

# INTERNATIONAL STANDARDS AND BEST PRACTICES ON THE RIGHTS OF TRADE UNIONS



European  
Social  
Charter

Charte  
sociale  
européenne



# **International standards and best practices on the rights of trade unions**

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## TABLE OF CONTENTS

|                                                                                                                          |           |
|--------------------------------------------------------------------------------------------------------------------------|-----------|
| <b>I. EXECUTIVE SUMMARY</b>                                                                                              | <b>6</b>  |
| 1. The purpose of the report                                                                                             | 6         |
| 2. Methodology                                                                                                           | 6         |
| 3. International standards and the current situation of trade unions in Armenia                                          | 7         |
| 4. Findings and recommendations for improving national legislation on trade unions                                       | 7         |
| (a) Personal scope                                                                                                       | 7         |
| (b) The right to form a trade union                                                                                      | 8         |
| (c) Consultation between employers and trade unions                                                                      | 9         |
| (d) Promotion of collective bargaining                                                                                   | 9         |
| (e) Individual protection of trade union members and officials                                                           | 10        |
| (f) The right to strike                                                                                                  | 10        |
| <b>II. FREEDOM OF ASSOCIATION IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER</b>             | <b>11</b> |
| 1. Article 11 of the European Convention on Human Rights, Articles 5 and 6 of the European Social Charter                | 11        |
| 2. The relevance of the freedom of association as a pillar of democracy                                                  | 12        |
| 3. The individual and collective aspects of freedom of association                                                       | 13        |
| <b>III. THE COLLECTIVE ASPECT OF FREEDOM OF ASSOCIATION – THE FORMATION OF TRADE UNIONS AND TRADE UNION ASSOCIATIONS</b> | <b>15</b> |
| 1. Outline and goals                                                                                                     | 15        |
| 2. Justified restrictions under Article 11 of the Convention                                                             | 15        |
| (1) Restriction is Prescribed by Law                                                                                     | 15        |
| (2) Legitimate Aims of the Restrictions                                                                                  | 16        |
| (3) Necessity and Proportionality of the Restriction                                                                     | 17        |
| 3. Personal scope                                                                                                        | 17        |
| (a) Workers and beyond                                                                                                   | 17        |
| (b) Police Officers                                                                                                      | 20        |
| (c) Armed forces                                                                                                         | 22        |
| (d) Self-employed and employee-like persons                                                                              | 24        |
| (e) Platform and Remote Workers                                                                                          | 25        |
| 4. The Right to Form a Trade Union                                                                                       | 26        |
| (a) Workers' Organisations Protected by the Freedom of Association                                                       | 26        |
| (b) The Free Establishment of Trade Unions                                                                               | 27        |
| (c) Right of Access to the Workplace                                                                                     | 30        |
| (d) Confederation of Trade Unions                                                                                        | 31        |

|                                                                                                                                                                                        |           |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| <b>IV.THE COLLECTIVE ASPECT OF FREEDOM OF ASSOCIATION – TRADE UNION ACTIVITIES</b>                                                                                                     | <b>32</b> |
| 1. Introduction                                                                                                                                                                        | 32        |
| 2. The European Union directive on adequate minimum wages: A crucial instrument to reduce in-work poverty and guarantee a decent standard of living                                    | 32        |
| 3. Article 6 of the European Social Charter and Article 11 of the Convention                                                                                                           | 33        |
| (a) Personal Scope – Who Can be Covered by Collective Agreements?                                                                                                                      | 33        |
| (b) Consultation between the Two Sides of Industry (Article 6§1 of the ESC)                                                                                                            | 35        |
| (c) Promotion of Voluntary Negotiation (Article 6§2 of the ESC) and Promotion of Conciliation and Voluntary Arbitration for the Settlement of Labour Disputes (Article 6§3 of the ESC) | 38        |
| (d) Representativity as a Restriction on the Right to Bargain Collectively                                                                                                             | 40        |
| <b>V. THE INDIVIDUAL ASPECTS OF FREEDOM OF ASSOCIATION</b>                                                                                                                             | <b>43</b> |
| 1. The right to join trade unions                                                                                                                                                      | 43        |
| 2. The right not to join trade unions (negative freedom of association)                                                                                                                | 44        |
| 3. Special Protection against Retaliation                                                                                                                                              | 46        |
| <b>VI. THE RIGHT TO STRIKE</b>                                                                                                                                                         | <b>49</b> |
| 1. The right to strike                                                                                                                                                                 | 49        |
| 2. High requirement to call a strike                                                                                                                                                   | 50        |
| 3. Permitted purposes of a strike                                                                                                                                                      | 50        |
| 4. Restrictions on the right to strike                                                                                                                                                 | 51        |
| (a) The general rule                                                                                                                                                                   | 51        |
| (b) Workers Providing Essential Services                                                                                                                                               | 51        |
| (c) Employees in the Public Sector – Civil Servants                                                                                                                                    | 53        |
| (d) Military, Police, Security Services, Justice                                                                                                                                       | 53        |

# **I. EXECUTIVE SUMMARY**

## **1. The purpose of the report**

This report has been prepared as part of the Council of Europe project “Enhancing Social Human Rights in Armenia”. The purpose of the report is to summarise international standards pertaining to the status and rights of trade unions, with particular reference to the European Social Charter (ESC) and the European Convention on Human Rights. Since a new draft law on trade unions is currently under review in Armenia, this report is intended to serve as a guiding document or reference for Armenian stakeholders.

The report outlines the international requirements and rights of trade unions, offering proposals to enhance the alignment of trade union legislation with Council of Europe standards. Special emphasis is placed on the role of trade unions in promoting and protecting workers’ rights, as well as providing social support and representation. The report addresses trade union prerogatives relevant to Armenia, without delving into a detailed analysis of specific national legal frameworks. At the conclusion of each chapter, the report presents concrete recommendations for improving the legal standing of trade unions, in accordance with the European Convention on Human Rights and the European Social Charter.

## **2. Methodology**

Legal analysis was conducted based on the provisions of international legal documents. As a result, the specific rights, obligations, and principles outlined in the European Social Charter and the European Convention on Human Rights were summarised.

International literature, along with publicly available findings of international organisations — particularly the jurisprudence of the European Committee of Social Rights and the European Court of Human Rights — was referenced. Additionally, although to a lesser extent, direct requests and comments from the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), as well as relevant European Union documents, were also considered.

### **3. International standards and the current situation of trade unions in Armenia**

Armenia became a member of the Council of Europe on 25 January 2001 and ratified the European Convention on Human Rights in 2002. Armenia ratified the revised European Social Charter in 2004 and has accepted 67 of its 98 paragraphs, including all paragraphs of Articles 5 and 6, which guarantee the right to organise and the right to bargain collectively. Armenia has also ratified ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise and Convention No. 98 on the Right to Organise and Collective Bargaining, both of which establish detailed standards on freedom of association and the right to strike. Although this report does not provide a detailed analysis of these ILO Conventions, references are made to them where they are particularly relevant, especially where they offer noteworthy practices.

As of 1 January 2023, the Confederation of Trade Unions of Armenia unites 18 republican branch unions of trade union organisations which comprise 585 trade union organisations with 194 279 trade union members.<sup>1</sup> 422 collective agreements have been concluded as of 1 January 2021, whereof only 2 — at the branch level, 55 — at the territorial level and 365 — at the organisation (company) level. The collective agreements applied to 117 119 employees of the organisations, of which 111 187 were members of trade unions.<sup>2</sup>

### **4. Findings and recommendations for improving national legislation on trade unions**

#### **(a) Personal scope**

In certain national legal frameworks, the criteria for who is eligible to join and form trade unions, as well as who can be covered by collective agreements, are often too narrowly defined and include exceptions that do not align with international standards.

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<sup>1</sup> Data from the Confederation of Trade Unions of Armenia, available at: <https://hamk.am/en/story>.

<sup>2</sup> Source of data with reference to information received from the Confederation of Trade Unions of Armenia: 16th National Report on the Implementation of the European Social Charter submitted by the Government of Armenia, RAP/Cha/ARM/16(2022), pp. 50, 65.

- ✚ Members of the state administration should not be excluded from the right to join and form organisations that protect their interests. This right should extend to employees of the Prosecutor's Office and civilians employed by security services as well. Members of the police and armed forces should have the right to form associations to represent and protect their interests. However, their right to express opinions, particularly to criticise the government publicly, may be subject to certain restrictions. The State may limit the activities of armed forces associations, provided such restrictions are proportionate and necessary to maintain public order.
- ✚ The right to collective bargaining should not be limited to those in an employment relationship. According to the jurisprudence of the European Committee of Social Rights, trade unions must have the right to bargain on behalf of self-employed workers who, although not typically classified as dependent employees, are in fact dependent on one or a few companies and often carry out their activities under conditions similar to those of employees (e.g., food delivery drivers, couriers, and platform workers).

#### (b) The right to form a trade union

Since most unions operate at the company level, they maintain a direct relationship with the employer, making it challenging to ensure their independence from the employer.

- ✚ Unions require support to negotiate effectively with employers. This includes, in particular, government-funded training to enhance negotiating skills and provide information on trade union rights.
- ✚ Trade union officials must be granted the right to access the workplace.
- ✚ To ensure the financing of trade union activities, the payment of membership fees should be automatic and based on legislation.
- ✚ The requirements for establishing regional, sectoral, and national confederations should be minimal.



### (c) Consultation between employers and trade unions

- ✚ Employers must regularly inform trade unions within the company of all issues affecting employees and, on an ad hoc basis, of any significant changes.
- ✚ At the national level, there should be a permanent tripartite consultation body involving trade union confederation, employers' organisations, and the government. This body should meet regularly to discuss all relevant issues affecting the world of work. Consultation must also take place during the preparation of new labour legislation. To ensure the long-term effectiveness of this consultative body, its work should be organised and funded by the state.
- ✚ Regular consultation must also take place in the public sector, including the civil service. In such bipartite consultation, where there is no sectoral employers' association, national or sectoral trade union confederations should consult directly with the relevant ministry.

### (d) Promotion of collective bargaining

- ✚ Labour legislation should encourage employers to conclude collective agreements. One approach is to specify in the Labour Code the issues that can only be regulated through collective agreements. Expanding the exclusive scope of collective agreements would improve their regulatory power and encourage employers to engage in negotiations with trade unions.
- ✚ Employers' willingness to negotiate can also be increased by conditioning certain benefits on the conclusion of a collective agreement (such as access to subsidised employment, tax credits, or participation in public procurement procedures, etc.).
- ✚ An incentive-based policy to promote collective bargaining should include financial support for training in negotiation skills and free advisory services from public authorities.

#### (e) Individual protection of trade union members and officials

- ✚ Trade union officials must be protected from any negative consequences of their activities in the workplace. This includes protection from any form of retaliation or discrimination, such as disciplinary investigations, suspension from work, workplace bans, wage withholding, forced inactivity, dismissal, medical examinations, and the obligation to perform tasks unrelated to their job duties, etc. The law must stipulate dissuasive sanctions (e.g., fines) to deter employers from taking discriminatory actions. In cases of retaliation, national law must ensure adequate and proportionate compensation for the victim.
- ✚ To protect trade union members and representatives from retaliation, it is essential to have a public authority, such as an equality body or ombudsman, with sufficient financial and human resources, empowered to provide individual advice to victims of discrimination and represent them in court proceedings.

#### (f) The right to strike

- ✚ The requirements for calling a strike should not be excessive, as this would limit the ability to exercise this right. Strikes should be allowed both at the company level and beyond.
- ✚ The purpose of a strike should be broadly defined, without limiting it to industrial disputes with the employer at company level.
- ✚ The liability of workers participating in an illegal strike should be regulated restrictively, as this can deter workers from exercising this right.
- ✚ The scope of individuals entitled to strike should be extended. Workers in essential services such as centralised electricity, heat, and gas supply organisations should have the right to strike. However, the state may regulate the process to establish the level of minimum services that must be provided during the strike. Members of the armed forces, police, and security services should also have the right to strike, though this may be restricted by requirements such as providing minimum services during the strike, or through compulsory conciliation or even arbitration.

