EUROPEAN COMMITTEE OF SOCIAL RIGHTS
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30 July 2021

Case Document No. 1

European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions in the Netherlands (CNV) v. the Netherlands
Complaint No. 201/2021

COMPLAINT

Registered by the Secretariat on 12 July 2021

Collective Complaint

by the

European Trade Union Confederation (ETUC),

Netherlands Trade Union Confederation (FNV) and

National Federation of Christian Trade Unions in the Netherlands (CNV)

v.

the Kingdom of the Netherlands

12 July 2021

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SUMMARY

The ETUC, FNV and CNV (hereinafter referred to as the complainants) hereby submit a collective complaint against the Kingdom of the Netherlands based on the Additional Protocol to the European Social Charter providing for a system of collective complaints adopted in 1995. The collective complaint deals with infringements made in the Netherlands on the right to collective action. This arises from the manner in which Article 6§4 and Article G of the revised European Social Charter (ESC) is interpreted by Dutch higher and lower courts. As the right to strike is not regulated by legislation in the Netherlands and is based on this jurisprudence, this has the result that practice in the Netherlands is not in conformity with the ESC.

Summary

The complainants submit a complaint against the manner of assessment applied by Dutch higher and lower courts when imposing restrictions on collective actions, namely with an excessively broad framework of standards and not (strictly) on the basis of Article G ESC (in conjunction with Article 6§4 ESC). This complaint consists of two parts:

Part 1. Complaint concerning the case law of the Supreme Court, as pronounced in the Enerco (2014) and Amsta (2015) judgments.

The Supreme Court, for the purpose of judicial assessment, has developed the following criteria for the possible limitation of the right to collective action:

1) the Supreme Court applies the general norm that restrictions may be permitted on the ground of social urgency to prevent a strike that could induce an unlawful act. This concept (social urgency) is broad enough to provide scope for a much broader interpretation than the strict standard of Article G itself. It includes grounds that are not mentioned as such in Article G.
2) In addition by elaborating this concept the Supreme Court states that all circumstances of the case can be taken into account pointing to 1. the nature and duration of the action, 2. the relationship between the action and the objective pursued by it, 3. the damage caused by it to the interests of the employer or third parties, and 4. the nature of those interests and that damage. This is far beyond the standard set in article G
3) In the assessment by the judge significance (in some circumstances even decisive significance) could and should also be attached to the answer to the question whether the 'rules of the game' were observed. The concept 'rules of the game' has nowhere been clearly defined and is therefore an open-ended standard to which judges give content as they see fit.

In the case law of the Supreme Court, the focus of the assessment whether restrictions can be imposed on collective actions has shifted from Article 6§4 ESC to the Article G test. The complainants note that after the Enerco and Amsta judgements there has been little or no debate in the case law about the question whether an action falls under the protection of Article 6§4 ESC: the right to take collective action is recognised and placed within the scope of Article 6§4 ESC.

The restrictions on this right of action on account of the standard of socially (im)proper conduct are based on the unlawful act set out in Article 6:162 Dutch Civil Code. In the opinion of the complainants, the use of this standard developed by the Supreme Court in the two judgements referred to for assessing whether a prohibition is or restrictions are (or may be) at issue on the basis of Article G, goes much further than Article G allows, on the one hand because the grounds for a possible prohibition or restriction go beyond the grounds stated in Article G and furthermore because a prohibition or restriction can be based on a weighing-up of interests in which all the circumstances of the case can be taken into account. The conclusion is therefore that the assessment framework of the Supreme Court far exceeds the scope of Articles 6§4

and G ESC. Finally, it must be noted that this assessment framework lacks the quality of being stable and foreseeable. This too is not in conformity with Article 6§4 and Article G ESC, as required by the ECSR.

Part 2. Complaint concerning the way in which the framework of standards of the Supreme Court is applied by the lower courts.

Secondly the complainants state that the lower courts, when applying the assessment framework developed by the Supreme Court in its decisions in the Enerco and Amsta cases, apply these criteria that are not mentioned as such in Article G and also cannot be accommodated there. In the case law of the lower courts and within the framework of the unlawful act test on the basis of Article 6:162 Dutch Civil Code, a weighing-up of interests is used for assessment in light of all the circumstances of the case as mentioned in the decisions of the Supreme Court. This does not do justice to the assessment framework included in Article G.

Article G specifically mentions the standards that must be applied when assessing whether restrictions may be imposed on the fundamental right to collective action. Since the Netherlands has no legislation in respect of the right to collective action, it is to the court to assess and decide whether a prohibition or restriction to the exercise of that right can be imposed. It therefore must give correct substance to the standards in accordance to Article G. The assessment framework developed in the case law has to be stable and foreseeable. This is not the case. The assessment framework based on the unlawful act is so broad that the outcomes of the judicial assessment are extremely divergent, inconsistent and difficult to predict. Whereas Article G takes as a starting point that the imposition of restrictions can only occur in exceptional cases, in the Netherlands in the majority of cases a general prohibition, temporary or otherwise, is imposed on collective actions or far-reaching restrictions are imposed. The effective use of the fundamental right to collective action is thereby seriously impeded.

1. Admissibility

1.1. Introduction to the complaint

1. This complaint is submitted by the:

European Trade Union Confederation (ETUC)

Represented by Luca Visentini, General Secretary of the ETUC
Boulevard du Roi Albert II, 5
B – 1210 Brussels
Belgium

Represented by Stefan Clauwaert, acting agent, ETUC Senior Legal and Human Rights Advisor, ETUC representative in the Council of Europe Steering Committee for Human Rights (CDDH) and Governmental Committee to the European Social Charter/European Code of Social Security,

Netherlands Trade Union Confederation (FNV)

Represented under Article 25(1) of the Constitution of the FNV by Tuur Elzinga and Zakaria Boufangacha, members of the FNV Executive Committee
Hertogswetering 159
NL - 3543 AS Utrecht
The Netherlands

Represented by Tuur Elzinga

National Federation of Christian Trade Unions in the Netherlands (CNV)

Represented under Article 11(7) of the constitution of the CNV by Piet Fortuin, Chairman of the board and Jan Pieter Daems, CNV board member
Tiberdreef 4
NL - 3561 GG Utrecht
The Netherlands

Represented by Piet Fortuin

- hereinafter 'the complainants' -

based on the Additional Protocol of 1995 providing for a system of collective complaints (hereinafter: the 1995 Protocol) alleging the violation of Article 6§4 and Article G of the Revised European Social Charter (hereinafter: ESC)

2. This collective complaint concerns alleged non-satisfactory application of Article 6§4 ESC by the Kingdom of the Netherlands (hereinafter 'the Netherlands') on the right to collective action. This arises from the restrictive manner in which Article 6§4 and Article G ESC is interpreted by Dutch higher and lower courts. The complaint is motivated in

particular by references to the relevant international legal framework, the development of the right to collective action in the Netherlands and the manner in which this development violates the fundamental right to collective action and the right to strike as protected in the ESC in particular.

1.2. The complainant trade union organisations

3. The **ETUC** is the international organisation of trade unions provided for in Article 1 lit. a of the 1995 Protocol as well as Article 27§2 of the European Social Charter (ESC). According to Article 22§3 of its Constitution the General Secretary is authorised to represent the ETUC in all matters.[1] **(see also Annex 1)** The ETUC comprises currently 90 national organisations from 38 countries, including FNV and CNV in the Netherlands. The ETUC is also a recognised European cross-industry social partner under Articles 154-155 Treaty on the Functioning of the European Union (TFEU).

4. The **FNV** and the **CNV** are associations with legal personality which aim to represent the material and immaterial interests of employed and non-employed persons, in particular the interests of their members organised in sectoral divisions and networks. They seek to achieve these objectives by, among other things, concluding collective labour agreements and, if necessary, by taking collective action aimed at the conclusion of collective labour agreements. The constitutions of both associations are attached as **Annex 1**. Article 25(1) of the Constitution of the FNV states that the governing board as well as two members of the executive committee acting jointly are authorised to represent the FNV. This complaint was signed by two members of the Executive Committee and therefore the FNV is legally represented. Article 11(7) of the Constitution of the CNV states that the CNV can be represented by the chairperson and general secretary acting jointly. This complaint was co-signed by them jointly and therefore the CNV is also legally represented.

5. The FNV and CNV together represent more than 1.2 million of the 1.6 million trade union members in the Netherlands. These complainants are contracting parties to the vast majority of the collective labour agreements that are concluded in the Netherlands.

6. FNV en CNV are both represented on a large number of consultative bodies which form part of Dutch society at decentralised and sectoral levels as well as the national level. At national level these complainants are prominent members of the Social and Economic Council of the Netherlands (SER), an advisory body of the Dutch government in which employers' and employees' organisations are represented together with independent members appointed by the government. These complainants are also represented in the Dutch Labour Foundation (*Stichting van de Arbeid*, STAR), an advisory body consisting of employers' and employees' organisations.

7. FNV and CNV meet the requirements that are laid down for a national trade union to bring a collective complaint. They are representative trade unions in the Netherlands, which is evident from their size as well as their involvement in all consultative structures that characterise Dutch labour relations.

8. Moreover, at European level, these complainants are both affiliated organisations to the ETUC and should as such be recognised as 'represenative trade unions' in the

[1] ETUC 2019 Constitution, as adopted at its 13th Statutory Congress in May 2019 at Vienna (Austria), Article 22§3 states: "*The General Secretary shall be the spokesperson of the Confederation and the coordinator of all activities,...*"

sense of Article 1(c) CCPP and the case law of the ECSR[2]. To note is that the ETUC, together with its Belgian affiliates CSC, FGTB and CGSLB, have in 2009 submitted a similar collective complaint on unacceptable judicial interventions on the right to take collection action and right to strike in particular.

1.3 Legal framework in respect of the ESC

9. The Kingdom of the Netherlands signed the revised ESC on 23 January 2004 and ratified it on 3 May 2006 (*Tractatenblad 2006/128*). This ratification included a reservation with regard to the position of military personnel in active service as well as military officials appointed at the Ministry of Defence. In addition, the Kingdom of the Netherlands has accepted the system of collective complaints as regulated by the Additional Protocol of 1995 providing for a system of collective complaints and ratified this Protocol on 3 May 2006.

1.4. Conclusion

10. Given the above information it is clear that the complaint is submitted by an international trade union organisation and representative national organisations of trade unions, within the jurisdiction of the Contracting Party against which they have lodged a complaint, and that the complaints formulated below should accordingly be declared admissible under the 1995 Protocol.

2. The international and domestic legal framework

2.1. General

11. The complaint concerns the manner in which the right to strike is protected in the Netherlands. The Netherlands has no legislation in the area of the right to collective action. Neither the Constitution nor other statutes contain legal standards relating to the right to collective action and/or the restrictions that can be placed on it, for example when essential services are involved.[3] Since 1900 interim relief proceedings before the President of the court of first instance as well as the broad interpretation given to the civil-law concept of unlawful act have influenced case law in the area of the right to collective action in Dutch civil law.

[2] Collective Complaint No. 59/2009 European Trade Union Confederation (ETUC)/ Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/ Confédération des Syndicats chrétiens de Belgique (CSC)/ Fédération Générale du Travail de Belgique (FGTB) v. Belgium.

[3] With the exception of the Dutch Military Personnel Act which includes restrictions on collective actions by military personnel. Since this falls outside the scope of the present complaint, it will not be dealt with further.

12. The law defines an unlawful act as a violation of a right and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, in so far as there was no justification for this behaviour (Article 6:162(2) Dutch Civil Code).[4] It has given the court the power to intervene on the basis of a broad general standard when an unlawful act is imminent or has taken place, for example by a mandatory measure, subject to a penalty payment. In the area of the right to collective action this doctrine forms the legal basis for prior assessment by the court as to whether a collective action which has been announced is lawful or not. This assessment takes place in the absence of a legally prescribed framework and enables the court to issue a (preventive) prohibition on taking collective action in whole or in part. In this assessment the Dutch courts have the assignment to protect the freedom of trade unions to involke the right to collective action as laid down in international law, such as Article 6§4 and Article G ESC.

13. The complainants file this collective complaint in due concern to violations made in the Netherlands on the right to collective action. This arises from the manner in which Article 6§4 and Article G ESC is interpreted by Dutch higher and lower courts (see paragraph 3.1.1.).

14. In this complaint attention will be paid first to the international legal framework and the manner in which the right to collective action, including the right to strike, is protected by the United Nations, the International Labour Organization as well as the Council of Europe and the European Union. It illustrates the developments in the international and European law on the right to strike and the central position of the ESC in the international legal framework. After that attention will be paid to the development of the right to collective action in the Netherlands and the manner in which this development violates the fundamental right to collective action and the right to strike as protected in the ESC in particular.

15. The importance and legal significance of international standards and their interpretation and application is widely recognised[5]. Thus, the complainants would like to add pertinent references to international law and material in their complaint because the right to collective bargaining including the right to collective action is not exclusively protected by the European Social Charther. All following International and European (human rights) organisations attribute a great importance to the right of collective bargaining in general and for civil servants in particular, be it in their standard-setting, the respective related case law or in other fields like research, projects, studies etc.

16. In this section, the complainants would like to refer to pertinent international law and material. From the outset, it should be noted that the Netherlands has ratified all instruments (as far as they are open for ratification) mentioned below, unless otherwise mentioned.

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[4] Article 6:162 Dutch Civil Code
- 1. A person who commits an unlawful act against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.
- 2. As an unlawful act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.
- 3. An unlawful act can be attributed to the person accountable if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).

[5] As to legal impact of the 'Interpretation in harmony with other rules of international law' see the ETUC Observations in No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden - Case Document no. 4, Observations by the European Trade Union Confederation (ETUC), paras. 32 and 33.

2.2 United Nations

17. At a general level, it appears more than relevant to refer at first to the most recent Joint Declaration of the Human Rights Committee (CCPR) and the Committee on Economic, Social and Cultural Rights (CESCR) dealing with the two Covenants ICCPR and ICECSR respectively. Adopted at the occasion of the 100th anniversary of the ILO, in their Joint Statement 'Freedom of association, including the right to form and join trade unions' the following is highlighted:[6]

> *(…) The Human Rights Committee and the Committee on Economic, Social and Cultural Rights, welcome the progress made by States to guarantee the freedom of association in labour relations. At the same time, the two committees note the challenges faced in the effective protection of this fundamental freedom, including undue restrictions of the right of individuals to form and join trade unions, the right of unions to function freely, and the right to strike. (…)*
>
> *3. Freedom of association includes the right of individuals, without distinction, to form and join trade unions for the protection of their interests. The right to form and join trade unions requires that trade unionists be protected from any discrimination, harassment, intimidation, or reprisals. The right to form and join trade unions also implies that trade unions should be allowed to function freely, without excessive restrictions on their functioning.*
>
> *4. Freedom of association, along with the right of peaceful assembly, also informs the right of individuals to participate in decision making within their workplaces and communities in order to achieve the protection of their interests. The Committees recall that the right to strike is the corollary to the effective exercise of the freedom to form and join trade unions. Both Committees have sought to protect the right to strike in their review of the implementation by States parties of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.*

18. From the outset, it is to be noted that neither the Universal Declaration on Human Rights (UDHR) of 1948, nor the International Covenant on Civil and Political rights (ICCPR) of 1966[7], contain a provision that explicitly recognises a right to collective action or right to strike. Whereas the UDHR (Articles 20(1) and 23(4))[8] and the ICCPR (Article 22(1))[9] recognise the freedom of association in a generic way, the ICECSR

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[6] Joint Declaration of the Human Rights Committee (CCPR) and the Committee on Economic, Social and Cultural Rights (CECSR), Statement on freedom of association, including the right to form and join trade unions, 18 October 2019.

[7] Ratified by the Netherlands in 1978.

