TRADE UNIONS

International standards

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TRADE UNIONS

INTERNATIONAL STANDARDS

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Table of abbreviations

ECHR	European Convention on Human Rights
CJEU	The Court of Justice of the European Union
ECtHR	The European Court of Human Rights
CoE	Council of Europe
EU	The European union
IECL	International Encyclopaedia of Comparative Law
ILO	International Labour Organization
UN	United Nations
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ESC	The European Social Charter
ECSR	European Committee of Social Rights
CFREU	Charter of Fundamental Rights of the European Union

1 INTRODUCTION

1.1 Objective

The objective of this document is to give a general overview of the international standards regarding trade unions. In particular, the right to join a trade union and the functions and rights of trade unions. As for the latter, this document mainly focuses on the regulations concerning collective bargaining, internal affairs, and industrial action. As the regulation largely varies depending on the public or private sector, the document will give specific weight to these differences.

1.2 Definitions

Collective agreement - "an agreement between two parties (the employer side and the employee side) which they consider binding upon themselves".[1]

Collective bargaining - "negotiations which aim at the conclusion of a collective agreement". The nature of collective bargaining varies across states in various ways, which impacts the interpretation of the concept in the different instruments. The agreements aim to control the relationship between "the collectivity of workers" and the employers when fixating the working conditions in a collective agreement.[2]

Industrial action - various forms of action to put pressure on an employer. Some of the actions that fall under the term industrial actions are classical strikes, boycotts, working to rule and go-slows.[3]

A *strike* - "a collective and concerted withholding of labour in pursuit of specific occupational demands exercised peacefully". As for the term "concerted", it refers to the time proceeding a strike. The term "collective", on the other hand, describes the way the strike can be carried out. According to Rocca, the withholding of labour should not be exclusive to trade unions, but also includes other groups of workers. Furthermore, to be perceived as a strike it must be performed by several employees. For this reason, Rocca founds that a strike can be defined as "a peaceful withholding of labour, organised by either a trade union or a group of workers

[1] Rocca, Marco, Posting of Workers and Collective Labour Law: There and Back Again: Between Internal Markets and Fundamntal Rights (Cambridge: Intersentia, 2015), 98.

[2] Ibid, see 98.

[3] Ibid, see 87-88.

in pursuit of specific occupational demands". The "withholding of labour" is however not easy to define.[4]

2 INTERNATIONAL INSTRUMENTS

2.1 United Nations (UN)

Article 23 (4) of the Universal Declaration of Human Rights (UDHR) provides that "everyone has a right to form and join trade unions for the protection of his interests". The UDHR is not legally binding, it is however massively influential.[5]

As for Article 22 in the International Covenant on Civil and Political Rights (ICCPR), regarding the freedom of association and the right to join and form trade union it provides:

> "1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
>
> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."

Article 8 in the International Covenant on Economic, Social and Cultural Rights (ICESCR) also recognises the right to form and join trade unions:

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

[4] Ibid, see 88, 90-92.

[5] Mantouvalou, Virginia, "Are labour rights human rights", European Labour Law Journal 3, No. 2 (2012): 153. Available at: https://bit.ly/30VN1Fn.

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

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

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

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

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

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."

2.2 The International Labour Organization (ILO)

The ILO has played a vital role in the development of norms regarding employment law.[6] The ILO conventions are relevant since they are legally binding international treaties ratified by ILO member states.[7] In addition, both the European Court of Human Rights (ECtHR) and the Court of Justice

[6] Allen, Robin, Crasnow, Rachel, Beale, Anna, McCann, Claire and Barret, Rachel, *Employment law and human rights* (Oxford: Ashford Coulour Press Ltd, 2018), 47.

[7] "International Labour Standards: What are ILO International Labour Standards?", IOE, accessed October 9, 2020. Available at: https://www.ioe-emp.org/policy-priorities/international-labour-standards.

of the European Union (CJEU) have taken into account the standards set by the ILO.[8]

The main ILO Conventions on collective labour law are Freedom of Association and Protection of the Right to Organise Convention (Convention No. 87) and Right to Organise and Collective Bargaining Convention (Convention No. 98).[9] Another relevant convention is the collective bargaining convention (Convention No. 154).

There are also recommendations relevant to collective labour law. Recommendations are not binding but serve as guidelines. The Collective Bargaining Recommendation (Recommendation No. 163) serves as a complement to Convention No. 154.[10]

2.2.1 *The Right to Join a Trade Union*

Convention No. 87 establishes that workers and employers are free to establish and join organisations. Article 2 of Convention No. 87 lays down:

> "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation"

The right covers workers in both private and public sectors. The only exceptions are the armed forces and police. According to article 9, the states determine the extent to which it guarantees the right to these groups. It should however be noted that restrictions are interpreted in a restrictive manner by the ILO supervisory bodies.[11]

Article 10 defines workers organisations as any organisation "for furthering the defending the interest of workers".

According to article 11 states must "take all necessary and appropriate

[8] Allen, Crasnow, Beale, McCann, and Barret, *Employment law and human rights*, 49.

[9] Nielsen, Ruth, *EU Labour* Law (Copenhagen: DJOF Publishing, 2013), 116–117.

[10] International Labour Office, Collective bargaining: A policy guide (Turin: International Labour Organization, 2015), 11. Availbale at: https://bit.ly/2Nvnccm.

