

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



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Case document No. 2

European Council of Police Trade Unions (CESP) v. France
Complaint n° 54/2008

WRITTEN SUBMISSIONS ON THE MERITS

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**MINISTRY
OF
FOREIGN AND EUROPEAN
AFFAIRS**

Paris, 4 May 2009

**DIRECTORATE
OF LEGAL AFFAIRS**

The Ministry of Foreign Affairs

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to

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The Executive Secretary of the European
Social Charter

Council of Europe
Directorate General of Human Rights

No. DJ/DDL

**Subject: collective complaint no. 54/2008: European Council of Police Trade Unions (CESP)
v. France**

In a letter of 9 January 2009, the European Committee of Social Rights informed the Government of the complaint submitted by the European Council of Police Trade Unions on 3 December 2008. The complaint was declared admissible on 17 February 2009. The Committee invited the Government to submit its observations on the merits by 4 May 2009.

The complaints submitted by the complainant

The European Council of Police Trade Unions complains firstly that the new working hours regulations of the command corps of the national police force, as they appear in the general regulations of the national police force of 6 June 2006, as amended by the order of 15 April 2008 and the instruction of 17 April 2008, are in breach of Article 2§1 of the revised Social Charter because the overtime worked by members of the command corps is no longer counted for the purposes of determining working hours.

It also maintains that the flat-rate payments established by Decree 2000-193 of 3 March 2000, as amended by Decree 2008-340 of 15 April 2008, and by the general regulations of the national police force of 6 June 2006, as amended by the order of 15 April 2008 and the instruction of 17 April 2008, are in breach of Article 4§2 of the revised Social Charter.

The Government challenges these contentions and offers the following observations in support:

The general regulations governing working conditions in the national police force

The working conditions regulations applicable to operational staff of the national police force derive from several legal provisions that have been modified to take account of changes in the status of the various corps of which it is composed. Reference should be made to the most important ones.

A- *Outline Act 95-73 of 21 January 1995*¹

Section 19 of the Act stipulates that:

"On account of their particular duties and responsibilities, operational staff of the national police force form a special category of the national public service. The general public service staff regulations may not apply to this special category of staff, to ensure that the organisation of the corps and careers concerned is adapted to the specific duties of the national police force.

Because of the nature of these duties, operational staff of the national police force are subject to special obligations regarding their availability, length of assignment, mobility and residence. The regulations governing their status, laid down by decree in the Conseil d'Etat, may include special conditions regarding the career patterns of police officers who are assigned on a long-term basis to certain large cities.

.... These officers may be granted exceptional allowances and special conditions governing their allowances and pension schemes on account of the specific nature of the duties and activities entrusted to them."

Article 22 of Decree 95-654 of 9 May 1995² establishing common conditions applicable to operational staff of the national police force, which implements section 19 of the Act of 21 January 1995, specifies the conditions governing compensation for overtime worked by the operational branches of the police.

Article 22 stipulates that:

"Hours worked in excess of the normal working week shall be compensated by equal or equivalent rest periods that must be granted as soon as is compatible with the needs of the service, or by an appropriate allowance system, under conditions laid down in a decree."

This decree therefore makes it possible to compensate overtime worked by operational police officers either by granting compensatory rest periods or by paying them an allowance, under conditions that must be laid down in a simple decree.

This is the specific legal background to Decree 2000-815 of 25 August 2000 on the adjustment and reduction of working hours in the national public service.

¹ Appendix 1

² Appendix 2

B- The Decree of 25 August 2000³

Particular attention should be drawn to two provisions of the Decree of 25 August 2000.

1. Following articles 1 and 2, which establish, respectively, an actual working week of 35 hours and the conditions governing daily and weekly hours worked, night work and daily rest periods, article 3-II provides for exceptions to these working arrangements, *"when the very purpose of the public service concerned so requires on a permanent basis, particularly for the protection of persons and of goods, by decree in the Conseil d'Etat, adopted after an opinion has been obtained from the health and safety committee if applicable, from the ministerial joint technical committee and from the supreme council of the public service, which shall define the compensation granted to the categories of staff concerned."*

2. The final paragraph of Article 4 of the decree stipulates that:

"For those staff subject to a system under which hours of overtime are counted, these hours shall be taken into account as soon as the hours of work defined by the work schedule have been exceeded.