[8] Articles 20(1) and 23(4) UDHR respectively state:
Article 20(1) *Everyone has the right to freedom of peaceful assembly and association.(…)*
Article 23(4) *Everyone has the right to form and to join trade unions for the protection of his interests.*

[9] Article 22 ICCPR provides:
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.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

recognises firstly the freedom of association in a more specific way *id est* as a right of everyone to form and join trade unions, but also explicitly to the right to strike in its Article 8(1)(d) (see below).

2.2.1. International Covenant on Economic, Social and Cultural Rights (ICESCR)[10]

The Right to form and join trade unions (Article 8 ICECSR)

19. The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides in Article 8 on the right to form and join trade unions the following:

> ***Article 8***
>
> *1. The States Parties to the present Covenant undertake to ensure:*
>
> > *(…) (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.*
>
> *3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

CECSR Concluding observations

20. Until now, the CECSR has not yet elaborated a specific 'General Comment' in relation to Article 8.

21. The CESCR expressed over the period 2014-2019, serious concern about the protection of trade union rights (right to organise, right to collective bargaining and right to strike), both in law and practice. As for the attacks on the right to strike the CESCR raised in particular Concluding observations to Montenegro, North Macedonia, Serbia, Spain and the United Kingdom).[11]

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[10] Ratified by France in 1978.

[11] For the respective Concluding Observations, see: Committee on Economic, Social and Cultural Rights, Concluding observations on the initial report of **Montenegro**, 15 December 2014 (DOC E/C.12/MNE/CO/1), Committee on Economic, Social and Cultural Rights, Concluding observations on the combined second to fourth periodic reports of the former Yugoslav Republic of **Macedonia**, 15 July 2016 (DOC E/C.12/MKD/CO/2-4); Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of **Serbia,** 10 July 2014 (DOC E/C.12/SRB/CO/2); Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of **Spain,** 25 April 2018 (DOC E/C.12/ESP/CO/6) and Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the **United Kingdom** of Great Britain and Northern Ireland, 14 July 2016 (DOC E/C.12/GBR/CO/6).

22. The CESCR did not address Concluding observations towards the Netherlands on the particular issue of trade union rights and right to strike in particular.

2.3 International Labour Organisation (ILO)

2.3.1. ILO Constitution and Declarations[12]

23. The ILO Declaration of Philadelphia of 1944 on the aims and purposes of the ILO (annexed to the Constitution) and which forms part of the ILO Constitution does not refer explicitly to the right to strike.[13]

Also other important ILO Declarations like the ILO Declaration on Fundamental Principles and Rights at Work of 1998[14], the ILO Declaration on Social Justice for a Fair Globalization of 2008[15], and the ILO Centenary Declaration for the Future of Work[16] do not explicitly refer to it as well.

However from the longstanding case law of the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) it is clear that the right to strike forms an important corollary of the freedom of association and right to collective bargaining (see Chapter 2 paragraph 2.3.4.).

2.3.2 Conventions

24. Several ILO (fundamental) Conventions deal with trade union rights such as the freedom of association and the right to collective bargaining, but none of them refer explicitly to right to collective action and strike.[17]

But as mentioned, from the longstanding case law of the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) it is clear that the right to strike forms an important corollary of the freedom of association and right to collective bargaining (see Chapter 2; paragraph 2.3.4.)

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[12] J. Vogt et al, The right to strike in international law, Part III., Hart, Oxford, 2020, p. 35 ff.
[13] ILO Declaration of Philadelphia of 1944.
[14] ILO Declaration on Fundamental Principles and Rights at Work of 1998, adopted by the International Labour Conference at its Eighty-sixth session on 18 June 1998.
[15] ILO Declaration on Social Justice for a Fair Globalization, adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008
[16] ILO Centenary Declaration for the Future of Work, adopted by ILC at its 108th Session, Geneva, 21 June 2019.
[17] Convention concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Entry into force: 4 July 1950; Convention concerning the right to Application of the Principles of the Right to Organise and to Bargain Collectively, 1949 (No. 98) – Entry into force: 18 July 1951); Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (No. 151, Entry into force: 25 Feb 1981) and the Convention concerning the Promotion of Collective Bargaining (No. 154, Entry into force: 11 Aug 1983).

2.3.3 Other relevant ILO instruments

25. However, some other ILO instruments also refer to the right to strike, and principally the Abolition of Forced Labour Convention, 1957 (No. 105)[18], which prohibits the use of any form of forced or compulsory labour as a punishment for having participated in strikes, and the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)[19], which indicates that the parties should be encouraged to abstain from strikes and lockouts in the event of voluntary conciliation and arbitration, and that none of its provisions may be interpreted as limiting, in any way whatsoever, the right to strike. Also certain resolutions make reference to this right.[20]

2.3.4. ILO Supervisory bodies case law

26. As mentioned, there exists a longstanding case law by both the CFA and the CEACR in particular on the issue of the right to strike. Below, an overview of the most relevant case law parts is provided both in general as well as specific decisions in relation to the Netherlands.

General case law of the Committee of Experts on Application of Conventions and Recommendations

27. In its most recent General Survey on fundamental rights Conventions, in particular on Convention No. 87 (2012), the CEACR states the following in regard of the right to strike and eventual allowed restrictions:[21]

> *Strikes are essential means available to workers and their organizations to protect their interests, but there is a variety of opinions in relation to the right to strike. While it is true that strike action is a basic right, it is not an end in itself, but the last resort for workers" organizations, as its consequences are serious, not only for employers, but also for workers, their families and organizations and in some circumstances for third parties. In the absence of an express provision in Convention No. 87, it was mainly on the basis of Article 3 of the Convention, which sets out the right of workers" organizations to organize their*

[18] Convention concerning the Abolition of Forced Labour Convention, 1957 (No. 105), Entry into force: 17 Jan 1959, the Netherlands ratified the Convention on 18 February 1959. Article 1 provides that '*Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour (…) (d) as a punishment for having participated in strikes; (…).*

[19] Recommendation concerning Voluntary Conciliation and Arbitration, which provides the following:
II. Voluntary Arbitration
6. If a dispute has been submitted to arbitration for final settlement with the consent of all parties concerned, the latter should be encouraged to abstain from strikes and lockouts while the arbitration is in progress and to accept the arbitration award.
III. General
7. No provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike.

[20] See, in particular, the resolution adopted in 1970 by the ILC concerning trade union rights and their relation to civil liberties. http://white.lim.ilo.org/qvilis_world/english/infobd/l_anexoiii.html.

[21] ILO, International Labour Conference, 101st Session, 2012, Report of the Committee of Experts on the Application of Conventions and Recommendations – Report III (Part 1 B), General Survey – Giving globalisation a human face, Geneva 2012, § 168.

activities and to formulate their programmes, and Article 10, under which the objective of these organizations is to further and defend the interests of workers, that a number of principles relating to the right to strike were progressively developed (as was the case for other provisions of the Convention) by the Committee on Freedom of Association as a specialized tripartite body (as of 1952), and by the Committee of Experts (as of 1959, and essentially taking into consideration the principles established by the Committee on Freedom of Association). This position of the supervisory bodies in favour of the recognition and protection of the right to strike has, however, been subject to a number of criticisms from the Employers" group in the Committee on the Application of Standards of the International Labour Conference.

120. The affirmation of the right to strike by the supervisory bodies lies within the broader framework of the recognition of this right at the international level, particularly in the International Covenant on Economic, Social and Cultural Rights of the United Nations (Article 8, paragraph 1(d)), which, to date, has been ratified by 160 countries, most of which are ILO members, as well as in a number of regional instruments, as indicated in paragraph 35 of the present Survey. It is in the context of the Council of Europe that the protection of the right to strike is the most fully developed at the regional level, in light of the abundant case law of the European Committee of Social Rights, the supervisory body for the application of the European Social Charter adopted in 1961 and revised in 1996, which sets out this right.

Permitted restrictions and compensatory guarantees

127. The right to strike is not absolute and may be restricted in exceptional circumstances, or even prohibited. Over and above the armed forces and the police, the members of which may be excluded from the scope of the Convention in general, other restrictions on the right to strike may relate to: (i) certain categories of public servants; (ii) essential services in the strict sense of the term; and (iii) situations of acute national or local crisis, although only for a limited period and solely to the extent necessary to meet the requirements of the situation. In these cases, compensatory guarantees should be provided for the workers who are thus deprived of the right to strike.

General case law of the Committee on Freedom of Association

28. From the CFA Digest it becomes amongst others apparent that:[22]

Importance of the right to strike and its legitimate exercise

The Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests. (§ 752)

The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. (§ 753)

The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87. (§754)

Strikes are by nature disruptive and costly; strike action also calls for a significant sacrifice from those workers who choose to exercise it as a last resort tool and means of pressure on the employer to redress any perceived injustices. (§755)

[22] ILO, Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Sixth edition, 2018.

Objective of the strike (strikes on economic and social issues, political strikes, solidarity strikes, etc.)

The occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers. (§ 758)

Organizations responsible for defending workers socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living. (§759)

2.4. Council of Europe

29. The Council of Europe (CoE) is characterised by two main human rights instruments, the European Convention on Human Rights (ECHR, See Chapter 2, paragraph 2.4.1.) and the European Social Charter (ESC, see Chapter 2, paragraph 2.4.0.) which is at the very core of this complaint. However, there are also other relevant documents (see paragraph 2.4.3.).

2.4.1. European Convention of Human Rights (ECHR)

30. The European Convention of Human Rights does also not explicitly refer to the right to strike, however the European Court of Human Rights (ECtHR) has recognized that Article 11 ECHR on 'Freedom of assembly and association' covers the right to strike.

Article 11 ECHR on '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.

Based on the Grand Chamber judgment in *Demir and Baykara*[23], in which the ECtHR for the first time recognized explicitly the right to collective bargaining, the ECtHR in *Enerji Yapi-Yop Sen* recognized the right to strike as an aspect of the same right.[24]

32. La Cour reconnait que le droit de grève n'a pas de caractère absolu. Il peut être soumis à certaines conditions et faire l'objet de certaines restrictions. Ainsi, le principe de la liberté

[23] ECtHR, 12 November 2008, *Demir and Baykara v. Turkey*, App. No. 34503/97, Judgment of 12 November 2008.
[24] ECtHR, 21 April 2009, *Enerji Yapi-Yop Sen v. Turkey*, App. No. 68959/01, Judgment of 24 April 2009.

syndicale peut être compatible avec l'interdiction du droit de grève des fonctionnaires exerçant des fonctions d'autorité au nom de l'Etat. Toutefois, si l'interdiction du droit de grève peut concerner certaines catégories de fonctionnaires (voir, mutatis mutandis, Pellegrin c. France [GC], no 28541/95, §§ 64-67, CEDH 1999-VIII), elle ne peut pas s'étendre aux fonctionnaires en général, comme en l'espèce, ou aux travailleurs publics des entreprises commerciales ou industrielles de l'Etat. Ainsi, les restrictions légales au droit de grève devraient définir aussi clairement et étroitement que possible les catégories de fonctionnaires concernées. De l'avis de la Cour, en l'espèce, la circulaire litigieuse était rédigée en des termes généraux qui interdisaient de manière absolue à tous les fonctionnaires le droit de grève, sans procéder à une mise en balance des impératifs des fins énumérées au paragraphe 2 de l'article 11 de la Convention. En outre, la Cour note que rien n'indique dans le dossier que la journée d'action nationale du 18 avril 1996 eût été interdite. L'interdiction posée par la circulaire ne concernait que la participation des fonctionnaires à cette journée d'action. En se joignant à celle-ci, les membres du conseil d'administration du syndicat requérant n'ont fait qu'user de leur liberté de réunion pacifique (Ezelin c. France, arrêt du 26 avril 1991, § 41, série A no 202). Or ils se sont vu infliger des sanctions disciplinaires sur le fondement de la circulaire incriminée (paragraphe 9 ci-dessus). La Cour considère que ces sanctions sont de nature à dissuader les membres de syndicats et toute autre personne souhaitant le faire de participer légitimement à une telle journée de grève ou à des actions visant à la défense des intérêts de leurs affiliés (Urcan et autres, précité, § 34, et Karaçay c. Turquie, no 6615/03, § 36, 27 mars 2007). La Cour relève que le Gouvernement n'a pas démontré la nécessité dans une société démocratique de la restriction incriminée.

In this ruling the Court acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions. However, while certain categories of civil servants could be prohibited from taking strike action, the ban did not extend to all public servants or to employees of State-run commercial or industrial concerns. Furthermore the legal restrictions on the right to strike should define as clearly and narrowly as possible the categories of civil servants concerned and general terms which absolutely prohibit all civil servants from the right to strike, without balancing the imperatives of the purposes listed in paragraph 2 of article 11 of the Convention, is not permitted.This ruling was followed by a series of similar judgements.[25]

2.4.2. European Social Charter (ESC)

31. Trade union rights and the right to collective action, in particular the right to strike, is embedded in Article 6 of the ESC, which is belonging to the so-called "hard core provisions of the Charter" and their fundamental character remained thus unchanged in the Revised European Social Charter.

The European Social Charter provides in Article 6§4 the following:

Article 6 – The right to bargain collectively

[25] ECtHR, 15 September 2009, *Kaya and Seyhan v. Turkey*, App. No. 30946/04, Judgement of 15 September 2019; ECtHR, 13 July 2007, *Saime Őzcan v. Turkey*, App. No. 22943/04, Judgement of 13 July 2010, ECtHR, 13 October 2010, *Çerikci v. Turkey*, App. No. 33322/07, Judgement of 13 October 2010; ECtHR, 27 June 2007, *Karaçaj v. Turkey*, App. No. 6615/03, Judgement of 27 June 2007. For an extensive analysis of the right to take collective action under Article 11 ECHR, see Filip Dorssemont, Klaus Lörcher and Isabelle Schömann, *The European Convention on Human Rights and the Employment Relation*, Oxford and Portland, Oregon, 2013, pp. 333-365

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: (…)

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

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.

32. As for the allowed restrictions to this right, Article G is providing the following:

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.

Compilation of case law

33. In its Digest of case law[26], the ECSR has emphasised the importance of the right to strike i.a. in the following terms:

Article 6§4 guarantees the right to strike and the right to call a lock-out. The right may result from statutory law or case-law.

In the former case, the Committee examines the case law of domestic courts in order to verify whether the courts do not overly restrict the right to strike and in particular if any intervention by domestic courts does not reduce the substance of the right to strike so as to render it ineffective. In this regard for example, the fact that a national judge may determine whether recourse to strikes are "premature" is not in conformity with Article 6§4 as this allows the judge to exercise one of the trade unions' key prerogatives.

Compilation of case law concerning the Netherlands

34. The case at stake has at several occasions formed part of the ECSR Conclusions in respect of the Netherlands under the normal reporting procedure. The complainants

[26] ECSR DIGEST OF THE CASE LAW OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS, December 2018.

refer to the most relevant Conclusions in relation to (the restrictions by judges on) Article 6§4.

