article 39 (1)),* delegating to Parliament the task of further regulating the matter, also by means of agreements between the parties concerned, however without questioning this principle.

Among the various international treaties and conventions strengthening the concept of trade union freedom, in virtue of the right to establish organizations for exercising bargaining powers, I wish to mention the ILO Conventions No. 11/1921 (ratified on 20 March 1924, by the R.D.L No. 601), No. 87/1948 and No. 98/1949 (ratified on 20 March 1958, by Law No. 367), No. 135/1970 (ratified on 10 April 1981, by Law No. 157), No. 141/1975 (ratified on 3 February 1979, by Law No. 68.

In the "Universal Declaration of the Rights of Man" of 1966, in the "International Agreement on Economic, Social and Cultural Rights" it is declared that "individuals have the right to form and join trade unions for the protection of their interests" (*Article 8 (1)).*

The European Council Convention for the protection of Human Rights and Fundamental Freedoms of 1950, and the European Social Charter of 1961, bind the member States to ensure and promote trade union freedom.

The European conventions establish that trade union freedom is an unquestionable principle, which cannot be impaired in any way by national law; they

also clearly assert that belonging to the armed forces cannot be an obstacle to the full recognition of the principle of trade union freedom.

With reference to this point, European legislation sets forth that national laws or regulations may only determine 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, and not the recognition of the governing principle itself, aimed to ensure and promote the freedom of workers to organize themselves for the purpose of protecting their economic interests *(Article 5 (1), Convention No. 98/1949, and Article 5 of the European Social Charter (Revised))*.

Now therefore, and in conformity with the above mentioned provisions and with article 10 of the Italian Constitution, one would logically expect the automatic adaptation of the Italian to the European legislation.

However, if we examine the Italian law on the rights of representation in the armed forces, we will see that there is absolutely no consistency between the European and the Italian legislation, since the latter openly violates the former.

It may reasonably be concluded, therefore, that with reference to trade union freedom for the members of the armed forces and the police (also for the "civil" police, in consideration of the limitations imposed by articles 81 and 83 of Law No. 121/1981), Italian legislation has not yet sufficiently conformed to the European one; on the contrary, it significantly strays away from it, thus violating the obligations descending from membership of the ILO and the European Community.

On the voluntary nature of membership of trade unions and the performance of its activities

The military representative organizations are forbidden to promote and accept membership, for the purpose of exercising their representation activities *(Article 12 (5) (e) of RARM)*.

Expenses relating to the operation of the representative associations (accomodation and travel expenses, advertising materials, sundry services), therefore, are totally incurred by the military institution *(Article 26 (5) of RIRM, Article 37 of RARM and DPR No. 691/79)*.

Members of the armed forces have the duty (and not the right) of taking part in the ballots for electing the representative bodies *(Article 17 (1) of RARM)*.

The elected delegates cannot leave the meeting room unless they are authorized by the chairman *(Article 15 (2) of RIRM)*.

On democracy and autonomy

The definition of representation, in the enforcement regulations, as an institution of the military system, has strengthened the presupposition denying the right to a free and autonomous representative organization *(Article 1 (3) of RARM)*.

The establishment and election of the basic representative body called COBAR, the size of the basic units and the ballot procedures are established by the respective military commands *(Article 6 (3), (4) and (5) of RARM).*

The same also applies to the intermediate, COIR, and central, COCER, representative bodies *(Article 20 and 21 of RARM).*

The ballots for the election of the delegates to the various representative bodies are called and held by the respective military commands (*Article 15 (6) of RARM).*

The military commandants even decide the ballot procedures and appoint the chief electoral officers *(Article 16 (1) and (4) of RARM).*

The ballot documentation must be delivered to the commandant *(Article 18 (2) and (4) of RARM).*

The obligation to deliver the documentation, resolutions, agendas and motions to the respective commandants also applies to the routine activities of the representative bodies *(Article 25 (1) of RIRM).*

Even though envisaged in the RARM, the relations between the representative bodies at the various levels (central, intermediate and basic) are not regulated in the RIRM. Therefore, relations between the above mentioned bodies, as well as the hearing of servicemen by the representative bodies, who must always confine themselves solely to the question under debate, are not possible without the prior authorization of the respective command, to which a copy of the documentation relating to the discussion must then be delivered *(Article 27 (1), (2) and (3) and Article 31 (1) and (2) of RIRM).*

With the aim of maintaining the activities of the representative bodies within the framework of military discipline, the delegates are obliged to respect the following prohibitions:

1. they may only formulate proposals not related to the matters strictly specified under article 19 of Law No. 382/78;
2. they cannot take part in meetings or perform representation-related activities outside the bodies to which they belong;
3. they cannot entertain relations of any kind with organizations unrelated to the armed forces (*Article 12 (5) (a), (b) and (c) of RARM*).