They shall be the subject of compensatory time off within a time limit set by an order of the minister concerned, the minister responsible for the public service and the minister responsible for the budget, after an opinion has been obtained from the ministerial joint technical committee. Failing which, they shall receive a compensatory allowance."

This article therefore stipulates that in principle overtime worked beyond the legal working hours shall be the subject of compensatory time off, under conditions laid down in a ministerial order. Only failing that will a compensatory allowance be paid. In accordance with these provisions, special regulations have been drawn up for operational staff of the national police force.

3. Decree 2002-1279 of 23 October 2002⁴ introducing exceptions to the minimum guarantees relating to working time and rest applicable to employees of the national police force has been issued in accordance with Article 3-II of the Decree of 25 August 2000. Article 1 stipulates that:

"For the purposes of the organisation of the work of operational members of the national police force, there shall be exceptions to the minimum guarantees mentioned in section I of Article 3 of the aforementioned Decree of 25 August 2000 when the tasks entrusted to them in relation to public safety and public order, policing, intelligence and investigation, so require."

Article 2 specifies the arrangements for compensating operational police officers for these exceptions to the legal working hours:

"In compensation for the constraints resulting from Article 1, and irrespective of the specific advantages which they derive from their status, staff members shall benefit from a compensatory payment, from exemption to the effective annual working time of 1 607 hours, or from compensatory leave, equal or equivalent to the extra services performed, granted on an individual basis and in conditions laid down by an order of the Minister of the Interior."

³ Appendix 3

⁴ Appendix 4

4. The order of 3 May 2002 applies to the national police force articles 1, 4, 5 and 10 of Decree 2000-815 of 25 August 2000 on the adjustment and reduction of working hours in the national public service.

The initial version of Article 4 of this order stipulated that if no compensatory payment was made for overtime worked, compensatory time off would be granted, under conditions laid down in an order of the Interior Ministry.

This was thus the situation before the changes to the staff regulations applicable to operational members of the national police force.

B- The reform of 17 June 2004

The memorandum of understanding of 17 June 2004 on reform of the corps and careers in the national police force, dated 17 June 2004, stipulated that:

"all senior police officers will be assigned managerial status, with no accumulation of overtime hours worked and an unchanged adjustment and reduction of working hours scheme."

This entailed firstly a reform of the status of those concerned through the establishment of a command corps to replace the existing command and management corps (Decree 2005-716 of 29 June 2005⁵ on the specific status of the command corps of the national police force).

Article 2 specifies the duties of the members of this corps:

"The senior police officers who constitute this corps shall perform operational command duties and provide advanced knowledge and skills with regard to internal policing and security. They shall assist and replace police superintendants in the performance of their duties, except in cases where the law explicitly requires a superintendant's intervention. They shall also manage certain departments."

The increase in their responsibilities has also been reflected in a higher pay scale as a result of their upgrading to category A managerial status.

The memorandum of understanding has been implemented via a number of decrees and orders on their revised working arrangements. The regulations on the adjustment and reduction of working hours of members of the command corps were approved in April 2008. They comprise:

- Decree 2008-340 of 15 April 2008⁶ amending Decree 2000-193 of 3 March 2000 setting the conditions for compensation for overtime for operational members of the police force,

- an interministerial order of 15 April 2008⁷ amending the order of 3 May 2002 applying to the national police force Articles 1, 4, 5 and 10 of Decree 2000-815 of 25 August 2000 on the adjustment and reduction of working hours in the national public service,

- Decree 2008-341 of 15 April 2008 awarding a command bonus to members of the national police command corps,

⁵ Appendix 5

⁶ Appendix 6

⁷ Appendix 7

- an order of 15 April 2008⁸ setting the amounts of the command bonus awarded to members of the national police command corps,

- a ministerial order of 15 April 2008⁹ amending the amended order of 6 June 2006 on the general regulations governing employment in the national police force,

- a circular of 16 April 2008 on the application of the memorandum of understanding on reform of the corps and careers in the national police force to the command corps from 1 April 2008.

