EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON THE MERITS

Adoption: 24 January 2024

Notification: 22 March 2024

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European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) v. the Netherlands

Complaint No. 201/2021

The European Committee of Social Rights, committee of independent experts ("the Committee") established under Article 25 of the European Social Charter, during its 339th session in the following composition:

Aoife NOLAN, President
Eliane CHEMLA, Vice-President
Tatiana PUIU, Vice-President
Kristine DUPATE, General Rapporteur
József HAJDU
Karin Møhl LARSEN
Yusuf BALCI
Paul RIETJENS
George THEODOSIS
Mario VINKOVIC
Miriam KULLMANN
Carmen SALCEDO BELTRÁN
Franz MARHOLD
Alla FEDOROVA
Grega STRBAN

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 18 October 2023, 5 December 2023 and 24 January 2024,

On the basis of the report presented by Karin Møhl LARSEN,

Delivers the following decision, adopted on the latter date:

PROCEDURE

1. The complaint lodged by the European Trade Union Confederation (ETUC), Netherlands Trade Union Confederation (FNV) and National Federation of Christian Trade Unions (CNV) was registered on 12 July 2021.

2. In their complaint, ETUC, FNV and CNV allege that the assessment by the Dutch Supreme Court regarding restrictions on collective action, which is based on an excessively broad framework not strictly grounded on Article 6§4 and Article G of the revised European Social Charter ("the Charter"), is not in conformity with the aforementioned provisions of the Charter. The complainant organisations further allege that the way in which the assessment framework defined by the Supreme Court is applied in the lower courts goes beyond what is provided by Article G of the Charter, is not stable and foreseeable and thus does not afford sufficient protection in procedures before the courts.

3. On 7 December 2021, the Committee declared the complaint admissible.

4. Pursuant to Article 7§1 of the 1995 Protocol providing for a system of collective complaints ("the Protocol"), the Committee invited the Government to make written submissions on the merits of the complaint by 15 February 2022.

5. Pursuant to Article 7§§1, 2 of the Protocol and Rule 32§§1, 2 of its Rules ("the Rules"), the Committee invited the States Parties to the Protocol, the States having made a declaration in accordance with Article D§2 of the Charter, and the international organisations of employers or workers referred to in Article 27§2 of the 1961 Charter, to submit observations, if they so wished, on the merits of the complaint by 15 February 2022.

6. On 10 February 2022, the Government asked for an extension of the deadline for submitting its submission on the merits of the complaint. The President of the Committee extended this deadline until 12 April 2022. The Government's submissions on the merits were registered on 12 April 2022.

7. Pursuant to Rule 31§2 of the Rules, ETUC, FNV and CNV were invited to submit a response to the Government's submissions on the merits by 30 June 2022.

8. On 30 June 2022, ETUC, FNV and CNV requested and were granted an extension of the deadline for submitting their response to the Government's submission on the merits of the complaint until 15 July 2022. The response by the complainant organisations was registered on 15 July 2022.

9. Pursuant to Rule 31§3 of the Rules, the Government was invited to submit a reply to the complainant organisations' response by 13 September 2022. The Government's reply was registered on 13 September 2022.

SUBMISSIONS OF THE PARTIES

A – The complainant organisations

10. The complainant organisations, ETUC, FNV and CNV, allege a violation of Article 6§4 of the Charter on two grounds. The first is directed against the interpretation given by the Supreme Court to Article 6§4 and Article G in judgments handed down in 2014-2015, following which it has provided the framework for assessing the scope for exercising the right to strike in the Netherlands. The second ground concerns the way in which the lower courts have applied the assessment framework, which the complainant organisations consider is not stable and foreseeable and thus goes beyond what is provided by Article G of the Charter.

B – The respondent Government

11. The Government requests the Committee to declare the complaint unfounded. It contends that the way in which the right to take collective action is exercised in the Netherlands is in conformity with Article 6§4 and Article G of the Charter.

RELEVANT DOMESTIC LAW AND PRACTICE

12. In their submissions the complainant organisations and the respondent Government refer, in particular, to the following provisions of domestic legislation:

The Civil Code

Article 6:162(1)

A person who commits a tort against another which is attributable to him, must compensate any consequential loss suffered by the other.

Article 6:162(2)

Except where there are grounds for justification, the following are considered as torts: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law relating to proper social conduct.

General information on the right to collective action in the Netherlands

13. The complainant organisations and the Government provide background information regarding the evolution of the case law on collective action in the Netherlands.

14. The Netherlands has no specific legislation on the right to collective action. Neither the Constitution nor other statutes contain legal standards relating to the right to collective action and/or the restrictions that can be placed on it. Therefore, since the

ratification and entry into force of the European Social Charter for the Netherlands, Article 6§4 of the Charter is regarded as having direct applicability in Dutch law.

15. Case law on the right to collective action has, since 1900, been influenced by interim relief proceedings before the courts as well as the interpretation given to the civil law concept of “unlawful act”. This concept is included in the Civil Code and applies to all cases of damage resulting from acts or omissions by natural or legal persons vis-à-vis others.

16. The law defines an unlawful act as a violation of a right and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, in so far as there was no justification for a certain behaviour (Article 6:162(2) Civil Code). The person who commits an unlawful act which can be attributed to them is obliged to compensate the damage another person has suffered as a result thereof (Article 6:162(1) Dutch Civil Code). This provision has given rise to most case law and literature on collective action.

17. Interim relief proceedings may be initiated by an employer or a third party which considers that its interests would be harmed by a collective action that has been announced by trade unions. A hearing before the interim relief judge may take place on short notice, that is within a day or within a few hours, during which the judge may impose a prohibition or restriction on the collective action that has been announced or has already started. Employers and third parties may bring forward any arguments supporting their claim that the strike is unlawful, while the trade unions may put forward a defence, usually within a few hours before the hearing or in court.

18. In its *Netherlands Railways (NS)* judgment in 1986, the Supreme Court held that Article 6§4 of the Charter had direct effect, being binding on all persons pursuant to Article 93 of the Constitution and taking precedence over Dutch legislation pursuant to Article 94 of the Constitution. As it has direct effect, private parties can invoke this international provision directly in civil proceedings, irrespective of the national rules.

19. As regards the exceptions to the right to strike, the Supreme Court stated in its *FNV v. Streekvervoer* judgment that a strike that falls under Article 6§4 of the Charter must, in principle, be tolerated, also by the employer, as a legitimate exercise of the fundamental right recognised in the Charter, notwithstanding the harmful consequences which it is intended and accepted that the strike will have for the employer and third parties. The Supreme Court went on to hold that, in view of the duty of care that must be observed with regard to the person and property of others pursuant to Article 6:162 of the Civil Code, the only circumstance in which the courts may impose restrictions on a strike of this kind is where the strike would infringe the rights of third parties or the public interest to such an extent that restrictions are urgently needed to protect the interests of society. Whether that is the case is a question of proportionality to be decided only by assessing the various interests involved in the exercise of the fundamental right in the light of the interests which are being infringed, taking into account all the different factors that characterise the dispute between the parties, both in relation to one another and in their overall context.

20. Moreover, the Supreme Court held in the *Netherlands Railways* judgment that collective action that came within the scope of Article 6§4 of the Charter was unlawful if it did not comply with the 'rules of the game' (*spelregels*) test. Following this test, a collective action was lawful only if timely notice had been given and where all other possibilities had first been exhausted, that is as a last resort.

21. Assessing the 'rules of the game' test amounted to a procedural test that preceded the necessity test of Article G of the Charter and was intended to determine whether trade unions were entitled to resort to strike action. In fact, the rules of the game test constituted an extra restriction on the right to take collective action, going beyond the restrictions permitted by Article G of the Charter.

Relevant domestic case law

22. In 2014/2015, the Supreme Court modified its assessment of the right to collective action in two judgments, the *Enerco* case (2014) and the *Amsta* case (2015), by deciding that the assessment whether collective action is lawful should be made with reference to Article G of the Charter.

23. The *Enerco* and *Amsta* cases are summarised below (under a)).

a) Case law of the Supreme Court

The *Enerco* judgment

24. The *Enerco* case concerned collective actions in the port of Amsterdam. These had been organised by the trade unions against the stevedoring company *Rietlanden* because the latter had refused to conclude a collective agreement. The dispute resulted in an unannounced strike in mid-October 2012. At the time in question, *Enerco* had hired *Rietlanden* to unload the *Evgenia*, a seagoing vessel laden with 120,000 tonnes of coal. As a result of the strike affecting *Rietlanden*, the *Evgenia's* cargo was not fully unloaded. *Enerco* then started searching for another firm to finish the job. However, the trade unions called on trade union officials at similar firms to declare their solidarity with the strike action at *Rietlanden* and refuse to unload the ships. Because of the boycott, the sympathy strike meant that the vessel was not unloaded either by *Rietlanden* or by its competitors. *Enerco* applied for an interim injunction barring the unions from boycotting the work. The application did not therefore relate to the strike at the firm targeted by the strike, but instead concerned the strike at its competitors in support of that strike.

25. The case concerned the scope of Article 6§4 of the Charter, in particular, whether provision extends to secondary strikes. The Supreme Court confirmed the direct effect of Article 6§4 in the Netherlands. It then ruled that the nature of the right to collective bargaining as a fundamental social right does not give rise to a restrictive interpretation of the concept of 'collective action'. That is a trade union is, in principle, free to choose the means for achieving its objective. Whether a collective action is protected by Article 6§4 is thus mainly determined by the answer given to the question whether the action can reasonably contribute to the effective exercise of the right to collective bargaining. If this question is answered in the affirmative, the collective action will fall within the scope of Article 6§4 of the Charter. The exercise of the right to

collective action can then only be restricted by way of Article G of the Charter. With reference to this standard, the Supreme Court concluded that the Court of Appeal had wrongly placed the secondary strike outside the scope of Article 6§4 of the Charter. The decisive factor was whether the secondary strike could reasonably contribute to the effective exercise of the right to collective bargaining and thus to the intended purpose of the action. According to the Supreme Court that was the case in this matter.

26. Moreover, the Supreme Court ruled that restrictions may be placed on the exercise of the right to strike, thereby referring to the unlawful act standard with regard to the due care that must be observed in society in relation to a third party (in this case: *Enerco*). After the Court of Appeal had judged that with due regard to the duty of proper social conduct towards to the person and the goods of others, limitations the right to strike may be imposed, the Supreme Court confirmed:

> "Nevertheless, the action related to art. G of the European Social Charter is to be prohibited or restricted if, in view of the care taken that pursuant to art. 6: 162 Dutch Civil Code must be observed in society with regard to a third party (in this case: *Enerco*), infringes its rights to such an extent that restrictions, from a social point of view, are urgently necessary. Whether this is the case is a question that must be decided by weighing - taking into account all the circumstances of the case - the interests served by exercising the fundamental right against those which are infringed (cf. HR 21 March 1997, ECLI:NL:HR:1997:AG3098)."

27. Thus, in the event of a breach of this duty of care, restrictions to the right to strike are possible when they are socially urgent. For this to be the case, taking all circumstances of the case into account, the interests served by the exercise of the fundamental right against the interests that are infringed must be balanced. With this consideration, the Supreme Court has allowed the scope of Article G of the Charter to be interpreted in accordance with the framework contained in Article 6:162 of the Civil Code, and thus provided the basis for the possibility of limitation of the right to collective action.

28. According to the Supreme Court, the Amsterdam Court of Appeal had wrongly held that the boycott did not fall under Article 6§4 of the Charter. Having established that the collective action fell within the scope of Article 6§4 of the Charter as it was considered to reasonably contribute to achieving the aim of the action, the Supreme Court considered that the action was, in principle, lawful and that it was therefore up to *Enerco* to demonstrate its disproportionality.

The *Amsta* judgment

29. The *Amsta* judgment concerned a collective action undertaken by the *AbvaKabo* FNV trade union ('FNV') at the premises of *Amsta*, a care provider. At the FNV's request, consultations had taken place about the terms and conditions of employment of Amsta's employees. As the consultations failed to produce the result desired by the FNV, the latter organised a collective action on three occasions in the form of work stoppages of two hours each at two of *Amsta*'s institutions. On 2 February 2013, *Amsta* employees again took collective action. This involved denying access to the building to senior executives and to managers not involved in the action.

30. *Amsta* had applied for an interim injunction barring the FNV from organising occupations of the premises. In support of its application, *Amsta* argued that the FNV

was involved in the ‘unannounced occupation’ of the premises on 2 February 2013 and that it feared that the further action that had been announced for 8 February 2013 would again lead to an occupation of the premises. The Supreme Court’s judgment concerned the issue of whether the unannounced occupation of the premises of 2 February 2013 fell within the scope of Article 6§4 of the Charter.

31. The *Amsta* judgment was concerned with a sit-down strike started by a group of workers that had been taken over by the trade union. In first instance, the court held that a sit-down action by workers does not fall under the scope of Article 6§4 of the Charter. In appeal, it was ruled that the collective action was not lawful because it had not been announced in advance. Thus, the action could not pass the proportionality test because the action had not been implemented as an *ultimum remedium*.

32. In line with the *Enerco* judgment, the Supreme Court found that the permissibility of collective actions should be assessed on the basis of the question whether those actions contribute to ensuring the effective exercise of the right to collective bargaining. Because it concerns a fundamental social right, there is no reason to restrict the interpretation of the concept of ‘collective action’. Therefore, the Supreme Court decided that it was no longer an independent condition of permissibility whether collective action is used as a last resort. Moreover, the Supreme Court decided that testing against the ‘rules of the game’ was no longer an independent criterion for assessing whether a collective action is lawful in light of Article 6§4 of the Charter.

33. According to the Supreme Court, however, the rules of the game are still important as one of the factors in assessing whether the right to collective action should be limited or prohibited in a specific case on the basis of Article G of the Charter.

34. The Supreme Court also noted that if the action also affects persons who are particularly vulnerable, such as young people, the disabled, the elderly, and others who are in need of special care, in the sense that it interferes with their ability to receive care, thereby exposing those persons to the risk of harm to their mental or physical health, the action must quickly be classified as unlawful under Article G of the Charter. This was not the case here.

35. In the *Amsta* case, the Supreme Court ruled as follows:

> “…this does not alter the fact that the rules of the game (and not only those mentioned by the Court of Appeal in this case) are still important in deciding whether to restrict or prohibit the exercise of the right to collective action in a specific case on the basis of Article G of the European Social Charter. Although they are no longer prerequisites for the admissibility of the action, they are still relevant in assessing whether to restrict or prohibit the action. However, the importance of the rules of the game as points of view is not always the same. They may count heavily in a general strike, but far less so in instances of 'work-to rule' of limited duration in which the risk of major damage is nil.”

b) Case law of the lower courts since the *Enerco* and *Amsta* judgments

36. The lower court judgments summarised below provide only the essence of the courts’ rulings, all of which refer to the Supreme Court judgements in *Enerco* and *Amsta.* These summaries are structured along the particular issue at stake: (i) public

order and safety and related circumstances; (ii) interests of third parties; (iii) interests of the employer.

(i) Public order and safety and related circumstances

Actions by special enforcement officers (Summary proceeding, Amsterdam Court, 26 April 2019, ECLI:NL:RBAMS:2019:3024)

Facts

This case involves a timely announced collective action by the national unions for special enforcement officers (so-called boa). As protest meetings and the suspension of issuing fines had had no effect, it was announced that special enforcement officers in Amsterdam would not issue fines on King's Day, a national holiday in the Netherlands, in combination with a strike on that day between 19:00 and 21:00 hours. The trade unions wanted to draw attention to the fact that special enforcement officers cannot do their work safely and that measures were needed, including adding the truncheon and pepper spray to the arsenal of powers and means of violence at the disposal of special enforcement officers. That request was denied. While the municipality is not seeking a ban on the special enforcement officers not to issue fines for observed violations during King's Day in Amsterdam, but that the trade unions be prohibited to organise a strike during King's Day.

