EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON THE MERITS

Adoption: 12 September 2017

Notification: 11 October 2017

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European Organisation of Military Associations (EUROMIL) v. Ireland

Complaint No. 112/2014

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 294th session attended by:

Giuseppe PALMISANO President
Monika SCHLACHTER, Vice-President
Karin LUKAS, Vice-President
Eliane CHEMLA, General Rapporteur
Birgitta NYSTRÖM
Petros STANGOS
Krassimira SREDKOVA
Raul CANOSA USERA
Marit FROGNER
François VANDAMME
Barbara KRESAL
Kristine DUPATE
Aoife NOLAN

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 4 July and 12 September 2017,

On the basis of the report presented by Birgitta NYSTRÖM

Delivers the following decision adopted on the latter date:

PROCEDURE

1. The complaint submitted by the European Organisation of Military Associations ("EUROMIL") was registered on 4 November 2014. It was transmitted to the Government on 5 December 2014.

2. The complainant organisation alleges that the Ireland is in violation of Article 5 and Article 6 of the Revised European Social Charter ("the Charter") on the grounds that defence force representative associations do not possess proper trade union rights.

3. On 30 June 2015, the Committee declared the complaint admissible. On 6 July 2015 the admissibility decision was communicated to the parties and the Government was simultaneously invited to make written submissions on the merits of the complaint by the time-limit of 30 September 2015.

4. On 10 July 2015, referring to Article 7§1 of the Protocol providing for a system of collective complaints ("the Protocol"), the Committee invited the States Parties to the Protocol, and the States having made a declaration under Article D§2 of the Revised Charter, to transmit to it any observations they might wish to make on the merits of the complaint before 30 September 2015.

5. No such observations were received.

6. The Government's submissions were registered on 30 September 2015.

7. EUROMIL's response was registered on 16 December 2015. On 7 January 2016 the Government requested permission to submit a further response which was registered on 26 February 2016.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

9. EUROMIL invites the Committee to find a violation of Articles 5 and 6 of the Charter on the grounds that Ireland does not afford defence force representative associations full trade union rights, and in particular the right to join umbrella organisations such as the Irish Congress of Trade Unions ("ICTU"), the right to take part in collective bargaining over pay and the right to take collective action.

B – The respondent Government

10. The Government requests the Committee to find the complaint unfounded in all respects.

RELEVANT DOMESTIC LAW AND PRACTICE

11. Defence Act 1954 as amended

Defence (Amendment) Act 1990

Section 2 provides as follows:

(1) Subject to Section 3 of this Act, the Minister may provide by regulations for the establishment of an association or associations (in this Act referred to as an "association") for the purpose of representing members of such rank or ranks of the Defence Forces as may be specified in the regulations in relation to matters affecting their remuneration and such other matters as the Minister may specify in the regulations, but excluding matters relating to any operation and the raising, maintenance, command, constitution, organisation and discipline of the Defence Forces under the Principal Act and offences in relation to the Defence Forces and military property under that Act.

(2) An association shall represent under subsection (1) of this section only members of the association.

(3) An association shall be independent of and shall not, without the consent of the Minister, be associated with or affiliated to any trade union or any other body.

(4) A member shall not become a member of a trade union, or of any other body (other than an association), which seeks to influence or otherwise be concerned with the remuneration or other conditions of service of members.

(5) The Minister shall determine any question that arises as to whether any trade union or any other body is a trade union or body to which subsection (4) of this section applies.

(6) The Minister may provide by regulations for the establishment of a system of conciliation and arbitration in respect of such matters, in relation to which an association represents members, as the Minister may specify in the regulations

(7) Regulations under this section may provide for such ancillary, subsidiary and connected matters as the Minister considers necessary or expedient.

12. Defence Force Regulations S. 6

Section 2

(l) There shall stand established an association to be known as the "Representative Association of Cornmissioned Officers" (or in Irish "Comhlachas lonadaitheach na nOifigeach Coimisiunta") for the purpose of representing officers of the Permanent Defence Force of the ranks of Colonel, Lieutenant-Colonel, Commandant, Captain, Lieutenant and Second-Lieutenant and of representing Cadets, in relation to the matters specified in the Third Schedule to these regulations.

Section 19

(l) There shall stand established an association to be known as the "Permanent Defence Force Other Ranks Representative Association" (or in Irish "Comhlachas lonadaitheach Cheimnigh Eile na mBuan-Oglach") for the purpose of representing non-commissioned officers and privates of the Permanent Defence Force of the ranks of Sergeant-Major, Battalion Quartermaster-Sergeant, Company-Sergeant, Company Quartermaster-Sergeant, Sergeant, Corporal and private (other than a Cadet) in relation to the matters specified in the Third Schedule to these regulations.

Section 20

(l) Subject to the provisions of the Defence Acts, 1954 to 1990 and regulations made thereunder the Association shall be independent in the formulation of its policy, in its deliberations and in its decision-making process. For those purposes the Association shall also be subject to its constitution and rules as approved, ratified and adopted in accordance with paragraph 34.