[11] International Labour Organisation, *Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (Part 1B)* (Geneva: International Labour Office, 2012), *19. Available at: https://bit.ly/3f25Nn5*

measures to ensure that workers and employers may exercise freely the right to organise". This implies that states cannot interfere in legitimate activities of organisations, such as through arbitrary detentions and arrests. It also means that there have to be, in the case of allegation of violations of the convention, independent judicial investigations that are carried out without delay.[12]

Convention No. 98 covers workers in both private and public sectors. The only exceptions are the armed forces, police and public servants engaged in the administration of the state. Regarding the establishment of trade unions, Article 2 of Convention No. 98 provides:

> "1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
>
> 2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article."

Article 3 states that:

> "Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise |…]"

Convention No. 98 does however not detail how this should be done.

2.2.2 *The Right to Collective Bargaining*

The right to collective bargaining is a fundamental right according to the ILO.[13] The right covers workers in both the private and public sectors. The only exceptions are the armed forces, police, and public officials engaged in the administration of the state.[14]

Article 2 of Convention No. 154 defines collective bargaining as:

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[12] Ibid, see 22.

[13] Ibid, see 81.

[14] *Ibid*. See 68.

"[…]***collective bargaining*** extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for--

(a) determining working conditions and terms of employment; and/or

(b) regulating relations between employers and workers; and/or

(c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations."

Working conditions cover both traditional working conditions, such as working day, additional hours, rest periods, wages, etc. and, other areas such as promotion, transfer, dismissal without notice, etc.[15]

Article 4 in Convention No. 98 lays down two essential elements of the right to collective bargaining: the responsibility of the contracting states to encourage the development of collective bargaining and the voluntary nature of negotiations:[16]

" 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."

The free and voluntary nature of collective bargaining can be subject to restrictions in the form of an obligation to submit collective agreements to prior approval by the authorities. Such an obligation is however only in accordance with ILO regulation under certain conditions. Furthermore, under certain very strict conditions states can have legislation that limits the content of a future collective agreement (mainly relating to wages) for the purposes of public interests.[17]

According to the ILO, direct bargaining with employees for anti-union purposes may undermine the promotion of collective bargaining. For this reason, ILO finds that it should only be possible to do collective bargaining with non-unionised workers when there are no relevant trade unions. It

[15] *Ibid*. See 88.

[16] *Ibid*. See 81–82.

[17] Ibid, see 83, 90.

further finds that states should take measures to prevent direct agreements with non-unionized workers when they are being used for anti-union purposes.[18]

It can amount to an interference with the ILO regulation if there is an unjustified refusal to recognize the most representative organisations. It can also amount to interference if, to be recognized as a collective bargaining agent, there is a requirement for a high percentage of membership.[19] It is lawful to have legislation that gives preferential or exclusive bargaining rights to a union that has a majority or a high percentage of workers in a bargaining unit. However, if no union meets these conditions or enjoys exclusive rights, minority trade unions should be able to conclude a collective or direct agreement.[20]

According to the ILO, collective agreements are binding and have primacy over individual employment contracts. The only exception from this rule is if the provisions in the individual contracts are more favourable to the workers.[21]

Recommendation No. 163 further details the measures that could be taken to promote collective bargaining.[22]

2.2.3 *The Right for Trade Unions to Draw up their Own Rules*

Legislative provisions that limit the trade unions' freedom to draw up their own rules are only allowed under article 3.2 in Convention No. 87 under two conditions. Firstly, the national legislation should only lay down formal requirements respecting trade unions' constitutions, except when it comes to the need to follow a democratic process and to ensure a right of appeal for the members. Secondly, the trade unions' constitutions and rules should only be subject to verifications of formal requirements by the state.[23]

[18] Ibid, see 96–97.

[19] Ibid, see 92.

[20] Ibid, see 92.

[21] Ibid, see 82.

[22] International Labour Office, *Collective bargaining: A policy guide*, 11.

[23] International Labour Organisation, *Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (Part 1B)*, 82–83.

2.2.4 *The Right to Strike*

The right to strike and other collective action is not explicitly mentioned in the Conventions. The supervising bodies of the ILO have however stated that the right to strike is a fundamental right of workers and their organisations. It has also been affirmed in the ILO case law interpreting Convention No. 87.[24]

There is no clear definition of what a strike is according to the ILO. However, the Committee on Freedom of Association has accepted certain types of strikes as long as they are not typical work stoppages and as long as they are conducted peacefully. Such as occupation of the workplace, go-slow, or work-to-rule strikes.[25]

Strikes that have a purely political purpose do not fall within the scope of the right to strike. The strike can however be an expression of the union's dissatisfaction with a social and economic policy that impacts their members or workers in general. To make a strike with this purpose illegitimate is therefore a violation of the freedom of association. The only exception is in the case of public servants exercising authority in the name of the state or workers in essential services (see more under "workers in the public sector").[26]

There is also the case of sympathy strikes. A sympathy strike is a strike where workers come out in support of another strike. Such strikes do not affect the workers in a direct manner. The ILO considers a general ban on sympathy strikes unlawful and that workers should be able to sympathy strike as long as the initial strike they are supporting is itself lawful.[27]

2.2.5 *Workers in the Public Sector*

Article 9 of Convention No. 87 sets forth that "the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations". For this reason, it does not deny such groups the right to strike. Furthermore, people that carry out essential service in the strict sense may be excluded

[24] Nielsen, *EU Labour Law*, 117 and 160-161.

[25] Gernigigon, Bernard, Odero, Alberto and Guido, Horacio, *ILO principles on the right to strike* (Switzerland: International Labour Organisation, 1998), 12. Available at: https://bit.ly/3vBxybB.

[26] Gernigigon, Odero and Guido, *ILO principles on the right to strike*, 14-15.