Relevant court considerations

Referring to Article G of the European Social Charter, the court considered that in the past, 700,000-900,000 people annually came to Amsterdam on King's Day to celebrate. Account must be taken of the possibility that many of them will be under the influence of alcohol or drugs to a greater or lesser extent during the day and will display related, disinhibited behaviour. Assistance from other police forces cannot be obtained because King's Day is celebrated nationwide, requiring the deployment of police everywhere. Therefore, those charged with the actual maintenance of public order, the special enforcement officers and the police, will be tasked to the limits of their capabilities on King's Day; the same applies, incidentally, to the emergency services. If special enforcement officers are absent precisely during the hours when many people start moving disorganised through the city on their way home, while many people are under the influence, an essential link in the safety chain would be lost. This is insufficiently compensated by the unions' offer to be available in case of emergencies. It is to be feared that the failure of the special enforcement officers to call people with deviant behaviour to account during strike hours means that such behaviour could escalate to the level where the police have to intervene by force of arms more easily than would otherwise be the case. If those fears materialise, the strike would lead to a grimmer atmosphere than would otherwise be the case and to disorder and destruction, and possibly even violence. On these grounds, it is held that the proposed action, while serving a reasonable purpose, is disproportionate given the consequences that can reasonably be feared from it. The municipality has made it sufficiently plausible that the prohibition of the intended collective action is urgently needed in social terms and is necessary in a democratic society for the protection of the rights and freedoms of others and for the protection of public order. The action will therefore be prohibited. The imposition of a penalty is waived because the unions' lawyer informed the court at the hearing that any ban will be respected. The unions will be ordered to pay the costs of the proceedings.

Actions by Schiphol ground staff (summary proceeding, North Holland Court, 11 August 2016, ECLI:NL:RBNHO:2016:6696 as well as Court of Appeal Amsterdam 26 August 2016, ECLI:NL:GHAMS:2016:3472)

Facts

In a conflict over the establishment of a collective agreement for KLM ground staff, and after protest meetings had failed to produce a negotiation result, actions were being announced. KLM went to court with the request to prohibit strike actions at KLM.

Relevant court considerations

The interim relief judge referred to the Supreme Court's judgments in the *Enerco* and *Amsta* cases noting that, in principle, Article G of the European Social Charter was the only ground on which the right to take strike action could be restricted. The judge found that the strikes would make it impossible for those willing to work to do their jobs, delaying or suspending the company's entire operations. As this was the peak holiday season, the action would cause significant damage, certainly in combination with the existing problems and backlogs in baggage handling. This would result in a large number of stranded passengers. This is a sufficient reason to restrict the right to strike, even more so because of the 'explosive combination' of extreme peak demand and the terrorist threat. Strike action was therefore prohibited in the period up to and including 4 September 2016. After the expected peak holiday season has passed, the FNV would be allowed to resume industrial action. The FNV (*Federatie Nederlandse Vakbeweging* - Netherlands Trade Union Confederation) lodged an expedited appeal with Amsterdam Court of Appeal.

Court of appeal

The Court of Appeal noted that KLM had cited the extreme pressure of the peak holiday season as a reason for restricting the right to strike. This peak season activity was considered in detail: it would take at least 10 hours to make up for 1 lost hour and between 70 and 114 flights, carrying around 12,000 passengers, would be affected, quite apart from the 5,000 passengers who would lose their luggage. A 90-minute strike would also mean that about 5,000 passengers in planes that had already landed would have to wait for hours before being able to disembark. It would take days before air traffic and baggage handling would return to normal. In the Court of Appeal's view, this meant that the right to strike could indeed be restricted. The security risks were a factor in its decision as the FNV had been unable to show how they could be reduced. The Court of Appeal also considered it relevant that KLM had limited itself in the appeal proceedings to requesting a strike ban up to and including 4 September and had not requested an unlimited ban. The Court of Appeal therefore upheld the judgment of the interim relief judge and banned strike action up to and including 4 September 2016. KLM and the FNV eventually reached a collective agreement on 6 September 2016.

Actions by KLM (summary proceedings, 8 November 2016, North Holland District Court ECLI:NL:RBNHO:2016:9238)

Facts

After unsuccessful negotiations on a new collective agreement, on 31 October 2016, VNC (*Vereniging Nederlands Cabinpersoneel*) and FNV Cabine notified KLM to again lay down work on 3, 4 and 7 November 2016, with a duration of 40 minutes on 3 and 4 November and 60 minutes on 7 November.

Relevant court considerations

KLM argued that restriction of the action is justified: because VNC and FNV Cabine refuse to enter into consultations about a new collective agreement, although they are obliged to do so; because the financial damage for KLM because of the announced actions amounts to at least € 3.6 million; and because the announced actions entail an unacceptable safety risk. VNC and FNV Cabine have not breached their obligation to consult. As to the financial damage to the employer, this is inherent in collective actions and does not easily lead to the judgment that a limitation of the right of action is socially urgent. Moreover, KLM submits that an unacceptable safety risk arises from the intended actions, because of significant inconvenience to passengers the risk of 'unruly passengers' increases. However, this inconvenience does not result in an unacceptable safety risk. What other safety risks, apart from the 'unruly passenger', will occur KLM has not specified. KLM has therefore not made it sufficiently plausible that (the consequences of) the actions will lead to unacceptable safety risks. In addition, VNC and FNV

Cabine have shown through the safety consultations to have an eye for safety and to be willing to take measures to reduce safety risks. KLM has argued that the restriction of the right to take action requested by KLM in the form of prior registration of activists keeps the operation manageable. The court in preliminary relief proceedings does not consider this registration a minimal restriction of the right to take action. On the contrary, the requested registration, with KLM itself, is intimidating for employees and can have a major impact on their willingness to take action. As such, the restriction deeply interferes with the relationship between activists and KLM. In assessing the requested restriction on the right to take action, the court in preliminary relief proceedings further considered the objective of the actions, the nature of the actions, their build-up, the manner of announcement, the notice and the safety consultations held prior to each action. All the above leads to the opinion that the claimed restriction of the right of action should not be regarded as socially urgent and therefore not justified. The relief sought in this regard will be refused.

Actions at Schiphol security (summary proceeding, North Holland Court, 1 August 2018, ECLI:NL:RBNHO:2018:6807)

Facts

Action had been taken at Schiphol's security companies for some time in the context of deadlocked negotiations on collective terms of employment: initially, public-friendly actions and short work breaks of 10 minutes were held, with little effect. Subsequently, the work stoppage was extended from 10 to 15 minutes and, where necessary, to 20 minutes. The actions would mean that several times a day and only during short periods of time, no new departing passengers would be admitted to the Security lane, so that they would have to wait a limited amount of time.

Relevant court considerations

Schiphol sought an injunction primarily to prohibit each of the defendants from taking collective action in the form of work stoppages at the security companies at Schiphol until 1 October 2018. The court dismisses the claimed blanket prohibition of collective action, since Schiphol did not substantiate this claim in fact at the hearing. The parties agree that the agreements in place until today, with work stoppages of up to ten minutes at a time, have not created or will not create insurmountable safety risks. Schiphol's position is that work stoppages longer than ten minutes at a time will be socially disruptive. The court in interim relief proceedings has the impression that the seriousness of the consequences of work interruptions longer than ten minutes each time seems exaggerated by Schiphol and trivialised by the unions. Yet it ruled that it was sufficiently plausible that a work stoppage of 20 minutes or more at a time could lead to unacceptable safety risks, especially in the coming busy period of school holidays. However, with regard to the work stoppages of 15 minutes each announced by the unions for the next few days, Schiphol has not made it sufficiently plausible that unacceptable safety risks will result. Thus, the unions will be prohibited from increasing the collective action already initiated to work interruptions of more than 15 minutes each time. The court sees no reason to additionally limit the number of work stoppages per day to three, as alternatively claimed by Schiphol. The unions will be followed here in their intention to increase this number to a maximum of five per 24-hour period. The court sees cause to limit the duration of the restrictions to be imposed on the unions' right to take collective action to the remainder of the school holidays up to and including 2 September 2018.

Actions in public transport (North Holland Court, 26 May 2019, ECLI:NL:RBNHO:2019:5857)

Facts

This concerns the complete cessation of all train and regional transport to and from Schiphol Airport for a whole day.

Relevant court considerations

Schiphol submitted figures explaining the consequences of the actions. KLM's statement submitted by Schiphol provides insight into the logistical complexity of the operation at the airport and the impact that a traffic jam around Schiphol could have on that operation. In view of the above, the Court does not consider the possible consequences, regarding the maximum capacity of Schiphol Plaza, a further influx of passengers as well as the insufficiency of the capacity of the road network, to be sufficiently rebutted by the trade unions. The court rules that there is a real risk of serious disruptions to public order and safety if public transport is completely crippled, taking into account that Schiphol is located in the most densely populated part of one of the most densely populated countries in Europe, it being the second largest hub in the world. As practice has shown, the nature and complexity of its operation means that even a minor disruption to the infrastructural system within which it has to operate has significant consequences. The court considers it likely that the total absence of public transport in the Schiphol region on 28 May 2019 will have a significant impact on tens of thousands of passengers and will cause considerable material damage to Schiphol and the airlines operating there. This concerns third parties that are not involved in the conflict. The fact that Schiphol and KLM are major players in the Dutch economy, with considerable influence on political decision-making, does not alter this. However, the unions have noted that Schiphol has not put forward any arguments to suggest that the risks it has identified require action to be taken outside the Schiphol region. The court rules that a total ban is not necessary to prevent the dreaded disruptive consequences.

Actions in Netherlands Railways (NS) (Breda District Court, 22 December 2016, ECLI:NL:RBZWB:2016:8222)

Facts

Trade union VVMC seeks a bargaining result consisting of a modified work package. A new timetable entered into force as of 11 December 2016, following which the duty rosters for train drivers and chief conductors were determined in the form of "work packages", linking staff and equipment to the timetable. After the discussions on the work packages, Netherlands Railways decided to deliver new adjusted work packages for train drivers and chief conductors in April 2017. By letter dated 8 December 2016, VVMC expressed its dissatisfaction with these packages and called on its members to proceed to action on Friday 23 December 2016 and suspend work from the start of the timetable until 11:00 h at the Amsterdam, Rotterdam and Hoofddorp stations.

Relevant court considerations

VVMC made it plausible that the action could reasonably contribute to the effective exercise of the right to collective bargaining, that is an amended work package, resulting in the strike action being, in principle, lawful. It is inherent in a strike that it has adverse personal and financial consequences for citizens and/or companies such as Netherlands Railways but also others. The consequences cited by Netherlands Railways were significant as the strike would affect a large number of travellers, had major financial consequences and would also have a significant social impact because of the run-up to Christmas. However, these consequences were not in themselves decisive to limit the right to strike on 23 December 2016. Of significant and heavy weight were the safety risks associated with a strike on that date. Netherlands Railways argued that there were insufficient order and security officers available to ensure safety for large crowds at the major train stations to be affected by the strike, e.g. Amsterdam, Rotterdam, and Schiphol. At the hearing, Netherlands Railways stated that he was in contact with the national police informing that the many Christmas markets and other events in this period, partly due to the threat of terrorism, already required an extra effort from order and security officers needed for safety at the aforementioned train stations and Schiphol. The court further noted that the parties were still negotiating and that it could not be said that a negotiation would not lead to a

satisfactory result. Based on the foregoing, the interim relief judge considered that it was necessary to limit VVMC's right to strike, suspending the collective action announced for 23 December 2016 until 6 January 2017.

(ii) Interests of third parties

Actions at airline Easyjet (summary proceeding, North Holland Court, 8 July 2016, ECLI:NL:RBNHO:2016:5638 as well as North Holland Court, 12 August 2016, ECLI:NL:RBNHO:2016:6755, Court of Appeal Amsterdam, 6 February 2018, ECLI:NL:GHAMS:2018:398)

Facts

On 14 June 2016, 15 pilots from EasyJet had gone on strike to exert pressure on the negotiations for a collective agreement. EasyJet applied to the district court asking for a general strike ban or, alternatively, a ban on strikes on all weekends in the following 12 weeks as well as an order that strikes be notified at least 48 hours in advance. EasyJet deployed 14 pilots from bases other than Amsterdam to carry out the flights of the striking pilots of EasyJet.

Relevant considerations of the North Holland Court of 8 July 2016

The possible public discussion resulting in a social dynamic can stimulate conflict resolution. Therefore, the circumstance that the public is inconvenienced by the action should not be judged negatively. Having said this, it is undisputed that VNV met the requirement for notice of a strike at least 48 hours in advance in the case of the 14 June 2016 strike. All flights scheduled on that date could be operated, as EasyJet had sufficient time to recruit pilots from other branches. There is no doubt that the imposition of a duty of prior notice significantly impairs the effectiveness of the strike remedy. Given that the notice period requested by EasyJet is a considerable restriction of the right to strike, yet the court in interim relief proceedings will prescribe that VNV must announce its actions at least six hours prior to the action. To limit the potential harmful effects of the strikes on passengers in terms of the time periods during which strikes may take place, the interim relief judge will prescribe that in the weekend, no strike action may take place and that during three weekends it is not allowed between Friday 6:00 am and Sunday 6:00 am Dutch time. The reason for this restriction is that the weekends are the peaks of the upcoming summer holidays. The parties are advised to collectively ensure that deployment of the strike is minimised in a way that effectively prevents travellers from getting to their holiday destinations.

Relevant considerations of the North Holland Court of 12 August 2016

Given the terrorist threat at and around Schiphol, which is of general knowledge and the compelling fact that the holiday rush, on which the provisions already made in the judgment of 8 July 2016 are based, will continue until 5 September 2016, mean that a decision should be rendered in favour of the claim made by EasyJet. As a result, strike action is also prohibited on Sundays, as it has been made sufficiently plausible that peak traffic can also be expected on those days due to travellers returning from holidays, who should be protected from expected transport problems with often lengthy delays. EasyJet indicated that, especially in the coming weekends, it will not be able to cope with flight cancellations or postponements in such a way as to prevent large numbers of passengers from being seriously inconvenienced. While VNV is in principle free to use the right to strike, it emerged during the hearing that a strike on weekdays - most recently on 1 and 11 August 2016 - equally causes significant damage to EasyJet and can therefore hardly be considered less effective than on weekends.

Relevant considerations of the Court of Appeal Amsterdam 6 February 2018

By writ of summons dated 5 September 2016, VNV appealed against the judgment of the judge in interim relief proceedings of 12 August 2016. EasyJet has established and demonstrated facts and circumstances that entail that restriction of VNV's right to strike was socially urgent, putting forward that the announcement by VNV of unpredictable actions caused much uncertainty for passengers, that due to the strikes on 1 and 11 August 2016, 16 and 14 flights

were cancelled respectively, causing other flights to be cancelled, and that unpredictable strikes would disproportionately harm passengers by causing them to arrive late at their holiday destinations or return home late, especially in the case of flights that only operate twice a week. VNV believes that these facts and circumstances do not outweigh the fundamental right of VNV and its members to take actions acknowledging that the intended being inherent to the means of strike action. In the Court's interim opinion, EasyJet has made it sufficiently plausible that strikes during the weekends in August and the first weekend of September 2016 would have had a major impact on passengers, as these were the weekends of the summer holidays with sustained holiday crowds. EasyJet explained that not only holiday travellers to and from Schiphol but also to and from other foreign airports would be affected by the intended strikes, because EasyJet does not operate one-way return flights, so the cancellation of a flight from Amsterdam would lead to a multitude of cancelled flights of holidaymakers from the other destinations of the flight. These adverse effects on many passengers, evidenced in the strikes on 1 and 11 August 2016, and their interest in carrying out their holiday plans, entail that it was socially urgent to prohibit VNV from striking and/or interrupting work during four busy holiday weekends in the months of August and September 2016 from Friday 06:00 to Sunday 23:59 h.

