



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

28 March 2022

**Case Document No. 4**

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

**SUBMISSIONS OF THE GOVERNMENT  
ON THE MERITS**

**Registered at the Secretariat on 15 March 2022**

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS**

**EUROPEAN ORGANISATION OF MILITARY ASSOCIATIONS  
AND TRADE UNIONS (EUROMIL)  
(Applicant)**

**V.**

**PORTUGAL  
(Respondent)**

**COMPLAINT No. 199/2021**

**OBSERVATIONS ON THE MERITS**

**15 MARCH 2022**

## **I. INTRODUCTION**

1. On May 25<sup>th</sup>, 2021, the European Organisation of Military Associations and Trade Unions ("Applicant") lodged a complaint against Portugal ("Respondent") regarding the application of Articles 5 and 6 of the Revised European Social Charter ("the Charter") to Portuguese military associations.

2. In summary, the Applicant claims that:

- (i) The Respondent has infringed Article 5 of the Charter insofar as it prohibits its military associations from exercising trade union rights, namely collective bargaining rights of its members for the protection of their economic and social interests;
- (ii) The Respondent violated Article 6 (1) of the Charter because it does not promote joint consultations between the military associations and the Ministry of National Defence, as the employer;
- (iii) The Respondent violated Article 6 (2) of the Charter since it fails to facilitate bargaining mechanisms between military associations and the Ministry of National Defence, as the employer, with the aim of regulating the terms and conditions of employment through collective agreements;
- (iv) The Respondent violated Article 6 (4) of the Charter as it prohibits military associations, as workers' organisations, from exercising the right to strike.

3. Although Portugal has challenged the admissibility of the complaint, the European Committee of Social Rights ("Committee") declared it

admissible and invited the Respondent to make written submissions on the merits by March 15<sup>th</sup>, 2022.

## **II. OBSERVATIONS ON THE MERITS OF THE COMPLAINT**

4. The Applicant argues the violation of Articles 5 and 6 of the Charter; it considers, in short, that Portuguese professional military associations do not have trade union rights and are banned from collectively representing their members and making binding agreements.

5. In the Respondent's view, this allegation is unfounded in all respects, for the reasons set out below.

## **III. INTERNATIONAL LEGAL INSTRUMENTS**

6. Firstly, it is important to consider the following provisions contained in relevant international legal instruments that bind the Portuguese Republic:

### **A. The Universal Declaration of Human Rights (UDHR)**

Article 29 enables the legislator to set limits on the exercise of fundamental rights to ensure the recognition of or respect for other values: “rights and freedoms of others”, “just requirements of morality, of public order, and of the general welfare in a democratic society.” [emphasis added]

**B. ILO Convention No. 87** on Freedom of Association and Protection of the Right to Organise, of 1948, provides in Articles 2 and 9:

*“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 9 (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.”* [emphasis added]

**C. ILO Convention No. 98** on the Right to Organise and Collective Bargaining, of 1949, provides in Article 5:

*“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..”* [emphasis added]

**D. International Covenant on Economic, Social and Cultural Rights (ICESCR)** *“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;* [emphasis added]

*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 organisations;*

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; [emphasis added]*

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.* [emphasis added]

## **E. International Covenant on Civil and Political Rights (ICCPR)**

*“Article 22 (1)*

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.* [emphasis added]

## **F. The European Convention on Human Rights**

*“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." [emphasis added]

### **G. European Social Charter (Revised)**

The Respondent highlights, in support of its stand, that Article 5 of the European Social Charter (Revised) provides that "...the principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations." [emphasis added]

In short, it is noted that relevant international legal instruments, including the **Revised European Social Charter**, enshrine the possibility for the law to establish legitimate restrictions on the exercise of fundamental rights by members of the armed forces, such as, *inter alia*, the rights of assembly and association, freedom of association and the right to strike.

## **IV. RELEVANT DOMESTIC LAW**

7. The Respondent also refers to the following legal texts and provisions of domestic law that, among others, are relevant for the analysis and dismissal of the present complaint:

### **A. Constitution of the Portuguese Republic**

*“Article 45 (Right to Assemble and Demonstrate)*

1. *Citizens shall have the right to assemble peacefully and unarmed, even in places open to the public, without the need for any authorisation.*
2. *The right to demonstrate shall be recognised to all citizens.”*

**“Article 270 (Restrictions on the exercise of rights)**

*The law may establish, in the strict measure of the requirements of the respective functions, restrictions on the exercise of the rights of expression, assembly, demonstration, association, and collective petition and on the passive electoral capacity by military personnel and militarized agents of the permanent staff on active service, as well as by agents of the security services and forces and, in the case of the latter, the non-admission of the right to strike, even when the right of trade union association is recognized.”*  
[emphasis added]