## **II. FREEDOM OF ASSOCIATION IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER**

### **1. Article 11 of the European Convention on Human Rights, Articles 5 and 6 of the European Social Charter**

Article 11 of the European Convention on Human Rights guarantees the freedom of assembly and association as follows:

*"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."*

The European Social Charter includes the following relevant provisions:

#### *Article 5 – The right to organise*

*"With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations."*

#### *Article 6 – The right to bargain collectively*

*"With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:*

- 1. to promote joint consultation between workers and employers;*
- 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;*
- 3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;*

*and recognise:*

*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."*

While Article 11 of the Convention affirms the freedom of association, Article 5 of the ESC<sup>3</sup> addresses the right to organise. Additionally, Article 6 of the ESC enshrines the right to collective bargaining and the right to strike, providing detailed rules on how these rights should be exercised. Despite the slight differences in wording, the understanding of trade union rights is similar in both the Convention and the ESC. In this report, I will use the term 'freedom of association', as it is the most commonly used term in international documents.

## **2. The relevance of the freedom of association as a pillar of democracy**

Freedom of association, the right to collective bargaining, and the right to strike are not only fundamental to the principles of industrial relations but are also essential for the effective implementation and realisation of many other basic social and labour rights. These collective rights serve as a means to support the enforcement of individual rights at work.<sup>4</sup> Trade unions are vital organisations in the protection and promotion of many fundamental rights of workers. They play an essential role in all democratic societies as defenders of workers' rights. Freedom of association is a cornerstone of democracy, enabling workers to voice their opinions and safeguard their interests.<sup>5</sup> As the European Committee of Social Rights has noted, the right to organise "is one of the pillars of democracy"<sup>6</sup>. Accordingly, the Committee has recommended that all States Parties to the ESC should accept Articles 5 and 6, as states that respect these provisions are more likely

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<sup>3</sup> The text of the European Social Charter, the Revised European Social Charter, and other key documents related to the Charters are available on the website of the Council of Europe: <https://www.coe.int/en/web/european-social-charter/charter-texts>.

<sup>4</sup> As the European Committee of Social Rights highlighted: "Not only do they guarantee some of the most fundamental rights, but they also allow other Charter provisions to be effectively guaranteed." See: *Conclusions XIV-1*, p. 42 (General Introduction).

<sup>5</sup> Tomuschat, *Freedom of Association*, in: MacDonald et al. (eds.), *The European System for the Protection of Human Rights*, 1993, p. 493.

<sup>6</sup> European Committee of Social Rights (ECSR), *Conclusions VIII*, p. 9.

to comply with other provisions of the ESC.<sup>7</sup> The significance of Articles 5 and 6 is demonstrated by the fact that they are among the so-called 'core' provisions.

The European Court of Human Rights has established in a number of judgments the inextricable link between democracy, pluralism, and freedom of association. The extent to which freedom of association is implemented in national law reflects the state of democracy within a country.<sup>8</sup> Indeed, the manner in which this freedom is enshrined in national legislation, and how it is practically applied by authorities, serves as a barometer for the state of democracy in a given country.<sup>9</sup> Similarly, the European Committee of Social Rights has stressed that the right to organise, by ensuring social dialogue between workers and employers, is also an important tool for achieving social justice and harmony.<sup>10</sup>

### **3. The individual and collective aspects of freedom of association**

Freedom of association guarantees, on the one hand, the right of workers' and employers' organisations to be freely established and to operate effectively, and on the other hand, the right of individuals to participate in collective labour relations. Thus, freedom of association comprises two rights: a collective right of associations and an individual right of workers. The individual right includes the right to form an association, join and belong to a trade union, refrain from joining a trade union, and to engage in union activities either as a member or representative. Collective rights include, among others, the right of trade unions to operate autonomously and effectively, including in particular the right to collective bargaining and the right to strike, the right to participate in national

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<sup>7</sup> ECSR, *Conclusions XIV-1*, p. 42 (General Introduction).

<sup>8</sup> *Sidiropoulos and Others v. Greece*, App.No. 26695/95, European Court of Human Rights judgment of 10 July 1998, §§ 38, 40.

<sup>9</sup> *Gorzelik and Others v. Poland* [GC], 2004, § 88; *Sidiropoulos and Others v. Greece*, European Court of Human Rights judgment of 1998, § 40.

<sup>10</sup> *Sindicatul "Păstorul cel Bun" v. Romania*, App. No. 2330/09, European Court of Human Rights judgment of 9 July 2013, § 130.

representative bodies, and the right to organise at national and international levels.<sup>11</sup> Freedom of association, therefore, holds both an individual character, as a human right and a collective character, since the guarantee of this right is an essential condition for the functioning of collective labour relations.<sup>12</sup> Both the collective and the individual aspects of this right must be safeguarded.

On the one hand, legal or practical pressure to join a union can interfere with the individual's right not to join a union. On the other hand, as *Kahn-Freund* aptly noted, a certain degree of social compulsion to organise may, under specific conditions, be a prerequisite for the effective functioning of collective labour relations.<sup>13</sup> The challenge, therefore, in the context of declining union membership, is to strike a delicate balance between the individual and collective components of the right to organise.

Based on these two aspects, the guarantee of freedom of association imposes two main obligations on states: first, to refrain from interfering with workers' interest organisations and to leave them a broad margin of discretion to carry out their activities freely; and second, to actively protect trade union members and officials from any disadvantage resulting from their association with trade unions. The obligation to refrain from interference requires the state to avoid infringing on fundamental trade union rights and to guarantee the freedom of workers to either join or refrain from joining a trade union, as well as the right to form an organisation of their choice. However, the mere absence of state interference is often not enough to guarantee the exercise of this right; individuals also require state measures to protect them from any external interference. This is why the second obligation contains a positive requirement: states must adopt appropriate legislation and create all the necessary legal instruments to ensure the practical exercise of freedom of association and to protect workers' organisation from any interference.<sup>14</sup>

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<sup>11</sup> About the individual and collective aspects of the right to organise in comparative view, see: Neal, Rights of Association (Trade Union Freedom) and Collective Bargaining, in: Neal (ed.), *Fundamental Social Rights at Work in the European Community*, 1999, pp. 101 et seqq.

<sup>12</sup> See in detail: Kahn-Freund, *Labour Relations and International Standards – Some reflections on the European Social Charter*, in: Van Der Meersch (ed.), *Miscellanea*, 1972, pp. 134-142.

<sup>13</sup> Kahn-Freund, *The European Social Charter*, in: Jacobs (ed.), *European Law and the Individual*, 1976, p. 138.

<sup>14</sup> ECSR, *Conclusions I*, p. 31 (General Introduction).

The report follows this structure, first addressing the collective aspects and then examining the individual aspects of freedom of association.

### **III. THE COLLECTIVE ASPECT OF FREEDOM OF ASSOCIATION – THE FORMATION OF TRADE UNIONS AND TRADE UNION ASSOCIATIONS**

#### **1. Outline and goals**

This chapter will address the formal and material conditions for the formation of a new trade union or trade union confederation. First, it will address the individuals protected by this right, as well as any exceptions that may apply. It will then explore the requirements that may be imposed for the establishment of a new trade union and analyse the potential impact of relatively low or high mandatory requirements on the trade union landscape. Furthermore, it will highlight the importance of ensuring the independence of trade unions from employers, the state, and other organisations. Finally, this chapter will discuss the justified restrictions on this right.

#### **2. Justified restrictions under Article 11 of the Convention**

Freedom of association is not an absolute right and may be subject to restrictions under three conditions: (1) the restriction is prescribed by law; (2) it pursues one or more legitimate aims; and (3) it is necessary in a democratic society to achieve the aim or aims in question.

##### (1) Restriction is Prescribed by Law

The restriction must be prescribed by law, which ideally means by a general-abstract norm. However, the Court has also accepted norms enacted below the statutory level, including court judgments.<sup>15</sup> On the other hand, simple administrative circulars or practices do not meet the criteria of the concept of law under Article 11 of the Convention.<sup>16</sup>

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<sup>15</sup> Kruslin case, European Court of Human Rights judgment of 24 April 1990, § 29.

<sup>16</sup> Malone case, European Court of Human Rights judgment of 2 August 1984, §§ 66-79.

The law must meet certain qualitative criteria: it must be precisely formulated and foreseeable by individuals, which means that the persons concerned should be aware of the consequences that a certain action may entail.<sup>17</sup> However, the Court has recognised that most laws contain ambiguous expressions, the interpretation and application of which can only be clarified through practice.<sup>18</sup> Consequently, it is sufficient that vague terms are interpreted in case law or official practice and that this practice is accessible to the public.<sup>19</sup> In addition, the law must be reasonably accessible: that is, citizens should be able to obtain adequate information on the applicable law.<sup>20</sup> The 'quality of law' criterion does not permit authorities to have a wide margin of discretion in deciding whether a particular association can be registered.<sup>21</sup> Judicial review must provide adequate and effective safeguards against arbitrary and discriminatory exercise of the wide discretion granted to the executive.<sup>22</sup>

## (2) Legitimate Aims of the Restrictions

The restriction must pursue at least one of the legitimate aims listed in Article 11(2) of the Convention: national security or public safety, the prevention of disorder or crime, the protection of health or morals, as well as the protection of the rights and freedoms of others. This list is exhaustive, and each aim must be interpreted narrowly. Only convincing and compelling reasons can justify restrictions on the freedom of association. States have only a limited margin of appreciation to assess whether the restriction is necessary.

In terms of the legitimate aims of the restrictions, the reference to national and public security has been a subject of particular concern. There have been frequent attempts to use these terms to justify the defense of national cultural traditions and national historical and cultural symbols. In the *Sidiropoulos* case, the Court stated that an association whose

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<sup>17</sup> Leander case, European Court of Human Rights judgment of 26 March 1987, §§ 50-52; Olsson case, European Court of Human Rights judgment of 24 March 1988, § 61; N.F. v. Italy, App. No. 37119/97, European Court of Human Rights judgment of 2 August 2001.

<sup>18</sup> Sunday Times case, European Court of Human Rights judgment of 26 April 1979, § 49.

<sup>19</sup> Malone case, European Court of Human Rights judgment of 2 August 1984, § 67; Leander case, European Court of Human Rights judgment of 26 March 1987, § 51; Kruslin case, European Court of Human Rights judgment of 24 April 1990, § 29.

<sup>20</sup> Sunday Times case, European Court of Human Rights judgment of 26 April 1979, § 49. See also Villiger, Handbook on the European Convention on Human Rights (ECHR), p. 313.

<sup>21</sup> Koretsky and Others v. Ukraine, App. No. 40269/02, European Court of Human Rights judgment of 3 April 2008, §§ 47-48; Yefimov and Youth Human Rights Group v. Russia, App. Nos. 12385/15 and 51619/15, European Court of Human Rights judgment, §§ 59-73.

<sup>22</sup> Ecodefence and Others v. Russia, App. No. 9988/13, European Court of Human Rights judgment of 14 June 2022, § 118.



aim is to promote the culture of a particular minority does not threaten territorial integrity, national security, or public order. The existence of minorities and different cultures within a country is a historical fact that, according to the principles of international law, should not only be tolerated but also protected and supported by a democratic society.<sup>23</sup>

### (3) Necessity and Proportionality of the Restriction

Restrictions on freedom of association must be necessary in a democratic society. Necessity does not imply indispensability, but requires that the measure be useful, reasonable, appropriate, or desirable.<sup>24</sup> The decisive criterion of necessity is functional necessity.<sup>25</sup> Only convincing and compelling reasons can justify restrictions on this freedom, meaning that any interference must meet a 'pressing social need'.<sup>26</sup>

The severity of the restriction on freedom of association must be proportionate to the objective. The legitimate aim pursued by the restriction of the freedom of association must be balanced against the severity of the interference with the rights of the individual. If there is a disproportion between the objective pursued and the means employed, the restriction will be deemed unlawful.<sup>27</sup>

## **3. Personal scope**

### (a) Workers and beyond

The freedom of association guaranteed under Article 11§2 of the Convention applies to all persons in an employment relationship. The Court defines an employment relationship by reference to ILO Recommendation No. 198. It considers that the determination of the existence of such a relationship should be guided primarily by the facts related to the performance of work and the remuneration of the worker, regardless of how the

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<sup>23</sup> Sidiropoulos case, European Court of Human Rights judgment of 10 July 1998, § 41.