Section 24 (1)
(1) Subject to section 2 of the Act, the matters which shall come within the scope of representation of the Association shall be those set out in the Third Schedule to these regulations;

(2) To such an extent as may be set out in a scheme of conciliation and arbitration established by the Minister, in consultation with the Association, such of the matters referred to in the Third Schedule to these Regulations as may be agreed between the Minster and the Association shall be processed under such a scheme.

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

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

Section 28 (in relation to the Permanent Defence Forces Other Ranks Representative Association)

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

13. Industrial Relations Act 1990

PART II
Trade Union Law
Trade Disputes
Definitions for Part II .

8.—In this Part, save where the context otherwise requires—

““employer” means a person for whom one or more workers work or have worked or normally work or seek to work having previously worked for that person;

“trade dispute” means any dispute between employers and workers which is connected with the employment or non-employment, or the terms or conditions of or affecting the employment, of any person;

“trade union” means a trade union which is the holder of a negotiation licence under Part II of the Trade Union Act, 1941 ;

“worker” means any person who is or was employed whether or not in the employment of the employer with whom a trade dispute arises, but does not include a member of the Defence Forces or of the Garda Síochána;”

RELEVANT INTERNATIONAL MATERIALS

I. The Council of Europe

14. The European Convention on Human Rights 1950 (“the Convention”) includes the following provision:

Article 11 - Freedom of assembly and association

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

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

15. According to the European Court of Human Rights (ECtHR), the characteristics of military life differ by nature from those of civil life (Engel and others v. the Netherlands, applications Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, judgment of 8 June 1976, §§54, 57, 59, 73, 103). As to the restriction in Article 11§2 of the Convention concerning the rights of the members of the armed forces, the ECtHR has held in particular that:

“During the preparation and subsequent conclusion of the Convention, the great majority of the Contracting States possessed Defence forces and, in consequence, a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians. The existence of such a system, which those States have retained since then, does not in itself run counter to their obligations. [...]” (§57)

"[…] Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation. […]" (§59)

[…] In Matelly v. France (application No. 10609/10, judgment of 2 October 2014, §§56-58, 71, 75-77), the applicant contested the statutory prohibition against members of the Gendarmerie forming professional associations or trade unions. The Court held that Article 11 of the Convention allowed States Parties to restrict, even significantly, the actions and expressions of a professional association founded by the members of the armed forces, as well as those of the individual members of such an association. Such restrictions could nevertheless not entirely deprive the association's members of their rights under Article 11 of the Convention. The grounds invoked by the Government in support of the imposed restrictions were neither pertinent nor sufficient to justify an absolute prohibition to adhere to a professional association founded for the purpose of defending the members' professional and moral interests. Such a prohibition affected the essence of the freedom guaranteed under Article 11 of the Convention and constituted a violation of the provision (also ADEFDROMIL v. France, application No. 32191/09, judgment of 2 October 2014, §§55, 58, 60; Junta Rectora del Ertzainen Nazional Elkartasuna (ER.N.E) v. Spain, application No. 45892/09, judgment of 21 April 2015, §§28-33).

II. Other materials

16. The Committee of Ministers of the Council of Europe has adopted the following texts:

Recommendation CM/Rec (2010)4

Recommends that the governments of the member states:

"1. ensure that the principles set out in the appendix to this recommendation are complied with in national legislation and practice relating to members of the armed forces;

[…] "

28. The Appendix to the above Recommendation provides as follows:

"2. Whilst taking into account the special characteristics of military life, members of the armed forces, whatever their status, shall enjoy the rights guaranteed in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, "the Convention") and the European Social Charter and the European Social Charter (revised) (hereafter, "the Charter"), as well as other relevant human rights instruments, to the extent that states are bound by them.

[…]

53. No restrictions should be placed on the exercise of the rights to freedom of peaceful assembly and to freedom of association other than those that 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.

54. Members of the armed forces should have the right to join independent organisations representing their interests and have the right to organise and to bargain collectively. Where these rights are not granted, the continued justification for such restrictions should be reviewed and unnecessary and disproportionate restrictions on the right to assembly and association should be lifted.

55. No disciplinary action or any discriminatory measure should be taken against members of the armed forces merely because of their participation in the activities of lawfully established military associations or trade unions.

[…]

57. Paragraphs 53 to 56 should not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces.

[…]”

III. The United Nations

17. The International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) includes the following provision:

“Article 8

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.

[…].”

18. The International Covenant on Civil and Political Rights (New York, 16 December 1966) includes the following provision:

“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.

[…].”

IV. International Labour Organisation

19. Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise

"Article 2

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

Article 5

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

Article 9

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.

[…]"

20. Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively

"Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

Article 5

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

[…]"

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CHARTER

21. Article 5 reads as follows:

Article 5 – The right to organise

Part I: "All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests."

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

22. Article G reads as follows:

Article G – Restrictions

1 "The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.
2 The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

A – Arguments of the parties

1. The complainant organisation

23. EUROMIL states that the prohibition on Defence Force organisations from joining umbrella organisations such as the Irish Congress of Trade Unions (ICTU), is in violation of Article 5 of the Charter.

