EUROPEAN COMMITTEE OF SOCIAL RIGHTS
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Case Document No. 5

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

OBSERVATIONS BY THE EUROPEAN TRADE UNION CONFEDERATION (ETUC)

Registered at the Secretariat on 14 February 2023

Collective Complaint

Unione sindacale di base (USB) v. Italy

Complaint No. 208/2022

Observations by the European Trade Union Confederation (ETUC)

14.02.2023

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Overview

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1 In availing itself of the opportunity provided in the Collective Complaints Procedure Protocol (CCPP - Article 7§2) the European Trade Union Confederation (ETUC) would like to submit the following observations.

2 The ETUC welcomes the fact that the respondent State has ratified not only the Revised European Social Charter (RESC) but also the Collective Complaints Procedure Protocol (CCPP).

3 These observations focus on the core allegation of the complaint, i.e. that the restrictions on the exercise of the right to strike in essential public services contained in the provisions of Law No. 146 of 12 June 1990 are in breach with Article 6§4 of the Charter inter alia, because they impose an obligation to provide during a strike "indispensable services" in addition to those necessary to guarantee "minimum services"; because the compulsory period of notice, together with compulsory reflection and conciliation procedures, are excessive and unreasonable, so as to undermine the dissuasive effect of the strike and because the wide discretionary power granted to the administrative authority in the exercise of the power to postpone strikes and/or issue warnings under Article 8 of Law No. 46/1990 is likely, in practice, to exclude and render ineffective the exercise of the right to strike.

I. General observations

4 The main content of the complaint is described in the Decision on admissibility of 8 September 2021 as follows:

> *USB alleges that Law No. 146/1990 as subsequently amended (in particular by Law No. 182/2015) regarding the exercise of the right to strike in essential public services, considered in light of its practical application, is in breach of Article 6§4 and Article G of the Charter. More specifically, USB argues that Articles 1(2), 2(1), (2) and (5), 13(1)(a), (c), (d) and (e) and 8 of Law No. 146/1990 authorise the adoption and enforcement of restrictions and limitations on the right to strike that are not compatible with the aforementioned provisions of the Charter, in particular by:*
>
> - *requiring that work be performed during a strike on a broader scale than merely those "minimum services" that are necessary in the meaning of Article G of the Charter;*
> - *imposing a requirement to indicate the duration of a strike at the time it is called;*
> - *imposing mandatory cooling-off and conciliation procedures, which must be completed before a strike can start and are of such a duration as to impair its efficacy;*
> - *imposing a prohibition on strikes for a certain period of time after a strike has taken place and at certain times during the year;*
> - *granting an independent administrative authority the power to prohibit or otherwise limit the exercise of the right to strike that is not subject to review by the courts;*
> - *granting 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 of whether the power has been legitimately exercised.*[1]

5 In substantive terms, this complaint adds a further element to the series of collective complaints invoking Article 6§4 ESC on the right to strike, however, it goes for the first time into more detailed elements of restrictions on the right to strike.

[1] Decision on admissibility, 7.12.2022, No. 208/2022, *Unione sindacale di base (USB) v. Italy*.

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6 At an editorial level, it is indicated that all quotations[2] will be governed by the following principles: they focus on the issues at stake (while still showing the relevant context) and will be ordered chronologically (beginning with the newest text).

II. International and European law and material

7 The ETUC would like to start by referring to pertinent international and European law and material as the importance and legal significance of international and European standards and their interpretation and application is widely recognised and because the fundamental right to collective action, including right to strike, is not exclusively protected by the European Social Charter.[3] From the outset, it should be noted that Italy has ratified all instruments (as far as they are open for ratification) mentioned below, unless otherwise mentioned.

A. United Nations

8 In general terms, it appears more than relevant to refer at first to the Joint Declaration of the Human Rights Committee (CCPR) and the Committee on Economic, Social and Cultural Rights (CECSR) dealing with the two Covenants International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICECSR) respectively. Adopted in 2019 at the occasion of the 100th anniversary of the ILO, they recognise the right to strike in their Joint Statement 'Freedom of association, including the right to form and join trade unions' in the following terms:

> *"(…) The Human Rights Committee and the Committee on Economic, Social and Cultural Rights, welcome the progress made by States to guarantee the freedom of association in labour relations. At the same time, the two committees note the challenges faced in the effective protection of this fundamental freedom, including undue restrictions of the right of individuals to form and join trade unions, the right of unions to function freely, and the right to strike. (…)*
>
> *The committees recall that the right to strike is corollary to the effective exercise of the freedom to form and join trade unions. Both committees have sought to protect the right to strike in their review of the implementation of the ICESCR and the ICCPR by the States parties."*[4]

9 This joint statement is all the more remarkable as Article 22 ICCPR refers in general terms to freedom of association whereas only Article 8(1)(d) ICESCR contains an express recognition of the right to strike.[5] In interpreting those provisions the two supervisory bodies tend to refer to ILO standards and/or case law.[6]

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[2] All quotations will be in *italics*; underlined emphases are added by the ETUC; eventual footnotes are, in principle, omitted.

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

[4] E/C.12/2019/3-CCPR/C/2019/1, 23.10.2019, para. 4.

[5] In its case law, the CESCR also refers to this Joint statement, see e.g. Concluding observations, Belgium 2020, E/C.12/BEL/CO/5 (CESCR 2020), para. 29.

[6] For a general reference, see Joint statement, note 4, para. 1. See also e.g. note 9 as well as Concluding observations, Estonia 2019 E/C.12/EST/CO/3 (CESCR 2019), para. 27, Concluding observations, Belgium 2020, E/C.12/BEL/CO/5 (CESCR 2020), para. 29, Concluding observations, Germany 2018,

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10 To date, no General Comment on both relevant provisions, i.e. Article 8 ICESCR and Article 22 ICCPR respectively, have been adopted yet. Accordingly, the 'Concluding Observations' on the countries concerned bear specific importance and which will be further specified below.