These new regulations came into force on 1 April 2008.

However, in a series of five applications registered with the *Conseil d'Etat* on 16 June 2008, the national union of senior police officers asked for nearly all of these regulations to be set aside. These applications are still, currently, before the court.

Additionally, the European Council of Police Trade Unions (CESP) is also challenging these regulations in complaint 54/2008 of 3 December 2008.

Failure to exhaust domestic remedies

As it is entitled to under its rules of procedure, the European Committee of Social Rights declared the European Council of Police Trade Unions' complaint admissible, without asking the French Government for its observations on its admissibility.

The Government nevertheless wishes to challenge the admissibility of the complaint on grounds of failure to exhaust domestic remedies.

There are currently five applications from the national union of senior police officers before the *Conseil d'Etat*. The complaints made in these applications are the same as those that the CESP makes in complaint 54/2008 before the European Committee of Social Rights. Nor has the complainant organisation associated itself, directly or indirectly, with the challenge to the relevant regulations in the domestic courts. The latter have not yet reached a decision on this case.

Admittedly, in its decision on the merits of complaint 38/2006 of 3 December 2007 introduced by the same complainant organisation, the Committee rejected the French Government's argument that the complaint was inadmissible for failure to exhaust domestic remedies on the grounds that the Additional Protocol to the Charter establishing the collective complaints system did not make the exhaustion of domestic remedies a condition of admissibility.

However, it is important to stress this point and to remind the Committee that, in accordance with the subsidiarity principle, the exhaustion of domestic remedies condition is recognised by the various international courts and committees of the United Nations responsible for hearing individual and collective applications and complaints.

For example, in the *Interhandel* case, the International Court of Justice stated that the requirement to exhaust domestic remedies, which is an aspect of customary international law, has to be taken into account in international disputes.

⁸ Appendix 8

⁹ Appendix 9

Although none of the provisions of the European Social Charter include such an obligation, the Committee will agree that it is still important to take account of the "general principles of international law", of which the subsidiarity principle is one of the most important. The application of this principle to international disputes necessarily entails the exhaustion of domestic remedies.

Moreover, in its interpretations¹⁰ of various provisions of the Charter, the Committee often lays great stress on the need for states to establish efficient and effective remedies, to enable those concerned to enforce their rights under the Charter in the domestic courts. The Committee therefore appears to acknowledge explicitly that responsibility for rectifying any alleged Charter violations rests firstly with the domestic authorities.

Even if the Committee refuses to accept the Government's reasoning it might nevertheless conclude that since similar cases are currently before the domestic courts, it would be appropriate to defer consideration of this complaint to a later date, in case the decisions handed down are challenged by the complainant organisation.

I. The complaint under Article 2§1 of the Social Charter, concerning working hours

Interpretation of the European Committee of Social Rights

According to the Committee, flexible working hours as such are not incompatible with the revised Social Charter.

However, to comply with the Charter, particularly Article 2§1 on the right to reasonable working hours, national legislation on the organisation of working time must satisfy certain criteria. In particular, daily and weekly working time must not be unreasonable. In the absence of a precise definition of what constitutes reasonable working time, the Committee assesses the situation case by case. It has found, for example, that a 16 hour working day can be considered unreasonable¹¹, as can a 60 hour working week.

Moreover, such regulations should be established within a legal framework which provides adequate safeguards. Finally, the legislation should provide for reference periods of a reasonable length for the calculation of average working time, and these reference periods should not exceed six months, other than in exceptional circumstances where they may be up to a year.

The working time system for members of the police command corps

In this complaint, the European Council of Police Trade Unions (CESP) challenges regulations that derive directly from a memorandum of understanding signed by the Government and the representative trade unions that accepted the terms.

The CESP maintains that the reform of the employment conditions of members of the command corps will lead to the indirect abolition of the restrictions on working hours, in breach of Article 2§1 of the revised Social Charter, which provides for "reasonable daily and weekly working hours".

More specifically, it claims that implementation of the regulations on the working hours of senior police officers would remove any restriction on the hours worked by these officers since the

¹⁰ See conclusions XV-2 – statements of interpretation on Article 17; see also the interpretations under articles 1, 4, 5, 6 and 15.

