



**COVID-19 WATCH  
ETUC BRIEFING NOTES**

**TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020**

# TRADE UNION RIGHTS AND COVID-19

## Table of contents

**INTRODUCTION..... 3**

**I. EXPERIENCE SO FAR SHOWS A MIXED PICTURE ON THE RESPECT OF TRADE UNION RIGHTS UNDER COVID-19 CRISIS MEASURES, INCLUDING SOME MOST WORRYING NATIONAL EXPERIENCES, BUT TRADE UNIONS ARE FIGHTING BACK! ..... 7**

ETUC DEMANDS ..... 7

EXAMPLES FOR INTERFERENCES..... 7

EXAMPLES FOR SUCCESSFUL INTERVENTIONS ..... 20

**II. RECALLING INTERNATIONAL AND EUROPEAN (CASE) LAW ON HUMAN RIGHTS AND TRADE UNION RIGHTS IN TIMES OF (COVID-19) CRISIS ..... 22**

UNITED NATIONS..... 22

1. *International Covenant on Civil and Political Rights (ICCPR)* ..... 24

1.1 Relevant provisions ..... 24

1.2 Human Rights Committee (CCPR)..... 24

2. *International Covenant on Economic, Cultural and Social Rights (ICECSR)*..... 25

2.1. Relevant provisions ..... 25

2.2. Committee on Economic, Social and Cultural Rights (CECSR) ..... 26

3. *The UN High Commissioner for Human Rights and UN Special Rapporteurs* ..... 28

INTERNATIONAL LABOUR ORGANISATION (ILO) ..... 29

1. *Relevant instruments*..... 29

2. *ILO “crisis/state of emergency” related case law* ..... 36

2.1. Committee on Freedom of Association (CFA) ..... 36

a. Trade union and employers organizations rights and civil liberties ..... 36

b. Collective bargaining ..... 38

c. Consultation with the organizations of workers and employers..... 39

d. Right to strike ..... 39

2.2. Committee of Experts on Applications of Conventions and Recommendations (CEACR) ..... 40

COUNCIL OF EUROPE ..... 41

1. *European Convention of Human Rights (ECHR)* ..... 42

1.1 Relevant provisions ..... 42

1.2. European Court of Human Rights (ECtHR) ..... 43



**COVID-19 WATCH**  
**ETUC BRIEFING NOTES**

**TRADE UNION RIGHTS**  
**AND COVID-19**  
**10 JUNE 2020**

2. *European Social Charter (ESC)* ..... 44

2.1. Relevant provisions ..... 44

2.2. European Committee of Social Rights (ECSR)..... 45

    a. General case law ..... 45

    b. ECSR ‘crisis/austerity’ case law..... 46

3. *Other Council of Europe bodies/representatives* ..... 49

EUROPEAN UNION ..... 50



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

### Introduction

Due to the Covid-19 outbreak, a wide range of exceptional measures both at EU level and at national level have been taken and/or were/are in preparation and which touch upon workers' and trade union rights.

However, first signs already indicate that certain governments use the Covid-19 crisis as an alibi, like it was done in the framework of the 2008 economic crisis<sup>1</sup>, to "temporarily" undermine and curtail human rights in general and workers and trade union rights in particular. Governments are introducing legislative initiatives to reduce trade union rights be it in the areas of freedom of association, social dialogue structures/processes, collective bargaining and agreements and collective actions. Fortunately, thanks to the action put in place by national ETUC affiliates, with the full support of the ETUC, has stopped so far these attempts, but it is far from sure that they will not be tried again in those countries or that governments in other countries take measures along those same lines.

For ETUC this is unacceptable as it is particularly in times of crisis that human and trade union rights must be upheld and even enhanced. ETUC therefore urges that any response given now by international, European and national instances and authorities should ensure that the measures taken and/or envisaged do not infringe human rights standards, including workers' and trade unions rights, but instead to promote trade unions and collective bargaining as the effective response to the crisis and in the road to recovery.<sup>2</sup>

Whereas a previous [ETUC Covid-19 Watch Briefing Note](#) on 'Human Rights and Covid-19' looked at the impact of such measures on human rights (including workers' rights) in general, this Briefing Note in particular looks at the impact on trade union rights (freedom of association, right to collective bargaining and right to collective action, including right to strike).

In Section I, an overview is given of some national developments whereby Governments have used the Covid-19 crisis to introduce legislative initiatives, often via emergency decrees<sup>3</sup>, also (potentially) impacting trade union rights.

In Section II, an overview is provided of the guidelines by international and European human rights bodies (UN, ILO and Council of Europe) to ensure the protection of those trade union

<sup>1</sup> For more information see amongst others ETUI Reform Watch and ETUI publications on the [economic crisis in general](#), [labour law reforms](#) and the [impact of the European Semester CSRs in the social policy field](#) in particular.

<sup>2</sup> For more information on the positive and key role social dialogue (including collective bargaining) has played in mitigating the economic and social impact of this crisis, see the [ETUC Covid-19 Briefing Note on "Covid-19 and social dialogue developments"](#).

<sup>3</sup> While some Member States' constitutions include mechanisms allowing for recourse to a 'state of emergency' or the entrustment of special powers to specific institutions, other Member States' legal orders do not, either for historic reasons or owing to institutional tradition. For an overview of the responses to the coronavirus pandemic in Belgium, France, Germany, Hungary, Italy, Poland and Spain, see the European Parliament briefing on '[States of emergency in response to the coronavirus crisis: Situation in certain Member States](#)'.



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

rights, in particular in times of crisis. It also provides an outline of the fundamental principles, according to international and European human rights case law, that should be underlined and respected when governments elaborate and adopt (emergency) measures in the framework of any crisis, including this Covid-19 crisis.

*One note of caution, this briefing note captures a dynamic situation which is subject to ongoing change. We therefore kindly ask affiliates to provide us with further information on COVID 19-related measures that have been introduced in your country so that we can update this briefing note.*

*This briefing note was originally produced on 17 April 2020 and has been first updated on 7 May and now on 10 June to take account of developments in the following international organisations and countries: UN, ILO, Council of Europe, European Union, Belgium, France, Hungary and Turkey.<sup>4</sup>*

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<sup>4</sup> Note that, with the support of the ITUC-PERC, translations of (earlier) versions of this Briefing Note are available in Russian and Serbo-Croat, respectively at [https://perc.ituc-csi.org/IMG/pdf/ru\\_covid-19\\_briefing\\_trade\\_union\\_rights\\_and\\_covid-19\\_with\\_table.pdf](https://perc.ituc-csi.org/IMG/pdf/ru_covid-19_briefing_trade_union_rights_and_covid-19_with_table.pdf) and <https://perc.ituc-csi.org/EKS-lzvjes%CC%8Ctaj-SINDIKALNA-PRAVA-I-COVID-19>.



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

**IN SUM:** for ETUC, it is crystal clear that “Trade Union Rights = Human Rights”, hence any Covid-19 measure planned/adopted at both EU but in particular national level must respect the fundamental principles and obligations as set by international and European human rights (case) law as established by amongst others the UN International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, ILO Conventions and the Council of Europe European Convention on Human Rights and European Social Charter (and their respective monitoring bodies). These principles are:

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### Principles

*All crisis responses need to be human rights-compliant and ensure respect for all human rights and the rule of law, including respect for fundamental principles and rights at work and for international labour standards*

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Furthermore, ETUC recalls that any derogation from or restriction of Human Rights are strictly regulated. They should respect the very essence of democratic principles and rule of law and can only be established under very clear and strict conditions and in limited circumstances.



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

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**Derogations from or restrictions of Trade Union Rights,  
are, like for other Human Rights, equally strictly regulated by these international and  
European law instruments and monitoring bodies**

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*Such derogations or restrictions:*

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*can only be*

- *only invoked in time of war or other public emergency threatening the life of the nation,*
- *solely established for the purpose of promoting the general welfare in a democratic society,*

*should be*

- *consistent with the State's other obligations under international law,*
  - *taken in full respect democratic principles and of the rule of law,*
  - *only adopted/implemented when necessary,*
  - *applied in a non-discriminatory way,*
  - *specific in focus,*
  - *proportionate to the evaluated risk,*
  - *temporary and supervised/monitored on a regular basis,*
  - *using the least intrusive approach possible, and should be*
  - *elaborated and implemented following a permanent and intensive dialogue with the most representative workers' and employers' organization.*
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## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

- I. **Experience so far shows a mixed picture on the respect of trade union rights under Covid-19 crisis measures, including some most worrying national experiences, but trade unions are fighting back!**

#### ETUC demands

ETUC has been informed that there have unfortunately been several attempts at national level to put human rights and in particular trade unions rights aside under the excuse of the Covid-19 outbreak and on the grounds of maintaining and relaunching economic activity. In Europe, but also globally, a tendency is noticed of abusing emergency powers/decrees to fast-track legislative amendments curtailing trade union rights that were previously proposed successfully blocked due to trade union opposition.

Unlike in several countries where governments in proper (tripartite) dialogue and consultation with social partners urgent and appropriate measures (e.g. Finland, Netherlands, Sweden), in other countries, Governments are indeed introducing, often by 'emergency decrees', legislative initiatives to reduce workers' and trade union rights. The action put in place by national trade unions with the support of ETUC has so far stopped several of these attempts, but it is far from sure that they will not be tried again by the same and other governments. Therefore, [ETUC](#) has addressed on 30 March all EU institutions asking amongst others for:

- Member States to refrain from any initiative aimed at reducing wages, rights and protections of workers, or to undermine social dialogue.
- The ECB, all EU and national financial institutions, the European Commission and Member States to set clear conditionalities for all types of funding provided to companies, the banking and financial sectors and services of general interest: no worker lay-offs, no reduction of wages and rights, no distribution of dividends to beneficiaries of public funding.

#### Examples for interferences

Some national examples of interference in trade union rights that were reported to ETUC:

- **Belgium**: A minority government, although with the support of a large majority of the opposition is allowed to govern by **emergency laws/competences, including in the area of labour law, without involving properly the federal Parliament and consultation of trade unions, including in the area of labour law.** Also the obligatory advice competence of the Conseil d'Etat is not applicable. Any measures taken by this minority government under this regime can however later on be challenged before courts. So far no attempts yet to restrict trade union rights are provided for. This emergency power mandate is intended to end by end of June and more and more voices from both governing as well as opposition parties are calling to not renew this mandate unless really necessary.





## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

Following the announcement of the bankruptcy of Swissport, one of the luggage handlers at Brussels Airport, it was decided on 10 June that all 1500 workers are laid-off. The trade union front CSC-FGTB-CGSLB decided to hold a personnel assembly on 11 June to allow amongst others all workers, many of which had been on technical unemployment due to the Covid-19 crisis, to say farewell. However the Ministry of Internal Affairs prohibited this assembly also based on the applicable Covid-19 measures for holding demonstrations and bringing together (too) large groups of persons. Workers who turned up would risk to be arrested and fined for violation of Covid-19 measures, although several hundred of workers turned up nobody was arrested.

On Monday 8 June, a second wave of strike action (combined with picketing stations at the loading zones) started at the distribution centre of sportswear firm Decathlon in Willebroek. The workers mainly contested the withdrawal of a productivity bonus of 5% (and this at a moment of increased workload following a period of technical unemployment) as well the fact that during that crisis period, management has used in an illegal manner evening/night work shifts and temporary agency workers. Following a unilateral court injunction, management send on 10 June bailiff to the company following which the trade unions stopped the blockades, but all workers did not resume to normal work instead.

- **Croatia:** The Croatian Ministry of Labour and Pension System was end of March in the mid, **without informing let alone consulting the trade unions**, drafting an Act on regulating labour relations in the circumstances of the COVID-19 epidemic and by which bring some important changes to fundamental social rights as they are currently enshrined in the Croatian Labour Code.

The law would “temporarily“ amongst others:

- Enable employers to cut wages through company by-laws up to the level of the minimum wage, and to abolish workers' rights to payment of one-off material rights, but in practical terms it would thus abolish collective agreements and allow the employers to unilaterally exclude certain provisions /material rights from collective agreements,
- Temporarily suspend certain provisions of the Labour Code by allowing a different regulation of the entitlement to wage compensation in case of termination of work due to the COVID-19 epidemic, i.e. reductions in the amount of compensation,
- Enable employers to unilaterally shorten workers' working time (and thus lowered wages) by simply putting an annex to their employment contracts,





## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

- Enable employers to organize annual leave without further notice of 15 days and an obligation of periodic medical check-ups of workers employed on jobs with specific working conditions would also be abolished.
- Enable employers to unilaterally decide to organize work on a dislocated place of work; and no sanctions will be put on employers who have already organized telework, but who have not ensured OSH protection.
- **and finally, the law would abolish the obligation to consultation of the employer with the works council prior to adopting any such decisions.**

Following immediate and strong reactions of ETUC affiliates, SSSH/UATUC and NHS, and with the full support of [ETUC](#) (as well as [EPSU](#) and [ITUC](#)), however, the Croatian government announced those reform plans were abandoned.

Regarding the public sector, the Government issued a Conclusion stating that it would launch negotiations with the social partners on the amount which will serve as the base for the salary calculation for civil servants and employees in the state administration and for other employees in the public sector. Apart from this, they will negotiate reducing other financial rights guaranteed to the civil and public servants and employees in the public sector by the applicable collective agreements<sup>5</sup>

- **France:**
  - The Decree on working time adopted the 25 March 2020 opens the possibility to derogate to the labour code until the 31 December 2020 and more in particular 1) to increase weekly working hours from 48hours up to 60 hours for some sectors (that have to be determined by a specific decree), 2) reduce the daily rest from 11 hours to 9 hours for some sectors (that have to be determined by a specific decree), 3) suspend the rest day of Sunday, so that business can operate 7/7, and 4) to unilaterally modify the use of RTT (reduction of working time). Derogations to such an extent of the maximal working and rest times constitute a clear breaches of ILO conventions and the European Social Charter, and endanger workers' health and safety, which is particularly at stake in the present crisis.<sup>6</sup> **These measures have been thus adopted without proper parliament scrutiny and involvement, let alone a proper consultation of trade unions.**
  - Other decrees adopted allow temporarily some derogations to the legal deadlines for the information and consultation. These derogations are applicable for deadlines that start to run between the 3<sup>rd</sup> of May and the 23<sup>rd</sup> of August. The decrees cut down the deadlines for the information and

<sup>5</sup> Grgurev, I. (2020) COVID-19 and Labour Law: Croatia, in Italian Labour Law e-Journal, [Special Covid-19 and Labour Law. A Global Review, Issue 1, Vol. 13\(2020\)](#).