35. From 1984 the ECSR expressed its concern with regard to the conformity of Dutch court decisions on the right to strike with Article 6§4 and wished to be informed as regards to the manner in which the right to strike was protected by the courts (see Conclusion VIII 1984). In 1989 and 1991 (Conclusions XI-1 and XII-1) the ECSR asked information as regards to the direct application of art. 31 (later replaced by article G) by the Netherlands courts given its concern at the conformity with its own case law. When this information was given, the ECSR pointed out that on the basis of Article 31 of the Charter, damages caused to third parties and financial losses sustained by the employer could only be taken into consideration in exceptional cases, when justified by a pressing social need. It continued its interest to receive detailed information on cases brought to Dutch courts and give information as regards to who could request that a court limits the means of duration of the collective action and whether it was possible to appeal against the judgments of first instance in this field (see Conclusions XIII -1 1993). The information provided raised questions. The ECSR posed questions as regards to the entitlement of third parties to request interim injunctions against the collective actions as well as that losses sustained by individual employers themselves, could be regarded as ground for the limitation of the duration of a collective action (Conclusions XIV-1, 1998). Thereupon the information given by FNV led to the conclusion that the ECSR considered it doubful that the conditions of Article 31 of the Charter were met and requested further information to be provided (Conclusion XV-1 2003). After that information was provided the ECSR (Conclusions XVI-1) concluded:

> *The Committee notes that the Dutch courts have recourse to the criterion of proportionality and as the courts further have the power to determine whether a strike is premature they are led to pass judgment on whether a strike is appropriate and lawful. The Committee considers that the judicial practices concerned by their nature restrict the right to strike and that they go beyond the restrictions admissible under Article 31 of the Charter. (…)*

36. In its next cycle the ECSR considered that the fact that a Dutch judge may determine whether recourse to strikes are “premature”, impinges on the very substance of the right to strike, as this allows the judge to exercise one of the trade unions’ key prerogatives, that of deciding whether and when a strike is necessary. Furthermore it was decided that the ECSR would continue to pay attention to decisions restricting the right to strike, as regards to the reasonable nature of Dutch courts’ intervention on the proportionality criterion, within or beyond the scope of Article 31 of the Charter (Conclusions XVII-1 2005 and XVIII-1 2006). The ECSR requested to be informed on case law demonstrating that Article G (that replaced Article 31, with equal content) of the Charter was taken into account. On the basis of information given as regards to two cases, the ECSR thereupon concluded that the situation was in conformity with the Charter on this point. However, the Committee wished to receive updated information on any new developments and case law of the courts with regard to this situation (Conclusion 2014).

37. The Conclusions 2018, adopted on 24 January 2019, deal with the case law of the Supreme Court in two rulings given in 2014-2015. The ECSR concluded that due to this case law of the Supreme Court the situation in the Netherlands is now in conformity with Article 6(4) ESC. It is noted with reference to the Dutch country report:

> *‘According to the report collective action may be restricted only by article G of the Charter and not by rules laid down in previous cases. (…)’.*

38. It is not apparent from the Conclusions 2018 whether the information provided by the FNV -which was transmitted by the Dutch government- made it sufficiently clear to the ECSR that the assessment framework of Article 6§4 ESC had been shifted by the

Supreme Court to the Article G test, with the assessment standard being whether it is socially urgent to impose restrictions. Nor is it apparent whether it has been made sufficiently clear how this was subsequently applied in the lower courts. This has been an important reason for the trade unions to submit this complaint.

Compilation of other case law

39. The ECSR has also expressed itself in relation to court interventions in restricting or limiting the right to strike against other ESC State Parties, for example as regards to the situation in Belgium.

Like in the Netherlands, the right to strike in Belgium is not regulated by law, but courts have sole jurisdiction to decide whether strikes are lawful or not and strikes could equally be stopped or prohibited by the courts via unilateral injunction procedures. In Conclusions XIV-1 it was considered that the increasing use of courts of referral judgments to bring strikes to an end, raised an important question about Belgium's compliance with Article 6§4 of the Charter, it was considered in Conclusions XVI-1 (2003) that the judicial practices restricted the exercise of the right to strike beyond the restrictions accepted in Article 31 of the Charter.'[27] The ECSR based its evaluation on the ground that a Belgian Judge may indirectly control the reasonable character of industrial claims. In its Conclusions 2010[28], the ECSR considered that case law that lacked sufficient precision and consistency so as to enable parties wishing to engage in a collective action to foresee whether their actions will be subject to legal restraint. In addition, the Committee considered that the expression "prescribed by law" includes within its scope the requirement that fair procedures exist.

2.4.3. Other relevant Council of Europe documents

40. In its Resolution 2033 (2015) of 28 January 2015 on the "Protection of the right to bargain collectively, including the right to strike"[29], the Parliamentary Assembly (PACE) highlights the following:

> *1. Social dialogue, the regular and institutionalised dialogue between employers' and workers' representatives, has been an inherent part of European socio-economic processes for decades. The rights to organise, to bargain collectively and to strike – all essential components of this dialogue – are not only democratic principles underlying modern economic processes, but fundamental rights enshrined in the European Convention on Human Rights (ETS No. 5) and the European Social Charter (revised) (ETS No. 163).*
>
> *2. However, these fundamental rights have come under threat in many Council of Europe member States in recent years, in the context of the economic crisis and austerity measures. In some countries, the right to organise has been restricted, collective agreements have been revoked, collective bargaining undermined and the right to strike*

[27] ECSR Conclusions XVI-1 (2003), Belgium, Article 6§4.
[28] ECSR Conclusions 2010, Belgium, Article 6§4.
[29] PACE Resolution 2033 (2015), Protection of the right to bargain collectively, including the right to strike', Rapporteur Mr. Andrej Hunko; text adopted by the Assembly on 28 January 2015 (6th Sitting).

limited. As a consequence, in the affected countries, inequalities have grown, there has been a persistent trend towards lower wages, and negative effects on working and employment conditions have been observed.

3. The Parliamentary Assembly is most concerned by these trends and their consequences for the values, institutions and outcomes of economic governance. Without equal opportunities for all in accessing decent employment and without appropriate means of defending social rights in a globalised economic context, the inclusion, development and life chances of whole generations will be put into question. In the medium term, the exclusion of certain groups from economic development, the distribution of wealth and decision making could seriously damage European economies and democracy itself.

4. Investing in social rights is an investment in the future. In order to build and maintain strong and sustainable socio-economic systems in Europe, social rights need to be protected and promoted.

5. In particular, the rights to bargain collectively and to strike are crucial to ensure that workers and their organisations can effectively take part in the socio-economic process to promote their interests when it comes to wages, working conditions and social rights. "Social partners" should be taken to mean just that: "partners" in achieving economic performance, but sometimes opponents striving to find a settlement concerning the distribution of power and scarce resources.

41. Therefore, the PACE calls in this Resolution amongst others on the member states to take measures to uphold the highest standard of democracy and good governance in the socio-economic sphere including:

7.1. protect and strengthen the rights to organise, to bargain collectively and to strike by:

(…) 7.1.2. developing or revising their labour legislation to make it comprehensive and solid with regard to these specific rights; (…)

2.5. European Union

2.5.1. Treaty

42. From a general point of view it should be recalled that the improvement of living and working conditions is enshrined as a common objective of the Union and the Member States in Article 151 of the Treaty on the Functioning of the European Union (TFEU).

Article 151

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. (…)

43. Next to the reference to the European Social Charter in Article 151 TFEU, it should also be recalled that in the Recital 5 to the Treaty of the European Union (TEU) all EU member states are

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

44. Secondly, the right to collective action, including the right to strike is confirmed in the **Charter of Fundamental Rights of the European Union** (CFREU) which provides under 'Chapter IV Solidarity' in its Article 28 on 'Right to collective bargaining and action' that: [30] [31]

> *Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.*

45. The 'Explanations' on Article 28 CFREU show that this article is clearly based on and inspired by Article 6 ESC (and its case law) and should thus be interpreted in light of the ECSR requirements and case law:[32]

> *This Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). (…) The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.*[33]

46. The principle that the modalities and limits for the exercise of collective action, including strike action, come under national laws and practices and take precedence over European Law has been confirmed in the Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services in which it was stated Article 1a):

> *This Directive shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, to conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practice.*

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[30] It is to be noted that the ESC is referred to in paragraph 5 of the CFREU which states: '*This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.'*

[31] For a recent extensive academic analysis, see Dorssemont, F. and Rocca, M. (2019) Chapter 22. Article 28 – Right of Collective Bargaining and Action, Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds.) (2019), The Charter of Fundamental Rights of the European Union and the Employment Relation, London: Hart Publishing, pp. 465-504; and Teun Jaspers, Frans Pennings and Saskia Peters (eds), European Labour law, Cambridge 2019, pp. 292-307.

[32] Explanations relating to the Charter of Fundamental Rights, O.J. C303, 14 December 2007, p. 17-35.

[33] In the explanations to Article 27 on 'Workers' right to information and consultation within the undertaking' it is mentioned that "(…) The reference to appropriate levels refers to the levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides. (…).

2.5.2. Fundamental rights texts

47. Over the course of time, the European Community/European Union has developed several mainly politically binding catalogues of fundamental social rights.

Firstly the **Community Charter of Fundamental Social Rights of Workers** (1989) explicitly includes the right to strike:

> *13. The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations arid collective agreements.*
>
> *In order to facilitate the settlement of industrial disputes the establishment and utilization at the appropriate levels of conciliation, mediation and arbitration procedures should be encouraged in accordance with national practice.*

Furthermore, the preamble mentions that in the implementation of this Charter:

> *"(…) inspiration should be drawn from the Conventions of the International Labour Organization and from the European Social Charter of the Council of Europe; (10th paragraph of Preamble)*

Secondly, there is the solemnly proclaimed **European Pillar of Social Rights** (EPSR) (November 2017).

Under "Chapter II – Fair working conditions", the right to collective actions is referred to in Principle 8 of the Pillar as follows:

> *Social dialogue and involvement of workers*
>
> *a. The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. (…)*

48. It has also to be recalled that the Preamble to the EPSR refers at several occasions to the European Social Charter and ILO Conventions in particular in relation to the interpretation and implementation of the EPSR:

> *The European Pillar of Social Rights shall not prevent Member States or their social partners from establishing more ambitious social standards. In particular, nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting rights and principles as recognised, in their respective fields of application, by Union law or international law and by international agreements to which the Union or all the Member States are party, including the European Social Charter signed at Turin on 18 October 1961 and the relevant Conventions and Recommendations of the International Labour Organisation.*

From the above it is clear that as Principle 8 thus builds on 28 CFREU (and its interpretation), which on their turn draw amongst others on Article 6 ESC (and which in its turn draws on relevant ILO Conventions (see Chapter 2 paragraph 2.3), that both in the interpretation and implementation of Principle 8 due regard needs to be taken to the interpretation given to the latter mentioned ESC and ILO norms.

From the above mentioned global international (UN and ILO) and european (Council of Europe and EU) law and case law on in particular the right to collective action including the right to strike, it is apparent that the right to collective action is a

fundamental right and that it should be enjoyed fully. Such international and European standards are thus universally applicable to all workers and enterprises.

3. The right to collective action including the right to strike in Dutch law

3.1. The way in which the right to collective action has been developped in the Netherlands

49. The Netherlands has no legislation in the area of the right to collective action. Neither the Constitution nor other statutes contain legal standards relating to the right to collective action and/or the restrictions that can be placed on it, for example when essential services are involved.

3.1.1. Unlawful act

50. Since 1900 interim relief proceedings before the President of the court as well as the broad interpretation given to the civil-law concept of unlawful act have influenced case law in the area of the right to collective action in Dutch civil law.

In the twentieth century the doctrine of unlawful act has become one of the most important subjects of civil law in the Netherlands. This has distinguished Dutch law from other continental European legal systems. It concerns a form of noncontractual liability law, also referred to as an obligation arising from the law. This is a general standard included in the Dutch Civil Code, part of private law, which applies to all cases of damage resulting from acts or omissions by natural or legal persons vis-à-vis another. The law defines an unlawful act as a violation of a right and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, in so far as there was no justification for this behaviour (Article 6:162(2) Dutch Civil Code). The person who commits an unlawful act which can be attributed to him is obliged to compensate the damage which another person has suffered as a result thereof (Article 6:162(1) Dutch Civil Code). This is the provision of the Dutch Civil Code that has given rise to most case law and literature. It has given the court the power to intervene on the basis of a broad general standard – that of proper social conduct – when an unlawful act is imminent or has taken place, for example by a mandatory measure, subject to a penalty payment. In many cases the doctrine of unlawful act provides the legal basis, after an event has taken place, for a subsequent court judgment on liability for the damage caused. But in the area of the right to collective action this doctrine forms the legal basis for prior assessment by the court as to whether a collective action which has been announced is lawful or not. This assessment takes place in the absence of a legally prescribed framework for assessment. It enables the court to issue a (preventive) prohibition on taking collective action in whole or in part. A penalty may also be imposed, which will be payable if the court ruling is not complied with. This (partly) explains the major role which the Dutch courts play in strike law.

51. In 1960 a strike by employees was treated as breach of contract in terms of civil law and a call to strike by trade unions as ‘incitement to breach of contract’. This ground also constituted an unlawful act towards the employer against whom the strike is directed (Supreme Court, 15 January 1960, NJ 1960, 84, the Panhonlibco judgment). The result was that strikes became unlawful and were prohibited for this reason. This could only be otherwise “if the purpose of the action involves general interests or moral

principles to such an extent and in such a way that such action is so pressing that it can justify breach of the principle of contractual obligation towards those employers". The circumstances in question had to be highly exceptional. This judgment gave rise to considerable debate in the Netherlands. In 1969 a draft law was proposed to regulate the right to strike.[34] The contents of this draft law provoked a great deal of resistance and it was finally withdrawn in 1980. Since then there have been no further proposals in the Netherlands for legal regulation of the right to strike.

3.1.2. Significance of the ESC in Dutch jurisprudence

52. In 1961 the Netherlands signed the European Social Charter. Ratification only took place in 1980, partly because the criminal-law prohibition of strikes first had to be removed from Dutch legislation. At the time of ratification a reservation was made regarding the operation of Article 6§4 ESC with regard to government personnel. This was done in anticipation of national legislation regulating the right of public-sector employees to collective action. This reservation fell away upon the revision of the ESC in 2006 and now applies only to defence personnel.

53. The Constitution of the Netherlands does not allow the Dutch courts to test legislation against the Constitution. Article 93 of the Constitution however does provide that the courts may test legislation against provisions of international treaties and against decisions by international organisations which in terms of their content may be binding on everyone and have binding force after being published. On the basis of this provision Dutch courts can therefore test directly against any binding provisions of treaties (also referred to as self-executing treaty provisions) within the Dutch legal system. In 1986 the Supreme Court recognised the direct effect of Article 6§4 ESC in Dutch legal relationships (Supreme Court, 30 May 1986, NJ 1986, 688 NS judgment). Since then it has been established that the framework of standards included in the ESC with regard to the right to collective action, as specified in Article 6§4 and Article G, has direct effect in Dutch law. Assessment against the ESC takes place within the framework of the unlawful act assessment by the courts. As a result, the way in which Article 6§4 ESC and the ground for restriction under Article G ESC are applied is essential for the right to strike in the Netherlands. The interpretation given to the ESC in the case law of the Supreme Court and the lower courts constitutes the right to collective action in the Netherlands. Because there is no legislation and because the interpretation given in case law to Article 6§4 in conjunction with Article G ESC is not correct in the opinion of the complainants, the complainants have chosen to submit this collective complaint to the authority that is competent for this purpose in terms of the ESC. The outcome thereof will be of great significance to the extent to which the complainants and their members in the Netherlands can make use of the right to collective action.

3.1.3. Major importance of interim relief proceedings

54. Interim relief proceedings conducted in the first instance before the President of the court, the interim relief judge, have a crucial role in strike law practice in the Netherlands. An employer or a third party which considers that its interests would be

[34] Bill 10 111, Statutory provisions relating to the work strike, Kamerstukken, (Parliamentary Papers) II, 1968-69, 10 111, no. 2

harmed by collective action that has been announced, may initiate interim relief proceedings against the trade unions that have called for the collective action. It is thereby possible to have a hearing before the interim relief judge within a day (or sometimes within a few hours) and ask the judge to impose a prohibition on the collective action that has been announced or has already started.

55. In these proceedings employers and third parties may bring all more or less comprehensive and substantiated statements forward for their claim that the strike is unlawful. The trade unions are expected to put forward a defense in short term, i.e. within a few hours or even only in court. The complainants believe that a fair hearing is excluded by the way in which the judge assesses the interests against the (excessively) broad criterion of an unlawful act. The interim judge furthermore assumes facts as having been established if he considers them sufficiently plausible, without application of the rules of evidence that are applicable in private law. In doing so the interim relief judge decides on the basis of the plausibility of the submissions that are made (and therefore without strict evidence) whether restrictions should be imposed on the right to collective action. The interim relief judge then makes a ruling within a few hours or a day.

