European Social Charter | Charte sociale européenne

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

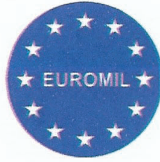
2 June 2021

Case Document No. 1

European Organisation of Military Associations and Trade Unions (EUROMIL) v. Portugal
Complaint No. 199/2021

COMPLAINT

Registered at the Secretariat on 12 May 2021



EUROMIL aisbl
(European Organisation of Military Associations and Trade Unions)
Rond-Point Robert Schuman 6
B-1040 Brussels
Tel: +32.2.626.06.80
E-mail: euromil@euromil.org
N° Ent.: 0538.809.759
RPM : Brussels

To the Executive Secretary of the European Committee of Social Rights
Department of the European Social Charter
Directorate General Human Rights and Rule of Law, Council of Europe
Agora building, 1 quai Jacoutot, F-67075 Strasbourg Cedex, France
E-mail address: social.charter@coe.int

Brussels, 11 May 2021

EUROMIL against Portugal

Complaint

The collective complaint launched by the European Organisation of Military Associations and Trade Unions (EUROMIL) against Portugal, alleging a violation of Articles 5 and 6 of the European Social Charter by the Portuguese state, deals with the fact that Portuguese professional military associations do not have trade union rights and are therefore banned from collectively representing their members and making binding agreements.

Summary

EUROMIL launches a collective complaint against Portugal to grant trade union rights for professional military associations in Portugal.

Professional military associations in Portugal are not allowed to undertake trade union activities. This means that professional military associations are banned from representing their members for the protection of their economic and social interests and negotiating collective agreements with the employer.

Articles violated are articles 5 and 6 of the European Social Charter (ESC).

By this collective complaint filed pursuant to the 1995 Additional Protocol to the European Social Charter, the European Organisation of Military Associations and Trade Unions (EUROMIL), with registered office at Rond-Point Robert Schuman 6, 1040 Brussels (Belgium), represented by its President Emmanuel Jacob, and Vice-

EUROMIL aisbl
(European Organisation of Military Associations and Trade Unions)
Rond-Point Robert Schuman 6
B-1040 Brussels
Tel: +32.2.626.06.80
E-mail: euromil@euromil.org
N° Ent.: 0538.809.759
RPM : Brussels

President Jörg Greiffendorf[1], complains against the violation and insufficient implementation of Articles 5 and 6 of the revised version of the European Social Charter by the Portuguese state with reference to the ban on members of the Portuguese armed forces on establishing trade unions and engaging in trade union activity and on exercising the right of collective bargaining.

Admissibility

Portugal ratified the European Social Charter on 30 September 1991 and the revised European Social Charter on 30 May 2002. It also ratified the Additional Protocol providing for a system of collective complaints on 20 March 1998, which entered into force on 1 July 1998.

The European Organisation of Military Associations and Trade Unions (EUROMIL) is a European non-governmental organisation which has participatory status with the Council of Europe. It is included in the list established by the Governmental Committee of international non-governmental organisations entitled to lodge complaints under the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

Founded in 1972, EUROMIL is an umbrella organisation composed of military associations and trade unions. It is the main Europe-wide forum for cooperation among professional military associations on issues of common concern. EUROMIL counts three member associations in Portugal, namely the "National Sergeants Associations" (ANS), the "Association of the Officers of the Armed Forces" (AOFA) and the "Association of Enlisted" (AP).

EUROMIL strives to secure and advance the human rights, fundamental freedoms and socio-professional interests of military personnel of all ranks in Europe. It promotes the concept of "Citizen in Uniform". As such, a soldier is entitled to the same rights and obligations as any other citizen. EUROMIL particularly calls for recognition of the right of servicemen and -women to form and join trade unions and independent associations and for their inclusion in a regular social dialogue by the authorities.