<sup>6</sup> On how the emergency measures constitute a de facto derogation of the ECHR, see Sudre, F. (2020) [La mise en quarantaine de la Convention européenne des droits de l'homme](#), Les Club des Juristes, Blogpost 20/04/2020 and [La Convention EDH face au Covid-19 : dépasser les apparences](#), idem, Blogpost, 27/04/2020 (French only).



## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

consultation of social and economic work Councils where the consultation focuses on employer decisions that “aim to address the economic, financial and social consequences of the spread of the Covid-19 epidemic”. These derogations are not applicable to information and consultation on: job preservation plans, collective performance agreements, dismissal of 10 or more employees in the same 30-day period and the recurrent consultations (that are the consultation on strategic directions, the consultation on the economic and financial situation of the company, and the consultation on social policies).

The derogations deadlines are:

- Consultation periods on "covid-19 decisions" that are reduced from 1 month to 8 days in the absence of an expert's intervention and from 2 months to 12 days in the case of an expertise.
- The time available to the expert, from his appointment, to request from the employer any additional information (he considers necessary for the performance of his duties) is reduced from 3 days to 24 hours. The deadline for the employer to respond to this request is reduced from 5 days to 24 hours.
- The deadline for the expert to notify the employer of the estimated cost, scope and the duration of the expertise is reduced from 10 days to 48 hours.  
The period available to the employer to seize the judge, in the event of a dispute (on the need for the expertise, the appointment of the expert, the estimated cost, the scope of the expertise), is decreased from 10 days to 48 hours.
- Finally, the minimum period between the expert's submission of the report and the expiry of the Social and economic Council consultation deadlines is reduced from 15 days to 24 hours.

It is questionable to what extent these temporarily deadlines are in compliance with some European standards like:

- **EU Directive 2002/14, article 4:** “Consultation shall take place while ensuring that the timing, method and content thereof are appropriate”.
- **EU Charter of Fundamental Rights, article 27**, in particular the right for representatives to be guaranteed information and consultation in good time.
- **Council of Europe European social charter, article 21** on the right to information and consultation, in particular the right to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

- On May 15, the French parliamentary deputies adopted the bill "carrying various provisions related to the health crisis" (*'loi portant diverses dispositions liées à la crise sanitaire'*), which temporarily relaxes the rules governing relations between employers and employees. Like the measures taken at the end of March to relieve - temporarily again - working time constraints, these changes are justified by the need to allow companies to adapt to the consequences of the recession. One of the main changes concerns the renewal of fixed-term contracts (CDD) and temporary work contracts (CTT). Their number may be fixed by a "company agreement" and exceed that provided for by the branch agreement (or, failing this, by law, if there is no branch agreement). This new rule will apply to contracts concluded until December 31, 2020. Another controversial development concerns the so-called social and economic committee (CSE) - which has gradually replaced the works council – which will be able to use part of its budget operating costs (not more than half) "to finance social and cultural activities" offered to employees. This capacity for initiative is given "on an exceptional basis (...), until the expiration of six months from the date termination of the state of health emergency". The aim is "to provide additional material support" to workers. The measure has been widely criticized, in particular by several unions which are on the one hand are concerned that the CSEs will be deprived of resources to order expertise on "employment" and "occupational health" and on the other hand deplored the fact that such a decision was taken without prior consultation with the trade unions.

Five trade union organizations (CGT, Solidaires, Unitary trade union federation, Syndicat de la magistrature and Syndicat des avocats de France) contest the ban on demonstrations and seize the Council of State (*Conseil d'Etat*) and question whether the ban on demonstrations is still legitimate while the constraints linked to the Covid-19 epidemic are gradually easing. For the defendants upholding the ban clearly infringes several freedoms fundamental: freedom to demonstrate and the right to collective expression of ideas and opinions, freedom of assembly and freedom of association. Three weeks after ordering the Government to lift the "general and absolute" ban on assembly in places of worship, Council of State will examine, Thursday, June 11, three requests requesting the suspension of Article 3 of the Decree of 31 May, taken as part of the state of health emergency. This text stipulates that "any gathering, meeting or activity on the public highway or in a place open to the public, bringing together more than ten people simultaneously, is prohibited throughout the territory of the Republic".

The Council of State will have to reconcile respect for the fundamental principle of freedom of expression with the objective of constitutional value of health protection. The question is what can justify more restrictive measures with regard to political or trade union gatherings than with regard to professional, commercial or religious gatherings in closed buildings.

- In a second request, the League for Human Rights (*Ligue des Droits (Ligue des droits de l'homme - LDH)*) recalls that the right to collective expression of ideas



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

and opinions, freedom of demonstration and freedom of association are among the most fundamental standards of the Constitution as well as of the European and international legal order. The decision of the Council of State will in principle come before the day of mobilization scheduled for June 16 across the country on the initiative of a dozen union organizations of healthcare workers. But in principle the ban on demonstrations does not prevent the protesters from gathering. This was the case on June 2, despite the decision of the Prefecture of Police, during the demonstration against racism and police violence in Paris.

- On 10 June, Prime Minister Edouard Philippe intended to present a proposal of law to the Government to end the emergency situation (decided in March) on 10 July although there would still be a four month transition period during which the Government would still be allowed – because of the Covid-19 crisis- to prohibit assemblies, limit public transport and close public places.
- **Hungary:** Next to the fast track law adopted on 10th March 2020 to flexible labour law during the pandemic crisis, Hungary had also declared a state of emergency on March 11 to fight the Covid-19. On 21 March, four Hungarian Trade Union confederations (LIGA, MASZSZ, SZEF and ÉSZT) published a press release regarding those government measures introduced in the state of emergency. Although trade unions welcome some of the measures mentioned above in safeguarding jobs, they express concern that the Labour Code changes endanger employees unproportionally. The new measure states that "The employee and the employer may deviate from the provision of the Labour Code in a separate agreement" is basically eliminating the entire Labour Code and autonomous collective agreements. **The trade unions also find it unacceptable that such decisions regarding working life have been unilaterally made by the government without any consultation with the social partners.**<sup>7</sup>

On 30 March, a further step was taken when the Hungarian Parliament gave the green light for a law that offers Prime Minister Orban the opportunity to extend the state of emergency for an indefinite period of time, without requiring the consent of Parliament and, through special decrees, suspend certain laws and take exceptional measures to guarantee "public health, the safety of citizens and the economy". **Also, prison sentences are provided for the dissemination of "fake news" about the virus and government measures and which could thus also affect eventually trade unions.** This new demarche by the Hungarian government has already strongly [condemned by the Council of Europe Secretary General Marija Pejčinović Burić](#), recalling that "*an indefinite and uncontrolled state of emergency cannot guarantee that the basic principles of democracy will be observed and that the emergency measures restricting fundamental human rights are strictly proportionate to the threat which they are supposed to counter.*" Also [ETUC](#) has expressed and addressed its serious concern

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<sup>7</sup> For more details, see also Gyulavári, T. (2020) COVID-19 and Labour Law: Hungary, in Italian Labour Law e-Journal, [Special Covid-19 and Labour Law. A Global Review, Issue 1, Vol. 13\(2020\)](#).





## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

about these new developments to both [Prime Minister Orban](#) and the [European Commission](#) highlighting thereby in particular that those developments put in danger Hungary's respect of and commitment to the EU values and EU (employment) secondary law as well several ILO Conventions and the Council of Europe European Social Charter. [ETUC](#) also called upon the Commission to fully back Article 7 proceedings and to launch urgent actions to challenge the emergency law before the EU Court of Justice, to immediately increase scrutiny of the use of EU funding by Hungary to ensure that no EU funding can be misused or used to reinforce the democratic deficit and considers and to launch an investigation as a matter of urgency into what amounts to a manifest invitation to employers to breach EU employment rights.

This law also triggered a lot of reaction from other EU member states. In a [diplomatic statement of 1<sup>st</sup> April, 17 Member States](#) (Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden) recalled that emergency measures should be limited to what is strictly necessary, should be proportionate and temporary in nature, subject to regular scrutiny, and respect the aforementioned principles and international law obligations. They supported the European Commission initiative to monitor the emergency measures and their application to ensure the fundamental values of the Union are upheld, and invite the General Affairs Council to take up the matter when appropriate.

To note also is the reaction of the [European Parliament Committee of Civil Liberties, Justice and Home Affairs](#) of 24 March in which they call upon the Commission to "to assess if the [then proposed] bill complies with the values enshrined in Article 2 of the Treaty on European Union and to remind member states of their responsibility to respect and protect these common values". Furthermore, at its [Plenary session of 17<sup>th</sup> April](#) as well as the session of the Civil Liberties Committee of 23 April, discussed the emergency measures adopted in Hungary (and Poland). The MEPs voiced strong concerns regarding steps taken by the Hungarian government to prolong the country's state of emergency indefinitely, to rule by decree without a time limit and to weaken the parliamentary emergency oversight. They call on the European Commission to urgently assess whether the emergency measures taken are in line with the EU Treaties, and to make use of all available EU tools and sanctions to address this serious and persistent breach, including budgetary ones. The Council shall put the discussions and procedures related to the ongoing Article 7 procedures against Poland and Hungary back on its agenda.

End May, the chief of staff of Prime Minister Viktor Orban announced that he Hungarian government will make a proposal to parliament on 26 May to end special emergency powers in the corona crisis in view of ending the much-criticized emergency powers in early June.

Just before the Easter break, the Hungarian Government proposed a new change by taking away the „public service employee” (also known as “civil servant”) status -and



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

as provided for by the Hungarian special labour law 'KJT') from cultural workers (working in e.g. museums, libraries, archives and public cultural institutes). On the last working day at 7:45 pm before Easter, the trade union KKDSZ (affiliated to EPSU) received the bill from the responsible Ministry for Human Resources for social partner consultation. However, this day was followed by four public holidays and the Ministry was awaiting for the opinion of the KKDSZ until 8:30 am on the first working day after Easter. This constitutes **an unacceptable social dialogue process** and during the Easter celebrations KKDSZ as well as the five Hungarian confederations affiliated to the ETUC (SZEF, ÉSZT, LIGA, MASZSZ, MOSZ) to the government requesting for a real negotiation with social partners immediately. It is feared that the same approach will be used also towards public sector workers. EPSU has addressed its [concerns](#) to both Prime Minister Orban (as well as the European Commission and European Parliament) calling for an immediate withdrawal of this proposal and guarantee the right to social dialogue and collective bargaining across the public sector.

Government Decree 104/2020 (of 10 April 2020) on the amendment of the labour law regulations within the framework of the Economic Protection Action Plan of the Government Decree 47/2020 (III. 18.) on the immediate measures necessary to mitigate the impact of the coronavirus pandemic on the national economy gives all the powers to the employer to unilaterally order a 24 month long working time frame, while prohibiting any derogations by collective agreements. The new changes allow **the employer to order a reference period (in other words working time banking) for a maximum period of 24 months (and may extend the reference period ordered prior to the entry into force of the decree for a maximum period of 24 months)**. The reference period that could be ordered unilaterally by the employer until now was maximum of 4, in special cases 6 months. Longer reference period - of up to 36 months - , could only be ordered on the bases of a collective agreement in agreement with the trade union. This measure complements the previous Government Decree on the measures "to mitigate the Covid-19 impacts on national economy" (18.03), which suspended the provisions of the Labour Code „for the period of state of emergency” – making employees vulnerable and repealing collective agreements. The change of the Labour Code was made with the argument "to make employment regulations more flexible, in order to facilitate future agreements between employers and employees." **It needs to be stressed that this decision, as well as all previous ones, was unilaterally made by the Government without consultation with the trade unions** while business organisations have been regularly invited to discuss preparations of measures. The trade unions in Hungary protest against this decision. **Furthermore it needs to be highlighted that Hungary is also living a time of restricted collective action (protests, etc.), no meaningful social dialogue is taking place and there exists a totally pro government public media (and great part of the private one), which all means that there is a very limited way trade unions can get their opinions heard.**

- **Poland:** By way of general remark, it should be noted that no state of emergency has been introduced in Poland. This is due to the fact that the government seeks to hold





## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

presidential elections on May 10 (on their previously foreseen date) and the Polish Constitution prohibits the organization of elections during such a state (state of emergency, martial law, or state of natural disaster). This means that the above acts were “theoretically” adopted in the normal legislative procedure with the “usual” involvement of the Sejm and Senate (the first and second chamber of the Polish Parliament) and should be “normally” consulted with the Social Dialogue Council (RDS) and social partners within the usual statutory deadlines. Both chambers of the Parliament held their proceedings remotely (online), often at night and in a simplified manner, at maximum speed and without any debate. The social partners nor the RDS were properly or not consulted on these projects, in particular the so-called ‘Anti-Covid-Shield Two’ (see below).

End of March, the government began work on the so-called “anti-crisis shield” which was composed of a series of solutions aimed at ensuring financial liquidity of enterprises and minimum level of income for employees. Before presenting the first proposals, consultations in the form of video conferences were held with the participation of representative organizations of social partners. After the first phase of consultations, the government presented the assumptions of the “shield” and key solutions included amongst others (for more details on other proposals in the field of workers’ rights see the [ETUC Covid-19 Briefing note on “Human Rights and Covid-19”](#)):

- Allowing employers to use more flexible rules for determining employees’ working time and modifying employment conditions in order to preserve jobs (limiting uninterrupted daily and weekly rest, introducing an equivalent working time system without having to meet the requirements from the Labor Code).

