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“Legal analysis of certain aspects of collective labour law: strike”

Final Report

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Addressed To: Ministry of Social Affairs of Estonia

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This document has the purpose of bringing the final report, taking into account the **issues and discussions** raised during **the first and the second meeting**, held in Estonia on 18-19 January 2011 and 26-27 April 2011 respectively, at the premises of the Ministry of Social Affairs.

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1. Introduction

1. This document contains the *Draft Final Report* from the expert team with regard to the study on “**Legal analysis of certain aspects of collective labour law: strike**”, hereafter “the Study”.

A. Context and background

2. The Study has been designed to have sufficiently **practical** meaning in order to meet the necessary aims of **law reform** research. It has no explicit abstract-theoretical ambition, although it is based on academic research. The Study takes the background situation of labour law in Estonia into account.

3. It is understood that Estonian labour law is in a process of **review and reform**. Individual labour law in Estonia has been reviewed in recent years in order to increase issues of clarity and new notions (like flexicurity) in employment relationships (cf. Employment Contracts Act). It is understood that it has also be found appropriate and necessary to also reform legislation in the area of Estonian collective labour law. It appears that the changed socio-economic circumstances need to be taken into account, as well as European and international legal developments. An improved stage of regulation in the area of collective labour law is being aimed at. It is understood that the strategic goal of the pursued legislative agenda is to create a more modern and balanced environment for collective employment relationships that would satisfy all involved parties on the labour market. The direct goal of the reform agenda is understood as to guarantee legal clarity and legal security in collectively designed employment relationships.

B. Work and methodology

4. The expert team performing the Study, has been asked to make sure that they would receive all relevant and necessary background information on the Estonian labour reform situation before making any conclusions and/or recommendations.

5. The Study has been designed to provide a report, in **English**, containing an **analysis** of the Estonian situation in relation to the context of the Study subject. The Study has been undertaken by a **team** of experts, specialised in the field of international and comparative labour law.

6. **Three main stages** have been applied in the form of combinations of desk research as well as visits and interviews at Estonia.

STAGE 1

A°) Information and identification of issues :

The Study departed from a collection of **information** and an improved **identification** of issues and problems relating to the scope of the Study. For this purpose, the Study has made use of **existing documentation** on the Estonian situation regarding the law on strike, including legislation, collective agreements, regulations and other legal sources, taking into account practices, including application and interpretation by Courts. At this stage and for this reason, the expert team has undertaken a **first Study visit** to Estonia on **18 and 19 January 2011**, in order to meet with the contracting authority (the Estonian Ministry of Social Affairs), the Public Conciliator, representatives of the Labour Inspectorate, representatives of the trade unions and the central federations of employers. These meetings have been undertaken separately in order to receive the respective visions and views of the partners and stakeholders and in order to specify the expectations of the different parties in respect of the Study.

B°) Narrowing down the scope :

During the meetings of 18-19 January 2011, the Expert team has followed a **bottom-up approach** in making an inventory of the issues, problems and concerns as expressed by the Ministry of Social Affairs and the other relevant stakeholders. The following partners/stakeholders were part of the meetings:

- the Ministry of Social Affairs;
- the Public Conciliator;
- the Labour Inspectorate;
- a Professor of Labour Law;
- trade union representatives;
- an Employers' organisation representative.

During these First visit's meetings, the **scope of the Study** was more narrowly defined, in agreement with the Contractor, i.e. the Ministry of Social Affairs. On this basis, the Study focuses on the following **three main issues**:

- the right to strike in the public service;
- the determination of minimum services;
- the distinction between conflicts over rights versus conflicts over interests.

Four **additional issues** have been added to this:

- the concept of the legality of a strike, including the issue of support strikes;
- the initiation of a strike action (who can call a strike);
- procedures regarding the right to strike;
- liability of strike leaders.

STAGE 2

A^o) Preliminary Report :

7. In agreement with the Contractor (the Ministry of Social Affairs) at the occasion of the first visit, the Expert team concluded to take account, in a **Preliminary Report** prepared before (and for the purposes of) the Second Visit (26-27 April 2011), the items mentioned above (main issues and additional issues), taking into account: a summary of the identification of problems; preliminary opinions on possible solutions; references to the ILO instruments, the European Social Charter as well as a comparative input.

The Preliminary Report has taken forward the following **three main issues**: the right to strike in the public service; the determination of minimum services; the distinction between conflicts of rights versus conflicts of interests. From the First Meeting (January 2011), it was understood that the questions to be addressed were then the following:

- How is the concept of 'public service' to be defined in order to exclude some public sector workers from the right to strike? Which public workers should be excluded from the right to strike?
- What alternative procedures should be provided for interest disputes involving the public service workers who do not have the right to strike?
- How should minimum services be defined, both in terms of a substantial as well as a procedural context?
- How is the distinction to be made between conflicts over rights versus conflicts over interests and is there a need to implement this distinction in the legal system?

During the meeting of 18-19 January 2011, four **additional issues** were raised:

- the concept of the legality of a strike, including the issue of support strikes;
- the initiation of a strike action (who can call a strike);
- procedures regarding the right to strike;
- liability of strike leaders.

B^o) Discussion and feedback concerning the Preliminary Report

The Preliminary Report was discussed with the Ministry of Social Affairs and the relevant partners/stakeholders during a subsequent and separate meetings. The following partners/stakeholders were part of these separate meetings held on 26-27 April 2011 at Estonia:

- the Ministry of Social Affairs;
- the Public Conciliator;
- the Labour Inspectorate;
- a Professor of Labour Law;
- trade union representatives;
- an Employers' organisation representative.

On the analysis and suggestions forwarded in the Preliminary Report, feedback and comments were made by the Ministry of Social Affairs and the other partners/stakeholders during this April 2011 meeting.

8. It was concluded that the Preliminary Report reflected well the projected scope of the Study and the discussions during the First Visit and was the starting point to elaborate further on the issues laid down herein.

STAGE 3

9. After the completion of the draft of the Final Report, the methodology involved a new visit to Estonia in order to meet the contractor, the Ministry of Social Affairs and the other stakeholders mentioned above.

A^o) Final Report

10. As regards the analysis, this has been the subject not only of the earlier meetings in Estonia and the communications with the Ministry of Social Affairs, but also of **desk research** at the home base of the expert team (the University of Leuven). Regular contact has been held with the Estonian Ministry of Social Affairs and, whenever was necessary (but only at a few occasions), with the stakeholders mentioned above. This method has been used in order to receive clarifications and sometimes more precise information, or in order to test the clarification of the legal and practical info and data.

11. The Estonian regulation of strike has been examined both from an **international and European law** point of view as well as from a comparative perspective. Although the aim of the Study is to give more clarity about how the issues that have been raised in the Study **should be regulated** has been seen by the Contractor as a “description of the optimal model with justifications for the proposed changes”, the expert team has emphasised from the beginning that strike law remains an element of **a given country’s unique industrial relations system** with its specific features and characteristics. Differences in countries are widely due to historical, political, economic and cultural factors. It was therefore decided that the Study would hold the middle between providing for sufficiently concrete and useful conclusions with regard to the issues that have been raised on the one hand and a fair degree of respect of national policy discretion on the other hand.

B^o) Seminar

12. The draft of the final report was presented during a seminar that was open to the stakeholders and those with an interest in the subject. It was organised in Estonia at the occasion of the third visit, at 16 November 2011.

C. The right to strike

13. Since this analysis is made in light of European and international protection of the right to strike, it is relevant to point out the basic documents, which are the ILO Conventions nrs. 87 and 98 as well as the European Social Charter (1961, Revised 1996) (adopted in the Council of Europe).

14. It is relevant to refer to § 3 of the **Estonian Constitution** in which it is provided that “generally recognised principles and rules of international law are an inseparable part of the Estonian legal system.”

1. ILO Conventions 87 and 98

15. 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), are the two main references of the ILO in the international protection of freedom of association, collective bargaining and the right to strike. Neither Convention makes any express reference to the right to strike. However the supervisory bodies have consistently taken the view that the right to strike is an integral part of the free exercise of the rights guaranteed by Conventions Nos. 87 and 98.

16. For the supervision of the ILO Conventions Nos 87 and 98, it is relevant to point at the existence of two important ILO committees. The **Committee on Freedom of Association** (CFA) was established in 1951. After a relatively slow beginning, the number of cases submitted to the CFA increased steadily for a number of years. Overall, the Committee has examined more than 2400 alleged breaches of the principles of freedom of association. It has also established an elaborate jurisprudence, the key features of which are set out in the ILO’ Digest of decisions. It does not concern ‘case law’ in the strict sense of the word.

17. The examination of periodic reports on Conventions Nos. 87 and 98 also constitutes an important part of the work of the **Committee of Experts on the Application of Conventions and Recommendations**. For example, in 2007, the Committee addressed ‘observations’ to 103 of the 147 States that had ratified Convention No. 87, plus direct requests to 55 States (including 30 that had also received an observation). It also addressed ‘observations’ to 99 of

the 156 States that had ratified Convention No. 98, together with 18 'direct requests' (including to 11 countries that had also received an observation).¹

18. These two committees are not a judicial bodies. They provide for observations and decisions concerning the conformity of national laws and practices with the relevant ILO instruments. But it can be said that the committees, when relating to freedom of association and the right to strike, in the context of their observations and decisions, provide a sort of 'case law' from which general principles can be drawn.

19. As far as the two key ILO Conventions nrs. 87 (freedom of association) and 98 (right to collective bargaining) is concerned, Estonia has, according to the information made available by the ILO, ratified both conventions on 22 March 1994.

2. European Social Charter

20. The European Social Charter (also referred to below as "the Charter"), concluded on 18 October 1996, also sets out rights and freedoms with regard to the right to strike and establishes a supervisory mechanism guaranteeing their respect by the state parties. Following its revision on 3 May 1996, the revised European Social Charter is gradually replacing the initial 1961 version.

21. According to the ratification information which is made available by the Council of Europe, the European Social Charter of 1996 (revised version) has been signed by Estonia on 4 May 1998 and ratified on 11 September 2000.

22. For reasons of clarity, we display article 6 of the European Social Charter (Revised, 1996):

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:

¹ L. SWEPSTON, "International labour law", in R. BLANPAIN, Comparative labour law and industrial relations in industrialised market economies, The Hague, Kluwer Law International, 2010, 141-168.

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.

23. The right to strike is, thus, not the only right which is protected by article 6(4) ESC. Article 6(4) also includes the more wide-ranging concept of 'collective action', a concept that not only encompasses actions of workers and/or trade unions or other bona fide representatives of workers, but also actions undertaken by employers.

The right to 'collective action' is neither unconditional nor unlimited. According to article G of the European Social Charter (Revised, 1996), the right to collective action can be subject to restrictions or limitations, but only under certain conditions.

Article G – Restrictions

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

This implies that a country would be able regulate the right to collective action in its national law, insofar as this is compatible with Article G. According to the Appendix clause of the European Social Charter (Revised, 1996) with regard to article 6, paragraph 4 :

“It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G.”

24. The Charter is not supervised by a judicial body, but by an expert committee, the European Committee of Social Rights (“ECSR”). The decisions of the ECSR concern interpretations of the Charter and the conformity of national laws and practices with the Charter. As explained by the ECSR itself :

“As is natural with social rights and a body that does not exercise full judicial authority, even in the case of collective complaints, the European Social Charter and its regulatory body, the ECSR, do not enjoy the reputation and the credit that, given the issues dealt with, they might legitimately expect. This does not mean that legal specialists are not interested in the Committee's activities or its decisions, or that the courts in the states party, including constitutional courts, or for that matter international courts, fail to take

account of the positions it adopts. Indeed this is becoming less and less frequent, although certain national courts are still reluctant, even when handing down an identical ruling on a subject on which the Committee has already given a decision, to refer expressly to the Charter and the Committee."²

25. The 'case law' of the ECSR is therefore not of a binding nature, but primarily authoritative.³ The committee provides, nevertheless, a body of 'case law' from which general principles can be drawn. When relating to freedom the right to strike, furthermore, it should be noted that some national jurisdictions (like for example Belgium and the Netherlands) have accepted the direct applicability of article 6(4) ESC in the internal legal order.