[27] Ibid. see 16.

from the right to strike. These services are those when "the interruption of which would endanger the life, personal safety or health of the whole or part of the population".[28]

2.3 The Council of Europe (CoE)

2.3.1 *The European Social Charter*

The European Social Charter (ESC) sets out minimum standards regarding employment law. The ESC is an important tool of interpretation of the ECHR.[29]

2.3.1.1 *The Right to Join and Form Trade Unions*

The right to organise and the right to bargain collectively is protected by articles 5 and 6 of the ESC. The right to organise is manifested in article 5, which follows:

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

2.3.1.2 *The Right to Bargain Collectively*

The right to bargain collectively is manifested in article 6, which follows:

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

[28] Gernigigon, Odero and Guido, *ILO principles on the right to strike*, 17-20.

[29] Allen, Crasnow, Beale, McCann, and Barret, *Employment law and human rights*, 43-44.

(1) To promote joint consultation between workers and employers;

(2) To promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by the means of collective agreements;

(3) To promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:

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

The European Committee of Social Rights (ECSR) has given collective bargaining a broad interpretation.[30]

2.3.1.3 *The Right to Strike*

The ESC explicitly recognises the right to industrial action and the right to strike in article 6.4. The ECSR has however concluded that political strikes are not protected by the ESC as the purpose of article 6 is to protect collective bargaining.[31]

As for sympathy strikes, the ECSR has noted that the right to strike includes the right to sympathy strikes.[32]

2.3.1.4 *Trade Unions' Right in the Public Sector and Essential Workers*

The right to strike also applies to public officials and workers in essential services. The right to strike for public officials, for example, armed forces,

[30] Rocca, Marco, Posting of Workers and Collective Labour Law: There and Back Again: Between Internal Markets and Fundamental Rights, 89.

[31] Council of Europe, Digest of the case law of the European Committee of Social Rights, (European Committee of Social Rights, 2018), 103. Available at: https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80.

[32] Council of Europe, Digest of the case law of the European Committee of Social Rights, 104.

or essential workers can however be restricted if the restriction serves a legitimate purpose. However, a general ban on strikes in essential sectors is not considered to be proportionate. When it comes to public officials the restrictions must be limited to those whose duties and functions are directly related to national security, general interests, etc. An absolute ban on the right to strike for police officers can be in line with article 6.4 as long as there are compelling reasons that justify the ban.[33]

2.3.2 *The European Convention on Human Rights*

2.3.2.1 *Main Principles*

The freedom of assembly and association is protected by article 11 of the European Convention on Human Rights (ECHR) which states:

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

The freedom of association in article 11 sets forth an obligation for the states not to interfere with the activities of the associations. It also consists of a positive obligation to ensure that individuals are not hindered in the exercise of their freedom.[34]

The right can however be restricted according to article 11.2 as long as the restrictions are prescribed by law and are necessary in a democratic society:

> "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."

Trade union freedom is one form or a special aspect of freedom of asso-

[33] Council of Europe, Digest of the case law of the European Committee of Social Rights, 105.

[34] Danelius, Hans, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (Visby: Nordstedts Juridik, 2015), 515-516.

ciation.[35] How far this right goes is however not clear.[36] In *National Union of Belgian Police v. Belgium* the ECtHR laid down the main principles regarding the freedoms of trade unions.[37] According to the court the article safeguards

- The right to form a trade union and to join the trade union of one's choice.[38]
- The right to be heard and "freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible".[39]

The ECtHR has held that states only enjoy a limited margin of appreciation in regards to the limitations in article 10.2.[40] The rules governing the exercise of the right to organise do however fall within States' margin of appreciation.[41] The court's judgement in *Schmidt and Dahlström v. Sweden* follows that article 11 "leaves each state a free choice of the means to be used [to make collective action possible]".[42]

2.3.2.2 *The Right to not Join a Trade Union*

According to the ECtHR case law, article 11 includes a negative right of association.[43] Individuals, therefore, have a right not to join or withdraw from an association. In *Gustafsson v. Sweden* the ECtHR concluded that the State had to take "reasonable and appropriate measures to secure the effective enjoyment of the negative right to freedom of association".[44]

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[35] *Schmidt and Dahlström v. Sweden* (5589/72), 6 February 1976, § 34.

[36] Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna*, 516.

[37] "Factsheet – Trade union rights", European Court of Human Rights, 1, accessed 1 October 2020, last modified December 2018, https://www.echr.coe.int/Documents/FS_Trade_union_ENG.pdf.

[38] *National Union of Belgian Police v. Belgium* (4464/70), 27 October 1975, § 37.

[39] *National Union of Belgian Police v. Belgium* (4464/70), 27 October 1975, § 39.

[40] *Demir and Baykara v. Turkey,* [GC] (34503/97), 12 November 2008, § 119.

[41] "Factsheet – Trade union rights", European Court of Human Rights, 1.

[42] *Schmidt and Dahlström v. Sweden* (5589/72), 6 February 1976, § 36.

[43] *Sigurdur A. Sigurjónsson v. Iceland* (16130/90), 30 June 1993, § 35.

[44] *Gustafsson v. Sweden* (15573/89) [GC], 25 April 1996, § 45.