24. Section 2 of the Defence (Amendment) Act 1990 provides that a military representative association must be independent and shall not without the consent of the Minister be associated with or affiliated to any trade union or other body. Further it provides that "A member shall not become a member of a trade union, or of any other body (other than an association), which seeks to influence or otherwise be concerned with the remuneration or other conditions of service of members.".

25. One of the two defence force representative associations; Permanent Defence Forces Other Ranks Representative Association (PDFORRA) sought the consent of the Minister of Defence to become affiliated to ICTU but was refused. EUROMIL states that ICTU has stated that PDFORRA could be afilliated to ICTU with whatever conditions the Government deems necessary.

26. EUROMIL maintains that prohibiting/denying military representative associations from becoming affiliated to ICTU has the effect of preventing them attend the national negotiations ICTU conducts on salaries in the public service sector.

27. EUROMIL recognises that Article 5 of the Charter permits restriction on the right to organise of members of the armed forces, however it argues that such a restriction (prohibiting their affiliation with ICTU which conducts negotiations on pay etc. for the public sector) has the effect of denying their associations from expressing their demands on working conditions and pay which is an important trade union prerogative. No pressing justification can be invoked for such a restriction, nor could it be considered proportionate to any aim of public safety or public interest.

28. EUROMIL states that PDFORRA and the Representative Association of Commissioned Officers (RACO) have been permitted to affiliate to EUROMIL and EUROFEDOP.

2. The respondent Government

29. The Government recalls that there are two representative associations representing military personnel, PDFORRA representing 6,754 personnel and 1,000 officers represented by RACO. They are independent in their formulation of policy and decision making process. Both are recognized by the Ministry of Defence and Ministry of Public Expenditure for negotiating purposes.

30. Section 2 of the Defence (Amendment) Act 1990 prevents a military representative association such as PDFORRA from being associated with or affiliated to any trade union or any other body without the consent of the Minister for Defence.

31. The Government argues that the restrictions on military representative associations, namely PDFORRA and RACO from affiliating with ICTU do not amount to a breach of Article 5 of the Charter, in light of the trade union prerogatives that are afforded to them and the unique nature of the military and its role in maintaining national security and public order.

32. The Government recalls that Committee has recognised that Article 5 of the Charter “authorises restrictions on or the removal of the right to organise for two categories of employees, namely members of the police and members of the armed forces.” Article 5 also distinguishes between these two categories. In this regard, the provision is more permissive of restrictions applying to members of the armed forces than it is with respect to restrictions applying to the police. Under Article 5, States Parties are entitled to restrict or withdraw the right to organise in the case of members of the armed forces.

33. According to the Government the restrictions fall within the scope of the permissible restrictions for the armed force expressly permitted by Article 5 of the Charter and in the alternative the scope of permissible restrictions provided for by Article G of the Charter.

34. The Government submits that the impugned restriction is established by law (Section 2 of the Defence Act). Further it has a legitimate objective and is necessary in a democratic society. Such affiliation, according to the Government is regarded as being irreconcilable with the unique nature of military service and its role in maintaining national security and public order, public health, morals and freedom of others. The restriction is intended to ensure the operational effectiveness of the armed forces and military discipline. Members of a union may act collectively or on the instruction of union officials and as such may give rise to a rival source of authority or allegiance. This conflicts with the chain of command within the military. The problem is particularly acute in circumstances where the body in question is a civilian congress of unions. It is crucial for military representative associations to remain unbound by decisions of entities as ICTU whose members are not subject to military law and discipline if they engage in industrial action.

35. The Defence Force also play a vital role in public safety, in practice assisting *An Garda Síochána* (the police), who have primary responsibility for law and order, including the protection of the internal security of the State.

36. It further supports lead agencies in response to major emergencies and provides a range of other supports to government departments and agencies, e.g. search and rescue operations and air ambulance services etc. It is crucial for military representative associations to remain unbound by decisions of such outsider entities as ICTU, which do not need to consider similar factors in their decisionmaking.

37. Strike action is inconsistent with the role of the Defence Force. The first stated objective of ICTU, however, is: “To uphold the democratic character and structure of the Trade Union Movement, to maintain the right of freedom of association and the right of workers to organise and negotiate and all such rights as are necessary to the performance of trade union functions and in particular, the right to strike.” A condition of affiliation to ICTU is that the trade union’s objects and policy must be in harmony with the Constitution of ICTU. Article 4 of the ICTU Constitution provides that “A Trade Union desiring to affiliate to Congress shall satisfy the Executive Council that its rules, objects and policy are in harmony with the Constitution of Congress and undertake to abide by its provisions”. Public agitation on the part of PDFORRA and RACO, however, is prohibited by Defence Regulation S.6. In this respect, the Government submits that there is a clear conflict between strike action and military discipline.

38. The interference is justified by the need to prevent the Defence Force from being destabilised by protest movements within organisations such as ICTU. Even if they were permitted to voluntarily forswear industrial action, their members would be open to risks of external influence and industrial militancy in such arrangements.

39. In circumstances where the Defence Forces could be called upon to aid the Civil Authority, as has happened in the past, a clear conflict of objects and policy arise. For instance, this might give rise to members of the Defence Force having to cross picket lines. The Government provides examples of where the military have been deployed to carry out tasks etc. during strikes, how military personnel have been made available to maintain services.

