

The Image of Trade Unions in the European Social Charter

I. Introduction

1. The Structure of the Article

This study provides an examination and assessment of the case law of the European Social Charter of 1961 and the revised European Social Charter of 1996 about the right to organise.¹

This paper is divided into three sections. The first part specifies the structure of this study and gives an overview about the significance of Art. 5 of the Charter as well as about the most important problems emerging from the right to organise. The second section provides a description of the case law under the Charter. This study does not include all aspects of the right to organise but only concentrates on the conditions of forming a trade union, the right to join or not to join a trade union and the representativity. The impact of the case law on the States will also be examined. The limited scope of this work requires us to disregard some other aspects such as trade union activities and the scope *rationae personae*. The examination of these topics would exceed the framework of this article. The second section is intended to focus particularly on the necessary and admissible conditions of trade unions as suggested by the European Committee of Social Rights (hereafter: Committee), on the limits of the negative right to organise and on the representativity criteria. Finally, the third section offers a general evaluation of the case law pointing out its most important tendencies.

2. The Significance of the Right to Organise

The Charter² contains two basic rights dealing with collective labour relations. The two “key provisions”³ are the right to organise (Art. 5) and the right to bargain collectively (Art. 6) which ensure on the one hand the rights of workers’ and employers’ organisa-

¹ The formulation of the right to organise was not amended by the revised Charter therefore the case law has been continuously. Hereafter both the Charter of 1961 and the revised Charter of 1996 will be referred to as “Charter”.

² The text of the European Social Charter, the Revised European Social Charter and other basic texts about the two Charters can be found in: Council of Europe, *European Social Charter: Collected texts*, (4th ed., Strasbourg 2003), or it is also available on the website of the Council of Europe: www.coe.int/T/E/Human_Rights/Esc/

³ Samuel, Lenia, *Fundamental Social Rights - Case law of the European Social Charter*, (2nd ed., Strasbourg, 2002), 103.

tions to be constituted freely and function effectively and on the other hand the right of individuals to take part in collective labour relations. These two rights have the common aim of promoting collective labour relations. Art. 5 and 6 are basic provisions of the Charter and thus belong to the so-called “core” provisions. The importance of these rights is demonstrated by the extensive case law of the Committee.

These two rights are not only significant because they declare the basic principle of the industrial relations, but they are essential in effective implementation of all other rights of the Charter too. Trade unions and their work are important instruments in the realisation of social rights. In this context both collective rights can be seen as supplementary guarantees to the individual employment rights.⁴ Therefore, the Committee suggested that all Contracting Parties should accept Articles 5 and 6 since states which respect them will have an easier task in complying with other provisions of the Charter.⁵

The right to organise laid down in Art. 5 has two functions and hence two aspects. Firstly, it has an individual character as a human right⁶ and secondly, it has a collective character, since the guarantee of this right is an essential condition for the operation of the collective labour relations.⁷ As the Committee stated, the right to organise “is one of the pillars of democracy”.⁸

In the first supervision cycle it was declared that Art. 5 demands the fulfilment of two main obligations of the Member States. The first task is a negative one which requires the absence from the State.⁹ This obligation expects the State not to interfere with fundamental trade union rights and to ensure workers’ freedom to join or not to join a trade union and form an organisation of their own choice.¹⁰ Nevertheless the mere absence of State interference in the right to organise is not adequate to guarantee the exercise of this right. In some cases individuals need positive measures from the

⁴ As the Committee stated: “Not only do they guarantee some of the most fundamental rights, but they also allow other Charter provisions to be effectively guaranteed.” in: Conclusions XIV-1, p. 42 (General Introduction).

⁵ Conclusions XIV-1, p. 42 (General Introduction).

⁶ In the preparatory process of the Charter the right to organise was in the first draft formulated as a subjective right: “Everyone has the right to form trade unions whether local, national or international and to join trade unions of their choice.” in: Council of Europe, *Collected “Travaux Préparatoires”*, Vol. II, (Strasbourg 1955) Doc. 403. p. 146. Later this article was modified to guarantee a more reserved acceptance of the right to organise which imposes obligation only to the member states.

⁷ See in detail: Kahn-Freund, Otto, *Labour Relations and International Standards – Some reflections on the European Social Charter*, [in *Miscellanea*, (Ganshof Van Der Meersch W.J. ed.), Bruxelles/Paris, 1972, 134-142.

⁸ Conclusions VIII, p. 9; About the dichotomous structure of the right to organise as a collective and individual right in the different international agreements see: Hepple, Bob, *Freedom to form and join or not to join trade unions*, [in *Freedom of association*, (Council of Europe ed., 1994, Dordrecht/Boston/London), 161, 166 et seqq.

⁹ The term “States” with large first letter refers to the Member States of the Charter.

¹⁰ “The implementation of the first obligation requires the absence, in the municipal law of each Contracting State of any legislation or regulation or any administrative practice such as to impair the freedom of employers or workers to form or join their respective organisations.” in: Conclusions I, 31 (General Introduction).

side of the State in order to be protected against intervening practices.¹¹ Therefore the second task contains a positive demand. The State has to enact on appropriate legislation and establish all legal instruments in order to guarantee the right to organise in practice and to protect workers' organisation from any interference.¹²

3. The Aim of the Survey

There is a general problem in many law systems in terms of the definition of a trade union. This problem stems from the tension between the requirement of an effective function of trade unions on the one hand and the free foundation of trade unions on the other hand. The right to organise permits trade unions to be freely created without any legal or administrative obstacles. Nevertheless, it should be guaranteed that a trade union acts and represents their members effectively. This is essential since states confer powers to the trade unions who accomplish state tasks, such as creating binding law for the workers. The two requirements, i.e. the free establishment and the effective function, are contradictory.

The right to organise comprises in general a collective right of the association and an individual right of employees. This individual right contains the right to create an organisation, to join and belong to a trade union, refrain from a trade union and to be active in a trade union. The collective right includes the right of trade unions to operate autonomously and effectively – which specifically includes the right to engage in collective bargaining and the right to strike, – to participate in national-level representative bodies and unite nationally and internationally.¹³ Both the collective and the individual aspects of this right have to be guaranteed. Therefore a delicate balance has to be found.

The question arises as to which features a trade union should have to be able to protect the economic and social interests of workers effectively. At the same time the conditions which a trade union has to fulfil may not create an obstacle to constitute a new one. We should bear in mind that the traditions of the states concerned play a crucial role in the regulation of industrial relations and in the acceptance of trade unions.

Another significant question arises in relation to the negative right to organise and the closed shop practises. The meaning of the right not to join a trade union has been one of the most controversial aspects of the right to organise discussed by the Committee. The problem of closed shop clauses stems from the ambiguous features of

¹¹ Cf. Kahn-Freund, Otto, *supra* note 7, 136 et seq.

¹² “By virtue of the second obligation the Contracting State is obliged to take adequate legislative or other measures to guarantee the exercise of the right to organise, and in particular to protect, workers’ organisations from any interference on the part of employers.” in: Conclusions I, p. 31 (General Introduction).

¹³ About the individual and collective aspects of the right to organise in comparative view see: Neal, Alan C., *Rights of Association (Trade Union Freedom) and Collective Bargaining*, [in Neal, Alan C. (ed.): *Fundamental social rights at work in the European Community*] Aldershot, 1999, 101 et seqq.

the right to organise as an individual and collective right. The closed shop clauses can be justified by the collective aspect namely by the interests of trade unions in effective operation. On the other hand, however, the individual rights of workers can only be guaranteed if they can decide freely without any pressure whether they join a trade union or not and if so which one. Therefore closed shop clauses are very controversial.

The study attempts to analyse these questions and describe the Committee's opinion.

II. The Case Law of the Committee

1. To Form a Trade Union

a) Definition of a Trade Union

Art. 5 covertly includes the definition of trade unions.¹⁴ According to this definition the trade union is a local, national or international organisation of workers whose primary aim is the protection of the workers' economic and social interests. Although the Committee had not declared an exact definition of a trade union, the components of this can be found after examining its case law. It is worth noting that Art. 5 intends to promote not only trade unions but all forms of workers' organisations, whose main aim is the protection of workers' interests.

b) Free Constitution of Trade Unions

aa) Definition of Free Constitution

In general, the right to organise includes the requirement that the constitution of trade unions is free from an authorization process. This principle does not prevent the state from laying down some formalities. Such formalities usually aim to guarantee the common function of trade unions. These formalities may, however, not cause an obstacle. This would mean a prohibition or prevention of the establishment of trade unions.¹⁵

Relating to the components necessary to a free foundation of trade unions the Committee stated "that the right to constitute trade unions can be effectively implemented only if the creation itself, the accession to an existing association, its hypothetical affiliation to other organisations and its internal organisation and internal

¹⁴ See in detail: Harris, David & Darcy, John, *The European Social Charter*, New York, 2001, 93.