Background Portugal

Military personnel in Portugal were granted the right to freedom of association for the first time in 2001 by the Organic Law 3/2001, of 29 August, namely the "Law on the right of military Professional association" (*Lei do direito de Associação profissional dos militares*), which provides the framework for the right of association of military personnel. However, the legislation restricts the right for military personnel to organise by prohibiting activities of a trade union nature and forbids their right to bargain collectively. Moreover, although the law foresees the

[1] The Charter of EUROMIL stipulates in §12 (2) that "The President and the Vice-President or another member of the Board shall represent EUROMIL in legal proceedings and with regard to third parties."

EUROMIL aisbl
(European Organisation of Military Associations and Trade Unions)
Rond-Point Robert Schuman 6
B-1040 Brussels
Tel: +32.2.626.06.80
E-mail: euromil@euromil.org
N° Ent.: 0538.809.759
RPM : Brussels

right for military professional associations to be heard, associations have barely been consulted in practice.

The Portuguese Constitution, in Art. 18, foresees restrictions to rights, freedoms and guarantees that should "be limited to those needed to safeguard other constitutionally protected rights and interests. (...) [and may not] reduce the extent or scope of the essential content of the constitutional percept". This means that while restrictions may be accepted within the limits of specific conditions, an outright ban on certain rights may not be tolerated. Trade union rights are enshrined in Articles 55-57 of the Constitution. However, Article 270 foresees restrictions on the exercise of certain rights for military personnel, including the right of association: "Strictly to the extent required by the specific demands of the respective functions, the law may establish restrictions on the exercise of the rights of expression, meeting, demonstration, association and collective petition by full-time military personnel (...)".

Article 3 of the Organic Law 3/2001, of 29 August, stipulates: "1. The exercise of the rights enshrined in the previous article for military associations established under the terms of this law is subject to the restrictions and conditionality's provided for in articles 31 to 31-F of the Law on National Defense and Armed Forces [which clearly prohibits any activity of a trade union nature]. 2. Without prejudice to the provisions of this law and other applicable law, the exercise of associative activities referred to in this law cannot, in any case and in any way, collide with the legally defined duties and functions nor with the accomplishment of service missions".

The Organic Law 4/2001, of 30 August, on National Defense and Armed Forces (sixth amendment to Law 29/82, of 11 December), foresees in Article 31, 3. "To the citizens mentioned in number 1 [namely military personnel of permanent staff and on voluntary and contract regime] are not applicable the constitutional rules regarding human rights of workers whose exercise presupposed the rights restricted in the following articles, namely freedom of trade-union, in its different manifestations and developments, the right to creation of workers' commissions, also with the respective developments, and the right to strike." More specifically, in Article 31D, the law highlights that "1. Citizens referred to in Article 31 have the right to form any association, namely professional associations, unless they have political party or trade union nature. 2. The exercise of the right of professional association is regulated by its own law".

The Organic Law 3/2001 stipulates in Article 2 on the rights of associations that "Military associations legally constituted enjoy the following rights: a) To integrate advisory councils, commissions of study and working groups set up to proceed with the analysis of subjects of relevant interest to the institution, in the area of their specific competence; b) To be heard on the issues of the professional, remuneration and social status of their members; c) To promote civic initiatives that contribute to the unity and cohesion of the military in effective service in the armed forces and the dignification of the military in the country and in society; d) To promote activities and edit publications on associative, deontological and

socioprofessional subjects or, with prior hierarchical authorization, on matters of an exclusively technical nature; e) To hold meetings within the scope of their statutory purposes; f) To disseminate their initiatives, activities and editions in military units and establishments, provided that it in a specific place made available for the for effect; g) To express an opinion on matters expressly included in its statutory purposes; h) To integrate and establish contacts with associations, federations of associations and organisations international counterparts that pursue similar objectives".

Portuguese military associations work under the Law-Decree 295/2007, of 22 August, namely the "Statute of Association Leaders" which defines the rights and duties of leaders of associations.

