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

19 May 2023

Case Document No.4

**European Organisation of Military Associations and Trade Unions (EUROMIL)
v. Ireland**
Complaint No. 212/2022

**RESPONSE FROM EUROMIL
TO THE GOVERNMENT'S SUBMISSIONS
ON THE MERITS**

Registered at the Secretariat on 10 May 2023



European Organisation of
Military Associations and
Trade Unions

Brussels, Belgium
<http://euromil.org/>

Department of the European Social Charter
Directorate General Human Rights and Rule of Law
Council of Europe F-67075, Strasbourg Cedex

To:

The Executive Secretary of the European Committee of Social Rights,
acting on behalf of the Secretary General of the Council of Europe

EUROMIL v. Ireland
Complaint No. 212/2022

10 May 2023

Dear Sir/Madam,

Following up on the Collective Complaint of EUROMIL v. Ireland that I have transmitted to You, pursuant to Article 1(b) of the Additional Protocol to the European Social Charter and having received Your letter annexing the State party's observations on the merits, I take the honour to submit the complainants' relevant observations and comments within the time limit indicated by the Committee.

Respectfully,

Emmanuel Jacob



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TO THE EUROPEAN COMMITTEE FOR SOCIAL RIGHTS

EUROMIL v. Ireland
Complaint No. 212/2022

EUROMIL'S RESPONSE TO OBSERVATIONS
MADE BY THE GOVERNMENT OF IRELAND
ON THE 15TH OF MARCH 2023



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INTRODUCTION

1. EUROMIL wishes to acknowledge receipt of the observations of the Government of Ireland to the complaint submitted on behalf of the members of the Irish Defence Forces represented by PDFORRA and RACO.
2. EUROMIL asserts that the observations made by the Government of Ireland are comprehensive in nature but fail to address the central issues contained within the complaint made by EUROMIL.
3. It is EUROMIL's contention that the Government has, in much of its reported observations, conflated the ability of Governments to exclude members of the armed forces from the scope of the Working Time Directive (WTD), where the inherent nature of the work conflicts with the Directive, with its necessity to remunerate workers appropriately and justly for work undertaken in the service of the State.
4. Further, the Government has made assertions that have no basis in fact and can best be described as broad generalisations in respect of the hours worked by members of the Irish Defence Forces. Currently, the Irish Defence Forces have no systems or procedures, either electronic or paper-based, for recording actual hours worked by military personnel. Additionally, the observations do not address the circumstances of military personnel who openly and regularly work over 48 hours a week.
5. It is noticeable that the Government did not specifically address the complaints made regarding the specific areas of work referenced within EUROMIL's complaint, namely personnel at sea, members of the Army Ranger Wing (Special Forces), Explosive Ordnance Disposal (EOD), and members undertaking duties in Portlaoise prison.
6. Furthermore, EUROMIL, on behalf of both PDFORRA and RACO, refutes any assertion by the Government that aspects of the submission are inaccurate or omit any aspect of remuneration.
7. EUROMIL contends that the Government has sought to minimize the impact of the failure to pay overtime and maximize the reference to national security in circumstances, despite the fact that An Garda Siochana (Police), the other lead agency for state security, receive overtime pay for every hour worked over their normal routine.
8. EUROMIL asserts, on behalf of both PDFORRA and RACO, that the current pay rates and working regime are leading to a situation which is directly impacting on the recruitment and retention of staff and is thus having a far greater direct effect on the ability of the State to carry out its security functions due to significant recruitment difficulties.