¹⁵ See the decisions of the Freedom of Association Committee of the Governing Body of the ILO about the requirement of previous authorisation in: International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, (4th ed. Geneva 2006), 57 et seq.

operation are protected by appropriate guarantees.”¹⁶ The first condition is the free creation which has two requirements: firstly, the absence “of any legislation or regulation or any administrative practice such as to impair the freedom of employers or workers to form or join their respective organisations”;¹⁷ and secondly, having adequate administrative and jurisdictional protection against abuse of the power to refuse to register a trade union. These two rules are the essential conditions of the right to organise.¹⁸

The decision-making authority in internal affairs and the free affiliation to other organisations are the preconditions of the free foundation and functioning of trade unions. In addition, trade unions should be created without excessive administrative or other burdens. Thus, under the next subtitles we are going to deal with the free creation and internal operation of trade unions as well as with their admissible administrative barriers.

bb) Conditions of Free Formation

(1) Autonomy of Trade Unions – Organisation and Administration

Trade unions must possess autonomy, i.e. they should organise and administrate their internal affairs without restriction. The State must not unduly interfere with the organisation and administration of trade unions. Any legislation may represent an obstacle for the operation of trade unions and thus an infringement of their autonomy because it could possibly prevent them from exercising their legitimate functions. Autonomy includes the freedom to choose the instruments to assert the trade unions decisions and to decide on the use of its property. The trade unions should establish their own rules without any interference on the part of the authorities.¹⁹

Nevertheless, not all provisions dealing with the internal affairs of trade unions impair the rights provided by Art. 5. Some forms of state intervention in trade union matters comply with the Charter.²⁰ For instance the provision regarding the obligatory secret ballot for the election of union governing bodies does not infringe upon Art. 5.²¹ Although the Committee did not give reasons for this statement, a secret ballot is understandably required, since there exist the demand for a democratic organisation of trade unions.

As the example of the British legislation shows, the interference by law in the exercise of legitimate trade union functions does not conform to Art. 5.²² The provisions that

¹⁶ Complaint No. 11/2000 from the European Council of Police Trade Unions against Portugal, § 28.

¹⁷ Complaint No. 11/2000 from the European Council of Police Trade Unions against Portugal, § 29.

¹⁸ Complaint No. 11/2000 from the European Council of Police Trade Unions against Portugal, § 31.

¹⁹ See Conclusions XIII-3, 109 (United Kingdom).

²⁰ See: Council of Europe, *The right to organise and to bargain collectively*, Social Charter monographs No. 5, (2nd ed., Strasbourg 2001), 18.

²¹ Conclusions, X-1, 68. (United Kingdom).

²² Conclusions XII-1, 115. (United Kingdom).

limit the disciplinary actions, which a trade union might take against its members if they refuse to comply with the democratic decisions of the trade union, interfere with the Charter, since an unjustified incursion into the autonomy of trade unions is created.²³

An important aspect of this autonomy is that trade unions can decide for themselves how to use their property. Therefore, the fact that the legislation prohibited the trade unions to indemnify members or officers in respect of any penalty imposed for an offence was not considered admissible.²⁴ Provisions which limit legitimate activities interfere with constitutions and internal regulations of trade unions and thus impair the freedom to constitute an organisation.²⁵

The right to organise may also be put at risk if the trade union requests that employers make a list of their unionised employees, because this act impairs the confidentiality of union membership.²⁶ In the United Kingdom an employer has the right to receive the number, category and workplace of the employees who are likely to participate in a ballot or an industrial action. The Committee considers this right to be too excessive.²⁷

The right of a trade union to choose its own members and representatives is a significant part of their autonomy.²⁸ It is therefore inadmissible when the provisions limit “the grounds on which a person may be refused admission to or expelled from a trade union to such an extent as to constitute an excessive restriction on the right of a trade union to determine its conditions for membership and goes beyond what is required to secure the individual right to join a trade union.”²⁹ Nevertheless, there is a limitation on the trade union’s right to choose its own members because all Contracting Parties have to legislate in order to prevent the exclusion of individuals on discriminatory grounds. This principle originates from the Preamble of the Charter and from Art. E of the Revised Charter. The State has to prevent the exclusion of foreigners and nationals of other Contracting Parties.³⁰ For this reason the Finnish provision which required shop stewards to be Finnish citizens was against to the Charter.³¹

(2) Affiliation

Art. 5 declares that workers and employers must be able to form local, national or international organisations and join such organisations without any restriction. This

²³ Conclusions XVI-1, Vol. 2, 685. (United Kingdom).

²⁴ Conclusions XII-1, 115. (United Kingdom).

²⁵ Conclusions XII-1, 115. (United Kingdom).

²⁶ Conclusions XIII-3, 109. (United Kingdom).

²⁷ Conclusions XVI-1, Vol. 2, 684. (United Kingdom).

²⁸ Cf. Kahn-Freund, Otto, *supra* note 7, 141 et seq.

²⁹ Conclusions XVI-1 Vol. 2, 685. (United Kingdom).

³⁰ Council of Europe, *supra* note 20, 15.

³¹ Conclusions XV-1, 198 – 199. (Finland).

means that the employers' and workers' organisations may affiliate with national and international organisations of their own choosing.³² The Committee stated that "all trade union organisations should, in principle under Art. 5 of the Charter, be free to decide to which trade union, professional or technical association they wish to belong".³³

cc) Admissible Barriers of Free Foundation

(1) Registration

In many States there are requirements which an organisation has to fulfil in order to be accepted as a trade union or to be allowed to engage in collective bargaining. In many countries a trade union is considered to be a sort of non-profit making association.³⁴ Thus it is often the case that trade unions have to feature in a register for non-profit making associations. Generally, it may be declared that formal requirements and administrative rules, such as the compulsory registration, are compatible with the Charter in case they do not constitute a real obstacle to form a trade union. A significant condition of an admissible registration is that adequate remedies should exist against its refusal. It is important to note that only minimal administrative costs can be justified.³⁵ When registering the demand for an excessively large sum of money is not permitted.³⁶ The registration fee is admissible when it simply covers minimal necessary administrative costs.³⁷

The fact that workers' organisations have to submit their statutes of association for inclusion in an official register does not represent a violation of Art. 5 provided that the institute can not refuse the registration or may only refuse it on the basis of acceptable grounds and there are adequate remedies against the refusal.³⁸ This acts in accordance with the Charter if the organisation has to hand over its constitution containing its most important data, for example headquarters, representative bodies, method of election to executive body provided there are appropriate remedies against the refusal.³⁹

A registration fee, a minimum membership number and a deposit of a sum of money are the typical registration requirements which can cause violations of the Charter.

³² Cf. Kahn-Freund, *supra* note 7, 142. et seq.

³³ Conclusions II, 184. (Cyprus).

³⁴ For instance Conclusions XVIII-1 Vol. 1, 32. (Romania); Conclusions XVI-2 Vol. 1, 404. (Hungary); Conclusions 2004 Vol. 1, 32. (Bulgaria); Conclusions 2006 Vol. 1, 181. (Estonia).

³⁵ "The principle of the compulsory registration of trade unions is not, on the other hand, incompatible with Art. 5, so long as the persons concerned have adequate administrative and jurisdictional protection against abuse of the power to refuse to register a trade union." In: Conclusions II, 184. (Cyprus).

³⁶ Conclusions III, 30. (Introduction).

³⁷ Conclusions IV, 39. (Introduction); Conclusions XV-1 Vol. 2, p. 629 (United Kingdom).

³⁸ Conclusions VIII, 81. (Spain).

³⁹ Conclusions X-2, 68-69. (Spain) and XI-2, 75. (Spain).

The registration is carried out by the court⁴⁰ or by a minister.⁴¹ It is important that the registration procedure should be carried out within strict time limits. In general it may take no more than one month.⁴² Since the registration process is optional for the trade union and the registration is endowed with many advantages, the fulfilment of certain requirements can be demanded. However, this is a question for the representative organisations.⁴³

(2) Minimum Membership Requirements

In several Contracting Parties minimum membership requirements during the formation of a trade union exist. At first the Committee stated that making the right to engage in collective bargaining depending upon a minimum number of members interferes with the principle of the freedom to organise.⁴⁴ Later the Committee made this statement more specific and casually stated “that when the legislation sets a minimum number of members required to form a trade union which may be considered to be manifestly excessive, this could constitute an obstacle to found trade unions and, as such, infringe the freedom of association”.⁴⁵

In Ireland a trade union has to possess a negotiating licence, which permits then to engage in collective bargaining. In order to receive the license the trade union has to have at least 500 members and has to deposit a significant sum of money. The Committee stated that both requirements are in breach of the freedom of forming a trade union.⁴⁶

The Portuguese legislation demanded at least 10% of the total workforce or 2000 workers who intend to constitute a trade union. To form a trade union federation one third of all trade unions for that region or category concerned must associate with one another. These provisions did not comply with Art. 5 as the number of workers demanded was too high.⁴⁷

In the transformed Eastern European countries, there seems to exist the tendency that although legislation set out a minimum number of memberships it is often very low.