Aim of the Collective Complaint

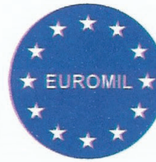
The aim of this complaint is to acquire trade union status for professional military associations in Portugal.

Violation of the European Social Charter

Articles violated are article 5 and 6 of the European Social Charter (ESC).

Article 5 reads as follows: "The right to organise - With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations."

Article 6 reads as follows: "The right to bargain collectively - With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
1 to promote joint consultation between workers and employers;
2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3 to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;
and recognise:
4 the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."



EUROMIL aisbl
(European Organisation of Military Associations and Trade Unions)
Rond-Point Robert Schuman 6
B-1040 Brussels
Tel: +32.2.626.06.80
E-mail: euromil@euromil.org
N° Ent.: 0538.809.759
RPM : Brussels

Article G foresees the conditions for restricting the above-mentioned rights: "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."

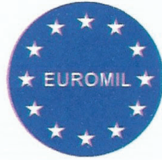
Relevant international material

Trade unions rights are foreseen in Article 8 of the International Covenant on Economic, Social and Cultural Rights, Article 22 of the International Covenant on Civil and Political Rights, Conventions 87 and 98 of the ILO and Articles 12 and 28 of the European Charter of Fundamental Rights.

At the Council of Europe level, the European Convention on Human Rights, Article 11, safeguards trade-union freedom as an aspect of freedom of association, to protect the occupational interests of trade-union members by trade-union action. The right to bargain collectively with the employer became one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests". The essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests (Wilson, National Union of Journalists and Others v. the United Kingdom, § 46). The right of collective action was recognised by the Court as one of the elements of trade union rights laid down by Article 11.

These rights apply to members of the armed forces under international standards and legislation. However, some restrictions have been foreseen to balance rights and service requirements. Nevertheless, human rights jurisprudence considers that these limitations should be interpreted restrictively and surely not serve as justification for imposing blanket bans on rights of military personnel. The European Court of Human Rights has considered that despite possible restrictions to their rights, military personnel should not be deprived from the general right of association to defend their occupational and non-pecuniary interests (Adefdromil v. France, §55; Matelly v. France, §71). A blanket ban on forming or joining a trade union by military personnel is contrary to the European Convention on Human Rights (Adefdromil v. France, §60; Matelly v. France, §75).

In Recommendation CM/Rec(2010)4 on human rights of members of armed forces, the Committee of Ministers of the Council of Europe highlighted that "54. Members of the armed forces should have the right to join independent



EURONIL aisbl
(European Organisation of Military Associations and Trade Unions)
Rond-Point Robert Schuman 6
B-1040 Brussels
Tel: +32.2.626.06.80
E-mail: euromil@euromil.org
N° Ent.: 0538.809.759
RPM : Brussels

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."

In light of the above, the Committee has considered that restrictions to Article 5 of the ESC 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 (CESP v. France, Complaint N° 101/2013, §84). For what concerns members of the armed forces specifically, the Committee, in the case EUROMIL v. Ireland (Complaint N° 112/2014, paragraphs 55-56), found that a complete ban on affiliation was not necessary or proportionate (see paragraphs 55-56). It also found that the exclusion of the military associations from direct participation in national public sector pay negotiations failed to ensure sufficient access of military representative associations to pay agreement discussions, thus violating Article 6(2) (paragraph 97). Moreover, in the case of the Italian General Confederation of Labour (CGIL) v. Italy (Complaint N° 140/2016), the Committee found a violation of the right to strike (see paragraph 145). Overall, the decisions of the Committee confirm the general rule that restrictions on collective representation by service personnel must always be tested against considerations of necessity and proportionality.

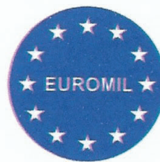
Arguments

EUROMIL, on behalf of its Portuguese member associations, considers that members of the armed forces in Portugal are discriminated against because of their military condition.