**B. Other Domestic Law**

**National Defence Law, Organic Law No. 1-B/2009 of July 7th**

**“Article 29 (Right of assembly)**

1. *Military personnel in active service may, provided they wear civilian clothes and do not bear any national or Armed Forces symbol, convene or participate in legally convened meetings not of a political party or trade union nature.*
2. *Military personnel in active service may attend political party and trade union meetings that have been legally convened if they do not take the floor or exercise any role in their preparation, organisation, or conduct or in the execution of the deliberations taken.*
3. *The right of assembly may not be exercised within military units and establishments nor in a manner that jeopardises the service normally*



assigned to the military personnel or their permanent availability for its performance.” [emphasis added]

**“Article 30 (Right to demonstrate)**

*Military personnel in active service may participate in legally convened demonstrations without a party-political or trade union nature, provided that they are unarmed, wear civilian clothes and do not bear any national or armed forces symbol and provided that their participation does not endanger the cohesion and discipline of the armed forces.”* [emphasis added]

**“Article 31 (Freedom of association)**

*“1. Military personnel in active service shall have the right to form or join associations without a political, party or trade union nature, namely professional associations.*

*2. The exercise of the right of professional associations of military personnel shall be regulated by its own law.”* [emphasis added]

**Organic Law no. 3/2001 of August 29th, on the right of professional association of military personnel**

**“Article 2 (The rights of associations)**

*The legally constituted military associations shall enjoy the following rights:*

*a) To integrate consultative councils, study commissions, and working groups set up to undertake the analysis of matters of relevant interest to the institution, in the area of their specific competence;*

*b) To be heard on questions of the professional, remuneration and social status of its members;*

*c) To promote initiatives of a civic nature that contribute towards the unity and cohesion of the military serving in the armed forces and the dignification of the military in the country and in society;*

- d) *Promote activities and edit publications on associative, deontological, and socio-professional matters or, with prior hierarchical authorization, on issues of an exclusively technical nature;*
- e) *To hold meetings within the scope of its statutory purposes;*
- f) *Disseminate its initiatives, activities, and editions in military units and establishments, provided that in a place made available for that purpose;*
- g) *Express an opinion on matters expressly included in its statutory purposes;*
- h) *To integrate and establish contacts with similar associations, federations of associations and international organisations pursuing similar objectives.”*

***“Article 3 (Restrictions on the exercise of rights)***

1. *The exercise of the rights enshrined in the preceding Article for military associations established under this law shall be subject to the restrictions and conditionalities provided for in Articles 31 to 31-F of the National Defence and Armed Forces Law.*

2. *Without prejudice to the provisions of this law and other applicable legislation, the exercise of associative activities referred to in this law shall not, under any circumstances and by any means whatsoever, conflict with legally defined duties and functions or with the fulfilment of service missions.*” [emphasis added]

***“Article 4 (Status of Associative Leaders)***

*The statute for associative leaders shall be approved by the Government by means of decree-law.*”

**Decree-Law no. 295/2007 of August 22nd, on the Statute of the associative leaders of the professional associations of military personnel of the Armed Forces.**

***“Article 3 (General Principles)***

*1. Military personnel shall not be prejudiced or benefited in their rights and benefits by virtue of their holding positions as leaders of military professional associations.*

*2. The activities of leaders of military professional associations shall always be conducted without prejudice to the service and in compliance with the duties inherent to their status as military personnel, and shall be subject to the restrictions and constraints provided for in military legislation, namely the National Defence and Armed Forces Law, the Military Charter, the law regulating the exercise of the right of professional associations of military personnel and the Military Disciplinary Regulations.” [emphasis added]*

**Statute of the Military of the Armed Forces approved by Decree-Law no. 90/2015, of May 29th, as amended**

Chapter II of Title II - Articles 16 to 25 - enshrines the rights inherent to the military condition, namely the right of association, legal protection, religious assistance, housing and transportation, training, career progression, as well as a special remuneration status and a special health care and social security system, extendable to their families.

## **V. ANALYSIS**

**8.** Portugal has a constitutional and legal framework which ensures compliance with International and European norms and standards for the

protection of Human Rights to which it is bound, including the provisions of the Charter.

**9.** Under the terms of Article 8 of the Constitution of the Portuguese Republic, the norms and principles of International Law are part of the Portuguese internal legal order.

**10.** And this includes the legal framework of the Charter. In this respect, the constitutional norms that enshrine the rights to freedom of assembly and demonstration of citizens in general should be highlighted.

**11.** Restrictions on the exercise of union rights by military personnel obey the principle of strictness and may only apply to the rights expressly referred to in article 270 of the Constitution of the Portuguese Republic. They are also subject to the principle of proportionality and must be limited to “*the strict measure of the demands inherent to military functions,*” imposing the observance of the three dimensions of this principle: adequacy, necessity or enforceability, and proportionality in a strict sense.