After presenting the assumptions of the “shield”, the government prepared a draft, which was forwarded to social partner organizations for urgent consultation. NSZZ Solidarnosc presented amongst others the following key concerns on it:

- The adoption in the Act of a two-day period for the conclusion of an arrangement or agreement and the decisive position of the employer in the event of failure to conclude the relevant agreements within that period leads to the conclusion of only virtual role of trade unions in shaping the conditions and mode of work performance during periods of economic downtime or reduced working time. The proposed two-day period is outrageously short, not adequate to the weight of the provisions to be regulated. The optimal solution would be to introduce a seven-day deadline.
- A very explicitly negative opinion on the proposal to reduce the daily rest from 11 to 8 hours and weekly rest from 35 to 32 hours as well as the way this change is being introduced. Referring to the method of introducing the reduction of daily uninterrupted rest, the strong opposition results from the fact of total freedom of employers to introduce the proposed solution. Referring to the possibility of concluding an agreement on the use of less favorable employment conditions for employees than resulting from employment contracts concluded with these employees, it should be indicated that the provision does not specify the maximum period for which such agreements may be concluded.



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

On the act of 31 March as well as to the next act adopted on the 17th of April, also OPZZ submitted proposals. (More info in next update)

On 31 March the Polish Parliament 'Sejm' adopted the Act on Special Solutions Related to the Prevention, Counteracting and Combating of Covid which seriously restricts the independence of social partners. Initially, the government intended the bill to exclude trade unions from representing workers if, during the crisis, employers planned to introduce special measures amending workers' terms and conditions. Following union protests, the regulation was removed from the draft before submission to parliament. Despite the rejections and opposition in Senate, the Sejm did however the adopt the amendments which **allow the Prime Minister to dismiss members of the Social Dialogue Council** and the law came into force the same day. On the request of NSZZ Solidarność the President promised to submit the regulations on the council to the Constitutional Tribunal, to assess whether they were in line with the Polish constitution, but this Constitutional Tribunal is however totally dependent on the leading Polish party PiS, which has appointed almost all of its judges (in a process heavily criticised by the European Commission). So far (beginning of June) nothing concretely has happened however. Whereas Article 85 allows the prime minister to dismiss members of the council only during this emergency, another Article 46 allows him to do so under two circumstances: if members of the Council co-operated with the Communist security authorities under the former regime or when they are engaged in inappropriate actions against the council which was unable to conduct transparent, substantive and regular dialogue among workers and employers' organisations and the government side. The second very vague and ambiguous reason can thus be easily used to remove any member who did not support government policies in the future. In April, a group of parliamentarians of the opposition submitted a bill to revise the act by removing the articles related to the council, but it was remitted for its first reading in the relevant commission of the Sejm.

ETUC Polish affiliates consider this as the possible end of social dialogue in Poland. Following joint protests and letters by the Polish national social partner organisations (including all ETUC Polish affiliates Solidarność, OPZZ, and FZZ Trade Unions Forum), on 1st April, also the European social partners, ETUC, BusinessEurope, SMEUnited and CEEP, wrote a [joint letter](#) to the President and Vice-Presidents of the Commission as well as the Commissioner for Jobs and Social Rights, to express their concern and highlighted that the autonomy of Social Partners is a founding element of social dialogue, guaranteed by international and European law. They also stressed that social dialogue is a key instrument to fight against the economic and social consequences of Covid-19 and Governments, all over Europe, should be supporting social partners for them to succeed in this endeavour. The EU social partners thus called upon the Commission to open a discussion with the Polish Government aiming at the immediate withdrawal of these new regulations.

By the Act of April 9 2020, known as the 'Anti-COVID-19 Shield Two' solutions were introduced to reduce employment in the civil service and other public administration units, and whereby the **potential reductions in employment will take place without**



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

**the participation of trade unions, since the legislator excluded the use of the Act on collective redundancies (which requires negotiations with the trade union to conclude an agreement on the mode and scope of collective redundancies).** The regulation provides amongst others that:

1. In the event of negative economic effects of COVID-10 causing a threat to public finances of the state, the Council of Ministers, at the motion of the Chief of the Chancellery of the Prime Minister, may issue a regulation which will result in limiting personnel costs in the civil service and indicated government administration units (such as offices servicing government administration in the province)
2. Personnel costs may be reduced by way of:
  - termination of employment
  - introduction of less favorable employment conditions (for a limited period until the end of the financial year), simply saying a reduction in salary
  - failure to conclude another contract following the expiry of the contract for the trial period or a fixed-term contract
  - reduction of the employee's working time with a simultaneous proportional reduction of salary.
3. The Act on collective redundancies shall not apply to the processes carried out. The trade union will be informed about the reduction of personnel costs and will be able to provide its opinion only within 7 days.
4. The provisions of the Labor Code limiting the possibility of terminating the employment relationship (with the exception of those related to maternity protection) shall not apply to termination of employment relationship or reduction of salary.
5. Employees of whom employment will be terminated will receive severance pay (in the amount of one month's salary if the employee has been employed in a given entity for less than 3 years; two-month salary if the employee has been employed in the given entity from 3 to 10 years; three-month salary if the employee has been employed in a given unit for over 10 years), but employees will not be entitled to re-employment (this right is included in the Act on Collective Redundancies).

NSZZ Solidarność demanded the withdrawal of these provisions, indicating, among other things, that civil servants have had their remunerations frozen for many years, and as a result they are now already abnormally low. The text of the Decision also indicates that the government allocates now huge financial resources for the support of self-employed persons and persons under civil law contracts, which, unlike employees, have contributed to social security and other public funds in a very limited way. Therefore, placing the burden of the consequences of the COVID-19 epidemic on civil servants and government administration employees is, in their opinion, socially unjustified.

- **Portugal:** In the Portuguese declaration of State of Emergency issued by the Portuguese President and implemented by the Law- Decree of the Socialist Party government foresees the limitation of workers' fundamental rights. The new measures allow the Prime Minister government to restrict movement of people, **temporarily suspend the right to strike** in vital sectors — such as health care units, civil protection, security and defence as well as 'economic sectors vital to the production



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

and supply of essential goods and services to the population’ — and **ban protests** and social or religious meetings. The Emergency Decree was renewed on 3rd April for another 15 days and contains two new elements: 1) suspension of the right to strike for all essential public services and 2) the suspension of the right to participate in the drafting of new labour legislation (enshrined in Constitution for trade unions and in the Labour Code for trade unions and employers associations) insofar as the exercise of such right may delay the entry into force of urgent legislative measures for the purposes provided for in this Decree. The law also provides for the possibility of forced mobilities of public sector workers, in particular in the health sector, to reinforce help in some sectors. Also, prohibition to terminate work contracts for health staff in the national health service is now in force<sup>8</sup>. The UGT-P has expressed publicly some concerns regarding the suspension of the right to participate in the drafting of new labour legislation in order to prevent abuses and not to undermine our capability of influencing (a priori and a posteriori) new legislation that is coming out all the time. Nevertheless, in practice the national social dialogue body is functioning and informal communications with the Government to and we are confident that, even if formalities are suspended, we still have a word to say. Also regarding the limitation on the right to strike, in practice it will not add much to what already existed and so far no issues arose because trade unions in those sectors are not initiating any strikes at the moment given the situation although a public sector strike that was to take place in March 20th was cancelled. However, ETUC’s Portuguese affiliates, [CGTP-IN](#) and UGT, informed us however that remaining vigilant on how these measures will indeed apply in practice remains key for the moment.

- **Romania:** In accordance of the Presidential Decree of 16 March 2020, in order to prevent the spread of COVID-19 and the achievement of managing the consequences, in relation to the evolution of the epidemiological situation, during the state of emergency, **the exercise of the following rights is restricted**, in proportion to the degree of fulfilment of the criteria provided by art. 4 paragraph (4) of the Decree: Free

<sup>8</sup> Free translation: *It can be determined by the competent public authorities that any employee of public or private entities or the social sector, regardless of the type of contract, have to present themselves to the service and, if necessary, start to perform functions in a different place, in a different entity and under conditions and working hours different from those corresponding to the existing contract, namely in the case of workers in the health care, protection and civil defense, security and defense and other activities necessary for the treatment of patients, support for vulnerable populations, elderly people, people with disabilities, children and young people at risk, in residential structures, home or street support, prevention and fight against the spread of the epidemic, production, distribution and supply of essential goods and services, the functioning of vital sectors of the economy, the critical networks and infrastructures and the maintenance of public order and the democratic rule of law, the possibility of terminating the respective industrial relations or cumulating functions between the public and private sectors may be limited.*

*The regime of temporary reduction of the normal period of work or suspension of the employment contract can be extended and simplified. The right of workers’ commissions, trade unions and employers’ associations to participate in the drafting of labour legislation is suspended, insofar as the exercise of such right may delay the entry into force of urgent legislative measures for the purposes provided for in this Decree. The exercise of the right to strike is suspended insofar in the exact measure not to jeopardize the functioning of critical infrastructures or of units providing essential health care and public services, as well as in economic sectors vital to the production and supply of goods.*





## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

movement; the right to family and private life; inviolability of the home; the right to education; **the freedom of assembly**; the right of private property and the **right to strike**.

Via an [Emergency Ordinance no. 34 of March 26, 2020](#) amending and completing of the Government Emergency Ordinance no. 1/1999 on the state of siege and the state of emergency, a new Article 33§1 was inserted which provides that: *"During the state of siege or the state of emergency, the legal norms regarding decisional transparency and social dialogue do not apply in the case of draft normative acts establishing measures applicable during the state of siege or state of emergency or which are a consequence of the establishment of these states."* For the public service unions (including in the health sector), this has meant that no social dialogue has taken place since mid-April.

- **Turkey:** Since beginning of April, President Recep Tayip Erdogan installed curfews during weekends starting on Friday until Sundays. On 27 April, he announced that at midnight of the eve before 1<sup>st</sup> May Day, another such three-day lockdown would be introduced in 31 Turkish provinces (including Istanbul and Ankara cities) to combat the spread of the corona virus.<sup>9</sup> Thus indirectly banning and prohibiting 1<sup>st</sup> May festivities and demonstrations. Despite this, ETUC affiliate DISK held a symbolic wreath action outside their building but their the President, General Secretary as well as other trade union delegates have been arrested. [ETUC](#) demand their immediate release without charges, to respect democratic rights and to stop the harassment of trade unions.

On 23 March, a circular was issued by the Ministry of Family, Labour and Social Services which restricted trade union rights considerably during the pandemic period. In the circular, it was stated that various procedures undertaken by the ministry – such as the issuance of certificate of competence for negotiating with employers, mediation procedures and strike ballot – were suspended.

In order to increase the social dialogue in the garment sector, The ILO Office in Turkey called for the meeting of an international working group coordinated by the International Trade Union Confederation (ITUC) with the participation of the International Organisation of Employers (IOE), brands and producers, workers' and employers' organisations and governments on 22 April with the main objective to work on minimising the damages caused by Covid-19 to the international garment sector and work on sustainable social protection systems for a just and durable garment industry.

On the other hand, the trade unions were not (always) invited to the nationwide meetings called by the government to discuss the urgent action plans and had thus to communicate their activities to the government through various (media) channels. DISK (Confederation of Progressive Trade Unions of Turkey), KESK (Confederation of Public Employees Trade Unions), TMMOB (Union of Chambers of Turkish Engineers and

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<sup>9</sup> Other curfews were announced on 11-12 April, 18-19 April, 23-26 April, 1-3 May, 8-9 May and 16-19 May in the 30 metropolitan provinces and Zonguldak province. In addition, a curfew in all 81 provinces of Turkey was implemented on 23-26 May to cover the feast following Ramadan.



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

Architects), TTB (Turkish Medical Association) launched a signature campaign at the beginning of April to submit to the government their urgent demand. The text, opened for signatures, included [demands](#) such as the temporary suspension of all economic activity except the essential and obligatory sectors, a dismissal ban, the nationalisation of private hospitals for the duration of the pandemic, the postponement of servicing consumers, housing and vehicle credits, the postponement of water, natural gas and electricity bills without the addition of interest.

DISK, one of the trade union confederations in Turkey, released a document on 14 May titled 'The Road Map for Working Life During and After Covid-19'. As the government had not included professional associations and trade unions in the committees assigned for handling the crisis management also in relation to working life. Therefore, the document called for the government's approval to involve health associations and trade unions are involved in steps taken regarding working life.

An international e-panel on 'How do workers of the world fight COVID-19?' was organised on 16 May with the participation of DISK, IndustriAll, ITF (International Transport Workers' Federation), ETUI (European Trade Union Institute), IUF (International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations) and UNI Global Union. The Turkey side of the panel was coordinated by DISK. The participants shared their views on the socio-economic damage and effects of the pandemic at the international level.

### Examples for successful interventions

In some countries, however and following strong reactions and interventions by parliamentarians as well as trade unions, it could be avoided that emergency laws/measures became even more detrimental to the respect of human and trade union rights:

- **Belgium:** Following brief collective actions, mainly walkouts, in stores of amongst others Delhaize and Carrefour, Belgium's trade unions in the mass retail market sector were able to start negotiating with success on a company-by-company basis on additional compensation, financially and/or in the form of additional leave. On 6 April, the social partners validated an agreement on hourly compensation for the entire Colruyt group (Bioplanet, Okay, CRU, Dreamland). It consists of 30 minutes of leave earned per day worked, up to a ceiling of 5 days or 36 hours, to be calculated over the period from 09 March to 30 June. In addition, bonuses and vouchers are available for sales and central services staff volunteers, and meal vouchers have also been increased by €4. Lidl workers will now be able to access up to seven days of additional (extra-legal) leave, that includes both employees in Lidl's branch outlets and the administrative staff working at Lidl headquarters and central offices. The number of hours off will be calculated in proportion to the hours actually worked between 13 March and 30 June 2020. The trade unions have also secured eco-vouchers for all staff (including students and temporary workers), which will also be calculated in proportion to the number of hours worked, up to a maximum value of €250. Finally, teleworking workers will receive a bonus of €3 net per day. Other agreements concern:





## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

Aldi (5 additional days off, meal vouchers raised by €1, purchasing vouchers), Delhaize (5 days off and between €400 and €470 in the form of meal vouchers, purchasing vouchers and reductions), agreements for Cora, Carrefour and Match have been negotiated by not yet validated.

