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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPÉEN DES DROITS SOCIAUX**

15 December 2016

Case Document No. 5

Matica hrvatskih sindikata v. Croatia

Complaint No. 116/2015

**ADDITIONAL OBSERVATIONS OF THE EUROPEAN TRADE
UNION CONFEDERATION**

Registered at the Secretariat on 22 November 2016

Collective Complaint

Matica Hrvatskih Sindikata v. Croatia

Complaint No. 116/2015

Additional Observations by the European Trade Union Confederation (ETUC)

(21/11/2016)

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- 1 The ETUC submitted its initial Observations dated 17 November 2015. Referring to several points which appeared to be not sufficiently clear, the ETUC requested to be permitted to provide additional observations. By a letter dated 11 October 2016 this request was accepted and a deadline set until 22 November 2016 for further observations following the submissions by the Government¹ (Submission by the Government) and by the complainant organisation² (Response from the complainant) which were enclosed. Accordingly, the ETUC avails itself of this opportunity.

I. International law and material

- 2 In accordance with the approach described in its initial Observations the ETUC would like to refer to more recent developments in international law in general and concerning the assessment of the situation in Croatia in particular.

A. United Nations (UN)

- 3 Most recently, the Special Rapporteur on the rights to freedom of peaceful assembly and of association has elaborated a report examining the exercise and enjoyment of the rights to freedom of peaceful assembly and of association in the workplace. In describing the international legal framework (IV.) he stated under the heading of 'International and regional human rights instruments' (A.) i.a.:

Both trade unions and the right to strike are fundamental tools to achieving workers' rights, as they provide mechanisms through which workers can stand up for their interests collectively, and engage with big business and government on a more equal footing. The State is obligated to protect these rights for all workers. ...

The right to strike has been established in international law for decades, in global and regional instruments, and is also enshrined in the constitutions of at least 90 countries. The right to strike has, in fact, become customary international law.³

- 4 Under the heading of 'States' obligations to respect, protect and fulfil the rights to freedom of peaceful assembly and association' it stated i.a.

Some laws restrict bargaining subjects, including wages, which hampers assembly and association rights, as workers are more reluctant to risk organizing when potential gains are so few. ...

State restrictions on assembly and association rights, including the right to strike, frequently exceed parameters set by ILO Convention 87 and decades of case law. In countries where the right to strike is not legally prohibited, Governments attempt to justify restrictions in the name of public order, public security, the threat of terrorism, national interest or economic crisis.

¹ Case Document No. 3 -16 March 2016.

² Case Document No. 4 -19 May 2016.

³ UN Document A/71/385 - 14 September 2016, paras. 54 and 56 respectively, http://freeassembly.net/wp-content/uploads/2016/10/A.71.385_E.pdf.

Restrictions often used include exclusion of categories of workers from the right to strike; excessive prerequisites required to hold a legal strike; inappropriate legal changes that allow public authorities to suspend or declare a strike illegal; and government and public arguments favouring restrictions on the right to strike. Onerous requirements or excessive restrictions can make it almost impossible to conduct a legal strike, thereby removing one of the tools of last recourse for workers trying to bring unwilling employers to the bargaining table. Such restrictions constitute a violation of workers' rights to freedom of assembly and of association.

States are obliged to respect the rights to freedom of peaceful assembly and of association by refraining from interfering, directly or indirectly, with their exercise. Under international law, restrictions on the rights to peaceful assembly and to association and to form or join a trade union are permissible only where prescribed by law and as necessary in a democratic society in the furtherance of the legitimate interests enumerated in those instruments. International law foresees the possibility of States restricting members of armed forces and police from exercising the right to freedom of association, and allows for States to restrict the right to strike for essential services and civil servants engaged in the administration of the State. However, as with all restrictions, these should be the exception rather than the rule.⁴

B. International Labour Organisation (ILO)

1. ILO Convention No. 98

- 5 The Committee of Experts on the Application of Conventions and Recommendation (CEACR) has published its 2016 observations concerning Articles 4 and 6 on the promotion of collective bargaining in the following terms:

With reference to previous allegations of MATICA denouncing the content of the Act on the Criteria for Participation in Tripartite Bodies and Representativeness for Collective Bargaining of 13 July 2012 (2012 Representativeness Act), the Committee had expressed the wish to receive any comments the most representative employers' and workers' organizations may wish to make in respect of this matter, so as to enable it to assess the established representativeness criteria. The Committee notes the Government's indication that: (i) the contested 2012 Representativeness Act is no longer in force; (ii) a new Act on Trade Unions' and Employers' Associations' Representativeness (2014 Representativeness Act) was adopted and entered into force on 7 August 2014 as part of a package which included adoption of a new Labour Act; and (iii) the 2014 Representativeness Act was elaborated in close cooperation and after numerous consultations with all representative social partners including MATICA. The Committee notes that the Government draws attention to certain developments in the new legislation that seek to address issues previously raised by MATICA (for example, longer period of extended application of collective agreement after expiry may be specified by the collective agreement in question; professional unions must fulfil the same general representativeness criteria as all other unions). ***With a view to examining the conformity of the 2014 Representativeness Act with the Convention, the Committee requests the Government to provide copies of it and further information on the relevant provisions and their application in practice, and expresses the wish that the most representative employers' and workers' organizations provide any views or comments in respect of the new legislation, so as to enable it to assess the newly established***

⁴ UN Document A/71/385 - 14 September 2016, paras. 59 and 66 - 68 respectively, http://freeassembly.net/wp-content/uploads/2016/10/A.71.385_E.pdf.

representativeness criteria, and to determine whether the established criteria are shared by the most representative social partners.

The Committee hopes that the Government will make every effort to take the necessary action in the near future.

Noting the adoption of the new Labour Act in 2014, the Committee invites the Government to provide information on the provisions giving effect to the Articles of the Convention, and their application in practice.⁵

2. ILO Convention No. 87

- 6 Moreover, the CEACR addressed a Direct request to the Government as follows:

The Committee notes the observations received on 1 September 2015 from the International Trade Union Confederation (ITUC), according to which the new Labour Act, which entered into force on 7 August 2014, does not appear to recognize the right to strike of higher level trade union organizations. ***The Committee requests the Government to provide its comments in this respect.***

The Committee notes the observations of the International Organisation of Employers (IOE) received on 1 September 2015, which are of a general nature.

The Committee notes with ***regret*** that the Government's report has not been received. It expresses ***concern*** in this respect. The Committee hopes that the next report will contain full information on the matters raised in its previous comments.

Article 3 of the Convention. Right of employers' and workers' organizations to organize their activities and to formulate their programmes. The Committee had previously noted that, under section 284 of the 2009 Labour Act, strikes in the armed forces, police, state administration and public services were regulated by a separate law. Observing that, according to the ITUC, that law had not yet been enacted, the Committee trusted that the relevant piece of legislation would be adopted in the near future and would take fully into account the freedom of association principles on this matter. The Committee notes that, under the new Labour Act of 2014, strikes in the armed forces, police, public administration and public services shall be regulated by specific provisions (section 220). ***The Committee requests the Government to provide information on and a copy of the specific provisions adopted under section 220 of the new Labour Act. ...***

Noting the adoption of the new Labour Act in 2014, the Committee invites the Government to provide information on the provisions giving effect to the Articles of the Convention, and their application in practice.⁶

C. Council of Europe

- 7 In addition to the resolutions of the Parliamentary Assembly (PACE) referred to in its initial Observations, the ETUC would like to refer also to the Resolution on the 'Protection of the

⁵ Observation (CEACR) - adopted 2015, published 105th ILC session (2016) http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3252593.