**12.** The Constitution of the Portuguese Republic creates a privileged regime for the approval of internal laws that establish restrictions on the exercise of rights by military personnel, which consists of the exclusive competence of the Portuguese Parliament [paragraph o) of article 164 of the Constitution] and the requirement that it be approved by a two-thirds majority of members of Parliament [paragraph e) of article 168 (6) of the Constitution].

**13.** Specifically regarding the armed forces, the associative rights and their respective rights and duties are guaranteed and regulated in the National

Defence Law; its Articles 29 to 31 enshrine the rights to freedom of assembly, demonstration, and association of military personnel.

**14.** As a result, these rights are regulated by law. In effect, Organic Law no. 3/2001 exhaustively regulates the military personnel's right to freedom of association, which, by the means of *legally constituted military associations*, may:

- Form part of consultative councils, study committees, and working groups set up to analyse matters of relevant interest to the institution in the area of its specific competence;
- Be heard on questions of the professional, remuneration, and social status of its members;
- Promote civic initiatives that contribute to the unity and cohesion of the active military in the armed forces and the dignification of the military in the country and in society;
- Promote activities and edit publications on associative, deontological, and socio-professional matters, or, with prior hierarchical authorization, on issues of an exclusively technical nature;
- Hold meetings within the scope of its statutory purposes;
- Disseminate its initiatives, activities, and editions in military units and establishments, as long as in a place made available for the purpose;
- Express an opinion on matters expressly included in its statutory purposes;
- Integrate and establish contacts with similar associations, federations of associations, and international organisations that pursue similar objectives.

**15.** The Respondent acknowledges that those rights, whether recognised by International and European law or by domestic law, are subject to certain restrictions.

**16.** This is because, in matters of application of general principles or rights to the armed forces, as is the case in other matters of National Defence, national sovereignty of regulation must take precedence, due to the specificities of the situation or the specific nature of the functions they are called upon to perform.

**17.** So much so that it is the Charter itself which, in the final part of Article 5, provides a safeguard clause in this regard by stating that “... *the principle of the application of these guarantees to members of the armed forces and the extent to which they shall apply to this category of persons shall also be determined by national laws or regulations.*”

**18.** Portuguese law, whether in the Fundamental Law - Constitution, the National Defence Law, or more specifically in the Military Associations Law, or even in the Statute of Leaders of Military Associations, lays down these restrictions which take into account the undeniable specificities of the functions exercised by the armed forces and which require special consideration.

**19.** Thus, in sum, under Article 270 of the Constitution of the Portuguese Republic, the law may establish restrictions on the exercise of the rights to freedom of expression, assembly, demonstration, association, and collective petition and on the passive electoral capacity by military personnel.

**20.** In this sense, the Law on the Right of Professional Association of Military Personnel stipulates that the exercise of associative activities cannot, under any circumstances and by any means, conflict with legally defined duties and functions or with the fulfilment of service missions and

that the exercise of these rights must always respect the National Defence Law.

**21.** These restrictions shall, in obedience to the Constitution, be established strictly in accordance with the requirements of the respective functions.

**22.** Taking into account the aforementioned legal framework and the respective analysis, Portugal believes that, regarding the application of Articles 5 and 6 of the Charter to the armed forces, the State complies with the principles that derive from the rights attributed, establishing only the restrictions that are required given the specific nature of the functions they perform.

**23.** In this sense, the Respondent finally notes that the rights to freedom of association are effective and freely exercised, which is demonstrated by the existence of various associations, and in the close articulation between these associations and the Ministry of National Defence.

**24.** It should also be noted that military personnel of the armed forces enjoy a set of special rights that are consistent with their military status, different from the regime of workers in public functions and workers subject to the private law regime, and which are set out in the Statute of Military Personnel of the Armed Forces (Decree-Law 90/2015, of May 29th, in its current drafting).

**25.** In light of the above, the Respondent State considers that the collective complaint filed by EUROMIL is unfounded and should be dismissed.

## **VI. CONCLUSIONS**

A. Portugal honours the compliance with the international norms and standards to which it is bound and, as far as this case is concerned, the application to the armed forces of Articles 5 and 6 of the Charter.

B. The rights to freedom of assembly, association, and demonstration are guaranteed by both the Constitution of the Portuguese Republic and the Military Associations Law.

C. The exercise of these rights can be restricted in the strict measure of the requirements of the respective functions of National Defense in compliance with constitutional principles and norms and the relevant domestic law.

D. The rights are effective and freely exercised, and articulation with the competent Government authorities is ensured.

E. In light of the above, the Respondent:

a. **Invites the Committee to find the complaint unfounded in all respects;**

b. **Requests the Committee to** conclude that the Respondent State has ensured the satisfactory application of the provisions of the Charter referred to in the complaint, namely Articles 5 and 6.