² European Committee of Social Rights, *Activity Report 2009*, Council of Europe, 11 (www.coe.int).

³ Cf. T. NOVITZ, *International and European protection of the right to strike* in *Oxford Monographs on Labour Law*, Oxford, Oxford University Press, 2003, 220; C. MAC AMHLAIGH en M. NEDELKA, "Forty years of the European Social Charter, : celebration or commiseration?", *University College Dublin Law Review* 2001, 76; E.-M. HOHNERLEIN, "Federal Republic of Germany" in A.Ph.C.M. JASPERS en L. BETTEN (eds.), *25 Years European Social Charter*, Deventer, Kluwer, 1988, 110.

2. Analysis of the main issues

26. The analysis will take forward the following **three main issues**: the right to strike in the public service; the determination of minimum services; the distinction between conflicts of rights versus conflicts of interests. From the First Meeting (January 2011), we have understood that the questions to be addressed are the following:

- How is the concept of 'public service' to be defined in order to exclude some public sector workers from the right to strike? Which public workers should be excluded from the right to strike?
- What alternative procedures should be provided for interest disputes involving the public service workers who do not have the right to strike?
- How should minimum services be defined, both in terms of a substantial as well as a procedural context?
- How is the distinction to be made between conflicts over rights versus conflicts over interests and is there a need to implement this distinction in the legal system?

These issues are discussed in the following paragraphs.

A. Right to strike in the public service

27. Under Estonian law, the question arises as to how the concept of 'public service' is to be defined. This is in the understanding that the Estonian concept of public sector worker appears to be conceived too broadly in light of international strike law.

28. The Estonian Collective Labour Dispute Resolution Act provides:

§ 21. Restrictions on right to strike

(1) Strikes are prohibited:

- 1) in government agencies and other state bodies and local governments;
- 2) in the Defence Forces, other national defence organisations, courts, and fire fighting and rescue services.

29. The principle of applying **restrictions to public sector workers**, with regard to the right to strike, is accepted in European and international strike law. According to the European Committee on Freedom of Association, "as regards the right of public servants to strike, the Committee recognises that (...) the right to strike of certain categories of public servants may be restricted, including members of the police and armed forces, judges and senior civil servants."⁴ This Committee also has held that restrictions to the right to strike of certain categories of civil servants, for example those whose duties and functions, given their nature or level of

4 ECSR, Digest, 2008, 203 (Conclusions I, Statement of Interpretation on Article 6§4, 38-39).

responsibility are directly affecting the rights of others, national security or public interest may serve a legitimate purpose in the meaning of Article G of the Charter.⁵

30. The ILO Committee on Freedom of Association has acknowledged that the right to strike can be restricted or even prohibited in the public service in so far as a strike there could cause serious hardship to the national community and provided that the limitations are accompanied by certain compensatory guarantees.⁶ It also has held that the right to strike may be restricted or prohibited only for “public servants exercising authority in the name of the State”.⁷

31. In furtherance of the analysis, it is relevant to refer to the ILO’s “Report of the Committee of Experts on the Application of Conventions and Recommendations”⁸ in the context of the Freedom of Association Convention (No. 87). With regard to Estonia, the “Committee recalls that for a number of years it had been raising the issue of the prohibition of the right to strike in the public service (section 21(1) of the Collective Labour Dispute Resolution Act), and had previously requested the Government to inform it of the progress achieved with respect to the adoption of legislative provisions ensuring the right to strike for public servants who do not exercise authority in the name of the State. The Committee takes note of the Government’s statement that it has approved the draft Public Service Act, which had been submitted to the Parliament and successfully underwent a first reading. The draft legislation retains the prohibition on the right to strike of public servants, but the term ‘public servant’ would be more narrowly defined. The Government further indicates that, according to the explanatory memorandum to the draft Public Service Act, 45 per cent of the current public service would gain the right to strike.”

At this point, the Committee concludes: “In these circumstances, the Committee, recalling that the right to strike may be restricted or prohibited only for public servants exercising authority in the name of the State, expresses the hope that the Public Service Act would ensure the right to strike in the public service in accordance with this principle and requests the Government to provide a copy of the said legislation once it is adopted.”

32. We have understood that the Bill of the Public Service Act has not yet been adopted in the Estonian Parliament at the moment of drafting of the present analysis.

5 ECSR, Digest, 2008, 204 (see Conclusions I, Statement of Interpretation, 38-39).

6 Cf. 1996 Digest, para. 533; 300th Report, Case No. 1791, para. 345; 302nd Report, Case No. 1849, para. 203; and 318th Report, Case No. 2020, para. 318.

7 Cf. 1996 Digest, para. 534; 304th Report, Case No. 1719, para. 413; 338th Report, Case No. 2363, para. 731, and Case No. 2364, para. 975.

8 Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries, International Labour Conference, 99th Session, 2010, 137.

33. The Council of Europe's European Committee on Social Rights, with regard to Estonia, concluded that "the right to strike of civil servants may be restricted because they perform duties affecting public interest or national security. However, a denial of the right to strike to civil servants as a whole cannot be deemed in conformity with the Charter."⁹

It is relevant to point at the most recent conclusions of the European Committee of Social Rights with regard to Estonia, under article 6§4 of the European Social Charter.¹⁰

Paragraph 4 - Collective action

The Committee takes note of the information contained in the report submitted by Estonia.

Meaning of Collective action - Permitted objectives of collective action - Persons entitled to call collective action - Procedural requirements - Consequences of collective action

The Committee previously examined the situation under all the above mention headings and found the situation to be in conformity with the Revised Charter. According to the report there has been no change to this situation.

Restrictions on the right to take collective action

The Committee held the situation in Estonia not to be in conformity with Article 6§4 of the Revised Charter on the ground that the law denies almost all civil servants the right to strike (Conclusions 2006). The Committee notes that during the reference period the situation remained unchanged and therefore reiterates its finding of non-conformity. The Committee notes however that new legislation has been drafted and is currently before Parliament.

Conclusion

The Committee concludes that the situation in Estonia is not in conformity with Article 6§4 of the Revised Charter on the ground that all civil servants are denied the right to strike.

34. The question is how **the concept of 'public service'** is to be defined.

9 Conclusions 2004, vol. 1, at. 147 (Est.).

10 European Social Charter (revised), European Committee of Social Rights, Conclusions 2010 (Estonia), Articles 2, 4, 5, 6, 21, 22, 28 and 29 of the Revised Charter, p.13.

We have understood that not all civil servants in Estonia are working in the 'public service'. In addition to this, contractual workers are excluded from this notion. Furthermore, it is understood that the pending Public Service Act (prepared under the auspices of the Estonian Ministry of Justice) is set to limit the amount of public service workers. All other workers would become (contractual) employees. We understood that the public service (civil servant) workers would be narrowed down.

35. In defining which worker belongs to the 'public service', account should be taken of the **national tradition** and culture of every country. The concept varies, therefore, from country to country. However, in our view, the core concept of what consists a 'public service' is a **limited concept**. This approach is in conformity with the ILO's approach of which the Committee of Experts has observed that "a too broad definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers".¹¹ The ILO Committee on Freedom of Association has held that the right to strike may be restricted or prohibited only for "public servants exercising authority in the name of the State".¹²

36. According to the ILO Committee on Freedom of Association, examples are officials working in the administration of justice and the judiciary itself,¹³ or customs officers.¹⁴ In the European Committee of Social Rights' case law, it is described that in France, members of the police and the judiciary were excluded from the right to strike and this was held to be in conformity with the Charter.¹⁵ In Malta, for example, members of the armed forces, the police, fire fighters, and prison service officers were prohibited from striking and this was also held in compliance with the Charter.¹⁶

37. Applying a limited notion has relevant consequences, as it means that for determining the public servants who may be excluded from the right to strike, this follows from "the nature of the functions that such public servants carry out".¹⁷

38. The European Committee of Social Rights has already indicated that the concept of public service worker cannot be too extensive with a view to restrict the right to strike. For example, Denmark did not comply with the Charter as too wide a range of employees, namely not only

11 ILO, Freedom of association and collective bargaining. General Survey of the reports on 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). Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, para. 158.

12 Cf. 1996 Digest, para. 534; 304th Report, Case No. 1719, para. 413; 338th Report, Case No. 2363, para. 731, and Case No. 2364, para. 975.

13 Cf. 1996 Digest, paras. 537 and 538; and 336th Report, Case No. 2383, para. 763.

14 Cf. 304th Report, Case No. 1719, para. 413.

15 Conclusions V, at 48 (Fr.).

16 Conclusions XIII-2, at 282 (Malta).

17 Cf. B. GERNIGON, A. ODERO AND H. GUIDO, ILO principles concerning the right to strike, Geneva, ILO Office, 2008, 18.

members of the army, navy, police, judiciary, and high ranking civil servants, but also railway and postal service employees, were denied the right to strike.¹⁸ With regard to Germany, also a violation of Article 6, paragraph 4, was arrived at, as civil servants employed by the German Railways and the German Postal Services continued to be excluded from the right to strike even after the privatization of these establishments.¹⁹

39. The European Committee on Social Rights seems, furthermore, to have expressed the view that a distinction is to be made between ‘ordinary’ public sector workers on the one hand and public sector workers with a specific responsibility on the other hand. The Committee concluded that the exclusion of members of staff of the armed forces and law enforcement from taking strike action is not contrary to the Charter, but it considered “that whereas restricting military personnel’s right to strike is compatible with Article 6§4 of the Revised Charter, having regard to Article G (see, in particular, Conclusions XIII-2, Malta, p. 282), this does not apply to ‘ordinary’ employees of the Ministry of Defence and any associated bodies and establishments.”²⁰

The Committee held “that a strike ban in the internal affairs, national defence and State security sectors could serve a legitimate purpose since work stoppages in these sectors could pose threats to public order and national security. However, simply prohibiting all employees in the internal affairs, national defence and State security sectors from striking, without any distinction as to function [of the workers concerned]²¹, cannot be considered proportionate, and therefore necessary in a democratic society.”²²

40. In our view, this ILO concept of “public servants exercising authority in the name of the State” is a useful reference for the ‘public service’ notion. It is similarly expressed in the context of article 45 of the Treaty on the Functioning of the European Union, which relates to exceptions in European free movement of persons law, in which reference is made to the **exercise of state authority or state power**. According to the European Court of Justice, employment in the public service “must be understood as meaning those posts which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the state or of other public authorities”.²³

41. The expert team is of the opinion that it seems clear that the concept of public service worker, for the purposes of restricting the right to strike, needs to be more narrowly defined in

18 Conclusions XIV-1 vol. 1, at 180 (Den.).

19 Cf. Addendum to Conclusions XV-1, at 29 (F.R.G.); Conclusions XV-I, vol. 1, at 178 (F.R.G.).

20 Conclusions 2004, vol. 1, at 42 (Bulg.).

21 Our addition.

22 Conclusions 2004, vol. 2, at 347 (Lith.).

23 Cf. *Lawrie-Blum*, Case 66/85, 3 July 1986, para. 27.

Estonian law. Taking into account a legislative basis, the appropriate governmental authority should be responsible as to deciding on the list of functions of public servants in order to determine the workers who are to be considered as excluded from the exercise of the right to strike. In light of the international protection of the right to strike and the freedom of association, such decision-making should, in our view, be made after due consultation of the social partners.

B. Determination of minimum services in case of strike

42. The issue of minimum services relates to the private as well as to the public sector. In the ILO Committee of Freedom of Association's opinion, the provision of a minimum service could be **appropriate** as a possible alternative in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, at the same time, one might consider ensuring that users' basic needs are met or that facilities operate safely or without interruption.²⁴

43. The question is how **minimum services** should be defined, both in terms of a substantial as well as a procedural manner.

44. The Estonian Labour Dispute Resolution Act provides:

§ 21. Restrictions on right to strike

(...)