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RESPONSE OF EUROMIL

9. The observations made by the Government from points 7 – 11 address the application of the WTD to members of the Irish Defence Forces. Two aspects of these observations are notable: firstly, the WTD does not relate to remuneration except for workers' entitlements to paid holidays. Additionally, the Department of Defence, through what seems to be the strictest interpretation of the *Obrambo* judgement¹, appears to want to have as many aspects of service deemed outside of scope as would be permissible. This would not be necessary if personnel worked a "typical 40 hours a week". Further, it must be considered that a 48-hour week is averaged over a period ranging from 17-26 weeks. EUROMIL requests that the Committee ask the Irish Government to provide a copy of correspondence presented to PDFORRA and RACO on 26 September 2022² regarding proposed exemptions.
10. EUROMIL believes that provisions related to working time are separate from the provisions in the European Social Charter regarding remuneration, as the Working Time Directive relates to compensation by way of rest for hours worked, while the Charter relates to the fairness and appropriateness of pay relative to the hours actually worked.
11. The pay policy of the public sector, among other factors, has impeded the Representative Associations' ability to seek and secure appropriate payment increases in allowances associated with working certain duties. All national pay agreements have precluded the initiation of cost increasing claims.
12. Furthermore, the fact that the Defence Forces have not recorded the actual hours worked has inhibited the Representative Associations from taking a claim similar to that of caregivers in the health sector who worked additional hours for a set allowance called a "sleepover allowance". The Irish Labour Court decided that the rate of pay for this allowance should increase in line with minimum wage.³ Therefore, it can be seen that the failure to apply the WTD to members of the Irish Defence Forces, together with a failure to record the actual hours worked, has benefited the Government to the detriment of workers within the Irish Defence Forces.
13. EUROMIL asserts that while Section 97 of the Defence Act 1954 does indeed provide for the making of regulations regarding pay, the Minister's actions are subject to Government approval and public sector pay policy. An example of the aforementioned restriction can be attained from a cursory

¹ European Court of Justice, Judgment of the Court (Grand Chamber) of 15 July 2021, B. K. v Republika Slovenija (Ministrstvo za obrambo), Case C-742/19.

² Contained in an Email from APO, C&A Branch, 26 September 2022.

³ Annex 1 - sleepover allowance case Workplace Relations Commission (WRC).



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examination of a case by a former member of PDFORRA in the McKenzie case⁴.

14. In respect of paragraph 12 of the Government's response, the following must be considered:
 - 14.1 That members at Sea and those undertaking Portlaoise duties are not relieved of duties on public holidays and are only paid flat-rate allowances that do not equate with the value of a day's pay.
 - 14.2 Furthermore, no increase in pay, remuneration or time off is provided in consideration of the fact that, for example, personnel within the Naval Service, or personnel undertaking Portlaoise prison duties, are working on these days.
 - 14.3 Personnel are paid on a flat-rate basis, which effectively confirms the lack of overtime, regardless of their underlying basic salary.
 - 14.4 Personnel across the Defence Forces undertake 24-hour duties, which normally commence at 09:00 and end at 09:00 the following day. Therefore, personnel who finish duty at 09:00 on the scheduled bank holiday attain no extra payment for having undertaken at least 8 hours of work on the day of the public holiday.
15. EUROMIL has attached correspondence to demonstrate that in circumstances where personnel are unable to utilize the day off within the month of undertaking a duty on a public holiday, they forfeit this day regardless of circumstances leading to the forfeiture of the day.⁵
16. The nature of duty rosters within the Irish Defence Forces effectively results in personnel undertaking three normal days' work in one 24-hour period. However, the resulting time off is equivalent to one normal day's work. Additionally, the duty allowances provided do not equate with the value of a day's pay.
17. In respect of the observations of the Irish Government on the developments arising from the Gleeson Commission in 1990, this Commission reviewed the pay rates of members of the Defence Forces, including members of the Naval Service, and set them by reference, *inter alia*, to the pay rates of other public service groups including the Prison Service, An Garda Síochána and the Fire Service. All these groups are paid on a 5-day week basis and, accordingly, the new pay rates recommended by the Gleeson Commission were similarly intended to compensate for attendance organised on a 5-day week basis.
18. The Gleeson Commission paid particular attention to comparisons with other groups and concluded that "*the rates recommended by the*

⁴ Mc Kenzie & Anor -v- Minister for Finance & Ors [2010] IEHC 461
<https://employmentrightsireland.com/wp-content/uploads/2014/02/mckenzie-v-minister-for-finance.pdf>.

⁵ Annex 2. - C&A Briefing note dated 18 June '13.



