EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 1

***Unione sindacale di base* (USB) v. Italy**
Complaint No. 208/2022

COMPLAINT

(*translation*)

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COLLECTIVE COMPLAINT

Executive Secretary of the European Committee of Social Rights
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Directorate General of Human Rights and Rule of Law
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Subject: Collective complaint by Unione Sindacale di Base (USB) concerning a violation by the Italian State of Articles 6(4) and G of the Revised European Social Charter

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1. Object of the collective complaint

By this complaint, Unione Sindacale di Base (USB), represented by Counsel Andrea Danilo Conte of the Florence bar, Counsel Marco Tufo of the Grosseto bar and Prof. Giovanni Orlandini (University of Siena), asks the European Committee of Social Rights (ECSR) to rule that the provisions laid down by Article 1(2), Article 2(1), (2) and (5), Article 13(1)(a), (c), (d) and (e) and Article 8 of Law no. 146 of 12 June 1990 ("*Provisions on the exercise of the right to strike within essential public services and on the safeguarding of individual rights guaranteed under the Constitution. Establishment of the Guarantee Committee for the implementation of the Law*"), considered in the light of their practical application, violate Article 6(4) (on the right to strike) and Article G ("Restrictions") of the Revised European Social Charter (RESC). The complaint concerns the rules governing the exercise of the right to strike within essential public services, as provided for under the provisions referred to above of Law no. 146/90 and as defined under collective agreements and the resolutions of the "Guarantee Committee" giving effect to those provisions. These rules limit the right to strike in a manner that is not compatible with the principles that can be inferred from Articles 6(4) and G RESC as: 1) they require that work be performed during the strike ("essential services") on a broader scale than merely those "minimum services" that are necessary in order to pursue the goals referred to by Article G RESC; 2) they impose a requirement to indicate the duration of the strike at the time it is called; 3) they impose mandatory cooling-off and conciliation procedures, which must be completed before the strike has started and are of such a duration as to impair its efficacy; 4) they impose a prohibition on strikes for a certain period of time after a strike has been held ("objective distancing") and at certain times during the year ("excluded periods"); 5) they grant an independent administrative authority (the "Guarantee Committee") a power to prohibit or otherwise limit the exercise of the right to strike that is *de facto* discretionary, as it is not subject to review by the courts; 6) they grant the Prefect and the Minister the power to order workers to return to work in the event of a strike, without establishing statutory prerequisites that are sufficiently clear and defined in order to enable a review as to whether that power has been legitimately exercised.
The complainant asks the ECSR to declare that each of the issues highlighted within the legislation applicable to strikes by essential public services violates Articles 6(4) and G ECSR and, *a fortiori*, that on account of all of the aspects highlighted, the overall law governing the right to strike limits the exercise of that right in a manner that is not compatible with the provisions of the ECSR referred to.

2. The reference legislative framework

2.1 The development of legislation on strikes by essential public services in Italy

The right to strike in Italy is a right recognised by Article 40 of the Constitution, which provides that "*The right to strike shall be exercised in accordance with the laws providing for its regulation*". Absent any law giving effect to the reservation laid down by Article 40, it has been left to the case law of the Court of Cassation and the Constitutional Court to define the scope of the right to strike, classifying it as an individual right that must be exercised collectively. In particular, the Constitutional Court has intervened on several occasions in order to assess the constitutionality of provisions contained in the 1930 Criminal Code that establish a series of offences related to the exercise of the right to strike: in this way the Constitutional Court has helped to frame the issue as to the limits that can be imposed on the exercise of the right to strike from the perspective of the balancing of constitutional rights and individual rights:[1] accordingly, under Italian law a strike may be subject only to those limits that are conducive to guaranteeing respect for other rights and freedoms relevant under the

[1] Constitutional Court, judgments no. 123/62, 31/69, 125/80 and 222/76.

Constitution, such as those guaranteed by public services. At the same time, within the area of private sector employment, the Court of Cassation has held that a strike may be held in any form and in any manner, subject to the sole limit that it may not jeopardise the very survival of the business (referred to as "business productivity"), which is protected by Article 41 of the Constitution (freedom of enterprise).[2]

In the 1970s, the need to balance the right to strike against the rights of users of public services was pursued through the adoption by trade unions of "self-regulatory codes"; the efficacy of those codes was then enhanced by Law no. 93/1983,[3] which provided that only trade unions that had adopted them could be participate in negotiations concerning the conclusion of collective agreements within the public sector.

However, self-regulatory codes could not be considered to be binding for trade unions that had not signed up to them. As such, any violations of them only resulted in sanctions within the respective associations, and did not give rise to any liability towards the employer. In 1990, the Italian Parliament then enacted Law no. 146 (Enclosure 1), having regard also to fears regarding the disruptions that could potentially have arisen within the transport sector during that year's football World Cup, which was held in Italy. That Law was subsequently amended by Law no. 83/2000,[4] which tightened up the limits on the exercise of the right to strike, on the occasion of another major event, the Jubilee 2000. Lastly, Decree-Law no. 146/2015 (converted into Law no. 182/2015)[5] amended Law no. 146/90 once again with the aim of expanding its scope with regard to services relating to the enjoyment of the country's artistic and cultural heritage.[6]

2.2 The concept of "essential public service"

Article 1 of Law no. 146/1990 defines those essential public services that must be guaranteed in the event of a strike. The fundamental principle expressed by the legislation in question, which constitutes its rationale, consists in the "*purpose of balancing the exercise of the right to strike against the enjoyment of individual rights protected under the Constitution*" (paragraph 2).

The law should therefore meet the need to strike a balance between two rights that are both recognised in the Italian Constitution, and as such have the same status: on the one hand, the right to strike under Article and, on the other hand, the rights of users that are affected by the strike, which are guaranteed through the provision of public services. It is thus necessary to establish "*rules that must be complied with and procedures that must be followed in the event of a collective dispute in order to ensure the efficacy of those rights in terms of their essential content*" (paragraph 2).

These rights are specified in Article 1(1) of Law no. 146/1990 in a closed list, i.e. a list that cannot be altered or expanded by interpretation, and are specifically "*those aimed at guaranteeing the exercise of the individual rights protected under the Constitution to life, health, freedom and security, freedom of movement, social security and pensions, education and freedom of communication*". The rights in question must each be considered in terms of their specific nature, as they are mandatory, as well as their essential content, as inviolable human rights (to life, health and freedom) and social rights (social security and pensions, education, etc.).

Article 1(2) of Law no. 146/1990 explains the concept of essential public service provided for under paragraph 1 with reference to a list of examples of such services – which are functionally related to the closed list of rights – and which can thus be expanded through interpretation were justified by

[2] Court of Cassation, judgment no. 711/80.

[3] Law no. 93 of 29 March 1983 (Framework Law on public sector employment).

[4] Law no. 83 of 11 April 2000 (Amendments and supplements to Law no. 146 of 12 June 1990 on the exercise of the right to strike within essential public services and on the safeguarding of individual rights guaranteed under the Constitution).

[5] Law no. 182 of 12 November 2015 (Conversion into law, with amendments, of Decree-Law no. 146 of 20 September 2015 laying down urgent measures on the enjoyment of the historical and artistic heritage of the Nation).

[6] Decree-Law 146/15 was adopted in the wake of the wide attention attracted in the media by a trade union dispute that had caused disruption to tourists visiting the Colosseum in Rome.

the rationale underlying the legislation. The list includes for example (in letters (a) to (e)) health services, public hygiene, civil protection, the administration of justice, the opening to the public of museums and other cultural institutions and venues, public transport, services relating to the payment of salaries and pensions, education, and postal and telecommunications services. The scope of the law also includes predicate services that are necessarily related to the "main" essential public service (e.g. the service consisting in the operation and technical maintenance of a radar system is an essential predicate for the provision of assistance to air navigation).
These services may be provided both by public and private operators (e.g. by a doctor working in a private clinic) and also by self-employed workers, professionals and small businesses (for example by a lawyer or a taxi driver). For this reason, Law no. 146/1990 applies to essential public services provided "*irrespective of the legal nature of the employment relationship, and also if provided under a concession or agreement*" (Article 2(1)).

2.3 The role of collective bargaining and the Guarantee Committee

The right to strike is balanced against the other constitutional rights listed in Article 1(1) of Law no. 146/1990 through the fixing of a number of conditions provided for within the Law, which must be complied with by any persons who call a strike, and also by stipulating minimum levels of "essential services" to be guaranteed by service providers during any strike. The law only lays down these obligations in general terms and leaves the task of supplementing the legal conditions applicable to the right to strike and of identifying, regulating and specifying essential services to collective bargaining (or self-regulatory codes where the service is provided by self-employed workers, professionals or small businesses).
In determining the conditions applicable to the exercise of the right to strike along with essential services, collective bargaining processes are subject to review by an independent administrative authority appointed by Parliament: the Guarantee Committee for the Implementation of the Law on Strikes within Essential Public Services established by Article 12 of Law no. 146/2000.[7]
The Committee's task is first and foremost to ascertain whether the measures provided for within collective agreements are suitable for ensuring that a balance is struck between the right to strike and the exercise of the individual rights provided for under Article 1(1). If it takes the view that the measures proposed are not suitable (or if no agreement has been reached regarding this aspect), the Committee submits a proposal to the parties concerning the overall services, procedures and measures that it deems to be necessary, and in the event that the parties fail to state their views within 15 days, the Committee itself must (having established that the parties have not been able to reach an agreement following hearings held within 20 days), adopt "provisional regulations" by a resolution of its own, which have legally binding status and remain applicable until an agreement considered suitable has been reached[8] (Article 13(1)(a)).
For the purpose of the provisional regulations, "*except under special circumstances*", minimum levels of special services must be set "*at a level not exceeding on average 50%* [i.e. half] *of the services normally provided and must involve staffing levels that are strictly necessary, not exceeding on average one third of the staff normally used for full-service provision for the duration of the strike*". Consideration must be given under all circumstances to the "*ability to use alternative services or services provided by competitor businesses*". The criteria described are relevant not only for the drafting of provisional regulations by the Committee but also as "*reference parameters*" for the

[7] The 9 members of the Guarantee Committee are appointed (from amongst experts in constitutional law, employment law and industrial relations law) by decree of the President of the Republic acting on a proposal by the Speakers of the Chamber of Deputies and the Senate, and remain in office for a term of 6 years (renewable once) (Article 10 of Law no. 146/90).
[8] The power to adopt provisional regulatory resolutions in the event of the failure to reach a collective agreement or where an agreement is deemed to be unsuitable was introduced by Law no. 83/00 amending Law no. 146/90; the intention of this reform was to reinforce the role of the Guarantee Committee, consequently reducing the autonomy of the social parties in regulating the strike.

Committee's assessment of the suitability for the collective agreements (Article 13(1)(a)). It follows that the 50% "limit" *de facto* establishes the level of "essential services" that is normally imposed in the various sectors, as the Guarantee Committee normally considers "unsuitable" any agreements that do not ensure it. In addition, the Committee also has the power to prescribe minimum service levels at a higher level than the limit specified by law, provided that it states reasons as to why this is necessary to guarantee operational and safety levels that are "*strictly necessary for the provision of services*", in order to avoid any violation of the fundamental rights provided for under Article 1(1). Accordingly, in actual fact the quantitative criteria set out in Article 13(1)(a) establish the minimum level of services that must be guaranteed in the event of a strike, and not the maximum level.