¹¹ See Conclusions XIV-2, Norway page 579

overtime they worked would no longer be recorded, and that as a result they would be deprived of reasonable daily and weekly working hours.

It must be emphasised that the new arrangements do not pose a threat to the legal working week. Decree 2000-815 of 25 August 2000 on the adjustment and reduction of working hours in the national public service and the judiciary, which serves as a reference in this respect, has certainly not been repealed. It therefore continues to be applicable to members of the command corps of the national police force. The decree establishes an annual working year of 1607 hours and a fixed 35 hour week. This is expressly confirmed in the amended order of 6 June 2006 on the general regulations governing employment in the national police force.

Similarly, the order of 3 May 2002 - still in force - applying to the national police force Articles 1, 4, 5 and 10 of Decree 2000-815 of 25 August 2000, also refers to a maximum number of yearly hours to be worked.

In practice, these restrictions maintain a dual restriction on the working hours of senior police officers, with annual and weekly limits of 1607 and 35 hours respectively, irrespective of any additional duties that these officers may be required to perform.

Moreover, in the absence of a precise definition of working time, the European Committee of Social Rights adopts a case by case approach, having regard to specific situations. It has thus acknowledged, in a decision concerning increased pay for overtime, that certain categories of senior officials and managers may be covered by different arrangements¹².

In this case, members of the command corps are now treated as managers and as such are required to exercise greater responsibilities that justify changes in the organisation of their work time. Senior police officers are responsible for managing internal departments and individual units. They may be required to manage entities such as *département* police directorates, district offices, training units or other operational units such as regional intervention groups. In these cases, they have authority over all personnel attached or seconded to them and exercise all the responsibilities specified in Article 111-4 of the national police force general regulations, and all the powers associated with this type of post. They may also act as deputy to a head of department.

The transition to managerial status also necessarily requires the officers concerned to take responsibility for and actively participate in the management of special assignments they might be required to carry out. They then have to organise their time, as managers, to ensure that they do not have to carry out regular assignments that last longer than their average working days.

At all events, it cannot be argued that there is no legislation laying down senior police officers' employment conditions and establishing adequate safeguards concerning any additional duties they might perform. As compensation for the constraints linked to their new responsibilities, senior police officers' allowances and salary scales have been increased, as have the hourly or fixed compensation for certain additional services.

II -The complaint under Article 4§2 concerning higher overtime pay

The complaints submitted by the complainant

The European Council of Police Trade Unions argue that the overtime arrangements are in breach of Article 4§2 of the revised Charter, whereby: *"With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake: (...)*

¹² See the Digest of the Case Law of the ECSR, paragraphs 117 and 118, p. 220.

2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;"

Interpretation of the European Committee of Social Rights

The Committee has already ruled on a number of occasions on the scope of Article 4§2 of the revised Charter. It considers that employees working overtime must be paid at a higher rate than their normal hourly pay. For example, offering compensatory leave for overtime worked is only compatible with Article 4§2 if the leave in question is longer than the number of overtime hours worked¹³.

However, the Committee also accepts that there may be exceptions to the requirements of Article 4§2. This applies in particular to senior public officials and managers. For example, in its conclusion X-2 on Ireland, dated 1 January 1988, the Committee noted that "by virtue of the legislation and regulations in force, collective agreements and established practice, increased rates of remuneration were actually paid for overtime work in the public and private sectors, except to *senior officials*, management and workers for whom there are no arrangements for overtime..."¹⁴.

The Committee considers that excluding public officials from the requirement for higher overtime rates without distinguishing between levels of responsibility is incompatible with Article 4§2. However, exceptions for senior officials are possible¹⁵.

The French Government's reply

The Government will first describe the current arrangements for members of the command corps. This will show that Article 4§2 and the Committee's case-law on increased overtime pay are not applicable to this complaint.