End of March, police trade unions announced strike action to obtain better safety and health protection, amongst others by providing mouth masks to police services and which in the meantime they successfully obtained.

On 6 April, also the trade unions representing the so-called sheltered workplaces (and which count many of persons with disabilities amongst their workers) submitted a strike notice because those workplaces were still on the list of so-called essential/crucial services/activities and people were thus forced to continue to work.

On 16 April, the police stopped a trade union action at a centre for people with disabilities in the town of Tielt. The action was not related to the Covid-19 crisis but to an alleged unjustified dismissal. Despite the fact that the protesters wore masks and kept social distancing, the police considered that such actions are not acceptable in current times.

The mainly French-speaking trade union front SETCa, CGSP and CEN heavily criticized two Royal Decrees that were published in the Official Journal beginning of May (and apply until 31 December) whereby one allows provincial governors for the opportunity to requisition health workers in the event of a serious staff shortage. The trade unions also complained about a lack of consultation when implementing the measures. Following this pressure, the Royal Decrees were withdrawn.

Mid May, all three trade unions (CSC, FGTB and CGSLB) submitted each on their own side strike notices for in particular the hospitals and elderly/rest homes in Wallonia and Brussels. Main reasons were amongst others that all Covid-19 measures were taken without proper consultation with the social partners and that also the federal government was not taking any initiative to even start a debate on the improvement of working conditions and in particular wages in the sector.

Also, mid-May, the trade union fronts in the transport companies in Flanders (De Lijn) and Brussels (MIVB) submitted strike announcements because of lack of protective measures for in particular bus drivers. This pressure was successful as agreements were found with the management and implemented.

On 22 May, the common trade union front of the prisons (ACOD, ACV and VSOA) made a notice of strike from June 2 because insufficient (health) security measures have been taken in the resumption of the visiting arrangement for prisoners as from 25 May.



## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

- **Bulgaria:** President Roumen Radev (socialist) vetoed part of the project adopted by the conservative majority in Parliament, as part of the state of emergency thereby holding back the proposal to toughen the sanctions for "spreading false information", which could have been punished by three years in prison and which would have led to a self-censorship by experts, journalists and citizens at large and thus trade unions too.

Whereas in some countries, restrictions are thus provided for regarding the right to strike, in other countries, trade unions do however not refrain from using their rights to collective action, including strike, to ensure that their governments (and employers) take all the necessary measures to ensure a proper protection of the workers who (have to) remain at work. Some examples are:

- **Italy:** With strike action having multiplied end of March across several industrial sectors, the decree signed on 25 March by the Economic Development Ministry modified the one of 22 March establishing a new list of authorized production activities. This led amongst others to businesses in the following industries to have to close down: automobile, clothing industries, rubber industry, agricultural machinery and machine tools for the food industry, and certain subcategories of the chemical industry, the plastics industry and the paper industry. The Authority competent to regulate the right to strike in public services (Commissione di Garanzia) has ordered all trade union organizations not to take any collective actions from February 24 to April 31. It is likely that the ban on strikes will be extended until the end of the state of emergency (at the moment, 31 July). The same Authority has activated the procedure provided by law 146/90 (on the strike in essential services) to sanction a union (USB) which called for a general strike on March 25 to protest against the failure to comply with the safety measures for prevent contagion in the workplace (CdG resolution n.20 / 89). Law 146/90 expressly guarantees the right to strike in public services in the event of "protests for serious events detrimental to the safety and security of workers". The Authority, however, states that in these cases the strikes must take place in a "symbolic" form (that is, as "virtual" or 1-minute strike).

## II. Recalling international and European (case) law on Human Rights and Trade Union Rights in times of (Covid-19) crisis

High-level representatives and bodies of the UN, ILO and the Council of Europe recall that the Covid-19 crisis should not be used, even temporarily, to dismantle human rights and trade unions rights. Such measures risk also to run against EU fundamental rights and Treaties provisions.

### United Nations



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

The UN High Commissioner for Human Rights Michelle Bachelet was crystal clear when stating that human dignity and rights need to be front and centre in all our responses to the Covid-19 crisis, not an afterthought. The UN Guidance on 'Covid-19 and human rights' is crystal clear in that "respect for human rights across the spectrum, including economic and social rights, and civil and political rights, will be fundamental to the success of the public health response" and that "*although international law allows emergency measures in response to significant threats, measures should be proportionate to the evaluated risk, necessary and applied in a non-discriminatory way. This means having a specific focus and duration and taking the least intrusive approach possible to protect public health*". As for the instalment of state of emergencies, emergency powers must be used for legitimate public health goals, not used as basis to quash dissent or silence the work of human rights defenders (and this includes trade unions of course) or journalists.

This call of the High Commissioner was echoed by 10 high-level UN experts (in different field of expertise) who '*encourage States to remain steadfast in maintaining a human rights-based approach to regulating this pandemic, in order to facilitate the emergence of healthy societies with rule of law and human rights protections.*'

On 14 April, the UN expert on the rights to freedom of peaceful assembly and of association, Mr. Clément Voule, called up on governments that "States responses to Covid 19 threat should not halt freedoms of assembly and association". In particular, the Special Rapporteur would like to emphasize ten key principles to be taken into account for any response given in this area:

- ensuring that new legal measures respect human rights,
- ensuring that the public health emergency is not used as a pretext for rights infringements,
- democracy cannot be indefinitely postponed,
- ensuring inclusive participation,
- guaranteeing freedom of association and assembly online,
- protecting workplace rights to freedom of association and assembly (and recalling that the latter includes the right to strike!),
- freedom of expression must be ensured,
- civil society's participation in multilateral institutions must be secured,
- international solidarity is needed more than ever, and prepare for future implications of Covid-19 and responding to popular calls for reform including citizens' calls and protests for more democratic governance structures, to enhance rights protection and fulfilment, to end austerity, to reduce inequality, and to ensure that the transition to greener and more sustainable energy sources.

The two main UN instruments for the protection of trade union rights concern on the one hand the International Covenant on Civil and Political Rights (ICCPR) and on the other hand the International Covenant on Economic, Social and Cultural Rights (ICESCR) (both from 1961 and widely ratified by EU/EEA/candidate countries).



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

### 1. International Covenant on Civil and Political Rights (ICCPR)

#### 1.1 Relevant provisions

The ICCPR provides in its Article 22 the following:

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention. (emphasis added)

Furthermore in its Article 4 that:

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. (...)

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

#### 1.2 Human Rights Committee (CCPR)

In a General Comment to Article 4, the **Human Rights Committee (CCPR)**, main supervisory body to the ICCPR, further specified and interpreted the different conditions under which such derogations from the ICCPR rights (so including those in Article 22) are allowed.

On the occasion of the 100th anniversary of the International Labour Organization (ILO), the CCPR and the Committee on Economic, Social and Cultural Rights (CECSR) (see below) issued a [joint statement on the basic principles of freedom of association](#) common to both



## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

Covenants, in particular in relation to trade union rights. Both Committees recall in that statement that:

3. Freedom of association includes the right of individuals, without distinction, to form and join trade unions for the protection of their interests. The right to form and join trade unions requires that trade unionists be protected from any discrimination, harassment, intimidation or reprisals. The right to form and join trade unions also implies that trade unions should be allowed to operate freely, without excessive restrictions on their functioning.

4. Freedom of association, along with the right of peaceful assembly, also informs the right of individuals to participate in decision-making within their workplaces and communities in order to achieve the protection of their interests. The Committees recall that the right to strike is the corollary to the effective exercise of the freedom to form and join trade unions. (...)

On 30 April, the Human Rights Committee (CCPR), main supervisory body to the ICCPR, provided a '[Statement on derogations from the Covenant in connection with the COVID-19 pandemic](#)'.

Also, the Office of the UN High Commissioner of Human Rights (OHCHR) launched on 27 April a Guidance on "Emergency measures and Covid-19" mainly related to rights in the International Covenant on Civil and Political Rights (ICCPR), including the freedom of association and assembly.

## **2. International Covenant on Economic, Cultural and Social Rights (ICECSR)**

### **2.1. Relevant provisions**

The ICESCR guarantees in its Article 8 that:

#### **Article 8**

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.





## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

The ICESCR also clearly spells out in its Article 4 that:

“(…) in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.

#### 2.2. Committee on Economic, Social and Cultural Rights (CECSR)

The Committee on Economic, Social and Cultural Rights (CECSR), the main supervisory body to the ICESCR has not adopted a General Comment on Article 22, however in its General Comment on Article 7 on ‘the right to just and favourable conditions at work’ (including i.a. the right to fair (minimum) wages and healthy and safe working conditions), the Committee on Economic, Social and Cultural Rights, clearly stated in relation to retrogressive measures that:

52. State parties should avoid taking any deliberately retrogressive measure without careful consideration and justification. When a State party seeks to introduce retrogressive measures, for example, in response to an economic crisis, it has to demonstrate that such measures are temporary, necessary and non-discriminatory, and that they respect at least its core obligations. A State party may never justify retrogressive measures in relation to aspects of the right to just and favourable conditions of work that are subject to immediate or core obligations. States parties facing considerable difficulties in achieving progressive realization of that right due to a lack of national resources have an obligation to seek international cooperation and assistance.

The core obligations referred to above in the field of just and favourable conditions entail the following:

#### C. Core obligations

65. States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to just and favourable conditions of work. Specifically, this requires States parties to:

**(a) Guarantee through law the exercise of the right without discrimination** of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, sexual orientation, gender identity, intersex status, health, nationality or any other status; (...)

**(c) Establish in legislation and in consultation with workers and employers, their representative organizations and other relevant partners, minimum wages that are non-discriminatory and non-derogable**, fixed by taking into consideration relevant economic factors and indexed to the cost of living so as to ensure a decent living for workers and their families; (...)  
[Emphases added]





## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

In addition, in its [2016 Statement on 'Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights'](#), the CECSR provided guidance to State parties (both borrowing and lending states) and other actors (including international lender organisations<sup>10</sup>) on the scope of their obligations under the Covenant in relation to incurring debt. The Statement provides amongst others for the following:

2. The adoption of fiscal consolidation programmes may be necessary for the implementation of economic and social rights. If such programmes are not implemented with full respect for human rights standards and do not take into account the obligations of States towards the rights holders, however, they may adversely affect a range of rights protected by the International Covenant on Economic, Social and Cultural Rights. Most at risk are labour rights, including the right to work (art. 6), the right to just and favourable conditions of work, including the right to fair wages and to a minimum wage that provides workers with a decent living for themselves and their families (art. 7), the right to collective bargaining (art. 8), the right to social security, including unemployment benefits, social assistance and old-age pensions (arts. 9 and 11), the right to an adequate standard of living, including the right to food and the right to housing (art. 11), the right to health and access to adequate health care (art. 12) and the right to education (arts. 13-14). Low-income families, especially those with children, and workers with the lowest qualifications are disproportionately affected by measures such as job cuts, minimum wage freezes and cutbacks in social assistance benefits, which potentially result in discrimination on the grounds of social origin or property (art. 2 (2)).

11. The Committee is of the view that the above-cited obligations imposed under the Covenant require both lending and borrowing States seeking loans with certain conditionalities, to carry out a human rights impact assessment prior to the provision of the loan, in order to ensure that the conditionalities do not disproportionately affect economic, social and cultural rights nor lead to discrimination.

In the framework of the 2008 economic crisis, the **CECSR** expressed its concerns via its **Concluding Observations** about the austerity measures introduced in several European countries (e.g. Concluding Observations Spain, [2012](#) and [2018](#); Greece [2015](#); Portugal [2014](#) (with a particular recommendation for Greece and Portugal in relation to the (effects of) legislative changes to collective bargaining) and whereby the general line of recommendations were as follows:

Obligations of the State party under the Covenant in the context of the economic crisis

The Committee reminds the State party of its obligation under the Covenant to respect, protect and fulfil economic, social and cultural rights progressively, to the maximum of its available resources. The Committee draws the State party's attention to the Committee's open letter of 16 May 2012 to States parties on economic, social and cultural rights in the context of the economic and financial crisis, in particular to the recommendations contained therein with regard to the requirements resulting from the Covenant regarding the applicability of austerity measures. Such measures can be applicable only if they are temporary, necessary and proportionate, not

<sup>10</sup> Already in its General Comment n° 2 on '[International technical assistance measures \(art. 22 of the Covenant\)](#)' (1990), the CECSR insisted that 'international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation.'



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

discriminatory and do not disproportionately affect the rights of disadvantaged and marginalized individuals and groups. (...)

The Committee recommends that the State party ensure that all the austerity measures adopted reflect the minimum core content of all the Covenant rights and that it take all appropriate measures to protect that core content under any circumstances, especially for disadvantaged and marginalized individuals and groups.

The Committee recommends that the State party review the reforms adopted in the context of the current economic and financial crisis to ensure that all the austerity measures introduced uphold the level of the protection attained in the realm of economic, social and cultural rights and that, in all cases, such measures are temporary and proportionate and do not negatively impinge on economic, social and cultural rights.

### 3. The UN High Commissioner for Human Rights and UN Special Rapporteurs

As for the UN High Commissioner for Human Rights Michelle Bachelet human dignity and rights need to be front and centre in all our responses to the Covid-19 crisis, not an afterthought. The UN Guidance on 'Covid-19 and human rights' is crystal clear in that "respect for human rights across the spectrum, including economic and social rights, and civil and political rights, will be fundamental to the success of the public health response". This implies also that "although international law allows emergency measures in response to significant threats, measures/powers:

- should be proportionate to the evaluated risk, necessary and applied in a non-discriminatory way,
- Should have a specific focus and duration and taking the least intrusive approach possible to protect public health'
- must be used for legitimate public health goals, not used as basis to quash dissent or silence the work of human rights defenders (and this includes trade unions of course) or journalists,
- and when the crisis passes, it will be important for Governments to return life to normal and not use emergency powers to indefinitely regulate day-to-day life, recognising that the response must match the needs of different phases of this crisis.