The failure to comply with the provisions regulating the representation activities are not sanctioned on the basis of trade union regulations but are considered, to all intents and purposes, serious disciplinary violations (Article 12 (6) of RARM, as amended by article 1 of DPR No. 136/86).

The members of the representative bodies are strictly subject to military discipline also in the fulfilment of their representative functions. This is the

fundamental reason whereby the Chairmen of these bodies are not elected, but the member highest in rank automatically appointed, inasmuch as they are required to ensure representation by applying the rules of military discipline, for which they are responsible, and they are also obliged to inform their military superiors in the event of any violations of the regulations *(Article 14 (1) and (5) of RARM, DPR No. 691/79 and Article 5 (1) of RIRM).*

The exercise of representation activities and meetings of any kinds are always subject to the prior agreement between the chairman of the representative body and the respective commandant *(Article 12 (3) of RIRM).*

The right to take the floor at meetings of the representative bodies, and only on the matters in the agenda, may be exercised only if the members register with the chair before the proceedings are formally opened; the possibility of registering once the proceedings are under way is considered an exceptional event and is subject to the chairman's discretionary powers *(Article 19 (1) of RIRM).*

The meetings of the COCER (Consiglio Centrale di Rappresentanza - Central Representative Council) are valid only if there is a quorum of two thirds of the members attending *(Article 14 (1) of RIRM).*

Secret ballots are envisaged only for the election of the chair committee and for the appointment of persons to specific offices, and not for the approval of agendas, motions, resolutions or the like *(Article 21 (2) of RIRM).*

The performance of the members' representation tasks is considered part of his active duties as a serviceman, to all intents and purposes *(Article 13 (1) of RIRM).*

With reference to the provisions issued by the President of the Republic, on the issue of wages and regulations, the Carabinieri and Guardia di Finanza sections of the COCER are allowed to take part in the bargaining activities between the government and the trade unions, within the framework of concertation, as members of the delegations of the Ministry of Defense and of the Ministry of Finance *(Article 2 (1) (B) of the Legislative Decree No. 195/95).*

Besides the obvious damage to the autonomy of representation, the different procedures between the "civil" and "military" police forces *(Article 2 (1) (A) of the Legislative Decree No. 195/95)* openly institutionalizes a form of discrimination between workers with similar investigatory, security and public order functions.

The obvious outcome of the failure to recognize trade union freedom for the members of the armed forces is that the representative bodies set up within the armed forces have a status which does not differ from that of the military institution as a whole, thus engendering a dangerous confusion of roles and functions between the military representations and the institution, also to the detriment of the latter.

On the responsibilities of representation

The representative mandate may be terminated only in the following cases:

a) termination of service;
b) transfer to other position or promotion;
c) secondment;
d) loss of the member's eligibility requirements;
e) after having incurred at least two serious disciplinary measures;
f) (*Article 13 (2) of RARM*).

Obviously, since the principle of no-confidence not envisaged, with regard to the members of the representative bodies, the mandate is considered of indefinite duration, within the three-year term, however, thus depriving the delegate of any responsibility or accountability, in connection with his representation duties.

Moreover, the withdrawal from the representative body as a consequence of being transferred to another position, denies the delegate, *de facto*, the function of collective representative.

This observation is further supported by the ballot rule prohibiting ballots being cast in favour of candidates not belonging to one's same category *(Article 17 of RARM)*.

On the rights of information

The members of the representative bodies are forbidden to issue press releases or make statements *(Article 12 (5) (b) of RARM)*.

The intermediate and basic representation bodies are forbidden to disclose the resolutions and documents they produce outside the military institution. The commands finally decide whether or not to post up and/or disclose these materials *(Article 37 of RARM)*.