⁴⁰ See e.g. Conclusions XVI-2 Vol. 1, 404. (Hungary); Conclusions 2006 Vol. 2, Art. 5 (Romania); Conclusions 2006 Vol. 1, 34 (Albania). The Conclusions 2006 Vol. 2 has not yet officially published, therefore there are no exact page numbers.

⁴¹ In Moldova the Ministry of Justice registers trade unions. See: Conclusions 2006 Vol. 2, Art. 5 (Moldova).

⁴² See e.g.: in Romania 27 days in: Conclusions 2006 Vol. 2, Art. 5 (Romania); in Croatia 30 days Conclusions XVIII-1 Vol. 1, 120. (Croatia); In Albania 60 days, see in: Conclusions 2006 Vol. 1, 34. (Albania).

⁴³ International Labour Office, *supra* note 15, 63.

⁴⁴ Conclusions III, 30. (Introduction).

⁴⁵ Conclusions XIII-5, 172. (Portugal).

⁴⁶ Conclusions III, 31. (Ireland).

⁴⁷ Conclusions XIII-3, 272. (Portugal).

In Bulgaria⁴⁸ and Moldova⁴⁹ three, in Estonia⁵⁰ the figure is five and in Malta⁵¹ seven people can form a trade union. In Poland,⁵² Hungary⁵³ and in Croatia⁵⁴ at least ten people have to unite to form a union and in Romania⁵⁵ fifteen people can establish a trade union. In Albania twenty founding members have to sign the statute of a new trade union.⁵⁶ These membership requirements were found to comply with the Charter.⁵⁷

In some other cases the Committee found that the number of founding members required was too excessive and this is consequently not allowed. The Lithuanian law expects at least 30 founding members or at least three founding members representing one fifth of the employees.⁵⁸ The Committee considered this requirement to be too excessive.⁵⁹ In Latvia “a minimum of 50 members or at least one fourth of the employees of an undertaking, organization, profession or industry is necessary for the establishment of a trade union”.⁶⁰ Such a high number of members required to form a trade union was declared an unreasonable obstacle to the right to organise and is thereby not in conformity with Art. 5 of the Charter.⁶¹

2. The Right to Join or not to Join Trade Unions

a) Joining Trade Unions

The freedom to join a trade union means that the worker may enter into a trade union of his own free will. This right demands that the employer is not allowed to put pressure on the workers to refrain from a trade union. The State is obliged to prohibit such pressure in the workplace.

The Committee explained, on the basis of the situation in the UK, that the legislation should guarantee effective procedures and provisions which prohibit the acts of

⁴⁸ Conclusion 2004 Vol. 1, 32. (Bulgaria).

⁴⁹ Conclusions 2006 Vol. 2, Art. 5 (Moldova).

⁵⁰ Conclusions 2004 Vol. 1, 141. (Estonia).

⁵¹ See Conclusions XVII-1 Vol. 2, 283. (Malta).

⁵² Addendum to Conclusions XV-1, 146. (Poland).

⁵³ Conclusions XVI-2, 404. (Hungary).

⁵⁴ Conclusions XVIII-1 Vol. 1, 120. (Croatia).

⁵⁵ Conclusions 2002, 125. (Romania).

⁵⁶ Conclusions 2006 Vol. 2, 34. (Albania).

⁵⁷ Cf. According to the case law of the ILO the requirement of the minimum number of 30 workers is acceptable in the case of sectoral trade unions, but not at enterprise level. The requirement of this number should be reduced otherwise it would hinder the constitution of trade unions as enterprises. The requirement of 20 members is not too high. A minimum membership requirement of 30 per cent of the workers concerned is too excessive. In: International Labour Office, *supra* note 15, 60. et seq.

⁵⁸ Conclusions 2004 Vol. 2, 340. (Lithuania); Conclusions 2006 Vol. 2 Art. 5 (Lithuania).

⁵⁹ Conclusions 2004 Vol. 2, 340. (Lithuania).

⁶⁰ Conclusions XVII-2, Vol. 2, 473. (Latvia).

⁶¹ Conclusions XVII-2, Vol. 2, 473. (Latvia).

anti-union discrimination. Trade union membership or non-membership must not be influential in the selection of redundancy. The requirements of Art. 5 would not be fulfilled if “an employer awarded preferential remuneration to employees who accepted individual contracts and relinquished clauses agreed through collective bargaining”⁶², because this act obviously intends to persuade employees to relinquish trade union activities and collective bargaining.⁶³

A similar case occurred in Swedish legislation which permitted an employer to agree with his employee and insert a clause in the contract of employment that prohibited him to join a union representing workers subordinate to himself. This case presented an infringement of Art. 5 because the employee did not have the opportunity to join a trade union of his own choice.⁶⁴

In Bulgaria employers in the “underground economy” put pressure on employees to give written promise not to join a trade union”.⁶⁵ Such practices are certainly not in conformity with the Charter. The Committee reiterated that “the Contracting State is obliged to take adequate legislative or other measures to guarantee the exercise of the right to organise, and in particular to protect workers’ organisations from any interference on the part of employers.”⁶⁶

b) The Right not to Join Trade Unions

aa) Dualism of the Right to Organise

The right to organise has dual aspects; this is an individual human right and the basic guarantee of the collective labour relations at the same time. The right to organise has two social functions; firstly, it ensures the freedom of the individual and secondly, it guarantees the effective functioning of the labour relations. From the individual’s point of view the freedom to organise prohibits any compulsion to join a trade union. The legal or practical pressure to join a union may impair the right of the individual not to join a trade union. On the other hand as Kahn-Freund aptly formulated “a certain amount of social compulsion towards organisation may, under certain conditions, be a condition for the effective functioning of collective labour relations”.⁶⁷ It is very difficult to find a delicate balance between the individual and collective components of the right to organise. The attitude towards the union security arrangements depends on the history of trade unions and also on the consideration of the particular state and whether it emphasises the human rights aspect or rather the collective aspect of this

⁶² Conclusions XIII-3, 108. (United Kingdom).

⁶³ Conclusions XIII-3, 108. (United Kingdom).

⁶⁴ Conclusions II, 23. (Sweden).

⁶⁵ Conclusions 2004 Vol. 1, 32. (Bulgaria).

⁶⁶ Conclusions XIII-3, 108. (United Kingdom).

⁶⁷ Kahn-Freund, Otto., *The European Social Charter*, [in Jacobs, Francis G., (ed), *European law and the individual*] Amsterdam/New York/Oxford, 1976, 138.

right. If the legislation of a State accepts that the freedom to organise includes the right not to organise this weakens the functioning of trade unions and so contradicts the initial aim of this right, namely the promotion of collective labour relations.⁶⁸

Therefore, Kahn-Freund suggested that the Committee should be neutral in this question and should not establish a common standard. In his opinion it is a bad policy for the Committee to try to establish common standards in this field where traditions dominate.⁶⁹ As it is described below the Committee did not follow his advice.

The freedom not to join a trade union is a logical consequence of the right to organise which should contain also the freedom to choose among different unions. The right not to join a trade union, i.e. the negative right to organise, is the complementary aspect of the positive right to organise. The right to join a trade union is usually threatened by the employer, whereas the right of individuals not to join a trade union is put at risk by the trade unions. Trade unions try to acquire as many members as possible and intend to guarantee the required benefits from the collective agreements only for their members. The main instrument to retain the advantages for the member is the union security clause, i.e. closed shop practice. The union security clause is the most appropriate means to keep away free riders from the benefits of its members. Free riders are employees who do not want to share the risks and cost of a trade union membership but benefit from the achievements of the trade union.⁷⁰

The Committee was very focused on this right which is shown by the creation of a great deal of case law.⁷¹

bb) The Modification of the Committee's Case Law

(1) The Initial Opinion of the Committee

The appreciation of the negative right to organise has been questionable in the Committee since Art. 5 does not specifically refer to it. The Committee has not acknowledged from the very beginning that Art. 5 also includes the negative right to organise. It stated in the first supervision cycle that "in accordance with the Appendix to the Charter, Art. 5 does not rule on the admissibility of union security clauses or practices".⁷² This

⁶⁸ As Kahn-Freund stated: "In so far as legislation or the judicial interpretation of constitutional provisions reads into the freedom to organise a freedom not to organise it sacrifices on the altar of a (debatable) conception of human rights a part of the function which this freedom is designed to exercise in the promotion of collective labour relations. This is a debate which will continue as long as labour law remains a live issue." Kahn-Freund, *supra* note 7, 138 et seq. On the contrary, human rights are not debatable any more.