Commission would establish military pay at an appropriate position relative to current pay rates in other employments".⁶

19. Subsequently, the 2002 Benchmarking exercise and report consolidated the fact that the published rates of pay for Personnel were recompensed for a 5-day week attendance pattern. The Benchmarking Body's terms of reference state that its "*recommendations should be grounded in a coherent and broadly-based comparison with jobs and pay rates across the economy*".⁷ In doing so, the Benchmarking Body gathered information on, *inter alia*, private sector base salary rates, excluding overtime for comparison purposes. All this information gathered was based on normal 5 days a week attendance and, accordingly, the recommended rates apply to normal 5 days a week attendance on the part of Personnel within the Irish Defence Forces.
20. In its submission to the Benchmarking Body in 2001, the Department of Defence explained that, although the normal working week for Defence Forces personnel was "*one of 40 hours over five days, personnel may be required to work long hours, shift work or irregular hours, or a combination of these*".⁸ This is also the position in General Routine Order 43/55. Therefore, the rates recommended by the Benchmarking Body are intended to compensate for the normal 5 days working week as sought by the Department of Defence.
21. However, it must be remembered that the Department of Defence itself went on to say "*[t]here is no overtime system and no guarantee of recompense on all occasions for additional hours worked*".⁹ This appears to be vindication of EUROMIL's position.
22. Given the foregoing observations made by the Department, it is evident that the pay rates of certain Enlisted Personnel of the Naval Service would be set below the national wage rate if their weekly pay is intended to recompense for a 5/7 days week attendance when, according to the patrol plans for naval service personnel, they are expected to be on patrol for 160 days in a year, with only 43 days of annual leave.
23. The Government's references in its response to the Public Sector Pay Commission and the Commission on the Defence Forces can be described as disingenuous at best, particularly when the following is considered:
 - 23.1 Both the Public Sector Pay Commission and the Commission on the Defence Forces were constrained by public sector pay policy.

⁶ The Report of the Commission on Remuneration and Conditions of Service in the Defence Forces, p. 77.

⁷ The Report of the Public Service Benchmarking Body, p. 13.

⁸ Department of Defence Submission on Defence Forces Pay to the Public Service Benchmarking Body, p. 17.

⁹ Department of Defence Submission on Defence Forces Pay to the Public Service Benchmarking Body, p. 17.



- 23.2 The assertion that Defence Forces members attained an individual increase of 10% in Military Service Allowance (MSA) negates the fact that all non-members of fast accrual groups attained an increase of approximately €675 due to changes in pension levies. Fast accrual groups, excluding the Defence Forces, attained increases in remuneration through the subsuming of allowances into core pay, thus giving rise to increased overtime rates.
- 23.3 The Public Service Pay Commission, reporting in 2019, acknowledged that: *"In the absence of conventional working time or overtime arrangements, including the absence of any limitation on working hours, the Commission recommends, with immediate effect the full restoration of Pre- Haddington Rd levels of allowance"*. Moreover, it must be considered that the foregoing comments were made in the context of it having said in Para 3 of its recommendations that: *"The pressure on serving personnel is likely to have increased further, resulting in increased working hours"*.
- 23.4 Additionally, EUROMIL believes that the following remarks in the Public Sector Pay Commission are pertinent to appropriate payments for additional hours worked: *"SDAs (Security Duty Allowances) are fixed period allowances in the nature of pay but are not linked to pay"*.¹⁰
24. While the Government appointed Commission on the Defence Forces may have had a particular view on how additional hours of work could or should be managed, the representative associations in Ireland note that they are currently restricted from seeking or claiming increases in payments for additional hours worked, in contravention of Article 4.2 of the European Social Charter.
25. In respect of the observations by the Government on dispute resolution mechanisms, EUROMIL emphasizes that, while both representative bodies have existed since 1990, their ability to effectively negotiate on behalf of their members was stifled until the recent decision of the European Social Rights Committee in 2018, which found that Ireland had been in breach of aspects of Articles 5 & 6.
26. Additionally, the Conciliation and Arbitration (C&A) scheme explicitly prohibits discussions regarding overtime.
27. The scheme operates within the confines of public sector pay policy, which has restrictive covenants inhibiting the initiation of claims for increases to pay and allowances for the duration of any such agreements.