(3) In enterprises and agencies which satisfy the primary needs of the population and economy, the body which calls a strike or locks out employees shall ensure indispensable services or production which shall be determined by agreement of the parties. In the case of disagreements, indispensable services or production shall be determined by the Public Conciliator whose decision is binding on the parties. (4) A list of enterprises and agencies which satisfy the primary needs of the population and economy shall be established by the Government of the Republic.

45. In this context, it is relevant to refer to the ILO's "Report of the Committee of Experts on the Application of Conventions and Recommendations"²⁵ in its discussion of the Freedom of Association Convention (No. 87). The Committee notes that it "had requested the Government to provide the list of services where the right to strike will be restricted, as referred to in section 21(3) and (4) of the Collective Labour Dispute Resolution Act. In this regard, the Committee

24 Committee on Freedom of Association, Digest, para. 607.

25 Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries, International Labour Conference, 99th Session, 2010, 137.

notes the Government's statement that it has experienced problems establishing the list of enterprises and agencies wherein the right to strike will be restricted (through a minimum service), in accordance with section 21(4) of the said law, as the list must be based on the services provided by the enterprises or agencies and not on the names of the enterprises or agencies themselves. The Government further indicates that it has started to review the entire industrial relations field and that the current laws and regulations – including those concerning minimum services – needed to be analysed and discussed with the social partners before amendments could be introduced.”

At this point, the Committee of Experts concludes: “The Committee notes this information and requests the Government to indicate the progress achieved in respect of the adoption of legislative provisions ensuring that the right to strike may be prohibited only in essential services in the strict sense of the term (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population) and for public servants exercising authority in the name of the State.”

From the ILO's Committee of Experts comments, it is relevant to point out that the Committee is primarily concerned with the definition of “essential services in the strict sense” through “legislative provisions”. It does not expressly require “the establishment of a list of enterprises and agencies”, while it has taken note of the Government's references to the issue of establishing such list. However, in the ILO Committee on Freedom of Association, this reference is explicitly made. There, it is concluded that the Committee “expects that a list of enterprises or agencies where minimum services should be maintained during a strike will be soon adopted, in full consultation with the workers' and employers' organizations concerned”.²⁶

46. In our view, the discussion entails two aspects: the definition of minimum services on the one hand, and the establishment of legislative and procedural conditions under which minimum services will be determined.

47. With regard to the **definition of minimum services**, we are of the opinion that this is a dynamic notion, depending on various factors and specific contexts. Nevertheless, the case law of the ILO Committee on Freedom of Association can be a guide. For the determination of situations in which a strike could be prohibited, the criterion which has to be established is, according to the ILO case law, the **existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population.**²⁷

²⁶ Committee on Freedom of Association, Case 2543, para. 727.

²⁷ Committee on Freedom of Association, Digest, para. 581.

It is, however, accepted that what is meant by essential services in the strict sense of the term, depends to a large extent on the **particular circumstances** prevailing in a country.²⁸

By way of guidance, it can be pointed out that the ILO Committee on Freedom of Association has considered the following services as **essential services**:²⁹ the hospital sector; electricity services; water supply services; the telephone service; the police and the armed forces; fire-fighting services; prison services; provision of food to pupils of school age and the cleaning of schools; air traffic control.

The following have not constituted essential services in the strict sense, according to the ILO Committee on Freedom of Association:³⁰ radio and television; the petroleum sector; ports; banking computer services for the collection of excise duties and taxes; department stores and entertainment parks; the metal and mining sectors; transport generally; airline pilots; production, transport and distribution of fuel; railway services; metropolitan transport; postal services; refuse collection services; refrigeration enterprises; hotel services; construction; automobile manufacturing; agricultural activities, the supply and distribution of food; the government printing service and the state alcohol, salt and tobacco monopolies; the education sector; mineral water bottling.

It should be noted that, while the ILO Committee has found that the education sector does not constitute an essential service, it has held that principals and vice-principals can have their right to strike restricted or even prohibited.

Furthermore, the Committee also accepted that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope.³¹

48. Also the European Committee on Social Rights has dealt with the issue of minimum services, adopting the view that the right to strike can be limited for employees employed in such services. But also under the European Social Charter, a strict notion must be applied and minimum services cannot be too broadly defined.³²

With regard to the prohibition of strikes in the energy, telecommunications and health sector (Bulgaria) as well as in the electricity, district heating, gas supply enterprises and emergency medical services (Lithuania), the Committee held that “the partial or total withdrawal of the right to strike in the case of services that are essential to the community is in conformity with Article

28 Committee on Freedom of Association, Digest, para. 582.

29 Committee on Freedom of Association, Digest, para. 585-586.

30 Committee on Freedom of Association, Digest, para. 587.

31 Committee on Freedom of Association, Digest, para. 582.

32 Cf. Conclusions XIII-3, at 281 (Port.); Conclusions XIII-5, at 181 (Port.); Conclusions XIV-1, vol. 2., at 663 (Port.); Conclusions XV-1, vol. 2, at 479-481 (Port.).

6§4 of the Revised Charter so long as it satisfies the requirements of Article G . . . Such a restriction could also be deemed to serve a legitimate purpose since strikes in these sectors, which are essential to the community, could pose a threat to public interest, national security and/or public health. However, simply banning strikes, even in essential sectors, cannot be considered proportionate to the specific requirements of each of them and therefore necessary in a democratic society”.³³

The Committee also dealt with the Czech Republic, in which strikes were defined as unlawful for certain categories of workers, for example for workers of nuclear power stations, air traffic controllers, and fire-fighters. The Committee stated that these restrictions fall within the scope of exceptions of the European Social Charter (Article 31 of the Charter). The Committee considers “that the strike ban is prescribed by law, and that such a restriction may be justified to the extent that, because of the nature of their responsibilities, work stoppages by these categories of workers could threaten the lives of others, national security and/or public health.” The Committee nevertheless noted that simply prohibiting these workers from striking, without distinguishing between their particular functions, cannot be considered proportionate to the particular circumstances of each of the sectors concerned, and thus necessary in a democratic society.”³⁴

49. Comparative information shows that diverse practices exist with regard to the issue of defining and establishing minimum services. Some countries, such as **Germany** and **The Netherlands**, rely on the autonomy of the social partners and mainly case law to determine minimum services. In Germany, the principle of proportionality is the only available criterion of the legality of strikes and lock-outs in essential services. So far the Federal Labour Court has only clarified that emergency services may not be defined and organised by the employer alone, but in cooperation with trade unions. What would have to be done in a case of non-agreement is still fairly unclear.³⁵ In the Netherlands, there are no specific legal provisions either. The government proposed to make the social partners responsible for regulating this issue, through a code of practice on strikes, but this idea was never put into practice. The courts assess the legality of a strike by taking account of the fact that certain occupational sectors require a minimum service or safety measures in the event of strikes.³⁶ In **France**, minimum service legislative interventions were gradually introduced in specific areas, such as public

33 Conclusions 2004, vol. 1, at 42 (Bulg.); Conclusions 2004, vol. 2, at 347 (Lith.).

34 Conclusions XVII-1, vol. 1, at 103 (Czech Rep.).

35 M. WEISS, Germany, in R. BLANPAIN (ed.), *International Encyclopaedia of Labour Law*, ELL – Suppl. 340 (July 2008), 530-533.

36 A. JACOBS, Netherlands, in R. BLANPAIN (ed.), *International Encyclopaedia of Labour Law*, ELL – Suppl. 276 (January 2004), 222.

broadcasting, nuclear industry, traffic control, health and medical services and, since recently (introduced in 2008), public transport and nursery and primary schools.³⁷

Belgium has a single legislative instrument, the Essential Services Act of 1948. The 1948 Act relates to “the arrangements, supplies and services that must be maintained in the event of collective and voluntary stoppage of work or lock-out in order to meet certain vital needs, to carry out urgent work on machinery or material, or to perform certain tasks as a result of force majeure or an unforeseen necessity”.³⁸ The Act incorporates the principle of subsidiarity. The system is that the joint committees (sectoral social dialogue committees in which the social partners are represented) determine the essential services. The government can only intervene when the social partners fail to agree.³⁹

The Belgian Act also applies a cascade system. It is primarily for the joint committees to decide *what supplies and services* have to be maintained in the event of a strike or lock-out, and *how* these needs should be met. A decision taken with 75 per cent of the votes of each side can be extended by Royal Decree, which makes the decision imperatively and legally binding. If there is no agreement, the government will take a decision. In case of industrial conflict, the decision of the joint committee is put into operation by a sub-committee designated by the relevant joint committee. These sub-committees are composed of an equal number of representatives of the employers and employees, assisted by a representative of the Department for Employment and Labour. The sub-committee can designate the workers who will carry out the work necessary to assure the vital needs. In case there is no joint committee, or when the committee does not function, the government can intervene and requisition workers.⁴⁰

50. With regard to the **establishment of legislative and procedural conditions under which minimum services will be determined**, it should be noted that, in the view of the ILO Committee on Freedom of Association, the determination of minimum services and the minimum number of workers providing them, should involve not only the public authorities, but also the relevant employers’ and workers’ organisations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services.

³⁷ <http://www.france.fr/en/working/ins-and-outs-employment/professional-relations/article/minimum-service-guarantee-public-services> (26 Oct 2011)

³⁸ Article 1, Belgian Act of 19 August 1948.

³⁹ A. STEWART & M. BELL, *The right to strike: A comparative perspective. A study of national law in six EU states*, The Institute of Employment Rights, www.ier.org.uk, p.15.

As regards the legal requirement that a minimum service must be maintained in the event of a strike in essential public services, and that any disagreement as to the number and duties of the workers concerned shall be settled by the labour authority, the Committee is of the opinion that the legislation should provide for any such disagreement to be settled by an independent body and not by the ministry of labour or the ministry or public enterprise concerned.⁴¹

51. Furthermore, the case law of the Committee on Freedom of Association provides that, as regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services, such restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.⁴²

52. In our view, this guidance brings up **three main issues**: a procedure, with involvement of the social partners, to determine minimum services; a procedure involving an independent body in case of disagreement; and a procedure of dispute settlement in case of a conflict of interest in defined minimum services where the right to strike is restricted. The latter point will be dealt with under the subsequent heading in this report, since it is related to the availability of alternative procedures for interest disputes involving public service or essential service workers who do not have the right to strike (see below).

53. On the basis of the discussions held during the January and April 2011 meetings, taking into account the 'case law' of the ILO Committee on Freedom of Association and the European Committee of Social Rights, the comparative diverse practices, and the need for an adapted solution in the Estonian industrial relations system, an advisable way forward for the Estonian system, in our view, could be reached through the adoption of the following **measures**:

54. Legislation on essential services: (either through the adoption of an Act on essential services, or through amendment of Collective Labour Dispute Resolution Act. The legislative provisions would set the general criteria, concept and procedures for essential services. This would imply, in our view, that the essential services provisions of the Estonian Labour Dispute Resolution Act would need to be modified, although the the current definition and general principle could be maintained

"§ 21. Restrictions on right to strike : (3) In enterprises and agencies which satisfy the primary needs of the population and economy, the body which calls a strike or locks out

40 R. BLANPAIN, Belgium, in R. BLANPAIN (ed.), International Encyclopaedia of Labour Law, ELL – Suppl. 334 (February 2008), 875.

41 Cf. Digest, op. cit., paras 612 and 613.

42 Committee on Freedom of Association, Digest, para. 596.

employees shall ensure indispensable services or production which shall be determined by agreement of the parties.) “

It would be advisable to complement this abstract definition with a non-exhaustive list of examples of essential services (as recognised as essential services in international and European strike law, mentioned above), such as, for example, services in the hospital sector; electricity services; water supply services; the police and the armed forces; etc.

The Act could be made applicable to both the public as well as the private sector, including employees and civil servants. It could also encompass self-employed workers.

55. A cascade and subsidiarity system: The new Estonian Act on essential services could then install a mechanism for the determination of a preliminary list of minimum services (preliminary, *i.e.* before a strike takes place).