This call of the High Commissioner was echoed by 10 high-level UN experts (including the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr David Kaye; the Special Rapporteur on the situation of human rights defenders, Mr Michel Forst; and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Mr Clément Nyaletsossi Voule) highlighting that "declarations of states of emergency, whether for health or security reasons, have clear guidance from international law" and that "the use of emergency powers must be publicly declared and should be notified to the relevant treaty bodies when fundamental rights including movement, family life and assembly are being significantly limited." Moreover, 'emergency declarations based on the Covid-19 outbreak should not be used as a basis to target particular groups, minorities, or individuals. It should not function as a cover for repressive action under the guise of protecting health nor should it be used to silence the work of human rights defenders' and 'Restrictions



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

taken to respond to the virus must be motivated by legitimate public health goals and should not be used simply to quash dissent. Finally, they 'encourage States to remain steadfast in maintaining a human rights-based approach to regulating this pandemic, in order to facilitate the emergence of healthy societies with rule of law and human rights protections.”

The Independent Expert on debt and human rights issued two statements on the need to put human rights at the centre of the response to the economic recession induced by COVID-19. On 20 March 2020, the Independent Expert recalled that the best response to a potential economic and social catastrophe provoked by the COVID-19 crisis is to put finance at the service of human rights and to support the less well-off through bold financial approaches, today said a UN human rights expert. On 15 April 2020, the Independent Expert released a Guidance note on a human rights response to the economic recession in the context of COVID 19 (also available in French, Spanish and Portuguese).

In May 2020, the UN Human Rights Regional Office for Europe, guided by the universal mandate of the UN High Commissioner of Human Rights, launched a paper 'The case for a Human Rights approach to the Rule of Law in the European Union' providing guidance and avenues for strengthening existing EU rule of law tools and for optimizing the new initiative in terms of substance, methodology, process and outcome, thereby drawing on the rich expertise, experience and lessons learned by the international human rights machinery over the past 75 years. The paper explores the inclusive methodology of the Universal Periodic Review as a possible model for the rule of law initiative and advocates for a greater role for the EU Fundamental Rights Agency and independent national human rights institutions. Meaningful participation also requires creating a system to protect those who contribute information from reprisals and calls to develop and implement a mechanism to prevent, monitor and address intimidation and reprisals against human rights defenders and organizations (and their staff) who submit information to the process. It also calls to use human rights indicators to analyze the state of the rule of law in EU member States.

### International Labour Organisation (ILO)

#### 1. Relevant instruments

The principle of freedom of association, the right to collective bargaining and collective action, are at the core of the ILO's values, principles and rights: the principle of freedom of association is enshrined in the ILO Constitution (1919), the ILO Declaration of Philadelphia (1944), and the ILO Declaration on Fundamental Principles and Rights at Work (1998). It is also a right proclaimed in the Universal Declaration of Human Rights (1948). More recently the ILO Centenary Declaration for the Future of Work adopted by the International Labour Conference in 2019 recalled that “Social dialogue, including collective bargaining and tripartite cooperation, provides an essential foundation of all ILO action and contributes to successful policy and decision making in its member States.”

For the ILO, the right to organize and form employers' and workers' organizations is the prerequisite for sound collective bargaining and social dialogue. ILO standards are targeted at promoting collective bargaining in particular as previous experiences have shown that good



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

collective bargaining practices have been/can be an important element that has allowed/allows countries to overcome economic/financial/social crises.

Some of the **most relevant ILO Conventions**<sup>11</sup> to recall in the field of trade union rights are:

- [Freedom of Association and Protection of the Right to Organise Convention, 1948 \(No. 87\) - \[ratifications\]](#)
- [Right to Organise and Collective Bargaining Convention, 1949 \(No. 98\) - \[ratifications\]](#)
- [Workers' Representatives Convention, 1971 \(No. 135\) - \[ratifications\]](#)
- [Labour Relations \(Public Service\) Convention, 1978 \(No. 151\) - \[ratifications\]](#)
- [Collective Bargaining Convention, 1981 \(No. 154\) - \[ratifications\]](#)

It should also be recalled that already in 2009 and in view of recovering from the crisis, the ILO adopted a [Global Jobs Pact](#), in which it proposes a balanced and integrated set of policy measures that countries can adopt in both the economic and social policy sphere to address the crisis and many of which are also still or will become even more relevant to combat (the aftermath of) the Covid-19 crisis. The Global Jobs Pact is based on the Decent Work Agenda and recalls that respecting fundamental principles and rights at work, promoting gender equality and encouraging voice, participation and social dialogue are also critical to recovery and development. It also recalls in relation to trade union rights that:

#### STRENGTHENING RESPECT FOR INTERNATIONAL LABOUR STANDARDS

14. International labour standards create a basis for and support rights at work and contribute to building a culture of social dialogue particularly useful in times of crisis. In order to prevent a downward spiral in labour conditions and build the recovery, it is especially important to recognize that:

(1) Respect for fundamental principles and rights at work is critical for human dignity. It is also critical for recovery and development. Consequently, it is necessary to increase:

(...) (ii) respect for freedom of association, the right to organize and the effective recognition of the right to collective bargaining as enabling mechanisms to productive social dialogue in times of increased social tension, in both the formal and informal economies.

(2) A number of international labour Conventions and Recommendations, in addition to the fundamental Conventions, are relevant. These include ILO instruments concerning employment policy, wages, social security, the employment relationship, the termination of employment, labour administration and inspection, migrant workers, labour conditions on public contracts, occupational safety and health, working hours and social dialogue mechanisms.

SOCIAL DIALOGUE: BARGAINING COLLECTIVELY, IDENTIFYING PRIORITIES,  
STIMULATING ACTION

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<sup>11</sup> And related Recommendations such as: [R143 - Workers' Representatives Recommendation, 1971 \(No. 143\)](#), [R159 - Labour Relations \(Public Service\) Recommendation, 1978 \(No. 159\)](#), [R163 - Collective Bargaining Recommendation, 1981 \(No. 163\)](#) and [R091 - Collective Agreements Recommendation, 1951 \(No. 91\)](#)





## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

15. Especially in times of heightened social tension, strengthened respect for, and use of, mechanisms of social dialogue, including collective bargaining, where appropriate at all levels, is vital.

16. Social dialogue is an invaluable mechanism for the design of policies to fit national priorities. Furthermore, it is a strong basis for building the commitment of employers and workers to the joint action with governments needed to overcome the crisis and for a sustainable recovery. Successfully concluded, it inspires confidence in the results achieved.

17. Strengthening capacities for labour administration and labour inspection is an important element in inclusive action on worker protection, social security, labour market policies and social dialogue.

As for the **handling of the Covid-19 crisis** in particular, reference could be made to the following recent ILO guidelines and documents:

- With public emergency service workers' (in particular in health care) now being in the frontline to handle this crisis, reference should be made to [ILO Guidelines on decent work in public emergency services](#) (2018) which offer advice on the dos and don'ts in case of emergencies of this nature for both governments', workers' and employers' organisations. These Guidelines are reference tools setting out principles that can be reflected in the design and implementation of policies, strategies, programmes, legislation, administrative measures and social dialogue mechanisms. In relation to trade union rights and actions, the guidelines provide amongst others the following:

#### IV. Fundamental principles and rights at work

1. Governments and social partners have the responsibility to ensure that the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) and relevant ratified ILO Conventions protect and apply to all PES workers, under the conditions set out in each Convention.

#### 2. Governments should:

a) recognize the important role of employers' and workers' organizations in crisis response, taking into account the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98);

b) implement policies that aim to address obstacles to the full exercise of freedom of association and the right to collective bargaining in PES, as set out in Conventions Nos 87 and 98 and in technical ILO Conventions which lay down their key elements and conditions and that complement them, specifically the Workers' Representatives Convention, 1971 (No. 135), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154);

#### 3. Public emergency services employers should:

a) remove any existing obstacles to the activities of free and independent trade unions representing PES workers;



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

b) provide workers' representatives with facilities to conduct their normal activities, the freedom to hold meetings and access to PES workplaces, to the extent that is practicable without hindering the efficiency of PES;

#### 4. Workers' organizations should:

(...) b) address practical challenges to the freedom of association and collective bargaining rights of workers in non-standard forms of employment; (...)

d) engage with social dialogue partners in the monitoring of discrimination in PES work by, for example, establishing complaint procedures, including equality concerns in collective bargaining agreements, setting up gender committees and promoting pay equity;

#### VII. Occupational safety and health

36. To this end, concrete measures should take into account PES specificities, should incorporate the knowledge and experience of front-line PES workers at the local, national and transnational levels and should include:

i) providing for collective bargaining, where applicable, on safety and health standards and their application;

#### Part 3. Means of action

1. Governments and social partners should promote and engage in social dialogue, training and monitoring and evaluation when implementing the recommendations included in these guidelines.

#### IX. Social dialogue

2. Social dialogue is an effective means to both ensure emergency preparedness and improve emergency response. It seeks to improve working conditions for PES workers, including in situations of increased workload and responsibility.(...)

4. The unique and essential role of PES workers should not be used as a justification to deny their participation in effective social dialogue mechanisms. An overriding policy consideration for PES employers and workers should be to establish an environment and mechanisms for effective social dialogue on working conditions, including appropriate pay structures and levels. To this end, PES workers' representatives should be fully involved in social dialogue processes. PES employers should afford paid leave for workers' representatives to engage in such activities.

5. Social dialogue regarding PES should be based on freedom of association, should be conducted in good faith and, where applicable under the relevant ILO Conventions, should include the effective recognition of the right to collective bargaining or, where appropriate, recourse to consultations. In addition, it should be supported by enabling institutional, legal and regulatory frameworks.

6. Strong, independent and representative organizations of PES workers and employers, in collaboration with each other, can contribute to the improvement of issues such as social protection, OSH and access to training. In ensuring effective social dialogue, emphasis should be placed on:

a) reviewing the legal framework to eliminate any legal and practical obstacles that impede the realization of freedom of association and the right to collective bargaining regarding





## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

PES, where ILO Conventions allow it, such as excessive minimum membership thresholds, the absence of formalized social dialogue mechanisms and inadequate funding;

b) enabling the establishment of facilities, as appropriate, for the representatives of recognized PES workers' organizations that allows for representational functions to be carried out promptly and efficiently, both during and outside working hours, in a manner that does not impede the efficiency of PES operations;

c) creating an enabling environment for social dialogue by providing appropriate education and training programmes for representatives of PES workers, employers and governments.

7. Governments should encourage and promote the full development and utilization of machinery for voluntary negotiations between employers or between employers' and workers' organizations. A state of emergency, which should only be declared by an appropriate authority and for a reasonable and defined period, should not justify exempting PES employers from their obligations under relevant ratified ILO Conventions or suspending the application of those Conventions.
  8. Governments and social partners should take measures to mainstream diversity in social dialogue mechanisms, including by ensuring the representation of under-represented groups of workers. Social dialogue is an effective means of securing commitments to greater diversity in the PES workforce.
  9. Tripartite commissions or bodies on OSH or other working conditions should include PES employers' and workers' representatives. Collective agreements between PES employers and workers, as well as memoranda of understanding between agencies responsible for OSH and PES, could provide guidance in this regard. Social dialogue between PES workers and employers may include other relevant parties deemed necessary or desirable by the government or social partners.
  10. In addition to legal restrictions on freedom of association rights applicable to the police and armed forces, other categories of PES workers may be classified as essential services if the interruption of their work would endanger the life, health or personal safety of the whole or part of the population. If deprived of the right to strike by national laws, such workers should have access to adequate, impartial and speedy conciliation and arbitration proceedings in interest disputes.
- In a guide of 23 March on [ILO Standards and Covid-19 \(Corona virus\)](#), the ILO brought together the key provisions of international labour standards relevant to the evolving COVID-19 outbreak relating to safety and health, working arrangements, protection of specific categories of workers (including nursing personnel, domestic workers, migrant workers, seafarers or fishers, who are particularly vulnerable in the current context), non-discrimination and equality, social security or employment protection and of course trade union rights including collective bargaining. The key message is that all crisis responses need to ensure respect for all human rights and the rule of law, including respect for fundamental principles and rights at work and for international labour standards. The brief was [updated end of May 2020](#).
  - This brief also makes a particular reference to the very recent [Employment and Decent Work for Peace and Resilience Recommendation, 2017 \(No. 205\)](#) that outlines a strategic approach to crisis response, including the adoption of a phased multitrack approach implementing coherent and comprehensive strategies for enabling



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

recovery and building resilience (in different areas like employment/income generation, social protection, labour law, labour market institution, social dialogue (including capacity building) and special groups like refugees and migrant workers. Its section 'IX. Social dialogue and role of employers' and workers' organizations' recalls that:

24. In responding to crisis situations, Members should, in consultation with the most representative employers' and workers' organizations:

(a) ensure that all measures provided for in this Recommendation are developed or promoted through gender-inclusive social dialogue, taking into account the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144);

(b) create an enabling environment for the establishment, restoration or strengthening of employers' and workers' organizations; and

(c) encourage, where appropriate, close cooperation with civil society organizations.

25. Members should recognize the vital role of employers' and workers' organizations in crisis response, taking into account the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and in particular:

(a) assist sustainable enterprises, particularly small and medium-sized enterprises, to undertake business continuity planning to recover from crises by means of training, advice and material support, and facilitate access to finance;

(b) assist workers, in particular those who have been made vulnerable by the crisis, to recover from the crisis through training, advice and material support; and

(c) take measures for these purposes through the collective bargaining process as well as by other methods of social dialogue.