Minimum services (or rather "essential services) must always be guaranteed in the event of a strike within the sectors that fall within the Scope of Law 146/90. On the other hand, where it is necessary to guarantee the provision of services at certain times of day (as occurs for example within the transport sector), they must be guaranteed at the level of those normally offered, and are thus not affected by the above 50% limit. The same applies for so-called excluded periods, during which strikes are not permitted (cf. below section 2.4)

The other functions of the Committee that should be noted include: consultative and mediation tasks, both following a joint request by the parties and also on its own initiative; the provision of assessments on the interpretation and application of collective agreements; the issue at the joint request of the parties of an award concerning the merits of a dispute (Article 13(1)(b); and also, in the event of disputes of particular national significance, inviting those who have called a strike to postpone it for the period of time necessary in order to enable a further attempt at conciliation to be made (Article 13(1)(c)).

The Committee is also charged with preventing strikes that violate the conditions applicable to the exercise of the right to strike laid down by Law no. 146/1990, and must immediately report any violations to the parties concerned (including in particular violations concerning the failure to comply with the requirement of distancing and refraining from strikes during excluded periods, on which see below) and inviting them by a specific resolution to amend the declaration calling a strike in accordance with legal rules and sectoral regulations, postponing the strike until a later date (Article 13(1)(d)).

Another function of the Committee is to identify any parallel withdrawals or reductions of alternative public services that affect the same groups of users due to collective strikes called by different trade unions and invite any persons that have subsequently called a strike to postpone their strike (Article 13(1)(e)).

In the event of any breaches or violations of Law no. 146/1990 or sectoral rules, the Committee may impose sanctions on those persons who have called a strike (Article 13(1)(l)), which may consist in the suspension of remunerated leaves of absence for trade union activities and of contributions deducted from pay and (where applicable) a ban of two months on conducting negotiations with the relevant counterparty (Article 4(2)). Workers are subject to disciplinary sanctions, which the employer (business or administration) is obliged to impose (and the failure to impose which is in turn sanctioned) (Article 4(1)). The sanctions become more stringent ("doubled in terms of their maximum level") in the event that a strike has been called in breach of an "invitation" issued pursuant to Article 13(1)(c), (d) and (e).

Where the strike may give rise to "an imminent and well-founded risk of harm to individual rights protected under the Constitution as referred to in Article 1", the Committee must report the specific case to the authority with competence over the issue of "return to work" orders (see below), at the same time establishing the measures to be taken by that authority in order to prevent such harm (Article 13(1)(f)).

It is clearly apparent from this brief examination of the powers vested in the Guarantee Committee by Law no. 146/90 that it performs an absolutely central role in the adoption of rules governing the

exercise of the right to strike within public services. In particular, the grant of the power to adopt "provisional regulations" in the event that a collective agreement cannot be reached or where an agreement is declared "unsuitable" (a power introduced by the reform adopted in 2000) significantly reduces the autonomy of the social parties, in spite of the fact that Law 146/90 charges them with the task of regulating strikes in the first instance within the various sectors. Negotiations among the social parties are in actual fact directed externally by the Committee, as the rules proposed or imposed by it constitute an unavoidable point of reference for the trade unions called upon to sign the agreements (expressly, according to Article 13(1)(a)); on the other hand, only some trade unions out of those that are representative of the various sectors have signed agreements concerning essential services.
All of this explains why the specific rules applicable in the various sectors that fall within the scope of Law no. 146/90, including those contained in collective agreements, significantly impair the right to strike in a manner (as will be shown below) that is not compatible with Article 6(4) ESC.

2.4 The conditions applicable to the exercise of the right to strike

Article 2(2) of Law no. 146/1990 provides that collective agreements must set out cooling-off and conciliation procedures, which must be followed before a strike is called. Where the parties do not intend to adopt the procedures provided for under collective agreements, they may ask that the attempt at conciliation be made with the Prefecture or the Municipality, if the strike is to be local in scale, or with the Employment Ministry, if it is to be national in scale.
If the attempt at conciliation is unsuccessful, a strike may only be called subject to a requirement of prior notice of no fewer than ten days, which may be increased to a longer time limit within collective agreements (Article 2(2) and (5)). That obligation is related to another obligation for the persons calling a strike to give notice in writing, in accordance with the same notice period, concerning the duration of, arrangements for implementing and reasons for the strike. These notices must be sent both to the administrations or businesses that provide the service as well as the bodies competent to issue "return to work" orders (see below) as well as – in accordance with practice as well as the provisions of certain sectoral regulations – to the Guarantee Committee.
The purpose of the requirement of prior notice is to enable the service provider to put in place measures aimed at enabling essential services to be provided, so as to facilitate any attempts at settling the dispute as well as enabling users to use alternative services (Article 2(5)). The requirement to state the duration of the strike automatically renders unlawful any indefinite strike.
These procedural requirements are only dispensed with in cases involving "*strikes for the purpose of upholding the constitutional order, or protests relating to events causing serious harm to the health and safety of workers*" (Article 2(9)).
The requirement of "distancing" was introduced by the reform of Law no. 83/2000. Collective agreements must in fact also specify "*minimum intervals to be complied with between the holding of one strike and the calling of the next strike, where this is necessary in order to avoid situations in which the continuity of the public services referred to in Article 1 is objectively impaired as a result of the calling of a series of strikes by different persons that have an effect on the same ultimate service or the same group of users*" (Article 2(2)). Distancing may be "subjective" in the case of the minimum interval that must separate one strike from another called by the same collective body, or "objective" where it relates to two different trade unions. More specifically, the minimum distance must separate the holding (i.e. the completion) of one strike and the calling of the next strike.
The distancing rule is supplemented by a requirement of so-called "excluded periods" for certain sectors, such as – again – public transport; these are periods during which strikes are not permitted, as they coincide with certain times during the year, such as for example public holidays, departures for and returns from summer holidays or specific events, such as institutional processes including

elections or referendums.[9] Some bodies of sectoral rules also impose limits on the right to strike on particular days, on which services cannot be deferred after a specific time limit,[10] and even impose an absolute prohibition on strikes that would coincide with other strikes in the same sector, or even in different sectors, that have an impact on the same group of users, or with specific events of major importance.[11]

It is also forbidden to take advantage of the "calling effect", i.e. the abrupt cancellation of a strike previously called after users have been informed concerning it (Article 2(6)). Such behaviour is in fact regarded as a "*disloyal form of trade union action*", given that the very dissemination of news concerning a strike will cause disruption to users, resulting in pressure on the employer which, by virtue of the very calling of the strike, may be induced to accept the claims being made by workers even though no strike is actually held.

2.5 "Return to work" orders

The exercise of the right to strike within essential public services may also be limited by the authoritative power of the Government and the Prefect (the local representative of central government).

Where there is a "*well-founded risk of serious and imminent harm to the individual rights protected under the Constitution*" referred to in Article 1(1) of Law no. 146/1990 as a result of the suspension or alteration of the normal operation of the public services provided for under paragraph 2 in consequence of the strike, the President of the Council of Ministers or a minister designated by him/her (if the conflict is of national or inter-regional significance), or the Prefect or the corresponding body within the regions governed by special statute, acting on his/her own initiative in situations in which there is an urgent need for action, subject to prior notification of the Guarantee Committee, or otherwise acting pursuant to a referral by it, may invite the parties to desist from any acts that are giving rise to a situation of risk and pursue an attempt at conciliation. If it is unable to do so, the governmental authority issues a "return to work" order, i.e. an urgent administrative ruling setting out "*the measures necessary in order to prevent adverse consequences for individual rights protected under the Constitution*" *pursuant to Article 1(1)* (Article 8(1) of Law no. 146/1990).

The content of the "return to work" order may vary. It may require the strike to be postponed until a later date, including by incorporation into other strikes that have already been called, reduce the duration of the strike or stipulate that the persons calling and participating in the strike as well as the administrations or undertakings providing the service comply with measures that are capable of ensuring service levels compatible with the requirement to safeguard rights provided for under Article 1(1). The authority competent to issue "return to work" orders also takes account of any proposal made by the Guarantee Committee in its report pursuant to Article 13(1)(f), or at a later stage, concerning any measures to be adopted by such an order. The order must be issued at least 48 hours before the start of the strike, except where attempts at conciliation are still ongoing or in the event of an emergency, and must specify the period of time during which the measures contained in it must be complied with by the parties.

The persons who have called a strike, the administrations or undertakings providing the service or any individual workers affected by it may challenge the "return to work" order within 7 days of its notification or display at the workplace before the competent regional administrative court. The filing of an appeal does not automatically have suspensive effect on the order, which is therefore immediately enforceable; it can only be suspended by order of the regional administrative court, which may only do so in respect of any part of the measure that it considers to be excessive vis-a-vis

[9] See, for example, Article 4 of the National Agreement on Local Public Transport; Article 8 of the Provisional Regulations on Air Transport.

[10] See, for example, Article 10 of the Agreement for the Education and Research Sector.

[11] See Article 5 of the National Agreement on Local Public Transport; Article 12 of the Provisional Regulations on Air Transport.

the requirement to safeguard the rights provided for under Article 1(1).
Any failure to comply with a "return to work" order will result in the imposition of fines both on individual workers (between 500 and 1,000 euros for each day of absence from work) as well as the persons who called the strike (between 2,500 and 50,000 euros for each day of non-compliance) (Article 9 of Law no. 146/90).

3. The admissibility of the complaint

3.1 The State against which the collective complaint is directed

This complaint is directed against Italy. Italy has ratified both the European Social Charter, by Law no. 30/1999, as well as the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, by Law no. 298/1997 (Enclosures no. 2 and 3)

3.2. The organisation filing the complaint

3.2.1 Unione Sindacale di Base (USB)

Unione Sindacale di Base (abbreviated to USB) is the confederation of cross-sectoral, grass-roots trade unions "*in which all employee workers from all categories working according to any type of employment contract, irrespective of its classification, …. as well as pensioners and unemployed persons are organised*" (Article 1 of the Statute, Enclosure no. 4). Its structure is comprised of provincial offices, regional offices and the national headquarters, which co-ordinates activities at local level (Article 6 of the Charter, Enclosure no. 4).
USB is the largest grass-roots trade union in Italy. It is present in all regions, with branches in more than 80 provinces, and hence operates throughout the entire country. The trade union has signed national collective labour agreements for both the public and the private sectors. It has been clearly found to fulfil the prerequisite of representativeness in numerous judgments of the merits courts and the Court of Cassation (see ex multis Court of Cassation judgment 5321/2017 issued in relation to the trade union, SinCobas, which is only one of the many trade unions that have merged and incorporated with one another to create USB). It is a frequent interlocutor of the highest institutions in the country and is regularly heard before the Employment Committees of both the Senate and the Chamber of Deputies regarding draft legislation under discussion before those bodies.
On 17 July 2015 it adhered to the Consolidated Regulations on Representation [*Testo Unico sulla Rappresentanza*], which adherence was accepted by Confindustria on 30 July 2015, following which it was formally incorporated into the system of industrial relations governed by those Consolidated Regulations.
USB "*has the goal of representing, defending and promoting the economic, social, professional, trade union and cultural rights of workers, to be pursued by a widespread presence within workplaces and throughout society*" (Article 2 of the Charter, Enclosure no. 4). Its trade union activities are based "*on the principles of freedom, democracy, solidarity, equality and social justice… with the dedicated aim of asserting the right of each individual to satisfy his or her indispensable needs such as the rights to work, health, a home, income, education, social assistance and a sustainable environment*" (Article 2 of the Charter, Enclosure 4).
Since 14 February 2014, USB has been a member of the Word Federation of Trade Unions (WFTU) (Enclosure no. 5).