<sup>24</sup> Handyside case, European Court of Human Rights judgment of 7 December 1976, § 48 ff; Young, James and Webster case, European Court of Human Rights judgment of 13 August 1981, § 63; Dudgeon case, European Court of Human Rights judgment of 22 October 1981, § 51.

<sup>25</sup> Council of Civil Service Unions, European Court of Human Rights judgment of 20 January 1987, § 69.

<sup>26</sup> *Guide on Article 11 of the European Convention on Human Rights*, updated on 29 February 2024, mn 158-159.

<sup>27</sup> Berrehab case, European Court of Human Rights judgment of 21 June 1988, §§ 28-29.

relationship is characterised in any contrary arrangement, whether contractual or otherwise, agreed upon by the parties. Furthermore, the Court references Article 2 of ILO Convention No. 87, which states that workers, without distinction of any kind, have the right to form organisations of their choice.<sup>28</sup> Prison work does not constitute an employment relationship, and therefore, a legal ban on the unionisation of working prisoners may be justified.<sup>29</sup>

Under the ESC regime, all categories of workers, including public servants, have the right to organise. With regard to unemployed persons and retired workers, the ECSR distinguishes between the individual and collective aspects of this right. These groups may join and remain in trade unions: however, states are not required to allow them to form trade unions. Instead, they must be allowed to form their own specialised organisations, which can participate in consultation processes to influence their rights and interests.<sup>30</sup>

Even members of the clergy, in this case, the priests of the Romanian Orthodox Church, could have the right to form a trade union.<sup>31</sup> However, Article 9 of the Convention stipulates that religious communities have the right to express their opinion on any collective activities of their members that might undermine their autonomy, and this opinion must be respected by national authorities. A balance must be struck between the conflicting rights protected by the Convention. Respect for the autonomy of religious communities, as recognised by the state, implies that the state should accept the right of these communities to respond to any dissident movements within them that could threaten their cohesion, image, or unity. Therefore, the judicial decision refusing to register the association was justified in light of the need to respect the autonomy of religious denominations.

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<sup>28</sup> *Sindicatul "Păstorul cel Bun" v. Romania*, App. No. 2330/09, European Court of Human Rights judgment of 9 July 2013, § 142; *Demir and Baykara v. Turkey*, App. No. 34503/97, European Court of Human Rights judgment of 12 November 2008, § 85.

<sup>29</sup> *Yakut Republican Trade-Union Federation v. Russia*, App. No. 29582/09, judgment of 7 December 2021, §§ 44-47.

<sup>30</sup> ECSR, Conclusions 2010, Statement of Interpretation, Article 5, 2010\_163\_03/Ob/EN.

<sup>31</sup> *Sindicatul "Păstorul cel Bun" v. Romania*, App. No. 2330/09, European Court of Human Rights judgment of 9 July 2013, §§ 140-145.

According to second sentence of Article 11§2 of the Convention, states may impose lawful restrictions on the exercise of freedom of association for the public administration. However, the concept of public administration must be interpreted narrowly. As such, it is not permissible to exclude workers in the health sector or local authorities from the right to organise. Municipal civil servants, who do not work in the state administration as such, are not considered to be 'members of the administration of the state' and, therefore, their right to organise cannot be restricted.<sup>32</sup> An absolute ban on civil servants forming trade unions is incompatible with Article 11 of the Convention.<sup>33</sup> The European Committee of Social Rights has also clarified that employees of the Public Prosecutor's Office and civilians employed by the security services should have the right to join and form organisations to protect their interests.<sup>34</sup>

However, in the interest of transparency, it is permissible to require public officials to submit a declaration of membership in any association of a political, cultural, social or economic nature. The objective of informing citizens of any conflicts of interest that may affect public administrators is a legitimate one.<sup>35</sup>

It should be noted that Article 19§4(b) of the ESC requires that foreigners be treated equally with nationals as regards membership in trade unions and the benefits of collective bargaining. This principle of equal treatment applies to workers who are lawfully present within the territory of the state concerned and to those rights that are regulated by law or by a regulation, or are subject to the control of administrative authorities.

### **Summary conclusions:**

- ✚ Members of the state administration must not be excluded from the right to join and form organisations to protect their interests. Even employees of the Public Prosecutor's Office and civilians employed by the security services should have the right to join and form organisations to protect their interests.

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<sup>32</sup> Demir and Baykara v. Turkey, European Court of Human Rights judgment of 12 November 2008, § 97.

<sup>33</sup> Tüm Haber Sen and Çınar v. Turkey, European Court of Human Rights judgment of 21 February 2006, §§ 36 and 40.

<sup>34</sup> ECSR, Conclusions on Article 5, 2018, 2022.

<sup>35</sup> Siveri and Chiellini v. Italy, App. No. 13148/04, European Court of Human Rights judgment of 3 June 2008.

- ✚ Foreigners legally residing in the country (migrants, refugees) must have the same rights as nationals to form and join trade unions and to engage in collective bargaining.

### (b) Police Officers

The second sentence of Article 5 of the ESC stipulates that the state may restrict, but not entirely deny, the right of police officers to association.<sup>36</sup> Any such restriction is permissible only if it is prescribed by law, pursues a legitimate aim and is necessary in a democratic society for the pursuit of that aim. Justifiable aims for restricting this right include the protection of the rights and freedoms of others, the protection of the public interest, national security, public health, or morals.<sup>37</sup> The European Committee of Social Rights has stated from the outset that, while a state may be permitted to limit the freedom of association for police officers, it cannot deprive them of all the guarantees provided under Article 5 of the ESC.<sup>38</sup>

The legal situation is in line with Article 5 of the ESC when police officers are denied the right to form trade unions, but are still allowed to form and join other professional associations with aims and powers similar to trade unions. The condition is that such organisations have basic trade union prerogatives, such as the right to negotiate working conditions and pay, the right of access to the workplace, and the right of assembly and speech.<sup>39</sup>

As long as basic trade union rights are guaranteed, states may make distinctions between different categories of police personnel, granting more or less favourable treatment to these categories. The complete exclusion of senior police officers from the scope of the right to organise is only exceptionally allowed, subject to two conditions: it must be justified under Article G of the ESC and affect only a limited number of senior officials.<sup>40</sup>

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<sup>36</sup> ECSR, European Council of Police Trade Unions (CESP) v. Portugal, Complaint No. 11/2001, Decision on the merits of 22 May 2002, § 25.

<sup>37</sup> Article G of the ESC.

<sup>38</sup> ECSR, Conclusions I, Statement of Interpretation, Article 5.

<sup>39</sup> Council of Europe, Digest of the Case Law of the European Committee of Social Rights, 2022, p. 83.

<sup>40</sup> ECSR, European Council of Police Trade Unions (CESP) v. Portugal, Complaint No. 11/2001, Decision on the merits of 22 May 2002, § 27.

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*In the EuroCOP case, the European Committee of Social Rights accepted the justified exception concerning 12 senior police officers out of a total of 13 500.*

*Source: ECSR, European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012, Decision on the admissibility and merits of 2 December 2013, §§ 78, 79, 109.*

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The second sentence of Article 11§2 of the Convention allows states to impose lawful restrictions on the exercise of freedom of association by members of the police force. The specificity of police trade unions lies in the fact that their members are employed by the relevant ministry, meaning that demands for higher pay and better working conditions can be interpreted as criticism of the government, and thus, as a political statement. This was highlighted in the case of *Trade Union of the Police of the Slovak Republic and Others v. Slovakia*.<sup>41</sup> In this case, the police union organised a public demonstration in one of the main squares in Bratislava to protest against proposed changes to the law on social security for police officers and to demand higher pay. During the protest, participants spontaneously called for the resignation of the government.

The Court, by five votes to two, concluded that it was justified to sanction the union leader with a demotion and to threaten police officers with dismissal if they participated in similar public demonstrations in the future.<sup>42</sup> Given that the role of police officers in a democratic society is to assist the government in performing its functions, the duty of loyalty and discretion is of particular importance. The Court accepted that police officers must act impartially and with restraint when expressing their views in public, so as to avoid any doubt regarding their neutrality. Maintaining public confidence in the police is an indispensable condition for the effective performance of their duties, which include ensuring public safety, preventing disorder or crime and protecting the rights and freedoms of citizens. However, disproportionate sanctions must not discourage trade union representatives from seeking to express and defend the interests of their members.

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<sup>41</sup> *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, App. No. 11828/08, European Court of Human Rights judgment of 25 September 2012, §§ 67-70.

<sup>42</sup> The judgment was controversial, with two judges dissenting, arguing that the sanctions imposed by the Minister violated Article 11 of the Convention.

## Summary conclusions:

✚ In order to comply with Article 5 of the ESC and Article 11 of the Convention, it must be ensured that members of the police force are not prohibited from forming associations to protect their interests. Police officers should have the right to form organisations that represent and defend their interests, with rights similar to those of trade unions. While their right to express opinions in public may be subject to restrictions, particularly with regard to criticism of the government, such limitations should be proportionate and justified.

### (c) Armed forces

The final sentence of Article 5 of the ESC permits states to restrict the right of association for members of the armed forces. While states have a wide margin of discretion in this regard, they must take into account the provisions of Article G of the ESC. The scope of armed forces personnel who may be excluded from the right to organise must be defined narrowly. A total ban on all professional associations of a trade union nature would violate the right to organise. National security concerns cannot justify the complete suppression of the right to join or refrain from joining a trade union or the right to form a trade union. Finally, a total ban on military representative associations from joining national workers' organisations is neither necessary nor proportionate and is, therefore, incompatible with Article 5 and G of the ESC.<sup>43</sup>

According to second sentence of Article 11§2 of the Convention, states are permitted to impose lawful restrictions on the exercise of the freedom of association by members of the armed forces. The Court emphasised that such restrictions must be interpreted strictly and may not undermine the very essence of the right to organise. Any interference with the exercise of trade union freedom must be 'prescribed by law', pursue one or more legitimate aims, and be 'necessary in a democratic society' for the pursuit of those aims. Regarding to pursuit of a legitimate aim and the proportionality of the measure in

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<sup>43</sup> ECSR, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Complaint No. 140/2016, Decision on the merits of 22 January 2019, §§ 90-92.

question, the Court reiterated that the term 'order', as used in Article 11§2 of the Convention, refers not only to 'public order' but also to the internal order that should prevail within specific social groups, such as the armed forces, as disorder within that group could affect societal order as a whole. An outright ban on forming or joining a trade union is, therefore, not a measure 'necessary in a democratic society'.<sup>44</sup>

The European Court of Human Rights has accepted that trade union activity must be adapted to the specific nature of the armed forces' mission, and that even significant restrictions may be imposed on the forms of action and expression of a professional association and its members. However, such restrictions must not deprive them of the general right of association in order to defend their professional and non-pecuniary interests.<sup>45</sup> Therefore, it is contrary to Article 11 of the Convention for a government to prohibit members of the armed forces from forming trade unions or other professional associations of a trade union nature, the purpose of which is to protect the interests of their members. Even members of the armed forces cannot be entirely deprived of the right to form and join associations aimed at defending the professional and social interests of their members.<sup>46</sup>

### **Summary conclusions:**

- ✚ Members of the armed forces shall have the right to form and join associations to defend their interests. The state may impose restrictions on the manner in which the association expresses its views publicly and on its activities, provided that such restrictions are proportionate and necessary to maintain public order. Only a very small group of armed forces members may be completely excluded from the right of association, and only if such exclusion is necessary to protect the public interest and national security.

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<sup>44</sup> Matelly v. France, App. No. 10609/10, European Court of Human Rights judgment of 2 October 2014, §§ 55-62.

<sup>45</sup> Ibid., § 71.

<sup>46</sup> Adefdromil v. France, App. No. 32191/09, European Court of Human Rights judgment of 2 October 2014, §§ 55-60.