Actions at airline Ryanair (North Holland Court, 9 August 2018: ECLI:NL:RBNHO:2018:7026)

Facts

VNV announced to take strike action on 10 August 2018. During the hearing on 9 August 2018, Ryanair claims to prohibit VNV from organising or participating in work stoppages and/or strike action on the weekends, including the Friday on 10, 11, 12, 17, 18, 19, 24, 25 and 26 August and the weekend of 31 August and 1 and 2 September between 6:00 am on Friday and 11:59 pm on Sunday and to order VNV, in the event that it organises work stoppages and/or strike action, to give Ryanair notice thereof, specifying the nature and duration of the strike action or work stoppage as well as the exact time at which it will take place, no later than four days prior to the commencement of the strike action or work stoppage.

Relevant court considerations

The court in interim relief proceedings is of the opinion that Ryanair had not made it plausible that the announced 24-hour strike that coincides with strikes elsewhere in Europe would have such socially disruptive consequences that there is reason to limit it. In addition, Ryanair failed to explain why a weekend strike would result in greater harm than a strike action on weekdays and therefore why it should be prohibited and thus the claimed strike ban for next weekend and the coming weekends in August will be rejected. As to the claim for timely notice of strike action, VNV's objections to such announcements are based on the fear that Ryanair may take strike-breaking actions. The court in interim relief proceedings does not consider this fear to be entirely unfounded, however, this risk can be overcome by ordering Ryanair to refrain from strikebreaking actions; more specifically, that Ryanair, as it has already offered, will cancel flights in case of strikes announced in time and will therefore not deploy pilots from elsewhere. The court in interim relief proceedings rules that VNV has to announce strikes 72-hour before, so that Ryanair can warn its passengers in time.

Actions in school transport (Amsterdam Court, 22 June 2016, ECLI:NL:RBAMS:2016:3995, Court of Appeal Amsterdam, 24 April 2017, ECLI:NL:GHAMS:2017:1644)

Facts

FNV called a strike by bus drivers who took pupils with disabilities to and from school. The company by which the drivers were initially employed went bankrupt and they had been taken on by another firm, albeit on worse employment conditions, which the drivers had not signed on the advice of the trade union. Three Dutch municipalities, together with the two carriers that provided the school transport for them, applied to the district court for a ruling ordering FNV to end the strike and refrain from taking further action, including work stoppages and strikes of any

duration, in so far as these might in any way hinder the school transport provided by the company concerned.

Relevant court considerations

In the opinion of the interim relief judge, FNV has made it sufficiently plausible that the announced action can reasonably contribute to the effective exercise of the right to collective bargaining. The aim of the actions is primarily to obtain a better employment position compared to the successor carrier, which emerges as the winner of the current tender procedure. Whether limiting the exercise of the right to take collective action was urgently needed to protect the interests of society was assessed by the judge based on all the circumstances of the case. Factors that may be important include the nature and duration of the action, the relationship between the action and its aim, the damage caused by the action to the interests of the employer or third parties, and the nature of such interests and damage. The strike that was the subject of the proceedings had already started on the morning of the day on which the application for interim relief was heard. That morning the children had not been taken to their schools. After weighing the interests of each party, the judge ruled that the public interest, namely that pupils who are reliant on school transport for accessing education can go to school, outweighed FNV's interests in taking strike action. The fact that FNV announced further actions at the hearing, without specifying what form they would take, may have played a role in this decision. These actions would also affect school transport right up to the summer holidays, which would start on 16 July 2016. The actions affected a target group of vulnerable pupils, although, according to FNV, some parents and pupils agreed with the actions.

Court of Appeal

The actions that took place on 22 June 2016 had been announced in advance by FNV to the parents concerned. Although on 22 June 2016 FNV had not yet provided any further information about the content, including dates, of any follow-up actions, the Court of Appeal considers that, in view of the way in which the actions took place on 22 June 2016, there is no reason to assume that any follow-up actions would not also be announced in advance so that parents could take this into account. Apart from the fact that it has not been established that the children and parents concerned had or would have had no alternatives for transportation, the Court of Appeal is of the opinion that the mere circumstance of not being able to attend school for a single day does not make the restriction of the right to strike socially urgent. FNV had a real interest in the terms and conditions of employment. The Court of Appeal is of the opinion that the situation did not arise that case a restriction of the right to take collective action was justified on the basis of Article G of the European Social Charter in the sense that a general prohibition to take further action was justified.

Actions in mail delivery in Christmas Period (summary proceeding the Hague Court, 13 December 2018, ECLI:NL:RBDHA:2018:15444)

Facts

Actions (interruption of work for 15 minutes) were taken within the framework of collective bargaining in postal services, in the end of December 2018, the Christmas and New Year period. PostNL turned to the courts and requested to prohibit the strike.

Relevant court considerations

As to the request prohibition, PostNL has based its argument that a restriction is justified mainly on the statement that the collective actions will lead to disproportionate damage/social disruption and the statement that the parties at the collective agreement negotiating table had not yet (by a long) concluded negotiations and the conduct of action at this time cannot therefore be regarded as an ultimate remedy. The interim relief judge follows PostNL in this argument. It is not disputed that the planned collective actions take place in a period of exceptional busyness for PostNL, with PostNL processing 50% more parcels and letter mail during that period. PostNL has made it sufficiently plausible that the capacity of its transport, distribution and delivery process will be used to maximum effect during that period and that delays of more than 15

minutes per day in these processes will lead to significant backlogs, which will arise during the Christmas and New Year period cannot be eliminated. Collective actions during the Christmas and New Year period will therefore lead to a not insignificant portion of the postal packages and letter mail offered during that period not being delivered on time, not only concerning parcels and letter post that are offered for order directly by consumers, but also parcels and letter post that are sent by business customers. Gifts and cards purchased with a view to the holidays must of course be delivered on time and that delivery is jeopardised by FNV's actions. In addition, some of the parcels and letter mail to be delivered by PostNL include medical devices and medical correspondence and that delivery cannot be delayed. FNV has stated that provisions can be made for the timely delivery of such packages and letter mail. However, in light of PostNL's substantiated challenge to that statement, it is currently insufficiently plausible that these facilities can guarantee timely delivery of those parcels and letter mail. To this extent, it must therefore be assumed that the announced collective actions will affect a very vulnerable group of people. PostNL has also made it sufficiently plausible that it itself also suffers significant damage as a result of the announced actions, which extends beyond the period of Christmas and New Year period alone. After all, it is conceivable that the late delivery of some parcels and letter mail during the Christmas and New Year period will lead to less use of PostNL's services by consumers and business customers in subsequent years, which will result in disproportionate business damage. A restriction is even more appropriate now that PostNL has rightly pointed out that the collective agreement negotiations between it and the trade unions only started in mid-November 2018 and that the mutual collective agreement proposals on non-subordinate points have not yet been sufficiently developed and explained. It cannot currently be said that a continuation of the collective agreement negotiations could not lead to a negotiation result favourable to FNV. To this extent, taking collective action does not serve as an ultimate remedy. The right to collective action will be suspended until 6 January 2019. After 6 January 2019, PostNL will have more options available to absorb the consequences of collective actions, resulting in less extreme consequences/damage. For the sake of completeness, the interim relief judge notes that FNV is not obliged to formally (re)announce every collective action, except for a notification of collective actions in an ultimatum letter.

Actions Catering Schiphol (North Holland Court, 16 October 2019, ECLI:NL:RBNHO:2019:8589)

Facts

In the context of negotiations for a collective agreement in the catering sector, the trade union decided to announce a strike action at a catering company, preparing meals for passenger aircraft. During the first strike that lasted one day, arrangements had been made to keep sufficient capacity available to be able to supply intercontinental flights. As the action hardly had had any effect, the trade union decided to scale up the actions to a general strike for one day. In order to give the employer and third parties the opportunity to prepare for this, these actions were announced well in advance.

Relevant court considerations

The fact that the data provided by KLM concerning the possible impact of the actions and on which the arguments of KLM are largely based, were not brought to the attention of the FNV much earlier is no reason for the judge in interim relief proceedings not to give that documentation the weight it should have at face value. Based on the data and the arguments they support, it must be noted that FNV speaks rather laconically of the causal chain on which the reliance on disproportionality between KCS and KLM is based. The catering operation has been set up in such a way that the lack of a relatively small percentage of the minimum necessary deployment on a number of key functions can already lead to major disruption of her entire operation. FNV's approach to the alleged risks of disproportionate damage and inconvenience is to some extent inconsistent. On the one hand, it rejects a repetition of the restrictions agreed for 10 October, because they led to too great a limitation of the impact of the action taken at that time, but on the other hand, it draws attention to the experience with the course of that action to support its argument that it will not be all that bad. In doing so, however, FNV ignores the fact that it is precisely the uncertainty regarding the impact of the actions that causes major problems. The Court in interim relief proceedings deems it plausible on the basis

of the information available, as explained at the hearing, that a strike of a limited number of hours by a relatively limited number of crucial employees already has a considerable impact on the operation. As there is a chance that several tens of thousands of passengers will be hit, the strike action must be limited. The restriction will not be imposed until the end of 2019 as after a more thorough investigation of the data provided this could lead to a different assessment of the risks discussed. In the collective actions announced for 17 and 24 October 2019, FNV undertakes to comply fully and in a timely manner with the minimum occupancy levels, so that the supply of catering and other customary products to its customers' intercontinental flights remains possible.

(iii) Interests of the employer

Actions at Jumbo butchery (Amsterdam Court, 25 February 2016, C13/603149/KG ZA 16-202)

Facts

Employees working in the group's butchery business wanted to carry out a one-day action in connection with a planned divestiture of the butchery business, without there being any willingness to guarantee the employment of employees for a longer period. Employees therefore wanted to submit a petition to the Executive Board of the supermarket group and hold a general strike for one day.

Relevant court considerations

The expressed intention to sell the Central Butchery has led to unrest among the employees and to the preservation of their jobs. However, there is no concrete threat for the preservation of employment at the location of the Central Butchery, Jumbo explained at the hearing that it is currently focusing on the possibilities of sale and that there is even talk of the fact that an information memorandum is already being drawn up for prospective buyers. Jumbo’s internal memo of 29 December 2015 shows that the process for outsourcing/sales consists of research and analysis of the proposition, after which information memos will be drawn up. It therefore seems as if the process is still in the face of research and analysis of the proposition. The Court in interim relief proceedings deems it sufficiently plausible that the announced strike will (almost) completely shut down the business of the Central Butchery. According to FNV, approximately half of the permanent staff applied for the action, while it remained undisputed that another part of the permanent staff will take a day off out of solidarity. It has become sufficiently plausible that Jumbo’s franchisees, as third parties, will also suffer considerable loss of turnover on Saturdays, Sundays, and Mondays after the announced strike because they will be supplied with considerably less meat. Under these circumstances, any other collective action that would (almost) bring the company to a complete standstill for at least an entire day must also be deemed unlawful. If and as soon as FNV accepts Jumbo's offer to enter into consultation on the further course of business in the (intended) sales process, a new situation will arise in which the prohibition no longer applies and in which it will depend on the circumstances of the case whether and to what extent collective action is permissible. If FNV does not accept the offer to enter into consultation, a new situation will arise in which the prohibition no longer applies, at the time that Jumbo is obliged under the Merger SER Merger Behaviour Rules 2015 to put the FNV in the position of preparing a takeover.

Actions at VDL/Nedcar (summary proceeding, Limburg Court, 9 January 2019, ECLI:NL:RBLIM:2019:382)

Facts

During negotiations on the collective agreement in the Metal electro sector, FNV announced a strike at VDL Nedcar for two days. VDL Nedcar requests an injunction at the court of interim relief.

Relevant court considerations

At the time of the oral hearing of these interlocutory proceedings, there is a substantial chance that the employment at VDL Nedcar will be seriously affected by the withdrawal of BMW as a customer. The consequences of such a decision by BMW do affect the interests of society to a considerable extent. The concrete danger that employment in Limburg will be severely affected is also a circumstance to which the court in interim relief proceedings attach great importance in its decision. The parties disagree on the question whether VDL Nedcar can force a breakthrough in the collective agreement conflict between the association of enterprises in the industrial sector (FME) and the trade unions. The question of the exact extent of VDL Nedcar's influence within FME and its influence at the negotiating table, compared to the influence of other large employers affiliated with FME, cannot be overlooked. The same applies to the further undisputed assertion that a member of the board of directors of the VDL group is a member of the board of FME. A circumstance to which the court attaches some weight, is the reason why VDL Nedcar is being sued. With their collective actions, including at VDL Nedcar, the trade unions aim to force a breakthrough at the negotiating table on a new Metal electro collective agreement. This is a fundamentally different situation than if VDL Nedcar were to be monitored to persuade VDL Nedcar to conclude its own corporate collective agreement with the trade unions. VDL Nedcar argued that the strikes had already cost it €9.3 million up to the time of the oral hearing of these interim proceedings. Apart from the fact that there is no substantiation of this amount, and that the damage to the extent as claimed by VDL Nedcar has not become plausible, the court considers that economic damage to be inherent to the fact that there is a strike. Therefore, he considered this circumstance to be of no importance, let alone of decisive importance in making his decision. It is not disputed that until the oral hearing nine full working days at VDL Nedcar have been suspended. Other circumstances put forward by VDL Nedcar (that the overtime strikes hit VDL Nedcar twice and that a relatively small group of strikers can halt production within VDL Nedcar) are not given any weight by the court in answering the question whether the limitations of the right to take collective action are socially urgent. Based on the documents and the proceedings at the meeting, it is sufficiently plausible that if VDL Nedcar ceases production (again) on 10 and 11 January 2019, there is a concrete and real risk that BMW will decide for that reason not to continue its production at VDL Nedcar after 2022 and 2023. The court is of the opinion that it is socially urgent to limit the right to go on strike on 10 and 11 January 2019.

RELEVANT INTERNATIONAL MATERIAL

A – Council of Europe

1. European Court of Human Rights

37. The European Convention of Human Rights does also not explicitly refer to the right to strike, however the European Court of Human Rights (ECtHR) has recognized that Article 11 ECHR on ‘Freedom of assembly and association’ covers the right to strike.

Article 11 ‘Freedom of assembly and association’

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

38. In its Grand Chamber judgment in *Demir and Baykara v. Türkiye* (App. No. 4503/97), the ECtHR for the first time recognised explicitly the right to collective bargaining. In *Enerji Yapi-Yol Sen v. Türkiye* (App. No 68959/01) the ECtHR recognised the right to strike as an aspect of the same right.

39. In this ruling, the Court acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions. However, while certain categories of civil servants could be prohibited from taking strike action, the ban did not extend to all public servants or to employees of State-run commercial or industrial concerns. Furthermore, the legal restrictions on the right to strike should define as clearly and narrowly as possible the categories of civil servants concerned and general terms which absolutely prohibit all civil servants from the right to strike, without balancing the imperatives of the purposes listed in paragraph 2 of Article 11 of the Convention, is not permitted.