3.2.2. The standing of USB to file a complaint before the ECSR

USB therefore has standing to submit this complaint to the ECSR under the terms of the Article 1 of the Additional Protocol to the European Social Charter, which provides that "*representative national*

organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint" have the right to submit complaints.
USB also has a clear interest in submitting a complaint, having regard to the principles and aims set forth in its Charter, which include (Article 2(2)(d), Enclosure 4), *inter alia*: "*to defend the right to strike and to promote all legal and institutional trade union initiatives in order to extend that guarantee*".
As it has standing to submit a complaint and interest in doing so, USB has thus brought this complaint against Italy.
Legal representation of USB is regulated under Article 9(2)(b), which provides for the role of "*legal representative of USB Confederation, who shall have the status of the legal representative of USB Confederation concerning all matters with third parties and within legal action*". As specified in the report of the National Co-ordination Committee of 9 July 2017, the current legal representative is Ms Paola Palmieri (Enclosure no. 6).

4. The merits of the collective complaint

The provisions contained in Law no. 146/1990 raise the question of the relevance of Articles 6(4) and G of the Revised European Social Charter for the subject matter of this complaint.

4.1 Article 6(4) RESC and the relevant case law of the ECSR

Article 6(4) RESC provides that, with a view to ensuring the effective exercise of the right to bargain collectively, the Member States undertake to recognise "*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*".

4.1.1 The principles

According to the interpretation of the ECSR, Article 6(4) recognises the right to strike, which may be regulated by law or left to be interpreted by the courts.[12]
According to Article G RESC, the rights set forth in Parts I and II of the Charter, and hence also the right to strike under Article 6(4), "*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*". This provision reflects the second paragraphs of Articles 8 and 11 ECHR and, whilst it cannot be violated as such, it must be taken into account when assessing the compatibility of national arrangements with the substantive provisions of the RESC.[13] Therefore, any potential restrictions provided for by Member States on the rights set out in the RESC will only comply with the Charter if they fulfil the preconditions laid down in Article G which, given the severity of the consequences resulting from restrictions on those rights, in particular for the most vulnerable, must be interpreted narrowly as exceptions (Article G expressly states "except", author's note) which only apply under extreme circumstances.[14]
According to Article G and the case law of the ECSR, restrictions on the rights contained in the RESC, and hence also the right to strike, must:

a) be "prescribed by law": restrictions must be provided for under ordinary legislation, another

[12] Conclusion I (1969), Statement of Interpretation on Article 6§4.
[13] Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France, Complaint No. 26/2004, decision on the merits of 15 June 2005 § 31 and 33.
[14] Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, decision on the merits of 23 March 2017, § 83.

source of law or case law, provided that they have "a clear basis in law", for instance having been agreed upon by a democratic legislature,[15] and must be expressed in a sufficiently clear manner, i.e. they must fulfil the prerequisites of precision and foreseeability implied by the principle of legality;

b) pursue a "legitimate aim" - in response to "a pressing social need" - out of those referred to in Article G, i.e. the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.[16] Although within a democratic society it is for the legislature to define the public interest, striking an appropriate balance between the requirements of all members of society, subject to a certain margin of appreciation according to the RESC, since it is subject to the obligations arising from the Charter, it cannot be pursued without guaranteeing an appropriate level of protection for social rights, which must under all circumstances be capable of satisfying basic social needs. In other words, the legislature must strike a balance between the public interest (which may also be economic) and the need to protect social rights adequately. Moreover, States may not circumvent the obligations taken on by leaving the task of defining the public interest to external institutions.[17]

c) "necessary in a democratic society" to guarantee the pursuit of the legitimate aims provided for in Article G: any restriction of the right must be proportionate with the goal pursued, i.e. the former must be reasonably proportionate with the latter.[18] Accordingly, the legislature must ensure that any legislative acts imposing restrictions on those rights ensure that the aims pursued are proportionate with the adverse consequences to the exercise of those rights. In view of the above, even under extreme circumstances, the restrictions imposed must be appropriate in order to achieve the objectives pursued, must not go beyond what is required in order to achieve these objectives, must be applied for the sole purpose for which they were intended and must maintain an adequate level of protection.[19] In addition, the public authorities must carry out a detailed and balanced analysis of the effects of restrictive measures, focusing in particular on their potential impact on the most vulnerable groups on the labour market as well as a genuine consultation of those who will be most heavily affected by the measures concerned, assessing whether it is possible to adopt alternative, less restrictive measures.[20]

These principles have also been applied by the ECSR to strikes within essential public services.
In this regard, the ECSR has ruled that the imposition of either full or partial prohibitions or restrictions on the right of collective action in these sectors is lawful where, within the area concerned, the strike could jeopardise public order, national security or public health. However, the compatibility of any such restrictions with Article 6(4) is dependent on the extent to which the community affected is reliant on that service.[21] In addition, simply to prohibit workers in particular sectors from exercising the right to strike, especially where these sectors are defined broadly (such as for example the "energy" or "healthcare" sector), without distinguishing between the specific functions of each of them, will not pass muster under the proportionality principle and will thus not

[15] Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, decision on the merits of 23 March 2017, § 83.
[16] Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, decision on the merits of 23 March 2017, § 83.
[17] Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, decision on the merits of 23 March 2017, § 85 and 87.
[18] Conclusions XIII-1, The Netherlands, Article 6§4; European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012, decision on the merits of 2 December 2013, §§ 207 -214.
[19] Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, decision on the merits of 23 March 2017, § 87.
[20] Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, decision on the merits of 23 March 2017, § 90.
[21] Conclusions I (1969), Statement of Interpretation on Article 6§4.

constitute a restriction necessary in a democratic society. At most, the stipulation of minimum service levels in those sectors may be regarded as compliant with Article 6(4).[22]
In accordance with these principles, governmental authorities may order an end to a strike, although here, too, provided that the requirements laid down in Article G are complied with.[23]
In procedural terms, conciliation and cooling-off procedures have been held by the ECSR to be admissible, provided that the mechanism designed is not so slow as to undermine the deterrent effect of strikes.[24] Moreover, prior notice periods and distancing will also comply with Article 6(4), provided that they are reasonable in duration.[25]

4.1.2 Specific assessments by the ECSR of national legislation

The ECSR has reminded Member States on various occasions that they must not excessively expand the scope of sectors in which strikes are restricted in order to guarantee "essential services", which must be established in accordance with Article G of the Charter.
For example, in its 2018 Conclusions concerning Armenia, it observed that:

"*According to the report Article 77 of the Labour Code prescribes that during a strike in activities covering railway transport and urban public transport, civil aviation, communication, healthcare, food production, water supply, sewerage and waste disposal, organisations with a continuous production cycle, as well as in organisations the termination of work wherein may result in grave or hazardous consequences for life and health of the society or individual persons) a minimum service provision is required. Minimum service requirements shall be set by the relevant state or local self-government bodies.*
The Committee considers that the sectors in which the right to strike may be restricted are overly extensive and it has not been demonstrated that the restrictions satisfy the conditions laid down in Article G of the Charter. The Committee asks whether employee representatives are involved in the discussions on the minimum service to be provided on an equal footing with employers".

The ECSR has also intervened on various occasions in order to object to rules that excessively restrict or limit the conditions for calling strikes within public services.

In its 2018 conclusions on legislation enacted in Ukraine, the ECSR stated as follows as regards prior notice concerning the duration of the strike:

"*As to the procedural requirements, the Committee noted that according to Article 19 of the Law on the Procedure for Settlement of Collective Labour Disputes, "the body or person leading a strike shall inform the employer or its authorised representative in writing no later than seven days before the commencement of a strike, or no later than fifteen days if the decision to strike concerns a continuous production plant". Also, "the body or person leading a strike shall determine the location of the strike in agreement with the employer or his representative". Finally, "in the event of gatherings, meetings or picketing held outside the boundaries of an enterprise, the body or person leading the strike must advise the local executive authority or the body of local self-government of the event planned no later than three days in advance" (Conclusions 2014). The Committee recalled that the requirement to notify the duration of the strike to the employer prior to strike action is contrary to the Article 6§4 of the Charter, even for essential public services. The Committee asked if the law or the practice requires that the above-mentioned prior notice addressed to the employer*

[22] Conclusions XVII-1 (2004), Czech Republic.
[23] Conclusions 2014, Norway, Article 6§4.
[24] Conclusions XVII-1 (2004), Czech Republic.
[25] Conclusions XIV-1 (1998), Cyprus.

must contain an indication of the planned duration of the strike. The report states that the law does not provide for any requirement to notify the duration of a strike to the employer prior strike. The duration of the strike is not limited by law".

Similarly, the ECSR concluded as follows in 2004 in relation to legislation from the Czech Republic on the duration of conciliation and cooling-off procedures:

"*Strikes that start before mediation has been tried are unlawful, by virtue of Section 20 (a) of the Act. In its previous conclusion the Committee considered that this mediation requirement, which was considerably more onerous than a cooling off period, constituted a restriction of the right to take collective action not in conformity with the Charter. In particular, it thought that the length of the period prescribed in Section 12 of the Act ("if the dispute has not been resolved within thirty days of the mediator being informed of the substance of the dispute, the mediation is considered to have failed") was excessive*".

The ECSR has also ruled on the power of the public authorities to intervene in exceptional circumstances in order to limit or end a strike. In particular, the ECSR concluded as follows in 2018 in relation to Spanish legislation:

"*The Committee recalls that pursuant to Section 10.1 of Royal Legislative-Decree No. 17/1977 of 4 March 1977 the Government may impose arbitration to end a strike in exceptional circumstances, namely when it considers that there is a threat to the rights and freedoms of others because a strike had gone on for too long, the parties' positions were irreconcilable and too much damage was being done to the national economy. According to a Supreme Court judgment of 9 May 1988, a situation permitting Government interference has to be exceptional, or there must be a cumulative series of circumstances, all of which have to be considered by the Government before it can make use of its exceptional discretionary power. The Committee asks for more detailed description of these exceptional circumstances.*
The Committee in its previous conclusions (Conclusions XIX-3 (2010) and XX-3 (2014)), found that Royal Decree-Law 17/1977 allowed the use of obligatory arbitration in circumstances that exceeded the limits established by Article 31 of the 1961 Charter.
The report states that there has been no change in this respect, therefore the Committee considers that the situation is still not in conformity with the 1961 Charter. The Committee asks to be kept informed of when and in what circumstances this procedure has been used".

In order to be legitimate, the public intervention mentioned above must comply with the principles laid down by Article G RESC. In this regard, in the 2014 Conclusions concerning legislation enacted in Norway, the ECSR stated that:

"*First, the Committee examines the oil sector conflict. In 2012, the Government intervened to end a dispute in the oil sector by recommending the use of compulsory arbitration. […] The Government found that even a short interruption to all oil and gas production would be highly detrimental to the trust in Norway as a credible supplier of oil and gas.*
Furthermore, a full shutdown of production would have a serious impact on the Norwegian economy, including major ripple effects on the supplier industry […]. The Committee observes that even though the strike in the case at hand may have had important consequences for the economy, this being the primary consideration on which state intervention to terminate the strikes was based, the intervention (which brought the collective action to an end) was not necessary for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals. The Committee accepts that the implications of the industrial action would be serious in terms of the

loss of revenue but is not satisfied that the situation was so serious that it fell within the limits of Article 31 of the Charter, i.e. that it was necessary for the protection of the public interest. The loss of revenue, the Committee notes, would not necessarily have been of a permanent nature.
The Committee therefore considers that the intervention of the Government to terminate the collective action and impose compulsory recourse to arbitration in the oil sector conflict was not in conformity with Article 6§4 of the Charter".