#### (d) Self-employed and employee-like persons

In many countries, there is an ongoing debate about whether trade unions should also represent employee-like and self-employed workers (for further details, see below: Article 6 - Personal scope). Employee-like persons are those who perform work without being fully dependent on an employer, or with limited dependence, i.e. they have the freedom to choose their working hours, place of work, and working methods. However, they still carry out their work personally and are often economically dependent on a single primary source of income. Therefore, they need protection similar to that of employees.

Solo self-employed individuals often carry out their activities under conditions similar to those of employee-like persons. For instance, food delivery drivers and couriers may be

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*The European Commission adopted Guidelines on collective agreements for solo self-employed persons in 2022. These Guidelines argue that solo self-employed individuals are in a situation comparable to workers if they: (i) provide services exclusively or predominantly to one undertaking, (ii) work side-by-side with workers, and (iii) provide services to or through a digital labour platform. Due to their weak negotiating position against economically stronger companies, they should have the right to conclude collective agreements.*

*Source: Communication from the Commission – Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, 2022/C 374/02.*

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considered employee-like persons or even workers, but they are frequently classified as self-employed. The deprivation of worker status leads to numerous disadvantages in terms of labour rights and social security protection.

It is important to consider the situation of self-employed rural workers, such as farmers. The Court refers to ILO Convention No. 141 on Rural Workers' Organisations and ILO Convention No. 11 on the Right of Association in Agriculture. According to Article 1 of the latter, ILO Member States are required to ensure to all persons engaged in agriculture



enjoy the same rights to freedom of association as workers in industry, and to abolish any legislative or other provisions that restrict these rights.<sup>47</sup> Given the sensitivity of the social and political issues involved in rural employment, as well as the wide divergence between national systems in this area, the Court concludes that states enjoy a wide margin of appreciation in determining how to ensure freedom of association for self-employed farmers. In the case *Manole*, the Court found that the exclusion of self-employed farmers from the right to form trade unions did not violate Article 11 of the Convention, as they were still entitled to form professional associations that had essential rights, enabling them to defend the interests of their members vis-à-vis the public authorities.<sup>48</sup>

#### (e) Platform and Remote Workers

Another challenge for trade unions is reaching out to workers who do not operate within an employer-designated workplace but instead work regularly in the gig economy as platform or remote workers. Due to the nature of the work, which occurs outside the traditional workplace, unions face difficulties in organising and communicating with these workers, as they cannot rely on conventional methods of outreach. To overcome this, unions need to develop new methods of gathering information from platform workers and disseminating it systematically to ensure that information is circulated. Another challenge for trade unions is the unclear classification of these workers, who may be categorised as employees, self-employed individuals or as occupying a hybrid status between these two categories. Platform work is often performed in the framework of a complex multi-party relationships that blurs responsibilities between the digital labour platform and the intermediaries. Platform workers who work through intermediaries should receive the same level of protection as those with a direct contractual relationship with the digital labour platform.<sup>49</sup>

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<sup>47</sup> *Manole and "Romanian Farmers Direct" v. Romania*, App. No. 46551/06, European Court of Human Rights judgment of 16 June 2015, §§ 68-75.

<sup>48</sup> *Ibid.*, §§ 163-166.

<sup>49</sup> Directive (EU) 2024/2831 on Improving Working Conditions in Platform Work, Recital 24 of the Preamble.

A further issue is identifying their social partners, although work platforms are often perceived as the de facto employers of platform workers, thereby becoming the primary bargaining partners.<sup>50</sup> In many EU Member States, trade union initiatives have been established to organise platform workers, serving as a good example.<sup>51</sup> In nearly every European country, courts have been tasked with determining whether platform workers should be classified as employees or self-employed (or as part of a third, intermediate category).<sup>52</sup>

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*The European Union adopted the Directive (EU) 2024/2831 on improving working conditions in platform work, addressing issues of misclassification of employment contracts and algorithmic management. Article 25 of the Directive requires the Member States to promote collective bargaining in platform work: "Member States shall, without prejudice to the autonomy of the social partners and taking into account the diversity of national practices, take adequate measures to promote the role of the social partners and encourage the exercise of the right to collective bargaining in platform work, including measures with regard to the determination of the correct employment status of platform workers and to facilitate the exercise of their rights related to algorithmic management set out in Chapter III."*

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## 4. The Right to Form a Trade Union

### (a) Workers' Organisations Protected by the Freedom of Association

The concept of 'association' within the meaning of Article 11 of the Convention must be interpreted autonomously. The formation of an association must be voluntary, with members sharing a common purpose, and the association itself must have a permanent nature. Similarly, Article 5 of the ESC safeguards the rights of not only trade unions but

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<sup>50</sup> For further details see: Johnston/Land-Kazlauskas, Organizing on-demand: Representation, voice, and collective bargaining in the gig economy, ILO, Conditions of Work and Employment Series No. 94, 2019.

<sup>51</sup> See the detailed database of Eurofound with many examples of national initiatives: <https://apps.eurofound.europa.eu/platformeconomydb/> (last visited on 30 September 2024).

<sup>52</sup> See a comprehensive analysis of the case law in the European states: Hiebl, Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions, updated in February 2024, available at SSRN: <https://ssrn.com/abstract=3839603> (last visited on 30 September 2024).

also all forms of local, national, or international organisations of workers whose principal objective is the advancement of their members' economic and social interests.

Freedom of association applies only to organisations with a private law character. Institutions and associations under public law are not within the scope of Article 11 of the Convention. There are often organisations with mixed characteristics, i.e. they have both private and public law elements. To determine whether an association is protected by Article 11 of the Convention, one must examine its purpose, activities, and functions.<sup>53</sup> Further requirements are that the natural persons have voluntarily joined together to pursue common interests and that the organisation has not been granted the right to exercise sovereign powers, such as administrative and disciplinary authority.<sup>54</sup>

A public law institution set up by the legislator – such as a public university or a tourism federation<sup>55</sup> – is not considered an association within the meaning of Article 11 of the Convention. Professional associations that regulate and promote a profession while also exercising significant public functions for public protection (such as doctors' associations, architects' associations, bar associations, chambers of notaries, and chambers of craftsmen), do not fall within the scope of Article 11.<sup>56</sup> Even if membership in a particular professional association is compulsory, members of the profession are still free to form and join their own trade unions.<sup>57</sup>

### (b) The Free Establishment of Trade Unions

#### *No authorisation process*

The right to organise implies that trade unions can be formed without the need for authorisation and without excessive administrative or other burdens. However, the state may impose some basic formalities to ensure the proper functioning of trade unions, provided that these formalities do not create real obstacle to the formation of trade

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<sup>53</sup> Sigurdur A. Sigurjónsson, European Court of Human Rights judgment of 30 June 1993, § 31; Chassagnou case, European Court of Human Rights judgment of 29 April 1999, §§ 98-101.

<sup>54</sup> Chassagnou case, European Court of Human Rights judgment of 29 April 1999, § 101.

<sup>55</sup> Köll v. Austria, App. No. 43311/98, European Court of Human Rights judgment of 4 July 2002.

<sup>56</sup> See European Court of Human Rights, Guide on Article 11 of the European Convention on Human Rights, updated on 29 February 2024, pp. 25-26.

<sup>57</sup> Case Compte, Van Leuven and DeMeyere, European Court of Human Rights judgment of 23 June 1981, § 65; Ezelin case, European Court of Human Rights judgment of 26 April 1991, §§ 64-65.

unions — that is, they should not prohibit or prevent their establishment. Regarding the elements necessary for the free establishment of trade unions, the ECSR has stated that “the right to constitute trade unions can be effectively implemented only if the creation itself, the accession to an existing association, its hypothetical affiliation to other organisations and its internal organisation and internal operation are protected by appropriate guarantees.”<sup>58</sup>

### *Autonomy in internal affairs – organisation and administration*

Both Article 11 of the Convention and Article 5 of the ESC recognise the autonomy of trade unions, meaning they should be free to organise and manage their internal affairs and structure without restriction or interference from the state. Autonomy includes the freedom to choose the means for enforcing trade union decisions and to decide on the use of their property.<sup>59</sup> Associations should have the right to choose an appropriate name, establish governing bodies, draft their own rules, and manage their own affairs.<sup>60</sup> Nevertheless, states are permitted to establish certain minimum requirements concerning the role and structure of an association’s governing body.

### *Registration requirements*

Formal requirements and administrative rules, such as compulsory registration, are compatible with Article 5 of the ESC, provided they do not create a real obstacle to the formation of a trade union. An important safeguard for the freedom to form trade unions is the availability of adequate remedies against refusals to register. The registration process must be completed within strict time limits, typically not exceeding one month.<sup>61</sup> Only registration fees that simply cover the necessary administrative costs are permissible.<sup>62</sup>

The requirement for workers’ organisations to submit their statutes for inclusion in an official register does not violate Article 5 of the ESC, provided that the authority can

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<sup>58</sup> ECSR, Complaint No. 11/2000 from the European Council of Police Trade Unions against Portugal, § 28.

<sup>59</sup> See ECSR, Conclusions XII-1, p. 115 (United Kingdom); Conclusions XIII-3, p. 109 (United Kingdom).

<sup>60</sup> Yakut Republican Trade-Union Federation v. Russia, App. No. 29582/09, European Court of Human Rights judgment of 7 December 2021, § 30.

<sup>61</sup> For example, in Romania 27 days, ECSR, Conclusions 2006 Vol. 2, Article 5 (Romania); in Croatia 30 days, ECSR, Conclusions XVIII-1 Vol. 1, p. 120 (Croatia); in Albania 60 days, ECSR, Conclusions 2006 Vol. 1, p. 34 (Albania).

<sup>62</sup> ECSR, Conclusions III, p. 30 (Introduction); Conclusions XV-1 Vol. 2, p. 629 (United Kingdom).

refuse registration only on reasonable grounds and adequate remedies exist in case of refusal.<sup>63</sup> It is consistent with the Charter for an organisation to be required to submit its statutes, including its most important data, such as registered office, representative bodies, and the method of election to the executive body, provided that adequate remedies are available against refusal.<sup>64</sup>

### *Selection of own members*

The right of a trade union to choose its own members and representatives is a fundamental aspect of its autonomy. Article 11 of the Convention does not impose an obligation on associations to accept anyone who wishes to join.<sup>65</sup> Trade unions are free to establish their own rules regarding membership conditions, including administrative formalities, payment of fees, and other substantive criteria, such as the profession or trade of the prospective member. In addition, trade unions are not required to maintain political neutrality and may, in fact, be ideologically driven, with strong views on social and political matters. Therefore, unions are allowed to expel a member for being a member of a political party whose views are incompatible with those of the union.<sup>66</sup>

However, there are limits to the union's right to select its members. States must ensure that individuals are not excluded on discriminatory grounds. This principle derives from the Preamble and Article E of the ESC. Consequently, the exclusion of foreign nationals from trade union membership is prohibited (see above, Chapter III.3 on personal scope).<sup>67</sup>

### *Minimum membership requirements*

Several countries impose minimum membership requirements for the formation of a trade unions. However, if the number is excessively high, it could constitute an obstacle to the formation of trade unions and, as such, violate the right to freedom of association.<sup>68</sup>

In Eastern European countries, there appears to be a tendency for legislation to set minimum number of members, but these are often quite low. In Bulgaria and Moldova, as

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<sup>63</sup> ECSR, Conclusions VIII, p. 81 (Spain).

<sup>64</sup> ECSR, Conclusions X-2, p. 68-69 (Spain); Conclusions XI-2, p. 75 (Spain).

<sup>65</sup> Yakut Republican Trade-Union Federation v. Russia, App. No. 29582/09, European Court of Human Rights judgment § 30.

<sup>66</sup> Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom, European Court of Human Rights judgment of 2007, §§ 38-39, 50.

<sup>67</sup> ECSR, Conclusions XV-1, pp. 198-199 (Finland).

