

**DECISION ON THE MERITS**

**COMPLAINT No. 5/1999**

By the European Federation of Employees in Public Services  
against Portugal

The European Committee of Social Rights, ECSR, committee of independent experts established under Article 25 of the European Social Charter (hereafter referred to as “the Committee”), during its 174<sup>th</sup> session, composed of:

Messrs.	Matti MIKKOLA, President
	Rolf BIRK, Vice- President
	Stein EVJU, Vice-President
Ms	Suzanne GRÉVISSE, General Rapporteur
Mr	Konrad GRILLBERGER
Ms	Micheline JAMOULLE
Messrs.	Nikitas ALIPRANTIS
	Tekin AKILLIOĞLU

Assisted by Mr Régis Brillat, Executive Secretary to the European Social Charter;

In the presence of Ms Anna-Juliette Pouyat, observer of the International Labour Organisation;

In the absence of Mr Alfredo Bruto da Costa who, having been prevented from participating in the hearing and the deliberations held on 9 October 2000, did not participate in the adoption of the decision;

On the basis of the oral hearing held on 9 October 2000;

After having deliberated on 9 October and 4 December 2000;

On the basis of its deliberations;

Delivers the following decision adopted on 4 December 2000:

## PROCEDURE

1. On 10 February 2000, the Committee declared the complaint admissible.
2. In accordance with Article 7 paras. 1 and 2 of the Protocol providing for a system of collective complaints and with the Committee's decision of 10 February 2000 on the admissibility of the complaint, the Executive Secretary to the European Social Charter communicated, on 17 February 2000, the text of the admissibility decision to the Portuguese Government and to the European Federation of Employees in Public Services, the complainant organisation (hereafter referred to as EUROFEDOP). On 18 February 2000, he communicated the text of the decision to the Contracting Parties to the Protocol, as well as to the European Trade Union Confederation (ETUC), to the Union of Industrial and Employers' Confederations of Europe (UNICE) and to the International Organisation of Employers (IOE), inviting them to submit their observations on the merits of the complaint. The Executive Secretary also communicated the text of the decision to the Contracting Parties to the Charter and the revised Charter for their information.
3. The Portuguese Government submitted its observations on the merits on 29 March 2000. The ETUC submitted observations on 26 April 2000. EUROFEDOP submitted its observations on the merits on 15 May 2000. The Portuguese Government submitted supplementary observations on 25 July 2000.
4. In accordance with Article 7 para. 3 of the Protocol, each party received the information and supplementary observations of the other.
5. In accordance with Article 7 para. 4 of the Protocol and Rule 29 para. 1 of its Rules of Procedure, the Committee decided on 24 May 2000 to organise a hearing. For the purpose of the hearing the complaint was combined with complaints Nos. 2 and 4/1999, EUROFEDOP against France and Italy, respectively. The ETUC was invited to the hearing in accordance with Rule 29 para. 2 of the Committee's Rules of Procedure.
6. Additional written observations were requested from the parties in preparation of the hearing. EUROFEDOP submitted such observations on 28 August 2000.
7. The hearing took place in public in the Human Rights Building, Strasbourg, on 9 October 2000.

At the hearing the complainant organisation, EUROFEDOP, was represented by:

Mr Bert Van Caelenberg, Secretary General;  
Mr Ludo Vekemans, Project Manager;  
Mr Pim Gooijers, Chairman of the Trade Council Defence.

The ETUC, acting in support of the complainant, was represented by:

Mr Gérard Fonteneau, legal advisor;  
Mr Ulrich Hundt, Secretary General, EUROMIL;  
Mr Stefan Clauwaert, legal advisor.

The respondent Government, the Portuguese Government, was represented by:

Ms Cristina Siza Viera, Director of Legal Affairs at the Ministry of National Defence;  
Ms Ana Mendes Godinho, legal advisor, Directorate of Legal Affairs of the Ministry of National Defence ;  
Ms Cristina Coelho, Professor, Faculty of Law of the University of Lisbon.

The French Government was represented by:

Mr Pierre Boussaroque, Judge seconded to the Directorate of Legal Affairs of the Ministry of Foreign Affairs.

The Italian Government was represented by:

Mr Antonio Caracciolo, Inspector General, Ministry of Labour and Social Security;  
Mr Raffaello Di Cuonzo, Ministry of Defence;  
Colonel Vittorio Manconi.

## **SUBSTANCE OF THE COMPLAINT**

8. EUROFEDOP alleges that Portugal does not comply with Articles 5 and 6 of the European Social Charter in so far as members of the armed forces do not enjoy the right to organise and as it follows that there is no right to bargain collectively. Articles 5 and 6 read as follows:

### **Part II**

#### **“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 Contracting 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 Contracting 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."