Applying the same principles, in the 2018 conclusions on legislation enacted in Iceland, the ECSR stated that:

"*During the reference period, Parliament intervened in disputes on several occasions. On 12 April 2014, the Parliament passed a law ending strike action by the Icelandic Seamen's Union on the ferry Herjólfur VE, which had begun on 5 March the same year. The strike meant that work on the ferry came to an end between 5.00 p.m. and 08.00 a.m. the following day, and no work at all was allowed at the weekend. Then, from and including 21 March 2014, the strike also included the whole day on Fridays, with the result that the ferry sailed only four days a week between Vestmannaeyjar (a group of islands off the south coast of Iceland), and the mainland. The bill which was passed as law ending the strike action emphasised the special position of the islands with respect to transportations with the mainland as being evident and unequivocal. Transport of goods between the mainland and the islands is effected mainly by sea, as a consequence of which the strike had a negative impact on business operations in the islands, in addition to the impact on the people of the islands who depended on the ferry to access essential services of many types on the mainland.*
The Committee considers that although the justification for terminating the strike was the protection of the rights and freedom of others (and the economy), it has not been demonstrated that the conditions of Article 31 of the 1961 Charter have been fulfilled namely it was necessary in a democratic society. In order to be satisfied that the conditions of Article 31 of the 1961 Charter had been fulfilled the Committee would have needed further information on the essential services denied to the inhabitants, lack of hospital care, other modes of transport etc. Therefore the Committee concludes that the situation is not in conformity with Article 6§4 of the 1961 Charter, on the ground that during the reference period the legislature intervened in order to terminate collective action in circumstances which went beyond those permitted by Article 31 of the 1961 Charter.
On 15 May 2014, Parliament passed a law ending strike action by pilots working for the airline Icelandair. The strike involved an open-ended ban on working overtime and a temporary strike which, together, were supposed to span the period 9 May to 3 June 2014. The industrial action by the pilots' association was to cover the 300 pilots at Icelandair and would affect about 600 flights to and from the country, disrupting the travel plans of about 100,000 passengers during the 9 days that the temporary strike was supposed to last. In the bill which was passed as a law banning the action, reference was made to the economic interests at risk, i.e. the income that would be lost by the tourist and seafood-exporting industries.
The Committee notes that in the case at hand, even though a work stoppage in the aviation sector may have had important consequences on the economy and this being the primary consideration on which state intervention to terminate the strike was based, it has not been established that such intervention falls within the limits of Article 31 of the 1961 Charter, namely that it was necessary for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals. It considers that the situation is not in conformity with Article 6§4 of the 1961 Charter, on the ground that during the reference period the legislature intervened in order to terminate collective action in circumstances which went beyond those permitted by Article 31 of the 1961 Charter.
Likewise it considers that the termination of the strike by air traffic controllers in June 2016 did not fall within the limits of Article 31 of the 1961 Charter.
On 13 June 2015 the Parliament passed legislation against industrial action by the Alliance of

University Graduates (BHM) and the Icelandic Nurses' Association, In the bill which was passed as the Act on the Wages and Terms of Certain Unions within BHM and the Icelandic Nurses' Association, it was stated that it was necessary to respond to the widespread disruption that the strike entailed, particularly in the health services.
The Committee considers that although the justification for terminating the strike was the protection of the rights and freedom of others (and the economy), it has not been demonstrated that the conditions of Article 31 of the 1961 Charter have been fulfilled namely it was necessary in a democratic society. It considers that the situation is not in conformity with Article 6§4 of the 1961 Charter, on the ground that during the reference period the legislature intervened in order to terminate collective action in circumstances which went beyond those permitted by Article 31 of the 1961 Charter".

Accordingly, as is apparent from the cases referred to above, any intervention by the public authorities that restricts or limits the right to strike must take account not only of the interests and freedoms of those who are affected by the strike but also the right to strike itself of those wishing to strike, and must strike a measured balance between the interests at stake that takes account of the need to reduce as far as possible any restrictions imposed on the exercise of that right.
For this reason, the ECSR objected to Greek legislation in its decision on the merits of 23 March 2017, Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014,
§ 90:

"*The Committee has found no evidence, especially from the side of the Government, that a thorough balancing analysis of the effects of the legislative measures has been conducted by the authorities, notably of their possible impact on the most vulnerable groups in the labour market nor are there any indications that a genuine consultation has been carried out with those most affected by the measures. It follows that there has been no real examination or consideration of possible alternative and less restrictive measures*".

The balance with other rights and freedoms must always be struck in such a manner as to guarantee the efficacy of the right to strike, as clarified by the ECSR in its Conclusions from 2004 concerning the Netherlands:

"*The Committee recalls that since the judgment of 30 May 1986 in which the Dutch Supreme Court ruled that Article 6§4 and Article 31 of the Charter were directly applicable in national law (Conclusions XI-1 (1991)), it pays particular attention when examining case law of the Dutch courts, in particular Supreme Court rulings, in order to check whether the courts take decisions in the light of the principles laid down in the matter (Complaint No. 12/2002, Confederation of Swedish Enterprise v. Sweden, decision on the merits, 15 May 2003, §43). It is up to the Committee to verify, as a last resort, that the Dutch courts are ruling in a reasonable manner and in particular that their intervention does not so reduce the substance of the right to strike as to render it ineffective*."

Specifically, Article G RESC itself requires the interests of the persons calling the strike to be taken into account, both in terms of the legal certainty of any restrictions on the right to strike and also by putting in place procedures that take account of those interests. This was clearly asserted by the ECSR in the Decision on the merits of 13 September 2011, §43-44, 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, Complaint No. 59/2009:

"*43. In providing that restrictions on the enjoyment of Charter rights must be "prescribed by law", Article G does not require that such restrictions must necessarily be imposed solely through provisions of statutory law. The case-law of domestic courts may also comply with this requirement provided*

that it is sufficiently stable and foreseeable to provide sufficient legal certainty for the parties concerned. The decisions of the domestic courts adopted under the emergency relief procedure, as brought to the Committee's attention by the parties to the complaint, do not meet these conditions (see paragraphs 14-16). In particular, inconsistencies of approach appear to exist as between similar cases, and the case law lacks sufficient precision and consistency so as to enable parties wishing to engage in picketing activity to foresee whether their actions will be subject to legal restraint.
44. In addition, the Committee considered that the expression "prescribed by law" includes within its scope the requirement that fair procedures exist. The complete exclusion of unions in practice from the so called "unilateral application" procedure poses the risk that their legitimate interests are not taken into consideration. Unions may only intervene in the procedure after an initial binding decision has been taken and the collective action has been stopped. As a result of the unilateral nature of this procedure, the judge "may" summon other affected parties, but if he elects not to do so, the decision can be taken without such parties making submissions at the initial hearing or in its immediate aftermath. As a result, unions may be obliged to initiate collective action again, or else must go through a time-consuming appeal procedure. Consequently, the exclusion of unions from the emergency relief procedure may lead to a situation where the intervention by the courts runs the risk of producing unfair or arbitrary results. For this reason, such restrictions to the right to strike cannot be considered as being prescribed by law."

4.1.3 Specific assessments by the ECSR of Italian legislation

Since it came into force, Law no. 146/1990 has been brought to the attention of the ECSR within the regular reports presented by Italy.
As early as the Conclusions 1992 concerning Italian legislation, the ECSR stressed the need for any restrictions on the right to strike within essential public services to be compliant with what was then Article 31 of the European Social Charter (now Article G RESC). For this reason, it invited Italy to provide details in its next report concerning:
a) the scope and effects of collective agreements adopted pursuant to Law no. 146/1990;
b) the authority charged with deciding on sanctions to be imposed on workers and/or trade unions in the event of any breach of the rules laid down by Law no. 146/1990 as well as procedures for appealing against any such sanctions;
c) action taken by the Guarantee Committee and the respective results during the period covered by the report;
d) the compatibility of Law no. 146/1990 with the legislation on public security (Royal Decree no. 773 of 18 June 1931) and the law on municipalities and provinces (Royal Decree no. 383 of 3 March 1934).[26]
In its 1993 report, Italy only provided a list of self-regulatory codes, and the ECSR accordingly reiterated its request in relation to the scope of collective agreements falling under Law no. 146/1990. After Italy had clarified that the sanctions applicable in the event of any violation of a "return to work" order were adopted by the public authorities themselves that had issued the order and were applied by the labour inspectorates, and that it was possible to appeal against those sanctions in accordance with Articles 22 et seq. of Law no. 689/1981, the ECSR sought clarification concerning these procedures. Specifically, the ECSR stated that it could not conclude that the restrictions on the right to strike provided for under Law no. 146/1990 were consistent with the RESC, as it did not have sufficient information. It therefore asked that, in its next report, Italy indicate the strikes that had taken place within essential public services during the reference period, and provide details concerning the operations of essential services.[27] As that information was not provided by the Italian Republic, not even in the following report for 1995, the ECSR once again

[26] Conclusions XII-2, Italy, Article 6§4.
[27] Conclusions XIII-1, Italy, Article 6§4.

insisted on this matter.[28]

On the other hand, in its Conclusions 1998 the ECSR stated that, in order to assess the compatibility of Law no. 146/1990 with Article 6(4) RESC it would be necessary to establish whether any "return to work" orders had been adopted for the purpose of guaranteeing essential services, and if so what specifically the term "essential services" covered. The ECSR also noted that it was necessary to ensure essential services under Law no. 146/1990 in a large number of sectors. The ECSR therefore reserved judgment concerning this matter until the following report.[29] Since the request for clarification was not received in the following report, it was reiterated by the ECSR in its Conclusions 2000.[30] However, not even the report for 2002 was satisfactory regarding this aspect, as it lacked detailed information concerning the specific cases in which orders had been adopted.[31]

The shortcomings in the Italian reports in relation to cases in which "return to work" orders had been adopted in Italy were not rectified even after the above events.

In fact, in the Conclusions 2006 the ECSR stated that, whilst the report included a list of the cases in which the orders had been adopted, it was based on inquiries carried out by Prefectures and concerned only local strikes. This was not considered to be satisfactory by the Committee which, concluding for this reason that the situation in Italy was not compliant with Article 6(4), once again requested precise and detailed information in the following report concerning the public authorities' powers to issue orders as well as the consequences of such orders. The ECSR also observed that the powers of the Guarantee Committee had been reinforced following the enactment of Law no. 83/2000, but requested detailed information in the following report as to how those powers had been exercised in practice. Noting the introduction of conciliation and cooling-off mechanisms, the ECSR then asked that Italy provide detailed information in the following report as to how those measures had been implemented in practice. Lastly, the ECSR noted that the new requirement introduced by Law no. 83/2000 to provide advance notice to the employer concerning the exact duration of any strike within essential public services amounted to an excessive restriction on the right to strike that went beyond the limits laid down by Article G RESC, and which, as such, was not compliant with Article 6(4) RESC.[32]

A finding of non-compliance, along with a repeated request for information regarding the matter, was made once again by the ECSR in the Conclusions 2010. It also requested detailed information on the practical implementation of the Guarantee Committee's new powers to sanction actions by trade unions, employers and self-employed workers in relation to strikes, as well as the adoption of self-regulatory codes of conduct by self-employed persons and small businesses. Lastly, as the situation had not changed in Italy, the ECSR declared once again that the requirement of prior notice concerning the exact duration of the strike provided for under Law no. 146/1990, as amended by Law no. 83/2000, amounted to an excessive restriction of the right to strike having regard to Article G RESC, and as such violated Article 6(4) RESC.[33]

In its 2016 report, the Italian Republic did not provide satisfactory information concerning, in the first place, the Government's power to issue orders prohibiting or limiting the right to strike within essential public services, and secondly the requirement of prior notice concerning the duration of the collective action, as Law no. 146 had not been amended during the intervening period. Therefore, with regard to these two aspects, the ECSR issued a new declaration that Law no. 146/1990, as amended by Law no. 83/2000, did not comply with Articles 6(4) and G RESC.[34]