The ECtHR has also concluded that, regarding closed-shop agreements, there is little support for the maintenance of those.[45] A closed-shop agreement is a collective agreement that stipulates that a particular group of employees can only be or become members of a particular trade union.[46]

2.3.2.3 *The Right to Bargain Collectively*

In *Demir and Baykara v. Turkey* the ECtHR confirmed the fundamental right to engage in collective bargaining and to take collective action to achieve collective bargaining. The case concerned an annulment of a collective agreement that a trade union had entered into following a collective bargaining. The court held that "the right to bargain collectively with the employer have, in principle, become one of the essential elements of the right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11". An interference would thus only be in line with article 11 if it is strictly necessary in a democratic society. [47]

In *Wilson, National Union of Journalists and Others v. the United Kingdom,* the ECtHR recognised that it is up to the member states to make sure that members of trade unions are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employer. In this case, the ECtHR concluded that it amounts to a violation of article 11 if legislation in member states permit employers to use financial incentives to coerce employees to surrender important union rights.[48]

2.3.2.4 *Right to Take Industrial Action*

Article 11 does not explicitly mention the right to industrial action. Nevertheless, the ECtHR has noted on several occasions that the right to industrial action constitutes a part of the right set out under article 11.[49]

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[45] *Sörenssen and Rasmussen v. Denmark* [GC] (52562/99 and 52620/99), 11 January 2006, § 75.

[46] "Closed shop agreements, Quick reference," Oxford Reference, accessed October 2, 2020, last modified December 2018. Available at: https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095618901.

[47] *Demir and Baykara v. Turkey,* [GC] (34503/97), 12 November 2008, § 154

[48] *Wilson, National Union of Journalists v. The United Kingdom* (30668/96, 30671/96, 30678/96), 2 July 2002, § 46 and 48.

[49] Rocca, Marco, Posting of Workers and Collective Labour Law: There and Back Again: Between Internal Markets and Fundamental Rights, 88-89.

In *Wilson, National Union of Journalists and Others v. the United Kingdom* the ECtHR concluded that it must be possible for trade unions that are not recognized by an employer to take steps to persuade the employer to enter into collective bargaining, such as though organizing industrial action.[50]

What industrial action means is however not clearly defined by the ECtHR.[51] According to the judgement in *Schmidt and Dahlström v. Sweden* the right to industrial action includes various actions. The ECtHR has however concluded that the right to strike is one of the most important means by which the state can secure a trade union's freedom to protect its members' interests.[52]

The right to strike is not absolute and can be subject to conditions and restrictions.[53] *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* concerned the right to sympathy strikes under article 11. The ECtHR held that a national general ban prohibiting sympathy strikes did interfere with article 11. In this case however, the ECtHR considered the interference acceptable under article 11.2 as it didn't infringe on the essence of the right at hand and that states were granted a wide margin of appreciation on this issue. The court held that it pursued a legitimate aim; seeking to protect the right of others and stated that "by its nature secondary action may well have a much broader ramifications than primary action. It has the potential to impinge upon the rights of persons not party to the industrial dispute, to cause broad disruption within the economy and to affect the delivery of services to the public.". Furthermore, the ECtHR held that the ban was necessary in a democratic society.[54]

2.3.2.5 *Trade Unions' Right to Draw up their Own Rules and Choose their Members*

The ECtHR has noted that the right to form trade unions consist of a right for the trade unions to draw up their own rules and run their own affairs.[55]

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[50] Wilson, National Union of Journalists v. The United Kingdom (30668/96, 30671/96, 30678/96), 2 July 2002, § 46.

[51] Rocca, Marco, Posting of Workers and Collective Labour Law: There and Back Again: Between Internal Markets and Fundamental Rights, 89.

[52] Schmidt and Dahlström v. Sweden (5589/72), 6 February 1976, § 36.

[53] Enerji yapi-yol sen v. Turkey (68959/01), 21 April 2009, § 32.

[54] National Union of Rail, Maritime and Transport Workers v. the United Kingdom (31045/10), 8 April 2014, § 83-104.

[55] Johansson v. Sweden (13537/88), 7 May 1990, § 1.

Furthermore, trade unions have a right to choose their members; they are free to decide on admission and expulsion from the union. Article 11 does not guarantee individuals a right to join a particular trade union.[56]

2.3.2.6 *Trade Unions' Right in the Public Sector*

Article 11 applies to people working in the public sector. People working in the public sector therefore also have a right to form trade unions and be members of trade unions.[57] The ECtHR has on several occasions found a violation of article 11 when civil servants have been restricted in their rights guaranteed under article 11.[58]

National authorities can however, under certain circumstances, impose lawful restrictions on people working in the public sector. Article 11.2 clearly indicates that certain groups of the public sector can be subject to restrictions regarding article 11.

> "This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

The restrictions on these groups can however not impair the very essence of the right to organise; they must be constructed strictly and must be confined to the exercise of the right.[59] In *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain* the state had imposed a ban on strike for police officers of the Basque country. The ECtHR noted that the specific nature of this group's duties necessitated granting the state a wide margin of appreciation to regulate the trade union's activities. The ECtHR found no violation of article 11 since it considered the ban justified since prevention of disorder and public safety was at stake.[60]

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[56] *Associated society of locomotive engineers and firemen (ASLEF) v. The United Kingdom* (11002/05), 27 February 2007, § 39.

[57] *Demir and Baykara v. Turkey*, [GC] (34503/97), 12 November 2008, § 107.

[58] See for example *Demir and Baykara v. Turkey*, [GC] (34503/97), 12 November 2008, § 127, *Enerji yapi-yol sen v. Turkey* (68959/01), 21 April 2009, § 34, *Dilek and Others v. Turkey* (74611/01, 26876/02, 27628/02), 17 July 2007, § 74 and *Tum Haber Sen and Cinar v. Turkey* (2860/95), 21 February 2006, § 40.

[59] *Demir and Baykara v. Turkey*, [GC] (34503/97), 12 November 2008, § 97.

[60] *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain* (45892/09), 21 April 2015, § 38-39 & 43.