- **Per sector.** The new legislative provisions should provide that, on the basis of the legislative general criteria, the social partners at the relevant sector level have to define the concrete tasks and services with regard to the guarantee of minimum services. Thus, social partners will then arrive at a pre-defined list of services, enterprises and functions to be performed, and the conditions under which workers would need to be appointed, in case a collective labour dispute would occur, in order to guarantee essential services.
- **Public Conciliator:** If no agreement is reached by the social partners at the level of the sector (e.g. within a certain period of time and/or upon request of one of the social partners) , we would propose that the Public Conciliator is called in for mediation and/or conciliation services. If this process fails, the issue will be dealt with by an independent body.
- **Minister :** The Minister of Social Affairs will receive the social partners' sectoral agreements on essential services, after they have been concluded. If the Minister approves an agreement, the agreement can be made binding. If the Minister disapproves the agreement, then the issue will be dealt with by an independent body.
- **Independent Body:** If the Minister disapproves an agreement, or if, after the intervention of the Public Conciliator, there is no agreement, or in case no negotiations have taken place, we suggest that a (binding) decision is made by an independent body. We suggest that this is the same body as is indicated for the alternative collective interest dispute resolution in the public sector in case the right to strike is restricted (see below).

- **Updates:** A similar cascade system should apply in case the agreements or decisions are outdated and updates need to be provided.

56. Activation in case of a strike: The system would be activated and applied in case of a call for a strike. In such case, either the pre-existing sector agreements would be applied, or, in the absence thereof, the decision provided by the independent body. The Minister of Social Affairs would then be able to requisition persons in light of the essential services to be guaranteed.

57. Courts: In case of a dispute about the interpretation or application of the essential services provisions, we suggest that Court access is made available. Appropriate short proceedings could be applied.

58. We are of the opinion that such legislative intervention would be in conformity with the international and European principles regarding the right to strike and would be able to guarantee a legal basis for the further establishment of essential services (including a list of sectors, services and functions to be performed), and would imply social partner involvement, “a careful exchange of viewpoints” (cf. ILO Committee) as well as a procedure for dealing with disagreement on the matter.

C. Alternative procedures for interest disputes involving public service or essential service workers who do not have the right to strike

59. Under the headings above, the restrictions regarding the right to strike for certain categories of workers have been discussed: on the one hand, workers in the public sector and, on the other hand, workers employed in essential services.

60. According to the case law of the ILO Committee on Freedom of Association, where the right to strike is restricted or prohibited, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services.⁴³ As regards the nature of **appropriate guarantees** in cases where restrictions are placed on the right to strike in the public service, restrictions on the right to strike should, according to the ILO Committee on Freedom of Association, be accompanied by **adequate, impartial and speedy conciliation and arbitration** proceedings, in which the parties concerned can take part at every stage and in which the awards, once

⁴³ Cf. 1996 Digest, para. 546; and, for example, 300th Report, Case No. 1818, para. 367; 306th Report, Case No. 1882, para. 429; 310th Report, Case No. 1943, para. 227; 318th Report, Case No. 1999, para. 166; 324th Report, Case No. 2060, para. 518; 327th Report, Case No. 2127, para. 192; 330th Report, Case No. 2166, para. 292; 333rd Report, Case No. 2277, para. 274; 336th Report, Case No. 2340, para. 649; and 337th Report, Case No. 2244, para. 1269.

made, are fully and promptly implemented.⁴⁴ The ILO Committee considers that, in the event of deadlock, the parties must have the possibility of recourse to machinery seen to be **reliable** to and having the **confidence** of the parties concerned.”⁴⁵

61. Relevant is that the ILO’s Committee on Freedom of Association refers to the need to have “**adequate, impartial and speedy conciliation and arbitration proceedings**”. For example, the ILO Committee has had problems with the fact that decisions on collective agreement disputes are made by the Government of a country and not by an ‘independent body’.⁴⁶ With regard to the relationship between conciliation and arbitration, the ILO Committee has referred to “speedy **conciliation** proceedings **followed by arbitration** proceedings in the event of failure of the conciliation proceedings, in which the parties concerned can take part at every stage and in which awards, once made, are fully and properly implemented”.⁴⁷

62. On the basis of the discussions held during the January and April 2011 meetings, we would advise to consider, in the Estonian public service system, the introduction of an independent **dispute resolution committee**, both for national and local public service workers, but also applying to collective dispute resolution issues arising in light of the essential services legislation.

We would advise to conceive the organisation of such independent body on the basis of the following characteristics:

- An independent body under public law (a legal basis in legislation);
- Presided by an independent chairperson (e.g. the Public Conciliator); and
- Composed of 5 members;
- Appointed by the Minister of Social Affairs;
- 2 members appointed on proposal of the organisations of workers;
- 2 members appointed on proposal of the organisations of employers;
- 1 member appointed by the Minister from the public service;
- The body has competence over dispute interests;
- Decisions are taken on the basis of majority voting;
- The independent body issues an award which is duly motivated.

63. The independent body needs to assume competence over collective dispute interests. We are of the opinion that Court action remains possible, but on limited grounds, such as respect for the rule of law, violation of the duty to motivate the decision and due process issues. In such

44 Cf. 1996 Digest, para. 547; and, for example, 300th Report, Case No. 1818, para. 367; 306th Report, Case No. 1882, para. 429; 308th Report, Case No. 1897, para. 478; 310th Report, Case No. 1943, para. 227; 318th Report, Case No. 2020, para. 318; 324th Report, Case No. 2060, para. 518; 330th Report, Case No. 2166, para. 292; 333rd Report, Case No. 2277, para. 274; 336th Report, Case No. 2340, para. 649; and 337th Report, Case No. 2244, para. 1269.

45 Committee on Freedom of Association, Case 2543, para. 726.

46 Cf. Case No. 2244, para. 1269.

47 Cf. Digest, op. cit., paras. 546, 547 and 551; Case No. 2340, para. 649.

case, we would suggest that the Court would be able to nullify the award issues by the independent body, but not substituting it by a new decision. In such case, the issue would need to be brought back for a new decision to the independent body for reconsideration.

64. Taking into account that, in the past, the ILO Committee on Freedom of Association has stressed the importance of the **independence and impartiality** of the institution that would resolve public service disputes (or disputes in case of restrictions to the right to strike due to essential services), the **confidence** of the social partners and relevant stakeholders would be, in our view, guaranteed through these social partners' ability to propose or being involved in the proposal of candidates on the short list, from which the competent Minister is held to appoint.⁴⁸

D. Conflicts over rights / interests

65. In international and comparative scholarly literature, authors have been engaged in dividing industrial disputes according to whether they concern 'disputes of interests' or 'disputes of rights'. Interest disputes relate to economic interest and changes in the establishment of collective rules (e.g. with a view to conclude a collective agreement), while rights disputes relate to issues of interpretation and application of legal rights and obligations. In many countries, however, the distinction between issues over rights versus interests is almost irrelevant. This is for example the case in Britain, Belgium, Bulgaria, Spain, Italy and France.⁴⁹

66. We understand that **Estonian labour legislation** does not explicitly deal with the distinction between 'disputes of interests' and 'disputes of rights'. The question is whether it would need to be clarified and how.

67. We are of the opinion that the following distinction could be currently conceived in Estonian's industrial relations practices:

- individual conflicts over rights -> the Labour Dispute Committee / Court;
- collective conflicts over rights (e.g. interpretation of CBA) -> the Labour Dispute Committee / Court;
- collective conflicts over interests -> the Public Conciliator.

We have understood that individual conflicts over rights, such as employment contractual issues, would be the competent for the Labour Dispute Committee and the Court respectively. Collective interest disputes would not be the competence of the Labour Dispute Committee or

48 Cf. Committee on Freedom of Association, Digest, 599: "The appointment by the minister of all five members of the Essential Services Arbitration Tribunal calls into question the independence and impartiality of such a tribunal, as well as the confidence of the concerned parties in such a system. The representative organizations of workers and employers should, respectively, be able to select members of the Essential Services Arbitration Tribunal who represent them."

49 A. JACOBS, "The law of strikes and lockouts" in R. BLANPAIN (ed.), Comparative labour law and industrial relations in industrialised market economies, Kluwer Law International, 2001, 673.

the Court, but would be the competence of the Public Conciliator. Collective conflicts over rights are rights discussion and would, as a rule, also fall under the competences of the Labour Dispute Committee or the Court, although it would appear that the Public Conciliator may, in some cases, also be confronted with a rights dispute, either taken alone or in the context of an interest dispute and, which may be related to an existing collective agreement.

There may, nevertheless, be a point of discussion.

In this context, it should be noted that a strict separation of the notions 'disputes of interests' and 'disputes of rights' appears to be quite theoretical and is not always strictly maintained in practice.

However, it should also be noted that, due to the text of Article 6, Paragraph 4, of the European Social Charter and interpretations of the European Committee on Social Rights, the right to strike is limited to cases of conflicts of interest. As the Committee has stated: "This provision recognises the right to collective action only in cases of conflicts of interest. It follows that it cannot be invoked in cases of conflicts of right, i.e. in particular in cases of disputes concerning the existence, validity or interpretation of a collective agreement, or its violation, e.g. through action taken during its currency with a view to the revision of its contents. This interpretation should be adopted even where a collective agreement contains provisions purporting to permit such industrial action."⁵⁰

68. We are of the opinion that the fact that, in some cases, the Public Conciliator may be dealing with rights conflicts, should not be considered to be problematic, to the extent that it does not concern an individual, but a collective conflict, therefore also concealing a collective interest dispute, and to the extent that Court access remains possible in last resort. In our view, there does not appear to be a reason to spell out the distinction at the level of the legislation.

69. However, there may be a larger issue with regard to §12 of the Estonian Collective Labour Dispute Act, which reads as follows:

§ 12. Resolution of labour disputes in court

(1) Failing agreement between a federation of employers and a federation of employees in a dispute arising from the performance of a collective agreement, the federations have the right of recourse to labour dispute committees or the courts for resolution of the dispute.

50 ECSR, Digest, 2008, §198 (Conclusions I, Statement of Interpretation on Article 6§4, 38).

(2) Organisation of strikes or lock-outs is prohibited as of the date of recourse to a labour dispute committee or court.

70. One of the basic starting points of the European Committee of Social Rights, under the European Social Charter, was that article 6, paragraph 4, of this Charter, “recognises the right to collective action only in cases of conflicts of interest. It follows that it cannot be invoked in cases of conflicts of right, i.e., in particular, in cases of disputes concerning the existence, validity or interpretation of a collective agreement or its violation, e.g., through action taken during its currency with a view to the revision of its contents.”⁵¹ The European Committee would have seemed to allow national legal systems to prohibit collective action in these cases, even where the parties to a collective agreement would be willing to apply a wider legitimate basis for collective action.⁵²

71. Below, we will discuss the relationship between the notion of “collective labour dispute” and the notion of “strike” in the Estonian Collective Labour Dispute Act. We would advise to limit the notion of collective labour disputes to interest disputes only, meaning that disputes with regard to the interpretation of collective agreements would be excluded from its scope. Those interpretation matters would be solely left to the competence to the labour dispute committee or the court, which are both courts of law.

72. It would be appropriate, in our view, to adapt the Estonian Collective Labour Dispute Act to our proposed definition of what constitutes a collective labour dispute (see below our comments about the legality of a strike). This would, imply, in our view, that §12 of the Act could be deleted. We will indicate below that we would prefer to separate disputes regarding the interpretation of collective agreements from the notion of what constitutes a collective labour dispute.

3. Specific issues

73. During the meeting of 18-19 January 2011, four **additional issues** have been raised:

- the concept of legality of a strike, including the issue of support strikes;
- the initiation of a strike action (who can call a strike);
- procedures regarding the right to strike;
- liability of strike leaders.

51 Conclusions I (1969-70) 38.

52 Ibid; the final sentence of the paragraph states ‘This interpretation should be adopted even where a collective agreement contains provisions purporting to permit such industrial action’.