1. International Covenant on Economic Social and Cultural Rights (ICESCR)

11 The ICESCR[7], refers expressly to the right to strike in Article 8 which reads as follows:

> *"1. The States Parties to the present Convention undertake to ensure:*
>
> *[…]*
>
> *(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.*
>
> *2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State [...]"*
>
> *3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

a) Restrictions

12 In its Concluding observations, the CESCR has also expressed its position on the restriction of the right to strike among workers providing **essential services**, recommending that the respective State parties:

> *"[…] Ensure that restrictions on the right to strike in certain sectors are interpreted strictly, with a view to ensuring that all those workers whose services cannot reasonably be deemed as essential are entitled to their right to strike;*[8]
>
> *"[…] limit the prohibition against striking for public sector employees by narrowing the definition of "essential services" so that it complies with the Covenant and relevant International Labour Organization standards."*[9]
>
> *"[…] Revise the scope of the category of essential services to ensure that all those public servants whose services cannot reasonably be deemed as essential are entitled to their right to strike;"*[10]
>
> *"[…] remove excessive restrictions on the right to strike, in law and in practice, and limit the scope of "essential services" to services where interruption would endanger the life, personal safety or health of the whole or part of the population […]".*[11]

13 Concerning **minimum services**, the Committee encouraged the State Party concerned:

E/C.12/DEU/CO/6 (CESCR 2018), para. 45, Cabo Verde 2018 E/C.12/CPV/CO/1 (CESCR 2018) , para. 37 ("ILO principles concerning the right to strike").

[7] United Nations (General Assembly). 1966. "International Covenant on Economic, Social, and Cultural Rights."

[8] Concluding observations, Bahrain 2022, E/C.12/BHR/CO/1 (CESCR 2022), para. 25(c).

[9] Concluding observations, Serbia 2022, E/C.12/SRB/CO/3 (CESCR 2022), para. 49.

[10] Concluding observations, Czechia 2022, E/C.12/CZE/CO/3 (CESCR 2022), para. 27(a).

[11] Concluding observations, Viet Nam 2014, E/C.12/VNM/CO/2-4 (CESCR 2014) (no numbered paragraphs).

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"to establish the list of services, jobs and categories of personnel that are strictly necessary for the performance of a minimum level of service in the event of a strike in public service activities. […]"[12]

b) Procedural requirements

14 The CESCR has also addressed the matter of **mandatory conciliation** in the list of issues in relation to the fourth periodic report of Albania, inviting the State party to:

> *"indicate what steps have been taken to remove excessive limitations on the right to strike, including the requirement to undergo a mandatory reconciliation procedure prior to initiating a strike and the prohibition of the right to strike for public employees even if they do not provide essential services."*[13]

15 Also, on the issue of **requisitioning workers in the event of a strike** the Committee recommended that the State party concerned

> *amend Order […] to restrict the powers of requisition in the event of strikes exclusively to occasions where essential services need to be maintained for the population.*[14]

2. International Covenant on Civil and Political Rights (ICCPR)

a) Restrictions

16 Although not expressly guaranteed by Article 22 ICCPR, the CCPR has recognized that 'Freedom of association' includes the right to strike. In recent Concluding Observations[15] it specified under the respective heading of 'Freedom of association' that concerning **essential services**

> *the State party should take measures to revise the scope of the category of essential services with a view to ensuring that all those civil servants whose services cannot reasonably be deemed as essential are entitled to their right to strike, also in accordance with article 22 of the International Covenant on Civil and Political Rights.*[16]

17 Similarly, it confirmed that a too wide definition of essential services comes into conflict with Article 22 ICCPR.

> *32. The Committee reiterates the recommendation made by the Committee on Economic, Social and Cultural Rights (E/C.12/EST/CO/3, para. 27) that the Civil Service Act be reviewed with a view to allowing civil servants who do not provide essential services to exercise their right to strike. The State party should refrain from imposing any undue limitations on the right to strike and should ensure that the Collective Labour Dispute Resolution Act is in full conformity with article 22 of the Covenant.*[17]

b) Procedural requirements

18 Moreover, the CCPR addressed also undue limitations of the right to strike in practice, notably the much too short **duration** of permissible strikes under national law:

> *31. […] The Committee is also concerned about the requirements set forth in the Collective Labour Dispute Resolution Act that may adversely affect the meaningful exercise of the right*

[12] Concluding observations, Mali 2018, E/C.12/MLI/CO/1 (CESCR 2018), para. 29.
[13] List of issues, Albania, E/C.12/ALB/Q/4, para. 14.
[14] Concluding observations, Central African Republic 2018, E/C.12/CAF/CO/1 (CESCR 2018), para. 32.
[15] For previous assessments, see Concluding Observations, 8.11.1996 - CCPR/C/79/Add 73 (Germany), para 18; Concluding Observations, 3.8.1993 - CCPR/C/79/Add 21 (Ireland), para 17.
[16] CCPR/C/DEU/CO/7 (CCPR 2021), para. 51.
[17] CCPR, Concluding Observations, Estonia 2019, CCPR/C/EST/CO/4 (CCPR 2019), paras. 31 and 32.

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to strike in practice, inter alia by limiting the duration of a warning strike to one hour as opposed to three days for sympathy strikes (art. 22).

32. […] The State party should refrain from imposing any undue limitations on the right to strike and should ensure that the Collective Labour Dispute Resolution Act is in full conformity with article 22 of the Covenant.[18]

B. International Labour Organisation (ILO)

19 The two fundamental ILO Conventions that deal with trade union rights such as the freedom of association and the right to collective bargaining are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)[19] and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).[20]

20 While these Conventions might not refer explicitly to the right to strike, it is established via the longstanding case law of the Committee of Experts on the Application of Conventions and Recommendations (CEACR)[21] and the Committee on Freedom of Association (CFA)[22] and, which establishes that the right to strike forms an important corollary of the freedom of association and right to collective bargaining.

1. Committee of Experts on Application of Conventions and Recommendations (CEACR)

21 In its case law, the CEACR clearly establishes that the right to strike is a **basic right** as follows:

117. Strikes are essential means available to workers and their organizations to protect their interests, but there is a variety of opinions in relation to the right to strike. While it is true that strike action is a basic right, it is not an end in itself, but the last resort for workers' organizations, as its consequences are serious, not only for employers, but also for workers, their families and organizations and in some circumstances for third parties.