The current situation of members of the command corps with regard to overtime

Since 1 April 2008, when members of the command corps gained the status of managers, there have been special regulations on payment for any overtime they work. The main principle is set out in Article 22 of Decree 95-654 of 9 May 1995 establishing common conditions applicable to operational staff of the national police force:

"Subject to the conditions laid down in employment regulations established by ministerial order, operational members of the national police force may be required to perform their duties, day or night, outside the limits set for the normal working week.

Hours worked in excess of the normal working week shall be compensated by equal or equivalent rest periods that must be granted as soon as is compatible with the needs of the service, or by an appropriate allowance system, under conditions laid down in a decree."

The specific nature of the duties performed by members of the command corps are reflected in a special allowance system that takes account both of these officers' work patterns and the additional duties they are called on to perform, in accordance with Article 113-37 of the general regulations governing employment in the national police force.

¹³ See Conclusions XIV-2, Belgium page 134

¹⁴ See the Digest of the Case Law of the ECSR, paragraphs 117 and 118, p. 220.

¹⁵ See Conclusions XV-2, Poland, page 419

Moreover, the aforementioned Article 22 clearly provides for two forms of compensation for overtime, compensatory time off or financial compensation, which means that senior police officers have no established entitlement to overtime payments, let alone to a higher rate of overtime pay.

1. Changes in senior police officers' duties and the need to take specific account of their work pattern and the additional duties performed

Before 1 April 2008, under Decree 2000-194 of 3 March 2000¹⁶, senior police officers could register all the hours of overtime they had worked and were entitled to an allowance for additional duties, but following changes in the status of this corps this no longer applies.

Members of the command corps of the national police force are now expected to exercise additional responsibilities that require increased availability to work as and when required, as specified in Article 2 of Decree 2005-716 of 29 June 2005 on the specific status of the command corps of the national police force.

In determining whether overtime should be compensated on a hourly basis or by an allowance, consideration therefore has to be given to the nature of these senior officers' duties and their work patterns.

2) Articles 4 and 10 of Decree 2000-815 of 25 August 2000 establish two sets of working arrangements

Following the upgrading of the responsibilities of the command corps, senior police officers are now subject to two sets of working arrangements, laid down in articles 4 and 10 of Decree 2000-815 on the adjustment and reduction of working hours in the national public service.

The details of these working arrangements are laid down in articles 4 and 6 of the order of 3 May 2002, which applies to the national police force Articles 1, 4, 5 and 10 of Decree 2000-815.

a) Senior police officers not covered by Article 10 of Decree 2000-815 on the adjustment and reduction of working hours in the national public service

Under Article 113-37 of the amended order of 6 June 2006 on the general regulations governing employment in the national police force, senior officers who are not covered by Article 10 of Decree 2000-815 are no longer entitled to compensatory time off for time spent on call or on overtime, or on special duties. The payment system which applies to them shall compensate them in the form of a flat-rate payment for their exclusion from the benefit of such compensatory time off.

Under this allowance scheme, the senior officers concerned receive a command bonus, revalued by an order of 15 April 2008, which may vary in size according to the scale of the responsibilities assigned to them, how they carry out their duties and the various constraints inherent in the performance of their duties, up to a maximum of 140% of the monthly allowances specified in the order¹⁷.

¹⁶ Appendix 10

¹⁷ See the ministerial circular of 21 May 2008 on the arrangements for payment of the command bonus

Additionally, these officers continue to receive compensatory time off for stand-by duty performed and, subject to Decree No. 2002-819 of 3 May 2002, as amended, relating to the arrangements for remuneration and compensation for the time spent on call by staff of the national police force, for specific remuneration for their periods on call or, failing any such remuneration, compensatory time off.

b. Senior police officers who are covered by Article 10 of Decree 2000-815 on the adjustment and reduction of working hours in the national public service

Under Article 113-37 of the amended order on the general regulations governing employment in the national police force, senior officers who are covered by Article 10 of Decree 2000-815 are by definition no longer entitled to compensatory time off for time spent on call or on overtime, or on special duties.

However, to offset this loss of entitlement these senior officers now receive the allowance instituted by Decree 2004-455 of 27 May 2004 establishing a duty allowance for members of the national police planning and management corps, and police commanders who are heads of public security districts, of departments or of self-contained units. Under the order of 7 November 2006, the average monthly allowance to senior officers operating under the working arrangements instituted by Article 6 of the order of 3 May 2002 is € 743.