The Ministry asked for international and comparative input with regard to these issues, in particular relating to issues in the Estonian industrial relations system and law. It remains, in this regard, important to emphasise the fact that strike law remains an element of a given country's unique industrial relations system with its specific features and characteristics. Differences in countries are widely due to historical, political, economic and cultural factors.

A. Concept of the legality of a strike

74. Following the discussion during the January and April 2011 meetings, the issue has been raised that it does not appear clear how the concept of legality of a strike is (to be) defined under **Estonian labour law**. We understand that the current idea is that a strike is legal when certain procedures are followed. However, procedural aspects are examined below under a separate heading. Hereafter, we will provide guidance on the scope of the right to strike, its restrictions, its purposes, as well as the issue of solidarity strike.

75. Two **main issues** have been under discussion with regard to the concept of the legality of a strike. The first concerns the **scope** of the right to strike. The second concerns the limitations with regard to the **exercise** of the right to strike.

76. The Estonian Collective Labour Dispute Resolution Act provides :

§ 1. Purpose of Act

This Act regulates the procedures for the resolution of collective labour disputes and the calling and organisation of strikes and lock-outs.

§ 2. Definitions

(1) A collective labour dispute is a disagreement between an employer or an association or federation of employers and employees or a union or federation of employees which arises upon entry into or performance of collective agreements or establishment of new working conditions.

(2) A strike is an interruption of work on the initiative of employees or a union or federation of employees in order to achieve concessions from an employer or an association or federation of employers to lawful demands in labour matters.

(3) A lock-out is an interruption of work on the initiative of an employer or association or federation of employers in order to achieve concessions from employees or a union or federation of employees to lawful demands in labour matters.

77. Scope of the right to strike/collective action : The issue of legality of a strike is determined by the **legal notion of strike action**. It is well-known that, at the international level, there is no uniform notion of what constitutes a (legal) strike.⁵³ Notwithstanding the international recognition of the right to strike/right to collective action, it is much dependent on the national system. According to Kovacs, “the right to strike means the collective and concerted stoppage of work or slow-down the pace of work by a group of workers, usually but not necessarily organized by a trade union, in consideration and promotion of an industrial dispute, in order to put pressure on an employer”.⁵⁴

78. As far as the Estonian strike law is concerned, collective action would seem to stay limited to “an interruption of work”, according to the definition of §2, 2 of the Estonian Collective Labour Dispute Act. The question arises whether this conceptual limitation to is justified.

79. A main reference in European strike law constitutes article 6, paragraph 4, of the European Social Charter (Revised, 1996). This article protects not only the right to strike, but also forms of **collective action**.

Other types of action taken by employees should, therefore, be capable of inclusion within the concept of ‘collective action’, such as working to rule, go-slows, boycotts, blockades or picketing. There is considerable variation in the extent to which the national laws of states having ratified the Charter, including Article 6, permit these various forms of collective action. In recent years, questions have been addressed in the Council of Europe’s European Committee of Social Rights on specific matters,⁵⁵ but the issue has not been pursued systematically or in any detail. This makes strict guidance on the issue not very easy.

80. As far as the ILO Committee on Freedom of Association is concerned, it has been held that: “regarding various types of strike action denied to workers (like go-slow, working to rule and sit-down strikes), the Committee considers that these restrictions may be justified only if the strike ceases to be peaceful.”⁵⁶ That would thus imply a recognition of other forms of collective action than mere interruption of work.

53 R. BEN-ISRAEL, “Introduction to strikes and lock-outs. A comparative perspective” in R. BLANPAIN AND R. BEN-ISRAEL (eds.), *Strikes and lock-outs in industrialised market economies*, BCLR, 1994, nr. 29, 230 p.

54 E. KOVACS, “The right to strike in the European Social Charter”, *Comp. Labor Law and Policy Journal*, Vol. 26, 448.

55 E.g. Conclusions XV-1 (2000) 81 (Belgium), 121 (Cyprus). Conclusions XVI-1 (2002) 69-71 and 103. Conclusions XV-1 (2000) 202 (Finland). Conclusions XVI-1 (2002) 208.

56 Committee on Freedom of Association, *Digest*, para. 545; See the 1996 *Digest*, paras. 496 and 497; and 306th Report, Case No. 1865, para. 337.

81. Relying on research of the ETUI, we can give the following overview of the other 26 European Union countries (not including Estonia for reasons of discussion):⁵⁷

Types of collective action								
Country	Blockade	Boycott	Go slow	Work to rule	Picketing	Political	Sympathy	Warning
Austria								
Belgium			-		+	+/-	+	
Bulgaria					+	-	+	+
Croatia							+	
Cyprus				+			+	+
Czech Rep.					+		+	
Denmark	+	+	-	-	+	+/-	+	
Finland	+		+	+		+	+	
France	-		-	-	-	-	+	
Germany	-		+	+	+	-	+/-	+
Greece			+	+		-	+	
Hungary				+	+	-	+	+
Ireland			+	+	+	+	+	
Italy					+	+	+/-	
Latvia						-	-	
Lithuania								+
Luxembourg			+	+	+		-	
Malta			+	+	+		+	
Netherlands	+	+	+	+		-	-	
Norway	+	+	+	-	+	+	+	
Poland							+	+
Portugal		+	+		+		+	
Romania						-	+	+
Spain							+/-	
Slovakia					+		+	
Slovenia						-		
Sweden	+	+	+	+			+	
UK			+	+	+	-	-	

57 Cf. W. WARNECK, Strike rules in the EU27 and beyond. A comparative overview, European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS), p.9.

82. Picketing : In light of the issue of legality of a strike, it is relevant to refer to the problem of picketing. As regards the action of pickets, the ILO Committee on Freedom of Association considers that “the prohibition of strike pickets is justified only if the strike ceases to be peaceful”.⁵⁸ Consequently, the Committee has considered legitimate, a legal provision that prohibits pickets “ from disturbing public order and threatening workers who continued work”.⁵⁹ In the opinion of the Committee, taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work; such acts constitute criminal offences in many countries.

The ILO Committee of Experts, after recalling that strike picketing aims at ensuring the success of the strike by persuading as many persons as possible to stay away from work, has stated that the domestic courts are generally responsible for resolving problems which may arise in this respect. National practice is perhaps more important here, it claims, than on any other subject. The issue of picketing is, indeed, treated in a rather diverse way in various countries. In a comparative European study, it is concluded to be legal in Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Hungary, Ireland, Luxembourg, Malta, the Netherlands, Sweden, and the United Kingdom. But this legality only accepted if it is exercised peacefully. Also the ILO Committee of Experts sticks to the consideration that restrictions on strike pickets and workplace occupation should be limited to cases where the action ceases to be peaceful.⁶⁰

From the conclusions of the European Committee of Social Rights, it would seem that a peaceful picket would stay within the acceptable limits of the right to take collective action. It would seem that this could still be regarded as ‘peaceful’ picketing in the view of this Committee.⁶¹ This seems to stand in contrast with the opinion of the ILO Committee on Freedom of Association, which is clearly of the view that picketing ceases to be acceptable when it is “accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work”.

83. The question whether the right to strike needs further **legislative definition** is a question that deserves consideration. However, there remains an issue of appreciation. In many European industrial relations systems the right to strike / right to collective action, has not been

58 ILO, Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition, 1996, paras. 583 and 584.

59 *Idem.*, para. 585.

60 ILO, Freedom of association and collective bargaining. General Survey of the reports on 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). Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva para. 174.

61 Cf. Conclusions, XVII-1, Vol. 1, Belgium, art. 6, 4°, 30 september 2004, 67.

the subject of an extensive legislative agenda and is, instead, broadly left over to case law and practice.⁶² The case law of European Committee of Social Rights, under the European Social Charter, has accepted that the right to strike can be guaranteed (and also limited) in either law or case-law.⁶³

84. In conclusion, taking into consideration the fact that the Estonian Labour Dispute Resolution Act does not expressly prohibit, *a priori*, any other form of collective action than strike or lock-out, and seen the absence of uniformity in international and European strike law on the accepted scope of the right to strike and the right to collective action, we would not advise the Estonian legislator to adapt the Collective Labour Dispute Resolution Act with a view to include a broader regulation of collective action.

85. Limits of the right to strike/collective action : The question on lawfulness needs to be related to the **possible limits** of the right to strike. Under the European Social Charter, account must be taken of Article G (former Article 31, 1961 version) of the European Social Charter relating to restrictions on the rights laid down in the Charter: “The rights and principles (...) shall not be subject to any restrictions or limitations (...) 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.” Furthermore, under the Appendix of the European Social Charter, it is provided that, with regard to article 6, paragraph 4, it is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G (Article 31, 1961 version).

86. According to the ILO Committee on Freedom of Association, “the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations.”⁶⁴

87. Not only legislation, but also case law may impose limitations on the exercise of the right to strike. In the context of the case law of the European Committee of Social Rights, the case law of domestic courts is closely examined in order to verify whether courts rule in a reasonable manner and in particular whether their intervention does not reduce the substance of the right to strike so as to render it ineffective.⁶⁵ In a similar reasoning, the ILO Committee on Freedom of

62 Cf. e.g. Belgium, France, Germany, The Netherlands.

63 Conclusions I, Statement of Interpretation on Article 6§4, p. 34; Digest of the case law of the European Committee of Social Rights, 2008, p.55.

64 Committee on Freedom of Association, Digest, para. 547.

65 Conclusions I, Statement of Interpretation on Article 6§4, p. 38; Conclusion XVII-1, Netherlands, p. 317.; Digest of the case law of the European Committee of Social Rights, 2008, p. 55.

Association has stated, “ the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations”.⁶⁶ In this regard for example, the fact that a national judge may determine whether recourse to strikes are “premature” is not considered, by the European Committee of Social Rights, to be in conformity with Article 6§4, as this allows the judge to exercise one of the trade unions’ key prerogatives.⁶⁷

88. The purposes of strike action : With regard to the purposes of the exercise of the right to strike, or the right to collective action, some **guidance** from the European Social Charter may be useful, such as the European Committee’s opinion that the right to strike should remain limited to interest disputes.⁶⁸ However, the European Committee on Social Rights has not given clear guidance on the permitted purposes of strikes. The ILO’s Committee on Freedom of Association has been more clear in stating that “the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.”⁶⁹ It has further stated that “the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.”⁷⁰

89. Right to strike and concluding a collective agreement : There may be some room for clarification in the Estonian legal system with regard to the question whether the right to strike should stay limited or not in light of the aim of concluding a collective agreement.

90. The definition in the Estonian Collective Labour Dispute Resolution Act of what constitutes a strike, seems to be quite clear. According to §2, (2) of this act, a strike is “an interruption of work on the initiative of employees or a union or federation of employees in order to achieve concessions from an employer or an association or federation of employers to lawful demands in labour matters.” The notion of strike is, thus, not limited to the conclusion of a collective agreement.

On the other hand, § 2, (1) of the Estonian Collective Labour Dispute Resolution Act, defines a collective labour dispute as “a disagreement between an employer or an association or federation of employers and employees or a union or federation of employees which arises

66 Digest, para. 498.

67 Conclusions XVII-1, Netherlands, p. 319; Digest of the case law of the European Committee of Social Rights, 2008, p. 55.

68 ECSR, Digest, 2008, §198 (Conclusions I, Statement of Interpretation on Article 6§4, p. 38).

69 Committee on Freedom of Association, Digest, para. 522.

70 Committee on Freedom of Association, Digest, para. 526.

upon entry into or performance of collective agreements or establishment of new working conditions.” This is a more narrow definition when compared to the notion of strike in this act.

The difficult relationship between the two notions is to be, furthermore, noted in light of § 13 of the Estonian Collective Labour Dispute Resolution Act on the “creation of right to strike”, referring to “the right of employees or unions or federations of employees to organise a strike (...) to resolve a labour dispute.” Technically, it allows for an interpretation that limits the right to strike within the context of “labour disputes” (referring to the performance of collective agreements or establishment of new working conditions.), as defined earlier in the Act, only.