2. Parliamentary Assembly

40. In its Resolution 2033 (2015) of 28 January 2015 on the "Protection of the right to bargain collectively, including the right to strike", the Parliamentary Assembly of the Council of Europe (PACE) highlights the following:

> "5. In particular, the rights to bargain collectively and to strike are crucial to ensure that workers and their organisations can effectively take part in the socio-economic process to promote their interests when it comes to wages, working conditions and social rights. "Social partners" should be taken to mean just that: "partners" in achieving economic performance, but sometimes opponents striving to find a settlement concerning the distribution of power and scarce resources."

41. In this Resolution, PACE calls inter alia on the member states to take measures to uphold the highest standard of democracy and good governance in the socio-economic sphere including:

> "7.1. protect and strengthen the rights to organise, to bargain collectively and to strike by:
>
> (…) 7.1.2. developing or revising their labour legislation to make it comprehensive and solid with regard to these specific rights; (…)"

B – United Nations

42. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

> **Article 8**
>
> "1. The States Parties to the present Covenant undertake to ensure:
>
> (…) (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
>
> 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

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

C – International Labour Organisation (ILO)

43. Convention No. 87 on freedom of association and protection of the right to organise, 1948

Article 3

"1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."

44. Convention No. 98 on the right to organise and collective bargaining, 1949

Article 4

"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation 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."

45. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008

(i) the right to strike is a right which must be enjoyed by workers" organizations (trade unions, federations and confederations); (ii) as an essential means of defending the interests of workers through their organizations, only limited categories of workers may be denied this right and only limited restrictions may be imposed by law on its exercise; (iii) the objectives of strikes must be to further and defend the economic and social interests of workers and; (iv) the legitimate exercise of the right to strike may not result in sanctions of any sort, which would be tantamount to acts of anti-union discrimination. Accordingly, subject to the restrictions authorized, a general prohibition of strikes is incompatible with the Convention, although the supervisory bodies accept the prohibition of wildcat strikes. Furthermore, strikes are often called by federations and confederations which, in the view of the Committee, should be recognized as having the right to strike. Consequently, legislation which denies them this right is incompatible with the Convention.

D – European Union

1. Treaty on the functioning of the European Union

Article 152

"The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy."

2. Charter of fundamental rights of the European Union

Article 28 – Right of collective bargaining and action

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

THE LAW

ALLEGED VIOLATION OF ARTICLE 6§4 OF THE CHARTER

46. Article 6§4 of the Charter reads as follows:

Article 6 – The right to bargain collectively

Part I: "All workers and employers have the right to bargain collectively."

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

[…]

and recognise:

4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

Appendix Article 6§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."

47. Article G of the Charter reads as follows:

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."

AS REGARDS THE 2014-2015 SUPREME COURT JUDGMENTS AND THE RESULTING ASSESSMENT FRAMEWORK

A – Arguments of the parties

1. The complainant organisations

48. The complainant organisations maintain that with the *Enerco* and *Amsta* judgments the Supreme Court modified its assessment of the right to collective action, changed its interpretation and application of Article 6§4 and ruled that the assessment of whether collective action is lawful should be made with reference to Article G of the Charter. This modified approach of the Supreme Court is, in the opinion of the complainant organisations, not in conformity with Article 6§4 and Article G of the Charter as interpreted by the Committee in its conclusions and decisions in this field.

49. The complainant organisations state that in the *Enerco* judgment, the Supreme Court confirmed the direct effect of Article 6§4 in the Netherlands and held that concept of collective action should not be interpreted too narrowly. Thus, a trade union is, in principle, free to choose the means for achieving its objective. Whether collective action is protected by Article 6§4 is thus mainly determined by the answer given to the question of whether the action can reasonably contribute to the effective exercise of the right to collective bargaining. If this question is answered in the affirmative, the collective action will fall within the scope of Article 6§4. The exercise of the right to collective action can then only be restricted by way of Article G of the Charter.

50. More particularly, the complainants organisations allege that the case law of the Supreme Court violates the right to strike as laid down in Article 6§4 and Article G of the Charter on the following grounds:

- the so-called ‘rules of the game’ (*spelregels),* which include the establishment of whether a strike is premature, whether the parties have exhausted all the negotiation possibilities, whether the action really is a last resort (*ultimum remedium*), whether it is necessary in view of the trade unions’ objectives and whether it has been properly announced, continue to be relevant as one of the elements for answering the question of whether the action should be restricted or prohibited on the basis of Article G of the Charter, and they may even be decisive in this respect;
- as a general criterion for assessing conformity with Article G of the Charter, the Supreme Court maintained the standard of social urgency for restricting or prohibiting the exercise of the right to collective action as laid down in Article 6:162 of the Dutch Civil Code, which goes beyond the standard that is laid down in Article G of the Charter.

51. As regards the rules of the game, the complainant organisations state that whereas these “rules” were previously tested against the direct effect of Article 6§4 in the Dutch legal order, they are now tested against Article G of the Charter within the context of the unlawful act. This means that the rules of the game have been transposed to the assessment under Article G of the Charter and can therefore still lead to justifying a prohibition or restriction of collective action, as was previously the case but with reference to Article 6§4 itself.

52. According to the complainant organisations, the Supreme Court accepts the rules of the game as criteria on which a restriction can be based. The complainant organisations consider that the concept of the rules of the game has not been clearly defined. It therefore is an open-ended standard to which judges may give the meaning and impact as they see fit. Statutory rules of the game have not been laid down in any legislation which trade unions must observe before they can resort to collective action.

It is therefore unclear for trade unions, before and even afterwards, whether a strike action is permissible. In its judgments (*Enerco* and *Amsta*) the Supreme Court, emphasising the importance of the rules of the game as part of the assessment of conformity to Article G of the Charter, leaves open the scope of the rules of the game. In the *Amsta* judgment it is explicitly pointed out, with reference to the importance of the rules of the game, that there are even more rules of the game than those explicitly mentioned by the court of appeal in that matter.

53. The complainant organisations provide examples in support of their argument, notably the case of strike actions in mail delivery in the Christmas period, in which the Court found that since the collective bargaining between the parties had only started and proposals that had been tabled had not yet been sufficiently discussed, it was premature to conclude that the collective bargaining could not lead to a favourable result for the trade union. Collective action at this point could not be therefore regarded as an *ultimum remedium*. In the *Jumbo* case, the court found that given the fact that the trade union concerned had declined the offer to discuss the modalities of the sale or merger before the agreement would be concluded with a prospective buyer, the announced action was premature and disproportionate to the objective pursued.

54. As regards the standard of social urgency, the Supreme Court applied the criterion of whether a (possible) restriction on the exercise of the right of collective action in a specific case could be deemed to be *socially urgent.* In making this assessment all circumstances must be taken into account. Such circumstances may include 1) the nature and duration of the action, 2) the relationship between the action and its intended purpose, 3) the damage thereby caused to the interests of the employer or third parties, and 4) the nature of such interests and such damage.

55. The assessment of possible restrictions of actions against the conditions of Article G of the Charter is not called into question by the complainants. The complainants however refer to the criteria which, in their opinion, are more far-reaching than those referred to in Article G of the Charter, and that may be used to prohibit or limit the possibilities to strike. The complainants find that the possibility for the courts to limit collective action after a judgment based on the balancing of interests - in which all the circumstances of the case must be weighed up, as well as the possibly even decisive rules of the game - as summed up by the Supreme Court, violates the very substance of the right to collective action as regulated in Article 6§4 of the Charter. The application of this approach of the Supreme Court in the case law of the lower courts shows what consequences this can have in relation to concrete collective actions. The complainants believe that the criteria used by the Supreme Court in the assessment under Article G of the Charter find no or insufficient justification in the text of Article G of the Charter. The Supreme Court has introduced a rule containing standards that are not included as such in Article G of the Charter or cannot be inferred from it. In doing so the Supreme Court has created a legal framework for prohibiting or restricting actions on the basis of numerous circumstances that (may) go far beyond the standards laid down in Article G of the Charter.

56. The complainant organisations are of the opinion that the assessment framework developed by the Supreme Court mandates lower courts to include all the circumstances of the case, as embedded in, and shaped by the unlawful act test (restrictions are possible when socially urgent), within the framework of the assessment in terms of Article G of the Charter. This leaves considerable room for the lower courts to test Article G of the Charter in very divergent ways.

57. Finally, the complainant organisations assert that in the *Amsta* judgment the Supreme Court ruled that the assessment of whether or not to prohibit a strike should be based on the criteria of the unlawful act (according to Article 6:162 Dutch Civil Code), which means that all the circumstances of the case can and should be taken into consideration when imposing restrictions on the basis of social urgency. This framework of the unlawful act is in itself, so broad that it gives no possibilities to limit its scope by means of an interim question.

58. The complainant organisations maintain that the assessment framework applied by the Supreme Court, i.e. taking account of all the circumstances of the case, is so broad so that courts can apply it differently, even in ways that are not in conformity with Article G of the Charter.

59. The complainant organisations further contend that restrictions can be imposed in interim relief proceedings on the effective exercise of the right to strike which often mean that trade unions are prohibited from taking action for an extended period. This severely curtails the effectiveness of the right to collective action. Because of the immediate preventive prohibition, the momentum is lost and so, too, is the possibility of deploying the means of action in the collective dispute. This conflicts with the standard that national regulations may not impede the effectiveness of the right to take action by prohibiting collective action, even in sectors where essential services are provided.

60. In this way the interim relief judge thus plays a crucial role in determining the scope of the right to strike. Given the speed in which these rulings are given as well as the way in which the facts and grounds are assessed and the actual decisiveness of the decisions of the court, the complainant organisations find that the possibility for trade unions to organise strikes is seriously impeded by these relief proceedings. Furthermore, given the intrusion of the rulings on the right to collective action, making it possible to impose a lengthy ban on strikes, the complainants find the fundamental right to strike to be prejudiced.

61. The complainant organisations contend that as a result the case law of the courts in interim relief proceedings is of essential importance to the right of collective action in the Netherlands. Due to the absence of a legal framework of standards and the assessment of the lawfulness of actions against a general civil law standard such as the unlawful act, outcomes in the lower courts are virtually unpredictable. Consequently, there is no stable and foreseeable framework of standards, in that trade unions operating with due care are repeatedly confronted with a prohibition or restrictions on actions that were completely unforeseeable. This situation seriously affects the (effectivity of the) right to collective action by workers, as well as the strength of the trade unions.

62. While the Netherlands has a system in which the assessment of the right to collective action as laid down in the Charter is entrusted to the Supreme Court as the highest court, it thus appears that judgments are given by the lower courts which the Supreme Court does not (or cannot) test against the Charter, because of the factual nature of those judgments. The complainant organisations also find that this feature is partly responsible for the fact that the right to strike is not well protected, since the possibility to test the judgments of the lower courts against the Charter is limited.

2. The respondent Government

63. The Government states that in 2014 and 2015 the Supreme Court produced two judgments that changed the framework for assessing the lawfulness of a strike. In its judgment in the *Enerco* case, the Supreme Court ruled that the term 'collective action' should be interpreted broadly. This means that, in principle, it is up to the trade unions to decide what form of action they wish to take to achieve their goal. The test for determining whether the collective action falls within the scope of Article 6§4 of the Charter is whether it can reasonably contribute to the effective exercise of the right to collective bargaining.

64. Subsequently, in its judgment in the *Amsta* case, the Supreme Court abolished the rules of the game test as an independent condition. This means that the courts cannot hold that collective action is unlawful solely on the basis that it does not comply with the rules of the game. The courts can still treat the last resort principle and the requirement of timely notice as relevant factors when assessing whether the action is unlawful but only under Article G of the Charter. Other factors that may be considered are the nature and duration of the collective action, the relationship between the action and its aim, the damage caused by the action to the interests of the employer or third parties and the nature of those interests and damage, and the interests of the particularly vulnerable, such as young people, the disabled and the elderly.

65. According to the Government, it is apparent that the right to collective action as interpreted by the courts has been broadened by the two Supreme Court judgments of 2014 and 2015. Not only are the trade unions free, in principle, to choose whatever form of strike or other collective action they consider effective in exercising their right to collective bargaining, but their failure to comply with the rules of the game no longer automatically means that the action is unlawful. The decisions of the Supreme Court in the *Enerco* and *Amsta* judgments have thus created more scope for the unions to take collective action when disputes occur. Nonetheless, the courts can still test whether the collective action would lead to disproportionately large (or permanent) damage and in such cases can limit the right to collective action if it is urgently necessary to do so to protect the rights and freedoms of others.

66. The Government states that the new assessment framework refines various aspects of the old system for assessing whether a strike should be restricted or prohibited. The previous procedural rules – the requirement of timely notice of collective action and the need to have first exhausted all other possibilities (the last-resort principle) – are no longer an independent assessment criterion to be applied

prior to the proportionality test, but they can be considered as relevant factors in determining whether a restriction is necessary. Moreover, damage is inherent in collective actions and an action can be prohibited only if the expected damage is disproportionate.

67. The Government further maintains that as unions no longer need to give notice of collective action, they can use the element of surprise. Besides taking surprise action, unions can also use collective action as a warning. Action of this kind enables the unions to exert pressure in the negotiations, even if talks have not yet reached a breaking point. This is because compliance with the last-resort principle is no longer a precondition for the legality of a strike.

68. In its further reply, the Government states that as regards the impact of relief proceedings and procedural law on the right to strike**,** the legal protection in the Netherlands regarding the right to strike meets the requirements of Article 6 European Convention on Human Rights ('ECHR') and that the legal remedies available to the trade unions are not purely theoretical in nature but are both practical and effective.

69. The legal basis which Article G of the Charter requires for restrictions is always derived from the general provision on torts – Article 6:162 of the Dutch Civil Code – as interpreted in Dutch case law. According to the Government, this provision constitutes a sufficient legal basis for the standard of social urgency for restricting or prohibiting the exercise of the right to collective action. According to the Government, the legal basis thus meets the requirements as set out in the Charter and the ECHR.

70. The Government also points out that there are several effective legal remedies available in the Netherlands regarding the protection of the right to strike. The effective legal remedies are the possibility of an interim injunction procedure at a court of first instance, and the appeal procedure at the court of appeal. Appeal in cassation against the judgment of a court of appeal can then be lodged with the Dutch Supreme Court. In addition, throughout the proceedings, the Supreme Court can be requested to give an interim ruling on an essential legal issue arising during proceedings on which the Supreme Court has not previously ruled and the answer to which has an important bearing on a number of similar cases.

71. The Government states that this set of options for conducting legal proceedings is sufficient to adequately guarantee the rights of the trade unions. These legal remedies are effective and not purely theoretical.

72. In its judgment in the *Amsta* case, the Supreme Court abolished the 'rules of the game test' as an independent condition when assessing the lawfulness of collective actions. This meant that courts cannot hold that collective action is unlawful solely on the basis that it does not comply with the rules of the game. As stated above, the exercise of the right to collective action can be limited only under Article G of the Charter. The courts can still assess the last resort principle (the need to first exhaust all other possibilities) and the requirement of timely notice of collective action as relevant factors when assessing whether the action is unlawful under Article G of the Charter.

73. When reviewing whether restrictions to the right to collective action are urgently necessary from a societal point of view, the domestic courts must take all circumstances into account. According to the *Amsta* judgment, the following may be important in this regard: the nature and duration of the action; the relationship between the action and the aim pursued; the damage caused thereby; and by the interests of the employer or third parties, and the nature of those interests and the damage.