120. The affirmation of the right to strike by the supervisory bodies [CEACR and CFA] lies within the broader framework of the recognition of this right at the international level, particularly in the International Covenant on Economic, Social and Cultural Rights of the United Nations (Article 8, paragraph 1(d)), which, to date, has been ratified by 160 countries, most of which are ILO members, as well as in a number of regional instruments, as indicated in paragraph 35 of the present Survey. It is in the context of the Council of Europe that the protection of the right to strike is the most fully developed at the regional level, in light of the abundant case law of the European Committee of Social Rights, the supervisory body for the application of the European Social Charter adopted in 1961 and revised in 1996, which sets out this right.[23]

[18] CCPR, Concluding Observations, Estonia 2019, CCPR/C/EST/CO/4 (CCPR 2019), paras. 31 and 32.
[19] Entry into force: 4 July 1950.
[20] Entry into force: 18 July 1951.
[21] ILO, International Labour Conference, 101st Session, 2012, Report of the Committee of Experts on the Application of Conventions and Recommendations – Report III (Part 1 B), General Survey – Giving globalisation a human face, Geneva 2012, para. 168.
[22] ILO, Freedom of association - Compilation of decisions and principles of the Freedom of Association Committee. Sixth edition, 2018. §752-759. (see also eCompilation https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70001:0::NO:::)
[23] See above General Survey, note 21, paras. 117 and 120.

a) Restrictions

22 At the same time, it also outlines the permissible restrictions on the right to strike. Specifically concerning 'Permitted restrictions and compensatory guarantees' it states in relation to **essential and minimum services** the following:

> *127. The right to strike is not absolute and may be restricted in exceptional circumstances, or even prohibited. Over and above the armed forces and the police, the members of which may be excluded from the scope of the Convention in general, other restrictions on the right to strike may relate to: (i) certain categories of public servants; (ii) essential services in the strict sense of the term; and (iii) situations of acute national or local crisis, although only for a limited period and solely to the extent necessary to meet the requirements of the situation. In these cases, compensatory guarantees should be provided for the workers who are thus deprived of the right to strike.*
>
> *Essential services*
>
> *131. The second acceptable restriction on strikes concerns essential services. The Committee considers that essential services, for the purposes of restricting or prohibiting the right to strike, are only those "the interruption of which would endanger the life, personal safety or health of the whole of part of the population". This concept is not absolute in its nature in so far as a non-essential service may become essential if the strike exceeds a certain duration or extent, or as a function of the special characteristics of a country (for example, an island State) […].*
>
> *132. In practice, the manner in which strikes are viewed at the national level varies widely: several States continue to define essential services too broadly, or leave too much discretion to the authorities to unilaterally declare a service essential; […]. Such provisions are not compatible with the principles relating to the right to strike. […]*
>
> *Activities not considered as essential services*
>
> *134. When examining concrete cases, the ILO supervisory bodies have considered that it should be possible for strikes to be organized by workers in both the public and private sectors in numerous services, including [among others] the following: railways, transport services and public transport, air transport services and civil aviation, teachers and the public education service, port services and authorities and loading and unloading services for ships, radio and television.*
>
> *Negotiated minimum service*
>
> *136. In situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, consideration might be given to ensuring that users "basic needs are met or that facilities operate safely or without interruption, the introduction of a negotiated minimum service, as a possible alternative to a total prohibition of strikes, could be appropriate. In the view of the Committee, the maintenance of minimum services in the event of strikes should only be possible in certain situations, namely: (i) in services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (or essential services "in the strict sense of the term"); (ii) in services which are not essential in the strict sense of the term, but in which strikes of a certain magnitude and duration could cause an acute crisis threatening the normal conditions of existence of the population; and (iii) in public services of fundamental importance.*
>
> *137. However, such a service should meet at least two requirements: (i) it must genuinely and exclusively be a minimum service, that is one which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear; and (ii) since*

this system restricts one of the essential means of pressure available to workers to defend their interests, their organizations should be able, if they so wish, to participate in defining such a service, along with employers and the public authorities. […].

138. The Committee emphasizes the importance of adopting explicit legislative provisions on the participation of the organizations concerned in the definition of minimum services. Moreover, any disagreement on minimum services should be resolved, not by the government authorities, as is the case in certain countries, but by a joint or independent body which has the confidence of the parties, responsible for examining rapidly and without formalities the difficulties raised and empowered to issue enforceable decisions. […].[24]

b) Procedural requirements

23 As regards the procedural requirements ('Prerequisites') for a strike in the sense of exhaustion of prior procedures (conciliation, mediation and voluntary arbitration) the CEACR is critical vis-à-vis **compulsory arbitration**[25]**:**

144. A large number of countries require advance notice of strikes to be given to the administrative authorities or to the employer and/or establish an obligation to have recourse to prior conciliation and voluntary arbitration procedures in collective disputes before a strike may be called. In the view of the Committee, such machinery should, however, have the sole purpose of facilitating bargaining and should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness. With regard to the duration of prior conciliation and arbitration procedures, the Committee has considered, for example, that the imposition of a duration of over 60 working days as a prior condition for the exercise of a lawful strike may make the exercise of the right to strike difficult, or even impossible. In other cases, it has proposed reducing the period fixed for mediation. The situation is also problematic when legislation does not set any time limit for the exhaustion of prior procedures and confers full discretion on the authorities to extend such procedures. [26]

24 **Cooling-off periods** should have a limited duration:

145. In a large number of countries, there is a requirement to comply with a notice period or a cooling-off period before calling a strike. In so far as they are conceived as a stage designed to encourage the parties to engage in final negotiations before resorting to strike action, such provisions may be seen as measures taken to encourage and promote the development of voluntary bargaining. Again, however, the period of advance notice should not be an additional obstacle to bargaining, and should be shorter if it follows a compulsory prior mediation or conciliation procedure which itself is already lengthy. For example, the Committee has considered that advance notice of 60 days is excessive. [27]

25 The need of **indicating the duration** of a strike is considered to be not permissible:

146. Finally, in certain cases, the advance notice must be accompanied by an indication of the duration of the strike, under the threat that workers may be liable to sanctions if they participate in a strike the duration of which is not specified in the notification. The Committee considers that workers and their organizations should be able to call a strike for an indefinite period if they so wish. [28]

[24] See above General Survey, note 21, paras. 127, 131, 134, 136 - 138.
[25] To note also is that the ILO Voluntary Conciliation and Arbitration Recommendation, 1951 (N° 92) that none of its provisions may be interpreted as limiting, in any way whatsoever, the right to strike (Article 7).
[26] See above General Survey, note 21, para. 144.
[27] See above General Survey, note 21, para. 145.
[28] See above General Survey, note 21, para. 146.