56. Based on this manner of assessment, restrictions can be imposed in interim relief proceedings on the effective exercise of the right to strike which often mean that trade unions are prohibited from taking action for an extended period. This severely curtails the effectiveness of the right to collective action. Because of the immediate preventive prohibition the momentum is lost and so, too, is the possibility of deploying the means of action in the collective dispute. This is in conflict with the standard that national regulations may not impede the effectiveness of the right to take action by prohibiting collective action, even in sectors where essential services are provided. Article 6§4 ESC is based on this principle:

> *Simply banning strikes even in essential sectors – particularly when they are extensively defined i.e. "energy" or "health" – is not deemed proportionate to the specific requirements of each sector. At most, the introduction of a minimum service requirement in these sectors might be in conformity with Article 6(4).*

In this way the interim relief judge thus plays a crucial role in determining the scope of the right to strike. Given the speed in which these rulings are given as well as the manner in which the facts and grounds are assessed and the actual decisiveness of the decisions of the President of the court, the complainants find that the possibility for trade unions to organize strikes is seriously impeded by these relief proceedings. Furthermore, given the intrusion of the rulings on the right to collective action, making it possible to impose a lengthy ban on strikes, the complainants find the fundamental right to strike to be prejudiced.[35]

57. As a result the case law of the courts in interim relief proceedings is of essential importance to the right of collective action in the Netherlands. Due to the absence of a legal framework of standards and the assessment of the lawfulness of actions against a general civil-law standard such as the unlawful act, outcomes in the lower courts are virtually unpredictable. Consequently there is no stable and foreseeable framework of standards, in that trade unions operating with due care are repeatedly confronted with a prohibition or restrictions on actions that were completely unforeseeable. This state

[35] ECSR Decision on the merits, Collective Complaint No. 59/2009, European Trade Union Confederation (ETUC)/ Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/ Confédération des Syndicats Chrétiens de Belgique (CSC)/ Fédération Générale du Travail de Belgique (FGTB) v. Belgium, 13 September 2011, §§ 64-67; Article 8, International Covenant on Economic, Social and Cultural Rights (ICESCR)

of affairs seriously affects the (effectivity of the) right to collective action by employees in the Netherlands, as well as the strength of the trade unions in the Netherlands.

58. Although the possibility exists of appealing to the Court of Appeal against a judgment in interim relief proceedings, its significance as a guarantee for the right to collective action is very limited for several reasons. Because of the time involved in an appeal, even when lodging an expedited appeal, a favourable outcome generally comes too late to be capable of influencing the ongoing (collective labour agreement) dispute, for which the collective action was declared, and actually affect the right to collective bargaining on employment conditions. In addition there are obstacles of a procedural nature. It is occasionally ruled on appeal that a trade union has no or insufficient interest in an appeal because:

- the collective action has been terminated;
- a collective labour agreement has been concluded or
- other obligations have been fulfilled, e.g. the mandatory notification of a merger to a committee set up for this purpose.

59. Such events may result in the appeal by the trade union being declared inadmissible for lack of a sufficient interest. This deprives trade unions of the possibility of an assessment on appeal whether the court in interim relief proceedings in the first instance correctly applied Articles 6§4 and G ESC and assessed the facts correctly.

60. Employers can also prevent the possibility of an appeal. If the trade union is unsuccessful in interim relief proceedings, the trade union, as the losing party, will generally be ordered to pay the costs of the other party. As a result of this order for costs, the trade union has a sufficient interest to be able to lodge an appeal with the request to have the order for costs set aside and to order the employer to pay the costs of the trade union. It sometimes happens that employers voluntarily offer not to enforce the order for costs imposed by the court in the first instance. What is more, they are prepared to pay the legal costs of the trade union both in the first instance and on appeal, in order to prevent a Court of Appeal from arriving at a substantive assessment of the appeal.[36]

61. Such developments have meant that disputes concerning the interpretation of the right to collective action are or can very rarely be brought before the highest court, the Supreme Court. Partly for this reason, there is a very limited number of judgments in which the Supreme Court has given direction to the development of the right to strike in the Netherlands.The Supreme Court has exclusive jurisdiction over complaints about the incorrect application of the law and inadequate substantiation by courts and courts of appeal. The Supreme Court may only rule on the question whether the lower courts have applied the applicable legal rules correctly.The Supreme Court thus limits itself to providing a very general and broad assessment framework and leaves it to the lower court to assess whether the (possible) consequences of a collective action constitute a legitimate ground for limiting the action in light of the views stated by the Supreme Court, as contained in the Enerco and Amsta judgments (see first complaint, Chapter 3, paragraph 3.3).

[36] See for example Amsterdam Court of Appeal, 27 September 2016, ECLI:NL:GHAMS:2016:3931 on Jumbo, in which the Court ruled that the FNV did not have sufficient interest in bringing proceedings for a judgment on the legal costs because Jumbo was going to bear these costs. The Den Bosch Court of Appeal dismissed the application for an expedited appeal against a judgment in interim relief proceedings in which a prohibition was imposed on collective action at the employer Nedcar, partly because Nedcar was prepared to pay the legal costs (Limburg Court, 9 January 2019, ECLI:NL:RBLIM:2019:382).

62. After these judgments there have been developments in case law that indicate that the Supreme Court has left the further elaboration of the scope of the right to strike to the courts of first instance and the Courts of Appeal. For instance the Supreme Court did not rule on a complaint filed by the trade union involved, that the Amsterdam Court of Appeal had disregarded the argument that no essential service was involved, with reference to the scope of Article 6§4 ESC (see paragraph 3.4.4.; no. 99). The substance of this complaint was not assessed by the Supreme Court because it was so interwoven with the factual findings of the Court of Appeal that it could not be reviewed in cassation.[37] Later, in a subsequent strike that was challenged in court in 2019, the judge in summary proceedings ruled that it was accepted by the Supreme Court, that a collective action -resulting in flights being canceled with consequences for a large number of passengers- could be prohibited on the ground that this is socially urgent.[38] While the Netherlands has a system in which the assessment of the right to collective action as laid down in the ESC is entrusted to the Supreme Court as the highest court, it thus appears that judgments are given by the lower courts which the Supreme Court does not (or cannot) test against the ESC, because of the factual nature of those judgments. The complainants also find that this feature is partly responsible for the fact that the right to strike is not well protected, since the possibility to test the judgments of the lower courts against the ESC, is limited.

63. For this reason the complaint covers two elements, namely in the first place it is directed against the interpretation given by the Supreme Court to Article 6§4 and Article G ESC since 2014-2015 with which it has provided the framework for assessing the scope for the right to strike in the Netherlands (Chapter 3 paragraph 3.3.) and in the second place it is directed against the manner in which collective actions have subsequently been assessed and how the right to collective action is thus being explained in a number of judgments in the lower Dutch courts (Chapter 3 paragraph 3.4). First the development of the case law of the Supreme Court will be described (Chapter 3 paragraph 3.2.)

3.2. Development in Supreme Court case law 1986-2014 and criticism by the ECSR

3.2.1. Supreme Court case law 1986-2014

63. In 1986 the Supreme Court issued a judgment in which the direct effect of Article 6§4 ESC in Dutch legal relationships was recognised (Supreme Court, 30 May 1986, NJ 1986, 688 NS judgment). In the case law on interim relief proceedings, the assessment whether a collective action organised by trade unions was unlawful was based on the question whether the action fell under the protection of Article 6§4 ESC. Two judgements of the Supreme Court that are characteristic of this development were assessed by the committee of experts of the ESC – in part due to criticism from the trade unions, including the FNV– in the context of the country reports.

64. The Streekvervoer ("Regional transport") judgment was concerned with strike actions in bus transport. In that judgment restrictions were placed on the right to collective action by relying on Article 6:162 Dutch Civil Code (the unlawful act clause) with a test based on the proportionality criterion. The unrestricted exercise of the fundamental basic right was unlawful vis-à-vis all those who suffered damage as a result thereof,

[37] Supreme Court, 19 July 2019, ECLI:NL:HR:2019:1245.
[38] North Holland Court, 16 oktober 2019, ECLI:NL:RBNHO:2019:8589

including the employer, if a limitation of the right to collective action is socially urgent. The proportionality test had to be carried out in light of all the circumstances of the case. The judgment of the president in interim relief proceedings and the court of appeal that strike actions were prohibited unless they were conducted outside peak hours was upheld by the Supreme Court (Supreme Court, 21 March 1997, NJ 1997, 437).

65. The Douwe Egberts judgment was concerned with the timing of calls for action as a measure of last resort (ultimum remedium). After Douwe Egberts had announced that a possible outsourcing of activities would take place there was disquiet among staff. In this connection the trade unions proceeded to draw up a set of demands that had to be observed in the event of future outsourcing of activities. Douwe Egberts believed that it was still too early to draw conclusions and that further investigation would lead to a final position only at a later stage. The trade unions did not agree with this and put an ultimatum which Douwe Egberts did not meet. In interim relief proceedings Douwe Egberts argued that the actions were completely rash and premature, because no decision had yet been taken. The actions could not be regarded as a last resort.

66. Douwe Egberts succeeded in the first instance and on appeal. The Supreme Court concurred with these rulings and also concluded that "the strike was not used as a measure of last resort and should be regarded as entirely rash and premature". The trade unions calling for action had thereby "disregarded important procedural rules". The submission by the trade unions in the proceedings before the Supreme Court that the ultimum remedium requirement is incompatible with the content and scope of Article 6§4 ESC was rejected by the Supreme Court (Supreme Court, 28 January 2000, JAR 2000/63).

3.2.2. Assessment by the ECSR

67. As a result of these judgments the ECSR has on several occasions commented in its Conclusions on strike law in the Netherlands, partly in response to the criticism of this case law by the FNV. In 2003 this case law was found to be in conflict with Article 6(4) and Article 31 ESC with regard to the ultimum remedium test as well as the proportionality test. In 2005 (Conclusions XVII-1, vol. 2) and 2006 the ECSR concluded that the case law in the Netherlands was still not in line with Article 6§4 and Article 31 ESC (Conclusions XVIII-1). In 2010 the ECSR concluded that it was not possible to assess whether the application of the proportionality test in case law was in line with the ESC and the earlier criticism of the ECSR because no developments had been reported. In 2014 the Dutch government referred two judgments to the ECSR as part of the country report. The ECSR firstly reiterated

> *"that case law of domestic courts must be closely examined in order to verify whether the courts rule in a reasonable manner and in particular whether their intervention does not reduce the substance of the right to strike so as to render it ineffective". The Committee furthermore stated that the use of the proportionality criterion in itself does not undermine the right to take collective action "as it is essential for determining whether a restriction is necessary in a democratic society, in accordance with Article G of the Charter". Referring to the two judgments of the Dutch court that had been submitted, the Committee found that the assessment in those two judgments was not as yet in violation of Article G. The Committee did however indicate that it wished to continue to follow the developments in the case law critically and to be kept informed of the developments in the Dutch case law with regard to this situation."*

Part I

3.3 First ground for a violation: the Supreme Court case law of 2014/2015 violates Article 6§4 ESC

3.3.1. Recent Supreme Court judgments

68. Although the Supreme Court did not explicitly refer to the conclusion of the ECSR of 2014, the highest Dutch court modified its assessment of the right to collective action in two judgments.The Supreme Court changed its interpretation and application of Article 6§4 ESC in the sense indicated by the ECSR and shifted the assessment of the permissibility of collective actions to a test thereof on the basis of Article G ESC. The criteria put forward by the Supreme Court for assessing the permissibility of collective action in specific cases are set out below. In the opinion of the complainants this modified approach of the Supreme Court is not in conformity with the provisions of Article G as laid down by the ECSR in its Conclusions and its rulings on collective complaints in this field."

3.3.2. Enerco judgment[39]

69. The case was concerned with the scope of Article 6§4 ESC, in particular whether it extends to secondary strikes.[40] In brief: the Supreme Court confirmed the direct effect of Article 6§4 ESC in the Netherlands. The Supreme Court then ruled that the nature of the right to collective bargaining as a fundamental social right does not give rise to a restrictive interpretation of the concept of 'collective action'. This means that a trade union is in principle free to choose the means for achieving its objective. Whether a collective action is protected by Article 6§4 is thus mainly determined by the answer given to the question whether the action can reasonably contribute to the effective exercise of the right to collective bargaining. If this question is answered in the affirmative, the collective action will fall within the scope of Article 6§4 ESC. The exercise of the right to collective action can then only be restricted by way of Article G ESC. With reference to this standard, the Supreme Court concluded that the Court of Appeal had wrongly placed the secondary strike outside the scope of Article 6§4 ESC. The decisive factor was after all whether the secondary strike could reasonably contribute to the effective exercise of the right to collective bargaining and thus to the

[39] Supreme Court, 31 October 2014, ECLI:NL:HR:2014:3077

[40] In this case the union had called for action at an employer that would be responsible for taking over the services (unloading of ships) of a company where a strike was taking place. The question was whether a so-called secondary strike, in which the actions of the employees are taken against their employer but directed against another employer with which the trade unions have a dispute of interest, could also fall under the protection of Article 6§4 ESC. The Court of Appeal ruled that this was not the case. This action, the Court held, did not contribute to the effective exercise of the right to collective bargaining between the employer with which the trade union had a conflict over working conditions (that was not the employer against which the strike was directed) but whereby the other company at which there was a conflict would be placed under pressure to return to the negotiating table.

intended purpose of the action. According to the Supreme Court that was the case in this matter.

The Supreme Court also ruled that restrictions may indeed be placed on the exercise of the right to strike, thereby referring to the unlawful act standard with regard to the due care that must be observed in society in relation to a third party (in this case: Enerco). After the Court of Appeal had judged that with due regard to the duty of proper social conduct towards to the person and the goods of others, limitations the right to strike may be imposed, the Supreme Court confirmed:

> *Nevertheless, the action related to art. G ESH is to be prohibited or restricted if, in view of the care taken that pursuant to art. 6: 162 Dutch Civil Code must be observed in society with regard to a third party (in this case: Enerco), infringes its rights to such an extent that restrictions, from a social point of view, are urgently necessary*. *Whether this is the case is a question that must be decided by weighing - taking into account all the circumstances of the case - the interests served by exercising the fundamental right against those which are infringed (cf. HR 21 March 1997, ECLI: NL: HR: 1997: AG3098).*

Thus in the event of a breach of this duty of care, restrictions to the right to strike are possible when they are socially urgent. Whether this is the case is a question that must be answered – taking all the circumstances of the case into account – by balancing the interests served by te exercise of the fundamental right against the interests that are infringed.[41] With this consideration, the Supreme Court has allowed the scope of article G to be interpreted in accordance with the framework contained in article 6:162 of the Civil Code, and thus provided the basis for the possibility of limitation of the right to collective action, beyond the limits of Article G.

3.3.3. Amsta judgment[42]

70. The Amsta judgment was concerned with a sit-down strike that had been taken over by the trade union. In this case it was held in the first instance that a sit-down action by workers does not fall under the protection of Article 6§4 ESC. On appeal it was furthermore ruled that the collective action was not lawful because it had not been announced in advance. In addition, the action could not pass the proportionality test because the action had not been implemented as an ‘ultimum remedium’. In line with the Enerco judgment, the Supreme Court found that the permissibility of collective actions should be assessed on the basis of the question whether those actions contribute to ensuring the effective exercise of the right to collective bargaining. Because it concerns a fundamental social right, there is no reason to restrict the interpretation of the concept of ‘collective action’. Unlike in the Douwe Egberts case of 2000, the Supreme Court decided that it was no longer an independent condition of permissibility whether collective action is used as a last resort. The Supreme Court also decided that testing against the ‘rules of the game’ was no longer an independent criterion for assessing whether a collective action is lawful in light of Article 6§4 ESC. Compliance with the rules of the game is therefore no longer an independent condition for the (un)lawfulness of an action.