74. Under certain circumstances, it can be of significance whether 'the rules of the game' have been observed. These rules – the requirement of timely notice of collective action and the need to have first exhausted all other possibilities (the last-resort principle) – are no longer assessed in isolation from the other aspects of the case. It can be deduced from the case law of the Supreme Court that when reviewing a collective action, the question of whether weighty procedural rules have been observed must also be considered. In its assessment, the court will have to consider all the circumstances of the case.

B – Assessment of the Committee

75. The Committee recalls that under Article 6§4 of the Charter, the States Parties recognise 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. Moreover, Article 6§4 of the Charter does not raise any obstacle to the existence of legislation regulating the exercise of the right to strike (Conclusions VIII (1984), Statement of Interpretation on Article 6§4).

76. The right to strike is intrinsically linked to the right to collective bargaining, as it represents the most effective means to achieve a favourable result from a bargaining process. The abolition of the right to strike affects one of the essential elements of the right to collective bargaining, as provided for in Article 6 of the Charter, and without which the content of this right becomes void of its very substance and is therefore deprived of its effectiveness.

77. The Committee recalls that the right to strike may be restricted provided that any restriction satisfies the conditions laid down in Article G of the Charter which provides that restrictions on the rights guaranteed by the Charter must be prescribed by law, serve a legitimate purpose and be 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 (Conclusions 2014, Norway; see also Conclusions X-1 (1987), Norway).

78. In providing that restrictions on the enjoyment of Charter rights must be "prescribed by law", Article G of the Charter does not require that such restrictions must necessarily be imposed solely through provisions of statutory law (see, inter alia, European Trade Union Confederation (ETUC), *Centrale Générale des Syndicats Libéraux de Belgique* (CGSLB), *Confédération des Syndicats Chrétiens de Belgique* (CSC) and *Fédération Générale du Travail de Belgique* (FGTB) v. Belgium, Complaint No. 59/2009, decision on the merits of 13 September 2011, §43). The case law of domestic courts may also comply with this requirement provided that it is sufficiently stable and foreseeable to provide sufficient legal certainty for the parties concerned.

79. The prohibition of certain types of collective action, or even the introduction of a general legislative limitation of the right to collective action in order to prevent initiatives aimed at achieving illegitimate or abusive goals (e.g. goals which do not relate to the enjoyment of labour rights, or relate to discriminatory objectives) is not necessarily contrary to Article 6§4 of the Charter (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on admissibility and the merits of 3 July 2013, §119). Excessive or abusive forms of collective action, such as extended blockades, which would put at risk the maintenance of public order or unduly limit the rights and freedoms of others (such as the right of other workers to work, or the right of employers to engage in a gainful occupation) may be limited or prohibited by law. However, national legislation which prevents *a priori* the exercise of the right to collective action, or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards are not in conformity with Article 6§4 of the Charter, as it infringes the fundamental right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers (LO and TCO v. Sweden, Complaint No. 85/2012, op. cit., §120).

80. As regards the instant case, the Committee considers that it is called upon to examine whether the assessment framework that the Supreme Court laid out in its *Enerco* and *Amsta* judgments, and hence forming part of domestic law, respects the right to collective action as a fundamental component of collective bargaining. To do so, the Committee considers it necessary to firstly refer to its assessments in the framework of the reporting procedure of the situation in the Netherlands.

81. In its Conclusions 2004 and 2006 (Conclusions 2004 and 2006, Article 6§4, the Netherlands), the Committee considered that the fact that a Dutch judge may determine whether recourse to strikes are “premature” impinges on the very substance of the right to strike as this allows the judge to exercise one of the trade unions’ key prerogatives, that of deciding whether and when a strike is necessary. The Committee concluded that the situation in the Netherlands is not in conformity with Article 6§4 of the Charter on the grounds that the fact that Dutch judges may determine whether recourse to a strike is premature constitutes an impingement on the very substance of the right to strike as this allows the judge to exercise the trade unions’ prerogative of deciding whether and when a strike is necessary.

82. In its Conclusions 2010, the Committee asked the Government provide examples of case law demonstrating that the requirements of Article G of the Charter are taken into account when the courts are considering whether a strike may be premature.

83. In its Conclusions 2014, the Committee found that in view of the examples provided, the Dutch courts do take into account the principles enshrined in Article G of the Charter in their decisions. The Committee therefore considered that the situation was in conformity with the Charter on this point but requested updated information on any new developments and case law of the courts with regard to this situation.

84. In its Conclusions 2018, the Committee took note of the *Enerco* judgment, where the Supreme Court interpreted the right to strike in broad terms and held that the trade unions are, in principle, free to decide on the nature of collective action, provided that the action they take can reasonably be assumed to be useful in furthering the exercise of their right to collective bargaining. The Committee also took note of the *Amsta* judgment where the Supreme Court ruled that although criteria such as 'timely notice' and 'first having exhausted all other possibilities' may still be applied, they are no longer sufficient in themselves to determine whether collective action is lawful. They may therefore be taken into account, but only in the context of a decision on whether or not Article G of the Charter is applicable. The Committee concluded in its Conclusions 2018 that the situation in the Netherlands following the Supreme Court's new case law (*Enerco* and *Amsta* judgments) was in conformity with Article 6§4 of the Charter.

85. In view of the detailed evidence made available to it by the parties to the present complaint, the Committee considers it necessary to re-examine its 2018 conclusion on the Supreme Court's assessment framework and assess the situation anew.

86. Firstly, the Committee recalls that it has always – based on the *travaux préparatoires* and the Appendix – made a distinction between, on the one hand, *regulation* of the right to strike, which may be permissible under Article 6§4 of the Charter per se, and, on the other hand, any further *restriction* which must meet the conditions set out in Article G of the Charter.

87. As far as "regulation" of the right to strike is concerned, the Committee has examined measures such as advance notice requirements, cooling-off periods and (secret) ballot requirements and has found them to be generally compatible with Article 6§4 subject to certain limitations (Conclusions XIV-1 (1998), Cyprus). Under "restriction", the Committee has examined a wide range of measures including intervention by the authorities to prohibit or circumscribe collective action (Conclusions 2004, Norway), limitation of strikes in essential services (Conclusions I (1969), Statement of Interpretation on Article 6§4), limitation of strikes in certain sectors, limitation of strikes in respect of certain categories of workers, etc. These measures or situations have been examined on a case-by-case basis. Generally, the Committee has allowed only a very narrow scope for restrictions, which must be considered exceptions applicable only under extreme circumstances and adopted only in response to a pressing social need. Restrictions have been found to satisfy the conditions of Article G of the Charter where national security was affected or where the life and health of persons were at stake whereas purely economic considerations or concerns of a practical or organisational nature have not been regarded as sufficient justification for restrictions on the right to strike.

88. Secondly, the Committee acknowledges that the *Enerco* and *Amsta* judgments have changed the situation which had prevailed since the 1986 *Netherlands Railways* judgment, by emphasising that the primary consideration in deciding whether strike

action is lawful is whether that action can be deemed to be useful in exercising the right to collective bargaining. The Committee understands this to reflect a recognition of the intrinsic link between collective bargaining and collective action meaning that strike action in conflicts of interest in the context of collective bargaining is, in principle, lawful under Dutch law as required by Article 6§4 of the Charter.

89. Thirdly, the Committee also acknowledges that the 'rules of the game' to which the Supreme Court has regard, have the nature of regulatory measures which may be regarded as compatible with Article 6§4 of the Charter without any need to justify such measures with reference to Article G of the Charter. However, such rules of the game, in addition to being clear, precise and foreseeable, must conform to the principles the Committee has laid down in this respect, referring to notice periods and cooling-off periods must not be excessively long, prior mediation and conciliation procedures must not be too onerous, etc. More particularly with regard to the rule or requirement that collective action by trade unions should be taken as a last resort (*ultimum remedium* or *ultima ratio*), the Committee points out that while in practice collective action is usually taken as a last resort by trade unions, in the Committee's view, to formally uphold a generalised and absolute last resort requirement could amount to an excessive interference with the freedom of trade unions to deploy the means of collective bargaining in the way they deem most suitable to furthering their legitimate objectives, notably the objective of obtaining a collective agreement providing for terms and conditions of work as favourable as possible.

90. The Committee notes that the Supreme Court's holding that the rules of the game, and, in particular, the rule that collective action should only be taken as a last resort, are no longer to be considered as independent criteria for assessing whether collective action is lawful. It also notes that the Supreme Court considers that these rules remain important factors in assessing whether collective action may be restricted with reference to Article G of the Charter (see §§29-35 above, *Amsta* judgment). The Committee considers that the fact that the Dutch courts have regard to a multitude of factors when undertaking an analysis of whether collective action may be restricted with reference to Article G of the Charter does not pose a problem from the point of view of the Charter. However, the Committee wishes to emphasise that the decisive consideration in such an assessment can, in line with Article G of the Charter, only be whether the restriction is 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.

91. The Committee considers that in the majority of the abovementioned cases, the lower courts of first instance ruled on a restriction or limitation on the announced strike. The Committee observes in this respect that the Supreme Court in the *Enerco* judgment made a reference to the unlawful act standard established by Article 6:162 of the Civil Code as regards the duty of care that must be observed in society in relation to a third party and held that collective action can be restricted on the basis of Article G of the Charter where such restriction is urgently necessary in relation to the duty of "proper social conduct toward the person and the goods of others". A priori, the Dutch notion of a "duty of care" in this sense may fall within the notion of protection of the rights and freedoms of others contained in Article G of the Charter and as such the Supreme Court's reasoning does not per se give rise to a problem of conformity with the Charter.

92. However, the Committee wishes to emphasise that the duty of care cannot go beyond the principles it has laid down with respect to the rights and freedoms of others, in particular, that restrictions or prohibitions can only be justified where the strike action entails a clear and present threat to life, health and/or liberties of persons.

93. Having considered all the arguments presented by the parties, the Committee maintains its assessment made in Conclusions 2018 (see above) and considers that the framework laid down by the Supreme Court through the *Enerco* and *Amsta* judgments recognises the intrinsic link between collective bargaining and collective action, it expressly provides that the scope for collective action should not be interpreted narrowly, and it moderates the role that the rules of the game used to play in court decisions concerning whether or not to permit collective action. Consequently, the Supreme Court's assessment framework does, as such, not infringe the right of workers' and employers' organisations to take collective action.

94. On this basis, the Committee holds that there is no violation of Article 6§4 in this respect.

AS REGARDS THE APPLICATION OF THE SUPREME COURT'S ASSESSMENT FRAMEWORK BY THE LOWER COURTS

A – Arguments of the parties

1. The complainant organisations

95. The complainant organisations' second allegation concerns the way in which the lower courts have applied the assessment framework set out by the Supreme Court in the *Enerco* and *Amsta* judgments since 2014-2015. The complainant organisations are of the opinion that the right to take collective action is excessively curtailed by the way in which judgments are arrived at in interim relief proceedings before the lower courts. The relevant practice of the lower courts in the Netherlands is therefore not compatible with the case law of the Committee.

96. According to the complainant organisations, the change of approach by the Supreme Court in the *Enerco* and *Amsta* judgments is twofold. Firstly, the Supreme Court assesses the legality of collective action with reference to Article 6§4 of the Charter as interpreted by the Committee. Secondly, whether a collective action, a strike, can be restricted or prohibited is assessed with reference to the conditions set out in Article G of the Charter. This change of approach was expected to lead to a change of the approach by the lower courts resulting in less restrictions and prohibitions being imposed. According to the complainant organisations, the practice shows the opposite result.

97. According to the complainant organisations, since the *Enerco* and *Amsta* judgments, courts of first instance and appeal, including interim judges, have adopted

the framework of the Supreme Court. Consequently, the standard of social urgency as well as observance of the rules of the game have been used as assessment criteria for restricting or prohibiting the exercise of the right to collective action as laid down in Article 6:162 of the Dutch Civil Code. Therefore, the complainant organisations assert that the judgments of the Supreme Court have had significant impact on the possibility of trade unions to make use of their right to collective action, including strikes. Moreover, this situation has led the trade unions to impose far-reaching self-restraint in exercising the right to strike because of the fear of being hit by a ban.

98. The complainant organisations present a quantitative and qualitative analysis of the development of the case law of the lower courts following the *Amsta* and *Enerco* judgments of the Supreme Court. The quantitative analysis contains a comparison of the judgments handed down over a five-year period (2015-2019) with the judgments that were handed down over the same five-year period prior to 2015.

99. The complainant organisations state that the number of legal proceedings in which actions have been prohibited or substantially restricted, increased both in absolute and relative terms. In the five years before the *Enerco* and *Amsta* judgments were ruled, prohibitions or restrictions were imposed by interim relief judges in 44% of cases, compared to 57% after the two judgments. The figures show that there was an increase in the number of judgments in which actions were entirely prohibited (39%) by the lower courts as well as in the number of judgments in which the court prohibited part of the action (18%), with the court expressing a substantive opinion on the duration and/or form of the action.

100. In 19 of the 33 judgments issued by the lower courts since the *Enerco* and *Amsta* judgments, strike action was prohibited, or major restrictions were imposed on the exercise of the right to collective action. The complainant organisations are of the opinion that in these court decisions the scope for collective action was restricted in an excessive manner, going beyond what is justified in light of the fundamental right of workers to collective action as guaranteed by Articles 6§4 and G of the Charter. Within the assessment framework set out by the Supreme Court, the courts rely on too many factors, including some that are not relevant or appropriate to Article G of the Charter. In other words, the balancing of interests is too broadly conceived.

101. The complainant organisations then provide qualitative analysis of cases from the lower courts, which have been classified as relating to: (i) restrictions based on public order and safety; (ii) restrictions based on interests of third parties; (iii) restrictions based on the interests of the employer.

(i) Restrictions based on public order and safety

102. According to the complainant organisations, the reliance on potential threats to safety or even public order is often combined with the interests of third parties, usually involving users of services such as travellers. In situations where concrete safety risks may be present, trade unions will try to reach agreements with employers about safety measures. This is usually done beforehand to observe the necessary care and thus prevent safety-related problems from arising. The complainant organisations observe

that in the majority of cases where safety is discussed, it does not concern ‘national security’ but the safety of customers. When testing against the standard of social urgency, the bar is not set high enough. Inconvenience and nuisance are often also treated as a (potential) safety problem and are therefore, entirely wrongly, considered to be matters of social urgency.

103. The complainant organisations refer in this regard to an action that was entirely prohibited was an announced action involving special enforcement officers (BOAs) employed by municipalities. The complainant organisations assert that this restriction goes much too far in light of the terms of Article G of the Charter restrictions, according to which restriction may only be imposed on workers employed in essential public services whose duties and positions, given their nature or level of responsibility, are directly related to national security and public interest in themselves. In addition, any restriction can be justified only if public life depends on such services and to the extent that work stoppages could be life-threatening for others as well as for national security and public health.

104. The complainant organisations also refer to a number of cases concerning announced strikes at the airports, such as the ground staff working at Schiphol announced during the summer holidays, such as the interim relief proceedings instituted by KLM. Although these were limited actions, the court ruled that due to the major holiday rush it had been sufficiently established that damage would occur because passengers and/or baggage could be left stranded at Schiphol.

105. The complainant organisations claim that this is characteristic of the practice in interim relief proceedings involving strikes, where arguments relating to security are advanced during the hearing from the side of the employer or third parties such as Schiphol Airport which the trade union cannot refute or cast doubt on other than by contradicting them. The court often accepts these arguments at face value though it may later appear that the merits of these arguments is lacking or cannot be substantiated.