2.4 **EU regulation**

2.4.1 *Sources of law*

The sources of EU labour law are Primary EU law, Secondary EU law, Soft law, CJEU Case law, Scholarly Legal writing, Public international law and National law of the EU Member States.[61]

2.4.1.1 *Primary EU Law*

The primary EU law is the EU's constitutional basis. It consists of the Treaty on the Functioning of the European Union (TFEU) and the Treaty on the European Union (TEU), the Charter of Fundamental Rights of the European Union (CFREU) and other fundamental rights and general principles of EU law.[62] The freedom of assembly is manifested in article 12 of the CFREU, which follows:

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

The right to collective bargaining and action is manifested in article 28 of the CFREU, which follows:

> "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."

2.4.1.2 *Secondary EU Law*

The secondary EU law consist of regulations, directives, decisions, recommendations and opinions. Directives are the most important form of secondary EU law when it comes to EU labour law.[63]

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[61] Nielsen, *EU Labour Law*, 43.

[62] Nielsen, *EU Labour Law*, 54-55.

[63] Nielsen, *EU Labour Law*, 85.

2.4.1.3 *Soft Law*

The main soft law relevant to EU labour law is the Community charter of Fundamental Social Rights of Workers. Soft law is not binding and therefore has less weight than binding law. The charter is however commonly referred to by higher ranking sources of law.[64] It therefore has greater weight than "normal" soft law and serve as an interpretative guide.[65]

Two of the principles which can be found in the charter are the freedom of association and the right to collective bargaining. The freedom of association is manifested in article 11, which follows:

> "Employers and workers of the European Community shall have the right of association in order to constitute professional organizations or trade unions of their choice for the defence of their economic and social interests.
>
> Every employer and every worker shall have the freedom to join or not to join such organizations without any personal or occupational damage being thereby suffered by him."

The right to collective bargaining is manifested in article 12, which follows:

> "Employers or employers' organizations, on the one hand, and workers' organizations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.
>
> The dialogue between the two sides of industry at European level which must be developed, may, if the parties deem it desirable, result in contractual relations in particular at inter-occupational and sectoral level."

Article 13 lays down regarding the right to strike:

> "The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligation arising under national regulations and collective agreements. […]"

[64] See Nielsen, *EU Labour Law*, 70. The charter is referred to in the preamble to the TEU, article 151 TFEU, in the explanatory remarks to the CFREU and by the ECtHR.

[65] Nielsen, *EU Labour Law*, 89 and 120.

2.4.1.4 *Public International Law*

The public international law relevant to the EU labour law can be found in sources from the WTO, the UN, the ILO and the CoE.[66]

2.4.2 *CJEU Case law*

The right to take industrial action is considered a fundamental right according to CJEU judgement in *Viking* and *Laval*.[67] There is no clear definition on what constitutes industrial action under EU law as the regulation regarding this varies in every EU member state.[68] The right to take industrial action has been seen as a national matter, to be exercised according to national regulation but in accordance with international obligations. However, it can be viewed in the light of the ILO definition (see above).[69]

2.5 **Conclusions: What are the Minimum Standards?**

2.5.1 *Right to Form and Join Trade Unions*

The right to form and join trade unions is protected by all the above-mentioned international instruments. The right to join and form trade unions include workers in both the public and private sector. As shown above the right can be restricted, especially when it comes to workers in the public sector and workers in essential sectors. A minimum standard could be said to be a right to join and form trade unions, as well as a right to not be a part of a trade union.

2.5.2 *Collective Bargaining*

Most of the above-mentioned instruments guarantee the right to collective bargaining, such as the ILO, ECtHR and the ESC. As laid down by the ECtHR, states have a positive obligation to make sure that people can en-

[66] Nielsen, *EU Labour Law*, 94.

[67] Nyström, Birgitta. ”Stridsåtgärder - en grundläggande rättighet som kan begränsas av den fria rörligheten”. Juridisk Tidskrift, No. 4 (2007): 867.

[68] Kruse, Anders. ”Fackliga stridsåtgärder och den fria rörligheten i EU”. Europarättsslig tidskrift, No. 1(2009): 187.

[69] Novitz, Tonya,”The EU and the right to strike: Regulation through the back door and its impact on social dialogue”. Kings Law Journal 27, No. 1 (2016): 46 and 49.

joy this freedom. As shown above, the ILO has set particular standards in regard to the right to collective bargaining which could be considered a minimum standard.

2.5.3 *Right for Unions to Draw up their Own Rules*

The right for the trade unions to draw up their own rule is essential to their autonomy and is guaranteed by the above-mentioned instruments. According to the ILO restrictions, restrictions are only allowed if they are formal requirements. Thus, a minimum standard would be to give trade union the right to run their own affairs, only subject to certain formal restrictions.

2.5.4 *Right to Strike and Sympathy Strikes*

As seen above, the right to strike is protected by several international instruments and supervisory and jurisdictional bodies. The scope of the right protected is however different depending on the instrument at hand. The ILO gives a substantial protection to the right to strike as it includes the right to strike for what can be seen as political purposes and also enables sympathy strikes as long as the original strike is legitimate. Just as the ILO, the ECSR considers that sympathy strikes are protected under the right to strike. The ECSR however, has a more restrictive view on political strikes; the strike has to be with the purpose of collective bargaining. As opposed to the ILO and ECSR, the ECtHR has a narrower approach to sympathy strikes; considering sympathy strikes to be a valid limitation on the right to strike.

The right to strike is not protected by EU primary law. The CJEU has however found that the right to take industrial action is considered a fundamental right.