<sup>68</sup> ECSR, Conclusions XIII-5, p. 172 (Portugal).

few as three people can form a union. In Poland, Hungary, and Croatia, at least ten people are required to form a union, while in Romania, the requirement is fifteen. In Albania, twenty founding members must sign the statutes to establish a new trade union.<sup>69</sup> These membership requirements have been found to be in line with the Charter.

In some cases, the ECSR has found the number of founding members required to be too high. For example, Lithuanian law requires at least 30 founding members or at least three founding members representing one fifth of the employees. The Committee considered this requirement to be excessive.<sup>70</sup> In Latvia, at least 50 members or at least one quarter of the employees of an enterprise, organisation, profession, or industry are required to establish a trade union.<sup>71</sup> Such a high number of members required to form a trade union was deemed an excessive restriction on the right to organise and, as such, incompatible with Article 5 of the ESC.

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*According to ILO jurisprudence, a minimum requirement of 30 workers is acceptable for sectoral unions, but not at the company level, as it could hinder the establishment of trade unions at the company level. A minimum of 20 members is generally considered acceptable; however, a minimum membership requirement of 30 per cent of the workers concerned is deemed too high. The threshold should be assessed in light of the circumstances prevailing in the given country, including, for example, the prevalence of small and medium-sized enterprises (SMEs) in that country.*

*Source: ILO, Freedom of Association Digest 2006, p. 60 et seq.*

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### (c) Right of Access to the Workplace

Trade union representatives have the right to access the workplace, even if they are not employed there.<sup>72</sup> This access is essential for unions to communicate with workers about the potential benefits of unionisation, fulfill their representational duties, and safeguard their members' interests. However, trade unions must respect the employer's right to

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<sup>69</sup> ECSR, Conclusion 2004 Vol. 1, p. 32 (Bulgaria); Conclusions 2006 Vol. 2, Article 5 (Moldova); Conclusions 2004 Vol. 1, p. 141 (Estonia); Conclusions XVII-1 Vol. 2, p. 283 (Malta); Addendum to Conclusions XV-1, p. 146 (Poland); Conclusions XVI-2, p. 404 (Hungary); Conclusions XVIII-1 Vol. 1, p. 120 (Croatia); Conclusions 2002, p. 125 (Romania); Conclusions 2006 Vol. 2, p. 34 (Albania).

<sup>70</sup> ECSR, Conclusions 2004 Vol. 2, p. 340 (Lithuania); Conclusions 2006 Vol. 2, Article 5 (Lithuania).

<sup>71</sup> ECSR, Conclusions XVII-2, Vol. 2, p. 473 (Latvia).

<sup>72</sup> ECSR, Conclusions 2010, Armenia, Article 5.

property and management, taking the employer's legitimate interests into account when exercising this right.

Access to the workplace should not interfere with the efficient operation of the enterprise or public body concerned.<sup>73</sup> Therefore, trade unions and the employers should strive to reach an agreement ensuring that union representatives are granted access to the workplace — both during and outside working hours — without compromising the effective functioning of the enterprise or public body concerned.

### **Summary conclusions:**

- ✚ Trade union officials have the right to access the workplace. When exercising this right, they must consider the employer's legitimate interest in ensuring the efficient operation of the workplace.

#### (d) Confederation of Trade Unions

Article 5 of the ESC affirms that workers and employers have the right to form and join local, national or international organisations without restriction. This means that employers' and workers' organisations are free to join national and international organisations of their choosing. All trade union organisations must have the freedom to decide which trade union, professional, or technical association they wish to join.<sup>74</sup>

According to Article 11 of the Convention, the right to form trade unions includes the right of trade unions to join trade union confederations. Conversely, confederations are equally free to determine whether to admit a particular trade union.<sup>75</sup>

In Armenia, trade unions and employers' organisations may establish confederations at regional, sectoral and national levels and are free to join them. Notably, both the International Labour Organization and the European Committee of Social Rights have

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<sup>73</sup> ECSR, Conclusions 2014, Serbia, Article 5, 2014/def/SRB/5/EN; see also ILO, *Freedom of association - Compilation of Decisions of the Committee on Freedom of Association*, 6<sup>th</sup> ed., 2018, nos. 1588-1599.

<sup>74</sup> ECSR, Article 5, Conclusions II, p. 184 (Cyprus).

<sup>75</sup> Yakut Republican Trade-Union Federation v. Russia, App. No. 29582/09, European Court of Human Rights judgment of 7 December 2021, § 30.

recommended lowering the minimum membership requirements to facilitate the formation of multiple organisations at various levels.

### **Summary conclusions:**

- ✚ The requirements for establishing regional, sectoral, and national confederations should be lowered.

## **IV. THE COLLECTIVE ASPECT OF FREEDOM OF ASSOCIATION – TRADE UNION ACTIVITIES**

### **1. Introduction**

This chapter focuses on the capacity of trade unions to conclude collective agreements and on collective bargaining systems. It provides an overview of various collective bargaining models adopted in different countries, outlining their respective advantages and disadvantages. The chapter also explores the role of collective agreements in regulating workers' rights and obligations by analyzing the issues they typically address. Particular attention is given to whether these agreements have a real impact on employment relationships or merely restate rights already guaranteed by the Labour Code. Finally, the report highlights the importance of engaging national trade union confederations in regular tripartite consultations with national employers' confederations and the government.

### **2. The European Union directive on adequate minimum wages: A crucial instrument to reduce in-work poverty and guarantee a decent standard of living**

The European Union recognises that collective bargaining should be the primary mechanism for setting wages, offering several advantages over wage determination through national legislation. In line with this, the EU has adopted a Directive to promote adequate minimum wages across Member States by reinforcing collective bargaining systems.<sup>76</sup>

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<sup>76</sup> Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on Adequate Minimum Wages in the European Union.



Strong collective bargaining is essential for ensuring adequate minimum wage protection and improving workers' conditions. Effective bargaining and broad coverage of collective agreements contribute to setting fair wages and supporting a decent standard of living.<sup>77</sup> Notably, collective agreements often secure higher minimum wages than those established by statutory regulations. Countries with strong collective bargaining systems generally have fewer low-paid workers and higher overall wages. Consequently, these agreements play a crucial role in reducing in-work poverty and guaranteeing a decent standard of living for workers.<sup>78</sup>

### **3. Article 6 of the European Social Charter and Article 11 of the Convention**

#### (a) Personal Scope – Who Can be Covered by Collective Agreements?

Article 6 of the ESC guarantees the right to collective bargaining and the right to strike. The article does not provide exceptions regarding the personal scope of these rights, meaning that any restrictions on collective bargaining must comply with Article G of the ESC.

The ECSR has emphasised that trade unions should have the right to negotiate on behalf of self-employed workers and others who fall outside the typical definition of dependent employees, provided these workers are, de facto, dependent on one or a few employers. An outright prohibition on collective bargaining for all self-employed workers would be excessive and contrary to the object and purpose of Article 6.

In determining which forms of collective bargaining are protected under the ESC, it is insufficient to rely solely on the employee/self-employed distinction. The decisive criterion should be whether there is an imbalance of power between labour providers and employers. Where providers of labour lack significant influence over the terms and conditions of their contract, they must be granted the opportunity to correct this power imbalance through collective bargaining.<sup>79</sup>

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<sup>77</sup> Ibid., Recitals 16 and 22 of the Preamble.

<sup>78</sup> Ibid., Recitals 13 and 25 of the Preamble.

<sup>79</sup> ECSR, Decision on the merits: Irish Congress of Trade Unions v. Ireland, Complaint No. 123/2016, §§ 37-38.

The ECSR examined the situation of voice-over actors, musicians and freelance journalists in Ireland, who were classified by the Irish Competition Authority as undertakings. Based on this classification, the Authority prohibited the application of collective agreements that set minimum rates and other employment conditions to these workers.<sup>80</sup>

Although ensuring effective and undistorted competition in trade is a legitimate objective, the prohibition on collective bargaining was deemed excessive and unnecessary in a democratic society, thus violating Article 6§2 of the ESC. The ECSR did not find it necessary to determine whether the self-employed workers in question were 'false self-employed' or 'fully dependent self-employed workers'. The key factor was that these workers could not primarily be characterized as 'genuine independent self-employed individuals', as they did not meet several of the typical criteria, such as having multiple clients, the authority to hire staff, or the ability to make strategic decisions regarding how to operate their business.

The bottom line was that those providing services in such a dependent capacity were obviously not in a position to influence their remuneration without the right to collective bargaining.<sup>81</sup> Therefore, these dependent self-employed workers should be entitled to the right to bargain collectively.

### **Best practice:**

In some countries, a third category of workers exists who can engage in collective bargaining — economically dependent, employee-like workers. In Germany, individuals who are economically dependent and require social protection similar to that of employees (referred to as employee-like persons) are permitted to conclude collective agreements. The conditions for this are: (1) they work for other persons on the basis of service or work contracts, (2) they provide the services owed personally and essentially without the cooperation of other employees, and

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<sup>80</sup> ECSR, Decision on the merits: Irish Congress of Trade Unions v. Ireland, Complaint No. 123/2016.

<sup>81</sup> Ibid., §§ 98-99.

3) they primarily work for one employer or receive more than half of their total income from one employer.<sup>82</sup>

### **Summary conclusions:**

✚ The right to collective bargaining is not limited to those in traditional employment relationship. Self-employed workers should also have the right to bargain collectively with the service provider when there is a significant imbalance of power between the labour providers and users, preventing the self-employed from influencing their working conditions. A key indicator of such a situation is when the self-employed rely on only one or a few service providers, but in the latter case, a substantial portion of their income is derived from a single provider. Additionally, self-employed workers often do not have employees of their own and primarily use the means of production (such as materials, equipment, infrastructure, know-how, client lists, etc.) provided by the service provider, rendering them economically dependent on that provider.

#### (b) Consultation between the Two Sides of Industry (Article 6§1 of the ESC)

Article 6§1 of the ESC requires states to promote joint consultation between workers and employers to ensure the effective exercise of the right to collective bargaining. Such consultations must occur at national, regional, sectoral and company levels. Joint consultation encompasses all forms of dialogue between social partners, with or without the participation of government representatives. According to Article 6§1 of the ESC, consultations should address all matters of mutual interest, in particular: health, safety, and welfare at work, working conditions, vocational training, and other work-related issues.

Employers or employers' organisations must provide trade unions with relevant information on all issues affecting employees. This exchange of information should

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<sup>82</sup> Article 12a of the German Collective Agreement Act (*Tarifvertragsgesetz*).

happen regularly, as well as on an *ad hoc* basis when significant changes arise. In certain cases, employers are also required to consult trade unions before making key decisions.

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*The European Union requires its member states to establish national rules on information and consultation before the employer can make around 10% of the workforce redundant within 30 days (known as collective redundancies). Similarly, when an employer decides to restructure a company, they must inform workers' representatives and even consult with them on measures to mitigate the impact of the decision on employees.*

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States must take positive steps to promote consultation between trade unions and employers' organisations. Where such consultation does not occur spontaneously, the state should establish permanent bodies and mechanisms ensuring equal and joint representation of trade unions and employers' organisations.<sup>83</sup>

At the national level, consultation should take place before setting statutory minimum wages and before introducing any changes to labour legislation. To ensure effective consultation, states may require trade unions to meet representativeness criteria, provided these criteria are prescribed by law, are objective, proportionate, and subject to judicial review (see Representativity below).<sup>84</sup>

Consultation must also extend to the public sector, including the civil service. For example, in Italy, the Guardia di Finanza (Finance Police) operates under the authority of three different ministries, depending on the area of responsibility. In such cases, the appropriate social partner — acting as the formal employer — should be the ministry responsible for social and labour affairs.<sup>85</sup> In Armenia, sectoral-level collective bargaining in the public sector remains challenging due to the absence of a social partner on the employers' side willing or able to engage in negotiations with the sectoral trade union confederation.

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<sup>83</sup> ECSR, Decision on the merits of 9 May 2005: Centrale Générale des Services Publics (C.G.S.P.) v. Belgium, Collective Complaint No. 25/2004, § 41.

<sup>84</sup> ECSR, Conclusions 2006, Article 6, Albania; Conclusions 2010, Article 6§1, Ukraine.