40. The Government, accordingly, submits that this restriction is justified and legitimate as it is prescribed by law and is necessary for the protection of the rights and freedoms of others and for the protection of public interest, national security, public health and morals.

41. The Government also maintains that non-affiliation to ICTU has not had the factual effect of impairing the freedom of members of the armed forces to organise for the protection of their economic and social interests.

42. Furthermore, by establishing representative organisations which exercise most trade union prerogatives and which are permitted to affiliate to other organisations such as EUROMIL and EUROFEDOP, the restriction imposed on the freedom of association of the military is a minimal one in nature and sufficiently precise in scope in order to meet the requirements of Article G of the Charter.

43. Accordingly, the Government submits that the restriction on the military representative associations from affiliating to ICTU does not constitute an interference with Article 5 of the Charter, and in the alternative is a permissible restriction under Article G of the Charter.

B – Assessment of the Committee

44. The Committee recalls that it has held in the past that the third sentence of Article 5 of the Charter permits States Parties to limit and even suppress entirely the freedom to organise for members of the armed forces (Conclusions I (1969), Statement of Interpretation on Article 5; European Federation of Employees in Public Services (EUROFEDOP) v. France, Complaint No. 2/1999, decision on the merits of 4 December 2000 §28; Conclusions 2002 and 2006, France).

45. However the Committee recalls that in European Council of Trade Unions (CESP) v. France, Complaint No.101/2013, decision on the merits of 27 January 2016, §82, it noted that Article 31§§1 to 3 of the Vienna Convention of the Law on Treaties which codifies customary international law, requires the terms of a treaty to be read in their context and in the light of its objective and purpose. In so doing, the Committee decided that it must consider Article 5 of the Charter in the light of complementary international instruments, above all the European Convention on Human Rights and the Court’s interpretation of its provisions. The International

Covenant on Economic, Social and Cultural Rights is another key source of interpretation (mutatis mutandis, International Movement ATD Fourth World v. France, Complaint No. 33/2006, decision on the merits of 5 December 2007, §§68-71; European Federation of National Organisations working with the Homeless (FEANTSA) v. France, Complaint No. 39/2006, decision on the merits of 5 December 2007, §§64-65).

46. With regard to Article 11 of the European Convention on Human Rights, the Court held in Matelly v. France (see above §15) that “lawful restrictions […] must be construed strictly and confined to the exercise of the right in question [and] must not impair the very essence of the right to organise; a mere suppression of the right to organise was not a “measure necessary in a democratic society” (also ADEFDROMIL v. France, judgment cited above, §§55, 58, 60; Junta Rectora del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain, judgment cited above, §§28-33). Moreover, if Article 8§2 of the International Covenant on Economic, Social and Cultural Rights, Article 22§2 of the International Covenant on Civil and Political Rights, and Article 9§2 of ILO Convention (No. 87) (see §§ 30 to 32) provide for the possibility to impose restrictions upon the right of members of the armed forces to organise, they do not allow for the full exclusion of that right. Also, Recommendation CM/Rec(2010)4 of the Committee of Ministers (Appendix, §54; see §§ 27-28) calls upon States Parties to lift disproportionate restrictions on the right to association of the members of the armed forces.

47. Given this context, the Committee considers that Article 5, of the Charter allows States Parties to impose restrictions upon the right to organise of members of the armed forces and grants them a wide margin of appreciation in this regard, subject to the terms set out in Article G of the Charter. However, these restrictions may not go as far as to suppress entirely the right to organise, such as the blanket prohibition of professional associations of a trade union nature and of the affiliation of such associations to national federations/confederations, see CESP v. France, Complaint No.101/2013, §84, op. cit.

48. Although the right guaranteed in Article 5 is the right of individuals to form and join trade unions, Article 5 provides that workers must be free to form local, national, or international organisations. The Committee has consistently held that this implies for the organisations themselves, the right to establish and join federations. A State Party cannot limit the level at which workers may organize and must allow organisations to affiliate to federations and confederations. However the Committee has held in the context of police associations that affiliation may be made conditional upon whether the latter organisations are considered to be pursuing similar goals as the police associations see European Council of Trade Unions (CESP) v. Portugal, Complaint No.11/2001, decision on the merits of 21 May 2002, §§35-36, 38).

49. National umbrella organisations of employees may be observed to often possess more significant bargaining power in national negotiations, which is why their membership may amount to one of the primary means of conducting pay negotiations. This is all the more relevant for an organisation operating under several restrictions on its trade union rights (European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012, decision on admissibility and merits of 2 December 2013).

50. The Committee notes that Ireland allows members of the armed forces to form and join professional associations subject to certain conditions.

51. The Committee notes that the restriction on affiliation is prescribed by law.

52. The Government argues that the restriction on affiliation is necessary for the protection of the rights and freedoms of others and for the protection of public interest, and national security.

53. The Government maintains that preventing military representative associations from joining national umbrella organisations is necessary on the basis that it would be irreconcilable with the unique nature of military service and its role in maintaining national security and public order, public health, morals and freedom of others. The restriction is intended to ensure the operational effectiveness of the armed forces and military discipline. According to the Government it is crucial for military representative associations to remain unbound by decisions of entities as ICTU whose members are not subject to military law and discipline if they engage in industrial action.