¹⁰ Public Sector Pay Commission 2019, page 25. <https://paycommission.gov.ie/wp-content/uploads/Dept-of-Defence-PSPC-report-2019-WEB-1.pdf>.



28. Members of the Irish Defence Forces have no right to strike, and agreements made through the C&A Scheme are not legally enforceable.¹¹
29. It is fair to say that the associations represented by EUROMIL in the context of this complaint have referenced the Working Time Directive, however, said reference is only used to discern between what society at large considers fair, appropriate, and not injurious to the health and safety of citizens.
30. Members of the Irish Defence Forces have recognised the need for certain limited exemptions and derogations in respect of their duties. However, for illustrative purposes, they would ask that the following be considered:
 - 30.1 Members of the Irish Naval Service on their sea rotation have the following liability for hours worked: 160 days at sea per year. This equals 22.85 weeks (rounded up to 23). The average working hours while at sea are 16 per day. Therefore, $16 \times 160 = 2,560$ hours worked while at sea. If the 43 days of Annual Leave that members are entitled to are divided by 7 to give a weekly total, this amounts to 6.1(7) weeks. In total, between leave and sea time, this amounts to 30 weeks. $52/30$ leaves 22 weeks. If one assumes the Government position is correct at 40 hours per week, that results in a further $40 \times 22 = 880$ hours. Therefore, the grand total of hours worked by a member of the Naval Service is 3,440 per annum.
 - 30.2 The maximum permissible hours that can be worked by a normal worker under the Directive is 48 hours x 48 weeks = 2,304 hours. Therefore, members of the Irish Naval Service can work 1,136 hours more than someone in the civil or public service at the maximum permissible levels under the WTD. Further, (Para's 17, 18 & 19 are relevant when comparing the basis of pay rates under the Benchmarking exercise in 2001; $40 \times 48 = 1,920$ hours was the comparison). For all these additional hours worked by members of the Naval Service, they receive Patrol Duty Allowance (PDA) at a value of 160×56.12 Euro = €8,979.20 per annum. When contrasted against the ability of other workers to attain overtime upon reaching 40 hours of work, this equates to €8,979 / 1,520 hours of work, which gives an hourly rate of pay of €5.90 per hour. The National Minimum wage in Ireland is set at €11.30 per hour. The foregoing assumptions are based upon the basic pay and Military Service Allowance being payable for the basic 40 Hours x 48 Weeks.
 - 30.3 Similar exercises can be undertaken against other cohorts of personnel referenced in the original complaint of EUROMIL.
31. EUROMIL contests that the failure of the Irish Government to conclude an agreement with the representative associations for members of the Irish Defence Forces constitutes an abuse of a dominant position as these

¹¹ Ibid 2.



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workers are particularly vulnerable due to their limited Industrial Relations status and their inability to undertake industrial action.

32. As stated in the original complaint by EUROMIL, the Irish Government has failed to record the hours worked by personnel within the Irish Defence Forces, despite the successful undertaking of legal actions by PDFORRA for several years regarding the application of the WTD.
33. EUROMIL, based on information provided by the representative associations in Ireland, contests that it is not uncommon for members of the groups outlined in our original complaint to work periods far in excess of 16-hour days over prolonged periods.
34. EUROMIL asserts that the Representative Associations in Ireland have confirmed that, while they have no particular difficulty in maintaining a flexible working regime as necessary for the preservation of State security, the basis upon which their members can be recalled to duty outside of "normal" working hours is not codified, and results in an unreasonable level of disruption to the lives of its members and their families. Both Associations contest that other agencies such as the police force have standing agreements that incorporate flexibility while maintaining state security.
35. In respect of payments, the Department has contended that the "normal" working day is of an 8-hour duration, which is undertaken between the hours of 08:30 - 16:30 from Monday to Friday. However, as outlined in the Gleeson Commission report in 1990, and as continues to this day, no regulatory provision exists for the management of time or hours worked.
36. Additionally, while provision exists for the granting of time off for additional hours worked in certain circumstances, these are not guaranteed and may be forfeited without consideration of circumstances giving rise to said forfeiture.¹²
37. Payment of basic salary is premised upon completion of the foregoing hours, with Military Service Allowance being paid for, *inter alia*, the "liability" of being called to duty outside of normal duty hours, and exposure to uncomfortable and dangerous conditions, but not payment for the "actual" hours worked.
38. The average daily rate of pay of certain sample ranks (Private and Lieutenant) of the Defence Forces, based upon the Department's own figures of Basic Pay and MSA are seen in the following table:

¹² Ibid 4, Para 7.



