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CONSEIL DE L'EUROPE

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

22 July 2022

Case Document No. 6

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

**REPLY FROM THE GOVERNMENT TO
EUROMIL'S RESPONSE**

Registered at the Secretariat on 8 July 2022

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

EUROPEAN ORGANISATION OF MILITARY ASSOCIATIONS

AND TRADE UNIONS (EUROMIL)

(Applicant)

V.

PORTUGAL

(Respondent)

COMPLAINT No. 199/2021

REPLY TO EUROMIL'S RESPONSE

8TH. JULY 2022

I. BACKGROUND

1. On 25th May 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 ("Charter") to Portuguese military associations.

2. After having challenged the admissibility of the complaint, Portugal ("Respondent") objected to EUROMIL'S Complaint No. 199/221 and presented its observations on the merits on March 15th, 2022, which we now fully reaffirm.

3. EUROMIL submitted a response to the observations on the merits to which Portugal is now invited to reply pursuant to Rule 31 (3) of the Rules of the European Committee of Social Rights.

4. In its response, the Applicant argues, in short, that:

(i) The Respondent is not in compliance with international norms and standards since the provisions in law which grant the exercise of the rights foreseen in Articles 5 and 6 of the Charter are not applied in practice. Military associations can represent their members in theory but not in reality;

(ii) The restrictions imposed to the exercise of such rights by military associations are far beyond proportionate and necessary and constitute an outright ban for military personnel on activities of a trade union nature and from bargaining collectively;

(iii) Although the legislation allows for military professions to be heard, they are not consulted in practice. The Portuguese government fails to engage in any meaningful dialogue or negotiation with the representative associations or collective bargaining.

(iv) The Respondent has not given examples of useful mechanisms that are in place for professional military associations in any effective social bargaining and has only highlighted the existence of legislation allowing for the establishment of such associations.

5. In the Respondent's view, these allegations are unfounded in all respects, for the reasons set out below.

II. REPLY TO EUROMIL

6. RELEVANT INTERNATIONAL LEGAL INSTRUMENTS AND DOMESTIC LAW

7. The Respondent reaffirms and hereby reproduces for the purposes of this reply all the references made in the observations on the merits of 15th March to the international legal instruments and domestic laws;

8. Additionally, the Respondent would like to underline Article 16-A of the Statute of the Military of the Armed Forces approved by Decree-Law no. 90/2015, of May 29th which safeguards the right of association, when it provides that “*The military have the right to establish professional associations of institutional representation of their associates, of a welfare, ethical or socio-professional nature.*”

III. ANALYSIS

9. Compliance with International Law, including the provisions of the Charter, is a core feature of the Portuguese legal system.

10. Indeed, under Article 8 of the Constitution of the Portuguese Republic, the rules and principles of international law are part of the Portuguese domestic legal order.

11. Including the legal framework of the Charter. In this regard, the constitutional norms that enshrine the rights to freedom of assembly and demonstration and the ordinary legislation that provides for those rights specifically regarding the Armed Forces are of paramount importance.

12. The exercise of rights and duties of the Armed Forces, including associative rights, are specifically guaranteed, and regulated by the National Defence Law; its articles 29 to 31 provide for rights of assembly, demonstration, and association of the on-duty military personnel.

13. These rights are concretized in the law, namely Organic Law no. 3/2001 of August 29th, which exhaustively regulates the associative right of the military, who, when organized in legally constituted military associations, may:

- Integrate consultative councils, study commissions and working groups constituted to proceed with the analysis of matters of relevant interest to the institution, in the area of its specific competence;
- Be heard on issues regarding the professional, remuneration and social status of its members;
- Promote initiatives of a civic nature that contribute to the unity and cohesion of the military in actual service 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 authorisation, on issues of an exclusively technical nature;
- Hold meetings within the scope of its statutory purposes;
- Disclose its initiatives, activities and editions in the military units and establishments, as long as in a place made available for that purpose;
- Express an opinion on matters expressly included within its statutory purposes;
- Integrate and establish contacts with similar associations, federations of associations and international organisations that pursue similar objectives.

14. Contrary to what is referred to by EUROMIL, there are several professional associations of Armed Forces personnel rightfully established and active in Portugal, including the following:

- a. *Associação de Oficiais das Forças Armadas (AOFA)*;
- b. *Associação dos Militares na Reserva e Reforma (ASMIR)*;
- c. *Associação Nacional de Sargentos (ANS)*;

d. Associação de Praças (AP)

e. Associação de Contratados do Exército (ANCE).