2. Committee on Freedom of Association (CFA)

a) Restrictions

26 The CFA's Compilation of decisions and principles also provides an interpretation of what should only be considered as '**essential services**' and to what extent the right to strike could also in relation to **minimum services** only be restricted:

> *Restrictions of the right to strike in essential services*[29]
>
> *842. The following do not constitute essential services in the strict sense of the term: [amongst others]… radio and television, ports, rail services, transport generally, including metropolitan transport, education sector, airports (with the exception of air traffic control) […].*
>
> *848. By linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service "essential", and thus the right to strike should be maintained.*
>
> *Minimum operational service*[30]
>
> *866. The establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance.*

27 A **back to work order** is only lawful in certain specific circumstances:

> *920. Whenever a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered, a back-to-work order might be lawful, if applied to a specific category of staff in the event of a strike whose scope and duration could cause such a situation. However, a back-to-work requirement outside such cases is contrary to the principles of freedom of association.* [31]

b) Procedural requirements

28 When it comes to prerequisites, the CFA has expressed its position on **compulsory arbitration**[32] in the following terms:

> *793. Legislation which provides for voluntary conciliation and arbitration in industrial disputes before a strike may be called cannot be regarded as an infringement of freedom of association, provided recourse to arbitration is not compulsory and does not, in practice, prevent the calling of the strike.*
>
> *795. Conciliation and mediation machinery should have the sole purpose of facilitating bargaining and should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness.*
>
> *818. In as far as compulsory arbitration prevents strike action, it is contrary to the right of trade unions to organize freely their activities and could only be justified in the public service or in essential services in the strict sense of the term.*

[29] See above Compilation, note 22, paras. 842, 848.
[30] See above Compilation, note 22, para. 866.
[31] See above Compilation, note 22, para. 920.
[32] See above Compilation, note 22, paras. 793, 795, 818.

29 The case law of the CFA also addresses other elements that may restrict the right to strike, such as limitations on its **duration**:

> *815. The Committee has expressed its concern at the imposition of a limit on the duration of a strike which, due to its nature as a last resort for the defence of workers' interests, cannot be predetermined.* [33]

c) Review of the legality

30 The **authority to suspend a strike** should only lie with an impartial body according to the CFA:

> *914. The responsibility for suspending a strike should not lie with the Government, but with an independent body which has the confidence of all parties concerned.* [34]

C. Council of Europe (CoE)

31 The right to strike is guaranteed by the Council of Europe (CoE) prominently and in different standards and ways.

1. European Social Charter (ESC)

32 Most importantly, the right to strike and collective bargaining is enshrined in the European Social Europe Charter's 'hard core' Article 6, specifically in its paragraph 4 which recognises:

> *4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.*

It will be recalled that it was the first time that already in 1961 the right to strike was guaranteed by an international human rights instrument. Therefore, the protection of the right to strike is of particular relevance for the CoE as a whole.

33 As for the allowed restrictions to this right to strike, the Appendix to Article 6 paragraph 4 and Article G on 'Restrictions' provide the following:

> *Appendix*
>
> *Article 6, paragraph 4*
>
> *It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G.*
>
> *Article G – Restrictions*
>
> *1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.*
>
> *2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.*

[33] See above Compilation, note 22, para. 815.
[34] See above Compilation, note 22, para. 914.

34 The ETUC will refrain from referring extensively to the case law of the European Committee on Social Rights (ECSR) because it has been described and analysed in the motivation of the complaint itself (in particular under the heading "4.1 Article 6(4) RESC and the relevant case law of the ECSR" in general and in relation to the situation in Italy in particular). Nevertheless, it appears relevant to add the following:

a) Restrictions

35 Whether and to what extent the right to strike should be restricted in essential services is a matter addressed by the ECSR in its Conclusions concerning Ukraine:[35]

> *Restricting strikes in sectors which are essential to the community may serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health. However, simply banning strikes in essential sectors – particularly when they are extensively defined, i.e. "energy" or "health" – is not deemed proportionate to the specific requirements of each sector. Simply prohibiting these workers from striking, without distinguishing between their particular functions, cannot be considered proportionate to the particular circumstances of each of the sectors concerned, and thus necessary in a democratic society. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6§4 […].*

36 In its assessment of a collective complaint filed against Bulgaria, the ECSR provided an assessment on the restriction of the right to strike in essential sectors:

> *34.[…] the restrictions to the right to strike resulting from this provision are not sufficiently clear to allow workers in the sector concerned wishing to call or to participate in a strike to assess what is the scope of services required by the law in order to meet the required 50% threshold. It is further unclear what are the criteria for determining the 50% threshold. The Committee therefore considers that the law does not satisfy the requirements of precision and foreseeability implied by the concept of "prescribed by law" within the meaning of Article G.*
>
> *36.Secondly, the Committee finds that it has not been established that the restriction of the right to strike […] pursues a legitimate purpose in the meaning of Article G of the Revised Charter. It considers that the alleged and not further specified consequences for the economy do not qualify as a legitimate aim in this respect.* [36]

37 In its assessment of a collective complaint brought by a Croatian trade union,[37] the ECSR echoed its Conclusions on Ukraine in relation to restrictions in essential sectors:

> *114. […] simply banning strikes even in essential sectors – particularly when they are extensively defined, i.e. "energy" or "health" – is not deemed proportionate to the specific requirements of each sector. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6§4.*

b) Procedural requirements

38 Furthermore, the ECSR also expressed itself on prerequisites such as compulsory mediation:

> *[…]. 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*

[35] Conclusions 2018 - Ukraine - Article 6§4; see also Conclusions XVII-1 - Czech Republic - Article 6§4.
[36] Decision on the merits, 16.10.2006, No. 32/2005, *Confederation of Independent Trade Unions in Bulgaria, Confederation of Labour "Podkrepa" and European Trade Union Confederation (ETUC) v. Bulgaria*.
[37] Decision on the merits, 21.3.2018, No. 116/2015, *Matica Hrvatskih Sindikata v. Croatia*.

right to take collective action not in conformity with the Charter.[38] *[…]. 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.*[39]

2. European Convention on Human Rights (ECHR)

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

> ***Article 11 - Freedom of assembly and association***
>
> *1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
> *2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

40 Based on the Grand Chamber judgment in *Demir and Baykara*[40]*,* in which the **European Court of Human Rights (ECtHR)** for the first time recognized explicitly the right to collective bargaining, the ECtHR in *Enerji Yapi-Yop Sen* recognized the right to strike as an aspect of the same right.[41]

41 In this ruling the Court acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions. However, while certain categories of civil servants could be prohibited from taking strike action, the ban did not extend to all public servants or to employees of State-run commercial or industrial concerns. Furthermore, the legal restrictions on the right to strike should define as clearly and narrowly as possible the categories of civil servants concerned and general terms which absolutely prohibit all civil servants from the right to strike, without balancing the imperatives of the purposes listed in Article 11(2) of the Convention, is not permitted. This ruling was followed by a series of similar judgements.[42]