<sup>85</sup> ECSR, Conclusions III (1973), Denmark, Germany, Norway, Sweden; Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 140/2016, Decision on the merits of 22 January 2019, §107.

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### **The ILO approach**

*The ILO Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113) encourages states to promote effective consultation and cooperation at both industrial and national levels between public authorities and employers' and workers' organisations. Consultations should be conducted in good faith, with trust and mutual respect, allowing sufficient time for the parties to express their views and discuss them fully with a view to reaching an appropriate compromise.*

*The most representative employers' and workers' organisations, and particularly the confederations, should be consulted on matters of mutual interest, especially on the preparation and application of legislation concerning trade union matters, any legislation in the field of labour law and on the fixing of minimum wages.*

*Draft laws or decrees affecting collective bargaining or employment conditions should be submitted to representative workers' and employers' organisations for consultation well in advance of their adoption by the government, as a prerequisite for their consideration by parliament.*

*Source: ILO, Freedom of association - Compilation of decisions of the Committee on Freedom of Association, 6th ed., 2018, Nos. 1522, 1523, 1533, 1536, 1539, 1540, 1543, 1544, 1548.*

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### **Summary conclusions:**

-  Employers must regularly inform trade unions within the company about all matters affecting employees and provide *ad hoc* updates on any significant changes.
-  A permanent tripartite consultation body should be established at the national level, involving trade union confederations, employers' organisations, and the government. This body must convene regularly to discuss new or amended regulations affecting the world of work. To ensure its sustainability, the state should organise and finance its operation.
-  The most representative trade union associations and employers' organisations must be fully consulted on all matters of mutual interest, including the setting of minimum wages. They must be consulted on the preparation and application of legislation affecting their interests before the legislative process begins.

- ✚ Regular consultation must also take place in the public sector, including the civil service. In the absence of a sectoral employers' association, bipartite consultations should be conducted between the national or sectoral trade union confederation and the relevant ministry.

(c) Promotion of Voluntary Negotiation (Article 6§2 of the  
ESC) and Promotion of Conciliation and Voluntary  
Arbitration for the Settlement of Labour Disputes (Article  
6§3 of the ESC)

Article 6§2 of the ESC requires states to promote the machinery for voluntary negotiations between employers or employers' associations and workers' organisations, with a view to regulating terms and conditions of employment by means of collective agreements. Consequently, if the spontaneous development of collective bargaining is not sufficient, state must take positive measures to facilitate and encourage the conclusion of collective agreements. If collective agreements cover only 30% or less of the total number of employees, this indicates that the state is not sufficiently promoting collective bargaining in practice.<sup>86</sup>

Whatever procedures are established, collective bargaining must remain free and voluntary. Trade unions are free to choose the matters they wish to regulate and determine the means and methods for promoting and defending the interests of workers. Similarly, Article 11 of the Convention emphasises that collective bargaining should be voluntary. The essence of a voluntary system of collective bargaining is that a trade union, even if not recognised by an employer, must have the right to take actions — including organising industrial action — to persuade the employer to enter into collective bargaining on issues the union deems important to its members.

Article 6§3 of the ESC requires states to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes.

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<sup>86</sup> ECSR, Conclusions 2014, Slovak Republic, Article 6§2.

This is particularly relevant for conflicts of interest, specifically those concerning the conclusion or amendment of collective agreements.

Chapter 11 of the Armenian Labour Code outlines the procedures for settling collective labour disputes. The first step involves a compulsory conciliation procedure within a conciliation committee, which consists of an equal number of representatives from the parties involved in the dispute. If the conciliation committee fails to reach an agreement, the parties can appeal to the court within ten days from the date the record of disagreement is drawn up. However, the major disadvantage of this system is that the court procedure is not the appropriate mechanism for resolving collective disputes and for concluding collective agreements.

### **Summary conclusions:**

-  Labour regulations should create incentives for employers to conclude collective agreements. One way to achieve this is by specifying in the Labour Code the issues that cannot be regulated unilaterally by the employer, but must be addressed through collective agreements. Expanding the scope of issues exclusively covered by collective agreements would enhance their regulatory power and motivate employers to negotiate with trade unions. For example, making the regulation of flexible working arrangements conditional on the conclusion of collective agreements could be an effective measure. However, it is important not to delegate the most important protection rights to the social partners, but to maintain the level of legal guarantees for workers. Additionally, clear distinctions should be made regarding what can be regulated at the workplace level versus what must be regulated at sectoral or regional level.<sup>87</sup>
-  Employers' willingness to negotiate can be further encouraged by linking certain benefits to the conclusion of collective agreements, such as access to subsidised employment, tax credits, or eligibility for participation in public procurement procedures.

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<sup>87</sup> Same suggestion in: Gyulavári/Kártyás (ed.), Shadow Report on the Regulation of Collective Agreements in Hungary, June 2024, pp. 18-20, available at: <https://library.fes.de/pdf-files/bueros/budapest/21505.pdf> (last visited on 31 November 2024).

- + An incentive-based policy to promote collective bargaining should include financial support for training in negotiation skills and free advisory services from public authorities to both parties on effective negotiation strategies.
- + The state must take proactive steps to encourage voluntary negotiations between trade unions and employers' organisations. These steps include, in terms of legislation: (1) enhanced protection for trade union members and officials against retaliation, and (2) lowering requirements and restrictions for calling a strike. Without these fundamental protections, trade unions cannot effectively exert pressure on employers to engage in negotiations.

#### (d) Representativity as a Restriction on the Right to Bargain Collectively

##### *Definition and Purpose*

In several countries, a distinction is made between representative and non-representative unions. Certain rights, particularly the right to engage in collective bargaining and conclude collective agreements, are granted exclusively to representative unions. This distinction is based on the principle that only organisations capable of demonstrating their effectiveness should participate in regulating and protecting the social interests of workers. Without sufficient effectiveness as well as adequate social and bargaining power, there is no guarantee that a trade union will be able to promote and protect these interests.

Another objective of representativeness is that countries want to avoid the complications arising from the multiplicity of trade unions. The existence of multiple small or ineffective unions can undermine the efficient functioning of trade unions. The principle of representativeness aims to recognise those unions that represent the largest number of workers in a particular sector or industry or that otherwise have significant social power.

##### *Disadvantages of representativity*

The status of representativeness can easily result in a virtual monopoly for the recognised unions and their affiliates. As a result, smaller or newly established unions may find it



nearly impossible to attain this status. Minority unions are often denied the opportunity to fulfill their most important function — collective bargaining — which, in turn, hampers their ability to attract new members. This creates a self-preserving system. The European Committee of Social Rights has emphasised that any representativeness requirement must not, directly or indirectly, create obstacles to the formation of trade unions.<sup>88</sup>

### *Differences between Western and Eastern European countries*

The ECSR does not differentiate in its assessments between Eastern and Western European countries. Nevertheless, significant differences exist regarding representativeness.

In Western European countries, such as Germany and France, trade unions have developed organically over several decades. The rules for determining representative trade unions have evolved gradually, often shaped by case law. These countries apply a range of criteria — some of which cannot be quantified precisely — to assess a union's representativeness. The real influence and bargaining power of trade unions, along with their independence and long-standing experience, play a crucial role in this determination.

**In French law**, the conditions for trade union representativeness, as set out in the Labour Code, include a minimum number of members, the union's independence, its level and length of experience, and its patriotic attitude during the occupation.<sup>89</sup> Courts may still declare a union representative if other factors, such as the union's actual influence, compensate for a missing statutory criterion.<sup>90</sup> Unions must demonstrate that they are genuinely active and possess sufficient resources to carry out independent activities.<sup>91</sup> According to the European Committee of Social Rights, this framework complies with Article 5 of the ESC.

The situation is similar in Germany, where case law has established specific criteria for a union to be considered representative. These include independence from the state, the

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<sup>88</sup> ECSR, *Syndicat Occitan de l'Éducation v. France*, Complaints No. 23/2003, Decision on the merits, § 26.

<sup>89</sup> ECSR, Conclusions 2006, Article 6 (France).

<sup>90</sup> ECSR, Conclusions 2004, Article 6 (France).

<sup>91</sup> ECSR, Conclusions 2006, Article 6 (France).

church, political parties, and other organisations; a democratic structure; sufficient power and capacity to assert itself; a minimum number of members; the ability and willingness to call a strike; a commitment to concluding collective agreements; and acceptance of the laws governing collective bargaining, dispute resolution, and strikes.

In contrast, most Eastern European countries, due to obvious historical reasons, have not experienced a similar organic development of trade unions and therefore lack a tradition of trade union recognition. In these countries, the state has established clear and easily identifiable criteria for representativeness. These criteria at the sectoral or national level typically include the total number of members of the union, its presence within a particular sector, the number of sectors, branches or occupations in which it concludes collective agreements, the regions where it operates, and the number of affiliated organisations.<sup>92</sup>

### *Compatibility with the freedom of association*

Legal systems that restrict collective bargaining to 'representative' trade unions are generally considered compatible with the European Social Charter, provided that minority unions retain the right to represent their members. The Court has affirmed that it is consistent with the freedom of association to grant the right to conclude collective agreements only to representative trade unions.<sup>93</sup> States are free to structure their systems in such a way that gives special status to these representative unions.<sup>94</sup>

Many Eastern European countries often link the representativeness of trade unions to a specific **percentage of the workforce**. However, this approach can violate Article 6§2 of

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<sup>92</sup> In Romania, organisations "must have patrimonial and organisational independence; must comprise trade unions from at least half of the total number of counties including the capital; must comprise trade unions from at least 25 % of economic branches; their member unions must represent at least 5 % of all employees in the economy." (Conclusions 2002, Article 6, Romania).

In Bulgaria, representative trade unions at national level must have at least 50 000 members, at least 50 affiliated organisations with at least 5 members each in more than half of the industries in the national classification of economic activities, local branches in more than half of the municipalities in the country, and a national governing body and legal personality. (Conclusions 2004, Article 6, Bulgaria).

In Poland, they must have more than 300 000 members and operate in units of the national economy whose principal activities cover more than half of the sections of the classification of economic activity. (Conclusions XVIII-1, Article 6, Poland).

In Croatia, the most representative trade unions must possess 15 000 members, be an association of five trade unions operating at national level, be active in several counties, and be party to at least three collective agreements for different sectors of economic activity at national level. (Conclusions XVIII-1, Article 6, Croatia).

<sup>93</sup> Demir and Baykara v. Turkey, App. No. 34503/97, European Court of Human Rights judgment of 12 November 2008, § 60.

<sup>94</sup> Demir and Baykara v. Turkey, App. No. 34503/97, European Court of Human Rights judgment of 12 November 2008, § 154.

the ESC if collective bargaining is restricted to unions representing at least 33% of the employees at the relevant level (company, sector, or country).<sup>95</sup>

In contrast, the European Committee of Social Rights has found Slovenia's representativeness rule to be compliant with the Charter. Slovenia requires that a trade union must either represent at least 15% of the relevant workforce or be affiliated with a national representative organisation.<sup>96</sup>

## **V. THE INDIVIDUAL ASPECTS OF FREEDOM OF ASSOCIATION**

### **1. The right to join trade unions**

This chapter focuses on the individual aspects of freedom of association, in particular the right to join or not to join a trade union. The freedom to join a trade union means that workers have the right to join a trade union of their own free will, without any external interference. Employers must not exert pressure on workers to prevent them from joining or to force them to leave a trade union.

Furthermore, the right to join a trade union should extend beyond just workers to include other individuals who work under similar conditions. For example, delivery workers, taxi drivers, cleaners, platform workers, and public service contractors often work under conditions similar to those of traditional workers, even though they may not have formal employment contracts. All individuals who are, at least partially, personally or economically dependent on an enterprise should have the right to organise and join a trade union (see also Chapter III.3. on personal scope).

Article 11 of the Convention imposes positive obligations on states to ensure genuine and effective respect for freedom of association. The obligation of the state cannot be limited to merely refraining from interference. To guarantee the effective exercise of this right, national authorities may need to intervene in relations between private individuals by taking reasonable and proportionate measures when necessary.<sup>97</sup>

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<sup>95</sup> ECSR, Conclusions XIX-3, The former Yugoslav Republic of Macedonia, Article 652 of the ESC.