Basic Pay + MSA Amounts shown are pre-tax	Daily Rate: Weekly/5 (8-hour day)	Rate of Duty pay for 16 Hours over normal routine	Value of Duty Day + “rest off day”	Total value of 3 days’ work vs current practice of 24-hour duty (on allowances) plus one day rest off
Example 1: Private Point 1 of scale €711.91	€142.38	€62.79 (Mon-Fri)	(Paid Duty Day + Rest Day) + allowance = (€142.38 x 2) + €62.79 = €354.55	3 days’ work Mon-Fri (€427.14) less 24Hrs continuous duty + duty pay (€354.55) = €72.59 at basic pay levels*
Example 2: Lieutenant Point 1 of scale €892.42	€178.48	€61.26 (Mon-Fri)	(Paid Duty Day + Rest Day) + allowance = (€178.48 x 2) + €61.26 = €418.22	3 days’ work Mon-Fri (€535.44) less 24Hrs continuous duty + duty pay (€418.22) = €117.22 at basic pay levels*

*Note: As pay increases at higher ranks the gap widens as duty rates are similar for all ranks.

39. While the respondent refers to a declaration in the Gleeson Commission stating that the provision of overtime would be “totally inappropriate” for the Defence Forces, and a statement by the then General Secretary of RACO in 2012 regarding his experience with overtime, these statements do not absolve the Government of Ireland to provide just and equitable terms of service and remuneration. EUROMIL believes that the current “complex” pay structures do not provide just and equitable terms of service and remuneration. The RACO comments in 2012 described a situation whereby an exercise could hypothetically end abruptly before its natural conclusion, owing to a rigid enforcement of working time rules. This is not at issue here, and the payment of overtime in addition to other compensatory mechanisms would obviate any requirement for this to occur.
40. While EUROMIL acknowledges the provisions of Defence Force Regulation A.11 (Leave) and the provisions contained therein regarding public holidays, EUROMIL points to the fact that regulations do not provide for double pay or double time off when personnel are working on these days.



Additionally, EUROMIL believes that the contents of Para 33 above are relevant in the context of days *in lieu* granted for working on public holidays.¹³ Consequently, personnel are not guaranteed a day off in violation of the Charter.

41. The Military Authorities have supplied the details of the number of annual leave days, in line with the provisions of the Regulation, that were lost by Enlisted Personnel and the number of annual leave days that were lost by Officers in each of the years 2017 to 2021, as follows¹⁴:

Year	Enlisted Personnel	Average Per Enlisted Soldier	Commissioned Officers	Average Per Officer
2017	31,968.5	4.5	11,636.5	10.5
2018	33,126.5	4.7	11,105.0	10
2019	33,099.0	4.7	11,840.5	9.8
2020	57,544.5	8.5	15,643.5	13.0
2021	51,148.0	7.7	14,478.5	12

42. No specific provisions regarding time off for personnel working in the areas of the Naval Service, Portlaoise Prison, Army Ranger Wing, Explosive Ordnance Disposal or other groups who are paid flat-rate allowances are contained in regulations, thus contravening the requirement set out in the Committees conclusion in 2018.¹⁵
43. EUROMIL notes the assertion made by the respondent Government in paragraph 64 of its submission and asserts that not all the allowances vary with the seniority of the personnel concerned. In fact, allowances linked to rank are very small, and in any event, do not compensate for the level of overtime undertaken comparable to the daily rates of pay.

¹³ Conclusions 2018, Latvia "The Committee considers that work performed on a public holiday requires a constraint on the part of the worker, who should be compensated with a higher remuneration than that usually paid. Accordingly, in addition to the paid public holiday, work carried out on that holiday must be paid at least double the usual wage. The remuneration may also be provided as compensatory time-off, in which case it should be at least double the days worked."
https://hudoc.esc.coe.int/app/conversion/pdf?library=ESC&id=CR_2018_LVA_ENG&file_name=CR_2018_LVA_ENG.pdf.