71. However, the ‘rules of the game’ can be important in answering the question whether the exercise of the right to collective action in a specific instance should be restricted or prohibited on account of the duty of care to be observed. This possibility of restriction will then ensue from Article G ESC. The ‘rules of the game’ can thus serve as

[41] Supreme Court, 31 October 2014, ECLI:NL:HR:2014:3077, § 3.8.1.
[42] Supreme Court, 19 June 2015,ECLI:NL:HR:2015:1687

perspectives from which to assess whether the action should be restricted or prohibited. However, the importance of the 'rules of the game' as perspectives is not always the same. In the case of a general strike, for example, they will be of great importance, but this will be so to a lesser extent in the case of a 'lightning strike' of limited duration which does not cause major damage. In line with previous case law, the Supreme Court uses the criterion whether a (possible) restriction on the exercise of the right of collective action in a specific case is *socially urgent.* In this assessment the court must take all circumstances into account (Supreme Court, 21 March 1997, ECLI:NL:HR:1997:ZC2309, *Streekvervoer (Regional Public Transport)*[43]). Such circumstances may include 1. the nature and duration of the action, 2. the relationship between the action and its intended purpose, 3. the damage thereby caused to the interests of the employer or third parties, and 4. the nature of such interests and such damage. In this regard it may also be taken into account whether significance (in some circumstances even decisive significance) should be attached to the question whether the 'rules of the game' were observed.

3.3.4. Content of modified assessment framework

72. In both Supreme Court judgments there was a modification of the assessment as to whether a collective action qualifies as falling under Article 6§4 ESC. First, the Supreme Court expressly distanced itself from the position adopted – in the *Douwe Egberts* case and frequently in the lower courts[44] – with regard to the ultimum remedium test. Assessment against Article 6§4 ESC is bound to the criterion whether the collective actions (can) contribute to ensuring the effective exercise of the right to collective bargaining. In principle it is left to the trade unions to make a choice from the available means for achieving their objective. In doing so, the highest court of justice responded to the criticism of the ECSR. In its Conclusions regarding legal practice in the Netherlands on this issue, the ECSR had after all stated that this approach was not in accordance with Article 6§4 ESC. As a result the Supreme Court corrected the standard that a strike had to be ultimum remedium in order to fall under the protection of Article 6§4 ESC. However, the Supreme Court subsequently ruled that the standards previously used in the assessment against Article 6§4 ESC could be used as 'perspectives' in the assessment against the possibilities of restriction under Article G ESC. In other words: the same standards (whether the action can contribute to the effective exercise of the right to strike and whether the ultimum remedium principle has been met) were transferred from Article 6§4 to Article G ESC. They can therefore – in the opinion of the Supreme Court – be decisive in determining whether an action can be restricted or prohibited. Thus the previously established general criterion for assessing the exercise of the right to collective action has been maintained: is the prohibition or are the restrictions *socially urgent*? Assessment on the basis of the standard of due care of Article 6:162 Dutch Civil Code is thereby also maintained.

The formula used by the Supreme Court has no or insufficient basis in Article G ESC. The first ground of violation is directed against this (see Chapter 4).

[43] This is the Regional Public Transport judgment referred to above in which actions in public bus transport were largely prohibited on the basis of the proportionality test and were only permitted between the morning and evening peak hours.

[44] Assen Subdistrict Court, 19 February 2013, JAR 2013/94, Amsterdam Court of Appeal, 19 October 2010, RAR 2011/4, Utrecht Court, 8 March 2008, JAR 2008/103, Haarlem Court, 25 August 2008, JAR 2008/233, Rotterdam Court, 9 March 2007, JAR 2007/85, Amsterdam Court of Appeal, 26 February 1998, JAR 1998/69

3.3.5. Conclusions ECSR 2018

73. The FNV already made its opinion known to the Dutch government in the context of the country report. This was transmitted by the Dutch government together with the country report of the Netherlands. It is attached here as an appendix (**Appendix 3**). In it, the FNV expressed its criticism of the case law of the Supreme Court (as well as of the lower courts):

> *'In the abovementioned judgments the Supreme Court has to a large extent acceded to the criticism of the ECSR which has repeatedly stressed that the question whether a strike is lawful may only be answered strictly on the basis of the standard of Article G ESC (formerly Article 31 ESC). Despite the fact that Dutch case law should thus be more in line with Article 6(4) and Article G, the FNV notes that the "incorporation" of the old independent rules as perspectives in the context of Article G ESC seems to give cause for lower courts to apply the Article G test very broadly and in any case more broadly than before. The FNV notices that lower courts easily cross the threshold to concluding that there is a dispute of interest for the purposes of Article 6 ESC from which the right to collective action as such has arisen. Thereafter much attention is paid in the judgments to the question whether a restriction in terms of Article G ESC is applicable. The FNV is of the opinion that with the creation of the right to collective action only very limited scope is left for limiting this basic right of trade unions, namely on the basis of the restrictions as specified in Article G ESC. This is a limited test and not a broad test as is currently applied in the lower courts.'*

74. The Conclusions 2018 adopted on 24 January 2019,[45] deal with the case law of the Supreme Court of 2014-2015. It is concluded that due to this case law of the Supreme Court the situation in the Netherlands is now in conformity with Article 6§4 ESC. It is noted with reference to the Dutch country report:

> '*According to the report collective action may be restricted only by article G of the Charter and not by rules laid down in previous cases. (…)'*

It is not apparent from the Conclusions 2018 whether the information provided by the FNV which was transmitted by the Dutch government made it sufficiently clear to the ECSR how the assessment framework of Article 6§4 ESC has been shifted by the Supreme Court to the Article G test, with the assessment standard being whether it is socially urgent to impose restrictions. Nor is it apparent whether it has been made sufficiently clear how this was subsequently applied in the lower courts.

The text of the Conclusions does not refer to the views of the FNV nor address the criticisms it raised. As a result in particular the complainants are unable to ascertain whether and, if so, how these views were taken into account when drafting the Conclusions in 2018. This is one reason for the complainants to submit this collective complaint. This makes it possible to explain the practice in Dutch case law in more detail and why this practice is not developing in conformity with Article 6§4 and Article G ESC.

3.3.6. Conflict between case law of Supreme Court and ESC

75. The complainants claim that the case law of the Supreme Court violates the right to strike as laid down in Article 6§(4) and Article G ESC on the following grounds:

[45] Conclusions 2018 adopted on 24 January 2019, 2018/def/NLD/6/4/EN.

- The so called rules of the game (*spelregels)* continue to be relevant as one of the perspectives for answering the question whether the action should be restricted or prohibited on the basis of G and may even be decisive;

- As a general criterion for assessing conformity with Article G ESC, the Supreme Court maintained the standard of social urgency for restricting or prohibiting the exercise of the right to collective action as laid down in 6:162 of the Dutch Civil Code, which goes beyond the standard that is laid down in Article G, given the circumstances that may be assessed.

The complainants will further substantiate the first part of the complaint regarding the manner in which the Supreme Court has provided a framework for assessing the scope for the right to strike in the Netherlands.

76. In the Amsta-case the Supreme Court stated that what had previously and generally been referred to as rules of the game were no longer independent conditions for assessment of the lawfulness of an action in conformity with Article 6§4 ESC, but perspectives for answering the question whether the action should be restricted or prohibited. In doing so, the Supreme Court mentioned a number of aspects that should be taken into account in this assessment that would fit in with the grounds for restriction contained in Article G ESC. Together with this the Supreme Court affirmed that the importance of the perspectives may be of greater weight in the case of a general strike than in the case of a lightning strike of limited duration which does not cause major damage. As a general criterion for assessing conformity with Article G ESC, the Supreme Court thus maintained the standard of social urgency for restricting or prohibiting the exercise of the right to collective action.

77. In its Conclusions 2018 the ECSR concluded with reference to these two judgments that the Supreme Court “interpreted the right to strike in broad terms and held that the trade unions are, in principle, free to decide on the nature of collective action, provided that the action they take can reasonably be assumed to be useful in furthering the exercise of their right to collective bargaining”. The ECSR also noted that it was argued in the Amsta judgment (2015) that “although criteria such as ‘timely notice’ and ‘first having exhausted all other possibilities’ may still be applied, they are no longer sufficient in themselves to determine whether collective action is lawful. They may therefore be taken into account, but only in the context of a decision on whether or not article G of the Charter (serious social grounds) is applicable. According to the report collective action may be restricted only by article G of the Charter and not by rules laid down in previous cases.

78. The complainants noted these observations of the ECSR. The assessment of possible restrictions of actions against the criteria of Article G is not called into question by the complainants. The complainants however refer to the criteria which are further-reaching than those referred to in Article G ESC, and that may be used to prohibit or limit the possibilities to strike. The complainants find that the possibility for the courts to limit the possibility to resort to collective action after a judgment based on the balancing of interests -in which all the circumstances of the case must be weighed up, as well as the possibly even decisive ‘rules of the game’- as summed up by the Supreme Court, violates the very substance of the right to collective action as regulated in Article 6§4 ESC. The application of this approach of the Supreme Court in the case law of the lower courts shows what consequences this can have in relation to concrete collective actions (this is the subject of the second complaint). The complainants believe that the criteria used by the Supreme Court in the assessment under Article G ESC find no or insufficient justification in the text of Article G ESC. The Supreme Court has introduced a rule containing standards that are not included as such in Article G or cannot be inferred from it. In doing so the Supreme Court has created a – legal – framework for

prohibiting or restricting actions on the basis of numerous circumstances that (may) go far beyond the standards laid down in Article G which states:

> *'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.*
>
> *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.'*

79. In the case law of the Supreme Court the following criteria have been developed with regard to the assessment against Article G. The complainants have analysed these criteria on conformity with Article G.

1) The Supreme Court applies the general norm that restrictions may be permitted on the ground of *social urgency*.

This concept (social urgency) is not included in the list of legitimate aims of Article G which are exhaustively enumerated therein. Therefore this approach contradicts Article G. Allowing elements beyond those aims provides room for an interpretation much wider than the strict standard of Article G itself.

2) In the elaboration of that concept the Supreme Court decides that *all the circumstances of the case* can be taken into consideration in order to conclude that restrictions can be imposed. Factors that may be of importance may include 1. the nature and duration of the action, 2. the relationship between the action and its intended purpose, 3. the damage thereby caused to the interests of the employer or third parties, and 4. the nature of such interests and such damage.

3) The Supreme Court accepts the *rules of the game* as a criterium on which a restriction can be based. It has to be noted that the concept 'rules of the game' has not been clearly defined. It therefore is an open-ended standard to which judges may give the meaning and impact as they see fit. Statutory *rules of the game* have not been laid down in any legislation which trade unions must observe before they can resort to collective action. It is therefore beforehand and even afterwards unclear for trade unions whether a strike action is allowed. In the recent judgements (Enerco and Amsta) the Supreme Court, emphasising the importance of the *rules of the game* as part of the assessment of conformity to Article G, leaves open the scope of the *rules of the game*. They are not limited to those explicitly mentioned by the courts of appeal in such cases. In the *Amsta* judgment it is explicitly pointed out, with reference to the importance of the rules of the game, that there are even more rules of the game than those explicitly mentioned by the court of appeal in that matter. Case law, also that following the *Enerco* and *Amsta* judgments, shows that rules of the game also include: the question whether the parties have exhausted negotiations, and whether an action really is a last resort (ultimum remedium) in addition to the notice period and the manner of giving notice of an action (see Chapter 3, paragraph 3.4.5.).

80. Analysis of the judgements of the Supreme Court in these cases learns that criteria that were used in the case law before the recent judgements when assessing the conformity to the application of Article 6§4 ESC that is substantively criticized by the ECSR[46], are now included in Article G ESC. That fits in the doctrine of 'unlawful act' in Article 6:162 CC whereby all circumstances involved can or must be considered by courts in the context of a test of reasonableness. That goes beyond the scope of the strict

[46] See paragraph 2.4.2.

assessment framework of Article G ESC. In part II of the complaint this will be elaborated in the second ground in more details.

81. The ECSR has repeatedly stated that Article G stipulates that the requirement that it must involve a restriction prescribed by law shall not prevent its development in case law. This, however, is made subject to the condition that the outcome of such judicial proceedings must be of a stable and foreseeable character and demonstrate respect of fair procedures.[47] The complainants are of the opinion that there is no question of this in the Dutch situation. The assessment framework developed by the Supreme Court mandates lower courts to include all the circumstances of the case, as embedded in and shaped by the unlawful act test (restrictions are possible when socially urgent), within the framework of the assessment in terms of Article G ESC. This leaves considerable room for the lower courts to test Article G in very divergent ways, as is substantiated in the second part of the complaint below.

[47] Digest of the case law of the European Committee of Social Rights, December 2018, p. 104. See also Complaint no. 59/2009, Decision on the merits 13 September 2011, par. 43-44 in the matter of ETUC/CGSLB,FGTB v. Belgium.

Part II

3.4. Second ground for a violation: the case law of the lower courts since 2015 violates also Article 6§4 ESC

3.4.1. Introduction

82. The second ground for a violation is directed against the way in which the lower courts have applied the frameworks set out by the Supreme Court in the Amsta and Enerco judgments since 2014-2015. Since 2015 the Enerco en Amsta judgments, courts of first instance and appeal have adopted the framework of the Supreme Court in their judgments. As a consequence the standard of social urgency as well as observance of the rules of the game are -separately or in conjunction- used as assessment criterion for restricting or prohibiting the exercise of the right to collective action as laid down in article 6:162 of the Dutch Civil Code. Thereby the judgments of the Supreme Court have had significant impact on the possibility of trade unions to make use of their right to collective action, including strikes. It also leads to trade unions (having to) impose such far-reaching restrictions on the exercise of the right to strike because of the fear of otherwise being hit by a ban.

In the Netherlands interim relief proceedings are regularly brought against trade unions in which the court is requested to prohibit the trade unions from carrying out actions they have announced. Such interim relief proceedings are concluded within a period of a few days and sometimes even in a period of a few hours. In most cases the announced action is prohibited or restricted by the court. The application and manner of assessment in the case law have resulted in the possibilities for taking effective collective action becoming extremely limited in some sectors. Once an action has been prohibited, the possibilities of lifting an imposed prohibition, for example by lodging an expedited appeal, are limited. On appeal, the debate is almost always limited to the question whether the court in interim relief proceedings – in retrospect – had been correct in prohibiting the action. As indicated in 3.1. above, employers also sometimes deliberately limit the scope for trade unions to obtain a substantive judgment on appeal on the legality of the restrictions that were imposed or the prohibition of the action. For example by voluntarily paying legal costs when the trade union, as the unsuccessful party, has been ordered to pay the employer's legal costs. As mentioned above, this frustrates the possibility of appeal for the trade union on the ground of an absence of interest.

The complainants are of the opinion that the right to take effective collective actions is excessively curtailed by the way in which judgments are arrived at in interim relief proceedings. The second ground for a violation is directed against this. It puts the effectiveness of the means of action under so much pressure that it becomes illusory. The practice of law in the lower courts in the Netherlands is not in accordance with the way in which it is interpreted in the 'case law' of the ECSR and of the ECtHR.[48]

[48] ECtHR 2 July 2002 App nos. 30668/96, 30671/96 and 30678/96 *(Wilson a.o.),* §§*44-45*; and ECtHR 6 November 2009, App. No. 68959/01 (*Enerji*), § 24.

3.4.2. Analysis of the case law

83. The complainants have made a quantitative and qualitative analysis of the development of the case law of the lower courts following the *Amsta* and *Enerco* judgments of the Supreme Court. The quantitative analysis contains a comparison of the judgments given in the last five years (2015-2019) with the judgments that were given in the five years before 2015. As explained above (paragraph 3.3.4.) the change of the approach by the Supreme Court in the Enerco and Amsta judgements is twofold. Firstly the Supreme Court is assessing the legality of collective actions in conformity with Article 6§4 ESC, following the case law of the ECSR. Secondly whether a collective action, a strike, can be restricted or prohibited is assessed on the criteria of Article G ESC. This change of approach was expected to lead to a change of the approach by the lower courts resulting in less restrictions and prohibitions. The practice shows the opposite. The number of legal proceedings in which actions are prohibited or substantially restricted, increased both in absolute and relative terms.