⁶ Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016) http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3253384.

right to bargain collectively, including the right to strike' adopted on 28 January 2015⁷ based on the report of the Committee on Social Affairs, Health and Sustainable Development.⁸ The resolution stresses the importance of the collective rights to bargain collectively and to strike particularly in times of crisis by stating i.a.:

1. Social dialogue, the regular and institutionalised dialogue between employers' and workers' representatives, has been an inherent part of European socio-economic processes for decades. The rights to organise, to bargain collectively and to strike – all essential components of this dialogue – are not only democratic principles underlying modern economic processes, but fundamental rights enshrined in the European Convention on Human Rights (ETS No. 5) and the European Social Charter (revised) (ETS No. 163).
2. However, these fundamental rights have come under threat in many Council of Europe member States in recent years, in the context of the economic crisis and austerity measures. In some countries, the right to organise has been restricted, collective agreements have been revoked, collective bargaining undermined and the right to strike limited. As a consequence, in the affected countries, inequalities have grown, there has been a persistent trend towards lower wages, and negative effects on working and employment conditions have been observed.
3. The Parliamentary Assembly is most concerned by these trends and their consequences for the values, institutions and outcomes of economic governance. Without equal opportunities for all in accessing decent employment and without appropriate means of defending social rights in a globalised economic context, the inclusion, development and life chances of whole generations will be put into question. In the medium term, the exclusion of certain groups from economic development, wealth and decision-making could seriously damage European economies and democracy itself.
4. Investing in social rights is an investment in the future. In order to build and maintain strong and sustainable socio-economic systems in Europe, social rights need to be protected and promoted.
5. In particular, the rights to bargain collectively and to strike are crucial to ensure that workers and their organisations can effectively take part in the socio-economic process to promote their interest in wages, working conditions and social rights. "Social partners" should be considered as what they are: "partners" in achieving economic performance, and sometimes opponents in striving to find a settlement of their interests in the distribution of power and scarce resources.

II. The law

- 8 These additional observations will focus on those elements which contain new information and/or further details or would require additional arguments. In this context, it would appear that the information provided for in relation to Article 6§3 could perhaps still be considered as not sufficiently precise for a further assessment.

⁷ Resolution 2033 (2015) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21535&lang=en>.

⁸ see [Doc. 13663](#).

A. Article 6§1

1. Submission by the Government

- 9 On the question of consultation the Government responds to the complaint in the following terms:
- 10 Concerning the Act on Trade Unions and Employers Associations Representativeness (adopted in July 2014):

The new Act was prepared in close cooperation and after numerous consultations with all representative social partners at the national level (four representative trade union confederations, including the complainant, and Croatian Employers Association (CEA), and with professional assistance of experts from ILO and national experts, as was the previous one, of 2012.

- 11 Concerning previous acts:

After a series of meetings and consultations with social partners, the Act on the Criteria for Participation in Tripartite Bodies and the Representativeness for Collective Bargaining was adopted and entered into force on 28th July 2012.

- 12 Concerning the Cancellation of the 2010 Basic Collective agreement (BCA), conclusion of the new BCA for employees in public service in 2012, passing the Act of suspension of payment of certain rights to public service employees:

Eight meetings were held from 4 June to 16 July 2012.

- 13 Concerning the Economic and Social Council:

Economic and Social Council in 2012 held 10 meetings, while the ESC Commissions (working bodies) held a total of 44 sessions, out of which Committee for legislation, collective bargaining and protection of the rights held a total of 17 sessions, and the Commission for Sustainable development, economy, energy and climate change, held 10 sessions.

In 2012 the ESC and Commissions reviewed more than 80 draft laws and sub - laws. Social partners participated in the work of various working groups for drafting legislative proposals.

2. Response from the complainant

- 14 The complainant organisation replies to the information provided by the Government in the following terms:

In its response the Government of the Republic of Croatia is quoting data on the number of held meetings of the Economic and Social Council and its working bodies as well as the number of laws and subordinate legislation which were subject of discussions during these meetings, fully uncomprehending the problem stated in the submitted Complaint.

The complainant does not dispute that meetings of the Economic and Social Council as well as its working bodies are held. However, contrary to the Agreement on the foundation of the Economic and Social Council, the Government does not consult its social partners regarding all regulations stipulated by the Annual plan of normative activities for which social partners have shown an interest. We are also repeatedly quoting that the Government, in case it

proposes regulations which it did not anticipate by its Annual plan, is obliged to inform social partners about the same in order for them to be able to express their interest for including professionals in the work of the Council's bodies at appropriate levels. The above quoted obligation of the Government was not fulfilled when adopting any of the laws on withdrawal (during the period from 2012 - 2015 in total 4 laws on withdrawal and 2 ordinances prolonging the implementation of these laws were adopted).