42 The Third Section judgement of the ECtHR in the case of *Ognevenko v. Russia*[43] addressed restrictions of the right to strike in the railway sector which was considered by the respective Government as an essential service. Conversely, the ECtHR did not consider railway transport an essential service within which strikes could be prohibited because they would be necessary in a democratic society:

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[38] Conclusions XVII-1 - Czech Republic, note 35.
[39] Conclusions XVII-1 - Czech Republic, note 35.
[40] ECtHR, 12.11.2008, No. 34503/97, *Demir and Baykara v. Turkey*.
[41] ECtHR, 21.4.2009, No. 68959/01, *Enerji Yapi-Yop Sen v. Turkey*.
[42] ECtHR, 15.9.2009, No. 30946/04, *Kaya and Seyhan v. Turkey*; ECtHR, 13.7.2007, No. 22943/04, *Saime Özcan v. Turkey*; ECtHR, 13.10.2010, No. 33322/07,*Çerikci v. Turkey*; ECtHR, 27.6.2007, No. 6615/03, *Karaçaj v. Turkey*. For an extensive analysis of the right to take collective action under Article 11 ECHR, see, F Dorssemont, in F Dorssemont K Lörcher and I Schömann (eds.), *The European Convention on Human Rights and the Employment Relation*, Oxford and Portland, Oregon, 2013, pp. 333-365.
[43] ECtHR, 20.11.2018, No. 44873/09, *Ognevenko v. Russia*.

72. […] However, neither the ILO nor the ECSR consider transport in general, and railway transport in particular to constitute an essential service, an interruption of which could endanger the life or health of (a part of) the population (see section 587 of the ILO's Digest of decisions and principles, cited in paragraph 20 above; see also paragraph 23 above). The Court notes that both the ILO (see paragraphs 21-23 above) and the ECSR (see paragraph 26) have regularly criticised Russian legislation banning railway workers' right to strike. <u>There is no reason for the Court to reject the existing international approach to the definition of an essential service and to consider the railway transport as such</u>.

3. Parliamentary Assembly (PACE)

43 In its Resolution 2033 (2015) of 28 January 2015 on the "Protection of the right to bargain collectively, including the right to strike"[44], the Parliamentary Assembly (PACE) highlights the following:

1. Social dialogue, the regular and institutionalised dialogue between employers' and workers' representatives, has been an inherent part of European socio-economic processes for decades. The rights to organise, to bargain collectively and to strike – all essential components of this dialogue – are not only democratic principles underlying modern economic processes, but fundamental rights enshrined in the European Convention on Human Rights (ETS No. 5) and the European Social Charter (revised) (ETS No. 163).

2. However, these fundamental rights have come under threat in many Council of Europe member States in recent years, in the context of the economic crisis and austerity measures. In some countries, the right to organise has been restricted, collective agreements have been revoked, collective bargaining undermined and the right to strike limited. As a consequence, in the affected countries, inequalities have grown, there has been a persistent trend towards lower wages, and negative effects on working and employment conditions have been observed. [...]

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

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

7.1. protect and strengthen the rights to organise, to bargain collectively <u>and to strike</u> by:

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

7.1.3 restoring these rights wherever institutions and processes have already been undermined by recent legislative or regulatory changes; (…)

45 PACE Resolution 2146 (2017) on "Reinforcing social dialogue as an instrument for stability and decreasing social and economic inequalities", adopted on 25 January 2017, provides, where relevant, as follows:

"5. [...] the Assembly calls on member States to:
[...]

[44] PACE Resolution 2033 (2015), Protection of the right to bargain collectively, including the right to strike', Rapporteur Mr. Andrej Hunko; text adopted by the Assembly on 28 January 2015 (6th Sitting).

5.4. keep legal limitations on the right to collective bargaining and the right to strike to the strict minimum, as provided for by well-established ILO and European standards; [...]"

D. European Union (EU)

1. Charter of Fundamental Rights of the European Union (CFREU)

46 The right to collective action, including the right to strike is confirmed in the **Charter of Fundamental Rights of the European Union** (CFREU) which provides under 'Chapter IV Solidarity' in its Article 28 on 'Right to collective bargaining and action' that: [45] [46]

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

47 The 'Explanations' on Article 28 CFREU show that this article is clearly based on and inspired by Article 6 ESC (and its case law) and should thus be interpreted in light of the ECSR requirements and case law:[47]

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

2. Other Fundamental rights texts

48 Next to the CFREU, the European Community/European Union has over the course of time developed several mainly politically binding catalogues of fundamental social rights.

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

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

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

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

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

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

"[...] inspiration should be drawn from the Conventions of the International Labour Organization and from the European Social Charter of the Council of Europe; (recital 10 of the Preamble)

51 Secondly, there is the solemnly proclaimed **European Pillar of Social Rights**[48] (EPSR) (November 2017). Under "Chapter II – Fair working conditions", the right to collective actions is referred to in Principle 8 of the Pillar as follows:

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

52 It has also to be recalled that the Preamble to the EPSR refers at several occasions to the ESC and ILO Conventions in particular in relation to the interpretation and implementation of the EPSR:

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

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

E. The Organisation of American States (OAS)

54 From the outset, it should be recalled that the ECSR's case law refers to other regional human rights courts, in particular the Interamerican Court of Human Rights (IACtHR).[49]

1. General considerations

55 In respect of the right to strike, a specifically important development has taken place in 2021. Indeed, this Court has published an Advisory Opinion and in its follow-up a judgment on the right to strike. The Advisory Opinion[50] is of particular importance for several reasons:

> - It recognises the right to strike in general terms requiring that "*States must adopt measures aimed at … fully recognizing the rights to freedom to form a union, collective bargaining, and strike"*.[51]

[48] Interinstitutional proclamation on the European Pillar of social rights, adopted 17 November 2017.
[49] See e.g. ECSR, Decision on the merits of 6.12.2006, No. 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, para. 196.
[50] Opinión Consultiva, 5.5.2021, OC-27/21; this Advisory Opinion is only available in Spanish: https://www.corteidh.or.cr/docs/opiniones/seriea_27_esp1.pdf
[51] Press Release, Inter-American Court of Human Rights. I/A Court H.R. PR 47/2021, English https://corteidh.or.cr/docs/comunicados/cp_47_2021_eng.pdf

- It finds in particular that the right to strike constitutes a "*general principle of international law*".[52]
- It uses to a very important extent international standards and case law, in particular the relevant ILO Conventions and respective case law (in particular CFA) for interpretation purposes.[53]