54. The Government further argues that the restriction should be accepted to fall within the margin of appreciation of the state party due to the fact that States Parties are under Article 5 of the Charter permitted to substantially restrict members of the armed forces right to organise.

55. However, the Committee notes that it has not been established why issues of public safety, national security etc. cannot be discussed in the course of national negotiations by the Government and military representative associations, should the latter be members of a national umbrella organisation, such as ICTU in the Irish context. It notes in particular, that according to EUROMIL, ICTU has stated that PDFORRA could be affiliated to ICTU with whatever conditions the Government deemed necessary and that this remains the position of ICTU.

56. Further the Committee does not consider that a complete ban on affiliation is necessary or proportionate, in particular as the restriction has the factual effect of depriving the representative associations of an effective means of negotiating the conditions of employment on behalf of their members, in so far as ICTU possesses significant bargaining power in national negotiations. The Committee notes that ICTU conducts negotiations on, inter alia, salaries within the public sector.

57. Therefore the Committee holds that there is a violation of Article 5 of the Charter on grounds of the prohibition against military representative associations from joining national employees' organisations.

II. ALLEGED VIOLATION OF ARTICLE 6§2 OF THE CHARTER

58. Article 6§2 reads as follows:

> **Article 6 – The right to bargain collectively**
>
> Part I: "All workers and employers have the right to bargain collectively."
>
> Part II: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
> …..
>
> 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;"

59. Article G reads as follows

> **Article G – Restrictions**
>
> "1 The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.
>
> 2 The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

A – Arguments of the parties

1. The complainant organisation

60. EUROMIL argue that military representative associations are unable to participate in national pay agreement discussions and have no bargaining rights with regard to general pay increases as these are negotiated by ICTU on behalf of all public servants. The negotiated outcome is binding on military representative associations.

61. The views of the military representative associations are consulted in a parallel process, into which according to EUROMIL, the military representative associations have effectively no input.

62. EUROMIL states that following the Defence (Amendment) Act 1990 the Minister for Defence established a conciliation and arbitration scheme (the scheme), in order to provide the parties with a means for the determination of claims and proposals relating to the remuneration and conditions of service of members of the representative associations (PDFORRA and RACO). However it maintains that the system put in place does not work in practice. It alleges that decisions are indefinitely postponed and issues never resolved, Further the Minister can, following consultation simply refuse to accept the negotiated agreement or adjudicated ruling.

63. If the military representative associations were to seek a general pay increase through the scheme, however, it would have to make a claim for a pay increase through its mechanisms. EUROMIL maintains that this alternative would not be effective in practice as the claim would be answered in the negative by referring to the general pay agreement discussions, which provide that no cost increasing claims can be made during the lifetime of the agreement.

64. Moreover, in EUROMIL's opinion, the scheme is a slow mechanism, where postponements of claims affect the length of the negotiations.

65. In addition EUROMIL argues that as the chairman of the scheme is an employee of the Department of Defence he/she is not perceived to be truly independent. It compares the scheme to the Labour Relations Commission process available to private sector and other public sector employees apart from members of the Defence Forces, *Gardai Siochana* and prison services.

66. According to EUROMIL the scheme is not sufficient to deal with the issues coming within the direct pay agreement discussions.

67. EUROMIL submits that legislation and practice fail to ensure sufficient access for military representative associations to pay agreement discussions in breach of Article 6§2 of the Charter.

68. EUROMIL highlights that Article 6 of the Charter, unlike Article 5, contains no specific clause allowing States Parties to restrict the collective bargaining right of members of the armed forces.

2. The respondent Government

69. The Government states that EUROMIL's allegation that military representative associations are unable to take part in national pay agreements is incorrect. Non-affiliation with ICTU has not resulted in military representative associations being afforded less effective means of negotiating conditions on behalf of their members, in the context of public sector agreements such as the "Haddington Road Agreement"- the Public Service Stability Agreement 2013-2016 which came into force on 1 July

2013 and applies to all public servants who are members of Grades to which a collective agreement accepting the terms of the Agreement is in place. The military representative associations are parties to such national pay agreements and have negotiated tangible results on behalf of members. There are particular measures applying to specific sectors of the public service including members of the Defence Force, appendix 2 of the Haddington Road Agreement contains specific measures applicable to the Defence Sector. In addition to the role played by military representative organisations in national pay agreement discussions, a number of mechanisms are in place to ensure that military personnel have access to processes for the negotiation of pay and conditions and for the resolution of grievances relating to pay and conditions of employment. These include the conciliation and arbitration scheme for members of the Defence Force, the redress of wrongs process and access to review by the independent Ombudsman for the Defence Forces. These mechanisms are unique to military personnel and serve to compensate for the limitations on their access to the normal industrial relations machinery which applies in wider society.

70. The Government states that it engages with military employees in the determination of pay and terms and conditions in the military context in a number of ways, inter alia through Public Sector Agreements and the Conciliation and Arbitration Scheme for members of the Defence Force.