In conclusion, the right to strike is a fundamental part of the freedom of association. The right can however be subject to limitations. A minimum standard on the right to strike could be concluded as allowing political strikes if they are an expression of the union's dissatisfaction with social and economic policy that impact their members or workers in general and allowing sympathy strikes.

2.5.5 *Public Sector and Essential Workers*

As shown above, the right to take industrial action for the public sector and essential workers can be restricted according to most international instruments. The instruments do however allow it to different extents. The ILO finds that it is up to the national authorities to decide on the extent on which the right to strike should be allowed for the public sector. Furthermore, the ILO finds that essential workers in a strict sense can be restricted in their right to strike. The ESC allows for a more limited discretion from the national authorities. According to ESC, a general ban on the public sector and on essential workers would likely be unlawful, except for in very specific cases. In addition, every restriction must be legitimate. According to the ECtHR, it is lawful to impose restrictions on the public sector, in particular when it comes to armed forces, the police or the administration of the state. A general ban on the right to strike for civil servants is however not lawful.

3 NATIONAL REGULATION OF DIFFERENT COUNTRIES

3.1 Sweden

3.1.1 *Characteristics of the Swedish Model*

From an international viewpoint, Sweden has a very high trade union participation. In 2011, the number was 71 % of all workers in the country.[70] In addition, there is very little fragmentation of the trade unions. Besides three well established organisations, LO, TCO and SACO, there are only a small number of other unions and those are relatively small.[71] It is rare to find trade unions competing to organize the workers from the same sector. A reason for the high participation and low fragmentation could be seen as a result of legislation that gives trade unions that have concluded a collective agreement with an employer a privileged treatment. If a trade union has a collective agreement with an employer, the fiduciaries of that trade union are allowed do trade union related work on payed working time. Another characteristic of the Swedish model is that the trade unions have a large influence on work related matter through their collective

[70] Siegeman, Tore and Sjödin, Erik, Arbetsrätten – En översikt (Visby: Nordstedts Juridik, 2013), 21.

[71] Siegeman, Tore and Sjödin, Erik, Arbetsrätten – En översikt (Visby: Nordstedts Juridik, 2013), 21.

agreements.[72]

3.1.2 *The Right to Join and Form a Trade Union*

The right to association is protected by the Swedish constitution. It is also protected by regulation of the co-determination act (Medbestämmandelagen, MBL), which states that workers have a right to be a part of a trade union without being subject to discrimination. The regulation in MBL also protects the negative right of association; a right to not be a part of a trade union.

3.1.3 *The Right for Trade Unions to Draw up their Own Rules and Choose their Members*

There is very little legislation governing the trade unions internal affairs. According to principles of association law, all members need to be treated equally and not be subject to arbitrary treatment. In addition, no one may be subject to discrimination when it comes to membership or participation in a trade union.[73]

3.1.4 *The Right to Collective Bargaining*

The MBL lays down that an employer is obligated to negotiate with a trade union that want to conclude a collective agreement with the employer. It does however not include a right to conclude a collective agreement.[74]

3.1.5 *Industrial Action*

The right to take industrial action is protected by the Swedish constitution (Regeringsformen). Industrial actions are allowed when parties are not bound by a collective agreement. Once parties have entered into a collective agreement, they are obligated to not take industrial action, a so called “peace obligation” (fredsplikt).[75]

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[72] Siegeman, Tore and Sjödin, Erik, Arbetsrätten – En översikt (Visby: Nordstedts Juridik, 2013), 21–22.

[73] Siegeman and Sjödin, Arbetsrätten – En översikt, 64–65.

[74] Ibid, see 73.

[75] Ibid, see 85.

Limitation on the right to take industrial action do not derive from law. However, the MBL lays down a general obligation to negotiate.[76] In addition, national courts have found that it is not lawful to take industrial action for the purpose of pushing aside an already existing collective agreement on the workplace, even if the trade union taking the actions is not bound by a collective agreement with the employer. It is however lawful for a trade union, not bound by a collective agreement with an employer, to take industrial action to get a collective agreement alongside the other agreement already at place.[77]

There is no regulation that say the industrial action need to be proportionate to the damage inflicted. However, the CJEU has seemed to, in the *Laval* judgement, found that proportionality needs to be taken into account when other rights according to the EU law are at stake.[78]

There is no legal definition of a strike in Sweden. The MBL considers strikes and lockouts as stoppages of work undertaken by employees/trade unions and employers/employers' associations. The law also includes blockades, boycotts, overtime bans, go-slows and work to rule. In general, national courts have found that industrial actions must be taken with the purpose of exerting pressure on the other party to a work or labour related dispute. This has however been interpreted broadly and includes political strikes that relates to labour, employment and welfare policies. Strikes can be undertaken by trade unions, employers' associations or individual employers. Wildcat strikes are in general not lawful. However, the requirements for forming a trade union are minimal, thus individual workers could unite to form a trade union in order to be able to strike. [79]

From an international viewpoint the right to take industrial actions in Sweden could be considered far-reaching. In particular, the right to sympathy strike could be considered far-reaching from an international viewpoint. Even the trade unions bound by a collective agreement have a right to sympathy strike. This makes it possible to have a nation vide actions taken.[80]

[76] Iossa, Andrea and EPSU/ETUI, The right to strike in the public sector – Sweden, (European public service union, 2018), 7. Available at: https://bit.ly/3eMXmvC.

[77] Siegeman and Sjödin, Arbetsrätten – En översikt, 86.

[78] Siegeman and Sjödin, Arbetsrätten – En översikt, 86.

[79] Iossa and EPSU/ETUI, The right to strike in the public sector – Sweden, 4-5.