### **SUBMISSIONS OF THE PARTICIPANTS IN THE PROCEDURE**

#### *a) The complainant organisation, EUROFEDOP*

9. In its initial complaint and in subsequent written observations, EUROFEDOP alleged that in practice, the situation of civilian members of the Ministry of Defence in Portugal is not in conformity with the above mentioned provisions of the Charter. However, this part of the complaint was not maintained. At the hearing, EUROFEDOP conceded that domestic law grants civilian personnel all rights required pursuant to Articles 5 and 6 of the Charter. The complainant organisation alleged that there is a lack of clarity in defining civilian as opposed to military tasks and appealed to the respondent government to alleviate this.

10. EUROFEDOP maintains its complaint as regards members of the armed forces in Portugal. The complaint is based on Section 270 of the Constitution and the Act on National Defence (Act No. 29/82 of 11 December 1982) which prohibit military personnel of the armed forces and of the "Guarda Nacional Republicana" from joining a trade union but allows them to affiliate only to professional associations which must be concerned solely with the professional code of ethics.

11. EUROFEDOP alleges that it is a contradiction in terms to say that military personnel takes part in collective bargaining. In EUROFEDOP's view, the basic right to collective bargaining is respected only if bargaining can be exercised by trade unions as holders of this right. It asserts that Article 6 of the Charter cannot in effect be complied with if Article 5 is not applied in the first place.

12. EUROFEDOP emphasises that other States, notably in Northern Europe, have granted the right to organise to members of the armed forces. It considers that the absence of a right to organise in several States, including Portugal, is particularly unjustifiable in view of both the domestic and the international context. In many States the armed forces have been restructured in order to abolish compulsory military service and aiming to establish an army composed exclusively of professionals, civilian and military. At the international level the tasks assigned to the armed forces have changed

and now include peace-keeping and humanitarian operations. They are based on co-operation between European States within the framework of a policy on peace and security. EUROFEDOP asserts that, in this context it seems unacceptable that employees of the armed forces of some countries do not enjoy the same trade union rights as their colleagues from other countries.

13. EUROFEDOP asserts that, like the European Convention on Human Rights, the European Social Charter is a "living instrument" which should be interpreted in the light of present realities. As a consequence, EUROFEDOP submits that a modification of Articles 5 and 6 is required and requests that amendments to include armed forces be initiated by the Council of Europe and by the governments of the countries concerned. According to EUROFEDOP, such amendments would allow for a universal interpretation of fundamental rights in the armed forces.

*b) The European Trade Union Confederation (ETUC)*

14. The ETUC, referring to the fundamental nature of Articles 5 and 6 of the Charter and to the regulation of the various points at issue in the complaint in other international instruments and in case law developed under those instruments, submits that the term "members of the armed forces" in Article 5 should be interpreted in a restrictive and functional way. If thus construed, this would imply that military personnel with more technical tasks must be accorded the right to organise.

15. With respect to Article 6, the ETUC asserts that if the Committee would apply such a construction of Article 5, the categories of personnel excluded from the right to organise in Portugal are in fact too broadly defined and, pursuant to the Committee's case law, the resulting infringement of Article 5 automatically entails a violation of Article 6 para. 2.

16. Alternatively, the ETUC submits that there is no restriction *ratione personae* in Article 6 and hence, the right to collective bargaining must in some way be guaranteed to all workers, including members of the armed forces.

17. At the hearing, the ETUC requested the Committee to undertake a study on the right to organise of military personnel in Europe together with the ILO with a view to harmonisation of legislation in the Contracting Parties. It also invited the Committee to hold an exchange of views on the subject with governments, with management and labour and other interested bodies.

*c) The Portuguese Government*

18. The Portuguese Government alleges that the complaint introduced by EUROFEDOP does not give grounds for finding a violation of Articles 5 and 6 of the Charter.

19. It underlines that Article 5 of the Charter recognises the freedom of states to determine the principle as well as the extent of the application of the guarantees contained therein to the members of the armed forces. The suppression of trade union rights is thus authorised by Article 5 of the Charter, which is not contested by the

complainant organisation. In addition, the Portuguese Government points out that this interpretation has been confirmed by the case law of the European Committee of Social Rights and that it was not challenged during the process of revision of the Charter and the adoption of the revised Charter.

20. In addition, the Portuguese Government considers that the complaint under Article 6 should be dismissed as this provision has no autonomy from Article 5, the right to bargain collectively being invested in trade unions and not being an individual and subjective right of workers.

21. According to the Portuguese Government, the complaint raises a question of principle and has as its objective a revision of the articles concerned. It considers, however, that the European Committee of Social Rights is not competent to address a matter of this nature.

22. As regards the functional approach to the armed forces invoked by the complainant organisation and the ETUC, the Government rejects such an interpretation. In its view, the duties inherent in military status do not differ according to the task in question.