Quantitative analysis of case law before and after Enerco/Amsta

84. When examining the number of interim relief judgments in the Netherlands in the five years before and five years after the *Enerco*/*Amsta* judgments and the results of those proceedings, the following picture emerges (**Appendix 3**: List of judgments and sources):

Judgments in interim relief proceedings in lower courts

	Number	**Actions permitted**	**Judgments containing a full or partial prohibition of actions**		
			Actions entirely prohibited	**Actions restricted**	**Total**
2010 - June 2015	27	15 (56%)	9 (33%)	3 (11%)	12 (44%)
June 2015 -2020	33	14 (43%)	13 (39%)	6 (18%)	19 (57%)

This is the reality while it had been expected by the trade unions that the change in the Supreme Court case law would lead to broadening the scope in Dutch case law for taking collective actions. These figures show that the shift of the focal point of judicial assessment following the *Enerco*/*Amsta* judgments of the Supreme Court from an Article 6§4 test to an Article G test did not lead to a decrease in the number of judicial decisions imposing restrictions on the right to collective action. While before 2015, trade unions already had insurmountable problems with the way in which the right to strike was interpreted in court, this dissatisfaction has only increased, since trade unions are increasingly affected by judgements limiting the possibility to strike. When either 44% or 57% of the collective actions that are announced and brought to court, are restricted or entirely prohibited, it is clear that the judicial review constitutes an important limitation for the right to strike, let alone that trade unions are already

exercising the necessary caution when announcing collective actions with a view to the fact that there is a reasonable chance that actions will be prohibited. In the second part of the complaint the complainants will try to provide insight into the way in which lower courts give substance to the space given by the rulings of the Supreme Court and how this influences the possibility to organize collective actions. However not only the cases in which collective actions are prohibited, but also the situations in which they do pass the judicial review, provide an interesting insight into the scope that is offered in the Netherlands for the purpose of organizing collective actions.

85. Assessment only or mainly against Article G should, after all, lead to more scope for collective actions in view of the fact that this standard relates only to exceptional situations. In terms of absolute numbers there appears to be no question of this. In the 5 years prior to *Enerco*/*Amsta* a prohibition or restriction was imposed in 12 judgments and in the 5 years thereafter in 19 judgments. This gives a picture that is contrary to what might have been expected. But this should be put into perspective, since the absolute numbers are partly determined by the number of actions that were submitted to the courts for assessment in those 5 years (27 versus 33). Finally also in relative terms a big difference is clearly noticeable. In the 5 years before *Enerco*/*Amsta* (partial) prohibitions were imposed by interim relief judges in 44% of cases, compared to 57% after *Enerco*/*Amsta*. The figures show that there was an increase in the number of judgments in which actions were entirely prohibited (39%) by the lower courts as well as in the number of judgments in which the court prohibited part of the action (18%), with the court expressing a substantive opinion on the duration and/or form of the action. These figures speak for themselves. The *Enerco*/*Amsta* assessment framework has led to a considerable increase in the number of judgments in legal proceedings in which the court imposed restrictions on trade unions taking collective action in the Netherlands.

In 19 of the 33 judgements issued since the Enerco and Amsta judgments in 2015 strike action was prohibited or major restrictions were imposed on the exercise of the right to collective action. They all were based on the application of Article G ESC as interpreted by the Supreme Court. As the main categories can be identified: 1. possible risks to safety and public order, 2. interests of third parties of various kinds, including damage and ‘major inconvenience’, and 3. interest of and damage to the employer against whom the strike is directed. A common feature in the judgements was a multiplicity of grounds advanced and adopted in the judgments. The complainants are of the opinion that in the court decisions applying these grounds the scope for collective action was excessively restricted, beyond what is justified in light of the fundamental right of workers to collective action as guaranteed by Articles 6§4 and G ESC.

Substantive analysis of the judgments since 2015

86. With regard to the 14 cases in which the collective action have not been prohibited the following conclusions can be drawn. In all cases except one[49], the request to prohibit the actions was -among other grounds- based on the statement that the rules of the game had been ignored when the actions were notified by the unions. In 5 of the 14 cases in which the collective actions have not been prohibited, it was substantively tested by the judge whether a sufficient notice period (*aanzegtermijn*) had been applied

[49] https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Noord-Holland/Nieuws/Documents/Korte-tekst-voorzieningenrechter-Pont-Velsen-27-05-2019.docx.pdf.

before the collective action.[50] In 8 of the 14 cases in which the collective actions have not been prohibited it was was substantively tested whether the action had been used as the last means (*ultimate remedium-principe)* to settle the conflict of interest.[51]In all 14 cases other grounds were substantively assessed and rejected. In all 14 cases the circumstances of the case, which may have included the nature and duration of the action, its intended purpose as well as the damage thereby caused to the interests of the employer or third parties, has lead the judge to conclude that the actions should not be prohibited. It is to be noted that in 7 of the 14 cases the actions where very short in duration (limited in minutes or hours) or held in a period of the year (holiday season) so that the chance of nuisance and damage to third parties was limited.[52] In 3 of the 14 cases it was assessed that damage suffered by the employer, was not disproportional but manageabel.[53]In one case it was contested by the employer that the action (a 15-30 minutes work stoppage) might create safety risks for passengers, while awaiting security screening at the airport during the work stoppage. This ground was rejected for which it was considered by the Court[54]:

> *In the run-up to collective actions in precarious sectors such as those of (specialist) security guards at a major airport, it is essential that the parties jointly consider the consequences that the actions may have for public order and (national) security and the measures to be taken in that connection. This consultation - which is referred to as 'technical' - must be conducted as exhaustively as possible on the part of employers and employees, in the sense that all foreseeable dangers of the actions are analyzed and addressed on the basis of the available knowledge and experience. Based on what the parties have argued in this respect, the interim relief judge is convinced that the parties have certainly not taken this responsibility lightly. From what Mr. [D], on behalf of the FNV, stated during the hearing concerning the extensive experience that has meanwhile been gained at (and in consultation with the competent authorities of) Schiphol concerning collective actions with safety implications, the Court in preliminary relief proceedings concludes that also from the side of the trade unions nothing has been left to chance. Procheck provided an overview of what it considered to be existing safety risks in the technical consultations of (10 and) 12 September 2018. In consultation with the trade unions, measures were identified to reduce those risks to a - also in Procheck's apparent opinion - responsible level. The trade unions have committed themselves to this, as was evident at the hearing, from complete conviction, because - as Mr. Van der List put it - nobody wants to have it on their conscience that something bad happens. Contrary to what Procheck argued at the hearing, the note*

[50] Court of Central Netherlands,14 October 2015, ECLI:NL:RBMNE:2015:7579; Court of Gelderland, 15 February 2017, ECLI:NL:RBGEL:2017:1419; Court of Central Netherland, 13 April 2017, ECLI:NL:RBMNE:2017:1989; Court of Appeal, 24 April 2017; ECLI:NL:GHAMS:2017:1644; Court of Central Netherland, 24 January 2019, ECLI:NL:RBMNE:2019:1282.

[51] Court of Central Netherland, 4 April 2016, ECLI:NL:RBMNE:2016:1899; Court of Central Netherland, 13 April 2017, ECLI:NL:RBMNE:2017:1989; Court of North Holland, 8 November 2016, ECLI:NL:RBNHO:2016:9238; Court of Gelderland, 15 February 2017, ECLI:NL:RBGEL:2017:1419; Court of Central Netherland, 26 April 2018, ECLI:NL:RBMNE:2018:1786; Court of Central Netherland, 13 September 2018, ECLI:NL:RBMNE:2018:4556; Court of Central Netherland, 24 January 2019, ECLI:NL:RBMNE:2019:1282; Court of Zeeland West Brabant, 19 April 2019, ECLI:NL:RBZWB:2019:1893.

[52] Court of Central Netherlands, 14 October 2015, ECLI:NL:RBMNE:2015:7579; Court of Central Netherland, 4 April 2016, ECLI:NL:RBMNE:2016:1899; Court of North Holland, 8 November 2016, ECLI:NL:RBNHO:2016:9238; Court of Appeal, 24 April 2017; ECLI:NL:GHAMS:2017:1644; Court of Central Netherland, 26 April 2018, ECLI:NL:RBMNE:2018:1786; Court of Central Netherland, 13 September 2018, ECLI:NL:RBMNE:2018:4556; Court of Central Netherland, 24 January 2019, ECLI:NL:RBMNE:2019:1282.

[53] Court of Zeeland West Brabant, 19 April 2019, ECLI:NL:RBZWB:2019:1893, ; Court of Central Netherland, 24 January 2019, ECLI:NL:RBMNE:2019:1282; Court of Central Netherland, 13 April 2017, ECLI:NL:RBMNE:2017:1989

[54] Court of Central Netherland, 13 September 2018 ECLI:NL:RBMNE:2018:4556

made by the trade union side after the technical consultation of 12 September 2018, also in view of the e-mail exchange of 12 and 13 September 2018 between Ms [E] of FNV and Mr [C] of Procheck, must be regarded as agreements between the parties, and such agreements that there was also confidence on the part of Procheck that the actions could proceed in a sufficiently orderly and safe manner under the agreed conditions. In these preliminary relief proceedings it has not been stated or shown that risks have been overlooked.

In particular, the agreed maximum duration of the work interruptions (no longer than 15 minutes during peak time and no more than two hours during off-peak time), the agreement that the boarding procedure will not be interrupted and that during peak time the activists will remain near their positions in order to be able to intervene in case of an emergency, must be regarded as measures that sufficiently limit possible order and safety risks. At the hearing, Mr. [B] of Procheck did state that the so-called 'red button' procedure (in short: that the action is stopped in the event of an emergency) does not suffice because it is precisely the prevention of an emergency that is required and that only the employees of Procheck have the necessary knowledge and experience for this, but this cannot be reconciled with the report that he himself made of the technical consultation of 12 September 2018. In it, it is stated that the assessment, that the action should be suspended due to imminent security risks, will - and thus apparently can - be made by the Royal Military Police responsibly (a similar agreement was also part of the technical consultation of September 10, 2018). Now that the Royal Netherlands Marechaussee has not expressed any objections to the outcome of the technical consultations of September 12, 2018, it may be assumed that it can and is willing to take that assessment on its behalf.

Concludingly the Court found that the measures taken by the trade unions (actions of limited duration, availability of strikes during the action and the willingness to resume work when necessary) did not give sufficient indication that safety risks for passengers might occur. The complainants are of the opinion that these cases in which actions were not prohibited but allowed, already make clear that the judicial assessment is very far-reaching, goes beyond the restrictive grounds as mentioned under G ESC and that where any security risk may be involved, the unions impose themselves far reaching restrictions in advance, so that there is little time left for strikes.[55]

87. In 19 of the judgments the collective actions were prohibited or major restrictions were imposed on the exercise of the right to collective action. What stands out in the judgments is that the courts found it sufficient when the interests at issue are not actually substantiated as the weighing of these interests in relation to the interests of the trade unions, was not clearly expressed. The courts do not motivate whether such interests qualify as one of the grounds for restriction as contained in Article G ESC: all circumstances of the case are being taken into consideration where it remains unclear whether they fall within the scope of Article G ESC. Within the assessment framework set out by the Supreme Court, the court therefore applies a (far too) broad weighing-up of interests.

88. Below it is explained in more detail which circumstances and factors were taken into account in the decisions to impose restrictions or prohibitions. In the opinion of the complainants it can be concluded that the limits set out in Article G ESC have been stretched too far. According to the ECSR restrictions can only be imposed in exceptional cases.[56]

[55] Court of Central Netherland, 13 september 2018, ECLI:NL:RBMNE:2018:4556
[56] Digest of the case law of the European Committee of Social Rights, p. 234

89. The judgments explained hereafter are classified as follows:

Public order and safety and related circumstances: (see 3.4.3.)

Actions by BOA officers (special enforcement officers) (restriction of actions in connection with potential risks to safety)

Amsterdam Court, 26 April 2019, ECLI:NL:RBAMS:2019:3024

Actions by Schiphol ground staff (restriction of actions to prevent disturbance among passengers due to the risk of being left stranded without baggage)

Amsterdam Court, 11 August 2016, ECLI:NL:RBNHO:2016:6696 and Amsterdam Court of Appeal, ECLI:NL:GHMS:2016:3472

Actions at Schiphol security (restriction of actions in the summer period to prevent long queues of passengers)

North Holland Court, 1 August 2018, ECLI:NL:RBNHO:2018:6807

Actions in public transport (restriction of actions on account of inconvenience to travellers)

North Holland Court, 26 May 2019, ECLI:NL:RBNHO:2019:5857

Interests of third parties (see 3.4.4.)

Actions at airline Easyjet (restriction in connection with the interests of passengers so that they would not be affected regarding holiday plans and arrangements with third parties)

North Holland Court, 8 July 2016, ECLI:NL:RBNHO:2016:5638 and

North Holland Court, 12 August 2016, ECLI:NL:RBNHO:2016:6755

Amsterdam Court of Appeal, 6 February 2018: ECLI:NL:GHAMS:2018:398

Actions at airline Ryanair (order regarding notice period so that the airline could mitigate the consequences for travellers)

North Holland Court, 9 August 2018: ECLI:NL:RBNHO:2018:7026

Actions in school transport (restriction in connection with the interests of third parties: pupils going to school)

Amsterdam Court, 22 June 2016:ECLI:NL:RBAMS:2016, 3995

Amsterdam Court of Appeal, 24 April 2017, ECLI:NL:GHAMS:2017:1644

Actions in mail delivery in the Christmas period (restriction in connection with the interests of consumers)

The Hague Court, 13 December 2018, ECLI:NL:RBDHA:2018:15444

Actions at Catering Schiphol (restriction of actions on account of the interests of passengers)

North Holland Court, 16 October 2019, ECLI:NL:RBNHO:2019:8589

Restriction in view of the interests of the employer (see 3.4.5)

Actions at Jumbo (one day action at the butchery)

Amsterdam Court, 25 February 2016/C13/603149/KG ZA 16-202

Actions at VDL Nedcar (strikes in car industry)

Limburg Court, 9 January 2019, ECLI:NL:RBLIM:2019, 382

Appendix 4 contains summaries of these judgments including the relevant judicial considerations. Below the complainants will substantiate why standards are applied in these judgments that are in conflict with Article G ESC.

3.4.3. Public order and safety

90. As mentioned already, the grounds put forward cannot always be categorised unequivocally. The reliance on potential threats to safety or even public order is often combined with the interests of third parties, usually involving users of services such as travellers. In situations where concrete safety risks may be present, trade unions will try to reach agreements with employers about safety measures. This is usually done beforehand in order to observe the necessary care and thus prevent safety-related problems from arising. Furthermore, for instance during actions that took place at security companies, including those at Schiphol, agreements were reached on a so-called 'red button procedure' that made it possible to terminate the action with immediate effect in the event of a threat to security, while the staff required for that remained available at the workplace. It should be noted that in the majority of cases where safety is discussed, it does not concern 'national security' but the safety of customers or processes of the private employer against whom the action is directed.

91. The trade unions do not dispute that an action must be terminated when this is desirable in the interest of public order. This is fully in line with existing case law, also that of the ECSR. For example, an go-slow action action of driving slowly in procession by the police and a nationwide demonstration on 18 March 2019 in connection with a change to the retirement age were immediately cancelled when it transpired that there was a (possible) terrorist attack on a tram in Utrecht. 40,000 people took part in these actions, including police and defence personnel. After the immediate cancellation of the action, all police officers on duty were immediately available. It should be noted that a substantial part of the cases in which the need to protect public order and safety are defended, do not relate to strikes in the public sector but in the private sector. Thus also private entreprises may claim that safety risks occur when a strike in their enterprise is being conducted, f.e. when the enterprise has a responsibility to secure the protection of persons at the airport, in shopping area's etc. A number of cases relate to companies where potential safety issues are involved but where other interests, besides safety risks, also play a role, namely (additional) inconvenience for the employers against whom the strike is directed and/or third parties, such as travellers. Judges often combine the various grounds for a restriction or prohibition.