- As many workers will unfortunately become be victim of collective and individual lay-offs due to this Covid-19 crisis, it is recalled that [ILO Convention n° 158 on Termination of Employment \(1982\)](#) foresees that in case of terminations of employment for economic, technological, structural or similar reasons, employers must amongst others consult trade unions/workers' representatives on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. For the CEACR General Survey on this Convention, click [here](#).
- The ILO has also set up a monitoring system, which is regularly updated, on [how ILO member States are responding to the crisis](#) in particular in the world of work caused by the COVID-19 pandemic. It provides a mass of information on the field of workers' protection as well as the role played by social dialogue and/or separate trade union and employers' activities.
- In written statements to the International Monetary Fund (IMF) and the World Bank (WB) of mid-April, [ILO Director General Guy Ryder urged the IMF and WB](#) to focus their response on providing immediate relief to workers and enterprises in order to protect businesses and livelihoods, and to pay priority attention to unprotected workers, and those in the informal economy, and to make sure that any policy response makes '*full use of social dialogue between governments, and workers and employers*'



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

*organisations, which has a proven record of generating effective, practical, and equitable solutions to the type of challenges now confronting the world of work.*

- In the course of May, the ILO also launched several tools in relation to a safe and health return to work. There is the '[10 step tool for a safe and healthy return to work in times of COVID-19](#)' which looks at different OHS aspects like personal protective equipment (PPE), health surveillance of workers, psycho-social risks, preventive and control measures and procedures. Most importantly to highlight is that the first steps to considered are 'to convene social dialogue in a sector of activity where it exists, and if it does not exist consider setting up a bipartite team with the same number of members representing businesses and workers from the respective sector' and 'convene the joint OSH committee in the establishment where it exists, and if it does not exist set up a team with the same number of members representing management and workers'. There is also a [policy brief](#) on this particular topic with again a lot of key attention devoted to the role of social dialogue at all levels including the undertaking level.
- Furthermore, a separate policy brief was launched on '[The need for social dialogue in addressing the COVID-19 crisis](#)' which stresses the crucial role social dialogue at all levels has played and must play in mitigating the social and economic consequences of the Covid-19 crisis. Amongst the policy recommendations, the following is highlighted:
  - Although each country situation and each industry is different and there is no "one-size fits all" type of dialogue, all forms and levels of social dialogue will be crucial in the current and coming periods.
  - It is essential to start the social dialogue process as early as possible in order to maximize its impact, and the social partners need to be involved at all stages of crisis responses: from initial needs assessment to formulation of measures, implementation, monitoring and evaluation.
  - The engagement of the state authorities at the highest levels in tripartite social dialogue with the social partners enhances the credibility of the process.
  - Given social partners' in-depth knowledge of the needs and realities of companies and workers, their effective involvement in decision-making can lead to the adoption of well-targeted and effective preventive measures to help workers and enterprises limit the spread of COVID-19 in workplaces, and also of measures to support jobs and enterprises.
  - Social dialogue should address the protection needs of the most vulnerable workers and enterprises as a matter of priority, in line with the pledge by UN Member States to "leave no one behind".
- Also another policy brief from May 2020 on '[A policy framework for tackling the economic and social impact of the COVID-19 crisis](#)' stresses very much, next to the protecting workers in the work place, the need on the one hand to strengthen the capacity and resilience social partners' organisations and on the other hand to



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

strengthen social dialogue, collective bargaining and and labour relations institutions and processes.

Similarly, the **social partners within the ILO** have already reacted to the COVID-19 outbreak. In a [joint statement, ITUC and IOE](#) call for urgent action in amongst others the following key areas:

- Ensure business continuity, income security and solidarity to prevent the spread and protect lives and livelihoods and build resilient economies and societies.
- Important role that social dialogue and social partners play in the control of the virus at the workplace and beyond, but also to avoid massive job losses in the short and medium term
- Ensure policy coordination and coherence whereby consideration must be given to the need for protecting employment and income through strengthening social protection measures in both the resolution of the pandemic and in setting the foundation for the employment and economic conditions for recovery (...).

Also the **ILO's Bureau for Workers' Activities (ACTRAV)** prepared a note on "[COVID-19: what role for workers' organizations?](#)" highlighting the importance of ILO Recommendation No 205 on Employment and Decent Work for Peace and Resilience (R205) (see above) as an effective instrument for governments, employers and workers organizations to address the COVID-19 pandemic.

### **2. ILO "crisis/state of emergency" related case law**

Over time, the ILO supervisory bodies have had to pronounce themselves on the application of standards in situations of crisis and/or state of emergency.

#### **2.1. Committee on Freedom of Association (CFA)**

Freedom of association is the only subject dealt with and supervised by a special (tripartite) body, the [Committee on Freedom of Association \(CFA\)](#), which underlines even more the utmost importance the ILO attaches to this subject. The CFA has indeed developed a longstanding case law on the derogations, restrictions and limitations that are allowed (or not) in situations of state of emergency and/or (economic) crisis and this in different particular areas like 'trade union and employers organizations rights and civil liberties', collective bargaining, consultation with employers' and workers' organisations and the right to strike. Below a non-exhaustive overview is provided, more can be found in the [ILO CFA Digest of Case law \(2018\)](#).<sup>12</sup>

##### **a. Trade union and employers organizations rights and civil liberties**

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<sup>12</sup> Where appropriate reference is also made to the CFA cases relating to EU/EEA/candidate countries where the CFA expressed such decisions.





## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

The Committee requested a government to ensure that any emergency measures aimed at national security did not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security. (para. 74)

The Committee requested a government to issue appropriate high-level instructions to: (i) bring to an end prolonged military presence inside workplaces which is liable to have an intimidating effect on the workers wishing to engage in legitimate trade union activities and to create an atmosphere of mistrust which is hardly conducive to harmonious industrial relations; (ii) to ensure that any emergency measures aimed at national security do not prevent in any way the exercise of legitimate trade union rights and activities, including strikes, by all trade unions irrespective of their philosophical or political orientation, in a climate of complete security; and (iii) to ensure the strict observance of due process guarantees in the context of any surveillance and interrogation operations by the army and police in a way that guarantees that the legitimate rights of workers organizations can be exercised in a climate that is free from violence, pressure or threats of any kind against their leaders and members. (para. 100)

Due process would not appear to be ensured if, under the national law, the effect of a state of emergency is that a court cannot examine, and does not examine, the merits of the case. (para. 147)

The Committee on Freedom of Association has recalled that the Committee of Experts on the Application of Conventions and Recommendations has emphasized that the freedom of association Conventions do not contain any provision permitting derogation from the obligations arising under the Convention, or any suspension of their application, based on a plea that an emergency exists. (para. 298)

In cases of repeated renewals of the state of emergency, the Committee has pointed out that the resolution concerning trade union rights and their relation to civil liberties, adopted by the International Labour Conference in 1970, states that the rights conferred upon workers and employers organizations must be based on respect for (...) civil liberties (...) and that the absence of these civil liberties removes all meaning from the concept of trade union rights. (para. 299)

The enactment of emergency regulations which empower the government to place restrictions on the organization of public meetings and which are applicable not only to public trade union meetings, but also to all public meetings, and which are occasioned by events which the government considered so serious as to call for the declaration of a state of emergency, does not in itself constitute a violation of trade union rights. (para. 301)

Where restrictions imposed by a revolutionary government on certain publications during a period of emergency appeared mainly to have been imposed for reasons of a general political character, the Committee, while taking account of the exceptional nature of these measures, drew the attention of the government to the importance of ensuring respect for the freedom of trade union publications. (para. 302)

Emergency legislation aimed at anti-social disruptive elements should not be applied against workers for exercising their legitimate trade union rights. (para. 306)

The Committee would also recall that where a state of emergency exists, it is desirable that the Government in its relations with occupational organizations and their representatives, should rely,





## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

as far as possible, on the ordinary law rather than on emergency measures which are liable, by their very nature, to involve certain restrictions on fundamental rights. (para. 309)

#### b. Collective bargaining

In cases of government intervention to restrict collective bargaining, (...) it is for the Committee to express its views on whether, in taking such action, the Government has gone beyond what the Committee has considered to be acceptable restrictions that might be placed temporarily on free collective bargaining. (para 1420)

The Committee has expressed the view that the mere existence of a deadlock in a collective bargaining process is not in itself a sufficient ground to justify an intervention from the public authorities to impose arbitration on the parties to the labour dispute. Any intervention by the public authorities in collective disputes must be consistent with the principle of free and voluntary negotiations; this implies that the bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent and recourse to these bodies should be on a voluntary basis, except where there is an acute national crisis. (para. 1430)

(...) [The Committee] nevertheless considers that the interruption of already negotiated contracts is not in conformity with the principles of free collective bargaining because such contracts should be respected. (para 1433)

While it is not its role to express a view on the soundness of the economic arguments invoked to justify government intervention to restrict collective bargaining, the Committee must recall that measures that might be taken to confront exceptional circumstances ought to be temporary in nature having regard to the severe negative consequences on workers terms and conditions of employment and their particular impact on vulnerable workers. (para. 1434, Cases 2820, 2947 and 3072 – respectively Greece, Spain and Portugal)

The Committee has highlighted the importance, in the context of an economic crisis, of maintaining permanent and intensive dialogue with the most representative workers and employers organizations. (para. 1437, Case 2918 - Spain)

The suspension or derogation by decree without the agreement of the parties of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98. If a government wishes the clauses of a collective agreement to be brought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force. (para. 1449, Cases 2447, 2820, 2918/2947 and 3072 – respectively Malta, Greece, Spain and Portugal)

In examining allegations of the annulment and forced renegotiation of collective agreements for reasons of economic crisis, the Committee was of the view that legislation which required the renegotiation of agreements in force was contrary to the principles of free and voluntary collective bargaining enshrined in Convention No. 98 and insisted that the government should have endeavoured to ensure that the renegotiation of collective agreements in force resulted from an agreement reached between the parties concerned. (para. 1453)

If, as part of its stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it



## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

should be accompanied by adequate safeguards to protect workers living standards. (para. 1456, Cases 2820, 2918 and 3072 – respectively Greece, Spain and Portugal)

As regards the obligation for future collective agreements to respect productivity criteria, the Committee recalled that if, within the context of a stabilization policy, a government may consider for compelling reasons that wage rates cannot be fixed freely by collective bargaining (in the present case the fixing of wage scales excludes index-linking mechanisms and must be adjusted to increases in productivity), such a restriction should be imposed as an exceptional measure and only to the extent necessary, without exceeding a reasonable period and it should be accompanied by adequate safeguards to protect workers living standards. This principle is all the more important because successive restrictions may lead to a prolonged suspension of wage negotiations, which goes against the principle of encouraging voluntary collective negotiation. (para. 1461)

Legislative provisions prohibiting the negotiation of wage increases beyond the level of the increase in the cost of living are contrary to the principle of voluntary collective bargaining embodied in Convention No. 98; such a limitation would be admissible only if it remained within the context of an economic stabilization policy, and even then only as an exceptional measure and only to the extent necessary, without exceeding a reasonable period of time. (para. 1463, Case 2447 – Malta)

Adequate mechanisms for dealing with exceptional economic situations can be developed within the framework of the public sector collective bargaining system. (para. 1481, Case 2918 – Spain)  
Possible avenues for constructive engagement can be based in the elaboration of adequate mechanisms for dealing with exceptional economic situations within the framework of the public sector collective bargaining system. (para. 1482, Case 2820 – Greece)

#### c. Consultation with the organizations of workers and employers

The Committee highlighted the importance of social dialogue in the process of adopting legislation, which may have an effect on workers' rights, including those intended to alleviate a serious crisis situation. (para. 1546, Case 3072 - Portugal)

#### d. Right to strike

Economic consideration should not be invoked as a justification for restrictions on the right to strike. (para. 791, Case 2841 – France)

Compulsory arbitration is acceptable in cases of acute national crisis. (para. 817, Case 3084 – Turkey)

A general prohibition of strikes can only be justified in the event of an acute national emergency and for a limited period of time. (para. 824)

A certain minimum service may be requested in the event of strikes whose scope and duration would cause an acute national crisis, but in this case, the trade union organizations should be able to participate, along with employers and the public authorities, in defining the minimum service. (para. 871)

Minimum service may be set up in the event of a strike, the extent and duration of which might be such as to result in an acute national crisis endangering the normal living conditions of the population. Such a minimum service should be confined to operations that are strictly necessary to avoid endangering the life or normal living conditions of the whole or part of the population; in



## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

addition, workers organizations should be able to participate in defining such a service in the same way as employers and the public authorities. (para. 873, Cases 2494/3038 and 2696 – respectively Norway and Bulgaria)

Strikers should be replaced only: (a) in the case of a strike in an essential service in the strict sense of the term in which the legislation prohibits strikes; and (b) where the strike would cause an acute national crisis. (para. 917)

The establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance. (para. 866, Cases 2506, 2509 and 2841 – respectively Greece, Romania and France)

Placing leaflets containing slogans such as let those who caused the crisis pay for it, fight substandard employment, and we demand our night shift pay or similar slogans on the list of extremist literature impedes considerably the right of trade unions to express their views and is an unacceptable restriction on trade union activities and, as such, a grave violation of freedom of association. (para. 262)

#### 2.2. Committee of Experts on Applications of Conventions and Recommendations (CEACR)

Also the **Committee of Experts on Applications of Conventions and Recommendations (CEACR)** adopted in the context of the 2008 economic/financial crisis a statement in which the importance of the role of international labour standards in dealing with the crisis and emphasised that the crisis must not be used as an excuse for lowering standards. Furthermore, it made a general observation on the application of the ILO social security standards in which it emphasised the need to avoid the risk of social regression. The CEACR also underlined that in such unprecedented circumstances, governments must manage the skyrocketing levels of budgetary deficit in such a way not to endanger the social guarantees of the population and that measures taken by governments to salvage private providers could not be taken at the expense of cutting the resources available to public social security schemes (ILO, 2009, para. 68 ff.).

In its General Survey on the fundamental Conventions “Giving globalization a human face” of 2012, As a general principle, the CEACR General Survey (2012) confirms that collective bargaining is a fundamental right accepted by Member States from the very fact of their membership in the ILO, and which they have an obligation to respect, to promote and to realize in good faith. The agreements so concluded must be respected and must be able to establish conditions of work more favourable than those envisaged in law: Indeed, if this were not so, there would be no reason for engaging in collective bargaining.