## **ASSESSMENT OF THE COMMITTEE**

23. The Committee, by way of introduction, notes that as the case now stands, it is not in dispute that for civilian personnel in the defence sector the situation in Portugal is compatible with Articles 5 and 6 of the Charter. While taking note of the submissions of EUROFEDOP and the ETUC as to the delineation of the concept “members of the armed forces” in Article 5 of the Charter, the Committee notes that in the present proceedings no concrete submissions have been made, nor has any evidence been presented, in respect of any particular group or category of workers which in the view of the complainant or the ETUC should be deemed not to fall within the scope of the exception clause in Article 5. Hence, there are no grounds for the Committee to elaborate on this point in the present case.

24. The point at issue in the present complaint concerns, firstly, the construction of the exception clause in the final sentence of Article 5 as regards military personnel. The Committee recalls that according to this provision, “[t]he principle governing the application to the members of the armed forces of” the guarantees set out in Article 5 “and the extent to which they shall apply to persons in this category shall [...] be determined by national laws and regulations”.

25. The Committee notes that the complainant organisation, on the one hand, alleges that there is a violation of Articles 5 and 6 of the Charter as military personnel employed by the armed forces in Portugal – and in the other states against which complaints have been lodged – do not enjoy the right to organise and bargain collectively, while on the other hand, the complainant holds that amendment of Articles 5 and 6 is requisite with a view to the safeguarding of rights for this category of personnel and that reform for that purpose should be initiated by the Council of Europe and by the governments concerned.

26. As the Committee has consistently held, it follows from the wording of the final sentence of Article 5 of the European Social Charter of 1961 that states are permitted to "limit in any way and even to suppress entirely the freedom to organise of the armed forces" (Conclusions I, p. 31). The Committee observes that the provision in question has been included unchanged in the revised European Social Charter of 1996.

27. The Committee considers that no argument has been brought forward by EUROFEDOP, nor by the ETUC, of a nature giving grounds for a change in the interpretation of Article 5. The Committee underlines that the well-established interpretation of Article 5 is based on the wording of the provision. Further, as to EUROFEDOP's submission that this interpretation should be modified as the tasks assigned to the armed forces now include peace-keeping and humanitarian operations and are based on co-operation between European States, the Committee points out that co-operation between the armed forces of the Contracting Parties to the Charter, or some of them, in no way is a new phenomenon.

28. Secondly, the Committee takes note of EUROFEDOP's submission that the basic right to collective bargaining is respected only if bargaining can be exercised by trade unions as holders of this right, and of the ETUC's assertion that there is no restriction *ratione personae* in Article 6 and that, consequently, the right to collective bargaining must in some way be guaranteed to all workers, including members of the armed forces.

29. While recognising that provisions in Article 6 of the Charter may be held to have application also in respect of workers excluded from the scope of Article 5, the Committee considers that these are issues which in the context of a collective complaint cannot be assessed in the abstract. The issues to which the relationship between Article 5 and Article 6 may give rise need to be considered on a concrete, case-by-case basis. The Committee is obliged to note, however, that the complainant organisation's submissions on this point have not been specified or elaborated on, nor is there evidence at hand in the present case to substantiate the submissions. In view of this, and without prejudice to any subsequent assessment of issues concerning the relationship between Articles 5 and 6 of the Charter, the Committee, in the context of the present complaint, does not find grounds for holding that there is a violation of Article 6.

30. Finally, with regard to the request made by EUROFEDOP that Articles 5 and 6 be amended; the Committee is obliged to note that this is a matter beyond the scope of its competence in the present context. The role of the Committee as defined in the 1995 Protocol providing for a system of collective complaints is, solely, to assess whether the Contracting Party concerned by a complaint "has ensured the satisfactory application of the provision of the Charter referred to in the complaint" (Article 8 of the Protocol). Having regard to this, the Committee considers that it would be inappropriate in the present context to express itself on EUROFEDOP's request and, similarly, on the ETUC's proposal to undertake a study of the said provisions together with the ILO.

31. On the above grounds, the Committee has reached the following:

### **CONCLUSION**

The complaint lodged by EUROFEDOP against Portugal is dismissed.

Micheline JAMOULLE  
Rapporteur

Matti MIKKOLA  
President of the Committee

Régis BRILLAT  
Executive Secretary

In accordance with Rule 30 of the Committee's Rules of Procedure, a separate opinion of Ms Micheline JAMOULLE, Rapporteur, is appended to the decision.

**SEPARATE OPINION of Ms Micheline JAMOULLE**

The Rapporteur found no violation of Article 5 and 6 of the Charter by Portugal, but believed this conclusion should not have been reached on the basis of the approach and certain reasons of the majority of the Committee.

1. The Rapporteur is of the opinion that the object of the written complaint by EUROFEDOP, supported by subsequent representations could not be modified by an oral hearing, which is an optional procedure under the Protocol providing for a system of collective complaints.
  
2. The Rapporteur regrets that the principle according to which questions which are raised in the framework of a collective complaint “cannot be assessed in the abstract” was affirmed. It is for the Committee to define the meaning and scope of the text invoked, and to interpret it, so as to create a case law consistent with the principle of effectiveness.