71. In the context of concluding Haddington Road Agreement, the employer representatives had direct discussions with the representative associations for the Defence Force, (as it did as well when concluding previous agreements), who had the opportunity to shape and influence the required measures in the Defence sector agreement in conjunction with Defence management.

72. The Government recently engaged with public service unions represented by ICTU and with other non ICTU sectoral associations such as the military representative associations in parallel process meetings with a view to extending the Haddington Road Agreement. ICTU and sectoral representative associations (such as RACO and PDFORRA) were briefed by the Government’s representatives on the fiscal situation and the EU rules regarding fiscal constraints, funding and expenditure.

73. The Government rejects the suggestion that the military representative associations were excluded from the scope of direct pay negotiations. There were in fact ongoing and continuous engagement and discussions with the military representative associations in respect of the proposals emerging as part of a public sector collective agreement.

74. The following is a practical example of the military representative associations exercising their opportunity to shape and influence pay determination: In the context of discussions surrounding the proposals for the Haddington Road Agreement, representative associations for the Defence Forces were asked to contribute a 5%

reduction in the pay and pensions bill for the Defence Forces. This mirrored what was requested of all sectors in the public service and in practice would have resulted in a reduction of €35 million of the pay bill, thereby eliminating overall allowances in the Defence Force. Following direct engagement with the Government's employer representatives and the military representatives, the pay reduction "ask" of the military was reduced to €9.8 million. These associations, accordingly, had the opportunity to shape the outcome of the collective agreement.

75. The Government maintains that the criticisms made of the conciliation and arbitration Scheme are factually inaccurate and unmerited; it maintains that the scheme provides a range of consultation and engagement mechanisms for Defence management to discuss with representative associations matters within their scope of representation. The scheme was introduced in accordance with Defence Regulation S. 6, in 1998 and provides a means for both sides to discuss issues which are of importance to them and to arrive at mutually acceptable resolutions or to bring to dispute resolution matters such as pay and conditions of employment.

76. In the context of the scheme, PDFORRA and RACO may make representations to claims relating to a wide range of issues such as remuneration and other emoluments, deductions from pay in respect of accommodation, etc., changes in systems of performance appraisal, general criteria governing selection for overseas service.

77. The Government maintains the parallel process of meeting negotiations with PDFORRA and RACO is no less real than the negotiation which takes place with ICTU.

78. As regards the conciliation scheme the Government states that claims are discussed in the Conciliation Council with the aim of finding agreement through negotiation. Unresolved matters maybe referred to adjudication or arbitration.

79. The Government states that PDFORRA and RACO through the conciliation and arbitration scheme have secured various increases in allowances, pay awards, increases in annual leave, etc.

80. As concerns the allegation relating to the independence of the Chairperson of the Conciliation Council, the Government points out that the Chairperson may not be appointed without the agreement of the representative associations. Secondly, the function of the Chairperson is to facilitate discussion as well as to record agreement or disagreement; the Chairperson is not empowered to determine the merits of matters discussed at the Council.

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

82. If the operation of parallel processes for military personnel is not consistent with Article 6§2 which is denied, the Government maintains it pursues the legitimate aim of safeguarding the unique role of the armed forces in the protection of the public interest, national security, public health or morals. The need for a separate system of dispute resolution and collective bargaining arises from the unique circumstances of military personnel in terms of their code of military discipline and law as well as the unique pay structure and allowances which take into account the nature of their duties and service. The reasons accordingly mirror those set out below in relation to permissible restrictions on industrial action. The operation of parallel processes for military personnel is a permissible restriction in accordance with Article G of the Charter.

83. The Government highlights that States Parties enjoy a wide margin of appreciation in cases involving the restrictions of the rights of military personnel in international law.

B – Assessment of the Committee

84. The Committee notes that the allegations made are very similar to those made in EuroCOP v. Ireland, Complaint No. 83/2012, op. cit., as regards members of the police.

85. The Committee first observes that nothing in the wording of Article 6 of the Charter entitles States Parties to enact restrictions on the right to bargain collectively on part of the armed forces in particular.

86. Article 6§2 of the Charter, obliges the States parties to promote, where necessary and appropriate, machinery for voluntary negotiations on, inter alia, the regulation of terms and conditions of employment (European Council of Police Trade Unions (CESP) v. Portugal, Complaint No. 11/2002, decision on the merits of 21 May 2002, §§51 and 63).

87. The Committee reiterates that the extent to which ordinary collective bargaining applies to officials may be determined by law. Officials nevertheless always retain the right to participate in any processes that are directly relevant for the determination of procedures applicable to them (Conclusions III, (1973) Germany, CESP v. Portugal, Complaint No. 11/2002, §58, op. cit.). A mere hearing of a party on a predetermined outcome will not satisfy the requirements of Article 6§2 of the Charter. On the contrary, it is imperative to regularly consult all parties throughout the process of setting terms and conditions of employment and thereby provide for a possibility to influence the outcome. Especially in a situation where the trade union rights have been restricted, it must maintain its ability to argue on behalf of its members through at least one effective mechanism. Moreover, in order to satisfy this

requirement, the mechanism of collective bargaining must be such as to genuinely provide for a possibility of a negotiated outcome in favour of the workers' side (EuroCOP v. Ireland, Complaint No. 83/2012, §177, op. cit.).