92. Notwithstanding this the complainants note that, despite this position, courts are readily inclined to prohibit or restrict actions which they justify with the argument that it is 'socially urgent' or 'socially disruptive'. A prohibition or restriction of the action is then the result. It is notable from the case law that when testing against the standard of social urgency the bar is not set high. Inconvenience and nuisance are often also treated as a (potential) safety problem and are therefore, entirely wrongly, considered to be matters of social urgency. Examples of this are the (planned) actions by BOA officers, ground staff of KLM, security staff at Schiphol and drivers in public transport. These prohibitions or restrictions also factor in the inconvenience that third parties such as passengers may experience. The complainants find that this case law goes far beyond the limits as set out by the Council of Europe and the ILO, prescribing that although the right to strike is not absolute it may only be restricted in exceptional circumstances, or even prohibited but only when 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 public health or morals or for the protection of the rights and freedoms of others.[57]

93. For example, an action that was entirely prohibited was an announced action involving special enforcement officers (BOAs) employed by municipalities (**Actions by BOA officers**, Amsterdam Court, 26 April 2019, ECLI:NL:RBAMS:2019:3024). BOAs are public-sector employees who monitor matters of public order and safety such as parked cars, (bulky) household refuse disposal, illegal dumping, moped/bicycle wrecks, illegal parking, (stray) dogs, graffiti/illegal fly-posting, nuisance caused by youth, restrictions on shop displays and oversight of neighbourhoods and parks. They do not form part of the police organisation, have no responsibilities in the field of security (at national and municipal level) because they have far fewer powers than police officers. They can however impose fines. The BOAs were of the opinion that they could no longer carry out their duties safely because they could not defend themselves sufficiently against violence in the course of their work. After protest meetings and non-issuing of fines for some time had had no effect, it was decided to extend the actions. It was announced that the BOAs in Amsterdam would not issue fines on King's Day, a national holiday in the Netherlands, together with a (very limited) work stoppage between 19h00 and 21h00, during which the BOAs would be available immediately in case of an emergency. The judge prohibited the work stoppage: while endorsing the importance of the BOAs, he ruled that the actions could not be carried out because safety risks could conceivably arise if during the work stoppage people behaving in aberrant ways were called to order less promptly.[58] The actions were prohibited. The complainants find that this restriction goes much too far in light of the position adopted by Committee of Experts of the ILO[59] and the ECSR that in terms of Article G restrictions may only be imposed on workers employed in essential public services whose duties and positions, given their nature or level of responsibility, are directly related to national security and public interest in themselves. In addition, restriction can be justified only if public life depends on such services and to the extent that work stoppages could be life-threatening for others as well as for national security and public health.[60] In this case, however, a restriction was imposed on workers who had no responsibilities in the field

[57] ILO, Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Sixth edition, 2018; ECtHR, 15 September 2009, *Kaya and Seyhan v. Turkey*, App. No. 30946/04, Judgement of 15 September 2019.
[58] Amsterdam Court, 26 April 2019, ECLI:NL:RBAMS:2019:3024
[59] ILO, International Labour Conference, 101st Session, 2012, Report of the Committee of Experts on the Application of Conventions and Recommendations – Report III (Part 1 B), General Survey – Giving globalisation a human face, Geneva 2012, § 168.
[60] Conclusions I (1969) Statement of interpretation on Article 6§4, and Conclusions XVII-1 (2004), Digest of the case law of the European Committee of Social Rights, 105.

of national security by depriving them of the possibility of a very brief work stoppage of 2 hours (with availability in case of emergency).

94. The actions that were restricted in terms of scope related to cases where ground staff working at Schiphol (technical staff, refuelling and towing services, baggage handling and office staff) intended to hold work stoppages of short duration (**Actions by Schiphol ground staff**, Amsterdam Court, 11 August 2016, ECLI:NL:RBNHO: 2016:6696 and Amsterdam Court of Appeal, ECLI:NL:GHMS:2016:3472). In the first case brief work stoppages by ground staff, including baggage handling, were announced during the summer holidays. Cause for the interim relief proceedings instituted by KLM (the employer against whom the action was directed) and Schiphol was a very brief work stoppage announced for 19h30 to 21h00, hence 1.5 hours. Although these were limited actions, the court ruled that due to the major holiday rush it had been sufficiently established that damage would occur because passengers and/or baggage could be left stranded at Schiphol. Because additional security measures were applicable due to terrorist threat, the court deemed a total prohibition of actions during the holiday period to be necessary so that no additional disturbance would be created among passengers as a result of (announced) work stoppages, which would result in passengers and/or luggage being stranded at the airport. The complainants believe that this prohibition went much too far, because it meant that they could not take any collective action for a month. It was not the actual security risks that were invoked as grounds for restriction, but the risk of creating additional disturbance.[61] This judgment was upheld on appeal in which it was found in particular that the fact that the actions were held during the busy summer period meant that the actions were justifiably prohibited because catching up with the backlog would be less quick in the summer period. The imposition of the prohibition until 4 September 2016 was held to be proportionate, in which it was noted that actions outside the summer period would cause less (severe) damage. In any event, actions that could result in passengers having to wait some time in the aircraft before being able to disembark should -in the opinion of the Court of Appeal- be prohibited. What is striking in this respect is that on appeal the Court of Appeal no longer attributed any significance to the terrorist threat that was invoked in the first instance. This is characteristic of the practice in interim relief proceedings involving strikes, where arguments relating to security are advanced during the hearing from the side of the employer or third parties such as Schiphol Airport which the trade union cannot refute or cast doubt on other than by contradicting them. The court often accepts these arguments at face value though it may later appear that the merits of these arguments is lacking or cannot be substantiated.

95. In the second case (**Actions at Schiphol security**, North Holland Court, 1 August 2018, ECLI:NL:RBNHO:2018:6807) – two years later – the possibility of holding a work stoppage at the security check of departing passengers from the beginning of August to the beginning of September 2018 was severely restricted.[62] Non-disruptive actions followed by short work stoppages of 10 minutes had already taken place at the security companies, with little effect. It was then decided to extend the work stoppage from 10 to 15 minutes and, if necessary, to 20 minutes, depending on the effect of the actions. The actions would mean that a few times per day, for a very short period of time, no new departing passengers would be admitted to the security lane, so that they would have to wait for a limited period of time. The court ruled that it had been sufficiently established that a work stoppage of twenty minutes or more at a time could lead to unnecessary security risks, especially during the busy period of school holidays. Actions of such duration had to be prohibited. In the opinion of the court this did not apply to similar actions of 15 minutes or less. The prohibition extended until the end of the school holidays, namely 2 September, thus for a month. The result was that the

[61] North Holland Court, 11 August 2016, ECLI:NL:RBNHO:2016:6696
[62] North Holland Court, 1 August 2018, ECLI:NL:RBNHO:2018:6807

FNV and the CNV could only take collective actions of a maximum of 15 minutes during that month.

96. Due to these rulings, the possibility of carrying out collective actions of any significance and effect was restricted for a period of one month to such an extent that there was little or no room for the unions to take effective collective action for a long period. The complainants find that fundamental right to strike to be prejudiced, given the intrusion of the rulings on the right to collective action, making it possible to impose a lengthy ban on strikes.

97. A general strike in public transport in the Netherlands in connection with the increase of the retirement age, which was announced very long in advance, was also restricted by the court for reasons of public order and national security and the danger of traffic chaos at and around Schiphol Airport (**Actions in public transport)**. Without giving reasons the court assumed that a real risk of serious disturbances of public order and security would arise if public transport was brought to a halt. Even a "minor disruption of the infrastructural system", the court found, would have considerable consequences for Schiphol because it is located in a densely populated part of the Netherlands. The court substantiated its judgment in this regard in very general and far-reaching terms which went far beyond the assessment framework of Article G ESC. In the view of the court, the restriction of actions could be justified on the basis of this standard almost by definition, since any disruption can be sufficient to permit the imposition of restrictions. The court then stated that the adjustment of the actions that was imposed – in accordance with the scenario of the employer (the Dutch Railways) – "does not significantly impair the objective and effectiveness of the actions". It required the unions that were taking action to ensure that a train shuttle service was organised between Amsterdam and Schiphol.[63] On this point, too, the court went further than Article G by interfering in matters falling within the discretion of the trade unions.

98. The complainants believe that these rulings make it clear that the lower courts impose restrictions which fall beyond the scope of Article G ESC. Wrongly, the strict standard of Article G 'for the protection of public interest, national security' is not applied. In judicial practice a balancing of interests takes place, which lies beyond the scope of Article G ESC. It must be concluded that the courts combine or possibly confuse the standards laid down in Article G with interests of a different nature. The courts apply the test whether the actions are 'socially disruptive' or whether restrictions occasioned by the interests of third parties are 'socially urgent', a test which is based on the above-mentioned 'unlawful act' formula based on artikel 6:162 Dutch Civil Code. Interpretations are given of the terms '*public interest and national security*' used in Article G, without assessing these concepts as such and incorporating much more within them than is justified in view of the restrictive nature of Article G. In so doing a potential risk to security is sometimes considered sufficient in itself to prohibit or severely restrict a collective action on the basis of generalities, without concrete justification. In so doing reference is made not to the narrower concept of 'national security' in Article G, but to a much broader one: namely security risks in general. What also stands out is that, in the context of the (broad) weighing-up of interests in the assessment against this criterion, it is also taken into consideration whether nuisance and potential damage are incurred by third parties, such as passengers, as a result of the actions. In the reasoning of the court such nuisance and potential damage already exist if people could become irritated or stressed by the actions and this is then regarded as a sufficient risk for imposing restrictions on collective actions. Article G, however, does not refer to such interests (nor to a weighing-up of interests of that nature) but provides general standards that must be protected and respected in a democratic society: *'necessary in a democratic society for the protection of the rights*

[63] North Holland Court, 26 May 2019, ECLI:NL:RBNHO:2019:5857

and freedoms of others or for the protection of public interest, national security, public health, or morals'.

3.4.4. Restriction in connection with the interests of third parties

99. In a large number of the judgments other interests that may lead to the restriction of actions, beyond the grounds explicitly referred to under Article G, were taken into account. The restrictions were imposed on account of the social urgency to restrict actions in view of the interests of others. This is broader than the ground for restriction referred to in Article G: rights of third parties. The interests that were thereby taken into account were the desirability of not suffering nuisance or damage, such as by passengers. Article G does not mention damage suffered by the employer or third parties as such. This can only play a role in special cases when a 'pressing social need' is in question.[64] This is perfectly understandable, because it is precisely by inflicting damage through collective action that trade unions can exert pressure on the employer(s) to change their attitude at the negotiating table. Restrictions are very often imposed on the right to collective action when this right is exercised in the public transport sector, such as bus and rail transport and airlines.

For example, actions at airline Easyjet were prohibited over weekends to prevent passengers arriving late at their holiday destinations (see: **Actions at airline Easyjet).**[65] The court ruled that the use of the strike weapon must lead to as little inconvenience as possible for the travellers, or in the words of the judge: not "in a way that actually prevents travellers from being able to get to their holiday destinations. Damage for the travelling public must be limited as far as possible to the inconvenience caused by the uncertainty as to whether they will be affected and the resulting need to cancel or rebook their flights". Actions during weekends must be prohibited because these are peak days. This judgment was upheld on appeal, including the extension of the restriction to all weekends until 5 September 2016.[66] What the Court found decisive in this respect was "the damage thereby caused to the interests of the employer or third parties, and the nature of those interests and that damage". This is a formulation that far exceeds the assessment framework of Article G. Nevertheless the fact that passengers' holiday plans and arrangements would be affected was considered sufficient reason.

An appeal in cassation lodged against this judgment, in which it was argued that the consequences for passengers were not of such importance as to justify the restriction that was imposed, especially since EasyJet does not provide an essential service, was rejected by the Supreme Court without reasons being given.[67] As a result the judgment that restricting a strike which results in the cancellation of a number of international

[64] Conclusions XIII-1, Netherlands, art. 6§ 4: 'The Committee accordingly held that, on the basis of Article 31 of the Charter, damages caused to third parties and financial losses sustained by the employer could only be taken into consideration in exceptional cases, when justified by a pressing social need.'
[65] North Holland Court, 8 July 2016, ECLI:NL:RBNHO:2016:5638
[66] Amsterdam Court of Appeal, 6 February 2018, ECLI:NL:GHAMS:2018:398. The Court also found that EasyJet and the passengers it was carrying would suffer damage particularly because the intended strikes would not only affect holiday travellers to and from Schiphol but also to and from other foreign airports, because EasyJet does not fly single-destination return flights, but (so-called) "W-Triangle" flights to and from 3 to 4 destinations per flight. As a result, the cancellation of a flight from Amsterdam would lead to a multiplicity of cancelled flights of holidaymakers from other destinations of the flight in question, as a result of which, due to the generally high occupancy rate of EasyJet aircraft, many passengers would be affected in their holiday plans and arrangements.
[67] Supreme Court, 19 July 2019, ECLI:NL:HR:2019:1245

flights, and therefore has consequences for a large number of passengers, is socially urgent was upheld without the Supreme Court ruling on the correctness of the way in which this standard developed in the case law of the Supreme Court had been applied in relation to the standards of Article G ESC. This is left to the court deciding questions of fact. In the lower courts the question whether collective action bearing in mind the interests of passengers can be restricted is therefore not considered to be an issue: the Supreme Court permits it.

100. An action at Ryanair was limited on the same grounds (see**: Actions at airline Ryanair**). In this case the court did not rule that notice of the actions had not properly been given, but restricted the right to collective action by imposing a notice period of 72 hours with reference to the urgent social need of applying that restriction. The notice period of 72 hours had to be observed to enable Ryanair to warn passengers in time so that they could adjust their travel plans.[68]

101. In the judgment relating to the strike at the catering company of KLM airline **(Actions at Catering KLM**) it was assumed that if a strike results in a large number of flights being cancelled and therefore affects a large number of passengers, a restriction of the action can be socially urgent in the sense referred to in Article G ESC.[69] This is once again so when it comes to cancellation of flights of a party that can be regarded as a third party in relation to the labour dispute. Although KLM airline held 100% of shares in the catering company against which the strike was directed, it was regarded as a third party and the trade union was obliged to keep a minimum staffing level during a general strike, so that there would be no need for KLM to cancel (intercontinental) flights.

102. Finally, a strike by drivers was also prohibited by the court of first instance at a company engaged in school transport for children who went to school by bus because of physical or other disabilities (**Actions in school transport**).[70] The court was of the opinion that it was of social importance that these pupils should actually be able to go to school every day. That interest outweighed the interest of the trade union in the actions. Restriction was therefore considered urgently needed. On appeal this decision was set aside because it was clear that there were alternative means of transport. In addition, the appeal court found that the right to collective action for one day outweighed the interest of pupils possibly being unable to attend school on one single day.[71]

103. Furthermore, in the case law of the lower courts the incidence of loss or (the possibility of) damage to consumers is regarded as a legitimate ground for prohibiting or restricting an action in the balancing of interests. For example, this was the case at a postal company in the Netherlands responsible for sending letters and parcels, including for online stores (**Actions in mail delivery in the Christmas period**). The court found that the interests of consumers and online stores would be disproportionately affected if greeting cards and gifts were not delivered on time during the Christmas period and would therefore not be received on time by the consumers. This was sufficient reason for the court to impose a prohibition on work stoppages of more than 15 minutes in the period around Christmas and New Year. Here too the prohibition was for an extended period from mid-December 2018 to 6 January 2019. The interests of the employer against whom the action was directed were also taken into account because – so the court found – it could have consequences for the rating of the reliability of the affected

[68] North Holland Court, 9 August 2018, ECLI:NL:RBNHO:2018:7026
[69] North Holland Court, 16 October 2019, ECLI:NL:RBNHO:2019:8589
[70] Amsterdam Court, 22 June 2016, ECLI:NL:RBAMS:2016:3995
[71] Amsterdam Court of Appeal, 24 April 2017, ECLI:NL:GHAMS:2017:1644

employer. In view of these interests of third parties and the employer the actions were considered disproportionate.[72]

104. These examples show that the interests of third parties play a major role in case law in the imposition of prohibitions or restrictions on collective actions. A balancing of interests is used in the process, based on the unlawful act assessment framework and taking into account all circumstances of the case, which is too broad (see paragraph 3.3.6). The complainants find that these rulings make clear that the judicial practices bring about far reaching restrictions on the right to strike and that they go beyond the restrictions admissible under Article G of the Charter. This case law is in conflict with the provisions of Article G and the interpretation by the ECSR that only the rights and freedoms of third parties can be grounds for imposing restrictions.[73]

3.4.5. Restriction in view of the interests of the employer

105. It is also clear from the case law that the employer's own interest, consisting of the limitation or prevention of damage, may constitute a ground for prohibiting or restricting actions.