<sup>96</sup> ECSR, Conclusions 2004, Article 6 (Slovenia).

<sup>97</sup> Wilson, *National Union of Journalists and Others v. the United Kingdom*, European Court of Human Rights judgment 2002, § 41.

For the right to join a trade union to be effective, the state must also protect individuals from any abuse of a dominant position by trade unions. Such abuse might occur, for instance, if a union's exclusion or expulsion procedures are not consistent with the trade union's rules, or if the rules are unreasonable or arbitrary, or if the consequences of the exclusion or expulsion result in exceptional hardship. Another form of abuse could also involve discriminatory treatment, and in such cases, the state is required to take real and effective protective measures.<sup>98</sup>

## **2. The right not to join trade unions (negative freedom of association)**

The right not to join a trade union means that workers cannot be compelled to join a union as a condition of employment. While the positive right to join a trade union has been widely recognised, the acceptance of the negative aspect—namely, the right not to join—has been relatively late and contentious in comparison. The controversy surrounding the right not to join a trade union stems from historical practices in certain Northern and Western European countries (e.g., Sweden, the United Kingdom, Iceland, Denmark and the Netherlands), where closed-shop clauses were common. Such practices were viewed as an effective means to attract new members and ensure the retention of existing members of trade unions.

The inclusion of negative freedom of association in Article 11 of the Convention was unsuccessful during the drafting process due to opposition from states that had a closed-shop system.<sup>99</sup> Although the wording of Article 11 does not protect negative freedom of association, the European Court of Human Rights later recognised the negative aspect of this right, emphasising that the Convention is a living instrument and must always be interpreted in line with current and evolving circumstances.

In the landmark case of *Young, Webster, and James v. the United Kingdom*, the Court declared that Article 11 of the Convention could not exist without its negative aspect.<sup>100</sup> This decision was fundamental in shaping a unified European interpretation of negative

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<sup>98</sup> *Vlahov v. Croatia*, App. No. 31163/13, European Court of Human Rights judgment of 5 May 2022, § 61.

<sup>99</sup> Cited in *Sorensen v. Denmark* and *Rasmussen v. Denmark*, European Court of Human Rights judgment of 11 January 2006, § 33.

<sup>100</sup> *Young, James and Webster*, European Court of Human Rights judgment of 13 August 1981, § 52.

freedom of association. The Court stated that compulsory trade union membership would jeopardise the very essence of freedom of association. It stated that it is incompatible with Article 11 to make employment in a company dependent on membership of a specific trade union. However, the Court left room for national courts to balance the individual interests of the complainants against the collective interest in maintaining strong and effective trade union and to give priority to one of them.<sup>101</sup>

The European Committee of Social Rights has considered from the first monitoring cycle that while any form of compulsory unionism imposed by law is incompatible with Article 5 of the ESC, various forms of incentives to join a trade union could be lawful.<sup>102</sup> Later, referring to the *Young, James and Webster* judgment, the ECSR stated that allowing closed-shop practices would undermine the very essence of freedom of association,<sup>103</sup> and that no one should be compelled to join a trade union.<sup>104</sup> The absence of adequate protection in national law against any form of pressure to become or remain a member of a trade union violates the right to organise.<sup>105</sup> Legislation (or lack of it) allowing closed-shop practices violates Article 5 of the ESC, even if closed-shop clauses are included in collective agreements.<sup>106</sup>

The right of a worker to join a trade union implies that this decision should result from free choice, without any form of coercion. To safeguard this freedom, national legislation must explicitly prohibit all pre-entry or post-entry closed-shop clauses.<sup>107</sup> Clauses in collective agreements or other arrangements that, in practice, reserve jobs for members of a specific trade union are contrary to the freedom guaranteed by Article 5 of the ESC. The presence of priority clauses in collective agreements, which give preference to members of certain trade unions in hiring and firing, also violates this right.<sup>108</sup>

States are required to take appropriate legislative or other measures to ensure effective procedures and regulations that prevent employers from exerting pressure on workers to

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<sup>101</sup> *Sorensen v. Denmark and Rasmussen v. Denmark*, European Court of Human Rights judgment of 11 January 2006, §§ 58, 65.

<sup>102</sup> ECSR, Conclusions I, p. 31 (General Introduction).

<sup>103</sup> ECSR, Conclusions VII, p. 33 (United Kingdom).

<sup>104</sup> ECSR, Conclusions XIII-1, p. 26 (General Introduction).

<sup>105</sup> ECSR, Conclusions XI-1, p. 78 (Iceland).

<sup>106</sup> ECSR, Conclusions XI-1, p. 79 (Iceland).

<sup>107</sup> ECSR, *Confederation of Swedish Enterprise v. Sweden*, Complaint No. 12/2002, Decision on the merits of 15 May 2003, §§ 29, 42.

<sup>108</sup> ECSR, Conclusions XIX-3 (2010), Iceland; Conclusions XXI-3 (2018), Iceland.

join a specific trade union.<sup>109</sup> The dismissal, or the threat of dismissal, of a person for refusing to become a member of a particular trade union is a serious form of coercion that undermines the very essence of the freedom of choice inherent in the negative right to freedom of association.<sup>110</sup>

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*The ILO's Committee on Freedom of Association offers a different perspective, distinguishing between union security clauses that are permitted by law and those are mandated by law. Only the latter inevitably leads to a trade union monopoly system, which violates freedom of association. However, it is up to the states to decide whether union security clauses are permissible in freely agreed collective agreements.*

*Source: ILO Freedom of Association, Compilation of decisions of the Committee on Freedom of Association, 2018, nos. 551-559.*

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### **3. Special Protection against Retaliation**

It is imperative that both trade union members and representatives are adequately protected against any form of retaliation or discrimination based on their membership or activities. International standards are clear: workers must be shielded from any adverse consequences related to their trade union membership or activities on their employment. This protection includes safeguarding workers from any form of reprisal or discrimination in recruitment, dismissal, or promotion due to their union membership or involvement in trade union activities. If such discrimination or retaliatory measures occur, national law must provide for adequate and proportionate compensation for the victim.<sup>111</sup>

The Court considers it essential that individuals who suffer discriminatory treatment should be able to challenge it and have the right to take legal action to obtain damages and other remedies. Therefore, under Articles 11 and 14 of the Convention, states are

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<sup>109</sup> ECSR, Conclusions XIII-3, Article 6 (United Kingdom); Conclusions 2004, Article 6 (Bulgaria).

<sup>110</sup> *Sørensen and Rasmussen v. Denmark*, App. Nos. 52562/99 and 52620/99, European Court of Human Rights judgment of 11 January 2006, § 61.

<sup>111</sup> ECSR, Conclusions 2010, Article 5, Armenia, repeated in later Conclusions.

required to establish a judicial system that provides real and effective protection against anti-union discrimination.<sup>112</sup>

It is important to note that, according to the Court, both the worker and the trade union are victims when workers are dismissed due to their trade union membership; therefore, both must have the right to bring a case before the court. Reprisals against trade union members can have a chilling effect on the activities of the trade union and on the willingness of other workers to join the trade union. As a result, trade unions can claim to be victims of the dismissal of one of their members, provided that the dismissal was allegedly motivated by the individual's membership or activities within the trade union in question.<sup>113</sup>

It is crucial for union members and officials to be able to express to their employer the demands they are making to improve the situation of workers in their company. The ability of trade unions to express their ideas freely is one of their essential means of action, and employers must not penalise trade union members or officials in any way for doing so (such as disciplinary investigations, suspension from work, ban from the workplace, withdrawal of wages, obligation to remain inactive, dismissal, medical examinations, or the imposition of tasks unrelated to their employment duties, etc.).<sup>114</sup> The right of trade unions to protect their members and express their opinions may sometimes conflict with the interests of employers. Therefore, the Court has emphasised the need to strike a fair balance between the right of trade union members or representatives to freedom of association on the one hand, and the protection of employers' interests on the other. In the context of the freedom of expression of a trade union representative, the Court considers the following elements to be relevant: "the context within which the statements were made (including whether they formed part of a legitimate trade union activity); the nature of the statements (including whether the limits

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<sup>112</sup> Danilenkov and Others v. Russia, App. No. 67336/01, European Court of Human Rights judgment of 30 July 2009, § 124.

<sup>113</sup> Hoppen and Trade Union of AB Amber Grid Employees v. Lithuania, App. No. 976/20, European Court of Human Rights judgment of 17 January 2023, § 153.

<sup>114</sup> Straume v. Latvia, App. No. 59402/14, European Court of Human Rights judgment, §§ 91-92.

of acceptable criticisms were crossed); the damage suffered by the employer or other persons; and the nature and severity of the sanctions or other repercussions.”<sup>115</sup>

In order to guarantee meaningful and effective trade union rights, national authorities must ensure that disproportionate penalties do not discourage trade union representatives from expressing and defending the interests of their members.<sup>116</sup> Criminal or disciplinary sanctions imposed on trade union members in connection with their activities are particularly harmful to trade unions, even if they relate to participation in strikes. Such sanctions inevitably have a ‘chilling effect’ on trade union members, deterring them from engaging in industrial action, such as strikes, to protect their professional interests.<sup>117</sup>

In cases of dismissal for trade union activities, the ECSR emphasised that the compensation must be at least equal to the wages that would have been paid from the date of dismissal until the date of the court decision or reinstatement.<sup>118</sup>

While the Convention and the ESC do not require states to implement special protection against dismissal for trade union representatives,<sup>119</sup> many European countries have adopted such protections. These rules often require the employer to obtain permission from either an authority or a workers’ organisation before dismissing a union representative.

### **Summary conclusions:**

- ✚ Trade union officials must be protected from any adverse consequences related to their activities within their employment. This protection includes safeguarding against retaliation or discrimination, such as disciplinary investigation, suspension, workplace bans, wage withholding, enforced inactivity, dismissal, medical examinations, or being assigned tasks unrelated to their duties, etc. The law must provide for dissuasive sanctions (e.g., fines) to deter employers from engaging in discriminatory practices. In cases of

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<sup>115</sup> *Straume v. Latvia*, App. No. 59402/14, European Court of Human Rights judgment, § 103.

<sup>116</sup> *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, App. No. 11828/08, European Court of Human Rights judgment of 25 September 2012, § 55.

<sup>117</sup> *Ognevenko v. Russia*, App. Nos. 44873/09 and 11828/08, European Court of Human Rights judgment of 20 November 2018, § 83.

<sup>118</sup> ECSR, Conclusions 2004, Article 5, Bulgaria.

<sup>119</sup> *Hoppen and Trade Union of AB Amber Grid Employees v. Lithuania*, App. No. 976/20, European Court of Human Rights judgment of 17 January 2023, § 215.



retaliation, national law must ensure adequate and proportionate compensation for the victim.

- ✚ To effectively protect trade union members and representatives from retaliation, it is essential to have a public authority — such as an equality body or an ombudsman — equipped with sufficient financial and human resources. This authority must have the right to provide individual advice to victims of discrimination and represent them in legal proceedings.

## **VI. THE RIGHT TO STRIKE**

### **1. The right to strike**

Collective bargaining without the right to strike is just collective begging.<sup>120</sup> The right to strike is one of the most important means of protecting the interests of trade union members through collective action.<sup>121</sup> As the Court has noted: “The right to strike allows a trade union to make its voice heard and constitutes an important instrument for the trade union to protect the occupational interests of its members and, in turn, for the members of a trade union to defend their interests.”<sup>122</sup> The right to strike is guaranteed by both Article 11 of the Convention and Article 6§4 of the ESC.

However, the European Court of Human Rights only protects strikes that are initiated by trade unions, meaning those strikes that are called by trade union organisations and form a genuine part of trade union activities.<sup>123</sup> The Court has clarified that the right to strike has a dual nature — it is both a right of the trade union and a right of the individual trade union member. However, Article 11 of the Convention protects only those strikes that are called by trade unions.<sup>124</sup>

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<sup>120</sup> German Federal Court (Bundesarbeitsgericht), judgment of 10 June 1980, 1 AZR 822/79, with reference to Roger Blainpain.