106. The complainant organisations believe that these rulings make it clear that the lower courts impose restrictions which fall beyond the scope of Article G of the Charter. The courts apply the test whether the actions are ‘socially disruptive’ or whether restrictions occasioned by the interests of third parties are ‘socially urgent’, a test which is based on the ‘unlawful act’ formula based on Article 6:162 Dutch Civil Code. Interpretations are given of the terms ‘*public interest and national security*’ used in Article G of the Charter, without assessing these concepts as such and incorporating much more within them than is justified in view of the restrictive nature of Article G of the Charter. In so doing, a potential risk to security is sometimes considered sufficient in itself to prohibit or severely restrict collective action on the basis of generalities, without concrete justification. Reference is made not to the narrower concept of ‘national security’ in Article G of the Charter, but to a much broader one, namely security risks in general.

(ii) Restrictions based on the interests of third parties

107. The complainant organisations refer to judgments in connection with actions at the airline *Easyjet,* in which the court restricted the strikes in view of the damage that would be caused to the interests of the employer or third parties.

108. Furthermore, a strike by drivers was also prohibited by the court of first instance at a company engaged in school transport for children who went to school by bus because of physical or other disabilities (Actions in school transport). The court was of the opinion that it was of social importance that these pupils should actually be able to go to school every day. That interest outweighed the interest of the trade union in the actions. Restriction was therefore considered urgently needed. On appeal this decision was set aside because it was clear that there were alternative means of transport.

109. According to the complainant organisations, in the case law of the lower courts the incidence of loss or (the possibility of) damage to consumers is regarded as a legitimate ground for prohibiting or restricting an action in the balancing of interests. For example, this was the case at a postal company in the Netherlands responsible for sending letters and parcels, including for online stores (actions in mail delivery during the Christmas period). The court found that the interests of consumers and online stores would be disproportionately affected if greeting cards and gifts were not delivered on time during the Christmas period and would therefore not be received on time by the consumers.

110. The complainant organisations contend that these examples show that the interests of third parties play an excessive role in court decisions imposing prohibitions or restrictions on collective action.

(iii) Restrictions based on the interests of the employer

111. The complainant organisations also refer to the case law in which, in their opinion, the employer's own interest, consisting of the limitation or prevention of damage, clearly may constitute a ground for prohibiting or restricting actions.

112. In the case of the supermarket group *Jumbo* (Actions at *Jumbo* butchery), the court prohibited the announced action in the first place because an all-out strike of one day at the butchery of the group would result in damage to the group and franchisees. A second reason was the risk of meat spoilage that could be created. In addition, the court found the actions premature. The restriction was imposed by the court for an extended period, namely until discussions with a potential buyer had become concrete. Appeal against this judgment was disallowed because Jumbo had voluntarily offered to pay the legal costs of the trade union in both instances and the court therefore ruled that the trade union no longer had an interest in the case.

113. The complainant organisations are of the opinion that the court failed to recognise the right to collective action as a fundamental right and deprived it of its effectiveness. Only the grounds contained in Article G of the Charter can justify a restriction. The risk of damage to the group and franchisees and the risk of meat spoilage in any event do not form part of these.

114. Another example in which the court placed excessively far-reaching restrictions on the right of action involved a collective action at the car manufacturer *VDL*/*Nedcar*. The action was taken in connection with ongoing negotiations of a collective agreement for the metal industry (actions at *VDL*/*Nedcar*). The ground put forward was that one of the clients of the company, namely BMW, could use the actions as an argument for reducing the production volumes of *VDL*/*Nedcar*. The court saw in this a concrete and real risk that BMW might for that reason decide to cease production after 2022, which would threaten the continued existence of the company.

115. The complainant organisations contend that in view of the broad assessment framework based on the unlawful act whereby all the circumstances of the case are taken into account, the content and purport of Article G of the Charter are completely disregarded. The lower courts lose sight of the fact that the concept “public order” in the Charter should be interpreted differently from a general weighing-up of interests, as is the case in Dutch case law. It must involve interests of public order or ‘an interest of society that is so seriously endangered that it constitutes a threat to that society’. The complainant organisations find that the judicial practices inadmissibly restrict the right to strike since they go beyond the restrictions admissible under Article G of the Charter.

116. The complainant organisations state that the lower courts apply the assessment framework developed by the Supreme Court in the *Enerco* and *Amsta* judgments within the framework of the test for an unlawful act and based on the interpretation of Article G of the Charter. If the restrictions of Article G have not been provided for by legislation, as is the case in the Netherlands, it is permissible for the courts to give them substance by means of case law. However, according to the complainant organisations, if this is so, there must be a stable and foreseeable assessment framework.

117. In their reply to the Government’s submissions, the complainant organisations refer to a comparison of five years of case law, before and after the 2014-2015 judgments of the Supreme Court, which makes it clear that the extent of legal interventions has grown, as an increasing number of court cases result in a restriction or prohibition of collective action. The conditions set out by Article G of the Charter are not met when any and all circumstances, such as the nature and duration of the action, the relationship between the action and the objective pursued by it, the damage caused to the interests of the employer or third parties and the nature of the interests and damage as well as compliance with the rules of the game, can be taken into account may, separately or taken together be decisive for the imposition of a restriction or a prohibition of a strike. According to the complainant organisations the plurality of factors that a judge may take into consideration in interim relief proceedings go beyond the terms of Article G of the Charter and leads to arbitrariness and to a situation where there is no stable and foreseeable case law.

2. The respondent Government

118. The Government also states in its submissions that the right to strike is regulated in the Netherlands not by statute but by case law. Parties can institute interim relief proceedings in relation to collective action. Where time is of the essence, such proceedings are used to obtain a ruling from the courts in the short or very short term.

Both parties can express their views and such proceedings must also be conducted in accordance with the general principles of due process. The court must strike a balance between, on the one hand, the interests of the claimant in obtaining a decision without delay and, on the other, the interests of the defendant in enforcing procedural safeguards. Interim relief proceedings in the Netherlands, according to the Government, satisfy the requirements of a fair trial within the meaning of Article 6 ECHR. Appeal from a district court's judgment lies to the court of appeal. Appeal in cassation against the judgment of a court of appeal can then be lodged with the Supreme Court.

119. The Government points out that the right to collective action as interpreted by the lower courts has been broadened by the two Supreme Court judgments of 2014 and 2015. Not only are the trade unions free, in principle, to choose whatever form of strike or other collective action they consider effective in exercising their right to collective bargaining, but their failure to comply with the rules of the game no longer automatically means that the action is unlawful. This framework of the Supreme Court which is laid down in the judgments of 2014 and 2015 as set out above is applied by the lower courts in strike cases as of 2015. The possibilities for making use of the collective action right have therefore been expanded. Lower courts in the Netherlands have subsequently reviewed the cases submitted to them within this framework, considering the specific circumstances of each case under review. It is up to the national courts and not to the Government to weigh interests in every case based on the criteria laid down in the Charter. A party that does not agree with a judgment of the lower court, has the possibility of lodging an appeal at the appeal court and after that, to file an appeal in cassation at the Supreme Court.

120. According to the Government, it appears from the lower case law that the courts do take into account this amended assessment framework in their judgments. The fact that the employer may suffer substantial financial loss is unlikely to be considered disproportionate in itself, but the existence of safety or public health risks or the possibility of serious harm to large numbers of third parties can be reasons to prohibit or limit a strike in terms of scope or duration.

121. The amended assessment framework has led to stricter rules on the obligation to make factual submissions on damage and on the burden of proof. As a result, anyone alleging that a strike is unlawful, whether it be the employer or a third party, must adduce sufficiently concrete evidence of the nature and extent of the damage to be expected.

122. The Government states that, although the lower-case law is of a casuistic nature, the judgments of the lower courts are reached for the most part in accordance with the assessment criteria adopted by the Supreme Court. The complaint comments critically on only a few of the 35 judgments. It follows that there is no dispute that the great majority of lower-case law is in accordance with the Charter.

123. As regards the strike figures submitted by the complainant organisations, the Government states that the accuracy of this data is uncertain as it cannot be fully traced how the complainants established the figures mentioned. The Government can therefore not confirm that the figures mentioned are correct. Furthermore, the

Government emphasises that the frequency and duration of strikes depend on a number of factors which are not necessarily related to the legal framework.

124. In any event, the available data clearly shows that the possibility to strike exists in the Netherlands and that this option is actually being used. The number of strike days, which the complainant organisations consider to be limited, does not in itself mean that the Government does not properly guarantee the right to strike as such.

B – Assessment of the Committee

125. The Committee refers to its remarks above about the scope and meaning of Article 6§4 and Article G of the Charter (§§86-90).

126. The Committee recalls (*Syndicat CFDT de la métallurgie de la Meuse* v. France**,** Complaint No. 175/2019, decision on the merits of 5 July 2022, §91) that the Charter sets out international law obligations which are legally binding on the States Parties and that the Committee as a treaty body is vested with the responsibility of making legal assessments of whether the Charter's provisions have been satisfactorily applied. The Committee considers that it is for the national jurisdictions to rule on the issue at stake (*in casu*, collective action) in the light of the principles it has laid down in this regard or, as the case may be, it is for the legislator to provide the national jurisdictions with the means to draw the appropriate consequences as regards the conformity with the Charter of the domestic provisions in question (see *mutatis mutandis*, Confederation of Swedish Enterprise v. Sweden, Complaint No. 12/2002, decision on the merits of 22 May 2003, §43).

127. The Committee wishes to emphasise that it falls to the State Party to make sure that domestic courts do not act so as to interfere with the very substance of the right to collective action, thus depriving this right of its effectiveness.

128. The Committee also recalls that "as an exception applicable only under extreme circumstances, restrictions under Article G of the Charter must be interpreted narrowly". (Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, decision on the merits of 23 March 2017, §83) Restrictions must respond to a pressing social need and "even under extreme circumstances the restrictive measures put in place must be appropriate for reaching the goal pursued, they may not go beyond what is necessary to reach such goal" (GSEE v. Greece, Complaint No. 111/2014, op. cit., §87). The Committee has previously made clear that restrictions can satisfy the conditions of Article G of the Charter where they are prescribed by law and necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of the public interest, national security, public health, or morals (Conclusions 2014, Article 6§4, Norway). Purely economic considerations or concerns of a practical or organisational nature (such as cancellation of flights and trains, temporary shortages of some goods and services, increased waiting times for

certain non-vital services, etc.) cannot alone be regarded as sufficient justification for restrictions on the right to strike.

129. The Committee notes that according to the complainant organisations, the number of legal proceedings in which strike action have been prohibited or limited, increased both in absolute and relative terms since *Enerco* and *Amsta* judgments. The lower courts have issued 33 decisions on strike action since 2015, of which 19 have prohibited strike action or have imposed restrictions on such action (i.e. 57% of cases). The Government in turn states that the fact that the complainant organisations only comment critically on a limited number of decisions, indicates that the great majority of lower courts' decisions is in accordance with the Charter.

130. The Committee has reviewed the interim relief proceedings selected, presented, and analysed by the parties to the complaint, structured as 1) public order and safety, 2) interests of third parties and 3) interests of the employer. On the basis of this review, the Committee notes that the lower courts do not always apply the Supreme Court framework in a uniform and consistent manner leading to sometimes divergent assessments of when collective action should be allowed or restricted/prohibited in a democratic society, in the light of Article G of the Charter.

131. The Committee observes, in particular, that the so-called social urgency considerations (public safety and security concerns) have had a significant influence on the decisions of the lower courts, which have taken into account the potential negative consequences of strikes, such as, for example, airports overcrowded with stranded passengers. The Committee recognises that, in some cases, the concept of social urgency has been given a wide interpretation, beyond the situations envisaged by Article G of the Charter and beyond that envisaged by the Supreme Court. This situation suggests that there may be a need to further elaborate and specify the framework in order to give better guidance to the lower courts.

132. The Committee also observes, however, that the lower courts have recognised that collective action constitutes the continuation of negotiations by other means, and that the choice of means of action, its duration and communication lies primarily with the conflicting parties. The lower courts have also ruled that the economic damage that the employer is likely to suffer as a result of collective action is, as a general rule, inherent to a strike and therefore carries no decisive weight in the decision on whether to restrict or prohibit such collective action.

133. The Committee considers that the decisions of the lower courts to restrict or prohibit collective action, – some of which have later been overturned by the Court of Appeal applying a more appropriate and principled understanding of Article 6§4 and Article G of the Charter – do not point to the existence of a systemic problem in this area.

134. Based on the above, the Committee holds that there is no violation of Article 6§4 of the Charter as regards the lower courts' application of the Supreme Court assessment framework.

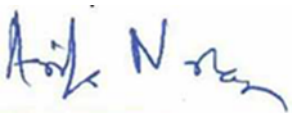
CONCLUSION

For these reasons, the Committee concludes:

- by 14 votes against 1, that there is no violation of Article 6§4 of the Charter as regards the assessment framework of the Supreme Court;

- by 14 votes against 1, that there is no violation of Article 6§4 of the Charter as regards the application of the assessment framework of the Supreme Court by the lower courts.

Karin Møhl LARSEN
Rapporteur



Aoife NOLAN
President

Henrik KRISTENSEN
Deputy Executive Secretary

In accordance with Rule 35§1 of the Rules of the Committee, a separate dissenting opinion of Carmen SALCEDO BELTRÁN is appended to this decision.

SEPARATE DISSENTING OPINION OF CARMEN SALCEDO BELTRÁN

I cannot agree with the Committee's majority decision that there is no violation of the European Social Charter in the present case. With the greatest respect for my fellow Committee members' opinion, I consider that the decision on the merits should have found against the Netherlands with regard to the two complaints submitted to the Committee for examination.

All of the arguments I present in this opinion will attempt to show that the Netherlands lacks a stable, effective and foreseeable framework to allow the trade unions to engage in collective action safely and with all the relevant legal safeguards.

The interpretation of the provisions of the Charter by the Supreme Court and, still more, by the lower courts is so restrictive that, in practice, it empties the right to strike of its essence. It is clear that Articles 6§4 and G of the Charter apply (I). However, the domestic courts, which are responsible for the implementation of the right to strike and have sovereign authority to delimit the right and the conditions under which it is exercised, have incorporated factors such as "social urgency" and "the rules of the game" into the range of restrictions to the right authorised under Article 6§4. The interpretation of the first expression is clearly very broad. As to the second, it implies a total absence of foreseeable, certain regulations accompanied by safeguards. The room for manoeuvre it leaves exceeds the admissible limits to guarantee this right. Added to these problems is a third no less important one, which is the establishment of procedures (interim injunctions) which fail to provide adequate judicial protection.

In the background, or perhaps even in the foreground, of this examination of the right to strike is Article 6:162 of the Dutch Civil Code, which provides the general legal basis for protecting the interests of third parties – or rather of employers and for responsibility for "unlawful acts". Two highly controversial expressions delimit its content with regard to the right to strike, namely a "duty of care" and a "duty of proper social conduct". The latter should be completely ruled out because it evokes outmoded concepts which curb this right.

Despite the theoretical standard-setting legislation, the actual circumstances in the Netherlands, which are revealed by the relevant case law, show that the right to strike is neither seen as a key democratic value for the rights of workers and their organisations nor protected as such (II). Quite the opposite in fact, because it is restricted to such an extent that it is almost non-existent, so that the risk of organising a strike and it being declared illegal is enormous. There is disproportionate interference by the state, in the form of restrictions, in the exercise of this right.