⁶⁹ See about this problem in detail Kahn-Freund, *supra* note 67, 138.

⁷⁰ Cf. *supra* note 8, 171. et seqq.

⁷¹ To the development of the case law concerning the negative aspect of the right to organise see: Lenia, *supra* note 3, 112. et seqq.

⁷² Conclusions I, 31. (General Introduction).

opinion was supported by the Appendix to Art. 1 para. 2 which lays down that “this provision shall not be interpreted as prohibiting or authorising any union security clause or practice”. This interpretation should be applied to the whole Charter. The Committee’s opinion was that the security clauses and practices do not interfere with Art. 5.

Under the influence of the European Court of Human Rights, the Committee later changed its initial opinion relating to this right.

(2) The Prohibition of Compulsory Unionism

The Committee considered from the very first supervision cycle, “that any form of compulsory unionism imposed by law must be considered incompatible with the obligation arising under this article of the Charter”.⁷³ The Committee later reiterated its view stating that any form of compulsory unionism was to become prohibited.⁷⁴ One can conclude that from the very beginning the Committee was of the opinion that the obvious compulsion to join a union impairs the right to organise, but the various forms of impetus to join a trade union such as the security clauses and closed shop practices are admissible.

(3) A Shift of Opinion

Subsequently this opinion was changed, mainly on the basis of the judgement of the European Court of Human Rights in the case of *Young, James and Webster*. In the VIIth supervision cycle the Committee stated: “In accordance with the statement of the European Court of Human Rights (...) concerning Art. 11 of the Convention on Human Rights, it should be underlined that also as regards Art. 5 of the Charter, to interpret this provision as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee”.⁷⁵ It was later confirmed that Article 5 guarantees both the negative aspect and the positive aspect of the right to organise and therefore no one should be compelled to join a trade union or a specific trade union.⁷⁶ In addition, it was maintained several times that closed shops must not be authorised or tolerated in practice including pre- and post entry closed shops.⁷⁷

Furthermore the Committee changed its opinion concerning the Appendix to the Charter. “While conceding that the Appendix to the Charter in respect of Article 1,

⁷³ Conclusions I, 31. (General Introduction).

⁷⁴ “The Committee again observes that any form of compulsion on a worker to belong to a trade union violates the right to freedom of association.” Conclusions XVI-1 Vol. 1, 346. (Ireland).

⁷⁵ Conclusions VII, 33. (United Kingdom).

⁷⁶ Conclusions XIII-1, 26. (General Introduction).

⁷⁷ See also Professor Zanetti’s dissenting opinion in Conclusions VII, 113 – 115 and *Harris & Darcy*, supra note 14, 95.

paragraph 2 stipulates that this provision ``shall not be interpreted as prohibiting or authorising any union security clause or practice``, the Committee considers, in view of the clear wording of Article 5, that no Contracting Party can fail to provide legal remedies or sanctions for practices which unduly obstruct the freedom to form or join trade union organisations, for otherwise the scope of the aforementioned provision of the Appendix would be excessively widened and situations incompatible with the fundamental freedom secured by Article 5 would be considered lawful.”⁷⁸

cc) Forms of Pressure to Join a Union

(1) Different Stages

It is evident that there are several stages between the compulsory unionism and other forms of pressure to join a certain union. Whilst compulsory unionism obviously impairs the right to organise, other forms of pressure should be examined and evaluated individually as to whether they should be permitted. This usually depends on whether the prerogatives of the unionised workers or the disadvantages of the non-unionised workers are weighty enough that the situation must be considered a practical compulsion to join a trade union.

Compulsory unionism only existed in some Contracting Parties. For example, in Iceland a taxi driver had to join a particular trade union to receive an operating licence. The Committee stated that this situation impairs the freedom of association.⁷⁹

The typical case of pressure to join trade unions is the closed shop practice and the States have to take appropriate measures to prevent this. It brings about another sort of pressure if non-members also have to pay fees to trade unions.

(2) A Lack of Legislation

The Committee stated that a lack of legislation concerning the right not to be a member of a trade union interferes with Art. 5 because it offers the trade unions the possibility to put pressure on the employees to join them. The absence of adequate protection in national law against any sort of pressure to become or remain a member of a trade union does not comply with the Charter. This missing requirement refers to either the lack of appropriate statutes or case law validating practices infringing the right to organise.⁸⁰

A similar situation appeared in Sweden where the Committee noted that there were “no legal safeguards for protecting the negative freedom of association and there-

⁷⁸ Conclusions VIII, 77. (General Introduction).

⁷⁹ Conclusions XII-1, 113. (Iceland).

⁸⁰ Conclusions XI-1, 78. (Iceland).

fore unorganised workers are afforded no protection against pressure to join a trade union in order to obtain employment (pre-entry closed shop).”⁸¹

(3) Closed Shop Clauses

Closed shop clauses exist traditionally in certain Northern and Western European states (e. g. Sweden, United Kingdom, Iceland, Denmark and The Netherlands) in different forms. Regarding the existence of closed shop clauses in collective agreements, the Committee generally states that “legislation (or lack thereof) which allows for such practices as stand in contradiction with the very substance of the freedom to organise protected by Article 5 of the Charter cannot be held to ensure the effective application of the principle enshrined in Article 5”.⁸²

It was noted that a Contracting Party infringes on Art. 5 if its legislation permits closed shop agreements or if this instrument exists in practice.⁸³ The State has to protect its workers against the existence of such practices. The Committee emphasised that a system of closed shop clauses constitutes a limitation of the right to organise. The Contracting Party has to make the appropriate provisions to ensure the right not to join a trade union and to prohibit closed shop agreements or other similar clauses. Furthermore, the State has to prevent such clauses from existing in practice.

This principle can be illustrated by a French case. De jure the situation was correct in France since closed shop clauses were sanctioned with criminal sanctions, but de facto pre-closed shop practices have existed in the book and dock work sectors and a certain trade union had the monopoly of recruitment.⁸⁴ This practice has interfered with the right to organise.

Art. 5 of the Charter is breached if collective agreements contain closed shop clauses, such as an agreement covering printing and associated trades in the Netherlands. The Committee considered closed shop clauses or any other similar arrangement, which dominantly influence the workers to become or remain a member of a trade union, to be interfering with Art. 5.⁸⁵

The conclusions also stated that the legislation, which grants only trade union members the right to unemployment benefit, conflicts with Article 5 since “depriving a worker of his right to economic protection in the event of unemployment represents

⁸¹ Conclusions XIII-1, 135. (Sweden).

⁸² Conclusions XI-1, 79. (Iceland).

⁸³ Contrary to the Committee’s opinion the case law of the ILO considers that closed shop clauses allowed by law are admissible and only clauses imposed by law do not comply with the freedom of association. See: International Labour Office, *supra* note 15, 76. et seq.

⁸⁴ Conclusions XIII-1, 131. et seq.; Conclusions XV-1, Vol. 1. 241.; Conclusions 2002, 30.; Conclusions 2006 Vol. 1, 299. (All France).

⁸⁵ Conclusions XVI-1, Vol. 2, 441. (Netherlands).

an inadmissible measure to exert pressure on him/her to become or remain a member of a trade union”.⁸⁶

The Committee found that the situation in Denmark was in violation of the right to join a trade union because of the provision which “authorises the dismissal of a worker who refuses to join a trade union or to join a particular trade union if, at the time of his engagement, he knew that his employment was conditional on membership of such a trade union. It also authorises the dismissal of a worker who refused to continue as a member of a trade union after being informed subsequent to his engagement that membership was a condition for continued employment”.⁸⁷

Lithuanian law contains a provision which in certain cases prohibits employers to dismiss trade union members without the prior permission of the union’s committee, to which the employee concerned belongs. The Committee considers this privilege of unionised workers as constituting a form of pressure which could undermine the freedom not to join a trade union.⁸⁸

In addition, a collective complaint is dealing with the right not to join a trade union, namely complaint No. 12/2002. This complaint was lodged by the Confederation of Swedish Enterprise, which alleged that in Sweden the right not to join a trade union is violated in practice since pre-entry closed shop clauses continue to exist in collective agreements.⁸⁹ It should be mentioned that the Swedish law did not contain explicit statutory protection of the right not to join a trade union.