56 This approach and its results in relation to the right to strike have been confirmed by the more recent judgment, stating i.a.:[54]

> *"This Court, in its advisory role, has already considered that the right to strike is one of the fundamental human rights of workers, which they can exercise independently of their organisations…"* (para.106)
> *In this regard, this Court has established that the protection of freedom of association fulfils an important social function, since the work of trade unions makes it possible to preserve or improve the working and living conditions of working men and women, and to that extent its protection allows the realisation of other human rights and that, in this sense, the protection of the right to collective bargaining and to strike, as essential tools of the rights of association and freedom of association, is fundamental.* (para. 114)

2. Specific issues

57 More specifically, **concerning minimum** services, the IACtHR declared:

> *"In this regard, it should be emphasised that the minimum service should be limited to operations that are necessary to meet the basic needs of the population or the minimum requirements of the service, ensuring that the extent of minimum services does not result in the strike becoming ineffective. Negotiations on minimum services should take place before a labour dispute has occurred so that all parties concerned (public authorities, workers' and employers' organizations and employers' and workers' organizations) can negotiate as objectively and calmly as possible.[55]*

58 As regards the **judicial review** procedures in relation to individual but also collective labour law disputes, the IACtHR requires a high standard:

> *"In this regard, the Court emphasises that access to justice in labour matters requires a system of administration of justice with the following characteristics: 1) the unwaivability of the right of male and female workers to turn to the competent judicial authorities to submit labour disputes of any kind, except in cases where other means of conflict resolution are legally provided for; 2) a specialised jurisdiction with exclusive competence in labour matters, in accordance with the number of cases and claims in labour matters; 3) the application of a gender perspective in the resolution of labour disputes; 4) the provision of a specialised procedure that takes into account the particularities of labour matters; 5) the distribution of the burden of proof, the analysis of evidence and the motivation of judicial decisions in accordance with principles that compensate for the inequalities inherent in the world of work,*

[52] Advisory Opinion, note 50, para. 97. All translations are provided by the ETUC and, accordingly, inofficial in nature. ("*Asimismo, la Corte advierte que, además de estar ampliamente reconocido en el corpus iuris internacional, el derecho a la huelga también ha sido reconocido en las Constituciones y en la legislación de los Estados miembros de la OEA. En ese sentido, puede ser considerado como un principio general de derecho internacional.*")
[53] Ibid, for freedom of association in general: paras. 59 – 62 in relation to international law in general, and in paras. 63 – 65, 75 - 87 in relation to the ILO; for the right to strike in relation to the ILO paras. 96 – 105, in particular para. 102 ("*Adicionalmente, el Tribunal considera que el ejercicio del derecho de huelga puede limitarse o prohibirse solo con respecto a: a) los funcionarios públicos que actúan como órganos del poder público que ejercen funciones de autoridad a nombre del Estado, y b) los trabajadores y las trabajadoras de los servicios esenciales*.")
[54] Sentencia 17.11.2021, *Extrabajadores del Organismo Judicial v. Guatemala*,
[55] Advisory Opinion, note 50, para. 104.

such as the principle of in dubio pro operario and the principle of favourability; 6) free labour justice; and 7) the guarantee of the right to a specialised defence."[56]

59 Accordingly, the recognition by the IACtHR of the right to strike in general and as a 'general principle of international law' in particular should be considered of high relevance for the ECSR.

F. Intermediate conclusions

60 From the above mentioned global international (UN and ILO) and European (Council of Europe and EU) law and case law in particular concerning the right to collective action, including the right to strike, it is apparent that the right to collective action is a fundamental right and that it should be enjoyed fully. Such international and European standards are thus universally applicable to all workers and enterprises.

III. The Law

61 Against the background of all references contained in the previous section[s], the following section will analyse the main grounds of the complaint by, first, describing the general framework (III.A) followed by, second, the examination of the specific allegations raised in the complaint (III.B).

A. General framework

62 Addressing the general framework, the following subsection will describe the general interpretative principles (III.A.1) followed by the overview for the structure of the examination (III.A.2).

1. General interpretative principles

63 Besides the general rules of interpretation enshrined in Article 31 VCLT, there are several elements which have to be taken seriously into account when interpreting human rights treaties in general and fundamental social rights in particular.

a) Human rights character

64 From the outset, it appears more than relevant to stress once again the importance of the human right to strike although this is not questioned by the Government. Only if it is fully placed in this perspective, it will be even more apparent that any restrictions or limitations have to be interpreted very strictly.

65 In this vein, it is recalled that, firstly, both UN Committees (CESCR and CCPR) have jointly highlighted that the right to strike is corollary to the effective exercise of the freedom to form and join trade unions.[57] Secondly, the ILO supervisory bodies' case law also stresses the

[56] Advisory Opinion, note 50, para. 116.
[57] See above para. 8 and note 4.

character of a "*basic right*".[58] This is confirmed by the IACtHR declaring that the "*right to strike is one of the fundamental human rights of workers".*[59]

b) Principle of effectiveness

66 Although representing a more general concept of interpretation, the "principle of effectiveness" has its particular value in relation to human rights treaties. It is aimed for securing the effectiveness of human rights in practice, i.e. in the every-day-life.

67 This element is genuine characteristic of the ESC because of its very wording. Indeed, each right enshrined therein is introduced by the requirement "*[w]ith a view to ensuring the effective exercise*". Accordingly, for the ECSR it is important to, "*ensure that the rights embodied in the Charter are applied effectively in all the Council of Europe member States*".[60]

68 Its overall importance is demonstrated by the fact that even in human rights instruments in which such a principle is not expressly mentioned, its relevance has nevertheless been developed and recognised in order to ensure human rights are guaranteed not only in theory but in every-day practice. In the words of the ECtHR, "[t]*he provisions of an international treaty such as the Convention must be construed in the light of their object and purpose and also in accordance with the principle of effectiveness.*[61]

c) "Living instrument"

69 The interpretative "living instrument" concept is closely related to the "principle of effectiveness" (see above)[62] and to "evolutive interpretation"[63]. Indeed, it is recognised by the ECSR in the following terms:

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[58] See above para. 21, note 21, para 117.
[59] See above para. 56, note 54, para.106.
[60] Council of Europe (ed.), Digest of the Case Law of the European Committee of Social Rights, June 2022 (Digest 2022), Part III, Nature and aim of the Charter.
[61] See ECtHR (GC), 10.2.2009, No. 14939/03, *Sergey Zolotukhin v. Russia*, para. 80 ("*The Court … reiterates that the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions (see, among other authorities, Tyrer v. the United Kingdom, 25 April 1978, § 31, Series A no. 26, and Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 75, ECHR 2002-VI). The provisions of an international treaty such as the Convention must be construed in the light of their object and purpose and also in accordance with the principle of effectiveness (see Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, § 123, ECHR 2005-I)*"); see also ECtHR (GC), 4.2.2005, No. 46827/99 e.a., *Mamatkulov e.a. v. Turkey*, para. 101 (*"The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective, as part of the system of individual applications. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society"*"). See as most recent authority ECtHR (GC), 14.9.2022, No. 24384/19 e.a., *H.F. e.a. v. France*, para. 211 ("*If Article 3 § 2 of Protocol No. 4 were to apply only to nationals who arrive at the national border or who have no travel documents it would be deprived of effectiveness in the context of the contemporary phenomena mentioned above*").
[62] See e.g. G A Serghides, *The European Convention on Human Rights as a 'Living Instrument' in the Light of the Principle of Effectiveness*, in R Spano, I Motoc, B Lubarda, P Pinto de Albuquerque, M Tsirli (eds.), *Fair Trial: Regional and International Perspectives – Procès equitable : perspectives régionales et internationales* – Liber Amicorum Linos-Alexandre Sicilianos, Limal, 2020, 537, at pp. 541-543.

> *"The Committee interprets the rights and freedoms set out in the Charter in the light of current conditions and in the light of relevant international instruments, as well as in light of new emerging issues and situations, in other words, the Charter is a living instrument."*[64]

70 This concept is deeply rooted in (if not invented by) the ECtHR's jurisprudence:

> *"The Court has on numerous occasions indicated that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today."*[65]

71 In this context, the ECSR will have to take into account particularly that the right to strike is generally very much threatened and finally violated. According to the International Confederation of Trade Unions (ITUC) 87% of countries violated the right to strike.[66] At European level, recent studies like in the public service show the specific problems trade unions are faced therein.[67] The respective study found (out of the 35 countries analysed) many examples of how public service workers are prohibited from striking.[68] Even the case law of the ECSR itself demonstrates clearly how much Article 6§4 is violated.

72 In real terms, this means that interpreting Article 6§4 ESC requires to respond in clear terms to the (legislative or practical) measures to restrict (or even prohibit) the exercise of the right to strike under those present-day conditions. Such an approach is particularly important, if not crucial, for a human rights instrument in the social field like the ESC.

d) Importance of other international instruments as minimum level of protection

73 The ESCR interprets the Charter in the light of other international treaties which are relevant in the field of rights guaranteed by the Charter as well in light of the interpretation given to these treaties by their respective monitoring bodies.[69]

74 However, these references should not be understood as limiting the level of protection provided by the ESC to those standards. Conversely, as international standards have to take account of their world-wide context, the ESC protects fundamental social rights at a higher level. This was also the understanding when the original 1961 Charter was drafted as well as its revised version in 1996.

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[63] See e.g. -G Abi-Saab, K Keith, C Marquet, *Evolutionary Interpretation and International Law*, Hart Publishing, London, 2019, or E Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford University Press, 2014.
[64] See above Digest 2022, note 60, Part III, The Charter as a Living Instrument.
[65] 24 January 2017, Nos. 60367/08 961/11, *Khamtokhu and Aksenchik v. Russia*, para. 73, referring to *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Kress v. France* [GC], no. 39594/98, § 70, ECHR 2001-VI; and *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 53, ECHR 2012). See also (IACtHR), Advisory Opinion OC-16/99, 1 October 1999, para. 114.
[66] ITUC, 2022 ITUC Global Rights Index (https://www.ituc-csi.org/2022-global-rights-index-en?lang=en).
[67] European Public Service Union (EPSU) (ed.), The right to strike in the public sector in Europe.
[68] See the summary in https://www.epsu.org/article/right-strike-public-sector-europe.
[69] See above Digest 2022, note 60, Part III, Interpretation of the Charter in the Light of other international Instruments.

2. Structure of the examination of the grounds for the complaint

75 The complaint refers mainly to different specific aspects limiting the (effective) exercise of the right to strike. Their examination will be structured according to more general themes as follows:

Restrictions

- requiring that work be performed during a strike on a broader scale than merely those "minimum services" that are necessary in the meaning of Article G of the Charter;
- granting 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 of whether the power has been legitimately exercised,
- imposing a prohibition on strikes for a certain period of time after a strike has taken place and at certain times during the year;

Procedural requirements

- imposing a requirement to indicate the duration of a strike at the time it is called;
- imposing mandatory cooling-off and conciliation procedures, which must be completed before a strike can start and are of such a duration as to impair its efficacy;

Review of the legality of a strike

- granting an independent administrative authority the power to prohibit or otherwise limit the exercise of the right to strike that is not subject to review by the courts.[70]

B. Restrictions to the right to strike

76 The complaint addresses several general sorts of general restrictions. The first is related to the definition of minimum services, the second concerns 'back to work' orders and the third leads directly to a further prohibition (for a certain period of time after a strike). All elements can have a detrimental effect on the effective exercise of the right to strike, particularly in their culminative effect.

77 In examining the conformity of the restrictions in the domestic legislation with the requirements of Article 6§4 ESC, specific importance will have to de paid to the "General interpretative principles" described above (III.A.1).

1. Minimum services

78 The definition of minimum services is closely related to the definition of essential services. In principle, the establishment of minimum services should only be allowed in case of essential services.

[70] Decision on admissibility, *Unione sindacale di base (USB) v. Italy*, see note 1**Error! Bookmark not defined.**.

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a) Essential services

79 The existence of essential services in which the right to strike might be restricted or even prohibited (but only with compensatory guarantees) are a permanent challenge for the effective exercise of the right to strike particularly if they are defined too vague, too broad. Accordingly, the main international supervisory bodies criticise such legislation and/or practices:[71] the CEACR requires that they have to be interpreted strictly;[72] the CFA not only establishes an exhaustive list of those sectors which might and which might not be considered as 'essential services'; it also stresses that an economic impact of industrial action and its effect on trade and commerce do not render a service "essential".[73]

b) Minimum services

80 The CESCR requires that minimum services can only be permissible if they are strictly necessary for the performance of a minimum level of service.[74] In the view of the CEACR they should only be allowed in certain situations, in particular if the interruption of those services would endanger the life, personal safety or health of the whole or part of the population (essential services "in the strict sense of the term")[75] and only if they are "strictly necessary" and – procedurally – if trade unions are able to participate in defining such a service, along with employers and the public authorities.[76], while any disagreement on minimum services should be resolved, not by the government authorities but by a joint or independent body which has the confidence of the parties, responsible for examining rapidly and without formalities the difficulties raised and empowered to issue enforceable decisions.[77] In the same vein, the CFA limits the possibilities to have recourse to minimum services,[78] what is to a large extent confirmed by the IACtHR.[79]

81 Accordingly, this restriction cannot be considered as being in line with international standards and, subsequently also not in harmony with Article 6§4 ESC.