Consequently, there is a violation of both provisions referred to by the parties and of Article 5 of the Charter, on the right to organise (II and III). The Netherlands is failing to meet its positive obligations to ensure enjoyment of the right, intervene in horizontal relations (between striking organisations and employers) and intervene in vertical relations (with regard to the interpretation by all courts) through reasonable and effective measures to guarantee proper respect for the right to strike, as required by the Charter.

The decision on the merits itself agrees in some paragraphs to these findings of a violation (§§132-134). Yet, paradoxically, the Committee has found that there is no violation, and done so on a questionable and ill-defined basis, which moreover adds a new prerequisite for a finding of a violation which the treaty and the procedure does not call for, namely that it must be systemic.

Before outlining my arguments in detail, I would like to highlight a matter raised by one of the complainant organisations (§74). In the 2018 conclusions, the Committee adopted a conclusion of conformity. The FNV submitted observations on the government report, in which it already criticised these restrictions.[1] The FNV pointed out to the Committee that there was no reference to its observations in the conclusions, raising doubts as to whether the situation they reported was clear to the Committee. This is what prompted it to lodge the collective complaint.

I would emphasise that pursuant to the adversarial principle which is supposed to apply in all the Committee's monitoring procedures (reporting system and collective complaints), it must analyse the government document and trade unions' and NGOs' observations in the same terms, particularly in view of the fact that states repeatedly totally or partly omit to provide the information requested of them and do not answer the targeted questions put to them in the context of the reporting system. It was important to give an opinion on the trade union's complaint. When the Committee failed to do so, in order to secure the parties' rights equitably, it should have given the reasons for this omission.

I. The legal framework: the "theoretical" application of Articles 6§4 and G of the Charter, the "real" application of Article 6:162 of the Civil Code and the "silent" application of the Committee's case law.

In the Netherlands there is no constitutional recognition of or national legislative framework for the right to strike. This normative void should be filled through application of Article 6§4 of the Charter. In Supreme Court judgment HR, 30-05-1986, no. 12698: NS, the Charter was found, for the first time, to have a direct effect pursuant to Articles 93 and 94 of the Constitution:

> "Provisions of treaties and of decisions of international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.
>
> Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions of international institutions that are binding on all persons."

The Dutch courts have been sovereign and responsible for deciding on the procedural arrangements for these provisions for some time. They have incorporated Article G of the Charter, on admissible restrictions or limitations, into their decisions, together with

[1] "The text of the Conclusions does not refer to the views of the FNV nor address the criticisms it raised. As a result, in particular the complainants are unable to ascertain whether and, if so, how these views were taken into account when drafting the Conclusions in 2018. This is one reason for the complainants to submit this collective complaint", Comments by FNV on the 11th national report on the implementation of the European Social Charter submitted by the government of the Netherlands registered by the Secretariat on 23 January 2018, pp. 1-15, https://rm.coe.int/comments-from-fnv-on-the-11th-report-from-the-netherlands/16807848de.

the general principle of Dutch civil law laid down in Article 6:162, which stipulates as follows:

> "1. A person who commits a tort against another which is attributable to him, must compensate any consequential loss suffered by the other.
>
> 2. Except where there are grounds for justification, the following are considered as torts: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law relating to proper social conduct".

On this subject, we should note, firstly, that when interpreting these articles, the Dutch courts neither take into account nor refer to the Committee's case law on them (whether in decisions, conclusions and/or statements of interpretation). The Committee did not consider this important and hence did not give its view on the matter.

My first objection relates to this decision. Article 93 of the Constitution refers specifically to the binding nature of "decisions of international institutions". The failure to take account of the case law adopted by the Committee is therefore paradoxical, surprising and, moreover, deliberate.

It should be emphasised that the Committee considers that it is for the national courts to rule on the matters at issue "in the light of the principles it has laid down in this regard" (Confederation of Swedish Enterprise v. Sweden, decision on the merits of 22 May 2003, §43). States are required to comply with the Committee's case law, as adopted in its conclusions and decisions on the merits, as a treaty body exclusively vested with this responsibility (Syndicat CFDT de la métallurgie de la Meuse v. France, Complaint No. 175/2019, decision on the merits of 5 July 2022, §91). If this case law had been integrated into the delimitation of the articles and their applications to all the cases raised, an interpretation as restrictive as this as to the right guaranteed and as broad as to the restrictions could not have been adopted, unless these courts altered it or applied it in a roundabout manner.

In addition, the Committee, to a certain extent, adopts this interpretation as its own, which seems to me to be a very serious consequence bearing in mind the Dutch courts' interpretation of the case law, which severely restricts the right at issue.

II. The "essential" nature of the right to strike guaranteed by the Charter interpreted in the light of the principles of *external* and *internal* consistency: violation of Articles 5 (right to organise), 6§4 (right to collective bargaining) and G (restrictions).

The general right to collective action and, in particular, the right to strike of workers and their organisations, which is the most obvious and contested manifestation thereof, is an essential aspect of social democracy in all societies. It is an "instrument to regulate democracy",[2] which has served as a "right to transform the law".[3] Social justice is a challenge for the whole world. To achieve it, it is necessary to find "ways of allowing

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[2] Supiot, Alain, *Savant du monde du travail* [Specialist in the world of work], 9 December 2019, https://www.radiofrance.fr/franceinter/podcasts/l-heure-bleue/reflexions-avec-alain-supiot-savant-du-monde-du-travail-9590288

[3] Supiot, Alain, *Revisiter les droits d'action collective* [Reexamining the right to collective action], p. 4, https://www.college-de-france.fr/media/alain-supiot/UPL7408028760523467086_revisiter_droit.pdf

differing viewpoints to be expressed".[4] It is important both to guarantee the right and to make it effective because strikes can make for "a fairer distribution of the fruits of labour. The right to contest the law is not a source of legal disorder; it is a means of perpetuating such order in societies".[5]

I spelt out this irrefutable argument because it is often overlooked. Strikes are generally seen negatively because of their social impact. This is especially clear in states such as the Netherlands where its use for the collective settlement of labour relations is rare, and even more so if we note that its examination is linked with the application of the enduring civil law principle of "unlawful acts". It is for this reason "that a major inequality has developed where it comes to the right to strike, with the result that it is denied to those who need it most".6 This is confirmed by the obstruction to which this right has been subject now for some considerable time, giving rise, on 10 November 2023, to an application to the International Court of Justice. 7

In my opinion the Netherlands does not respect Articles 6§4 and G of the Charter, on the right to collective bargaining and on permitted restrictions, both of which are referred to by the complainant organisations. It is also in breach of Article 5 of the Charter, which guarantees the right to organise. Here are my arguments in support of this conclusion:

Firstly, although the complainant organisations did not refer to Article 5, the Committee, drawing on its authority to reclassify a complaint when examining allegations and the *iura novit curia* principle, which applies to it by dint of its being a quasi-judicial body, should have examined the complaint under this article. The Committee "knows the law" and "states the law". A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (ECHR, *G.R. v. the Netherlands*, no. 22251/07, §36, 10 January 2012; ECHR, *Silickienė v. Lithuania,* no. 20496/02, §45, 10 July 2012). The parties to a dispute are not required to mention all the applicable rules of law, just to prove the facts as a whole.

The value of collective action is covered expressly by Article 6§4 of the Charter, but also by Article 5. "Bargaining, representation and collective action are the three pillars on which social dialogue is founded. Collective bargaining is impossible without legal persons authorised to represent the parties' interests and possessing the means to carry proper weight in the negotiations. These three dimensions of collective relations are closely interlinked and are all affected by the new organisation of work in the world".[8] Without the right to strike, "freedom of association would be a hollow term, a meaningless right … [P]ermitting governments to believe that they can ratify Convention No. 87 and claim to be promoting freedom of association while retaining unbounded ability to regulate industrial action is dangerous. The pertinent question is

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[4] Supiot, Alain, *Savant du monde du travail*, *op. cit.*
[5] Supiot, Alain, "Vers un droit international de la grève?" ["Are we moving towards an international right to strike?"], *Le Monde Diplomatique*, January 2024, pp. 1-2.
[6] Supiot, Alain, *Revisiter les droits d'action collective*, *op. cit.* p. 4.
[7] Request by the International Labour Organisation (ILO) for an Advisory Opinion of 10 November 2023 https://www.icj-cij.org/fr/affaire/191
[8] Supiot, Alain "Vers un ordre social international?" ["Are we moving towards an international social order?"], *L'Économie politique*, vol. No. 11, No. 3, 2001, pp. 37-61.

whether there can be freedom of association [including trade-union freedom] without a right to strike. The answer, as history has demonstrated, is no".[9]

Secondly, the Charter must be read in the light of the principles of *external consistency or harmony*. The Committee interprets the rights and freedoms set out in the Charter in the light of current conditions (Marangopoulos Foundation for Human Rights v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §194), and of international instruments and the interpretations made of these treaties by their respective regulatory bodies (European Federation of National Organisations working with the Homeless (FEANTSA) v. France, Complaint No. 39/2006, decision on the merits of 5 December 2007, §64), bearing in mind that the Charter is a living instrument. This means that the Charter must be interpreted in accordance with this context, in other words international law and practice, of which it forms an integral part (Article 31§3 (c) of the Vienna Convention on the Law of Treaties, 1969) (ECHR, *Golder v. the United Kingdom*, No. 4451/70, 21 February 1975, §§30 and 35).

The decision on the merits contains a section on "Relevant international material", which refers to articles and treaties on the right to freedom of association.

In this connection, the European Court of Human Rights examines the right to strike from the angle of freedom of association, holding that trade-union freedom is not an independent right but a specific aspect of freedom of association as recognised by Article 11 of the Convention (*Manole and "Romanian Famers Direct" v. Romania,* no. 46551/06, §57, 16 June 2015, *Humpert and Others v. Germany*, nos. 59433/18, 59477/18, 59481/18 and 59494/18, §98, 14 December 2023). Drawing directly on these guiding principles, the Court has built up, through its case-law, a non-exhaustive list of the essential elements of "trade-union freedom", which includes a trade union's right "to seek to persuade the employer to hear what it has to say on behalf of its members and, having regard to developments in labour relations, the right to bargain collectively with the employer, which has … also become one of these essential elements (see *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*, no. 45487/17, § 95, 10 June 2021; *Sindicatul "Păstorul cel Bun" v. Romania*, no. 2330/09, § 135; and *Demir and Baykara v. Turkey*, no. 34503/97, §§ 145 and 154)". Article 11 of the Convention guarantees trade union members means of defending their interests including "the right for their union to be heard". What the Convention requires is for domestic law to enable trade unions, in conditions not at variance with Article 11, "to strive for the protection of their members' interests" (*Sindicatul "Păstorul cel Bun" v. Romania,* op. cit., § 134).

For trade unions, the right to strike is a means of making their voice heard and an important instrument to protect their members' occupational interests, while for the members of a trade union, it is a key means for them to defend their interests (see *Hrvatski liječnički sindikat v. Croatia*, no. 36701/09, §59, 27 November 2014, *Federation of Offshore Workers' Trade Unions and Others v. Norway,* no. 38190/97, and *Ognevenko v. Russia*, no. 44873/09, §70, for cases emphasising the importance of the right to strike as an instrument for trade unions, and see *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, §24, and *Junta Rectora del Ertzainen Nazional*

[9] Bellace, Janice, "ILO Convention no. 87 and the right to Strike in an era of global trade", *Comparative labor law and policy journal*, No. 3, 2018, p. 528. Vogt, Jeffrey, Bellace, Janice, Compa, Lance, Ewing, Keith David, Hendy, John, Lörcher, Klaus and Novitz, Tonia, *The Right to Strike in International Law*, 2020, Hart Publishing.

Elkartasuna (ER.N.E.) v. Spain, no. 45892/09, §32, in which the Court placed emphasis on the importance of the right to strike for the members of the trade union; see also, more generally, *Ognevenko*, cited above, §55, emphasising the dual nature of trade union action as a right of the trade union and of the individual union members). Strike action is clearly protected by Article 11 in so far as it is called by trade unions (see *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10 §84, and *Association of Academics v. Iceland*, no. 2451/16, § 24; and *Barış and Others v. Turkey* (dec.), no. 66828/16 and 31 others, § 45, 14 December 2021).

From the same viewpoint, the ILO guarantees the right to strike on the basis of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise. Article 3 grants workers' and employers' organisations the "right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes". The right to strike "is an intrinsic corollary to the right to organise protected by Convention No. 87"; "the right to strike and to organise union meetings are essential aspects of trade union rights"; "the Committee has always recognised the right to strike by workers and their organisations as a legitimate means of defending their economic and social interests" (Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 2018, §§ 751-754; Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006, Case No. 2473, United Kingdom of Great Britain and Northern Ireland, Report 346, §1532; Case No. 2838, Greece, Rapport 362, §1077).

Consequently, the Committee was under an obligation when carrying out its examination not just to cite this "relevant international material" in a theoretical manner but to take an approach that was compatible with it, based also on Article 5, none of which ruled out a decision which applied a higher level of protection.

Third, the Charter must be read in the light of the principle of *internal consistency or harmony*. The rights enshrined in the Charter are not seen as separate compartments; they are closely linked to one another. The aim and the purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact (International Commission of Jurists v. Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32). This effectiveness is precisely what calls for the synergies between the provisions of the treaty to be established and for the Committee to arrive at a coherent interpretation in this respect.

This is confirmed by the Committee's case law. For instance, when examining Article 5, it has referred to "trade union prerogatives". It has said that this means "the right to express demands with regard to working conditions and pay, the right of access to the working place as well as the right of assembly and speech" (European Council of Police Trade Unions v. Portugal, Complaint No. 11/2001, decision on the merits of 21 May 2022, §40). Similarly, the Committee has stated that the right to express demands on working conditions is in parallel guaranteed under Article 6§2 as part of the right to bargain collectively (European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012, decision on the merits of 2 December 2013, §83). Therefore, these rights are covered by several provisions.

With all due regard for the view of the majority, the application of this case law when interpreting the provisions of the Charter should, in my humble opinion, have been carried out on both Article 6§4 and Article 5. These two provisions overlap in several respects and in current times, this is a matter of prime importance. The Committee has squandered a major opportunity to consolidate the fundamental right to strike through its case law by stating clearly that the issue is one of the rights to freedom of association and to collective bargaining.

III. The application in this case of the rights and guarantees contained in Articles 6§4 and G of the Charter and the resultant violations

Under Article 6§4 of the Charter the Parties undertake to recognise "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". Besides the right to strike, Article 6§4 encompasses other types of action taken by employees or trade unions, including blockades or picketing (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on admissibility and the merits of 3 July 2013, §117).

The Committee considers that the exercise of this right, which is intrinsically linked to the right to collective bargaining because it represents a means of achieving a favourable result from a bargaining process, is essential "for the fulfilment of other fundamental rights guaranteed by the Charter, including for example those relating to just conditions of work (Article 2), safe and healthy working conditions (Article 3), fair remuneration (Article 4), information and consultation (Article 21), participation in the determination and improvement of the working conditions and working environment (Article 22), protection in cases of termination of employment (Article 24), protection of the workers' claims in the event of the insolvency of their employer (Article 25), dignity at work (Article 26), workers' representatives protection in the undertaking and facilities to be accorded to them (Article 28), information and consultation in collective redundancy procedures (Article 29)". It is key when it comes to ensuring the autonomy of trade unions and protecting the employment conditions of workers: if the substance of this right is to be respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and its scope should not be limited by legislation to the attainment of minimum conditions (LO and TCO v. Sweden, Complaint No. 85/2013, *op. cit.*, §§109-120).