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

In relation to the right to strike, the CEACR survey also reiterates amongst others the following<sup>13</sup>:

### Permitted restrictions and compensatory guarantees

127. The right to strike is not absolute and may be restricted in exceptional circumstances, or even prohibited. Over and above the armed forces and the police, the members of which may be excluded from the scope of the Convention in general, other restrictions on the right to strike may relate to: (i) certain categories of public servants; (ii) essential services in the strict sense of the term; and (iii) situations of acute national or local crisis, although only for a limited period and solely to the extent necessary to meet the requirements of the situation. In these cases, compensatory guarantees should be provided for the workers who are thus deprived of the right to strike.

### Situations of acute national or local crisis

140. The third restriction on the right to strike relates to situations of acute national or local crisis. As general prohibitions of strikes resulting from emergency or exceptional powers constitute a major restriction on one of the essential means available to workers, the Committee considers that they are only justified in a situation of acute crisis, and then only for a limited period and to the extent necessary to meet the requirements of the situation. This means genuine crisis situations, such as those arising as a result of a serious conflict, insurrection or natural, sanitary or humanitarian disaster, in which the normal conditions for the functioning of society are absent.

### Requisitioning of strikers and hiring of external workers

151. Although certain systems continue to retain fairly broad powers to requisition workers in the case of a strike, the Committee considers that it is desirable to limit powers of requisitioning to cases in which the right to strike may be limited, or even prohibited, namely: (i) in the public service for public servants exercising authority in the name of the State; (ii) in essential services in the strict sense of the term; and (iii) in the case of an acute national or local crisis.

### Compulsory arbitration

153. (...) The Committee considers that recourse to compulsory arbitration to bring an end to a collective labour dispute and a strike is only acceptable under certain circumstances, namely: (i) when the two parties to the dispute so agree; or (ii) when the strike in question may be restricted, or even prohibited, that is: (a) in the case of disputes concerning public servants exercising authority in the name of the State; (b) in conflicts in essential services in the strict sense of the term; or (c) in situations of acute national or local crisis, but only for a limited period of time and to the extent necessary to meet the requirements of the situation. (...)

201. Prior approval by the authorities. (...) With regard to the compulsory extension of the validity of collective agreements prescribed by law (which is different from the issue of the continuing effect of collective agreements upon their expiry stipulated in certain legislations when the parties fail to agree on the terms of a new collective agreement), in the view of the Committee this would only be admissible on an exceptional basis in cases of acute national or local crisis of a non-economic nature and for short periods.

## Council of Europe

<sup>13</sup> For a complete and exhaustive analysis on the right to strike in international law, see Vogt Jeffrey e.a. (2020) [The Right to Strike in International Law](#), Hart Publishing: Oxford, p. 208.



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

The two main Council of Europe instruments for the protection of trade union rights concern on the one hand the European Convention of Human Rights (ECHR) and on the other hand the European Social Charter (ESC) (both widely ratified by EU/EEA/candidate countries).

### 1. European Convention of Human Rights (ECHR)

#### 1.1 Relevant provisions

As for the [European Convention on Human Rights](#), it provides in its Article 11 on the 'Freedom of assembly and association' that:

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.

Next to these particular restrictions, **Article 15 of the ECHR on 'Derogations in time of emergency'** states:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.(...)
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

As for allowed derogations/restrictions, Article 15 ECHR thus grants 'to the governments of the States parties, in exceptional circumstances, the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention. The use of that provision is governed by the following procedural and substantive conditions' (Article 15 ECHR regulating derogation in time of emergency):

- the right to derogate can be invoked only in time of war or other public emergency threatening the life of the nation.
- a State may take measures derogating from its obligations under the Convention only to the extent strictly required by the exigencies of the situation.
- any derogations may not be inconsistent with the State's other obligations under international law.





## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

- lastly, on a procedural level, the State availing itself of this right of derogation must keep the Secretary General of the Council of Europe fully informed.<sup>14</sup>

According to ELDH (European Association of Lawyers for Democracy & World Human Rights ELW-Network Coordinating Committee) and the ELW (European Lawyers for Workers Network), notifications of intention to derogate from provisions of the ECHR have been submitted to the Secretary General of the Council of Europe amongst others by Latvia, Romania, Armenia, Moldova, Estonia, Georgia, Albania, North Macedonia, and Serbia. This number of derogations because of COVID-19 is unprecedented.<sup>15</sup>

Beginning of April 2020, the Council of Europe Secretary General also launched a [new toolkit for governments across Europe to guarantee the respect of human rights, democracy and the rule of law](#) during the COVID-19 crisis and to ensure that measures taken by member states during the current crisis remain proportional to the threat posed by the spread of the virus and are limited in time. The toolkit covers several areas including: 1) derogations from the European Convention on Human Rights in times of emergency, 2) Respect for the rule of law and democratic principles in times of emergency, including limits on the scope and duration of emergency measures and 3) Fundamental human rights standards including freedom of expression, privacy and data protection, protection of vulnerable groups from discrimination and the right to education.

### 1.2. European Court of Human Rights (ECtHR)

The **European Court of Human Rights (ECtHR)** has recognised that Article 11 ECHR covers the right to form and join trade unions, right to collective bargaining and the right to strike. The most important judgment was delivered unanimously by the Grand Chamber in the [Demir and Baykara](#)<sup>16</sup> case which reversed the Court's previous jurisprudence by recognising for the first time the right to collective bargaining as being enshrined in the protection of freedom of association guaranteed by Article 11 ECHR. Based on this judgment the Court has also recognised in [Enerji Yapi-Yol Sen](#)<sup>17</sup> the right to strike as an aspect of that same human right. This was followed by a series of further judgments<sup>18, 19</sup>

<sup>14</sup> For more detailed information on see the ECtHR Guide on Article 15 '[Derogations in emergency times](#)' (for French version click [here](#)).

<sup>15</sup> ELDH and ELW, [European lawyers' declaration on May Day: Anti Covid-19 policies threaten workers' rights](#), 29 April 2020.

<sup>16</sup> ECtHR 12.11.2008, no. 34503/97 *Demir and Baykara v. Turkey*.

<sup>17</sup> ECtHR 21.4.2009, no. 68959/01 *Enerji Yapi-Yol Sen v. Turkey*.

<sup>18</sup> ECtHR 15.9.2009, no. 30946/04 *Kaya and Seyhan v Turkey*, 15.9.2009, no. 22943/04 *Saime Özcan v. Turkey*, 13.7.2010, no. 33322/07 *Çerikci v. Turkey* (see also 27.3.2007, no. 6615/03 *Karaçay v. Turkey*).

<sup>19</sup> For an extensive analysis of Article 11 ECHR in relation to the right to form and join trade unions, the right to bargain collectively and the right to take collective action, see the respective Chapters 11-13 by Van Hiel, I., Jacobs, A. and Dorssemont, F. in Dorssemont, F. Lörcher, K. and Schömann, I. (2013) [The European Convention on Human Rights and the Employment Relation](#), Hart Publishing: Oxford, p. 482.



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

### 2. European Social Charter (ESC)

#### 2.1. Relevant provisions

The [European Social Charter](#) (ESC) (both in its initial 1961 and 1996 version) provide for the following fundamental trade union rights:

#### **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.

The Appendix to the Charter, Part II, Article 6§4, stipulates that States may regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G. Article G of the Charter (on 'Restrictions') provides that the rights and principles [set in the Charter] "shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals" and that "the restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

As for allowed derogations and restrictions, Article 30 and 31 (and similarly Article F and G for the 1996 Revised ESC) provide amongst others the following:

#### **Article 30 –Derogations in time of war or public emergency**



## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

- 1) In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. (...)

#### Article 31 –Restrictions

- 1) The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.
- 2) The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

#### 2.2. European Committee of Social Rights (ECSR)

##### a. General case law

Firstly, as for Article 31 ESC (Article G of the revised ESC) on the allowed restrictions/derogations, the [2018 Case law Digest of the European Committee of Social Rights \(ECSR\)](#), the main supervisory body to the ESC, provides the following:

Article G provides for the conditions under which restrictions on the enjoyment of rights provided for by the Charter are permitted. This provision corresponds to the second paragraph of Articles 8 to 11 of the European Convention on Human Rights. It cannot lead to a violation as such, but this provision can nevertheless be taken into account when assessing the merits of the complaint with regard to a substantive article of the Charter. Article G is applicable to all provisions of Articles 1 to 31 of the Charter.

Any restriction to a right is only in conformity with the Charter if it satisfies the conditions laid down in Article G.

Given the severity of the consequences of a restriction of these rights, especially for society's most vulnerable members, Article G lays down specific preconditions for applying such restrictions. Furthermore, as an exception applicable only under extreme circumstances, restrictions under Article 31 must be interpreted narrowly. Thus, any restriction has to be

##### (i) prescribed by law,

Prescribed by law means by statutory law or any other text or case-law provided that the text is sufficiently clear i. e. that satisfy the requirements of precision and foreseeability implied by the concept of “prescribed by law”

(ii) pursue a legitimate purpose, i.e. the protection of the rights and freedoms of others, of public interest, national security, public health or morals. In a democratic society, it is in principle for the legislature to legitimise and define the public interest by striking a fair balance between the needs of all members of society. From the point of view of the Charter, the legislature has a margin of appreciation in doing so. However, the legislature is not totally free of any constraints in its decision-making : obligations undertaken under the Charter cannot be abandoned without appropriate guarantees of a level of protection is still adequate to meeting basic social needs. It



## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

is for the national legislature to balance the concerns for the public purse with the imperative of adequately protecting social rights. States cannot divest themselves of their obligations by surrendering the power to define what is in the public interest to external institutions.

(iii) necessary in a democratic society for the pursuance of these purposes, i.e. the restriction has to be proportionate to the legitimate aim pursued : There must be a reasonable relationship of proportionality between the restriction on the right and the legitimate aim(s) pursued. In transposing restrictive measures into national law, legal acts must ensure proportionality between the goals pursued and their negative consequences for the enjoyment of social rights. Consequently, even under extreme circumstances the restrictive measures put in place must be appropriate for reaching the goal pursued, they may not go beyond what is necessary to reach such goal, they may only be applied for the purpose for which they were intended, and they must maintain a level of protection which is adequate. Moreover, a thorough balancing analysis of the effects of the legislative measures should be conducted by the authorities, notably of their possible impact on the most vulnerable groups in the labour market as well as a genuine consultation with those most affected by the measures.

In relation to **article 6§2 (right to collective bargaining)** it should be recalled also that “*States Parties should not interfere in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned, including the use of collective action. Trade unions must be allowed to strive for the improvement of existing living and working conditions of workers and in this area the rights of trade unions should not be limited by legislation to the attainment of minimum conditions.*”<sup>20</sup>

It must be recalled that in its latest supervisory cycle on the so-called [Conclusions 2018](#), the ECSR found still numerous EU/EEA/candidate countries in violation of in particular Articles 5, 6§2 and 6§4 of the European Social Charter.

Furthermore, as many workers will unfortunately become be victim of collective and individual lay-offs due to this Covid-19 crisis, it is recalled that the ESC provides in its **Article 29 for the right to information and consultation of trade union and workers’ representatives in case of collective redundancy procedures** and this, in good time prior to such collective redundancies, on ways and means of avoiding collective redundancies or limiting their occurrence and mitigating their consequences, for example accompanying social measures aimed, in particular, at aid for the redeployment or retraining of the workers concerned.

#### b. ECSR ‘crisis/austerity’ case law<sup>21</sup>

<sup>20</sup> See Council of Europe (2018) ECSR Digest of Case Law. For an extensive analysis of articles 5 (right to organise) and 6 (right to collective bargaining), see the respective chapters by Jacobs, A. and Dorssemont, F. in Bruun, N., Lörcher, K. Schömann, I. and Clauwaert, S. (2017) [The European Social Charter and Employment Relation](#), Hart Publishing: Oxford, p. 552.

<sup>21</sup> For the impact of EU crisis responses and austerity measures on collective labour law, see Bruun, N., Lörcher, K. and Schömann, I. (2014) *The Economic and Financial Crisis and Collective Labour Law in Europe*, Hart Publishing: Oxford, p. 384. It also analyses the non-compliance of these measures against the framework of EU law, the relevant ILO Conventions, (Revised) European Social Charter and European Convention on Human Rights provisions, and also provides legal approaches which may be used to challenge crisis/austerity measures.





## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

In this framework it might be also more than appropriate to recall some of the (general) case law of the ECSR in relation to (austerity) measures taken following the 2008 economic crisis.

Both in the framework of the reporting and the collective complaint procedure, the ECSR expressed its views on the protection of social rights in times of economic crisis. In the general introduction to its Conclusions 2009<sup>22</sup>, the ECSR stated that the implementation of the social rights guaranteed by the Charter had acquired greater importance in a context of global economic crisis:

“The severe financial and economic crisis that broke in 2008 and 2009 has already had significant implications on social rights, in particular those relating to the thematic group of provisions ‘Health, social security and protection’ [...]. Increasing level of unemployment is presenting a challenge to social security and social assistance systems as the number of beneficiaries increase while [...] revenues decline. [T]he Committee recalls that under the Charter the Parties have accepted to pursue by all appropriate means, the attainment of conditions in which inter alia the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realized. From this point of view, the Committee considers that the economic crisis should not have as a consequence the reduction of the protection of the rights recognized by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most.”

In the framework of the [Collective Complaints Procedure](#), the ECSR also expressed itself on different occasions, in particular in relation to several Greek “austerity complaints” about the application of the ESC provisions in times of (economic) crisis.

In its [Decision on the merits of 23 May 2012](#), in respect of General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece, complaint No. 65/2011, the ECSR indicated that this principle, as expressed in its General Introduction of 2009, should equally apply to labour rights/law and that while it may be reasonable for the crisis to prompt changes in current legislation and practices in one or other of these areas to restrict certain items of public spending or relieve constraints on businesses, these changes should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter. (para. 16-17)

In its [Decision on the merits of 7 December 2012](#), Federation of employed pensioners of Greece ((IKA –ETAM) v. Greece, complaint No. 76/2012, the Committee indicated that this principle also applies to social security rights.