In its following report, the Italian Republic asserted that the objective of Law no. 146/1990 was to balance the right of workers to strike against the rights of other individuals affected by the strike

[28] Conclusions XIII-3, Italy, Article 6§4.
[29] Conclusions XIV-1, Italy, Article 6§4.
[30] Conclusions XV-3, Italy, Article 6§4.
[31] Conclusions 2002, Italy, Article 6§4.
[32] Conclusions 2006, Italy, Article 6§4
[33] Conclusions 2010, Italy, Article 6§4.
[34] Conclusions 2014, Italy, Article 6§4.

within essential public services and that the Guarantee Committee, the Government or the Prefects could issue decisions stipulating any necessary measures and in order to guarantee rights protected under the Constitution. The report provided a list of the public services in relation to which the right to strike could be limited, including for example transport, postal services, telecommunications and waste disposal. In this regard, in the Conclusions 2016 the ECSR asked Italy whether strikes in these sectors could be banned outright, or whether the provision of a specific minimum service level was required. For that reason, it expressed a hope that the following report would provide details concerning any decisions issued during the intervening reference period that prohibited or limited strikes, with a view to assessing the compatibility of Law no. 146/1990 with Article G RESC.[35]

4.2 Analysis of national legislation with reference to the provisions and goals of Article 6(4) RESC

4.2.1. Essential services under Article 1(2) and the obligation to guarantee "indispensable services" under Articles 2(2) and 13(1)(a)

The list of public services that are deemed to be "essential" under Article 1(2) of Law no. 146/90 is in itself extremely broad and detailed. The Law also allows its extent to be progressively extended. Specifically, although the list of rights guaranteed under the Constitution contained in Article 1(1), which must be protected in the event of a strike, is a closed list, this is not the case for those services that are functionally related to the protection of these rights. The services listed in paragraph 2 must therefore be regarded as mere examples, as is demonstrated by the phrase preceding the list "*in particular for the following services*". This is confirmed by the practice followed in implementing Law no. 146/90, as over the years the Committee has expanded the list contained in the Law. For example, urban, rail, air and marine public transport services have been expanded to include taxi services, fuel distribution and driver hire services,[36] and public health services (referred to generically by the Law) have been expanded to include private healthcare and spa services provided for therapeutic purposes.[37] The Committee has also taken the scope of essential services to cover activities that are conducive or ancillary to their provision, even if they are clearly not relevant for the requirements of protecting individual rights of constitutional significance: these include for example catering services within airports or on aircraft,[38] technical-IT services provided under contract for universities or research institutions,[39] and school canteen services, which are considered to be ancillary to educational activities.[40]

The scope of Law no. 146/90 in itself violates Article 6(4) ESC, especially considering the power granted to the Committee to increase at its discretion the number of services deemed to be "essential". In view of the above, it is clear that the principles inherent in the Charter have been

[35] Conclusions 2016, Italy, Article 6§4.

[36] Resolution no. 7.2 of 12 May 1994 and no. 01/111 of 4 October 2001.

[37] Resolution no. 04/612 of 11 November 2004; in the opinions provided in the submissions registered as no. 391 of 15 January 2003 and no. 12643 of 23 October 2003, the Committee held that businesses providing linen laundry and hire services for healthcare facilities as well as businesses providing management services for thermal spas for therapeutic purposes were subject to the rules on essential public services.

[38] Provisional regulation on essential services in the air transport sector, which classifies "ancillary airport services" as essential services (resolution no. 14/387 of 13 October 2014).

[39] Provisional regulation on the *Consorzio Interuniversitario Cineca* (resolution no. 19/45 of 15 March 2019).

[40] Amongst the many resolutions, see the conduct assessment resolution no. 17/271 of 28 September 2017 and opinion no. 495/14 of 10 March 2014; the classification of school canteen services as essential services has been interpreted differently by the administrative courts, when called upon to assess whether measures are lawful under Article 1 of Law no. 146/90 (see e.g. Regional Administrative Court for Friuli-Venezia Giulia, judgment no. 366 of 28 November 2017, which held the respective measure to be unlawful); however, the Council of State recently accepted the position taken by the Guarantee Committee (Council of State, division III, judgment no. 996 of 11 February 2019), holding that "*all those activities that are conducive to the normal conduct of education and the provision of assistance in school*" must be deemed to constitute essential services within schools (see also Court of Milan, judgment no. 1700 of 29 June 2015).

violated if one considers how, within the practice applying the law, those "essential services" that must be guaranteed in the event of a strike are identified from amongst the various services falling under Article 2(2), read in conjunction with Article 13(1)(a) of Law no. 146/90.

Law 146/90 allows for the imposition of rules governing the exercise of the right to strike with the aim of guaranteeing a level of service provision that cannot be regarded as "minimum services" according to how that concept must be understood in the light of Article G of the Charter, as interpreted within the case law of the ECSR. As mentioned above in fact, Article 13(1)(a) of Law no. 146/90 defines "essential services" with reference to the quantitative criterion of 50% of the service level normally provided (and one third of the staff normally engaged), whilst also granting the Guarantee Committee the power to depart from those limits "*in special cases*" and whenever deemed necessary "*to guarantee operational and safety levels that are strictly necessary for the provision of services*". However, at the same time, it provides for the option of stipulating "*the provision of services at certain times of day*" during which they "*must be guaranteed at the level of those normally offered*".

Against a backdrop in which the staff allocated to public services have been dramatically reduced over the course of the last few years in order to implement austerity policies, these provisions result in a paradoxical situation in which the "essential services" that must be guaranteed are the same as those that are normally provided (which frequently occurs, for example, in the public healthcare sector), as a result entirely neutralising the effects of the strike. In addition, there have also been cases in which, thanks to the obligation to guarantee essential services, services are provided at levels that are even higher than those that would normally have been provided on the day for which a strike has been called. This is confirmed by the Guarantee Committee itself in that, in the annual report to Parliament, the Committee Chairperson acknowledges that *"essential services are often provided with quality levels far below the minimum thresholds stipulated in the event of a strike".*[41]

It is particularly evident that the principles inherent within the combined provisions of Articles 6.4 and G ESC have been violated where the very classification of the respective services as "essential services" can be doubted. Moreover, the practice relating to the implementation of Law no. 146/90 in these sectors confirms that the quantitative criteria laid down by Article 13(1)(a) *de facto* constitute the minimum level of activity to be carried out in the event of a strike, and not the maximum permitted level (as the wording of the Law would appear to suggest).

Consider, for example, the case involving the supplementary agreement for the Ministerial Branch of 23 February 2016, which was concluded in order to implement the "micro-reform" to Law no. 146/90 provided for by Law no. 146 of 20 September 2015 (converted into Law no. 182/15).[42] This reform was implemented (by an urgent decree-law!) following a wave of attention in the media caused by a trade union meeting of workers responsible for providing security services for the Colosseum (in Rome), which had caused disruption for a group of foreign tourists. Thanks to it, "*the opening to the public of museums and other cultural institutions and venues*"[43] is now expressly included within the list of essential services, which must be guaranteed in the event of a strike. However, Article 2(2) of that Agreement provides that the ability of the public to use those cultural institutions and venues must be guaranteed "*at a level not lower than 50% of the areas ordinarily open to the public, including characteristic exhibits*", and that "*should this level* […] *prove to be inadequate in order to guarantee users' specific requirements*", "*full services*" must be guaranteed by stipulating "*a time period amounting to 50% of the normal opening hours for the public* […], *which must coincide with the period*

[41] Report to the Houses of Parliament by Chairperson of the Guarantee Committee, Giuseppe Santoro Passarelli, for the year 2018, Rome, 18 June 2019, page 11 (see also p. 16).

[42] Enclosure no. 7.

[43] The scope of the Agreement may be established with reference to the "cultural institutions and venues" provided for under Article 101 of Legislative Decree no. 42/2004 (Cultural Heritage and Landscape Code), which are referred to by Article 1(2) of Law no. 146/90 (as amended by Decree-Law no. 146/15); it follows that not only workers in museums, but also persons working in any "*library, archive, archaeological area or park, or monumental complex*" are subject to the rules restricting the right to strike, irrespective of whether those facilities have public or private status.

of greatest public demand" (Article 2(2) of the Agreement). The agreement implementing the "micro-reform" adopted in 2016 thus provides that, "*in order to guarantee specific user requirements*", "*full services*" must be guaranteed over a period of time corresponding to 50% of normal working hours" and that "*in order to guarantee full-service provision*" staff rostering (Article 3 of the Agreement) may involve the "*scheduling of normal staff shifts*".

Essential services are identified also in other sectors (in addition to those expressly referred to) by providing for times of day during which full services must be guaranteed. For example, the National Agreement for Local Transport Services (supplemented by a provisional regulatory resolution[44]) stipulates two periods during the day in which the full service must be guaranteed, for a total of six hours *"coinciding with the periods of maximum demand by users or the requirements of particular categories of user for which the service is essential (workers and students, rural and mountain areas, major tourist areas, barracks, industrial areas, hospitals and cemeteries)"*. Not only must services be provided during the guaranteed periods according to the ordinary operational plan applicable on normal days, including public holidays. In addition, service regulations (which according to the Agreement must be adopted by each individual business) must ensure the presence at work in good time of the staff necessary *"in order to guarantee the ordinary resumption of services once the strike has ended and/or at the start of guaranteed periods"*. This means that, when setting the times of the strike and the arrangements applicable to the cessation and resumption of services, consideration must also be given to the time necessary for drivers to travel to the depot, collect a bus and travel to the place where the bus is required to resume service according to the normal timetable.

The rules contained in the agreements referred to show how Law no. 146/90 enables "minimum services" (or rather "essential services") to be stipulated at a level that impairs the right to strike far in excess of the need to avoid any violation of individual rights of constitutional significance (as provided for under Article 1(1) of Law no. 146/90), as their aim is simply to prevent disruption to users as far as possible. As noted in the two examples mentioned above, these rules go so far as to stipulate lengthy periods during the day (which in the cultural heritage sector are quantified at 50% of normal service) during which strikes are entirely "neutralised" by guaranteeing "full-service provision".

On the other hand, it is also evident that these rules limit the strike's power to inflict harm on the counterparty, and often even negate such a power. In this regard it must also be considered that, in some sectors in which public financing is the most significant revenue item, being far higher than the revenues resulting from service provision (such as, for example, cultural or operatic and symphonic foundations), by virtue of these rules, the employer (company, foundation, entity) often gains from a strike, rather than suffering harm, as the reduction in workers' remuneration is lower than the fall in revenues.

4.2.2 The requirement of prior notice concerning the duration of the strike under Article 2(1) and (5) of Law no. 146/1990

The requirement to give prior notice concerning the duration of the strike, which must not be shorter than ten days, provided for under Article 2(1) and (5) of Law no. 146/1990 violates Article G RESC, and thus also Article 6(4) RESC, as previously found by the ECSR in the Conclusions 2006, 2010 and 2014 concerning Italian legislation. In fact, as was also recently reiterated by the ECSR in the Conclusions 2018 concerning legislation applicable in Ukraine, the requirement to give notice to the employer concerning the duration of the strike before the strike starts violates Article 6(4) RESC, including within essential public services.[45] This provision therefore reaches beyond the limits laid

[44] Resolution 18/138 amending and supplementing the National Agreement on Local Public Transport of 28 February 2018, Enclosure no. 8.