EUROMIL argues that Portugal has violated and is continuing to violate Article 5 of the ESC as the limited form of worker's representation through the existing professional military associations does not constitute a satisfactory implementation of Article 5 of the ESC.

It is accepted that Article 5 allows States 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.

The Portuguese legislation, through the Organic Law 3/2001 on the right of military Professional association and the Organic Law 4/2001 on National Defence and Armed Forces, prescribes restrictions to the right to organise for military personnel and their representatives by prohibiting activities of a trade union nature. However, this limitation is not considered as being proportionate and necessary in a democratic society.



EUROMIL aisbl
(European Organisation of Military Associations and Trade Unions)
Rond-Point Robert Schuman 6
B-1040 Brussels
Tel: +32.2.626.06.80
E-mail: euromil@euromil.org
N° Ent.: 0538.809.759
RPM : Brussels

While the right to freedom of association was theoretically granted to military personnel in 2001, the role and competences of military associations have been extremely restricted (see supra). This impedes professional military associations from collectively representing the "workers in uniform" as a professional category for the protection of their economic and social interests.

It is worth mentioning at this stage that although the Organic Law 4/2001 on National Defence and Armed Forces foresees the right for military association to be heard on the issues of the professional, remuneration and social status of their members, this provision has not been implemented in practice. Associations are not consulted, and their opinions are not taken into consideration.

Although it is conceded that Portugal may choose to regulate the right of members of the armed forces to organise by a mechanism applicable only to the military, such entitlement may not deprive military representative associations from expressing their demands on working conditions and pay in an appropriate and effective manner.

Moreover, it is argued that military personnel are discriminated against as they are not treated equally as members of the other public services, especially security forces. Indeed, judges, public prosecutors, as well as personnel of the Public Security Police (PSP) or the National Republican Guard (GNR) – a military security force - are recognized certain rights, including trade union rights, that are denied to members of the armed forces.

EUROMIL recalls that as public service employees, military personnel should be treated not only as "Citizens in Uniform" but also as "Workers in Uniform", meaning that they should be entitled to the same rights as any other worker.

The Armed Forces Military Statute, Decree-Law 90/2015, of 29 May, amended by Law 10/2018, of 2 March, does not equally provide (for the list of rights foreseen in this statute in Articles 16 to 25) any right of representation and collective bargaining to the members of the armed forces as public employees.

In fact, Article 92 of the Constitution of the Portuguese Republic foresees in its paragraph 2 that "The law shall define the composition of the Economic and Social Council, which shall particularly include representatives of the Government, of the organisations that represent workers, economic activities and families, of the autonomous regions and of local authorities". However, the Organic Law 1-B/2009, of 7 July, amended and republished by Organic Law 5/2014, of 29 August, on National Defence, restrains in an inadequate way the basic rights of public employees, specifically military personnel, when, it stipulates in paragraph 3 of Article 27, regarding the exercise of rights of members of the armed forces, that:

"3 – Constitutional rules concerning the rights of workers whose exercise presupposes the fundamental rights referred to in the following articles are not applicable to military personnel on active duty, insofar as they are restricted to

them, namely freedom of association, the right to establish and enjoy workers' commissions and the right to strike."

Additionally, Law 108/91, of 17 August, which created and regulated the functioning of the Economic and Social Council, this means "the body for consultation in the field of economic and social policies and [which] participates in the preparation of economic and social development plans" (Article 1) having competence to "promote dialogue and consultation between the social partners" (Article 2, §1 g), does not include any military association or representative of military personnel in the list of social partners identified and described in Article 3. This, once again, shows that military personnel are impeded from concretely representing their collective interests. However, they should be entitled to exercise their rights to freedom of association and to bargain collectively, as other public employees do.