It should also be pointed out that under Article 113-37 of the general regulations governing employment in the national police force, these officers receive compensatory time off for stand-by duties they perform.

Equally, all these officers, irrespective of how their overtime is taken into account, continue to receive their fixed allocations of annual leave, special leave linked to their irregular hours and days off to compensate for particularly time-consuming and demanding operational tasks and activities.

Finally, it should be stressed that, to coincide with the reform of the working hours of senior police officers and the abolition of their overtime payments, they were placed on a higher pay scale under the order of 17 April 2008.

The inapplicability of Article 4§2 to this complaint

The special nature of their duties and more specifically the fact that they have managerial status means that the senior police officers in question come within the scope of the exceptions provided for in Article 4§2 of the revised Social Charter and confirmed by the Committee's case-law.

The decisions of the European Committee of Social Rights in which it has confirmed that there can be exceptions to the principle of higher overtime pay and specified the particular cases in which such exceptions may be allowed must be applied to this category of staff. The Committee acknowledge that for certain categories, in particular senior officials and managers, exceptions to higher overtime rates are permissible.

It confirmed this principle in its conclusion X-2 on Ireland, dated 1 January 1988, where it stated that "by virtue of the legislation and regulations in force, collective agreements and established practice, increased rates of remuneration were actually paid for overtime work in the public and

private sectors, except to *senior officials*, management and workers for whom there are no arrangements for overtime..."¹⁸.

In this particular case, members of the command corps of the national police force now have managerial status, as the complainant organisation explicitly acknowledges and are required to exercise managerial functions. As a result, like other public officials performing such duties, they are now subject to working arrangements in which they no longer accumulate some of the overtime they work.

The inapplicability of the European Committee of Social Rights decision in CESP v. France, 3 December 2007

The complainant organisation refers in support of its complaint to the previous decision of the European Committee of Social Rights, dated 3 December 2007.

The Committee has already considered the compatibility of the overtime arrangements applicable to police officers with Article 4§2 of the revised Social Charter, leading to its December 2007 decision.

It concluded that there had been a violation of the Charter, and stated that: *"the system of flat-rate payments for overtime established by Article 3 of Decree No. 2000-194 has the effect of denying the proper increase required by Article 4§2 of the Revised Charter to officers who cannot be excluded from entitlement to increased remuneration because of the nature of their duties"*.

Since this decision and the implementation of the regulations arising from the most recent agreements with the trade unions representing members of the police, the situation of senior officers of the command corps has changed considerably. The duties assigned to them and the benefits they acquired in December 2007 mean that they now unquestionably perform a management role.

In practice, the fact that senior police officers effectively became part of a management corps on 1 April 2008 excludes them from the scope of Article 4§2 of the revised Social Charter and means that they come within the categories of exceptions authorised by this article, which the European Committee of Social Rights confirmed in its conclusion on Ireland on 1 January 1988.

The complainants cannot therefore rely on the Committee's decision of 3 December 2007 in which it held that the system of flat-rate payments for overtime established by Article 3 of Decree 2000-194 had the effect of depriving senior police officers of the increased remuneration that Article 4§2 of the revised Charter entitled them to.

In view of the foregoing comments, the French Government concludes that the complaints of breaches of articles 2§1 and 4§2 of the European Social Charter are unfounded and asks the European Committee of Social Rights to reject the complaint lodged by the European Council of Police Trade Unions.

Anne-Françoise Tissier
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¹⁸ See the Digest of the Case Law of the ECSR, paragraphs 117 and 118, p. 220.

Appendices

Act 95-73 of 21 January 1995

Decree 95-654 of 9 May 1995

Decree 2000-815 of 25 August 2000

Decree 2002-1279 of 23 October 2002

Decree 2005-716 of 29 June 2005

Decree 2008-341 of 15 April 2008

Order of 15 April 2008

Order of 15 April 2008 setting the amounts of the command bonus

Order of 15 April 2008 amending the amended order of 6 June 2006 on the general regulations governing employment in the national police force