2. Back to work orders

82 Another serious restriction to the right to strike is the possibility to use back to work orders. According to the CFA this is only lawful in very specific circumstances and only for a specific category of staff in situations where a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered. Otherwise, it would be contrary to the principles of freedom of association. [80]

83 Accordingly, this restriction cannot be considered as being in line with international standards and, subsequently also not in harmony with Article 6§4 ESC.

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[71] See also for the CCPR above para. 18, note 18, para. 32.
[72] See above para. II.A.1.a), note 8, see also notes 9, 10 and 11.
[73] See above para. 30, note 29.
[74] See above para. 13, note 12.
[75] See above para. 22, note 21, para. 136.
[76] See above para. 22, note 21, para. 137.
[77] See above para. 22, note 21, para. 138.
[78] See above para. 30, note 30.
[79] See above para. 57, note 55.
[80] See above para. 31, note 27; for the CESCR in relation to requisitioning, see also para. 15, note 14.

3. Prohibition on strikes for a certain period of time after a strike

84 This prohibition is very problematic. Besides the fact that it is a very unusual prohibition of strikes it amounts to a sort of punishment for a previous strike. It limits trade union collective action to a serious degree without any possibility for a justification. First, it is not conceivable to find a legitimate aim (and economic considerations cannot be recognised as such). Second, such a restriction is not necessary in a democratic society.

85 Concluding, any such requirement cannot be considered as being in line with Article 6§4 ESC.

C. Procedural requirements

86 The exercise of right to strike is also limited by procedural requirements.[81] They might easily render the exercise ineffective. To require the indication of the duration of the strike is particularly serious.

1. Indication on the duration

87 For trade unions responsible for organising a strike the burden to indicate the duration of a strike is not only difficult in practice. It is even per se impossible because the duration of a strike very much depends on the reactions from the employer side (and/or governments depending on the specific situation). Accordingly, trade unions cannot foresee and should even less be obliged to define the duration.

88 In this respect, the CEACR has pointed out that workers and their organizations should be able to call a strike for an indefinite period if they so wish[82] and accordingly they should not be obliged to indicate the duration. The CFA is of the same opinion and expressed its concern at the imposition of a limit on the duration of a strike which, due to its nature as a last resort for the defence of workers' interests, cannot be predetermined.[83]

89 Accordingly, any such procedural requirement cannot be considered as being in line with international standards and, subsequently also not in harmony with Article 6§4 ESC.

2. Cooling-off periods and conciliation procedures

90 Both procedural requirements lead to a heavy burden for trade unions in organising strikes.

a) Cooling-off period

91 While ILO supervisory bodies appear to allow a certain flexibility as to the requirement of cooling-off periods[84], it is obvious that they are directly contrary to an effective mobilisation which is the corner-stone for an effective strike.

92 Taking seriously the "principles of effectiveness" (III.A.1.b)) there is no possibility to limit direct strike action jeopardising mobilisation. This is even more true in relation to the interpretation as "living instrument" (III.A.1.c)) in times in which "real time" digital

[81] Often, they are called 'prerequisits'.
[82] See above para. 22, note 21, para. 146.
[83] See above para. 29, note 33, para. 815.
[84] See e.g. above para. 24, note 21, para. 145 (still requiring a limited duration).

communication is normal and already one week might appear under those conditions to be a longer time ago. Quick reaction is required.

93 Accordingly, Article 6§4 should be interpreted as not allowing cooling-off periods required by legislation.

b) Conciliation procedures

94 Generally speaking, conciliation procedures are usual methods to try to solve collective conflicts and they are recognised provided that they are voluntary. The parties to a conflict can easily have recourse to those procedures either by ad-hoc arrangements or collective agreements defining procedures aiming at trying to solve a collective conflict.

95 International standards also follow this approach. However, if conciliation leads to compulsory arbitration in the form of a legal requirement, such requirements are considered contrary to the right to strike. In the view of the CEACR such procedures should *have the sole purpose of facilitating bargaining and should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness*.[85] Similarly, the CFA requires that *conciliation and mediation machinery should have the sole purpose of facilitating bargaining* and that *arbitration is not compulsory and does not, in practice, prevent the calling of the strike.* [86] At EU level, the Community Charter only encourages but by no means obliges such procedures.[87]

96 Accordingly, any attempt to require compulsory arbitration should be considered as violating Article 6§4 ESC.

D. Review of the legality of a strike

97 A central feature for trade unions in relation to the effective exercise of the right to strike is how the review of the legality of a strike is organised.

98 A specific aspect in relation to **authority to suspend a strike** is addressed by the CFA requiring that this authority should only lie *with an independent body which has the confidence of all parties concerned.* [88]

99 More generally, it appears important to take specifically into account of the IACtHR's case law in relation to the **judicial review** of individual, but also collective labour law disputes requiring in particular *a specialised jurisdiction with exclusive competence in labour matters, the provision of a specialised procedure that takes into account the particularities of labour matters; the distribution of the burden of proof* in order to *compensate for the inequalities inherent in the world of work,* also the *right to a specialised defence*.[89]

100 Taking into account the requirements referred to above the organisation of the review of the legality of a strike should be considered as violating Article 6§4 ESC.

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[85] See above para. 23, note 26, para. 144.
[86] See above para. 28, note 32, paras. 793 and 795.
[87] See above para. 49, note
[88] See above Compilation, note 22, para. 914.
[89] See above para. 58, note 56.

IV. Conclusions

101 For all the reasons stated above, the ETUC suggests to hold that Italy has violated Article 6§4 ESC in the following respects:

- the establishment of minimum services (see above para. 81),
- the possibility to have recourse to 'back-to-work'-orders (see above para. 83),
- the prohibition on strikes to a certain period after a strike (see above para. 85),
- the requirement to indicate the duration of a strike (see above para. 89),
- the requirements of cooling-off periods and conciliation procedures (see above paras. 93 and 96, respectively),
- the review of the legality of a strike (see above para. 100).

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