The Committee points out that the Appendix to the Charter provides, with regard to Article 6§4, 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". This means that even though the right of trade unions to collective action is not an absolute one, any restriction to this right "can be considered in conformity with Article 6§4 of the Charter only if, as set forth by Article G, the restriction: a) is prescribed by law; b) pursues a legitimate purpose - i.e. the protection of rights and freedoms of others, of public interest, national security, public health or morals – and, c) is necessary in a democratic society for the pursuance of these purposes, i.e. the restriction has to be proportionate to the

legitimate aim pursued" (LO and TCO v. Sweden, Complaint No. 85/2012, *op. cit*., §§118-120).

Restrictions may be acceptable "only under specific conditions" (EuroCOP v. Ireland, Complaint No. 83/2012, *op. cit*., §31; *Confédération générale du travail* (CGT) v. France, Complaint No. 155/2017, decision on the merits of 14 September 2022, §55; Conclusions I – Statement of Interpretation - Article 6§4).

On this subject, it should be pointed out that the Committee has ruled that legal rules relating to the exercise of economic freedoms established by States Parties either directly through national law or indirectly through EU law should be interpreted so as not to impose disproportionate restrictions upon the exercise of labour rights as set forth, further to the Charter, by national laws, EU law, and other international binding standards. National and EU rules regulating the enjoyment of such freedoms should be interpreted and applied in a manner that recognises the fundamental importance of the right of trade unions and their members to strive both for the protection and the improvement of the living and working conditions of workers, and also to seek equal treatment of workers regardless of nationality or any other ground (LO and TCO v. Sweden, Complaint No. 85/2012, *op. cit*., §118).

Market freedoms cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers. In addition, any restrictions that are imposed on the enjoyment of this right should not prevent trade unions from engaging in collective action to improve the employment conditions, including wage levels, of workers irrespective of their nationality (LO and TCO v. Sweden, Complaint No. 85/2013, *op. cit*., §120).

The Committee notes that the case law of the ILO Committee of Experts provides that if the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example conciliation and mediation procedures leading, in the event of a deadlock, to arbitration machinery seen to be reliable by the parties concerned (ILO, Digest of decisions and principles of the Freedom of Association Committee 1996, § 547; European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, decision on the merits of 12 September 2017, §112).

III.1. The clearly unforeseeable and broad interpretation of the "rules of the game" by the courts based on procedural requirements

On the basis of the aforementioned case law, the Committee has stated that any restrictions on the right to strike must comply with the terms of Article G of the Charter, namely that they must be prescribed by law, serve a legitimate purpose and be necessary in a democratic society, in addition to being "precise". I note that the Committee has also specified that "this also applies to restrictions of a procedural nature" (CGT v. France, Complaint No. 155/2017, *op. cit*., §56).

Article G does not require that such restrictions must necessarily be imposed solely through provisions of statutory law. The case-law of domestic courts may also comply with this requirement "provided that it is sufficiently stable and foreseeable to provide sufficient legal certainty for the parties concerned" (European Trade Union Confederation (ETUC)*/Centrale Générale des Syndicats Libéraux de Belgique (CGSLB)/Confédération des Syndicats Chrétiens de Belgique (CSC)/Fédération Générale du Travail de Belgique (FGTB)* v. Belgium, Complaint No. 59/2009, decision on the merits of 13 September 2011, §43).

The Dutch courts have established "rules of the game" (*spelregels*) to determine whether or not collective action is lawful. The two main rules are that due notice must have been given and that a strike may only be called once all other possibilities have been exhausted (in other words, it must be a last resort or *ultimum remedium*). The courts check whether these two conditions have been met through summary proceedings.

It is unclear where the dividing line between procedural rules and restrictions to the right lies. However, it is essential to establish this, as procedural rules are not examined as thoroughly as restrictions under Article G. It is easy to deduce that an attempt is being made to place the requirements in the first category, thus avoiding the more thorough examination that would be needed if they were in the second. Clearly, regulation of the right to strike is authorised by Article 6§4. However, the content of any such regulation may amount to a restriction and must therefore meet the requirements of Article G.

In my opinion, this is the case with the right to strike in the Netherlands, but not so much because of the content of these "rules of the game" strictly speaking, but more because of their lack of precision, which is left to the sole interpretation of the judge or court during summary proceedings. To comply with the Charter, they should be clear, precise and foreseeable, but none of these conditions is met. Despite all this, the Committee found that there had been no violation.

This is clearly at odds with the established case law. In Conclusions 2004 and 2006 on the Netherlands under Article 6§4, the Committee considered that the fact that Dutch judges may determine whether recourse to a strike is premature constitutes an impingement on the very substance of the right to strike as this allows the judge to exercise the trade unions' prerogative of deciding whether and when a strike is necessary. Based on this argument, I also reject the Committee's conclusion of 2018, in which it found, following the new case law of the Supreme Court (the *Enerco* and *Amsta* judgments), that the situation was now in conformity with Article 6§4.

It was for the Dutch courts to determine in this case whether sufficient notice had been given. All that the parties know about notice and cooling-off periods is that they "must not be excessively long", but no more than this.

The same applies to the rule or requirement that collective action by trade unions must be carried out as a last resort. At what point can it be considered that all paths of negotiation have been exhausted, what are the procedures concerned, are they mandatory, and do the rules take equal account of measures intended to guarantee a

fair procedure for both parties? There is no answer to this. Once again, it is the Dutch courts which decide.

In the decision on the merits, the Committee shows that it is aware of this situation when it states that “to formally uphold a generalised and absolute last resort requirement could amount to an excessive interference with the freedom of trade unions to deploy the means of collective bargaining in the way they deem most suitable to furthering their legitimate objectives, notably the objective of obtaining a collective agreement providing for terms and conditions of work as favourable as possible” (§90).

However, it does not conclude that this procedural rule is in violation of the Charter, despite the fact that it clearly is, holding that the Dutch courts take account of “a multitude of factors” as part of an in-depth analysis intended to determine whether collective action is lawful (§90). I regret that I cannot agree with this viewpoint. These are two key rules, which significantly affect the conditions for a strike. The other factors evoked do not play this role as they are merely secondary.

Not only is the imprecision of the two rules of the game quite clear but also they are only delimited by the courts on a case-by-case basis, whereas the customary approach would be to define the law more strictly in advance. Nor should it be overlooked that this is all done through summary proceedings and having examined the judgments in these cases referred to in the decision, I cannot see how they could have delivered the “in-depth analysis” the Committee talks of. The decisions of the domestic courts adopted pursuant to these rules do not afford legal certainty for the parties concerned, as the Committee’s case law requires (ETUC, CGSLB, CSC and FGTB v. Belgium, Complaint No. 59/2009, *op. cit*., §43)

It is compatible with the Charter to leave the courts some room for manoeuvre, but this does not mean that they can be given total and potentially arbitrary discretion to establish the rules of the game according to each individual case. A further problem is the procedure through which such cases are examined, which does not guarantee the right to full and effective judicial protection. Therefore, the procedural arrangements are not adequate to preserve the lawfulness of the parties’ rights. Given the lack of specific legislation and the imprecision outlined above, there is a clear risk that conflicting judicial decisions will be made.

III.2. The cancelling out by the courts of the social impact of strikes by categorising all services as essential and prioritising the interests of third parties (notions of social urgency, duty of care and proper social conduct)

The Committee has ruled that the right to strike may be restricted provided that the requirements set out in Article 31 of the 1961 Charter are met, namely that the restrictions are prescribed by law, pursue a legitimate aim and are necessary in a democratic society for the protection of the rights and freedoms of others or the protection of public interest, national security, public health, or morals. Prohibiting strikes in sectors which are essential to the community is deemed to serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health. However, simply banning strikes, even in essential sectors – particularly when they are extensively defined, i.e. “energy” or “health” – is not deemed proportionate to the specific requirements of each sector. At most, the

introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6§4 (*Matica Hrvatskih Sindikata* v. Croatia, Complaint No. 116/2015, decision on the merits of 21 March 2018, §114).

If we examine the cases which the Dutch courts have analysed, it is clear that they made a very broad interpretation both of the activities which were affected by the strike and of the interests of third parties. The terms which the courts use to justify restrictions such as “proper social conduct” and “duty of care” clearly allow unlimited room for interpretation, making it easy to render the right to strike ineffective. I note that a duty of care generally implies an obligation to carry something out (in this case, the right to strike) with attention, caution and care, paying due regard to the prevailing circumstances. As to “proper social conduct towards the person and the goods of others”, I wonder how this expression can be placed in the context of the right to strike if we wish this right to be effective. All strikes have a social impact.

These two expressions are liable to provide unlimited support for all court decisions to prohibit strikes on certain dates, to set such high levels of minimum service that they cancel out a strike’s social impact or to declare the strike unlawful.

To ascertain this, I am going to analyse one of the activities referred to by the complainant organisations which the Committee has included in its decision, namely strikes by postal workers. For this purpose, I will refer to one of the summary proceedings mentioned in the decision on the merits (Hague Court, 13 December 2018, ECLI:NL:RBDHA:2018:15444), to which I will add another more recent case (Hague Court, 22 December 2022, ECLI:NL:RBDHA:2022:13241). In both cases, PostNL applied to the courts for a strike to be prohibited. In the second, a company specialising in medical nutrition called Sorgente, which uses PostNL to deliver its products, joined the proceedings.

Both cases related to the lawfulness of strikes called during especially busy periods, namely Christmas and New Year, Black Friday and Saint Nicholas (*Sinterklaas*). The companies concerned talked of the impact of strikes on a very vulnerable group of people who relied on the delivery of medical devices and correspondence. The trade union proposed alternatives to be able to strike without affecting these products (bearing in mind the difficulty of distinguishing parcels, it offered to guarantee delivery as part of a minimum service dealing only with such parcels). The suggestion was not accepted.

In both cases, the decision was to suspend the strike until 6 January. In other words, it was prohibited on certain dates, which is a very clear violation of the right to strike.

It is undoubtedly significant that PostNL states expressly in its submissions that these were “periods of peak activity”, in which “business turnover was highest”, that there was a need to deliver parcels on time so that customers “would not lose confidence” and that the company would incur “business damage” in relation to its competitors if there was a strike. These are economic interests which, in my opinion, are the real reason for the request to the court.

In conclusion, I consider that, when pitted against the fundamental right to strike and its essential role as an instrument for trade unions and the right to collective bargaining, the argument in favour of making it impossible to call strikes during certain periods is

unconvincing, especially in view of the very broad definition of an essential service deployed, giving priority to the interests of third parties, which are in fact those of the companies concerned.

III. The "recognition" of "divergences", "inconsistencies" and "broad interpretations of restrictions" by the lower courts: a "systemic" problem

On examining the judgments of the lower courts, the Committee noted that they do not always apply the framework established by the Supreme Court "in a uniform and consistent manner, leading to sometimes divergent assessments of when collective action should be allowed or restricted/prohibited" (§131). It recognised that, "in some cases, the concept of social urgency has been given a wide interpretation", surpassing the situations envisaged by Article G of the Charter and the Supreme Court (§132). This situation suggests "a need to further elaborate and specify the framework in order to give better guidance to the lower courts" (§132).

Although the Committee takes note of this context, it does not find a violation of the Charter. There are two main reasons for this: firstly, some of the lower courts' decisions "have later been overturned by the Court of Appeal", secondly, they "do not, when taken as a whole, point to the existence of a systemic problem in this area".

With all due respect for the opinion of the majority of the Committee members, I believe that the Committee should have found a violation. Firstly, it did note that there had been a violation of the treaty. Its "confidence" that the courts of appeal will offset the excessively broad interpretation of the lower courts is surprising and paradoxical given that it highlighted their "inconsistencies and divergent assessments". I wonder what happens now if their decisions are not set aside. The consequence is clear: although several provisions of the Charter will have been infringed, the Committee's decision on the merits will still have found that there is no violation.

At the same time, the Committee's decision is at variance with the case law referred to at the beginning of the assessment of the complaint, in which it is said that the Committee is the body "vested with the responsibility of making legal assessments of whether the Charter's provisions have been satisfactorily applied" (§127). It is the Committee's exclusive responsibility to ascertain whether the case law built up in this manner meets the requirements of the Charter (Conclusions I, Statement of Interpretation, article 6§4). In the present case, since this is a responsibility and an obligation which lies exclusively with the Committee, it did not perform its supervisory task.

Secondly, I cannot agree with the justification that, even though there have been violations, this is not a "systemic problem". In my opinion, this is neither consistent nor in accordance with the normative framework (the Charter and the Protocol governing the collective complaints procedure). This reasoning adds a new condition to the procedure which is not provided for. The complaint was declared admissible in the light of its collective nature. Through this argument, the Committee adds that for it to rule on a violation, it must also be systemic in nature. None of the relevant regulatory documents establish such a requirement. There are two further arguments against this contention. The first problem is its imprecision. Nobody knows the criteria by which the Committee should decide whether or not a violation is systemic. How many breaches

of the Charter provisions are needed for the Committee to regard a violation as systemic? Where is the dividing line to determine whether a Charter violation is systemic or not?

Secondly, this consideration ignores the right to strike itself and its impact. The right is individual, but it is exercised collectively. A single violation may affect many workers. The Committee, having noted the existence of broad interpretations of the restrictions, did not assess how many workers were denied their right and/or require the violation to be a recurring one. Even these two conditions are present in the instant case.

There may be only one violation of a right, but it may have a significant impact. The statistics confirm this. The number of strikes may not be very high, but thousands of workers are affected. Consequently, the collective violation is significant and sufficient to find a violation of the right to strike:[10]

Year	Labour strikes	WORKERS INVOLVED (X 1,000)	Working days lost (x 1,000)
1999	24	**58.9**	75.8
2000	23	**10.3**	9.4
2001	16	**37.4**	45.1
2002	16	**28.6**	245.5
2003	14	**10.8**	15.0
2004	12	**104.2**	62.2
2005	28	**29.0**	41.7
2006	31	**11.3**	15.8
2007	20	**20.7**	26.4
2008	21	**51.9**	120.6
2009	25	**3.6**	4.6
2010	21	**14.1**	59.2
2011	17	**47.1**	22.0
2012	18	**89.6**	219.4
2013	24	**4.5**	19.4
2014	25	**10.2**	40.9
2015	27	**42.4**	47.6
2016	25	**10.6**	19.2
2017	32	**146.9**	306.3
2018	28	**33.7**	239.1
2019	26	**318.7**	391.0
2020	9	**105.0**	211.0
2021	22	**28.2**	59.3
2022	33	**16.5**	39.4

[10] Statistics Netherlands, https://www.cbs.nl/en-gb/news/2023/18/more-strikes-but-fewer-strikers-in-2022

While these data already show that the violation has a collective impact, the specific example which I analysed above, namely the postal strike, confirms this. PostNL workers cannot currently exercise their right to strike on certain dates. According to the company website, it employs 37 000 persons. Since, in my opinion, there has been an excessive interpretation of the restriction, in other words a violation of the rights, in principle, this affects all the employees, regardless of whether they exercise it or not. I have also presented two cases in which it was not authorised to call a strike relying on arguments which fail to comply with the Charter.

For all these reasons, I consider that the Committee should have found that there was a violation of Articles 6§4, G and 5 of the Charter in several respects because there was interference by the state, through the domestic courts, in the effective exercise of the right to strike. This took the form of disproportionate restrictions establishing imprecise requirements and giving priority to the rights of third parties under conditions which rule out its implementation.