On the bargaining procedures and powers

In the face of bargaining procedures carried out every four years, the members of the armed forces are elected to the representative bodies for a term of three years, and cannot be immediately re-elected *(Article 18 (8) of RARM)*.

This provision prevents the delegates from gaining the necessary and adequate experience in respect of bargaining and protecting the interests of the members of the armed forces.

The bargaining powers of COCER are limited to the formulation of opinions, proposals and requests, and do not envisage decision-making powers in respect of agreements (*Article 19 (4) of Law No. 382/78 and Article 8 (2) of RARM)*.

With reference to the matters subject to bargaining, despite the similarity of tasks and functions between the "civil" and "military" police forces, and unlike the provisions applying to the former *(Article 3 (1) and (2) of the Legislative Decree No.*

195/95), the representative bodies of the "military" police (including the Carabinieri and Guardia di finanza) are not allowed to deal with the general criteria relating to training and further training *(Article 4 (1) of the Legislative Decree No. 195/95)*.

Furthermore, unlike the provisions applying to the "civil" police, the "military" police forces are not recognized the right to trade union relations for determining general criteria in respect of the following matters (at the level of the single administrations):

a) the organization of the mandatory daily and weekly working hours and of the shifts;
b) external personnel mobility on request;
c) the definition of staffing levels;
d) the management of the employment relationship, in respect of general regulations and administrative provisions concerning the legal status and social security matters;
e) the introduction of new technologies and the consequent general procedures relating to the organization of central and peripheral offices, with general effects on the work organization;
f) general measures relating to the work organization;
g) the quality of the service and relations with the general public, as well as other general measures aimed to improve the efficiency of the services;
h) the implementation of training programmes;
i) the measures relating to health and safety at the workplace.

Moreover, the failure to enforce item i) constitutes a violation of Law No. 626/94.

For the members of the armed forces (Air Force, Army and Navy) only the following matters may be subject to bargaining:

a) basic and accessory wages;
b) maximum weekly working hours;
c) leave;
d) leave of absence, for personal reasons or sickness;
e) short leave for personal reasons;
f) benefits granted in the event of missions or secondment;
g) the criteria for the establishment of bodies responsible for determining the quality of and compliance with the health regulations of the mess and shops inside the military facilities, for the development of social protection activities and the well-being of the personnel, including the cultural enhancement thereof, as well as the management of the personal assistance bodies (*Article 4 (1) of the Legislative Decree No. 195/95*).

It must be highlighted that, with reference to both the "military" police forces and the armed forces as whole, there are no measures for safeguarding the health of the personnel, but only the "salubriousness" of the facilities.

Therefore, it is obvious that the Italian military representation bodies cannot be considered voluntary bargaining organizations, inasmuch as they are not entitled to the right of collective bargaining *(Article 6 of the amended European Social Charter).*

The statement made by the Italian Government at the proceedings at the European Committee of Social Rights, to the effect that in Italy the military representation bodies enjoy bargaining rights, also through special procedures, is obviously groundless.

Moreover, it must be remembered that, in virtue of the rules of military discipline regulating the activities of the representative bodies, they (and the voluntary organizations) may not even exercise actions aimed to safeguard the rights of individual members of the armed forces and their families.

On the legislative reform procedures

Further proof of the necessity of introducing innovatory measures, in respect of trade union rights and freedom is that, since 1990, about ten reform bills relating to Law No. 382/78 have been tabled in Parliament.

In 1992, the select committee of the Defense Commission of the Chamber of Deputies approved an interesting consolidated bill, undoubtedly innovatory and allowing a fruitful discussion and approval of the laws in the plenary session. But due to the proverbial delays in the working of the Italian Parliament, that Parliament was dissolved before the new law was approved.

Other bills were tabled in the following two Parliaments, but they did not meet with the approval either of the military representative bodies or the trade union organizations.

Currently, the bill approved by the Defense Commission of the Chamber of Deputies, commonly judged to be rather unsatisfactory, has been lying at the Defense Committee of the Senate for a year now, and there are serious doubts as to the possibility of its being approved by the end of this Parliament.