<sup>121</sup> Schmidt and Dahlström v. Sweden, App. No. 5589/72, European Court of Human Rights judgment, § 36.

<sup>122</sup> Humpert and Others v. Germany, App. Nos. 59433/18, 59477/18, 59481/18 and 59494/18, European Court of Human Rights judgment, § 104.

<sup>123</sup> Barış and Others v. Turkey, App. No. 66828/16, European Court of Human Rights judgment, § 45.

<sup>124</sup> Clearly in Humpert and Others v. Germany, App. Nos. 59433/18, 59477/18, 59481/18 and 59494/18, European Court of Human Rights judgment, § 104; see also, Ognevenko v. Russia, App. No. 44873/09, European Court of Human Rights judgment, § 55.

The European Committee of Social Rights emphasised that limiting the right to call a strike to only the most representative trade unions at the national, sectoral, or company level constitutes a restriction that is not in conformity with Article 6§4 of the ESC.<sup>125</sup>

## **2. High requirement to call a strike**

The requirement to call a strike must not be excessive, as doing so would unduly limit the exercise of this fundamental right. Strikes should be permitted both at the company level and beyond.

## **3. Permitted purposes of a strike**

It should be noted that the ECSR recognises broad objectives for calling a strike. Trade unions have the right to take collective action not only against an immediate employer but also against a de facto employer. The ECSR has clarified that workers “often do not work solely for and under the direction of a single, clearly defined employer, as evidenced in cases of outsourcing, networked organisations, inter-organisational partnerships — particularly in public services — as well as the increased use of agency staff, secondments, and joint partnerships. These developments have created a far more diverse and complex matrix of contractual relationships, with workers formerly under a single employer now divided among multiple employers, while simultaneously working alongside others from different industries under new employment arrangements. Consequently, trade unions are increasingly representing a workforce whose terms and conditions are often shaped by entities other than their direct employer.”<sup>126</sup> Additionally, Article 6§4 of the ESC guarantees the right to engage in secondary action.<sup>127</sup>

### **Summary conclusions:**

-  The purpose of a strike should be broadly interpreted, extending beyond industrial disputes with the employer concerned at the company level.

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<sup>125</sup> ECSR, Conclusions XV-1 (2000), Article 6§4, France.

<sup>126</sup> ECSR, Conclusions XX-3 (2014), Article 6§4, United Kingdom.

<sup>127</sup> ECSR, Conclusions XX-3 (2014), Article 6§4, United Kingdom; Conclusions XXI-3 (2018), United Kingdom.

## 4. Restrictions on the right to strike

### (a) The general rule

Article 11§2 of the Convention does not exclude any occupational group from the scope of the right to strike. National authorities may only impose restrictions on certain employees in accordance with Article 11§2 of the Convention (see the justified restrictions in Chapter III.2).<sup>128</sup> The provision explicitly refers to members of the armed forces, the police, and the administration of the state. The Court has emphasised that any restrictions imposed on these three categories must be interpreted strictly and should therefore be limited to the 'exercise' of the right to strike, without undermining the very essence of that right.<sup>129</sup>

The European Committee of Social Rights has stressed that any restrictions on the right to strike must comply with the requirements of Article G of the ESC. Accordingly, restrictions or limitations on this right are permissible only if they are prescribed by law and necessary in a democratic society to protect the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. Notably, Article 6 of the ESC does not provide any exception for the police or armed forces.<sup>130</sup>

### (b) Workers Providing Essential Services

The European Court of Human Rights acknowledges that restrictions on the right to strike may be imposed on workers providing essential services to the population; however, the concept of 'essential services' must be interpreted narrowly. In its comparative law analysis, the Court noted that in many member states of the Convention, strikes are "restricted in order to ensure the continuity of vital public services, such as the medical service, air traffic control, fire and rescue services. Minimum services can be required in

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<sup>128</sup> Humpert and Others v. Germany, App. Nos. 59433/18, 59477/18, 59481/18 and 59494/18, European Court of Human Rights judgment, § 98.

<sup>129</sup> Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain, App. No. 45892/09, European Court of Human Rights judgment, §§ 29-30.

<sup>130</sup> ECSR, Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 140/2016, Decision on the merits, § 105; with references to ECSR, CESP v. France, Complaint No.101/2013, § 118, and EUROMIL v. Ireland, Complaint No. 112/2014, § 85.

areas such as public transport, waste management, power and heat supply, and telecommunications. The reasons for these prohibitions and restrictions relate to the need to secure the protection of life, health, personal security, and public safety.”<sup>131</sup>

The European Committee of Social Rights accepts the restriction of strikes in sectors essential to the community, provided that such strikes pose a threat to the public interest, national security, or public health.<sup>132</sup> A complete ban on strikes in the energy or health sector is not proportionate to the specific needs of each sector. In essential services, the law may require the provision of minimum services even during the strike. Importantly, the determination of minimum service levels should not be left solely to the employer's discretion; instead, they must be defined jointly by trade unions and employers.<sup>133</sup>

However, neither the Court nor the ECSR considers transport in general, and railway transport in particular, to be an essential service whose interruption would endanger the life or health of the population.<sup>134</sup> The Court has emphasised that “(w)hile a work stoppage on railway transport obviously could lead to negative economic consequences, the Court cannot agree that these would be sufficient to justify a complete ban on certain categories of railway workers’ right to strike; any strike implies certain economic losses, but it does not follow that any strike could be prohibited for risk of those losses.”<sup>135</sup>

Following a 36-hour strike, the Norwegian government banned work stoppages and picketing by offshore oil platform workers, imposing compulsory arbitration to resolve the dispute. The Court ruled that the strike ban was lawful as it pursued legitimate aims in the interests of ‘public safety’, the protection of ‘the rights and freedoms of others’, and ‘health’. The strike had already caused significant losses and placed considerable pressure on the employers. It went on to say that a continuation of the strike would not only have resulted in a very substantial loss of production revenue for both private and state

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<sup>131</sup> Humpert and Others v. Germany, App. Nos. 59433/18, 59477/18, 59481/18 and 59494/18, European Court of Human Rights judgment, § 66.

<sup>132</sup> Matica Hrvatskih Sindikata v. Croatia, Complaint No. 116/2015, Decision on the merits of 21 March 2018, § 114.

<sup>133</sup> ECSR, Conclusions 2018, Article 6§4, Serbia.

<sup>134</sup> Ognevenko v. Russia, App. No. 44873/09, European Court of Human Rights judgment, § 72.

<sup>135</sup> Ognevenko v. Russia, App. No. 44873/09, European Court of Human Rights judgment, § 73.

companies, but would also have negatively impacted energy supplies to industry and households in EU countries.

In addition, there was a risk of damage to technical installations if they had to be shut down for long periods, with potential consequences for health, safety, and the environment. Therefore, the strike was likely to have serious consequences beyond the loss of revenue. At the same time, the Court emphasised that its decision in this case should not be interpreted as endorsing compulsory arbitration as a proportionate response to all lawful strikes involving economic pressure. In the Court's view, there were specific and exceptional circumstances in the case, where the interruption of energy supplies would have immediate and very serious repercussions on the international energy distribution network, affecting the countries concerned, and where significant damage to technical installations and the environment was foreseeable in the event of a complete cessation of activity for a prolonged period. Additionally, the exceptionally high wages in the sector, compared to other industries, further indicated that the imposition of compulsory arbitration was not disproportionate.<sup>136</sup>

#### (c) Employees in the Public Sector – Civil Servants

According to the Court, the prohibition of the right to strike may apply to certain categories of civil servants exercising functions of authority on behalf of the state. However, this cannot extend to all civil servants or to public employees in state-owned commercial or industrial enterprises. A general ban on strike action for public sector workers would clearly violate Article 11 of the Convention. Therefore, any restriction on the right to strike for civil servants should be defined clearly and as narrow as possible.<sup>137</sup>

#### d) Military, Police, Security Services, Justice

Based on its comparative research, the European Court of Human Rights has made the following observations: "Commonly, strikes are prohibited in the military, police, security

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<sup>136</sup> Federation of Offshore Workers' Trade Unions, App. No. 38190/97, European Court of Human Rights judgment.

<sup>137</sup> Enerji Yayı-Yol Sen v. Turkey, App. No. 68959/01, European Court of Human Rights judgment, § 32.

services and often also in the justice system, prison service and diplomatic service. The rationale for a ban on strikes in these areas is that they are at the core of State authority and relate to tasks which are essential for the functioning of the State and for the protection of national security and public order/safety.”<sup>138</sup>

The Court upheld the ban on strikes by Basque police officers performing their duties in the territory of the autonomous community, recognising the maintenance of law and order as a legitimate aim. It considered the specific functions assigned to the police and the potential consequences of disrupting their activities. The Court noted that the restriction did not apply to all public officials, but only to members of the State Security Forces and Corps, who are responsible for ensuring public security. These bodies carry a greater responsibility, as they must intervene in defence of the law at any time and in any place, whether during working hours or not. According to the Court, this need for uninterrupted service and their armed mandate distinguish them from other civil servants, such as judges or doctors, and justify the restriction on their freedom of association. The stricter requirements imposed on them do not go beyond what is necessary in a democratic society in order to guarantee security, public safety and the maintenance of law and order, as well as the principles enshrined in Article 11§2 of the Convention.<sup>139</sup>

The European Committee of Social Rights emphasised that the objective of maintaining the operational capability of the command in the most extreme situations of military exposure does not justify the absolute prohibition of the right to strike for members of the Guardia di Finanza, since it is not necessary under Article G of the ESC. In the defence sector, minimum services may be required in the event of a strike. Other measures may be provided for by law, such as an effective and regular procedure for negotiation at the highest level between the members of the Guardia di Finanza Corps and the commanding authority, addressing not only material and salary conditions but also the organisation of work, or a conciliation or arbitration procedure. The requirement for minimum services

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<sup>138</sup> Humpert and Others v. Germany, App. Nos. 59433/18, 59477/18, 59481/18 and 59494/18, European Court of Human Rights judgment, §66.

<sup>139</sup> Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain, App. No. 45892/09, European Court of Human Rights judgment §§ 34-44.

and/or an effective negotiation or conciliation procedure before a strike is considered a proportionate restriction on the right to strike. However, an absolute prohibition on the right to strike for members of the Guardia di Finanza was not deemed proportionate to the legitimate aim pursued and was therefore not necessary in a democratic society.<sup>140</sup>

According to the ECSR, states may impose stricter restrictions on the right to strike for members of the armed forces than for police officers. In the case of police officers, only compelling reasons can justify an absolute ban on the right to strike. However, states may regulate the manner and form of strike action within the police force.<sup>141</sup>

### **Summary conclusions:**

- ✚ Workers in centralised electricity, heat, and gas supply organisations should have the right to strike, but the state can regulate the process to determine the level of minimum services that must be provided, even during a strike.
- ✚ Emergency medical services are essential services, so the right to strike can be more restrictive. In the event of such restrictions, workers must have alternative means of representing their interests (e.g., conciliation).
- ✚ Members of the armed forces, police, and security services have the right to strike, but it can be restricted through the requirement for minimum services and compulsory conciliation or even arbitration.

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<sup>140</sup> ECSR, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Complaint No. 140/2016, Decision on the merits of 22 January 2019, § 152.

<sup>141</sup> ECSR, *European Organisation of Military Associations (EUROMIL) v. Ireland*, Complaint No. 112/2014, Decision on the merits of 12 September 2017, § 116; *European Confederation of Police (EuroCOP) v. Ireland*, Complaint No. 83/2012, Decision on the admissibility and merits of 2 December 2013, § 211.

[www.coe.int/s](http://www.coe.int/s)

The The European Social Charter, adopted in 1961 and revised in 1996, is the counterpart of the European Convention on Human Rights in the field of economic and social rights. It guarantees a broad range of human rights related to employment, housing, health, education, social protection and welfare.

No other legal instrument at pan-European level provides such an extensive and complete protection of social rights as that provided by the Charter.

The Charter is therefore seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture.

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The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