The Law 21/85, of July 30 (19th version - Law 2/2020, of 31 March), on the Statute of judicial Magistrates, foresees in Article 17 - Special rights - 1 i) The enjoyment of the rights foreseen in the trade union legislation and the benefit of reduction in the distribution of services, through deliberation of the Superior Council of the Judiciary, when they exercise functions in the executive body of the union association of the judicial magistracy or in international organizations representatives of magistrates.

The Law 7/2009, of 12 February, (19th version - Law 93/2019, of 4 September), on the labour code, stipulates in Article 24 - Right to equality in access to employment and work - 1 - The worker or jobseeker is entitled to equal opportunities and treatment with regard to access to employment, training and promotion or professional career and working conditions, and cannot be privileged, benefited, impaired, deprived of any right or exemption from any duty due, in particular, to ancestry, age, sex, sexual orientation, gender identity, marital status, family situation, economic status, education, social origin or condition, genetic heritage, reduced work capacity, disability, chronic illness, nationality, ethnic or race origin, territory of origin, language, religion, political or ideological convictions and union membership, and the State should promote equal access to such rights.

This difference of treatment is particularly striking for what concerns personnel of the GNR, which has a military status. The Law 39/2004, of 18 August, establishes the general principles and bases for the exercise of the right of professional association for the members of the GNR.

While in 2020 trade unions and socio-professional associations of the PSP and GNR were engaged in a social dialogue with the authorities on issues such as pay or health and safety at work, military associations were not. However, EUROMIL considers that the latter were unfairly treated, as they were, on the opposite, forbidden from discussing basic working conditions with the authorities.

EUROMIL aisbl
(European Organisation of Military Associations and Trade Unions)
Rond-Point Robert Schuman 6
B-1040 Brussels
Tel: +32.2.626.06.80
E-mail: euromil@euromil.org
N° Ent.: 0538.809.759
RPM : Brussels

Invoking Article G of the ESC for justifying restrictions to the right to organise for military personnel should thus be considered unproportionate and not necessary in a democratic society.

In light of the above, EUROMIL also argues that Portugal has violated and is continuing to violate Article 6 of the ESC in various respects.

It is submitted that there is nothing in the wording of Article 6 of the ESC entitling Portugal to particularly enact restrictions on the right to bargain collectively for military personnel. EUROMIL therefore argues that it is not justified to have a complete ban on collective bargaining rights for members of the armed forces.

For what concerns its paragraphs 1 and 2, Article 6 has been violated because Portugal does not in any way promote joint consultations between the members of the armed forces and the Ministry of Defence, as public service employer, and does not promote any machinery for voluntary negotiations between trade unions representing the former (which as noted above are banned) and the latter in order to regulate working conditions through collective agreements. Professional military representative associations have been denied trade union status.

The Organic Law 4/2001 on National Defence and Armed Forces foresees the right for military association to be heard on the issues of the professional, remuneration and social status of their members. However, EUROMIL highlights that this right is not currently respected in practice. There is no social dialogue. Associations are not consulted, and their opinions are not considered. Portugal does not promote a fair and equal joint consultation between workers, on the one side and the employer on the other side.

Moreover, EUROMIL underlines that the right to be heard or consulted is not equivalent to the right to negotiate as understood by the Article 6 of the ESC. It is submitted that it is imperative to regularly consult with all parties during a process of collective bargaining and therefore any parallel discussions or mere hearing of a military representative association does not satisfy the requirements of efficiency inherent in Article 6(2) of the Charter.

Military associations have in legislation (see supra) a restricted role and their competences are extremely limited. There is no alternative to the bargaining process. They are consequently barred from taking part in the determination and improvement of the working conditions and working environment of their affiliates.

Trade Union rights of military representative associations have been restricted in Portugal and it is submitted that these associations should be able to argue on behalf of their members through at least one effective mechanism. Accordingly, 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. It is therefore submitted that the legislation and practice in Portugal fail to ensure that military associations are provided with means to effectively negotiate the terms and conditions of employment of the members of

EUROMIL aisbl
(European Organisation of Military Associations and Trade Unions)
Rond-Point Robert Schuman 6
B-1040 Brussels
Tel: +32.2.626.06.80
E-mail: euromil@euromil.org
N° Ent.: 0538.809.759
RPM : Brussels

the armed forces and make collective binding agreements with the employer on their behalf.