[45] *Supra.*

down by Article G RESC by imposing restrictions that are not 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.
That the Italian legislation violates Article 6(4) is even more clearly apparent if one considers how the obligation laid down by Article 2(1) of Law no. 146/1990 has been implemented in agreements concerning essential services and in provisional regulatory resolutions. In fact, the requirement to give notice in advance concerning the duration of the strike not only renders inherently unlawful the calling of indefinite strikes but also *de facto* results in a restriction on the duration of strikes that can be called that has the evident effect of excluding any capacity to interfere significantly with the counterparty's interests. It is sufficient in this regard to recall the National Agreement on Local Public Transport of 28 February 2018 (which in turn adopted the requirements previously laid down by the Guarantee Committee in provisional regulatory resolution no. 02/13 of 31 January 2002), which provided that "*the first strike in relation to any type of dispute may not last for longer than four hours of service provision*" and "*any subsequent strikes concerning the same dispute may not last for longer than one full working day*" (Article 12 of the Agreement).[46]

4.2.3. The requirement of prior notice under Article 2(1) and (5) of Law no. 146/1990 and the cooling-off and conciliation procedures under Article 2(2) of Law no. 146/1990

The requirement of prior notice under Article 2(1) and (5) of Law no. 146/1990 also violates Article 6(4) RESC and Article G RESC, when read in conjunction with the requirement to complete cooling-off and conciliation procedures before a strike is called, pursuant to Article 2(2) of Law no. 146/1990.
As mentioned above, conciliation and cooling-off procedures have been held by the ECSR to be admissible, provided that the mechanism designed is not so slow as to undermine the deterrent effect of strikes.[47] Moreover, prior notice periods and distancing will also comply with Article 6(4), provided that they are reasonable in duration.[48] For this reason, in 2004 the ECSR declared that the RESC had been violated by legislation from the Czech Republic setting a time limit of 30 days in order to attempt conciliation, which started to run from the time when the conciliator was informed concerning the dispute, on the grounds that the period was excessively long.
Article 1(1) and (5) of Law no. 146/1990 now provides for a requirement of prior notice of no fewer than 10 days. This period may, however, be increased (without any maximum limits) within collective agreements, which are also charged with regulating cooling-off and conciliation procedures. However, owing to the failure by Law no. 146/1990 to stipulate a maximum limit for the advance notice as well as a maximum time limit by which the cooling-off and conciliation procedure must be completed, extremely broad sectoral rules can be adopted. Such rules may result in overall periods, including the time limit for the attempt at conciliation and the provision of prior notice, that are excessively and unreasonably long to such an extent that impairs the deterrent effect of the strike. These overall periods are equal to or longer than 30 days in some sectors. For example:

- for land reclamation consortia, the cooling-off and conciliation period for strikes of national significance can last for as long as 20 days (a time limit which may be extended with the agreement of the parties)[49] and the minimum notice period, again for national strikes, is 13 days,[50] resulting in an overall period of 33 days;

[46] All agreements and provisional regulatory resolutions stipulate stringent limits on the duration of strikes; in particular, the first strike may not under any circumstances last for longer than one working day.
[47] Conclusions XVII-1 (2004), Czech Republic.
[48] Conclusions XIV-1 (1998), Cyprus.
[49] Article 6 to the Annex to the National Collective Agreement of 18 June 2001 for the Land Reclamation Consortia Sector.
[50] Article 6 of the National Collective Agreement for Workers in Land Reclamation Consortia.

- for the rail transport sector, the cooling-off and conciliation procedure for strikes of national significance can last for as long as 10 days (which may be extended with the agreement of the parties)[51] and the minimum notice period can be as long as 20 days for a national general strike called in relation to the renewal of the national collective agreement;[52]

- for the rail support sector, the conciliation and cooling-off procedure, which is subdivided into two stages, may last for up to 21 days[53] and prior notice of at least 12 days must be given for a national strike,[54] resulting in an overall period of 33 days;

- for the air transport sector, the conciliation and cooling-off procedure, which is subdivided into two stages, may last for up to 20 days[55] and prior notice of at least 12 days[56] must be given for a national strike, resulting in an overall period of 32 days;

Law no. 146/90 also vests the Guarantee Committee with the power to invite those who have called a strike to postpone further the date on which it is to be held, "*in relation to disputes of particular national significance*" (Article 13(1)(c)), thereby resulting in an extension of the duration of conciliation procedure beyond the time limits provided for under collective agreements. Moreover, in the event that the resolution issuing an invitation is not complied with, this results in the imposition of sanctions (both on those that called the strike as well as on the workers involved) that are twice as high as the normal amounts (Article 4(4-ter)).
In view of the above, Law no. 146/1990 violates Article G RESC, as the total duration of the notice period in addition to the time necessary in order to complete cooling-off and conciliation procedures (the duration of which may be extended at the discretion of the Committee) constitutes an irrational rule that is disproportionate with the aims of Article G itself, resulting in a restriction or limitation that is not 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.

4.2.4. The requirement of objective distancing and excluded periods under Article 2(2) of Law no. 146/90

Article 2(2) of Law no. 146/1990 does not comply with Articles 6(4) and G RESC insofar as it provides that collective agreements must state minimum intervals that must be complied with between the holding of one strike and the calling of the next strike by different trade unions (so-called requirement of objective distancing). In addition, the stipulation under sectoral regulations of subjective distancing (i.e. minimum intervals that must separate two different strikes by the same trade union), excluded periods and prohibitions on strikes on particular days, in conjunction with the requirement of objective distancing, makes it extremely difficult to exercise the right to strike, so much so as to preclude it entirely, circumscribing its legitimate exercise to very limited periods during the year.
In fact, the objective distancing periods provided for under agreements and provisional regulations vary between 15[57] and 30[58] days. The Guarantee Committee carries out a particularly stringent

[51] Agreement of 18 April 2001 on the establishment of Cooling-off and Conciliation Procedures for Collective Disputes.
[52] Article 4.2.4 of the Agreement on Essential Minimum Services of 23 November 1999, as amended and supplemented by the Agreements of 18 April 2001 and 29 October 2001 on the Rail Transport Sector.
[53] Article 10 of the Provisional Regulations on Essential Services in the Rail Contracts and Support Services Sector.
[54] Article 3 of the Provisional Regulations on Essential Services in the Rail Contracts and Support Services Sector.
[55] Articles 30 and 31 of the Provisional Regulations on Essential Services and other measures pursuant to Article 2(2) of Law no. 146 of 1990, as amended by Law no. 83 of 2000, in the air transport sector.
[56] Article 4 of the Provisional Regulations on Essential Services and other measures pursuant to Article 2(2) of Law no. 146 of 1990, as amended by Law no. 83 of 2000, in the air transport sector.
[57] Article 16 of the provisional regulations for the air transport sector.
[58] Article 17 of the provisional regulations for the air transport sector, with reference to flight assistance services.

review of this aspect of agreements, as is demonstrated by the National Agreement on Local Public Transport, which was unilaterally amended by a provisional regulatory resolution ordering an extension of the objective distancing period from 10 to 20 days, "*notwithstanding the reasons for and the trade union level that called the strike*".[59]
According to its practice, when exercising its power under Article 13(d) and (e) of Law no. 146/1990, the Guarantee Committee may also invite those who called the strike to comply with even longer deadlines, as is shown by the circumstances of a case which, for the sake of completeness, is presented below:

On 11 February 2019 UBS called a general strike on 12 April 2019.
The Guarantee Committee stated that the requirement of "subjective distancing" had been violated, as USB had joined the strike held on 8 March (International Women's Day) and invited USB to cancel the strike.
In its answer of 5 March 2019, USB informed the Committee that the Law did not contain any trace of the criterion of "subjective distancing", and was limited to protecting "continuity of public services" by providing for minimum intervals between the holding of one strike and the calling of the next strike. In this regard, having established that a total of 34 days separated the general strike due to be held on 8 March and the strike called for 12 April, it asked the Committee for an "urgent meeting" in order to provide clarification, deferring any decision to cancel the strike until that meeting had been held.
The Committee Chairman answered that the requirement of "subjective distancing" could be inferred from an interpretation of Article 2(2); he also asserted that the requirement to respect the minimum interval implicitly entailed that the same trade union could not call two general strikes within a short space of time; he defined general strikes of this type (i.e., in this case, with an interval of 34 days between one strike and the next) as "package" strikes and concluded that the Committee was willing to hear the views of USB concerning these issues, but only after it had cancelled the strike.[60]

Strikes are prohibited not only during distancing periods but also during excluded periods provided for under agreements and provisional regulatory resolutions. In fact, various sectoral regulations prohibit strikes at certain times during the year. Article 4 of the National Collective Agreement for the Ministerial Branch of 23 February 2016, cited above (and annexed to this document as Enclosure no. 7), imposes an absolute prohibition on any form of strike throughout the whole of August, from 23 December until 3 January and from the Thursday before Easter until the Tuesday after Easter for the broadly defined service, not specified in any greater detail, of "usage of cultural heritage".

Also in this case, the rules laid down for local public transport are testament to the broad scope for restricting the right to strike available under Law no. 146/90. In fact, the Agreement of 28 February 2018 further extended excluded periods beyond the already broad rules contained in the provisional regulatory resolution from 2002 (which, as mentioned above, was not capable of preventing a partial ruling by the Committee that the objective distancing was not sufficient). According to Article 4 of the Agreement, strikes are now prohibited between 17 December and 7 January, between 27 June and 4 July, between 28 July and 3 September and between 30 October and 5 November; they are also prohibited during the five days leading up to Easter Day, the three days leading up to and following any election, as well as the actual days on which the election is held, as well as the day before and the day after any local election or referendum.[61]

In practical terms, there is a prohibition on calling strikes in the local public transport sector throughout the whole summer, whereas the excluded periods under the previously applicable

[59] Article 11 of the National Agreement on Local Public Transport of 28 February 2018, as amended by resolution 18/138.
[60] Cf. urgent decision by the Guarantee Committee of 28 February 2019 and subsequent ruling by the Guarantee Committee of 7 March 2019 (Enclosure no. 9).
[61] See also Article 8 of the provisional regulations for the air transport sector.

regulations were between 27 June and 4 July and between 28 July and 3 August, which effectively coincided with the departures on and returns from summer holidays. Thus, also within the local public transport sector the entire month of August is covered by excluded periods, irrespective of the dates of users' departures on or returns from summer holidays, which normally fall around the middle or the end of the month.[62]
The Agreement also provides for a commitment by national, regional, provincial and company trade union bodies to avoid strikes at the same time as other strikes affecting the same group of users as well as at the same time as major events, clarifying that the significance of an event is to be determined having regard to the visitors-users involved as well as any days on which it is open or closed, as well as any *"additional days of particular significance during the period affected by the event concerned, as identified by a trade union agreement between the relevant parties, submitted for assessment by the Guarantee Committee"* (Article 5 of the Agreement). This requirement (which is applicable in a number of sectors[63]) is particular significant in assessing the effective impact of the requirement of excluded periods, as it vests the Guarantee Committee with the power to extend the periods during which strikes are prohibited beyond those specified in the respective agreement; this is a power that (as the following section will clarify) the Committee has wielded exercising broad discretion.

The excessive and unreasonable length of distancing periods[64] and the combination of that obligation with rules concerning excluded periods and the prohibition on parallel strikes thus complicate the exercise of the right to strike to such an extent as to render it ineffective.[65] The rules therefore extend further than the restrictions or limitations laid down by Article G RESC, which should be exceptional in nature and impair the exercise of the right to strike as little as possible.[66] On the other hand, the rules at issue here are not 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 and, in imposing prohibitions that are not justified by those goals, disproportionately interfere with the exercise of the right to strike to such an extent as to negate it.