In December 1999, the Members of Parliament of two parties, the Democratici di Sinistra (Left Democrats) and Alleanza Nazionale (National Alliance), tabled other bills at the Chamber of Deputies, for implementing the principles on trade union freedom introduced by a recent Order of the Council of State which, called to decide on the constitutionality of article 8 of Law No. 382/78, following a petition filed by Ernesto Pallotta, a "Marshal" of the Carabinieri, on behalf of the "UnArma" association, defined the request of unconstitutionality "not manifestly groundless", and suspended its judgement transmitting the documents of the case to the Constitutional Court with a request for an opinion *(Order No. 1142 issued by the Council of State on 8 June 1998).*

In this Order, the Council of State asserts, *inter alia*:

a) "the exclusion of trade union freedom for the members of the armed forces is questionable" (page 7, paragraph 5.1);
b) "it is simply not enough to advance the existence of representative bodies in order to deny the need of recognizing trade union freedom " (page 8, paragraph 5.3 (3));
c) "concerning disputes between the representative bodies and the administrations, the whole range of possible collective claims is not deemed to be covered " (page 8, paragraph 5.3 (4));
d) "the current system of military representation sacrifices the principles of trade union organization and plurality " (page 8, paragraph 5.3 (5));
e) "trade union pluralism is of considerable significance in respect of the election of the members of the representative bodies " (page 8, paragraph 5.3 (6));
f) "the system of trade union freedom may give rise to the more incisive instrument of the trade union agreement ", (page 8, paragraph 5.3 (7));
g) "the requirement not to weaken military discipline cannot be grounded on the exclusion of trade union freedom (page 9, paragraph 5.4 (1)).

The Constitutional Court, in declaring the non-unconstitutional nature of article 8 of Law No. 382/78, did not express an opinion on trade union freedom, spurring the Government and Parliament to intervene in order to achieve "a fuller definition of the freedom of action and autonomy" of the military representative bodies *(page 9, paragraph 3 (3) of the Ruling No. 449, issued on 20 December 1999).*

CONCLUSIONS

Besides the above mentioned opinions, it must be observed that it is the illiberal obstinacy of the Italian legislation that may undermine the military system, because it coercively advances the equation trade union freedom equal to demilitarization, as asserted by the government lawyers in the proceedings at the Constitutional Court *(page 5, paragraph 4, of the Ruling No. 449, issued on 20 December 1999).*

Response of the Italian Government to questions posed

(submitted on 10 July 2000)

With reference to Complaint no. 4/1999 (EUROFEDOP v. Italy) and further to your letter of 8 June last, I am pleased to inform you, in reply to your question concerning the legal instruments referred to by my government in its initial observations, that the aforementioned instruments are laws (Law no. 382/1978) or decrees having the force of law (legislative decrees).

As in any modern constitutional system, they cannot be repealed or amended except by instruments having equivalent force and status.

Under the Italian system, legislative power rests with parliament, which comprises two chambers and operates in accordance with the detailed procedures laid down in the Constitution and parliamentary regulations. I would point out that for a law to be passed, the same text must have been approved by both chambers.

It is only in exceptional circumstances that the government can issue instruments having the force and status of law, but always subject to parliamentary control. These are (a) legislative decrees, issued by the government further to a law of delegation voted by the two chambers which authorises the government to issue such instruments and specifies the criteria and guiding principles with which they should comply; and (b) decree-laws which the government may issue on its own initiative, but only in order to address exceptional cases of urgency and necessity. These decree-laws remain in force for 60 days, after which, if they have not been converted into legislation by parliament, they lose their effect as of their date of issue.

Under no circumstances can a minister alone repeal or amend a law or an instrument having the force of law.

I hope the above answers your questions satisfactorily, and I shall be happy to forward to you subsequently the French translation of the relevant parts of the laws quoted.

Follow-up reply of the European Federation of Employees in Public Services

(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 elaborated out points of view in this matter:

1. Eurofedop is of the opinion that workers belonging to the military can be divided into two 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 Article 5 of the Charter, but reject the principle as a whole, although it is a basic right for each and every employee.

Concerning Article 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 Article 6 of the Charter is null and void if Article 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:

The only exceptions authorised by Convention No. 87 are the members of the police and armed forces (Article 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

---

[1] For example: *Austria, Denmark, Finland, Germany, Luxembourg, Norway and Sweden.*

right to establish and join their own organisations,[1] 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.[2] 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.[3] 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.[4]

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 de Carabinieri" for example, have special duties that fall under 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 in four "armed forces," all resorting under the ministry of defence.