The pre-entry closed shop clauses are provisions in the collective agreements of the Swedish Building Workers’ Trade Union (SBWU) which ensure that the employer will give priority to trade union members when recruiting employees. The Swedish law did not prohibit pre-entry closed shop clauses and the Swedish Labour Court has found such clauses to be admissible. It is clear from the wording of the Committee that it is the obligation of the State to guarantee the implementation of the accepted rights, even if it is regulated by collective agreements. Moreover, the Committee explained the very essence of the right not to join a trade union as follows: “The freedom guaranteed by Article 5 of the Charter implies that the exercise of a worker’s right to join a trade union is the result of a choice and that, consequently, it is not to be decided by the worker under the influence of constraints that rule out the exercise of this freedom”.⁹⁰ The clauses in the collective agreements which influence the workers to become members of a certain union are contrary to Article 5. They limit work-

⁸⁶ Conclusions XI-1, 78. (Iceland).

⁸⁷ Conclusions XII-1, 111. (Denmark).

⁸⁸ Conclusions 2004 Vol. 2, 341. (Lithuania); Conclusions 2006 Vol. 2 Art. 5 (Lithuania).

⁸⁹ Complaint No. 12/2002, from the Confederation of Swedish Enterprise against (Sweden), decision on the merits, 3.

⁹⁰ Complaint No. 12/2002, from the Confederation of Swedish Enterprise against Sweden, decision on the merits, 7.

ers' freedom to choose whether or not to join a trade union or set up separate organisations of this type.⁹¹

The Council of Europe's Committee of Ministers of the addressed a resolution to Sweden in which it demanded the abolition of pre-closed shop clauses.⁹² In response to this resolution, the Swedish government made efforts to end all trade union closed shop agreements. They were, however, regulated in collective agreements for many decades and the legislation has traditionally limited the impact on these agreements. Therefore the government has set the target to abolish closed shop clauses and this tendency has been implemented but closed shop clauses still exist.⁹³

(4) The Obligation of Free Riders to Pay a Fee

In some states, such as Iceland or Spain, trade unions are permitted to demand contributions from all workers employed in the company, even from the non-members, for the benefit which the trade union obtained for all workers through collective bargaining. This clause is called the "agency shop" clause.⁹⁴ Even when non-unionised workers are obliged to pay a fee to the trade union, this raises questions about the violation of the negative right to organise. Paying a fee is usually a significant disadvantage for trade union members. If non-member workers are obliged to accept these disadvantages the question arises as to why they do not become members of the trade union simply to enjoy all advantages of this position. Such obligations can therefore adversely affect the negative right to organise.

In complaint No. 12/2002 the Committee examined the Swedish situation where non-unionised workers are forced to accept compulsory deductions from their wages as a consequence of directly transferring to a trade union. These deductions are wage monitoring fees. Some collective agreements authorise a trade union to check that the wages paid to workers are correct. For this monitoring activity the trade union receives a certain percentage of each worker's wage which is deducted by the employer from the wages of both the unionised and the non-unionised workers. The Swedish Labour Court found this system of fees, which imposes payment even on non-unionised workers, lawful. The employers' organisation mainly criticised that non-unionised workers are compelled to contribute to the general activities of a trade union. The Government said that the monitoring fee is not a contribution to the general union activities because the business activities are strictly separated from the non-profit activities. The Committee alleged "that the payment of a fee to the trade union for financing its activity of wage monitoring cannot be regarded in itself as unjustified. It also believes that

⁹¹ Complaint No. 12/2002, from the Confederation of Swedish Enterprise against Sweden, decision on the merits, 7.

⁹² Resolution ResChS(2003)1. Adopted by the Committee of Ministers on 24 September 2003 at the 853rd meeting of the Ministers' Deputies. See in: www.coe.int under Committee of Ministers.

⁹³ See in detail: Conclusions 2006 Vol. 2, Art. 5 (Sweden) and the Resolution ResChS(2003)1.

⁹⁴ See: Neal, Alan C, *supra* note 13, 103.

it cannot be regarded as an interference with the freedom a worker has to join a trade union, as the payment of the fee does not automatically lead to membership of the SBWU and in addition the fee is not required from workers who are members of trade unions other than SBWU. However, the Committee believes that doubts exist regarding the actual use of the fees and that, “in the present case, if they were to finance activities other than wage monitoring, these fees would, (...) be deducted, at least for a part, in violation of Article 5”.⁹⁵ Finally, the Committee stated that at the moment it does not have enough information to verify the use of the fees and to assess as to what extent the fees are proportional to the costs of the service carried out. These facts are decisive factors in judging whether there is a violation of Art. 5.

The Committee examined a similar situation in Romania. The Committee noted at first that the compulsory fee of non-unionised workers paid to a trade union, which had negotiated the applicable collective agreement, is not in conformity with Art. 5, “even though such agreements applied by law to all workers independently of whether or not they were members of a trade union”.⁹⁶ After re-examining the situation the Committee changed its view completely. “It notes firstly that the contribution helps to finance an activity that benefits all employees: negotiating collective agreements. Secondly, (...) the contribution is not obligatory and is not earmarked for a trade union. Finally there is no statutory provision for automatic affiliation to a trade union. The Committee therefore considers that the payment of this sum cannot in itself be regarded as an infringement of employees’ right to join or not to join a trade union.”⁹⁷

3. Representativity

a) Definition

At first the term “representativity” appeared at international level in the Peace Treaty of Versailles in Art. 389. Abs. 3 and in the ILO Constitution.⁹⁸ This term is also used by the law of some Member States, but other States, such as Germany, does not apply this notion.

A difference has to be made between representative and most representative trade unions. Representative trade unions are usually entitled to engage in collective bargaining and conclude a collective agreement. Contrary to the representative trade union organisations without representativity are either not qualified as a trade union or they only have certain rights, including representing their members before the court.

⁹⁵ Complaint No. 12/2002 from the Confederation of Swedish Enterprise against Sweden, decision on the merits, 9.

⁹⁶ Conclusions 2004 Vol. 2, 454. (Romania).

⁹⁷ Conclusions 2004 Vol. 2, 454. (Romania).

⁹⁸ See: Brisch, Ulrich: *Die Rechtsstellung der deutschen Gewerkschaften*, Göttingen, Schwartz, 1951, 69 f.

Most representative organisations hold a central position within the national and international sector. At national level the most representative trade unions have a consultative role. At international level only the most representative trade unions can represent the employees.

In some states there is no clear difference between representative and most representative organisations because affiliations of the most representative organisations are entitled to engage in collective bargaining.

In most states it is common to differentiate between trade unions with and without representativity. Usually only organisations which possess representativity are entitled to have certain rights like engaging in collective bargaining. The reason for such a distinction is that only organisations should participate in the regulation and protection of the workers' social interests, which can demonstrate their particular effectiveness. Without this effectiveness and appropriate social power it can not be ensured that a trade union would be able to promote and protect the social interests of the workers and thus the trade union would not be qualified as a representative trade union.

The other objective of the representativity is that the countries want to avoid or resolve the problem which the multiplicity of trade unions can cause. The aim of distinguishing between trade unions is to prevent a splitting up of these societies. This could adversely influence the effective function of trade unions. The state intends to avoid a multiplicity or fragmentation of trade unions and to strengthen the existing trade unions through the unification of trade unions. Nevertheless the state may not intervene by means of a legislation in the forming or operating of trade unions.⁹⁹ The principle of representativity is to recognise certain trade unions which represent the largest number of employees in a particular branch or industry or otherwise possess the biggest social power. Representative organisations have to fulfil certain criteria which vary from country to country. The most common requirements are minimum size, certain assets or trade union fees, independence, election results, the experiences and the length of the existence of the trade union as well as its actual activities.¹⁰⁰

In most of the legal systems there is a difference between the rights, which are granted to all trade unions, and those trade unions, which have additional rights. The representative trade unions are assigned to exclusive or preferential rights in the field of the regulation of social interests of employees.¹⁰¹

⁹⁹ Cf. International Labour Office, *supra* note 15, 67.

¹⁰⁰ See for example: Krieger, Gabriel: *Das französische Tarifvertragsrecht*, Heidelberg, Decker&Müller, 1991, 43 ff.