4.2.5. The discretionary power of the Guarantee Committee under Article 13(c), (d) and (e) of Law no. 146/1990 and its substantial immunity from review

The right to strike within essential public services is also considerably limited, in practice, by the broad discretion left to the Guarantee Committee over whether to issue "invitations" pursuant to Article 13(c), (d) and (e) of Law no. 146/1990. The first scenario (letter (c)) has already been considered in section 4.2.2. It is sufficient to add here that the power to issue invitations with the aim of postponing the date of a strike in order to make a further attempt at mediation is provided for "*in relation to disputes of particular national significance*", and that the decision as to whether that statutory prerequisite is met is left to the discretion of the Committee itself.
As regards the scenarios falling under letters (d) and (e), the Committee has been granted a discretionary power to identify the ultimate service or group of users whose rights are at risk of being

[62] A prohibition on strikes for the entire month of August is also imposed by the National Collective Agreement for the Ministerial Branch of 23 February 2016 in relation to the usage of cultural heritage ("the opening to the public of museums and other cultural institutions and venues" pursuant to Article 1(2)(a) of Law no. 146/90, as amended by Decree-Law no. 146/15).
[63] See for example [Article] 12 of the Provisional Regulations on Air Transport and Article 9 of the Provisional Regulations on Telecommunications.
[64] Conclusions XIV-1 (1998), Cyprus.
[65] Conclusions, 2004 Netherlands.
[66] Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, decision on the merits of 23 March 2017, § 83.

interfered with in the event of a strike. In fact, it is not uncommon for the Committee to find that the requirement of objective distancing has been violated and to issue an invitation requesting trade unions to cancel or postpone the strike, even for strikes that would affect extremely limited groups of users. In addition, the provision for excluded periods, as interpreted and implemented by the Guarantee Committee, results in violations of Articles 6(4) and G RESC, once again in view of the broad discretion vested in the Committee when assessing the degree of relevance of an event justifying a restriction of the right to strike. Moreover, given the discretion vested in the Committee as regards their application, the combination of the requirement of objective distancing with the need to respect excluded periods may in practice make it entirely impossible to exercise the right to strike.

In order to clarify the objections raised, it is appropriate to refer to some specific cases,[67] which offer examples of the critical issues noted with regard to objective distancing and excluded periods:

1) On 29 September 2014 USB called a general strike, excluding the schools segment, for 24 October 2014. Since on 15 September 2014 the UIL [Italian Labour Union] transport workers union had called a strike involving staff from the airline, New Livingstone, for 4 hours on 19 October, the Committee referred to its resolution 3/134 of 24 September 2003 on minimum intervals between a general strike and strikes in different areas and at different levels (which stated that there must be an interval of at least 10 days in order to prevent an "unacceptable impact on continuity of service") and concluded pursuant to Article 13(1)(d) of Law no. 146/1990 that the requirement of objective distancing had been breached. The Committee also held that the rule on excluded periods had been breached, as elections were scheduled to be held in two municipalities (Reggio Calabria and San Cipriano d'Aversa) on Sunday 26 October. The Committee accordingly invited USB to cancel the strike in the air sector, to comply with the rules that had been breached or to postpone the strike.

USB replied to the Guarantee Committee that, at the time of the strike in question, the airline, New Livingstone, would be operating with <u>three aeroplanes</u> throughout the country. As such, the strike called by the UIL transport workers union involving personnel from that company could not in actual fact be regarded as a national strike, as it would affect a service and group of users that was evidently very limited in view of the small size of the airline. USB also noted that New Livingstone <u>had ceased flying</u> on 6 October 2014. This meant that the requirement of objective distancing could not be violated, as the UIL strike should be deemed to have been cancelled on the grounds that the company had ceased operations. As regards the breach of the requirement of excluded periods, it announced that the two municipalities affected would not be involved in the strike.

2) By a later notice, the Guarantee Committee concluded in relation to the same strike that the event "Eurochocolate" was due to be held in the city of Perugia only from 17 October until 26 October. Accordingly, under the terms of Article 13(1)(d), the Committee held that the requirement to "comply with the prohibition on holding strikes at the same time as major events" provided for under resolution no. 2/13 of 31 January 2002, which stipulated that strikes may not be held "at the same time as major events", had been violated. In view of the above, the Committee called for the "immediate cancellation of the strike". The Committee made a similar request in relation to another event, the Salone del Gusto, due to be held in Turin from 23 to 27 October. USB pointed out that the event in Perugia started on 19 October and ended on 26 October whilst the event in Turin was scheduled to be held from 23 to 27 of the same month, and also objected that neither event was a "major event". USB stated that the date schedule for the strike (24 October) was not the date on which either event was due to start or finish. Although USB noted the seriousness of the fact that it would be unable to call a strike throughout the entire duration of the two culinary events and asked the Committee, the latter "confirmed in full" its assessment concerning the violation of the rules applicable to strikes within

[67] Urgent decision by the Guarantee Committee of 7 October 2014; urgent decision by the Guarantee Committee of 16 October 2014 (Enclosure no. 9)

essential public services, and repeated its request that the strike be postponed or cancelled. As a result, in order to avoid incurring sanctions, USB also excluded Perugia and Turin from the geographical scope of the strike and also cancelled the strike in the air transport sector.

3) USB called a national strike for Alitalia personnel on 21 April 2017. The Committee noted that the strike had been called for the same time as other strikes called by other trade unions and, whilst acknowledging that the strikes had been lawfully called, it noted the special time of year as being close to the long weekends around the dates 25 April and 1 May and the possibility of "tourist travel". In view of the above, the Committee invited the trade unions to display "a sense of responsibility".
The trade unions that had called the strikes were therefore summoned to the Transport Ministry, with which they agreed to confirm some strikes and to postpone others. The USB strike was confirmed. However, despite the agreement reached with the Ministry, the Guarantee Committee concluded that 21 April was a "special day", as it fell close to Easter and the long weekends, and that "tourist travel" was expected. Accordingly, it ordered that the strike be postponed until a later date.
USB challenged the Committee's ruling before the regional administrative court. After the challenge was rejected by the regional administrative court, USB was forced to postpone the strike until 12 May.

It is apparent from the cases mentioned that the broad discretion allowed to the Guarantee Committee in ensuring compliance with the requirement of objective distancing and excluded periods, including in conjunction with each other, according to which it may even order the postponement of strikes that have been lawfully called, is such as to limit significantly the exercise of the right to strike within essential public services in situations in which it is not 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.
In addition, it is reiterated that according to the case law of the ECSR referred to above, any restrictions on the right to strike must not be such as to "*limit the essence of the right to strike to such an extent as to render it ineffective*", even where they are imposed by a decision taken by (judicial or administrative) public authorities.[68] In particular, restrictions falling under Article G RESC must be "prescribed by law", i.e. they must be established in a sufficiently stable and foreseeable manner in order to enable the persons affected by them to establish legal certainty concerning the limits on the exercise of their right to strike.[69] Moreover, according to the ECSR, that principle of the legality of restrictions on the right to strike implies a requirement that fair procedures be put in place that take account also of strikers' interests.[70]

However, the Italian legislation governing strikes in essential public services is at odds with the principles referred to, as the broad discretion available to the Guarantee Committee in applying the requirement of objective distancing and excluded periods is of such a nature as to render the right to strike substantially ineffective and to prevent those who called the strike from identifying in advance with appropriate certainty those periods during which strikes are permitted. In particular, the cases discussed show how Law no. 146/1990 vests the Guarantee Committee with the power to decide arbitrarily whether there are any "*major events*" during which the right to strike must be limited, thereby enabling the public authorities to restrict the right to strike even in situations in which there is no serious risk for the rights and freedoms of others or for public order within the meaning of Article G RESC.
In fact, it is entirely evident that strikes have been prohibited by the Guarantee Committee in order to enable the proper conduct of events or activities that have no relationship whatsoever to

[68] Conclusions, 2004 Netherlands.
[69] Decision on the merits of 13 September 2011, §43-44, 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, Complaint No. 59/2009.
[70] *Ibidem.*

"essential services" (in the two cases cited above, the "salone del gusto" and a chocolate-related event) as that term has been understood by the ECSR when interpreting Article 6(4);[71] moreover, those prohibitions cannot be justified on the grounds that they are conducive to ensuring "minimum service" levels in the transport sector. It cannot be argued that the examples cited involve exceptional cases, and are not representative of actual practice; indeed, even if this were the case (and it is not), they would nonetheless unequivocally demonstrate the breadth of the powers that Law no. 146/90 vests in the Committee to prevent the exercise of the right to strike.

On the other hand, the resolutions of the Guarantee Committee are *de facto* immune to challenge: Italian law does not in fact provide for any procedure for assessing the propriety of decisions taken by the Guarantee Committee, or whether they are conducive to ensuring that a proper balance is struck between the strike and the rights of individuals protected under the Constitution, as required by Article 1 of Law no. 146/90. Resolutions containing invitations to postpone or cancel a strike that has been called are thus tantamount to orders directed at bodies that wish to strike, which do not have any real instruments for enforcing their interests, and are faced with having to choose between complying with the Committee's requests or persisting in their conduct and incurring sanctions. The law does not expressly provide for any procedure in relation to such resolutions that would enable the interests and risks of the trade unions that called the strike, or the workers that have adhered to it, to be taken into account. It is theoretically possible to challenge the Committee's resolutions before the administrative courts in accordance with general legal rules. However, under Italian law, the administrative courts are vested with general jurisdiction to review lawfulness, and thus can only review whether an administrative act is compliant with the law. They are only permitted to review the merits of a case in a closed list of scenarios, which do not include strikes within essential public services (Articles 7 and 134 of Legislative Decree no. 104 of 2 July 2010, "Administrative Procedure Code"). Moreover, the administrative case law on applications seeking the suspension of such rulings has generally held that the requirement of a *prima facie* case has not been met, and has thus rejected applications concerning measures adopted by the Committee in accordance with Article 13(d), concluding that they reflect a mere power of "moral-suasion", and are thus merely precursors to the adoption of a full administrative measure imposing sanctions (see Lazio Regional Administrative Court, order no. 3162/2019, Council of State, judgment no. 3008 of 18 June 2008).

As confirmation of the above, the complainant is unaware of any judicial rulings in which a resolution of the Committee has been struck down on the grounds that it violates the right to strike.

4.2.6. The power to issue "return to work orders" under Article 8 of Law no. 146/90

In addition to the rules regulating the exercise of the right to strike set out in agreements and the resolutions of the Committee, it is also necessary to consider the special power to issue "return to work" orders, which Law no. 146/90 vests in the public authorities (either the Prefect or the Minister). As mentioned above, this is an extraordinary power to prohibit or limit the exercise of the right to strike, potentially even where a strike has already been called in accordance with the rules applicable in the sector concerned.

Moreover, having regard to the manner in which it has been exercised by the public authorities, the power to issue "return to work" orders pursuant to Article 8 Law no. 146/1990 violates Articles 6(4) and G RESC, as it in practice results in the imposition of restrictions or limitations on the right to strike that are not 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. Specifically, the Minister and the Prefects often exercise that power in practice even where there is not effectively any "*well-founded risk of serious and imminent harm to the individual rights protected under the*

[71] The various events relied on the Guarantee Committee as grounds to prohibit the exercise of the right to strike (in addition to those cited as examples above) include the Bologna Motor Show, the event, *Milano Moda Donna*, the *Salone del mobile* in Rho, the annual gathering of the Alpini, and the event, *Friuli Doc*.