88. The Committee has previously had the opportunity to consider the issue of collective bargaining and more specifically negotiation over pay in respect of the police. It examines under Article 6§2 of the Charter whether, based on practical examples, a police trade union has effectively been consulted and its opinions taken into account (EuroCOP v. Ireland, Complaint No. 83/2012, §§161-178, op. cit.; Conclusions XVII-1 (2005), Poland). It decides to adopt this approach to members of the armed forces as well.

89. In the instant case firstly, the Committee observes that Ireland has enacted a conciliation and arbitration scheme ("the Scheme"), as well as put in place other arrangements aimed at ensuring that RACO and PDFORRA can exercise collective bargaining within the meaning of Article 6§2 of the Charter.

90. The Committee notes also that the public service agreements are the mechanisms through which the general issues relating to conditions of service of the armed forces are factually negotiated, notably pay.

91. It observes that in practice, the agreements are collective agreements made at the national level.

92. The Committee takes notes that while the military representative associations are consulted in a parallel process to the public service agreements, they are not however directly involved in the negotiations as they are not affiliated to ICTU. It notes that little information has been provided on this parallel process and how it effectively ensures meaningful consultation as opposed to a mere hearing. Therefore the Committee cannot conclude that the military representative associations are meaningfully consulted over pay during discussions on public service agreements.

93. With regard to the efficiency of the alternative means available for the purpose of negotiating pay and other conditions of service, the Committee notes that the Scheme is meant to provide the primary means for the determination of claims and proposals relating to the conditions of service. However agreements over pay are laid down in public sector agreements, which military representatives associations do not have direct access to, and the military representative associations may not raise claims in respect of pay within the scheme as pay is settled by the public service agreements, and these typically do not allow cost increasing claims by trade unions of employees for improvements in pay or conditions of employment.

94. The Committee has been provided with little information as to why the practical exclusion of the armed forces from the scope of direct pay negotiations is necessary within the meaning of Article G of the Charter, nor why such a near total exclusion could be considered as proportionate. The Committee therefore considers that the nearly total exclusion of the representative military organisations from direct negotiations concerning pay cannot be considered as necessary under Article G of the Charter.

95. As for the allegations concerning the background of the Chairperson of the Conciliation Council, the Committee recalls having previously stated, under Article 6§1, which it considers also applies under Article 6§2 (see EUROPCOP v. Ireland, Complaint No. 83/2012, §180, op. cit.) that:

> "[I]n some states, consultation takes place within the framework of joint bodies in which the government representative often acted as chairman. This form of joint consultation was deemed to comply with the requirements as set out in Article 6, paragraph 1" (Conclusions V (1970), Statement of interpretation on Article 6§1).

96. Furthermore, as concerns the possibility of the military representative associations to access the Labour Relations Commission, the Committee considers that access to a particular dispute resolution mechanism is not a condition for the fulfillment of the requirements of Article 6§2 of the Charter.

97. Having regard to the essential role of pay bargaining for the purposes of Article 6, the Committee considers that the situation fails to ensure sufficient access of military representative associations to pay agreement discussions. The Committee consequently holds that there is a violation of Article 6§2 of the Charter.

III. ALLEGED VIOLATION OF ARTICLE 6§4 OF THE CHARTER ON THE GROUNDS THAT MEMBERS OF THE ARMED FORCES ARE PROHBITED FROM STRIKING

98. Article 6§4 reads as follows:

> **Article 6 – The right to bargain collectively**
>
> Part I: "All workers and employers have the right to bargain collectively."
>
> Part II: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
> …..
>
> 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. "
>
> **Appendix to Article 6§4:**
>
> "Article 6, paragraph 4
>
> It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G."

99. Article G reads as follows:

> **Article G – Restrictions**
>
> "1 The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.
>
> 2 The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

A – Arguments of the parties

1. Complainant organisation

100. EUROMIL argues that the prohibition on members of the armed forces from striking laid down by Section 8 of the Industrial Relations Act 1990, amounts to a violation of Article 6§4 of the Charter.

101. It accepts that the prohibition is provided for by law, but disputes that it in reality has a legitimate aim; public security, or maintenance of national security.

102. EUROMIL maintains that there is no pressing social need for such a blanket prohibition, and that it is not proportionate and thus is not necessary in a democratic society. A right to strike could be permitted subject to certain conditions and limitations, ensuring national security.

103. EUROMIL highlights that restrictions on human rights must be interpreted narrowly.

104. However, EUROMIL, in its response to the Government's submissions on the merits of the complaint, accepts that certain restrictions may be placed on the right to take collective action for members of the armed forces.

2. The respondent Government

105. The Government states that in the context of the armed forces and in the specific national context the prohibition on the right to strike is necessary and proportionate with a view to achieving a legitimate aim.