¹⁰¹ Cf. Bartolomei de la Cruz, Héctor – von Potobsky, Geraldo – Swepston, Lee: *The International Labor Organisation – The International Standards System and Basic Human Rights*, Oxford, Oxford University Press, 1996, 188.

b) The disadvantage of representativity

The status of representativity and the corresponding rights contribute to the success of representative trade unions. Lots of privileges are attached to the official recognition of a representative trade union and this consequently strengthens the power and position of trade unions.¹⁰² Accordingly the status of representativity can easily give rise to the practical monopoly of these trade unions and their affiliates. As a consequence it can be impossible for smaller trade unions to reach this status. Minority unions do not have the opportunity to fulfil any traditional trade union functions and thus they cannot acquire new members. Hence we can identify this as a self-preserving system. The monopoly situation of the largest trade unions means that the employees do not really have the opportunity to choose between trade unions.¹⁰³ The distinction between trade unions and most representative trade unions may give rise to two problems. It can adversely affect the individual freedom of a worker to join an organisation and the prohibition of discrimination between trade unions.¹⁰⁴ Granting privileges to certain trade unions can, however, affect the freedom of free choice an employee has when choosing a trade union. The favoured trade unions can attract new members much more effectively than other trade unions, which lack such exclusive rights.¹⁰⁵ Such a practise does not comply with Art. 5.

Therefore it should be guaranteed that minority organisations also exist in order to give an alternative to the representative trade unions. Trade unions without representativity should have the opportunity to require the representative status. It is not permitted to deprive such trade unions from all rights, since they would otherwise no longer be trade unions and would not have the chance to become representative.¹⁰⁶

When the government grants certain advantages to particular organisation, this can have the indirect consequence of intervening in the right of workers to freely choose an organisation to which they want to belong. The preference of certain trade unions has an advertising effect on the workers, inspiring them to join the organisation which has the most rights, even if they would rather join another trade union due to its occupation, religion or some other reasons.¹⁰⁷

¹⁰² Engels, Chris: *The European Social Charter: Freedom of Association and Free Collective Bargaining. European and Belgian Implementation*, [in Blainpain, Roger, (ed.): *The Council of Europe and the social challenges of the XXIst century*, The Hague/London/Boston, Kluwer, 2001, 169, 205.

¹⁰³ So for instance in Belgium, see: Engels, Chris, *supra* note 102, 169, 208, 227.

¹⁰⁴ Neal, Alan, *supra* note 13, 104. et seq.

¹⁰⁵ See Bartolomei et al., *supra* note 101, 188.

¹⁰⁶ See id. 188 et seq.

¹⁰⁷ Cf. International Labour Office, *supra* note 15, 71.

The simple distinction between representative and other trade unions is generally admissible. A distinction, however, should not mean that trade unions, which do not belong to the representatives are deprived of the essential means for defending the interests of their members. A very controversial question is, however, which rights a minority trade union should have.¹⁰⁸

To conclude, it is theoretically possible to distinguish between trade unions and to only grant exclusive rights for certain trade unions, as long as these privileges do not include all typical trade union rights and that the representativity criteria are pre-established, precise and objective in order to prevent any partiality or abuse.¹⁰⁹

c) *The Case Law of the Committee*

aa) General Remarks

The Committee did not use the term of representativity in the early supervision cycles but in the recent cycles this notion has grown in importance. It was stated that the representativity does not constitute a violation of Art. 5 if a trade union has to fulfil some representativity criteria in order to be able to engage in collective bargaining.¹¹⁰ The Committee was of the opinion “that in order to render the participation of trade union in various procedures of consultation and collective bargaining efficacious, it is open to States parties to require them to meet an obligation of representativity subject to certain general conditions”.¹¹¹ The declared goal of the requirements of representativity is to ensure that trade unions can effectively take part in collective bargaining.

The Committee decided in the fourteenth supervision cycle to pay more attention to the issue of representativity and thus asked questioned the member states as to whether a system of representativity exists and which privileges the representative trade unions have.¹¹²

The case law of the Committee can be divided into three main parts.¹¹³ The first question is, which criteria an organisation has to meet to be representative; the second is which prerogatives the representative bodies have; and the third is, who judges and in which procedure on the refusal or acceptance of the representativity of the bodies.

¹⁰⁸ About the rights of minority unions see: International Labour Office, *supra* note 15, 73, 194 et seq.

¹⁰⁹ This is also the opinion of the Committee of Experts of the ILO. See: International Labour Office, *supra* note 15, 73 et seq. and Bartolomei et al. *supra* note 101, 189.

¹¹⁰ See Conclusions VI, 29. (France).

¹¹¹ Complaints No. 23/2003 from Syndicat occitan de l'éducation against France, decision on the merits, § 26.

¹¹² Conclusions XIV-1, 43. et seqq. (General introduction).

¹¹³ See: Conclusions 2004 Vol. 1, 143. (Estonia). “The Committee wishes to know what criteria for determining representativity emerged in practice, what prerogatives ensue from having the status of representative and who decides on representativeness.”

bb) Criteria of Representativity

(1) The Absolute Limit

The main question is which representativity requirements are excessive and which are still admissible. The Committee emphasised that any requirement of representativity must not cause, directly or indirectly, any obstacles for the formation of trade unions.¹¹⁴ The conditions of representativity may not impede the formation of a trade union.

(2) The Points of View of Examination

The Committee has elaborated on some criteria in order to examine the admissibility of the representativity requirements. The Committee examines “whether the criteria of representativity are prescribed by the law, are objective and reasonable and subject to judicial review”.¹¹⁵ At first the conditions should be laid down by the law; the conditions should be determined by legislation or by case law and should be clear as well as available for all to see. If the criteria are not laid down in the legislation then the state has to prove that such criteria are part of established case-law.¹¹⁶ Secondly, they must be objective and predictable. The criterion of objectivity does not allow room for subjective aspects. Thirdly, the representativity criteria should be reasonable, i.e. justified and rational. Fourthly, the requirements should be subject to judicial review, which permits the opportunity of remedy.¹¹⁷

With regards to these aspects only one, namely the idea of reasonableness, deals with the nature of the representativity criteria. However, the meaning behind the term “reasonable” has not been explained by the Committee.

There are very different conditions of the representativity within the Contracting Parties. It is difficult to make general statements about which conditions are compatible with the Charter.

There are some states in which representativity criteria do not exist, like Lithuania,¹¹⁸ Portugal¹¹⁹ or Moldova.¹²⁰ This means that all trade unions have the same rights from the moment they are established. Such a scenario also conforms with the Charter.¹²¹

¹¹⁴ Complaints No. 23/2003 from Syndicat occitan de l'éducation against France, decision on the merits, § 26.

¹¹⁵ Complaints No. 23/2003 from Syndicat occitan de l'éducation against France, decision on the merits, § 26.

¹¹⁶ Conclusions XVIII-1 Vol. 1, 69. (Belgium).

¹¹⁷ See also: Conclusions XVIII-1 Vol. 2, 466. (Luxembourg).

¹¹⁸ Conclusions 2004 Vol. 2, 342. (Lithuania).

¹¹⁹ Conclusions 2006 Vol. 2, Art. 5 (Portugal).

¹²⁰ Conclusions 2006 Vol. 2, Art. 5 (Moldova).

¹²¹ Conclusions 2004 Vol. 2, 342. (Lithuania).

In the States there are various criteria of representativity at national, branch and enterprise level. In the course of the following chapter, some requirements, which were found admissible, will be described in order to illustrate the different provisions and the possible permissible representativity requirements.

(3) The Differences between the Western and Eastern European Countries

With regard to the representativity criteria, one can also find a clear distinction between the Western European countries and the new Eastern European democracies.

In Western European countries there exist ancient traditions that define which trade unions are representative. Most of the trade unions have had an organic development and have existed for several decades. The rules identifying representative trade unions have been developed gradually and are partly stated by case law. France and Germany are the best examples proving this tendency.

In French law the conditions of representativity, as stated in the Labour Code, include the number of members, the union's independence, subscriptions, level and length of experience and patriotic attitude during the occupation.¹²² In reality, qualifying a trade union as a representative one is partly different from the regulation. Initially, there exist five trade unions which were declared representative in an order in 1966 and their representativity is no longer questionable. These five trade unions are the main recipients of state funding.¹²³ Another anomaly is that the jurisdiction does not only pass judgement according to the above listed criteria. Even if a legal requirement is missing, the trade union can still be declared representative if other factors, such as the real influence of the trade union, compensate for the lacking criterion. The French courts are even allowed to assess the representativity of trade unions under certain conditions, for example their influence, and this is not listed in the Labour Code.¹²⁴ It emerged from the last supervision cycle that the court can declare a union representative if its independence and influence has been proved. Unions have to show that they are genuinely active and have enough resources to engage in independent activities.¹²⁵ The Committee believed this situation complied with the Charter. In France the real activity and influence of trade unions are decisive and not a statistical number.