15. All these associations exercise, in accordance with the law and their own statutes, their mission to represent the rights of their members.

16. It is to be highlighted their **growing interaction with the Ministry of National Defence**, within the scope of a governmental policy of strengthening the participation of the military representative associations in the decision-making process, namely of legislative proposals and on aspects related to their conditions of work.

17. The table below shows a number of meetings held by various associations representing military personnel with political decision-makers and the heads of the various branches of the armed forces, within the scope of the exercise of the right of association, negotiation, and representation of the military. We believe that these examples clearly demonstrate that the argument used by the Applicant cannot proceed.

Table 1 - Meetings of Military and Militarized Associations with the Members of the Government in the area of National Defence		
Minister of National Defence and Secretary of State for National Defence	AP	03/05/2022
Minister of National Defence and Secretary of State for National Defence	AOFA	03/05/2022
Minister of National Defence and Secretary of State for National Defence	ANS	23/05/2022
State Secretary for National Defence	ASPPM	14/12/2020 29/10/2021

		17/01/2022
Table 2 - Hearing of Military and Militarized Associations by the CEMs of the Branches and by the Commandant-General of the Maritime Police		
ALM CEMA	AP	07/02/2022
ALM CEMA	ANS	08/03/2022
ALM CEMA	AOFA	09/03/2022
GEN CEME	ANS	07/04/2017 31/10/2018 02/05/2019 25/06/2021 24/02/2022
GEN CEME	AP	25/08/2017 09/11/2018 21/06/2021
GEN CEMFA	ANS	04/04/2022
GEN CEMFA	AOFA	04/04/2022

Commanding General of the Maritime Police	ASPPM	08/06/2021 27/07/2021 03/02/2022 13/04/2022
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Table 3 - Fulfilling the right of hearing of Military Associations, within the scope of statutory, remuneration and social issues, consecrated in the Organic Law no. 3/2001, of 29th August, the following military associations have been consulted

Decree-Law No. 90/2015, of 29 th May, which approves the Statute of the Armed Forces Military (EMFAR) and respective amendments. (Decree-Law no. 75/2021, of 25 th August, and Law no. 10/2018, of 2 March) AOFA	AOFA ANS AP	Statutory Rights
Decree-Law No. 296/2009, of 14 th August 2009, approves the remuneration scheme for military personnel of the Armed Forces	AOFA ANS AP	Remunerations
Decree-Law no. 75/2021, of 25 th August, which establishes the right to enter the permanent staff of the Armed Forces for military personnel in active service, following an accident in service that occurred during operational activity	AOFA ANS AP ADFA	Social Rights
Decree-Law No. 83/2019, of 20 th June, which alters the legal regime for renting houses with economic rent from the Armed Forces Social	ASMIR AOFA	Social Rights

Action Institute	ANS AP	
Draft Decree-Law that alters the legal regime for renting houses with economic rent from the Armed Forces Social Action Institute (in legislative cycle)	ASMIR AOFA ANS AP	Social Rights
Draft Order amending the Regulations for the Allocation of Budget Rentals of the Armed Forces Social Action Institute (IASFA) - currently being revised	ASMIR AOFA ANS AP	Social Rights
Draft Ministerial Order amending the Regulations for the Evaluation of the Armed Forces Military Personnel (RAMNFA) - ongoing review	AOFA ANS AP	Statutory Rights
Decree-Law no. 75/2018, of 11 th October, amends the Special Contract Regime (RCE)	AOFA ANS AP ANCE	Statutory Rights
Decree-Law no. 76/2018, of 11 th October, amends the Regulation on Incentives for Military Service (RIPSM)	AOFA ANS AP	

	ANCE	
<p>Decree-Law no. 167/2005, of 23rd September 2005, which approves the legal regime of Assistance in Sickness to Military personnel of the Armed Forces (ADM) and merges the subsystems of Assistance in Sickness to Military personnel of the Army (ADME), Assistance in Sickness to Military personnel of the Armed Forces (ADMA) and Assistance in Sickness to Military personnel of the Air Force (ADMFA).</p> <p>Amendments:</p> <p>Decree-Law no. 81/2015, of 15th May;</p> <p>Decree-Law no. 105/2013, of 30th July;</p> <p>Law 53-D/2006, of 29th December.</p>	<p>AOFA</p> <p>ANS</p> <p>AP</p> <p>ASMIR</p>	<p>Statutory and Social Rights</p>

18. It is thus amply demonstrated that the associative rights of the Armed Forces' military personnel are a reality in Portugal, exercised under the terms of the law, contrary to the Applicant's claim.