Constitution referred to in Article 1(1)" (as required under Article 8(1) of Law no. 146/90) on account of the broad discretion that the law leaves to them in establishing whether there is any such risk.
The discretion available to the authorities when issuing "return to work" orders also relates to the services that must be guaranteed, as it is frequently the case that the percentage of workers obliged to work is much higher than that necessary in order to guarantee minimum services. This is confirmed by the recent case law of the administrative courts, which has accepted "*the admissibility of a 'return to work' order that applied to all workers and the full range of services they were required to provide (up to and including a prohibition on strikes)*".[72]
That discretionary power (once again) is associated with a lack of fair procedures within which those calling a strike can insist upon compliance with the prerequisites to which the law subjects the exercise of the power to prohibit industrial action.
In order to understand these grounds for challenge, it is appropriate, once again, to provide some examples drawn from practice that has involved the complainant:[73]

1) USB called a full-day strike for employees from the Alitalia Group for 25 November 2019. "In view of the specific emergency circumstances of the transport infrastructure throughout vast areas of the country due to the exceptional weather emergency", the Transport Ministry invited the trade unions to display a sense of responsibility and suspend the strike, and also invited the trade unions that had called the strike to engage in discussions. After the discussions had been held, the Ministry ordered a reduction in the duration of the strike to 4 hours, from 1 p.m. to 5 p.m. USB "considered the reduction imposed to be excessive and postponed the strike until 13 December".

2) After completing the cooling-off period, USB called a full-day strike by the local police force in the Municipality of Milan for 7 December 2018. By an order of 4 December 2018, the Milan Prefect noted that several ministers from OSCE member countries were due to visit Milan on 6 and 7 December to attend a conference, and also noted that a eucharist would be celebrated by the Bishop of Milan and the "Oh bej! Oh bej" festival would be held on the same day, and hence ordered a postponement of the strike. USB thus called a new full-day strike for 24 March 2019. By an order of 21 March 2019, the Prefect noted that the sporting event, "Stramilano", and the children's event, "Stramilanina," were scheduled to be held on that day, and thus ordered the postponement of the strike.
Accordingly, USB once again postponed the strike and called a new strike for 7 April 2019. By an order of 4 April 2019, the Prefect noted that a sporting event called "Generali Milano Marathon 2019" was scheduled for that date, and also noted that Inter Milan and Atalanta were due to play a football match at the Meazza stadium on that day; taking account of the fact that "due to the number of trade union members, it is anticipated that a large number will participate in the strike", he ordered municipal police officers to comply with service orders issued by the police command in order to ensure protection for rights guaranteed under the Constitution.

3) Having noted that Parliament had scheduled debate in the chamber to convert Decree-Law no. 50/2017 into law, USB called a 4-hour local public transport strike on 9 June 2017 to coincide with the start of debate on 26 June 2017 concerning the conversion into law of the Decree-Law (which contained, inter alia, measures to accelerate the process of privatising local public transport), as the trade union opposed that privatisation policy. By a later statement of 9 June, it clarified that the strike would not take place in municipalities in which run-off administrative elections were to be held on 29 June 2017. By a statement made on 22 June 2017,[74] "whilst recognising that the strike had been

[72] See Council of State, judgment no. 2471 of 24 April 2018 (see also Council of State, judgment no. 3300/2005). "Return to work" orders affecting all workers providing essential services have also been upheld as lawful by the Court of Cassation (see judgments no. 4466 and 4476 of 5 May 1999 concerning disputes relating to the imposition of administrative sanctions for violations of a "return to work" order).
[73] Transport Ministry, order 191T of 22 November 2019.
[74] Annex no. 10.

lawfully called", the Infrastructure Ministry invited the trade union "to desist from the strike called", having regard to "the exceptional heatwave forecast, involving a risk to public health", calling on "the sense of responsibility previously displayed on similar occasions". By a statement made on the following day (23 June), USB confirmed its intention to strike, considering that the strike had been called in full accord with the applicable legislation as well as the importance of the issues that had resulted in the strike being called. It stated its hope that a dialogue would be launched with the institutions concerning those issues that would be capable of resolving the problems raised when the strike was called.
By order no. 188T of 23 June 2017, "whilst noting that the strike planned for 26 June is lawful", the Ministry stated that having regard to ""the exceptional heatwave forecast", considering "forecasts of further impending atmospheric instability and an imminent increase in temperatures throughout the country", and considering that "under exceptional circumstances such as these", as confirmed also by the Guarantee Committee, the Ministry could not avoid "assessing as a matter of priority the harm that might be caused to a high number of transport users", and hence ordered "that the strike be postponed".

It is apparent from the cases referred to above that the power to issue "return to work" orders can in practice be exercised by the administrative authorities even where there is no well-founded risk of serious and imminent harm to individual rights under the Constitution guaranteed by Law no. 146/1990, and even where it is accepted that the "strike was called lawfully", and hence in cases in which the strike has been called in accordance with the applicable legislation. The broad discretion granted to the administrative authorities in being able to assert that such risks exist where they in actual fact do not (or where, as in case no. 3 set out above, the risk - specifically to health - is not tangible, as it is dependent upon weather forecasts, which as such are subject to a margin of error) essentially precludes any ability to exercise the right to strike - and this outcome clearly establishes that the power to issue "return to work" orders is at odds with the principles laid down in the RESC.[75] In a similar manner to the cases previously considered by the ECSR in the past in which the public authorities had become involved in order to protect economic interests from strikes or to guarantee the continuity of essential services (for example in the area of public health),[76] the examples provided show how Law no. 146/1990 allows for the issue of "return to work" orders in situations in which there is no serious risk of harm to the rights and freedoms of others, the public interest, national security, public health or morals that could justify any restrictions under Article G RESC. Moreover, as noted above, the power to issue "return to work" orders, as it has been exercised by the administrative authorities, does not enable those affected to establish legal certainty (i.e. stability and foreseeability) concerning any restrictions or limitations on the exercise of their right,[77] given the broad discretion that the expression "*well-founded risk of serious and imminent harm to the individual rights protected under the Constitution referred to in Article 1(1)*" is interpreted as establishing. It should be added that, as is demonstrated by the cases referred to, the procedures provided for under Law no. 146/1990 in order to balance the interests of users against those of striking workers in the event that a "return to work" order is issued do not comply with the requirement of fairness.[78] This is because, if the administrative authorities issue a "return to work" order, according to Article 10 of Law no. 146/1990 those calling the strike can only challenge that order before the administrative courts which, as noted above in section 4.2.6, only assess the procedural propriety of the measure, and do not enter into the merits as to whether the prerequisites were met for the exercise of the

[75] Conclusions, 2004 Netherlands.
[76] Conclusions 2018, legislation in Iceland; Conclusions 2014, legislation in Norway.
[77] Decision on the merits of 13 September 2011, §43-44, 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, Complaint No. 59/2009.
[78] *Ibidem.*

power by the authority that issued the “return to work” order (“well-founded risk of serious and imminent harm to the individual rights”), and limit themselves to assessing whether the correct procedure was followed by the administrative authority concerned. In any case, even in the event that the “return to work” order were declared unlawful within such proceedings, the right to strike could already have been entirely frustrated, as the filing of an application does not automatically have the effect of suspending enforcement of the order.

5. Conclusions

In the light of the above, Law no. 146/1990, as amended by Law no. 83/2000 and Decree-Law no. 146/2015 (converted into Law no. 182/15), considered in the light of its application in practice, violates Articles 6(4) and G RESC for the following reasons:

1) because it allows requirements to be imposed regarding the provision of services during strikes (“essential services”) that are broader than those necessary in order to guarantee those “minimum services” that are conducive to achieve the objectives referred to in Article G RESC (Article 1(2) and Article 2(2)).

2) because it subjects those calling a strike to an obligation to give prior notice concerning the duration of the strike (Article 2(1) and (5) of Law no. 146/1990);

3) because the overall duration resulting from the mandatory notice period pursuant to Article 2(1) and (5) of Law no. 146/1990) and the time necessary in order to complete the mandatory cooling-off and conciliation procedures before a strike is called (pursuant to Article 2(2) of Law no. 146/1990, and as the case may be Article 13(1)(c)) is excessively and unreasonably long to such an extent that impairs the deterrent effect of the strike;

4) because the requirement of objective distancing (Article 2(2) of Law no. 146/1990), both in its own right and in conjunction with excluded periods and prohibitions on parallel strikes, makes it extremely difficult to exercise the right to strike, so much so as to exclude it or render it entirely ineffective, thus depriving it of its deterrent effect;

5) because the discretion vested in the Guarantee Committee pursuant to Article 13(d) and (e) of Law no. 146/1990 (as regards the designation of the ultimate service or group of users whose rights are at risk of being interfered with in the event of a strike, and in applying the rules on objective distancing and excluded periods as well as the prohibition on parallel strikes) significantly limits the exercise of the right to strike to such an extent as to render it ineffective, as it fails to provide striking workers with any foreseeability, stability and legal certainty regarding restrictions or limitations on the exercise of their right to strike, and also in view of the fact that Law no. 146/1990 does not provide for any fair procedure for reviewing the merits of the Committee's resolutions that takes account of the interests of those who have called a strike;

5) because the broad discretion vested in the administrative authorities when exercising the power to postpone strikes and/or issue "return to work" orders pursuant to Article 8 of Law no. 146/1990 in practice effectively excludes (or renders ineffective) the ability to exercise the right to strike, as that power may be exercised where there is no serious risk of harm to the rights and freedoms of others, the public interest, national security, public health or morals that could justify restrictions under Article G RESC, and as striking workers are not provided with any foreseeability, stability and legal certainty regarding restrictions or limitations on the exercise of their right to strike, and also in view of the fact that Law no. 146/1990 does not provide for any fair procedure for reviewing the merits of orders that takes account of the interests of those who have called a strike.

For these reasons, USB requests the European Committee of Social Rights to:

a) accept and rule admissible the collective complaint filed by USB;
b) rule that the Italian legislation on strikes in essential public services introduced by Law no. 146/1990, as amended by Law no. 83/2000 and by Decree-Law no. 146/15 (converted into Law no. 182/15), contained in the following provisions:
Article 1(2);
Article 2(1), (2) and (5);
Article 8;
Article 13(1)(a), (c), (d) and (e); Article 8
considered in the light of its practical application, violates the provisions of Article 6(4) RESC and Article G RESC, as it legitimises the adoption and enforcement of restrictions and limitations on the right to strike that are not 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;

c) order the communications and action required in the event of a violation of the RESC.

The complainant also asks that it be able to use the Italian language in these proceedings and in particular in all written documentation.

Rome and Strasbourg, 30 March 2022

Signature
Paola Palmieri

Enclosures

1. Law no. 146 of 12 June 1990 “Provisions on the exercise of the right to strike within essential public services and on the safeguarding of individual rights guaranteed under the Constitution. Establishment of the Guarantee Committee for the implementation of the law”
2. Law no. 30 of 9 February 1999, “Ratification and implementation of the Revised European Social Charter, with annex, done in Strasbourg on 3 May 1996”
3. Law no. 298 of 28 August 1997, “Ratification and implementation of the Protocol to the European Social Charter Providing for a System of Collective Complaints, done in Strasbourg on 9 November 1995”
4. USB Statute
5. Adherence of USB to the WFTU
6. Appointment of Paola Palmieri as legal representative
7. National Collective Agreement laying down Rules to Guarantee Minimum Essential Services of 23 February 2016 (ministerial branch)
8. Resolution no. 18/138 on local public transport
9. Urgent decisions by the Guarantee Committee of 28 February 2019 and ruling of the Guarantee Committee of 7 March 2019
10. Urgent decision of the Guarantee Committee pursuant to Article 13(1)(d) of Law no. 146/1990 of 16 October 2014
11. Statement by the Ministry for Infrastructure and Transport of 22 June 2017 and Order 188T of the Transport Ministry of 23 June 2017