[80] Siegeman and Sjödin, Arbetsrätten – En översikt, 22–23.

3.1.6 *Public Sector and Essential Workers*

The general principle is that industrial action is allowed for the public sector as they fall under the general rules for workers. There are however some restrictions following from law (Lag om offentlig anställning) that limit and restrict the right to strike for the public sector. This includes an obligation for the parties to negotiate in the event of a strike and limitations on permissible forms of industrial actions to strikes, lockouts, overtime bans and hiring blockades. In addition, political strikes are restricted.[81]

Certain categories of workers in the public sector are not allowed to take industrial action. Firstly, public employees whose work compromises the exercise of public power or is unavoidably necessary. Secondly, civil servants. These are defined as high ranking officials in the government offices, workers in the judiciary, workers in the penitentiary structures and other administrative agencies.[82]

Restrictions on the right to strike of essential services are set by sectorial collective agreements.[83]

3.2 **Germany**

3.2.1 *Characteristics of the German Model*

In 2018, 7.8 million workers in Germany were a part of a trade union. The majority of these people are represented by three major trade unions (DGB, DBB and CGB).[84]

Characteristic for the German model is that it has a dual system of interest representations. The trade unions are responsible for collective bargaining while work councils, elected by the employees and independent of the trade unions, represents the workers in their workplace. The majority of the members in the work councils are however also members of trade unions and has influence over the latter. Unlike other European countries, such as the Scandinavian countries, trade unions in Germany

[81] Iossa and EPSU/ETUI, The right to strike in the public sector – Sweden, 3 and 5.

[82] Ibid, See 6.

[83] Iossa and EPSU/ETUI, The right to strike in the public sector – Sweden, 3.

[84] Dribbusch, Heiner and Birke, Peter, Labour and social justice: Trade unions in Germany: Challenges in a time of transition, (Freidrich Ebert Stiftung, 2019), 6. Available at: https://library.fes.de/pdf-files/id/ipa/15399.pdf.

are not involved in payment of unemployment benefits or state pension payments.[85]

Another characteristic of the German model is that the collective agreements are concluded on a sectorial level. Unlike many other European countries, the state is not involved with collective negotiations, except for as a bargaining party when it comes to the public service.[86]

3.2.2 *The Right to Join and Form a Trade Union*

The German constitution (Grundgesetz) protects the freedom of association. This entails a right to join trade unions and a right to not be a part of a trade union.[87]

3.2.3 *The Right to Collective Bargaining*

In Germany, there is no law that guarantees the right to collective bargaining, there is however a principle of collective bargaining autonomy (Tarifautonomie). The right to collective bargaining is considered a guarantee for the exercise of the freedom of association under the German constitution.[88]

3.2.4 *Industrial Action*

The right to strike is considered a part of the principle of collective bargaining autonomy and is considered an element in the freedom of association under the German constitution. The right applies to trade unions, that can demonstrate that they are capable of bargaining collectively. They must thus prove that they have the power to exercise sufficient pressure to conclude a collective agreement. A collective agreement does not entail an absolute peace obligation under German law. It very rarely happens that a collective agreement includes a provision that demands an absolute peace obligation. It is however generally understood that once a collective agreement is concluded, there is a relative peace obligation. [89]

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[85] Ibid, see 6.

[86] Ibid, see 15.

[87] Ibid, see 6.

[88] Buttgen, Nina and Clauwaret, Stefan, The right to strike in the public sector –Germany, (European public service union, 2019), 3-4. Available at: https://bit.ly/30UQyEa.

[89] Buttgen and Clauwaret, The right to strike in the public sector –Germany, 3, 5 and 10.

The right to strike is restricted when it comes to the objectives it pursues. The right to strike is only allowed when it is considered necessary to ensure proper collective bargaining. For this reason, most political strikes are considered unlawful. Wildcat strikes are also illegal, unless a trade union takes over the action.[90]

The ESCR has found that the prohibition on all strikes that are not aimed at achieving a collective agreement is an excessive restriction on the right to strike. Furthermore, it has found that it constitutes an excessive restriction on the right to strike with the requirements that have to be met to by a group of workers to satisfy the conditions for calling a strike.[91]

In Germany, the industrial actions need to be proportionate to the damage inflicted through the actions.[92] The proportionality test entails the following:

- If the industrial action is suitable to enforce the trade unions objectives,
- If it is necessary (if the objective could have been achieved though less far-reaching means, and
- If the action is reasonable (proportionality in a strict sense – if it is considered appropriate when weighing the freedom of activity against the legal positions of the people affected.[93]

Due to the need for proportionality, sympathy strikes have traditionally been considered unlawful. This stance has however changed following from Germanys international obligations. A sympathy strike is not considered a violation of the peace obligation under a collective agreement. [94]

There is no legal definition of a strike in Germany. Collective work stoppages are considered the hallmark of a strike. Warning strikes are subject to the same proportionality test as work stoppages. Occupation of premises is in general not legal. It can however be legal during a short duration, and if it doesn't amount to a blockade that hinders e.g. workers from entering the premises. It is not lawful to use force or threats to block access.

[90] Ibid, see 6.

[91] Ibid, see 17.

[92] Ibid, see 23.

[93] Ibid, see 6.

[94] Ibid.