19. In Portugal there is no total inhibition, but only proportionate restrictions to the exercise of rights, in accordance with the specificities of armed forces functions. A significant number of associative rights is ensured, such as the right to create associations, to represent their professional interests, to develop collective activities and to be consulted or to issue opinions on legal measures within the scope of National Defence.

20. These restrictions are exceptional and exist only to the extent strictly necessary to maintain the interest of national defence and national security, given the differences between the legal regime of the military, to which they adhere aware of the specificities and benefits, in relation to other workers from other areas.

21. In fact, the Charter itself, in the final part of article 5, provides a safeguard clause in this matter by enshrining that “... *the principle of applying these guarantees to members of the Armed Forces and the extent to which they will apply to this category of persons are also determined by national laws or regulations.*”

22. The European Convention on Human Rights establishes that the right to freedom of assembly is not absolute; it may be subject to restrictions in accordance with Article 11(2). Which means they must consist of various other measures taken by the authorities, provided that they are "*prescribed by law*", pursue one or more legitimate objectives under paragraph 2, and are "*necessary in a democratic society*" for the achievement of the objective or objectives in question.

23. This is accurately the interpretation of the European Court of Human Rights, setting the criteria for the admissibility of restrictions imposed on freedom of assembly foreseen in article 11 of the Convention¹.

24. So, the referred measures must respond to a "*pressing social need*" and be proportionate to the "*legitimate objective*", the motivation for adopting the measures must be relevant and sufficient, since the principle of proportionality requires a balance between the rights and the interests to be protected, on the one hand, by the military as holders of the right to association and representation and, on the other hand, the public interest, which in Portugal is defined as the common good of society, anchored in public order and in public defense and security².

25. Finally, a reference should be made to the allegation that the Applicant makes regarding the statements made in audience with the Minister of National Defence, on 26

1 Guide for article 11, page 46 and following, **IV. Restrictions on members of the armed forces, the police, and the state administration**, https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf

² The European Court of Human Rights recalls that the term "order", as used in Article 11(2), does not designate only "public order", but also the order that must prevail within a given social group, as the military disorder can have a serious impact on order throughout society.

June 2018, by the then Secretary of State for Defence, *Marcos Perestrello*, in the sense that “... *the negotiation process with the union structures of the State bodies and the military are of a completely different nature structure (...) that “... we have not yet reached a conclusion...”* .

26. The Applicant’s interpretation of the intervention carried out by the former Secretary of State for National Defence is broad and partial. It was stressed that the negotiation process with the representatives of military associations is substantially different from the negotiations with the remaining workers due to the legal nature and importance of the military's role in maintaining public order in Portugal.

27. It is not said that there are no rights, what it is admitted is the need for constant improvement as in all activities.

28. To conclude, the Respondent observes that the associative rights established are effective and exercised, which is demonstrated by the existence of several associations and the close articulation between these regularly constituted military associations and the Ministry of National Defence.

29. In this sense, the Respondent notes that AOFA, referred in the Parliament that their meeting representing military personnel with political decision-makers (which took place on May 2022) was a sign of full recognition of the credibility of military associations and, also the dialogue was very important to acknowledge labour questions and military rights.³

30. One last note concerning the fact that the military personnel of the Armed Forces enjoy a set of special rights that are consistent with the military condition, different from the regime of workers in public functions and workers subject to the regime of private law, as established in the Statute of the Military of the Armed Forces (Decree-law

31. In these terms, once again, it is emphasized that the Respondent State considers that the collective complaint filed by EUROMIL is unfounded.

IV. CONCLUSIONS

³ To consulte AOFA: <https://aofa.pt/aofa-reuniu-com-o-grupo-parlamentar-do-partido-socialista/>

A. Portugal complies with the international standards and obligations to which it is bound and, in this case, the application of articles 5 and 6 of the Charter to the Armed Forces.

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

C. The implementation of these rights is carried out with respect for national sovereignty imposed by National Defence safeguards, in compliance with Constitutional principles and norms and the relevant domestic law.

D. The restrictions imposed comply with the Constitution and the principles of proportionality and reasonableness, with respect for the criteria that internationally define such principles.

E. The rights are effective and exercised, and the articulation with the Government authorities is ensured..

F. The examples provided demonstrate clearly that the rights do not only exist formally but rather that they are effectively exercised

G. In these terms and in conclusion, the Respondent:

Invites the Committee to find the complaint unfounded in all respects;

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.

Lisbon, July 8th 2022.