---

[1] For example: *Cyprus.*

[2] For example: *Australia, Belgium, Côte d'Ivoire, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malawi, Netherlands, New Zealand, Niger, Norway, Portugal, Senegal, Spain, Sweden, Tunisia, United Kingdom and United States.*

[3] This problem arose, for example, in the *United Kingdom*, in the case of the workers at the Government Communications headquarters (GCHQ) in Cheltenham, which has been the subject of observations by the Committee for several years.

[4] See Also CFA, 238th Report, Case No. 1279 (*Portugal*) para. 137; 286th Report, Case No. 1664 (*Ecuador*), para. 287.

Does this law put the security of the people under military jurisdiction? This would undermine democratic control, provided in Articles 5 and 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.

Final observations of the Italian Government

(submitted 30 September 2000)

1. MILITARY PERSONNEL

The Constitutional Court, in a recent judgment (No 449), confirmed that the legislature's prohibition of the formation of trades-union-type associations in the armed forces is perfectly legitimate and pointed out that the Houses have undertaken to implement certain reforms of Law 382/78 – also by "correcting" Legislative Decree 195/95 – in order to enhance the status of representative bodies in consultation procedures.

2. CIVILIAN PERSONNEL

The entry into force of the legislation on the single management register of State administrations (DPR 26.2.1999, No 150, published in the *Gazzetta ufficiale* of 26 May 1999) eliminated the unilateral determination, by legislation, of the remuneration of senior managers, now dealt with on a private-law basis.

Article 24, paragraph 2, of Legislative Decree No 29 of 3 February 1993, as successively amended, provides that:

For general office management posts as defined by Article 19, paragraphs 3 and 4, basic salary is determined by means of an individual contract, using a the basic reference criterion the maximum values provided for in the management sector collective agreements; it also fixes all additional allowances according to the level of responsibility attached to the duties, results achieved in administration and management, and the correspnding amounts.

3. LEGISLATIVE FRAMEWORK

Law No 382 of 11 July 1978 and Legislative Decrees (not Decree-Laws) No 29 of 3 February 1993 and No 195 of 12 May 1995 constitute primary sources within the meaning of Articles 70ff of the Constitution and can be amended only by measures of equal rank.

In particular, the legislative decrees in question were issued by the government on the basis of legislation delegated by Parliament (see Article 76 of the Constitution) and can be repealed or modified only by a formal law or another legislative decree with express delegation from Parliament.

Legislative Decree no 195 of 12 May 1995 has in fact been amended, by Legislative Decree No 129 of 31 March 2000 (*Appendix 1*) by reference to the delegated power contained in Article 18 of Law No 266 of 28 July 1999 (*Appendix 2*).

List of participants at audition between EUROFEDOP and Italy

Strasbourg, 9 October 2000

EUROFEDOP

Mr Guy Rasneur, Eurofedop Chairman.
Mr Bert Van Caelenberg, Secretary General.
Mr Ludo Vekemans, Project Manager.
Mr J. Vermeiren, Member of the Trade Council Defence.
Mr P. Gooiers, Chairman of the Trade Council Defence.

FRANCE

Monsieur Pierre BOUSSAROQUE, *Magistrat détaché auprès de la Direction des Affaires juridiques, Ministère des Affaires étrangères.*

ITALY

Monsieur Antonio CARACCIOLO, Inspecteur Général, Ministère du Travail et de la Prévoyance sociale.
Monsieur Raffaello Di Cuonzo du Ministère de la Défense italien.
Colonel Vittorio Manconi.

PORTUGAL

Madame Cristina SIZA VIEIRA, Directrice du Département des Affaires Juridiques du Ministère de la Défense Nationale.
Madame Ana Mendes Godinho, Consultant Juridique du Département des Affaires Juridiques du Ministère de la Défense Nationale.

ETUC/CES

Monsieur Jean LAPEYRE, Secrétaire Général Adjoint, Confédération européenne des syndicats.
Monsieur Gérard FONTENAU, Conseiller Juridique, Confédération européenne des syndicats.
Monsieur Klaus LOERCHER, Conseiller Juridique, Confédération européenne des syndicats.
Monsieur Stefan CLAUWAERT, Conseiller Juridique, Confédération européenne des syndicats.
Monsieur HUNDT, (EUROMIL).