106. Military representative associations are excluded from the scope of the right to strike, as the Industrial Relations Act 1990, setting out the general right to collective action does not apply to members of the Defence Forces. The Government considers that a prohibition on strikes by members of the armed forces pursues the legitimate aim of seeking to maintain public order, national security and the rights and freedoms of others by ensuring that the Defence Forces remains fully operational at all times. The Government considers that industrial action such as a strike, on the part of military personnel has the capacity to disrupt vital operations or threaten national security. Members of the Defence Forces may be called upon, at the direction of the Government, to take on duties and to cross picket lines in circumstances of strikes in essential services or in situations of public protest and unrest. The Defence Force plays a unique role in assisting the Civil Power and Civil Authority. The right to strike could therefore potentially disrupt vital operations for instance such as the air ambulance service or in the provision of fire services and ground ambulance crew.

107. The Defence Forces play a unique role within the State. Non-compliance with a responsibility assigned by the Government, at the behest of a third party, has the potential to seriously undermine the security of the State.

108. Military personnel are in accordance with Sections 118 and 119 of the Defence Act 1954 "…subject to military law at all times." This requirement sets the Defence Forces apart from groups such as nurses who are not subject to the rigours of military discipline and the military justice system.

109. An absolute prohibition is necessary in a democratic society and is proportionate in the light of other collective bargaining mechanisms available to the military which have been highlighted in its observations

110. The Government argues that EUROMIL changes its position during the course of the proceedings and appears to accept the prohibition on the right to strike, but is asking “the Committee to establish the parameter of permissible collective action by way of hypothesis”.

B – Assessment of the Committee

111. The Committee first observes that the right to strike is intrinsically linked to the right to collective bargaining, as it represents the most effective means to achieve a favourable result from a bargaining process. It is therefore of specific relevance to trade unions. Consequently, restrictions on this right may be acceptable only under specific conditions.

112. The Committee notes the case law of the ILO Committee of Experts which provides that if the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example conciliation and mediation procedures leading, in the event of a deadlock, to arbitration machinery seen to be reliable by the parties concerned (ILO, Digest of decisions and principles of the Freedom of Association Committee 1996, § 547).

113. The Committee recalls having held that restrictions on the right to strike for member of the armed forces may be in conformity with the Charter “As regards the right of public servants to strike, the Committee recognises that, by virtue of …Article G of the Revised Charter, the right to strike of certain categories of public servants may be restricted, including members of the police and armed forces, judges and senior civil servants. On the other hand, the Committee takes the view that a denial of the right to strike to public servants as a whole cannot be regarded as compatible with the Charter” (Conclusions I (1969), Statement of Interpretation on Article 6§4). Under Article G of the Charter, these restrictions should be limited to public officials whose duties and functions, given their nature or level of responsibility, are directly related to national security, general interest, etc. Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour “Podkrepa” and European Trade Union Confederation (ETUC) v. Bulgaria, Complaint No. 32/2005, decision on the merits of 16 October 2006, §46).

114. As regards police officers the Committee has, in the context of the diversity of the legal systems in this area, also taken note of the evolution towards the expansion of the right to strike to police officers. Their right to collective action may be restricted. Such a restriction may nevertheless only be compatible with the Charter if the requirements of Article G are met, i.e. if the restriction is established by law, pursues a legitimate aim and is objectively necessary in a democratic society, that is to say proportionate to the aim pursued. Concerning police officers, an absolute prohibition on the right to strike can be considered in conformity with Article 6§4 only if there are compelling reasons justifying it. On the other hand the imposition of restrictions as to the mode and form of such strike action can be in conformity to the Charter (EuroCOP v. Ireland, Complaint No. 83/2012, §§203-204, op. cit.).

115. However, the Committee in the instant case is called upon to determine whether members of the armed forces can be prohibited from striking. In the present case it is not disputed that the restriction is established by law. The restriction furthermore pursues a legitimate aim in that it seeks to maintain public order, national security and the rights and freedoms of others by ensuring that the armed forces remains fully operational and available to respond at all times.

116. Accordingly, the Committee is called upon to resolve the question of whether a prohibition on the right to strike by members of the armed forces, as a means of pursuing a legitimate aim such as those outlined in the previous paragraph, is necessary in a democratic society. It finds that the margin of appreciation is greater than that afforded to states in respect of the police.

117. The Committee further notes that most Council of Europe states prohibit members of the armed forces from striking (with the exception of Austria and Sweden). Therefore and having regard to the specific nature of the tasks carried out by members of the armed forces, the special circumstances of members of the armed forces who operate under a system of military discipline, the potential that any industrial action could disrupt operations in a way that threatens national security, the Committee considers that there is a justification for the imposition of the absolute prohibition on the right to strike set out in Section 8 of the 1990 Industrial Relations Act. The statutory provision is proportionate to the legitimate aim pursued and, accordingly, can be regarded as necessary in a democratic society.

118. The Committee consequently holds that the prohibition of the right to strike of members of the armed forces does not amount to a violation of Article 6§4 of the Charter.

CONCLUSION

For these reasons, the Committee concludes:

- by 11 votes to 2 that there is a violation of Article 5 of the Charter;
- unanimously that there is a violation of Article 6§2 of the Charter;
- by 9 votes to 4 that there is no violation of Article 6§4 of the Charter.



Birgitta NYSTRÖM	Giuseppe PALMISANO	Henrik KRISTENSEN
Rapporteur	President	Deputy Executive Secretary