This was very explicitly at issue in the case of the supermarket group Jumbo (**Actions at Jumbo butchery)**.[74] Employees employed at the butchery of the group wanted to stage a one-day action against divestment of the butchery without being given employment guarantees for the longer term. The planned action consisted of striking for one day and taking buses from the workplace to the head office to hand a petition to the employer. The court prohibited this action in the first place because an all-out strike of one day at the butchery of the group would result in damage to the group and franchisees. A second reason was the risk of meat spoilage that could be created. In addition the court found the actions premature. The complainants reiterate that the fact that a Dutch judge may determine whether recourse to strikes are "premature", infringes on the very substance of the right to strike, as this allows the judge to exercise one of the trade unions' key prerogatives, i.e. that of deciding whether and when a strike is necessary.[75] Once again the restriction was imposed by the court for an extended period of time, namely until discussions with a potential buyer had become concrete. Appeal against this judgment was disallowed because Jumbo had voluntarily offered to pay the legal costs of the trade union in both instances and the court therefore ruled that the trade union no longer had an interest in the case.[76] The complainants are of the opinion that the court failed to recognise the right to collective action as a fundamental right and deprived it of its effectiveness. Only the grounds contained in Article G ESC can justify a restriction. The risk of damage to the group and franchisees and the risk of meat spoilage in any event do not form part of these.

106. Another example in which the court placed excessively far-reaching restrictions on the right of action involved a collective action at the car manufacturer VDL/Nedcar. The action was taken in connection with ongoing negotiations of a collective agreement for the metal industry (**Actions at VDL/Nedcar**).[77] After a few one-day strikes had already

[72] The Hague Court, 13 December 2018, ECLI:NL:RBDHA:2018:15444. PostNL was the employer (against which the strike was directed).
[73] ECSR, Conclusions XVI-1 as regards to the Netherlands
[74] Amsterdam Court, 25 February 2016, C13/603149/KG ZA 16-202
[75] Conclusions XVII-1 2005 and XVIII-1 2006.
[76] Amsterdam Court of Appeal, 27 September 2016, ECLI:NL:GHAMS:2016:3931, see also Chapter 3 paragraph 3.1.3; 3.11 above
[77] Limburg Court, 9 January 2019, ECLI:NL:RBLIM:2019, 382.

been held at intervals at VDL/Nedcar and at other companies in that sector, VDL/Nedcar asked the court to prohibit further actions. The ground put forward was that one of the clients of the company, namely BMW, could use the actions as an argument for reducing the production volumes of VDL/Nedcar. The court saw in this a concrete and real risk that BMW might for that reason decide to cease production after 2022, which would threaten the continued existence of the company. For that reason the action was prohibited. The consequences of a (possible) decision by BMW to discontinue production would lead to a concrete threat to the preservation of job opportunities in Limburg, to which great weight was attached in the assessment. Further action was therefore prohibited.

107. The above makes it clear that the interests of the employer against whom the strike is directed, namely the prevention of damage, can also play a decisive role in the judicial assessment. In view of the broad assessment framework based on the unlawful act (see Chapter 3 paragraph 3.3.6.) whereby all the circumstances of the case are taken into account, the content and purport of Article G ESC are completely disregarded. The case law of the ECSR implies after all that restrictions on the right to collective action are only allowed to protect the rights and freedoms of others and to protect public order, national security, public health or morals and that restrictions can only be imposed in respect of strikes in essential services and sectors.[78] In the opinion of the complainants, the grounds for restriction relied on in the above-mentioned judgments do not fall into these categories. Furthermore, the lower courts lose sight of the fact that the concept "public order" in the ESC should be interpreted differently from a general weighing-up of interests, as is the case in Dutch case law. It must involve interests of public order or, in the words of the ECSR, 'an interest of society that is so seriously endangered that it constitutes a threat to that society'. In this context it must be borne in mind that the concept of 'essential services' is not known or used in the Netherlands. It is seldom referred to in Dutch case law. If that were to happen, the case law in cases where 'general interest' is currently given a broad interpretation could more readily tie in with the case law of the ECSR. The complainants find that the judicial practices inadmissibly restrict the right to strike since they go beyond the restrictions admissible under Article G. of the Charter.

3.4.6. 'Rules of the game' assessment

108. The judgment of the Supreme Court makes it clear that the lawfulness of actions in the Netherlands is not assessed solely on the basis of the scope for restriction provided for in Article G ESC. The court goes further and can do so by including in that assessment the question whether the rules of the game have been observed and, in particular, whether the action was used as a last resort in order to exert pressure in collective bargaining. The question arises whether this is in accordance with Article 6(4) and Article G ESC.

109. In the lower courts these aspects are regularly included in the weighing-up: in 13[79] of the 33 judgments the court considered in its assessment whether the actions were

[78] Digest of the case law of the European Committee of Social Rights, p. 106.

[79] Court of Central Netherland, 4 april 2016, ECLI:NL:RBMNE:2016:1899; Actions at airline Easyjet, North Holland Court, 8 July 2016, ECLI:NL:RBNHO:2016:5638, Actions by Schiphol ground staff, Amsterdam Court, 11 August 2016, ECLI:NL:RBNHO:2016:6696; North Holland Court, 8 November 2016, ECLI:NL:RBNHO:2016:9238; Court of Central Netherland, 13 April 2017, ECLI:NL:RBMNE:2017:1989; Court of Gelderland, 15 February 2017, ECLI:NL:RBGEL:2017:1419;

premature and whether they could contribute to the effective exercise of the right to collective bargaining, while in a number of cases this weighing-up (even) resulted in actions being restricted or prohibited. Examples of cases in which the actions were prohibited or restricted for that reason, among others, include the actions regarding mail delivery in the Christmas period and the actions at Jumbo.[80]

110. The complainants are of the opinion that this is contrary to the provisions of Article 6(4) ESC. It falls within the discretion of the unions to determine whether taking action is required and in what way. This is also 'settled case law' of the ECSR: the Committee finds it impermissible for the national court to judge whether the use of the strike instrument is premature, because this belongs to the prerogative of the trade unions.[81] In those cases the actions were judged to be premature and prohibited for that reason (among others) (see above under paragraph 3.5.4 Jumbo). In other judgments the court also assessed whether collective action was resorted to prematurely. In these cases that factor was not decisive, but was included in the assessment by the court.

In the context of the unlawful act assessment a rules of the game test has been developed in case law, which was referred to by the Supreme Court in 2014/2015 as a perspective relating to the question whether restrictions can be imposed on collective actions. These rules of the game have not been laid down by law or otherwise, except in case law. The court includes them in the assessment and thus quite rapidly embarks on an assessment of the course and content of the negotiations between the parties. This standard therefore goes beyond the content and purport of Article G ESC. This case law is therefore not in conformity with Article G ESC.

3.5. Conclusion

111. Above, the complainants have shown that the lower courts, when applying the assessment framework developed by the Supreme Court in the Enerco and Amsta cases within the framework of the test for an unlawful act and based on the interpretation of Article G ESC, perform a weighing-up of interests based on all the facts and circumstances of the case which does not give due weight to the assessment framework contained in Article G. Article G specifically and limited sets out the standards which must be referred to in assessing whether restrictions can be imposed on the fundamental right to collective action. If in any country the Article G-restrictions have not been provided for by legislation, as is the case in the Netherlands, it is permissible for the courts to give them substance by means of case law. But, if so, there needs to be a stable and foreseeable assessment framework.

112. This is by no means the case. The Supreme Court's framework of standards based on the unlawful act is so broad that the outcomes of judicial assessment are extremely divergent, inconsistent and difficult to predict. The assessment framework of the Supreme Court comprises a plurality of factors which, depending on the value that a judge attaches to them in interim relief proceedings in a specific case, may provide a basis for prohibiting or restricting the right to take collective action. This

Central Netherlands Court, 26 April 2018, ECLI:NL:RBMNE:2018:1786; Central Netherlands Court, 13 September 2018, ECLI:NL:RBMNE:2018:4556; Central Netherlands Court, 24 January 2019, ECLI:NL:RBMNE:2019:1282; Limburg Court, 9 January 2019, ECLI:NL:RBLIM:2019:382; The Hague Court, 13 December 2018, ECLI:NL:RBDHA:2018:15444; Zeeland West Brabant Court, 19 April 2019, ECLI:NL:RBZWB:2019:1893.

[80] The Hague Court, 13 December 2018, ECLI:NL:RBDHA:2018:15444; Amsterdam Court, 25 February 2016, C13/603149/KG ZA 16-202; Amsterdam Court, 22 June 2016:ECLI:NL:RBAMS:2016, 3995.

[81] Conclusions XVII-1 (2004), Netherlands

arbitrariness/imbalanced picture is particularly evident in the case law of the lower courts. From this it appears that it can involve a number of circumstances that (may) occur in a specific situation. The court makes use of these according to what it finds relevant in a particular situation and may also do so in applying the formula laid down by the Supreme Court in Enerco/Amsta.

113. Whereas Article G takes as a starting point that the imposition of restrictions can only occur in exceptional cases, the majority of cases in the lower courts in the Netherlands result in a complete prohibition of collective actions, temporary or otherwise, or in the imposition of far-reaching restrictions. This makes judicial assessment highly unpredictable. This, the complainants must conclude, has two consequences. The first is that it is unclear to trade unions, when considering and subsequently taking collective action, whether an intended action will be prohibited, restricted or permitted. There is no clarity about this beforehand, which is not consistent with the requirement of the ECSR that the assessment framework must be stable, predictable and foreseeable.[82] Another consequence is that, to be on the safe side, trade unions of their own accord frequently exercise great restraint in choosing a form of action when organising collective actions so as to avoid legal proceedings or injunctions and to ensure that the collective action can in any event take place. This is a form of self-censorship prompted by the state of case law in the Netherlands. The ability to make effective use of the basic right to collective action is thereby seriously impeded if not eroded. Or, in the words of the ECSR, “reducing the substance of the right to strike so as to render it ineffective”.[83] This constitutes a serious violation of/threat to the complainants’ right to bargain collectively, which should be safeguarded precisely by being able to exercise the right to collective action.

114. The way in which decisions are taken in interim relief proceedings prior to actions within a very short period of time and on the basis of likelihoods instead of evidence, which may lead to the imposition of far-reaching restrictions on the right of collective action, also leads to an excessive invasion of the ability to effectively exercise the right to collective action in terms of Article 6§4 and Article G ESC. This is reinforced by the fact that obtaining a judicial decision on appeal can easily be obstructed by the employer and assessment by the Supreme Court involves a limited (strictly legal) review (see Chapter 3 paragraph 3.1.3, 62-64)

[82] See: Digest of the case law of the European Committee of Social Rights, December 2018, p. 103 in which it is stated: the expression “prescribed by law” means, not only statutory law, but also case-law of domestic courts, if it is stable and foreseeable. Moreover this expression includes respect for fair procedure.

[83] Conclusions 2010 of 14 December 2010 (2010/def/NLD/6/4/EN); see also Digest of the case law of the European Committee of Social Rights, December 2018, p. 102.

4. Complaints

115. On the basis of the above grounds the complainants submit complaints against the manner of assessment in Dutch case law for the imposition of restrictions on collective actions, namely with reference to an excessively broad framework of standards and not (strictly) on the basis of Article G ESC (in conjunction with Article 6§4 ESC).

116. The first complaint is directed at the case law of the Supreme Court, as pronounced in the Enerco (2014) and Amsta (2015) judgments. In the case law of the Supreme Court, the focus of the assessment whether restrictions can be imposed on collective actions has shifted from Article 6§4 ESC to the test in terms of Article G. The complainants note that since the Enerco and Amsta judgments there has been little or no debate in the case law about the question whether an action falls under the protection of Article 6§4 ESC: the right to collective action is recognised and placed within the scope of Article 6§4 ESC.

The restrictions on this right to collective action by reason of the standard of socially unacceptable conduct are based on the unlawful act in terms of Article 6:162 Dutch Civil Code. In the opinion of the complainants, the use of this standard developed by the Supreme Court in the above-mentioned two judgments for assessing whether a prohibition is or restrictions are (or may be) allowed on the basis of Article G, goes much further than Article G allows, on the one hand because the grounds for a possible prohibition or restriction in the case law of the Supreme Court go beyond the grounds stated in Article G and, furthermore, because a prohibition or restriction can be based on a balancing of interests in which all the circumstances of the case can be taken into account. This assessment framework exceeds the scope of Articles 6§4 ESC and G and lacks the character of being stable and foreseeable and does not afford sufficient protection in court procedures.

117. The second ground of violation relates to the way in which the assessment framework of the Supreme Court is applied in the lower courts.

The complainants note that the lower courts, when applying the assessment framework developed by the Supreme Court in the Enerco/Amsta judgments, regularly use assessment standards that are not mentioned as such in Article G and also cannot be accommodated there. In the lower courts, a weighing-up of interests is used for assessment in light of all the facts and circumstances of the case, separately or cumulatively as they might find suitable, within the framework of the unlawful act test. This does not do justice to the assessment framework set out in Article G. Article G specifically mentions the standards that must be applied when assessing whether restrictions may be imposed on the basic right to collective action. If in any country the Article G-restrictions have not been provided for by legislation, as is the case in the Netherlands, it is required that they must be given correct content in case law and that there must be a stable and foreseeable assessment framework. This is not the case. The result is that trade unions themselves regularly exercise great restraint in the choice of a means of action in order to avoid legal proceedings or injunctions. This is a form of self-censorship which is prompted by the state of case law (of the Supreme Court and the lower courts) in the Netherlands and which is in violation of art. 6§4 and G ESC. Because clear assessment standards are lacking, the effective use of the fundamental right to collective action is seriously impeded if not eroded. This results in reducing the substance of the right to strike so as to render it ineffective.

118. The complainants therefore request the ECSR to uphold the two complaints, namely:

- that the case law of the Supreme Court in the Enerco and Amsta judgments containing the assessment framework as to whether restrictions may be imposed on collective action is incompatible with Articles 6§4 and G ESC; and
- that the case law of the lower courts applying the assessment framework developed by the Supreme Court in the Enerco and Amsta judgments is incompatible with Articles 6§4 and G ESC.

Brussels/Utrecht, XX June 2021

On behalf of the ETUC,

Luca Visentini, ETUC General Secretary

On behalf of the FNV,

Tuur Elzinga
Executive Committee Member FNV

Zakaria Boufangacha
Executive Committee Member FNV

On behalf of the CNV,

Piet Fortuin
Chairman of the board

Jan Pieter Daems
CNV board member

ANNEXES:

Annex 1	Constitutions of the complainant organisations ETUC (Annex 1(a)), FNV (Annex 1(b)) and CNV (Annex 1(c))
Annex 2	List of Abbreviations
Annex 3	Observations of FNV to the 11th National Report Netherlands (2017)
Annex 4	Overview of judgments 2010-2020
Annex 5	Abridged summary of judgments from 2015 involved in the research