Council of Europe
Conseil de l'Europe

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

Report by the European Committee of Social Rights to the Committee of Ministers

(Strasbourg, 4 December 2000)

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. 4/1999. 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.

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

2000

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DECISION ON THE MERITS

COMPLAINT No. 4/1999

By the European Federation of Employees in Public Services
against Italy

The European Committee of Social Rights, ECSR, committee of independent experts of the European Social Charter 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 and the report presented by Mr Stein Evju;

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 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 Italian 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 Italian Government submitted its observations on the merits on 30 November 1999 at the same time as its observations on the admissibility of the complaint. The ETUC submitted observations on 26 April 2000. EUROPFEDOP submitted its observations on the merits on 15 May 2000. The Italian Government submitted supplementary observations on 10 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 the ECSR 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 5/1999, EUROFEDOP against France and Portugal, 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 and the Italian Government on 3 October 2000. The ETUC submitted additional observations on 4 October 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 organisation, was represented by:

Mr Gérard Fonteneau, legal advisor;
Mr Ulrich Hundt, Secretary General, EUROMIL;
Mr Stefan Clauwaert, legal advisor.

The respondent Government, 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.

The French Government was represented by:

Mr Pierre Boussaroque, Judge seconded to the Directorate of Legal Affairs of the Ministry of Foreign Affairs.

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.

SUBSTANCE OF THE COMPLAINT

8. EUROFEDOP alleges that Italy does not comply with Articles 5 and 6 of the European Social Charter and the revised 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 Italy is not in conformity with the above mentioned provisions of the Charter and the revised 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 Italy. The complaint is here based on Act No. 382 of 11 July 1978 on rules for military discipline, which in its Section 18 provides for the establishment of bodies to represent members of the armed forces. These bodies may only put forward proposals, opinions and requests on terms and conditions of service. EUROFEDOP submits that consequently, they cannot be considered as trade unions within the meaning of the Charter and the revised Charter.

11. EUROFEDOP submits that it is not enough for a State to install an alternative form of "deliberation" within the armed forces with a view to meeting the requirement for collective bargaining, especially where such deliberation is not based on free choice and only consists in the right to "make proposals", a right which can only be exercised by members of the military hierarchy itself. In addition, EUROFEDOP asserts that the results of wage negotiations with trade unions relating to civilian personnel are applied to military personnel, although the latter are not permitted to belong to trade unions and therefore do not have a say in the negotiations.

12. EUROFEDOP alleges that it is a contradiction in terms to say that military personnel in Italy take 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.

13. 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 Italy, 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.

14. 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)

15. 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.

16. 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 Italy 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.

17. 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. The ETUC asserts that the alternative form of participation described by the Italian Government is not sufficient and effective. In this respect the ETUC submits, that an effective participation at all levels and echelons of the armed forces does not in itself guarantee effective and sufficient consultation. Moreover, all alternative systems providing "social structures" within the armed forces pose the problem of

independence and neutrality of the persons involved as they are part of the military hierarchy.

18. In its observations of 4 October 2000, the ETUC submitted information inter alia on the consultation rights of the armed forces in Italy. 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 Italian Government

19. The Italian Government asserts that the complaint concerning the situation of military personnel in the armed forces is clearly without foundation. It points out that Article 5 of the revised Charter, as does Article 5 of the 1961 Charter, leaves it to national law to determine whether and to what extent to apply the guarantees laid down in the said provision to members of the armed forces.

20. The Italian Government further submits that by setting up a specific system of representation of military personnel (Act No. 382 of 11 July 1978 and Legislative Decree No. 195 of 12 May 1995 as amended by Legislative Decree No. 129 of 31 March 2000) which recognises, albeit through a special procedure, their right to bargain collectively, it has complied with its international obligations.

21. The Government explains that the system of military representation, as provided for in Act No. 382, has the following characteristics:

– it is composed of a number of collegial bodies meeting at all levels of the military hierarchy and elected for a fixed term; all categories of armed forces personnel are represented at their meetings, which discuss relevant matters of a financial, legal, ethical or other nature;
– representatives are democratically elected on the basis of manifestos, which are debated in special meetings;
– when it needs to address issues of a general nature, the Central Representative Council (COCER) can also request a parliamentary hearing.