A similar situation exists in Germany where by the jurisdiction has elaborated certain requirements which a trade union has to fulfil in order to be declared represen-

¹²² Conclusions 2006 Vol. 1, 301. (France).

¹²³ See: Conclusions 2002. 32. (France).

¹²⁴ Conclusions 2004 Vol. 1, 214. (France).

¹²⁵ Conclusions 2006 Vol. 1, 300. (France).

tative. These criteria include the independence of the employees, state, church, parties and other organisations, democratic organisation, sufficient power and assertiveness, a minimum size of membership, the ability and willingness to call a strike, willingness to conclude collective agreements and the acceptance of the law about collective bargaining, dispute resolution as well as strike.¹²⁶

On the contrary, most Eastern European countries have not had a similar organic development due to obvious historical reasons and thereby do not have any tradition of recognising trade unions. These countries have therefore an exaggerated claim in establishing clear and easily identifiable requirements for representativity.

(4) The Relevant Criteria at Different Levels

A difference can be made between the representativity at enterprise and at national level. This difference can also be noticed in the wording of case law, since representative trade unions at national level are referred to as the most representative organisations, trade unions with national representative status or nationally representative trade unions.¹²⁷ Some states also recognise the representativity at branch level.¹²⁸

(i) At National Level

In the Western European countries certain criteria, which cannot be expressed mere by numbers, play a more important role than they do in the Eastern European countries. So the real influence and bargaining power of trade unions is of decisive importance for their representativeness in France and Germany. Other features, such as independence and length of experience, are also of significance.

Contrary to the German or British situation the written law in the Eastern European countries does regulate the exact conditions which a trade union has to fulfil to be nationally representative. These conditions refer especially to the total number of members of the trade union, the membership in a certain sector, the number of

¹²⁶ See in detail: Löwisch, Manfred – Rieble, Volker, *Tarifvertragsgesetz*, 2. Auflage, München, Beck, 2004, 319 ff.

¹²⁷ Conclusions XVIII-1 Vol. 2, 465. (Luxembourg).

¹²⁸ In Romania representative trade unions at branch level must be federations as provided for by law, must have patrimonial and organisational independence and must represent at least 7 % of employees in that branch; See: Conclusions 2002, 128. (Romania).

sectors, branches or occupations, in which they conclude collective agreements, the regions in which they are active and the number of affiliated organisations.¹²⁹

(ii) At Enterprise Level

At enterprise level there are big differences between the Contracting Parties. While in some States it is not really acceptable to conclude collective agreements at enterprise level, for example in Germany, whereas in other countries this practise is usual.

Some states, particularly in Eastern Europe associate the representativity of trade union at enterprise level with a certain percentage of the workforce. In Romania a trade union must represent at least 50 % of the employees in a firm or be part of a federation that fulfils the representativity criteria.¹³⁰

The Slovenian legislation is exemplary demanding “the democratic character of the organisation, at least six months’ existence, independence from state bodies and employers, own funding and sufficient membership to satisfy the quantitative thresholds laid down in the legislation”.¹³¹ Besides, a trade union has to possess a threshold of 15 % of the relevant workforce or be an affiliation of a national representative organisation. These conditions do not interfere with the Charter.

Some Western European countries also define certain thresholds. For instance, Italian trade unions must represent at least 5 % of the workforce in the department or area concerned.¹³²

¹²⁹ See e.g. In Romania organisations “must have patrimonial and organisational independence; must comprise trade unions from at least half of the total number of counties including the capital; must comprise trade unions from at least 25 % of economic branches; their member unions must represent at least 5 % of all employees in the economy;” In: Conclusions 2002, 128. (Romania). In Bulgaria the nationally representative trade unions have at least 50.000 members, at least 50 affiliated organisations with not less than 5 members each in more than half of the industries in the national classification of economic activities, local bodies in more than half of the municipalities in the country and a national managing body as well as legal personality. In: Conclusions 2004, Vol. 1, 35. (Bulgaria). In Poland they must have more than 300.000 members and operate in units of the national economy whose principal activities cover more than half of the sections of the classification of economic activity. In: Conclusions XVIII-1 Vol. 2, 632. et seq. (Poland). In Croatia the most representative trade unions must possess 15.000 members, association of five trade unions operating at national level, be active in several counties and party to at least three collective agreements for different sectors of economic activity at national level. In: Conclusions XVIII-1 Vol. 1, 122. (Croatia). In Albania are the following criteria: number of members, number of collective agreements concluded and the number of employees covered by these agreements, number of branches, occupations and/or geographical organisations, ability to become involved in negotiating collective agreements and to settle disputes through mediation and membership in international organisations. In: Conclusions 2006, Vol. 1, 36. (Albania). Cf. also the Hungarian situation.

¹³⁰ Conclusions 2002, 128. (Romania).

¹³¹ Conclusions 2004, Vol. 2, 511. (Slovenia).

¹³² Conclusions 2002, 80. (Italy).

cc) The Prerogatives of Representative Bodies and their Status

Representative trade unions enjoy specific privileges when compared to organisations without this status. A difference has to be made between the representativity at national and enterprise level. Representativity at national level usually means that the trade union may participate in several public bodies whether consultative, judicial or administrative and may, if required, suggest that a collective agreement should be declared generally binding for a whole branch.¹³³ At national level, it is usually only the representative trade unions and employers' organisations which may participate in the social and employment consultation process with the official consultative bodies.¹³⁴ In some States only the representative organisations receive financial support from the State.

For example, in Bulgaria only organisations which have been accepted as representative may be involved in the national, industry-wide and branch tripartite bodies that regulate industrial relations and may participate in collective bargaining at national level.¹³⁵

In France the representative trade unions receive financial support from the state. "The funding made available to unions is to be used for economic and social training of workers performing union functions and for union studies and research."¹³⁶ "Other financial aid exists, for such purposes as improving negotiating skills and participation, training for employees authorised to represent colleagues under the reduced working hour's agreements and training for employment tribunal members. The state also meets the costs incurred by trade unions on training and information in connection with their membership of joint vocational training bodies."¹³⁷

In Slovenia representative trade unions have the right to conclude collective agreements of general validity, to participate in bodies concerned with the economic and social security of workers and to recommend candidates for participation in management under the relevant provisions.¹³⁸

Representativity at enterprise level enables the trade union to engage in collective bargaining and conclude collective agreements. This statement is however not true for all Member States. Some of them differentiate between representativity and the right to engage in collective bargaining. For instance, trade unions in Slovenia that do not fulfil the statutory representativity criteria may still participate in collective bargain-

¹³³ See in detail: Krieger, Gabriel, *supra* note 100, 50. ff.

¹³⁴ See e.g. Belgium, Conclusions XVII-1 Vol. 1, 64. (Belgium).

¹³⁵ Conclusions 2004, Vol. 1, 35. (Bulgaria).

¹³⁶ Conclusions 2004, Vol. 1, 215. (France).

¹³⁷ Conclusions 2004 Vol. 1, 215. (France).

¹³⁸ Conclusions 2002, p. 183. (Slovenia).

ing.¹³⁹ In Bulgaria the non-representative trade unions may also take part in collective bargaining at enterprise level and may represent their members before the court.¹⁴⁰ In other states, such as Belgium, a representative organisation can take part in both collective bargaining and in the consultation process of the official consultative bodies.¹⁴¹

dd) The Procedure of Acceptance

Generally speaking there are two options as to who decides on the fulfilment of the relevant requirements of representativity. In many States the relevant minister is responsible in deciding whether an organisation is representative at national level and which trade union will be represented on the national tripartite bodies.¹⁴²

At enterprise level this decision initially rests with the employer.¹⁴³ If the employer refused the acceptance of the representativity, the court has the right to judge on it.¹⁴⁴ However, there should be the opportunity to appeal to the court against this refusal. In many States trade unions which have been excluded from collective bargaining may seek out a court in order to ensure participation in the collective bargaining.

4. The Impact of the Charter

a) *Achievements*

With regard the real impact of Art. 5 of the Charter, it is worth mentioning that some of the Member States are not willing to change their system according to the Committee's suggestions. So the situation in Ireland has not changed, where pre- and post-entry closed shops exist and the Committee has regularly reiterated, since the XIVth supervision cycle, that this is not in conformity with the Charter.¹⁴⁵ There exists a similar situation in Denmark where the law authorises closed shop clauses. The Committee stated in the XIth supervision cycle¹⁴⁶ that this situation infringes the right not to join a trade union. Although the Danish government submitted the necessary amendments to the act concerned, the parliament refused the proposal and the situa-

¹³⁹ Conclusions 2002, p. 183. (Slovenia).

¹⁴⁰ Conclusion 2006, Vol. 1, 93. (Bulgaria).