91. However, the European Committee of Social Rights’ general principle is that a limitation of the right to the aim of concluding a collective agreement is not in conformity with the Charter.⁷¹

The European Committee does, therefore, not accept the reasoning that the aim of the recognition of the right to taking collective actions, in article 6 ESC, is provided for the guarantee of the effective exercise of the right to bargain collectively.⁷² Although the issue was first raised in the context of the German system, the position that the right to strike cannot be limited to aims of concluding a collective agreement has been held with regard to various legal systems.⁷³ The European Committee is of the opinion that “workers should have the right to cease work or carry out other forms of collective action in all other occasions involving some form of collective bargaining.” In particular, according to the European Committee, workers should have a right to strike where their health and safety are at stake or where there is a threat of collective dismissals.⁷⁴

92. In conclusion, we would advise to rephrase the definition of the notion of collective labour dispute in § 2, (1) of the Estonian Collective Labour Dispute Resolution Act, in order to bring it in line with the concept of the right to strike. One may consider the following definition: a collective labour dispute is “a disagreement between an employer or an association or federation of employers and employees or a union or federation of employees “which arises in the context of lawful demands in labour matters”. It would also include labour disputes with a view to set new working conditions, but it would avoid, in our view, that interest disputes and rights disputes would become overtly mixed (see our discussion elsewhere in this report with regard to the distinction of disputes over interests vs. disputes over rights).

71 Conclusions II (1971) 28: “... provisions are not consonant with the Charter when they are designed to restrict the right to strike solely to strikes to secure the conclusion of collective agreements”.

72 Cf. Conclusions XIII-3, at 135 (Ice.)

73 Cf. also: Conclusions XVI-1, vol. 1, at 146 (Czech Rep.); Conclusions XVII-1, vol. 1, at 100 (Czech Rep.).

74 Conclusions XVI-2, vol. 2, at 740 (Slovk.).

B. Solidarity and warning strikes

93. The Estonian Collective Dispute Resolution Act provides :

§ 18. Warning and support strikes

(1) Employees and their unions or federations have the right to organise warning strikes with a duration of up to one hour.

(2) Support strikes are permitted in support of employees engaging in a strike. The duration of such strikes shall be decided by the representative, union or federation of the employees who makes the decision to organise the strike. A support strike shall not last longer than three days.

(3) A representative, union or federation of employees is required to notify the employer, association or federation of employers and the local government of a planned warning or support strike in writing at least three days in advance.

We have understood that the legal opinion in Estonia is that a solidarity strike is legal only if the primary strike can be considered legal.

94. The issue of solidarity/sympathy strikes : Solidarity action in strike law can be defined as a form of collection action designed to support other workers in their primary action.

95. With regard to *sympathy* (or *solidarity*) collective action, there is no established position of the European Committee on Social Rights on the issue, nor any specific requirement to the effect that national law must permit this. In the context of indicating limits to the notion of strike, it has been stated that '*political strikes*' are not protected by Article 6(4), the underlying point of view being that article 6 is 'designed to 'protect the right to bargain collectively'' and '*political strikes*' are rather outside collective bargaining.⁷⁵

96. Countries' laws and practices vary a lot on the issue of *sympathy* (or *solidarity*) strike action. Many countries do not address the issue expressly and/or have considered solidarity/sympathy strike action as legal under certain conditions.

97. A general prohibition of solidarity action can be questioned under international strike law.⁷⁶ In the United Kingdom nearly all forms of secondary action are unlawful. Trade unions may take action only against 'their' own employer, making it rather impossible for them to take action, inter alia, against the company which is the true 'employer' but which may hire the workers

⁷⁵ Conclusions C II (1971) 27.

⁷⁶ E. KOVACS, I.c., Comp. Lab. Law & Pol'y Journal, 450.

through an intermediary company.”⁷⁷ Under the European Social Charter, the European Committee of Social Rights concluded that the prohibition of secondary action impinges on the right to strike since it prevents the union “from taking action against the *de facto* employer if this is not the immediate employer.”⁷⁸

98. The ILO’s Committee of Experts on the Application of Conventions and Recommendations has subsequently stated that sympathy strikes are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalisation of the economy and the delocalisation of work centres. While pointing out that a number of distinctions need to be drawn here (such as an exact definition of the concept of a sympathy strike; a relationship justifying recourse to this type of strike, etc.), the Committee considers that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful.⁷⁹

99. In **Germany**, the legal situation with regard to the rules governing solidarity action is more nuanced and detailed and would appear, therefore, instructive. A solidarity strike is only legal under certain conditions. The solidarity action must not be ‘obviously **unsuitable**’ to support the main strike, not be **unnecessary** and not be **disproportional**. While, in such a case, the solidarity strike does not serve the enforcement of collective bargaining demands, it would be up to the trade union, calling out a solidarity strike, to decide whether a solidarity strike is suitable to support the main strike. The fact that the employer who is confronted with a solidarity strike, can not fulfill the strike demands of the main strike (or persuade the relevant employer association to do so) does imply that the solidarity strike is generally unsuitable. The degree of solidarity shown by strikers may be reinforced when they belong to the same trade union. Particular circumstances on behalf of the employer, confronted with a solidarity strike, may be taken into account. It may be relevant that the employer is connected with the employer subject to the main strike, for example because both belong to the same group or are an economic entity, or that the employer has already interfered with the main strike and hence infringed its neutrality.⁸⁰

In sum, in Germany, a solidarity strike may be legal when

- the primary action is not unlawful;
- it does aim at promoting participants’ own interests;
- it affects a party in the primary dispute;

77 Conclusions XII-1, at 132 (U.K.).

78 Conclusions XVI-1, vol. 2, at 689 (U.K.).

79 B. GERNIGON, A. ODERO AND H. GUIDO, I.c., p.16.

80 M. WEISS, Germany, I.c., ELL – Suppl. 340 (July 2008), n° 504.

- it is necessary, fair and reasonable in proportion to the objective;
- specific circumstances are taking into account, such as : the employer of the secondary dispute has not remained neutral in relation to the primary dispute or the employers of the primary and secondary disputes constitute an economic entity.⁸¹

100. The Estonian Collective Dispute Resolution Act, providing that “support strikes are permitted in support of employees engaging in a strike”, can be considered to be in line with the choice made in many national industrial relations systems. The Act also refers to the limitations of a solidarity strike. It is provided that “a support strike shall not last longer than three days” and that it is “required to notify the employer, association or federation of employers and the local government of a planned warning or support strike in writing at least three days in advance.”

Due to the margin of appreciation and the acceptability of limitations in international strike law, we are of the opinion that this range of limitations can be considered to be justified in realising the right to collective action. We would, therefore, not advise to amend the Act on this point.

101. The issue of warning strikes : Warning strike action is somewhat less expressly addressed as an issue in international strike law. In a comparative perspective, many countries do not expressly refer to it either. Where it is done and accepted as a legitimate form of action, there mainly exists limitations as with regard the duration of a warning strike (applying a maximum of about one to two hours).⁸²

102. But it would appear that it is strongly related to the issue of timing and the principle of ‘ultima ratio’ in strike law, i.e. using strike in last resort. The example of Germany would be a relevant. As is well-known, the German case law applies the theory of ‘ultima ratio’ in strike law. The Federal Labour Court has changed its position over the years, however. It is no longer willing to differentiate between a ‘normal strike’ and a ‘warning strike’ as regards the applicability of the principle of *ultima ratio*. The advantage would be that there is no debate anymore between what constitutes the exact difference, but as a consequence, both types of strike action come under the *ultima ratio* principle. Nevertheless, the Court has significantly reduced the conditions to be fulfilled in order to meet the requirements of *ultima ratio*. This means in practical terms that it is now much easier to go on strike even at an early stage of negotiations.⁸³

103. The recognition of the right to organise a warning strike in Estonian law is line with the international protection of the right to strike. A limitation of the warning strike to a specific period of time (in casu, one hour) can be considered to be justified and in line with practice in some

81 W. WARNECK, I.c., 32.

82 W. WARNECK, I.c., 8.

83 M. WEISS, I.c., ELL – Suppl. 340 (July 2008).

other European countries. It would also allow a clear demarcation between what constitutes a warning strike versus a 'regular' strike action. We would not advise to amend the Estonian Collective Dispute Resolution Act on this point.

C. Who can call a strike?

104. According to § 14 of the Estonian Collective Dispute Resolution Act Decision-making, "a decision to organise a strike is made by a general meeting of employees or a union or federation of employees."

We have understood, from the discussions during the April 2011 meeting, that the general meeting of employees are able to elect a "trustee", as regulated in the 2006 Employee Trustee's Act (cf. article 9 of this act). 'This trustee' can call a strike in case there is no union.

105. The issue who can call a strike is a much debated issue in international strike law. Under the European Social Charter, the European Committee of Social Rights has always adhered to the **individual** doctrine, meaning that **any group of workers**, regardless of having any specific legal status, whether unionised or not, enjoys the right to strike. This implies that according to this European Committee the right to call a strike cannot be the monopoly of a trade union or be dependent on trade union actions and/or consent. This view was first expressed with regard to Germany, when the Committee in 1971 stated that making the exercise of the right to strike 'dependent on trade union action' was not in conformity with the Charter.⁸⁴

106. The European Committee has continued to adhere to this position, but with some nuances. This is probably due to the fact the issue of the *individual* versus the *union* right character of the right to strike remains a controversial issue, and many countries aim to limit the right to call a strike to trade unions (outruling *wild cat* strikes). The Committee, therefore, has accepted that a **trade union's exclusive right** to call a strike may comply with the European Social Charter **if workers can easily and without excessive requirements form a trade union for the purposes of a strike.**

107. By way of examples, in its Conclusions, the Committee concluded that a specific situation was "not in conformity with Article 6§4 of the Charter because strikes could only be called by those entitled to be parties to collective agreements".⁸⁵ It continued "that the reference to "workers" in Article 6§4 relates to those who are entitled to take part in collective action but says nothing about those empowered to call a strike. In other words, this provision does not require states to grant any group of workers authority to call a strike but leaves them **the option of**

84 Conclusions II (1971) 28.

85 ESC, Digest, 2008, §195 (Conclusions 2004, Sweden, 565-566).

deciding which groups shall have this right and thus of restricting the right to call strikes to trade unions. However, such restrictions are only compatible with Article 6§4 if there is complete freedom to form trade unions and the process is **not subject to excessive formalities** that would impede the **rapid decisions** that strike action sometimes requires.”⁸⁶

108. With regard to France, “while taking into consideration, *inter alia*, the fact that the **unionisation rate** is very low in France, the Committee considers that the requirement that a strike must be initiated by one of the trade unions that are most representative at the national level, in the professional category or in the firm, organisation or department concerned, in order for a public sector strike to be lawful, amounts to a restriction of the right to collective action that is not compatible with Article 6 para. 4 of the Charter.”⁸⁷

109. The ILO **Committee on Freedom of Association** seems to conditionally accept the *organic* doctrine. Although the Committee has referred to the right to strike as a right for “workers and their organisations”, it has held that “it does not appear that making the right to call a strike the sole preserve of trade union organizations is incompatible with the standards of Convention No. 87.”⁸⁸ But also here the ILO would pay attention to the broader context. Workers, and especially their leaders in undertakings, should, according to the ILO Committee, “be protected against any discrimination which might be exercised because of a strike and they should be able to form trade unions without being exposed to anti-union discrimination”.⁸⁹

110. In conclusion, seen the formulation and references to the actors that can call a strike, in §14 of the Estonian Collective Dispute Resolution Act, which allows for an alternative for employees to call a strike in case of absence of a union, and given the international and European case law of the relevant Committees, we are of the opinion that Estonia does not need to amend its legislation.