22. In addition, since 1995 the terms and conditions of employment - both legal and financial - of military personnel have been subject to a system of "consultation", pursuant to Legislative Decree No. 195, between the Government, representatives of the Defence Chief of Staff and COCER representatives. Besides appointing representatives, it falls to COCER, as a body, to approve all activities and the results of consultation.

23. Where consultation fails to achieve results within a given time period, the Government makes a referral to Parliament. In effect, insofar as the involvement of staff representatives and the aims of the procedure are concerned, this consultation is precisely equivalent to a collective bargaining arrangement.

ASSESSMENT OF THE COMMITTEE

24. 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 Italy is compatible with Articles 5 and 6 of the revised 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 revised 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.

25. 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".

26. The Committee notes that the complainant organisation, on the one hand, alleges that there is a violation of Articles 5 and 6 of the revised Charter as military personnel employed by the armed forces in Italy – 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.

27. 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.

28. 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.

29. 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.

30. While recognising that provisions in Article 6 of the revised 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.

31. In the present case, the Italian Government argues that by virtue of Act No. 382 of 1978 and the above mentioned legislative decrees a system of consultation and collective negotiations exists for military personnel, which conforms to any potential requirements under Article 6 of the revised Charter. EUROFEDOP and the ETUC, on the other hand, have asserted that the system in question is not effective and sufficient. The Committee is obliged to note, however, that the organisations' 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 revised Charter, the Committee, in the context of the present complaint, does not find grounds for holding that there is a violation of Article 6.

32. 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.

33. On the above grounds, the Committee has reached the following:

CONCLUSION

The complaint lodged by EUROFEDOP against Italy is dismissed.

Annexe

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 21 of this monograph.

signed: Matti MIKKOLA, President of the Committee

signed: Stein EVJU, Rapporteur

signed: Régis BRILLAT, Executive Secretary

Resolution ChS (2001) 3 of the Committee of Ministers of the Council of Europe

Resolution ResChS(2001)3 on collective complaint No. 4/1999 European Federation of Employees in Public Services against Italy

(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 Italy,

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 Italy has not failed to ensure the satisfactory application of the provisions of the revised Charter referred to in the complaint,

Takes note of the report.

---

[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 (including the Collective Complaints Protocol) and the revised Charter – the situation as at 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 (KEK)

Eurolink Age

European Action of the Disabled (AEH) (1 January 2000)

European Anti-Poverty Network

European Association for Palliative Care (EAPC)

European Association of Railwaymen

European Centre of the International Council of Women

European Council of Police Trade Unions

European Council of WIZO Federations

European Federation of the Elderly (1 January 1999)

European Federation of Employees in Public Services (EUROFEDOP)

European Federation of National Organisations Working with the Homeless (FEANTSA)

European Forum for Child Welfare

Education International (1 January 1999)

European Movement

European Non-Governmental Sports Organisation (ENGSO) (1 January 1999)

European Ombudsman Institute

European Organisation of Military Associations (EUROMIL)

European Regional Council of the World Federation for Mental Health

Eurotalent

---

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 Union of Rechtspfleger (1 January 1999)

European Women's Lobby

International Association Autism-Europe

International Association of the Third-Age Universities

International Catholic Society for Girls

International Centre for the Legal Protection of Human Rights (INTERIGHTS)

International Commission of Jurists

International Confederation of Catholic Charities (CARITAS INTERNATIONALIS) (1 January 2000)

International Council of Environmental Law (ICEL) (1 January 2000)

International Council of Nurses

International Council on Social Welfare

International Federation of Educative Communities (FICE)

International Federation of Human Rights Leagues

International Federation for Hydrocephalus and Spina Bifida

International Federation of Musicians

International Federation for Parent Education (1 January 1999)

International Federation of Settlements and Neighbourhood Centres

International Humanist and Ethical Union

International Movement ATD - Fourth World

International Planned Parenthood Federation – Europe Region (IPPF)

International Road Safety

International Scientific Conference of Minorities for Europe of Tomorrow (ISCOMET)

Marangopoulos Foundation for Human Rights (MFHR) (1 January 2000)

Public Services International

Quaker Council for European Affairs (QCEA)

Standing Committee of the Hospitals of the European Union

World Confederation of Teachers