In its [Decision on the merits of 23 March 2017](#), on the Greek “austerity” collective complaint n° 111/2014 introduced by GSEE, the ECSR stated amongst the following<sup>23</sup>:

83. The Committee recalls that Article 31 indeed opens up a possibility for States to restrict rights enshrined in the Charter. Given the severity of the consequences of a restriction of these rights, especially for society's most vulnerable members, Article 31 lays down specific

<sup>22</sup> Conclusions 2009: General introduction.

<sup>23</sup> To note is that the [ETUC submitted comprehensive observations](#) in this case enumerating several references to relevant International and European law and other material/sources.





## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

preconditions for applying such restrictions. Furthermore, as an exception applicable only under extreme circumstances, restrictions under Article 31 must be interpreted narrowly. Restrictive measures must have a clear basis in law, i.e. they must have been agreed upon by the democratic legislature, and need to pursue one of the legitimate aims defined in Article 31§1. Additionally, restrictive measures must be "necessary in a democratic society", they must be adopted only in response to a "pressing social need" (Conclusions XIII-1, Netherlands, Article 6§4, see also European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012, decision on the merits of 2 December 2013, §207).

85. While, in a democratic society, it is in principle for the legislature to legitimize and define the public interest by striking a fair balance between the needs of all members of society, and while it from the point of view of the Charter has a margin of appreciation in doing so, this does not imply that the legislature is totally free of any constraints in its decision-making. Under public international law, States having ratified human rights treaties such as the 1961 Charter are bound to respect the obligations thereby undertaken including when defining the public interest. More particularly, obligations undertaken cannot be abandoned without appropriate guarantees of a level of protection which is still adequate to meeting basic social needs. It is for the national legislature to balance the concerns for the public purse with the imperative of adequately protecting social rights. and seq.).

87. Nevertheless, the Committee considers that States cannot divest themselves of their obligations by surrendering the power to define what is in the public interest to external institutions (see mutatis mutandis IKA-ETAM v. Greece, Complaint No. 76/2012, op.cit., §§50-52). In transposing restrictive measures into national law, legal acts must ensure proportionality between the goals pursued and their negative consequences for the enjoyment of social rights. Consequently, even under extreme circumstances the restrictive measures put in place must be appropriate for reaching the goal pursued, they may not go beyond what is necessary to reach such goal, they may only be applied for the purpose for which they were intended, and they must maintain a level of protection which is adequate.

**In particular in relation to Covid-19**, also the President of the [European Committee of Social Rights](#) (ECSR) was clear when launching in March its [Conclusions 2019](#) (in relation to the rights guaranteed by the ESC to young persons, families and migrant workers) that *"the COVID-19 crisis is a brutal reminder of the importance of ensuring lasting progress with respect to social rights enjoyment. It is crucial that the European Social Charter, also known as the Social Constitution of Europe, should be used to shape and analyse decisions during the COVID-19 crisis. The Charter serves as a key tool for states in ensuring that their responses to the Covid-19 pandemic is human rights-compliant – both in the short and the longer term."*

In a [statement of interpretation](#) issued on 22 April on the right to protection of health (Article 11 of the European Social Charter) in times of pandemic, the ECSR endorsed several measures adopted by states in response to COVID-19 (such as testing and tracing, physical distancing and self-isolation, the provision of adequate masks and disinfectant, as well as the imposition of quarantine and 'lockdown' arrangements). However it also warns that all such measures must be designed and implemented having regard to the current state of scientific knowledge but more importantly in accordance with relevant human rights standards. The ECSR also points to a range of other social human rights affected by the pandemic, including the right to health and safety at work or the rights of children and older persons, to which authorities must pay attention. **The ECSR also foresees to offer further guidance to states on social rights exigencies in the response to COVID-19 via its dedicated website on**



## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

**“Social Rights in times of pandemic: Covid-19 and the European Social Charter”**. Furthermore, it will also scrutinise closely action taken by states in response to the pandemic in terms of their social rights obligations. ETUC informs on a regular basis the ECSR on the detected violations of human, workers and trade union rights, in particular by providing them (the updates of) this and other [ETUC Covid-19 Briefing Notes](#).

### 3. Other Council of Europe bodies/representatives

Consideration should also be taken of the **Council of Europe Parliamentary Assembly Resolution 2033 (2015) of 28 January 2015, “Protection of the right to bargain collectively, including the right to strike”**, adopted in the full economic crisis period, which noted and confirmed that:

1. the rights to organise, to bargain collectively and to strike (..) are not only democratic principles underlying modern economic processes, but fundamental rights enshrined in the European Convention on Human Rights and the European Social Charter” and that “the rights to bargain collectively and to strike are crucial to ensure that workers and their organisations can effectively take part in the socio-economic process to promote their interests when it comes to wages, working conditions and social rights. (...)
2. However, these fundamental rights have come under threat in many Council of Europe member States in recent years, in the context of the economic crisis and austerity measures. In some countries, the right to organise has been restricted, collective agreements have been revoked, collective bargaining undermined and the right to strike limited. As a consequence, in the affected countries, inequalities have grown, there has been a persistent trend towards lower wages, and negative effects on working and employment conditions have been observed.
4. Investing in social rights is an investment in the future. In order to build and maintain strong and sustainable socio-economic systems in Europe, social rights need to be protected and promoted.
5. In particular, the rights to bargain collectively and to strike are crucial to ensure that workers and their organisations can effectively take part in the socio-economic process to promote their interests when it comes to wages, working conditions and social rights. “Social partners” should be taken to mean just that: “partners” in achieving economic performance, but sometimes opponents striving to find a settlement concerning the distribution of power and scar
7. The Assembly therefore calls on the member States to take the following measures to uphold the highest standards of democracy and good governance in the socio-economic sphere:
  - 7.1. protect and strengthen the rights to organise, to bargain collectively and to strike by:
    - 7.1.1. ratifying and implementing the European Social Charter (revised), if this has not yet been done;
    - 7.1.2. developing or revising their labour legislation to make it comprehensive and solid with regard to these specific rights;
    - 7.1.3. restoring these rights wherever institutions and processes have already been undermined by recent legislative or regulatory changes;
  - 7.2. make economic stakeholders accountable for upholding the rights to organise, to bargain collectively and to strike by:
    - 7.2.1. ratifying and implementing the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158), if this has not yet been done;



## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

7.2.2. supporting the enforcement, through labour legislation, of collective instruments such as “collective redress” (in particular for trade unions), aimed at the prevention of unlawful business practices;

7.2.3. setting up or maintaining effective labour inspections, supported by sufficient resources;

7.3. change the focus of current policies, by ending financial and economic austerity policies and putting emphasis on proactive investment policies, such as co-ordinated minimum levels of investment, stronger involvement of social partners and the promotion of decent work for all.<sup>24</sup>

In the framework of the [Steering Committee for Human Rights \(CDDH\)](#), the main monitoring body for the whole human rights Convention system of the Council of Europe, several reports and valuable recommendations were elaborated to ensure the protection of social rights (including trade union rights) in Europe both in general as in times of (economic) crisis. In all three reporting exercises, the ETUC played a very active role.

- [CDDH Report on the impact of economic crisis and austerity measures and human rights](#)
- CDDH Report on improving protection of social rights in Europe – [Volume I](#) and [Volume II](#).

Dunja Mijatović, the [Council of Europe Commissioner for Human Rights](#) launched on 16 March a [call](#) to “respect human rights and stand united against the coronavirus pandemic.” Although recognising that “*it is necessary to respond to the unprecedented challenge we are facing. At the same time, it is clear that the enjoyment of human rights is affected by the pandemic and the measures adopted to encounter it. The right to health, the broader range of economic and social rights, and civil and political freedoms, are all very relevant in the present context. It is therefore crucial that the authorities take measures that do not lead to discrimination and are proportionate to the aims pursued.*”

### European Union

The European Union primary and secondary law, as well as other human and social rights instruments, to be taken into consideration are the following:

- The [Treaty on European Union, Article 6](#) states that “3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law”.
- The [Treaty on the functioning of the European Union, TITLE X – Social policy, Article 151](#) states that “The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of

<sup>24</sup> [Council of Europe Parliamentary Assembly Resolution 2033 \(2015\) of 28 January 2015, “Protection of the right to bargain collectively, including the right to strike.](#)



## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

Workers, shall have as their objectives the promotion of employment, improved living and working conditions, (...) dialogue between management and labour,(...)” Furthermore, under Art. 152 TFEU there lies an obligation on the EU institutions recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems, and to facilitate dialogue between the social partners, respecting their autonomy.

- The Charter of Fundamental Rights of the European Union, being part of EU primary law, provides in its Articles 12 (freedom of association) and Article 28 (Right of collective bargaining and action), the following:

Article 12 Freedom of assembly and of association

Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. (...)

Article 28 Right of collective bargaining and action

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

It is to be re-called that the EU as well as its Member States are bound by the Charter when implementing, applying and derogating from EU law.<sup>25</sup>

Furthermore, as set out by Article 52(3) of the Charter, it guarantees at least the same level of protection as the ECHR and in accordance with Article 53 also recognises the level of protection as minimum guarantee as set out by other international human rights instruments which have been ratified by all EU Member States. This applies i.a. to the UN Covenant on Economic, Social and Cultural Rights as well as all eight core ILO Conventions including those two which guarantee freedom of association (Conventions Nos. 87 and 98).

- Other relevant human and social rights instruments at EU level are on the one hand the Community Charter of Fundamental Social Rights of Workers (CCFSRW, 1989) and the European Pillar of Social Rights (EPSR, 2017) which provide respectively the following:

#### CCFSRW

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<sup>25</sup> For an extensive analysis of the articles 12 and 28 CFREU, see the Chapters 15 and 22 by respectively Jacobs, A. and Dorssement, F. and Rocca, M. in Dorssement, F., Lörcher K., Clauwaert, S. and Schmitt, M. (2019) The Charter of Fundamental Rights of the European Union and the Employment Relation, Hart Publishing: Oxford, p. 712.





## COVID-19 WATCH ETUC BRIEFING NOTES

### TRADE UNION RIGHTS AND COVID-19 10 JUNE 2020

(...) Whereas the solemn proclamation of fundamental social rights at European Community level may not, when implemented, provide grounds for any retrogression compared with the situation currently existing in each Member State; (...)

#### Freedom of association and collective bargaining

11. Employers and workers of the European Community shall have the right of association in order to constitute professional organizations or trade unions of their choice for the defence of their economic and social interests.

Every employer and every worker shall have the freedom to join or not to join such organizations without any personal or occupational damage being thereby suffered by him.

12. Employers or employers' organizations, on the one hand, and workers' organizations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.

The dialogue between the two sides of industry at European level which must be developed, may, if the parties deem it desirable, result in contractual relations in particular at inter-occupational and sectoral level.

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

#### EPSR

##### 8. Social dialogue and involvement of workers

The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States. (...)

Support for increased capacity of social partners to promote social dialogue shall be encouraged.

It is to be noted that in its Preamble, the EPSR also states that: "16. The European Pillar of Social Rights shall not prevent Member States or their social partners from establishing more ambitious social standards. In particular, nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting rights and principles as recognised, in their respective fields of application, by Union law or international law and by international agreements to which the Union or all the Member States are party, including the European Social Charter signed at Turin on October 1961 and the relevant Conventions and Recommendations of the International Labour Organisation."

- As for secondary law, numerous directives provide for a prominent role and promotion of collective bargaining and the need to protect and promote trade union rights. In some Directives not related directly to the social policy field it is even underlined that the





## COVID-19 WATCH ETUC BRIEFING NOTES

TRADE UNION RIGHTS  
AND COVID-19  
10 JUNE 2020

implementation of that Directive might not affect amongst others the right to collective bargaining and strike.<sup>26</sup>

Other relevant documents deriving from EU institutions include amongst others the **European Parliament Resolution of 22 October 2008** on challenges to collective agreements in the EU which amongst others:

- Recalls the fundamental rights nature of the right to strike,
- Emphasises that freedom to provide services does not contradict and is not superior to the fundamental right of social partners to promote social dialogue and to take industrial action, in particular since this is a constitutional right in several Member States; (...);
- Emphasises that freedom to provide services is not superior to the fundamental rights contained in the Charter of Fundamental Rights of the European Union and in particular the right of trade unions to take industrial action, in particular since this is a constitutional right in several Member States; emphasises therefore that the (...) ECJ rulings in Rüffert, Laval and Viking (...) should be interpreted in such a way as not to infringe upon the exercise of fundamental social rights as recognised in the Member States and by Community law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and as not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers;
- Emphasises that the EU's economic freedoms cannot be interpreted as granting undertakings the right to evade or circumvent national social and employment laws and practices, or to impose unfair competition on wages and working conditions; (...).

In a [statement](#) of 5 May 2020, the **EU High Representative Josep Borrell, on human rights in the times of the coronavirus pandemic**, stresses that 'respect for all human rights must remain at the heart of fighting the pandemic and supporting the global recover' and the need to address the heavy impact of the crisis on economic and social rights. He recalls also that *'the coronavirus pandemic should not be used as a pretext to limit democratic and civic space, the respect of the rule of law and of international commitments, nor to curtail freedom of expression, freedom of the press and access to information online and offline. The measures should not be used to restrict the work of human rights defenders, journalists, media workers and civil society organisations. Digital technologies that have the potential to help contain the pandemic should be used in full respect of human rights including the right to privacy'* and that *'the European Union recognises that the role of civil society and human rights defenders is more important than ever to encourage solidarity, support those who are most in need, and defend human rights, fundamental freedoms and democratic space, and to promote accountability.'* He also indicates that the European Union will promote coordination in all

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<sup>26</sup> E.g. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market which establishes general provisions facilitating the exercise of the freedom of establishment for service providers but stipulates in its Article 1(7) that "This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law".



## **COVID-19 WATCH** **ETUC BRIEFING NOTES**

**TRADE UNION RIGHTS**  
**AND COVID-19**  
*10 JUNE 2020*

relevant multilateral fora, including working with the UN, WHO, the Council of Europe, the OSCE and other regional organisations.