D. Procedural aspects

111. With regard to procedural aspects, the European and ILO Committees do not oppose to the existence of procedural items in strike law, like information duties, notice periods, ballots, cooling off periods and the like. The main ILO Committee guidance would be that “legal

86 ESC, Digest, 2008, §195 (Conclusions 2004, Sweden, 565-566).

87 ESC, Digest, 2008, §196 (Conclusions XV-1, France, 254-257).

88 Committee on Freedom of Association, Digest, para. 524 (See the 1996 Digest, para. 477; 334th Report, Case No. 2258, para. 454; and 336th Report, Case No. 2153, para. 173).

89 Committee on Freedom of Association, Digest, para. 524 (See the 1996 Digest, para. 477; 334th Report, Case No. 2258, para. 454; and 336th Report, Case No. 2153, para. 173).

procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike".⁹⁰

112. Some issues are under discussion. Most concerns about procedural aspects are related to the instance before a strike takes place. For example, the obligation to give **prior notice** to the employer before calling a strike may be considered acceptable.⁹¹ In this regard, reference can be made to the European Committee of Social Rights' opinion with regard to Estonian, in which reference was made to the advance notification duty. The Estonian Collective Labour Dispute Resolution Act provides:

§ 15. Advance notice of strike or lock-out

(1) Organisers of a strike or lock-out are required to notify the other party, a conciliator and the local government of a planned strike or lock-out in writing at least two weeks in advance. The notice shall set out the reasons, exact time of commencement and possible scope of the strike or lock-out.

(2) An employer is required to inform the parties with whom the employer has contracts, other interested enterprises or agencies and the public through the media of a strike or lockout.

The Committee recalls the principle "that notice periods may be in conformity with Article 6§4 of the Revised Charter as long as they are of reasonable duration. It considers the situation in Estonia to be in conformity with Article 6§4 of the Revised Charter in this respect."

113. A decision to **suspend a strike** for a reasonable period so as to allow the parties to seek a negotiated solution through mediation or conciliation efforts, does not in itself constitute a violation of the principles of freedom of association.⁹² The Committee has held that **cooling off** periods are, in principle, compatible with the Charter. It stated that "such provisions do not impose a real restriction on the right to collective action, they simply regulate the exercise thereof".⁹³ However, the ILO Committee has mentioned that it reserves the right to return to the issue of the **length of such a period**.⁹⁴

In this context, it is relevant to point out §19 of the Estonian Collective Labour Dispute Resolution Act, providing:

90 Committee on Freedom of Association, Digest, para. 548 (See the 1996 Digest, para. 499; and 316th Report, Case No. 1989, para. 189).

91 Committee on Freedom of Association, Digest, para. 552 (See the 1996 Digest, para. 502; 325th Report, Case No. 2049, para. 520; and 333rd Report, Case No. 2251, para. 996).

92 Committee on Freedom of Association, Digest, para. 550 (See 338th Report, Case No. 2329, para. 1274).

§ 19. Postponement or suspension of strike or lock-out

(1) The commencement of a strike or lock-out may be postponed once: by one month by the Government of the Republic on the proposal of the Public Conciliator or by two weeks by the city or county government on the proposal of a local conciliator.

(2) The Government of the Republic has the right to suspend a strike or lock-out in the case of a natural disaster or catastrophe, in order to prevent the spread of an infectious disease or in a state of emergency.

Rules on cooling off, suspension etc., apply in, for example, Denmark,⁹⁵ Iceland⁹⁶ and Norway⁹⁷. No major objections or questions have been raised to these rules as to their conformity with Article 6(4) of the European Social Charter. The European Committee of Social Rights, for example, in its first conclusions, explicitly found Danish and Norwegian law to be in conformity with the requirements of Article 6(4) of the Charter on this point.⁹⁸

The duration of rounds of mediation and temporary bans on collective action may vary from country to country.⁹⁹ Minimum time limits of two or three weeks have been accepted.¹⁰⁰ Similarly, a ban of 30 days did not 'raise any problem of compliance' in the view of the European Committee of Social Rights.¹⁰¹ The European Committee did not respond negatively either to a time limit of 75 days applicable in Cyprus, but, just as the ILO Committee has already noted, reserved the right to return to the question after having investigated the situation in all other countries.¹⁰² Such investigation has not yet been carried out and in the latest 2010 conclusions the Committee has not returned to the issue in respect of Cyprus.

In light of this state of play, there does not appear to be a reason to modify the current provisions on this point in §19 of the Estonian Collective Labour Dispute Act. However, the expert team is of the opinion that the duration of a suspension period, in case of a strike, must remain limited. Furthermore, a collective action which is to be considered as an immediate

93 Conclusion II, 187.

94 Conclusions XIV-1, Cyprus, pp. 156-159 (cf. Digest, 212).

95 Act No 192 of 6 March 1997 on Mediation in Labour Disputes.

96 Trade Unions and Labour Disputes Act, 1938 (n 85).

97 Section 29 et seq. Labour Disputes Act.

98 Conclusions I (1969-70) 40. The Committee stated that 'It recognises that the restrictions on the right to strike in these states – denial of the right to strike ... during a 'cooling-off' period ... – could not be regarded [in the light of the Committee's general interpretation] as incompatible with the Charter'.

99 Cf. Overview in S. EVJU, "Collective action under the European Social Charter", ELLJ 2011, Nr. 3, forthcoming.

100 Cf. Finland, Conclusions XIV-1 (1998) 219.

101 Cf. Conclusions XIV-1 (1998) 595 (the Netherlands' Antilles), where the assessment is linked explicitly to the general position adopted with the interpretative statement in Conclusions I and subsequent practice. See further D Harris, J Darcy (n 12) 106-107.

102 Conclusions XIV-1 (1998) 157 (Cyprus).

response to an illegitimate employer decision or behaviour, should not be considered illegal per definition.

114. . According to the ILO Committee on Freedom of Association, legislation which provides for **voluntary conciliation and arbitration** in industrial disputes, before a strike may be called, cannot be regarded as an infringement of freedom of association, provided recourse to arbitration is not compulsory and does not, in practice, prevent the calling of the strike.¹⁰³ It must, therefore, concern a matter of voluntarism. Also the European Committee of Social Rights has expressed the view that compulsory arbitration or mediation prior to the strike is generally in breach of the European Social Charter. In the case of Romania, the European Committee was confronted with compulsory conciliation as a prerequisite for the exercise of the right to strike.¹⁰⁴ In the case of the Czech Republic the European Committee dealt with the fact that mediation must take place prior to a strike. Both situations were considered as an infringement of the Charter. "The Committee considers that this obligation, which is considerably more onerous than a cooling off period, constitutes a restriction of the right to take collective action that is not in conformity with the Charter."¹⁰⁵

115. In this light, we must point out §13 of the Estonian Collective Labour Dispute Act, in which it is provided that "the right of employees or unions or federations of employees to organise a strike (...) to resolve a labour dispute arises only (...) if conciliation procedures prescribed in this Act have been conducted but no conciliation has been achieved (...)". Furthermore, according to §22 (2) of the Estonian Collective Labour Dispute Act, strikes or lock-outs which are not preceded by negotiations and conciliation proceedings are unlawful. These provisions can be seen as problematic in light of the comments made above, to the extent that they prescribe negotiation or conciliation as a condition for the initiation or continuation of strike action. We are of the opinion that, in this form, these provisions cannot be upheld.

116. For example, the submission of a strike declaration to a **secret ballot** of the workers concerned has been considered as not *per se* incompatible with the Charter, at least when the vote does not prevent the expression of the free collective will of the interested parties.¹⁰⁶

It may be regulated how ballots should be organised and the required quorum and majority to pass a resolution in favour of collective action may be established. For example, a requirement of minimum 20 per cent of participation and a simple majority of votes cast, was not considered

103 Committee on Freedom of Association, Digest, para. 549 (See the 1996 Digest, para. 500; 307th Report, Case No. 1899, para. 83, and Case No. 1898, para. 324; 309th Report, Case No. 1912, para. 364; 324th Report, Case No. 2092/2101, para. 731; and 336th Report, Case No. 2369, para. 212).

104 Conclusions 2002, at 134 (Rom.).

105 Conclusions XVI-1, vol. 1, at 142 (Czech Rep.).

106 Conclusions II, Cyprus, 187.

to be in breach of Article 6(4) of the European Social Charter.¹⁰⁷ Where rules are too complex or restrictive, however, a violation of the Charter will be likely. The most known example concerns the system of the United Kingdom, in which strict balloting rules exist. Recently, legislation on this point in the Czech Republic, Lithuania (two-thirds majority of workers concerned required), and Romania (requirements of representativity and simple majority) has been found to breach Article 6(4).¹⁰⁸ It is pointed out that a common feature in the cases has been a requirement for at least 50 % of the ‘workers concerned’ – regardless of how many participated in the ballot – to vote in favour of the strike.¹⁰⁹

E. Liability of strike leaders

117. The European Committee of Social Rights has held that members of trade unions may be held liable in the event of **illegal** collective action. “The Committee is of the opinion that no violation of the Charter is involved in the application of legal provisions or principles making individual members of trade unions or employers’ associations criminally or civilly liable in the event of their organisation resorting to illegal collective action, on the understanding that legislation enacted in this field be in keeping with the Charter.”¹¹⁰

118. Imposing sanctions on unions for leading a legitimate strike is a serious violation of the principles of freedom of association, in the view of the ILO Committee on Freedom of Association.¹¹¹ That would not prevent abuses consisting of criminal acts while exercising the right to strike.¹¹²

119. There exists, however, little further guidance from the ILO or the European Committee of Social Rights with regard to the liability issue. The European Committee has not distinguished between the consequences for the individual strikers versus a trade unions involved in a strike action. Neither has the Committee explicitly dealt with liability in the event that a lawful strike causes severe damages.

The Committee has, nevertheless, concluded that the situation there is a violation of Article 6, section 4 of the revised Charter when a court may impose excessive and **disproportionate**

107 Cf. Conclusions XIV-1 (1998) 389.

108 Cf. UK, Conclusions XII-1 (1992) 131, Conclusions XIII-1 (1994) 160, Conclusions XIV-1 (1998) 805, Conclusions XV-1 (2000) 639, Conclusions XVI-1 (2002) 689, Conclusions XVII-1 (2004) 517-518, Conclusions XVIII-1 (2006) 820-821; Conclusions XIX-3; Cf. Czech Republic, Conclusions XVI-1 (2002) 140, and Conclusions XVII-1 (2004) 101; Conclusions XIX-3 (2010); Cf. Lithuania, Conclusions 2004, 347. Conclusions 2010; Romania, cf. Conclusions 2002, 134-136, Conclusions 2010; Cf. Hungary, Conclusions XVIII-1 (2006) 405-406; Conclusions XVI-2 (2003); Conclusions XIX-3 (2010). Cf. S. Evju, “Collective Action under the European Social Charter The Right to Collective Action under the Council of Europe’s Social Charter”, *European Labour Law Journal*, 2011, Nr.2, forthcoming.

109 S. Evju, *idem*.

110 Conclusions I, at 39.

111 Cf. ILO Committee on Freedom of Association, Digest, 658; 302nd Report, Case No. 1849, para. 207.

fines for the failure to observe notice rules and postponement orders.¹¹³ The Committee stated that reserving **immunity against civil action** for damages in the event of a strike for trade unions, and their members, only if they are holding a license to negotiate was also in breach of the Charter.¹¹⁴

120. Neither in a comparative perspective, is there widespread information on the liability issue. In the **Netherlands**, no action for compensation can be taken against workers who went on a legal strike. However, it is suggested that liability issues may arise in the context of picketing (obstructing roads or entrances is not allowed by case law while peaceful picketing is allowed). Employers would be able to request a summary court judgment ruling that a picket is illegal and there may be a fine.¹¹⁵ In **France**, strikers or trade unions can be held liable in cases where the strike causes damage to firms or non-strikers (e.g. by causing loss of wages). Also here, this is only the case when the actions of strikers (or unions) are not within the lawful scope of the (right to) strike. Moreover, in order to establish civil liability, the claimant must prove damage, fault and the causal link between fault and damages. It can only concern personal (individual) faults. A mandated employee, therefore, cannot be held liable for damages caused by the collectivity of the workers or the union.¹¹⁶ In **Germany**, trade unions can be made liable for damages caused by strike. A small number of unions have agreed upon liability limits with employers' associations. Up to present, employers have only called upon the courts to state the unions' liability for damages, but have not actually raised actions for performance.¹¹⁷ The system of the **United Kingdom**, can be considered to be rather exceptional with regard to the right to strike and the issue of liability. There are about five main torts which have been developed by the judiciary with specific relevance to industrial action. The legislator has created a range of negative 'immunities' for those who commit certain specified torts 'in contemplation or furtherance of a trade dispute'. However, these immunities have been narrowed down in the 1980s, thus exposing trade unions and their officers to civil liability. In particular there is the possibility of an injunction being obtained against the organisers of industrial action, including (since 1982) the trade union itself.¹¹⁸ A specific feature of the **Belgium** system, is the use of legal injunctions against some forms of industrial action, like those which are not characterised as withholding labour nor as peaceful picketing. Some employers have been able to address

112 ILO Committee on Freedom of Association, Digest, 667-668; 1996 Digest, para. 598; 320th Report, Case No. 2007, para. 281; 332nd Report, Case No. 2187, para. 719; and 338th Report, Case No. 2363, para. 734).