¹⁴¹ Conclusions XVIII-1 Vol. 1, 67. (Belgium).

¹⁴² For instance in Bulgaria the Council of Ministers decides on the grounds of the suggestion of the minister concerned. See e.g. Conclusions 2004 Vol. 1, 35 – 36 (Bulgaria); Conclusions 2006, Vol. 1, 93. (Bulgaria); In Belgium the Crown appoints the member of the national consultative body from the list of the most representative trade unions and employers' organisations at its own discretion. in: Conclusions XVIII-1 Vol. 1, 68. (Belgium); See also: Conclusions 2004, Vol. 2, 511. (Slovenia); Conclusions XVIII-1 Vol. 1, 122. (Croatia).

¹⁴³ See for instance: Conclusions 2004, Vol. 2, 511. (Slovenia).

¹⁴⁴ See e.g. Conclusions 2002, 128. (Romania).

¹⁴⁵ Conclusions XIV Vol. 1, 413. (Ireland); Conclusions 2006 Vol. 1, 366. (Ireland).

¹⁴⁶ Conclusions XI-1, 77. (Denmark).

tion has not changed since.¹⁴⁷ The Danish Supreme Court judged several cases regarding dismissals as a consequence of refusing to join a certain trade union and it always stated that closed shop clauses were legal.¹⁴⁸

There are some states which changed their law in accordance with the conclusions of the Committee and hence closed shop clauses were removed from the collective agreements regarding print workers in the Netherlands.¹⁴⁹

In case the report fails to provide information demanded from the Committee in the prior supervision cycle, the Committee will reiterate its question instead of stating the non-compliance. Therefore it is possible for some states to draw out the process for several decades. This obviously hinders the effective implementation of this clause.

b) Overlapping influence

It is difficult to assess the single effect of the Charter on the legislation of a state as there are other international treaties which aim to protect the right to organise.

There is a remarkable overlap between the case law of Art. 5 of the Charter and that of the ILO conventions, as well as that of the European Convention of Human Rights. In the first draft of the Charter in the article declared the right to organise there was already a link to Art. 11 para. 2 of the European Convention of Human Rights.¹⁵⁰ In the conclusions the Committee referred regularly to the judgments of the European Court of Human Rights concerning Article 11 of the European Convention of Human Rights.¹⁵¹ The Committee considers these references to be an affirmation of its own decision.

The origin of Art. 5 was widely influenced by the two relevant ILO conventions in this field, namely by the Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87) and by the Right to Organise and Collective Bargaining Convention of 1949 (No. 98).¹⁵² It is hard to decide why a state changes its law and whether the ILO conventions or the Charter had the higher impact. The Committee acknowledged the big influence of the ILO conventions several time and in the last reports it also mentioned their impact.¹⁵³ ILO Conventions and the documents of the EU, like the European Union's Charter of Fundamental Rights which

¹⁴⁷ Conclusions XVII-1 Vol. 1, 127. (Denmark).

¹⁴⁸ See recently Conclusions XVIII-1 Vol. 1, 264. (Denmark).

¹⁴⁹ Conclusions XVIII-1 Vol. 2, 549. (Netherlands).

¹⁵⁰ In: Council of Europe, *supra* note 6, Doc. 403. 146.

¹⁵¹ A recent example: Conclusions XVIII-1 Vol. 1, 264. et seq. (Denmark).

¹⁵² See: Kahn-Freund, Otto, *supra* note 7, 131, 132 et seqq. and see the references in Sproedt, Bernd, *Koalitionsfreiheit und Streikrecht in den universellen und europäischen Kollektivabkommen*, München, Beck, 1972, 14 et seq.

¹⁵³ See e.g. Conclusions 2006 Vol. 2, Art. 5 (Portugal).

was incorporated into the Treaty establishing a Constitution for Europe, are significant sources for the interpretation of the right to organise in the Charter.

III. Conclusions

This article placed a specific emphasis on two main problems regarding the right to organise; firstly, whether closed shops are permissible and secondly, which requirements of representativity are allowed.

With regards to the individual and collective aspects of the right to organise, in my opinion the emphasis of the negative right to organise strengthens the significance of the individual and this is contrary to the nature of the right to organise. It is uncontroversial that this right like other collective rights, has a dual aspect; it has to ensure the right of the individual to organise on the one hand, and it has to guarantee the effective functioning of a trade union on the other. It depends on the tradition of the state concerned whether it grants priority to the human rights aspect or rather to the collective nature of the right to organise. But in any event, the traditional function of this right is not only to protect the individual's interests but to associate the interest of the workers in order to put pressure on the employers. For this reason, the right to organise maybe misinterpreted when its individual nature is given priority over its collective aspect. This intention of the Committee is best observed with regard to the case law which laid extraordinary stress on the right not to join a trade union, in spite of the fact that Art. 5 does not expressly include the negative aspect of this right.¹⁵⁴ Furthermore, the Committee concluded, that it is mainly in relation to the situation of those states of a common law tradition that all forms of closed-shops and union security practices are contrary to the Charter.¹⁵⁵ The Committee thereby deprived trade unions of important prerogatives.

The case law of the Committee is Janus-faced since it is against the closed shop clauses but in some cases it also accepts strict representativity criteria. While the refusal of closed shop practices strengthens the rights of free riders, some representativity criteria guarantee the position of the established, powerful trade unions.

In most Contracting Parties there are some requirements which need to be fulfilled by the trade union in order for it to be accepted by the state and social partners as a representative one. The point of these requirements is mainly to ensure that only organisations which are powerful and can effectively protect and further workers' interests can be accepted by the state and employer. Usually, if a group of workers does not

¹⁵⁴ See for example: Conclusions I, 31; Conclusions VII, 33. (United Kingdom); Conclusions XIII-1, 26. (General introduction); Conclusions XVI-1 vol. 1, 346. (Ireland).

¹⁵⁵ See e.g. Conclusions XI-1, 79. (Iceland); Conclusions XI-1, 78. (Iceland); Conclusions XIII-1, 135. (Sweden); Conclusions XVI-1, vol. 2, 441. (the Netherlands).

fulfil these conditions then it cannot become an equal partner of the employer and cannot carry out effective bargaining. This principle brings about, however, the requirements of the acceptance of a trade union, making it difficult to establish a new one and thereby it can create an obstacle for the right to organise.

Considerable differences exist between the Parties with regard the exercise of the right to organise. The United Kingdom, Ireland, Denmark and Sweden received the most negative conclusions because of their closed shop practices. The reason for this is that the states with a common law system or with influence have a fundamentally different approach to the negative right to organise when compared to the other European States. There have been closed shops in existence for a long time.

In some Western European states like France and Germany it raises another problem that tradition plays an important role. One such tradition is where certain big trade unions exist for some decades enjoying special privileges. These privileges make it very difficult or even impossible for other trade unions to gain in power. This means that in practise a monopole situation of the powerful trade unions is created. This situation, however, was not criticised by the Committee.

At the other end of the spectrum, the post-socialist European countries try to regulate the right to organise with exact numbers and link the qualification of a trade union with strict formulated requirements. This phenomenon is a natural consequence of the lack of traditions in this field, which aim to resolve the uncertainty concerning trade unions.

A szakszervezetek az Európai Szociális Kartában

A tanulmány az Európai Szociális Kartának és a módosított Európai Szociális Kartának a szakszervezetekkel és a szervezkedéshez való joggal kapcsolatos esetjogát elemzi. A tanulmány három részre tagolódik. Az első rész rövid áttekintést nyújt a Kartában deklarált kollektív munkajogokról. A tanulmány második, központi része a szakszervezetek alakításával és működésével kapcsolatos három vitatott kérdésre koncentrálnak. Elsőként a szakszervezet alakításának szükséges és elégséges feltételei képezik a vizsgálat tárgyát. A szakszervezet elismerése során ugyanis egyensúlyt kell teremteni két szembemenő érvrendszer, egyrészt a szakszervezet hatékony működését biztosító szigorú materiális feltételek, másrészt a szervezkedéshez való jog szabadságjog jellege között, mely utóbbi tiltja a túlzott materiális és formális kritériumok megkövetelését. Ezt követően elemzésre kerül, hogy a szervezkedéshez való jog individuális és kollektív aspektusai figyelembevételével mennyiben garantálható a szakszervezettől való távolmaradás joga. A továbbiakban a reprezentativitás fogalma és annak a kérdésnek a megvitatása áll a középpontban, hogy megengedhető és szükséges-e bizonyos szakszervezeteket előjogokkal felruházni. Zárásként a tanulmány harmadik része az esetjog összefoglaló értékelését tartalmazza, amely különös hangsúlyt fektet az aktuális tendenciák bemutatására.