Consequently, EUROMIL maintains that the prohibition of trade union rights for military personnel in Portugal is neither necessary nor appropriate within the meaning of Article G and give rise accordingly to a violation of paragraphs 1 and 2 of Article 6 of the ESC.

As regards §4 of Article 6 of the ESC, EUROMIL argues that the prohibition against the right to strike of military representatives of associations amounts to a violation of the right to collective action under Article 6.

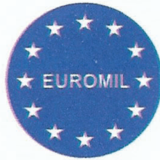
EUROMIL stresses that the right to strike must be considered alongside with the right to collective bargaining, as intrinsic to the right to organise, and should only be used as an instrument of last resort to defend workers' rights. However, it is an essential trade union right that must be guaranteed to all workers as it is the most effective mean to achieve a favourable result from a bargaining process.

In Portugal, it is accepted that the prohibition in respect of the right to collective action by way of strike is prescribed in the Organic Law 4/2001 on National Defence and Armed Forces. However, it is not accepted that this blanket ban is justified.

Indeed, EUROMIL argues that an absolute prohibition cannot be justified either by the requirements of military discipline or by the public nature of the service. Nevertheless, as the Committee notes, restrictions on the right to strike may be acceptable under specific circumstances and conditions (CGIL v. Italy N° 140/2016 §145). This means when social dialogue and the right of collective bargaining are sufficiently organised and effective. As this is not the case in Portugal, EUROMIL considers that the prohibition of the right to strike prescribed in the Organic Law 4/2001 is not necessary in a democratic society and should thus be replaced by a partial prohibition. Accordingly, it is submitted that the prohibition of the right to strike of representatives of military associations amounts to a violation of Article 6(4) of the Charter.

EUROMIL argues that in order to ensure an effective protection and promotion of the interests of Portuguese members of the armed forces, the three pillars of their collective representation, namely the right to freedom of association, social dialogue and the right of collective bargaining, and the right to strike, should be respected.

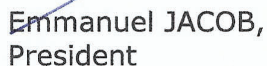
EUROMIL therefore insists that the lack of existing social dialogue, coupled with the prohibition of a machinery for voluntary negotiations between employers and workers' organisations, aiming at negotiating the terms and conditions of employment by means of collective binding agreements, impede on the essence of the rights to organise and to bargain collectively of Portuguese military personnel and therefore violates Articles 5 and 6 of the Social Charter.

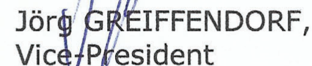


EUROMIL aisbl
(European Organisation of Military Associations and Trade Unions)
Rond-Point Robert Schuman 6
B-1040 Brussels
Tel: +32.2.626.06.80
E-mail: euromil@euromil.org
N° Ent.: 0538.809.759
RPM : Brussels

Thus, this Committee is asked to rule that the complaint is well-founded, concluding that:

- Portugal is violating Article 5 of the ESC because it prohibits professional military associations from exercising activities of a trade union nature and therefore to collectively represent members for the protection of their economic and social interests;
- Portugal is violating Article 6 §1 of the ESC because it is not promoting joint consultations between professional military associations as workers' organisations and the Ministry of Defence as employer;
- Portugal is violating Article 6 §2 of the ESC because it is not promoting machinery for voluntary negotiations between professional military associations as workers' organisations and the Ministry of Defence as employer in order to regulate employment conditions by collective agreements;
- Portugal is violating Article 6 §4 of the ESC because it prohibits professional military associations as workers' organisations from exercising the right to strike.





Emmanuel JACOB,
President

Jörg GREIFFENDORF,
Vice-President