113 Conclusions 2004, vol. 2, at 565 (Swed.).

114 Conclusions XIII-1, at 155 (Ir.); Conclusions XIV-1, at 422 (Ir.).

¹¹⁵ A. JACOBS, Netherlands, in R. BLANPAIN, International Encyclopaedia of Labour Law, ELL – Suppl. 276 (January 2004), 223.

116 A. STEWART & M. BELL, I.C., 47-48.

117 M. WEISS, Germany, in R. BLANPAIN, International Encyclopaedia of Labour Law, ELL – Suppl. 340 (July 2008), 528-529.

118 B. HEPPLER, United Kingdom, in R. BLANPAIN, International Encyclopaedia of Labour Law, ELL – Suppl. 320 (February 2007), 288.

the President of the Civil Court in order to obtain an injunction against blocking of the entrance of enterprises, blocking suppliers, customers or other third parties. These legal procedures are often introduced on the basis of an individual request in summary proceedings, meaning that the other party in the conflict is not to take part in the proceedings before the President. These injunctions are often granted and impose a fine on any individuals who would take part or continue to do so in these actions. A specific issue, related to this, however, is that trade unions do not themselves have legal personality, meaning that, in principle, individual workers need to be taken to court.¹¹⁹

119 R. BLANPAIN, Belgium, in R. BLANPAIN, *International Encyclopaedia of Labour Law*, ELL – Suppl. 334 (February 2008), 861.

Executive Summary and Recommendations

121. In light of the considerations made above, the expert team wishes to point out the following recommendations:

1. How is the concept of ‘public service’ to be defined in order to exclude some public sector workers from the right to strike? Which public workers should be excluded from the right to strike?

122. The principle of applying restrictions to public sector workers, with regard to the right to strike, is accepted in European and international strike law.

However, the right to strike may be restricted or prohibited only for “public servants exercising **authority in the name of the state**”¹²⁰, or, whose duties and functions, given their **nature or level of responsibility** are directly affecting the rights of others, national security or public interest.¹²¹

The expert team is of the opinion that the concept of public service worker, for the purposes of restricting the right to strike, needs to be more narrowly defined in Estonian law.

123. Taking into account a legislative basis, the appropriate governmental authority should be responsible as to deciding on the list of functions of public servants in order to determine the workers who are to be considered as excluded from the exercise of the right to strike.

In light of the international protection of the right to strike and the freedom of association, such decision-making should, in our view, be made after due consultation of the social partners.

2. How should minimum services be defined, both in terms of a substantial as well as a procedural context?

124. The definition of minimum services concerns a dynamic notion, which is dependent on various factors and specific contexts. Nevertheless, for the determination of situations in which a strike could be prohibited, the definition should relate to the existence of a **clear and imminent threat** to the life, personal safety or health of the whole or part of the population,¹²² or,

120 Cf. 1996 Digest, para. 534; 304th Report, Case No. 1719, para. 413; 338th Report, Case No. 2363, para. 731, and Case No. 2364, para. 975.

121 ECSR, Digest, 2008, 204 (see Conclusions I, Statement of Interpretation, 38-39).

122 Committee on Freedom of Association, Digest, para. 581.

according to the ECSR, relate to cases in which **services essential to the community**, could pose a threat to public interest, national security and/or public health.¹²³

125. An advisable way forward for the Estonian system could be reached through the adoption of **legislation on essential services** (either through the adoption of an Act on essential services, or through amendment of Collective Labour Dispute Resolution Act). The legislative provisions would set the general criteria, concept and procedures for essential services.

The Act could be made applicable to both the public as well as the private sector, including employees and civil servants. It could also encompass self-employed workers.

The new Estonian legislation on essential services could install a mechanism for the determination of a preliminary list of minimum services (preliminary, *i.e.* before a strike takes place) as well a reference to an independent body dealing with disputes, which, as it is suggested, could be the same body as is indicated for the alternative collective interest dispute resolution in the public sector in case the right to strike is restricted (see below).

126. The experts are of the opinion that such legislative intervention would be in conformity with the international and European principles regarding the right to strike and would be able to guarantee a legal basis for the further establishment of essential services (including a list of sectors, services and functions to be performed), and would imply social partner involvement, “a careful exchange of viewpoints”, as well as a procedure for dealing with disagreement on the matter.

3. What alternative procedures should be provided for interest disputes involving the public service workers who do not have the right to strike?

127. As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in the public service, these restrictions should be accompanied by **adequate, impartial and speedy conciliation and arbitration** proceedings, in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.¹²⁴

128. The expert team advises to consider, in the Estonian public service system, the introduction of an **independent dispute resolution committee**, both for national and local

123 Conclusions 2004, vol. 1, at 42 (Bulg.); Conclusions 2004, vol. 2, at 347 (Lith.).

124 See the 1996 Digest, para. 547; and, for example, 300th Report, Case No. 1818, para. 367; 306th Report, Case No. 1882, para. 429; 308th Report, Case No. 1897, para. 478; 310th Report, Case No. 1943, para. 227; 318th Report, Case No. 2020, para. 318; 324th Report, Case No. 2060, para. 518; 330th Report, Case No. 2166, para. 292; 333rd Report, Case No. 2277, para. 274; 336th Report, Case No. 2340, para. 649; and 337th Report, Case No. 2244, para. 1269.

public service workers, but also applying to collective dispute resolution issues arising in light of the essential services legislation.

129. It is advisable to conceive the organisation of such independent body on the basis of the following characteristics:

- An independent body under public law (a legal basis in legislation);
- Presided by an independent chairperson (e.g. the Public Conciliator); and
- Composed of 5 members;
- Appointed by the Minister of Social Affairs;
- 2 members appointed on proposal of the organisations of workers;
- 2 members appointed on proposal of the organisations of employers;
- 1 member appointed by the Minister from the public service;
- The body has competence over dispute interests;
- Decisions are taken on the basis of majority voting;
- The independent body issues an award which is duly motivated.

130. The independent body needs to assume competence over **collective dispute interests**. The expert team is of the opinion that Court action remains possible, but on limited grounds.

4. How is the distinction to be made between conflicts over rights versus conflicts over interests and is there a need to implement this distinction in the legal system?

131. The expert team is of the opinion that the following distinction could be conceived in Estonian's industrial relations practices:

- individual conflicts over rights -> the Labour Dispute Committee / Court;
- collective conflicts over rights (e.g. interpretation of CBA) -> the Labour Dispute Committee / Court;
- collective conflicts over interests -> the Public Conciliator.

132. It should be noted that a strict separation of the notions 'disputes of interests' and 'disputes of rights' appears to be quite theoretical and is not always strictly maintained in practice.

However, it should also be noted that, due to the text of Article 6, Paragraph 4, of the European Social Charter and interpretations of the European Committee on Social Rights, the right to strike is limited to cases of conflicts of interest.

133. There may be an issue with regard to §12 of the Estonian Collective Labour Dispute Act. The expert team advises to limit the notion of **collective labour disputes** to interest disputes only, meaning that disputes with regard to the interpretation of collective agreements would be excluded from its scope. Those interpretation matters would be solely left to the competence of the labour dispute committee or the court, which are both courts of law.

5. How is the concept of the legality of a strike, including the issue of support strikes, to be understood?

134. At the international level, there is no uniform notion of what constitutes a (legal) strike.¹²⁵ A main reference in European strike law constitutes article 6, paragraph 4, of the European Social Charter (Revised, 1996). This article protects not only the right to strike, but also forms of **collective action**.

Taking into consideration the fact that the Estonian Labour Dispute Resolution Act does not expressly prohibit, *a priori*, any other form of collective action than strike or lock-out, and seen the absence of uniformity in international and European strike law on the accepted scope of the right to strike and the right to collective action, we would not advise the Estonian legislator to adapt the Collective Labour Dispute Resolution Act with a view to include a broader regulation of collective action.

135. The expert team advises to rephrase the definition of the notion of **collective labour dispute** in § 2, (1) of the Estonian Collective Labour Dispute Resolution Act, in order to bring it in line with the concept of the right to strike, and to avoid that interest disputes and rights disputes would become overtly mixed.

136. With regard to **solidarity or support strikes**, and due to the margin of appreciation and the acceptability of limitations in international strike law, the expert team is of the opinion that there is no reason to amend the Estonian Collective Labour Dispute Resolution Act on this point.

137. With regard to the **warning strike**, the expert team does not advise to amend the Estonian Collective Dispute Resolution Act on this point.

6. Who can call a strike?

138. Seen the formulation and references to the actors that can call a strike, in §14 of the Estonian Collective Dispute Resolution Act, which allows for an alternative for employees to call a strike in case of absence of a union, and given the international and European case law of the relevant Committees, the expert team is of the opinion that Estonia does not need to amend its legislation on this point.

¹²⁵ R. BEN-ISRAEL, "Introduction to strikes and lock-outs. A comparative perspective" in R. BLANPAIN AND R. BEN-ISRAEL (eds.), *Strikes and lock-outs in industrialised market economies*, BCLR, 1994, nr. 29, 230 p.

7. What procedures regarding the right to strike are permissible?

139. With regard to procedural aspects, the European and ILO Committees do not oppose to the existence of procedural items in strike law, like information duties, notice periods, ballots, cooling off periods and the like. The main guidance would be that “legal procedures for declaring a strike should **not be so complicated as to make it practically impossible** to declare a legal strike”.¹²⁶

In light of this state of play, there does not appear to be a reason to modify the current provisions on this point in §19 of the Estonian Collective Labour Dispute Act. However, the expert team is of the opinion that the duration of a suspension period, in case of a strike, must remain limited. Furthermore, a collective action which is to be considered as an immediate response to an illegitimate employer decision or behaviour, should not be considered illegal per definition.

140. The expert team points at §13 of the Estonian Collective Labour Dispute Act, in which it is provided that “the right of employees or unions or federations of employees to organise a strike (...) to resolve a labour dispute arises only (...) if conciliation procedures prescribed in this Act have been conducted but no conciliation has been achieved (...)”. Furthermore, according to §22 (2) of the Estonian Collective Labour Dispute Act, strikes or lock-outs which are not preceded by negotiations and conciliation proceedings are unlawful. These provisions can be seen as problematic, to the extent that they prescribe negotiation or conciliation as a condition for the initiation or continuation of strike action. The expert team is of the opinion that, in this form, these provisions cannot be upheld.

8. How is liability of strike leaders (to be) conceived?

141. It would be allowed to apply legal provisions or principles making individual members of trade unions or employers’ associations criminally or civilly liable in the event of their organisation resorting to illegal collective action.¹²⁷ The international and comparative practice is quite diverse on this point.

¹²⁶ Committee on Freedom of Association, Digest, para. 548 (See the 1996 Digest, para. 499; and 316th Report, Case No. 1989, para. 189).

¹²⁷ Conclusions I, at 39.