Rotating strikes are unlawful. It is not entirely clear whether boycotts and flashmobs are lawful.[95]

3.2.5 *Public Sector and Essential Workers*

In principle, all workers are allowed to take industrial actions, including workers in the public sector. There is however a general ban on the right to industrial action for civil servants (whose employment is governed by public law). This is a substantial ban as it includes a large number of public sector workers, such as teachers, postal workers etc. This general ban is in conflict with ILO conventions No 87 and 98 and the ESC and has thus been subject to criticism. Furthermore, in the light of the ECtHR judgement in *Enerji Yapi-Yol Sen v Turkey*, the general ban on the right to strike for civil servants could be called into question. Workers in the public sectors whose employment is based on a labour contract and collective agreements are however not restricted in their right to strike.[96]

When it comes to essential workers, these are in general allowed to take industrial action. It is however necessary that essential services can be provided for even during a strike.[97]

3.3 **Lithuania**

3.3.1 *Characteristics of the Lithuanian Model*

Lithuania has a relatively low level of membership in a trade union. In 2008 it was estimated that the participation rate was 10 % of all workers.[98] The main trade unions are LPSK, LDF and LPS.[99] Even though trade union participation is low, collective bargaining is existent and collective agreements are signed in most businesses with functioning trade unions.[100] The Lithuanian Trade union Confederation (LPSK) finds however, that there are many flaws in the collective bargaining system such as a lack of quality

[95] Ibid, see 7.

[96] Ibid, see 8 and 18.

[97] Ibid, see 9.

[98] Blaziene, Inga, Lithuania: Industrial relations profile, (International Labour organisation), 1. Available at: https://www.ilo.org/dyn/travail/docs/2330/EIRO%20Lithuania.pdf.

[99] Blaziene, Inga, Lithuania: Industrial relations profile, (International Labour organisation), 3. Available at: https://www.ilo.org/dyn/travail/docs/2330/EIRO%20Lithuania.pdf.

[100] Blaziene, Inga, Lithuania: Industrial relations profile, (International Labour organisation), 4. Available at: https://www.ilo.org/dyn/travail/docs/2330/EIRO%20Lithuania.pdf.

collective agreements in the private sector, a need for adequate monitoring of collective agreement implementation, it is close to impossible to establish trade unions in some sectors, a double representation system (workers are represented by trade unions and work councils) weakens the collective bargaining system and a lack of education on trade unionists.[101]

The Lithuanian system distinguishes itself from the German and Swedish system in the sense that no collective bargaining happens at national or sectorial levels and company level is the most important level of collective bargaining. However, as a lot of regulation is set on a national level, the role of national level social dialogue can be considered even more important than that on company level.[102]

3.3.2 *The Right to Join and Form at Trade Union*

The right to form a trade union are protected by the Lithuanian constitution. The right to join trade unions is also protected by law.[103]

3.3.3 *The Right to Collective Bargaining*

According to Lithuanian law trade unions have a right to collective bargaining.[104]

3.3.4 *Industrial Action*

The right to strike is protected by the Lithuanian constitution. It provides for a right to strike with the aim to protect social and economic interests. The right to strike is reserved for trade unions.[105]

In Lithuania, a strike is defined as the suspension of work organised by trade unions or trade union organisations aimed at resolving a collective labour dispute over interests or guaranteeing the enforcement of a

[101] See: https://www.lpsk.lt/en/2019/02/01/collective-bargaining-in-lithuania-current-situation-and-priorities/.

[102] Blaziene, Lithuania: Industrial relations profile, 4.

[103] Dovydeniene, Roma, Trade union responses to globalization in Lithuania, (Geneva: International Institute for Labour Studies, 1999), 23. Available at: https://library.fes.de/pdf-files/gurn/00162.pdf.

[104] Dovydeniene, Trade union responses to globalization in Lithuania, 24.

[105] Mickevica, Natalja and EPSU/ETUI, The right to strike in the public sector – Lithuania, (European public service union, 2018), 3-4. Available at: https://bit.ly/3rXYv7m.

decision adopted during the settlement of such dispute.[106] According to national law, there are two forms of strikes: regular strikes and warning strikes. No specific type of strike is illegal.

The right to strike is subject to restrictions under the Lithuanian labour code (LC).[107] According to LC a strike is unlawful under the following conditions:

- The aims of the strike is not in line with the constitution or other laws;
- The strike is in violation with procedural requirements;
- The strike insists on demands that haven't been declared, political demands or other demands that are not connected to work or interests of employees participating in the strike;
- If it has been declared during the term of validity of a collective agreement with regard to the working conditions regulated in the agreement if these conditions are respected.[108]

According to LC, the parties have an obligation to try to resolve a dispute through alternative means before calling a strike. A written notice to the enterprise or institution is needed before organising a warning strike. A normal strike needs to be declared before taking place.[109]

3.3.5 *Public Sector and Essential Workers*

In general, all workers have a right to strike. There are however limitations when it comes to the public sectors. It is unlawful for ambulance workers, persons working in internal affairs, national defence and state security to strike.[110]

When it comes to essential services, they have a right to strike provided that a minimum level of service can be provided. Essential services are health care, electricity, water, gas, telecommunications, etc.[111]

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[106] Mickevica and EPSU/ETUI, The right to strike in the public sector – Lithuania, 5.

[107] Ibid, see 3-4.

[108] Ibid, see 6.

[109] Ibid, see 9-10.

[110] Mickevica, Natalja and EPSU/ETUI. The right to strike in the public sector – Lithuania. European public service union, 2018. https://www.epsu.org/sites/default/files/article/files/Lithuania%20-%20Right%20to%20strike%20in%20public%20sector.pdf, p. 8.

[111] Mickevica, Natalja and EPSU/ETUI. The right to strike in the public sector – Lithuania. European public service union, 2018. https://www.epsu.org/sites/default/files/article/files/Lithuania%20-%20Right%20to%20strike%20in%20public%20sector.pdf, p. 8.