¹⁴ Source: Defence Forces – Thursday, 12 May 2022 – Parliamentary Questions (33rd Dáil) – Houses of the Oireachtas; <https://www.oireachtas.ie/en/debates/question/2022-05-12/49/#pq-answers-49>.

¹⁵ Ibid 12.



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44. Of particular note, and vindicating the complaint of EUROMIL, is the acceptance by the respondent that "SDA" is paid for work outside of normal duty hours. The foregoing is true of other payments falling into this category of payment including EOD duty payments, Portlaoise duty payments, Patrol Duty Allowance (differing rates do apply across ranks (seniority), but these are minor) and Aid to the Civil Authority payments, Border Duty Allowance, all of which are flat rated.
45. EUROMIL contends, based upon advice from the representative associations, that these payments generally pre-date the introduction of representation and have not been the subject of collective bargaining. Moreover, it is contended that the representative associations are inhibited from seeking changes to the current rates as it would contravene public sector pay policy and restrictions on seeking claims for improvements in pay.

CONCLUSIONS

46. EUROMIL, on behalf of the members represented by both PDFORRA and RACO, contends that the current remuneration scheme is deliberately complex and unjust and inhibits members from being paid just and appropriate payments in accordance with the provisions of Article 2.1, 2.2 and 4.2 of the European Social Charter.
47. EUROMIL notes that in other areas of the public sectors where similar "complex" arrangements have existed, public servants have managed to secure increased payments through recourse to the WRC as in the case of the "sleepover allowance" for care workers.
48. That other sectors of the security services (Gardai, Prison Service) of the Irish State have in place appropriate collectively bargained for overtime and compensatory rest regimes, which ensures compliance with the State's obligations under the European Social Charter.
49. That there has been a longstanding and continued complication of the payments regime for members of the Defence Forces, which denies them appropriate payments for additional hours worked.¹⁶
50. It must be remembered and considered that members of the Defence Forces assigned to duty have no ability to refuse to undertake such duty and face the potential of severe punishment under military law for failing to complete assigned duties.¹⁷

¹⁶ Letter from Policy Branch dated 11th May 1993.

¹⁷ Section 137 of the Defence Act - Absence

https://www.lawreform.ie/fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_1954_0018.html.



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51. That the Representative Associations in Ireland have been hampered and denied information regarding payments and adherence to National Wage legislation despite repeated attempts over many years.¹⁸
52. Further, EUROMIL believes that it has exhibited, through its initial complaint, and this response, that clear violations of Articles 2.1, 2.2 and 4.2 exist and continue to exist with regards to the payments regime and time granted *in lieu* regime for members of the Irish Defence Forces.
53. The failure to collectively agree a payments/allowance regime or allow the representative associations within Ireland scope to agree on one due to Public Sector pay policy denies members of the Irish Defence Forces rights provided for under the Charter.
54. The failure of the Government to appropriately record time worked by members of the Irish Defence Forces denies them the ability to expressly and transparently assess their pay and overtime rates to ensure compliance with the European Social Charter.
55. As clearly shown within our complaints, the payments awarded to members of the Irish Defence Forces fall far short of compensating personnel on an equal basis to basic pay at daily rates for work undertaken outside "normal" duty hours. Additionally, despite somewhat increased rates for Saturdays and Sundays, the rates of allowance, together with the allotted time off, do not equal or reach the level of "double pay" as required under the Charter.
56. Members of the Defence Forces encompassed by this complaint occupy a class of workers that the Committee has previously stated deserve overtime payments.
57. For the foregoing reasons, EUROMIL believes that a finding of violation of the Charter is warranted and appropriate having due regard to the facts, circumstances and customs and practices of the Irish Government in respect of the failure to provide just conditions of employment and provide for Overtime for members of the Defence Forces.

¹⁸ Multiple correspondences received by the C&A Branch of the Department of Defence between 2015- 2021 failing to illustrate compliance with National Legislation regarding payments.