3. Assessment

- 15 Concerning the consultation in relation to the preparation of laws, the Government only refers in a most general way to consultations in relation to the Act on Trade Unions and Employers Associations Representativeness (see para. 10) and even more generally in relation to the Cancellation of the 2010 Basic Collective agreement (BCA) (see above para. 12). It is obvious that the Government does not provide any sort of concrete information on the consultation process in relation to the
- Act on Withdrawal of Certain Material Rights of the Employed in Public Services⁹ as well as subsequently the
 - Act on Withdrawal of Right to Salary Increase Based on Years of Service.¹⁰
- 16 As regards the description of the work of the Economic and Social Council, the information provided by the Government (see above para. 13) may even be correct as such but does not respond in any substance to the allegations put forward by the complainant organisation (see above para. 14).
- 17 Concerning the alleged insufficient consultation as to the bill on Financial Transactions and Accounting of Non-Profit Organizations, no further information is provided by the Government.
- 18 In conclusion, the ETUC would see a strengthening of the assessment in its initial Observations of a violation of Article 6§1.

B. Article 6§2

1. Submission by the Government

a) *Annulment of collective agreements*

(1) Cancellation of 2010 Basic Collective agreement (BCA)

- 19 Concerning the cancellation of the BCA the Government describes the situation as follows:

Consequently, the Government, under economic circumstances that were continuing to deteriorate, entered into negotiations with the trade unions in public services and proposed amendments to the Basic Collective Agreement (BCA). The BCA and culture (in 2012 covering cca 166 306 public servants, out of which more than a half in health care and education sectors).

Eight meetings were held from 4 June to 16 July 2012.

⁹ Official Gazette No. 143/2012.

¹⁰ Official Gazette No. 41/2014, 154/2014.

Proposed amendments were aimed at reducing or temporarily suspending the following rights:

- the right to a Christmas bonus in 2012
- the right to a holiday bonus in 2013
- the right to jubilee awards in 2013, except for employees who had been employed for more than 35 years and were retiring in the year to which they were entitled to the bonus

Considering that the BCA itself envisages the possibility of bringing the dispute before arbitration (Article 9), the Government, at the proposal of the four trade unions who had signed the proposed BCA amendments, had, on 17 July 2012, suggested arbitration to the trade unions who had refused to sign the amendments. On 19 July 2012 it appointed its representatives to the arbitration council, while constantly inviting the trade unions to reach an agreement. Those trade unions that had refused to sign the amendments sent a written rejection of the arbitration settlement of the dispute, stating that arbitration was not mandatory. Article 23 of the BCA provided that the Agreement can be cancelled in writing by both parties in the event of economic circumstances that have significantly changed, after the party cancelling the Agreement had proposed amendments to the other party beforehand, with a notice period of three months. Having exhausted all possibilities of coming to an agreement, based on article 23 of the BCA, on 17 September 2012, the Government took the decision to revoke the BCA for public service employees with a notice period of three months. The procedure for cancellation of the BCA were therefore, conducted legally.

(2) Act on Withdrawal of Certain Material Rights of the Employed in Public Services dated December 20th 2012

20 Concerning this act the Government describes the situation as follows:

Concerning the Act on the suspension of payment of certain rights to public service employees of 20 December 2012, despite the conclusion of the new BCA and Annex I (agreement to reduce or temporarily suspend some material benefits), pursuant to the principle in the Labour Code to apply the more favourable law, those rights continued to be applied according to the branch collective agreements, because they had been agreed in branch/sectoral collective agreements for each public service (health care, social welfare, primary and secondary education, science, higher education and culture).

Further, the Government would like to point out that civil servants (63.129 employees in State bodies, whose rights are also ensured in the state budget) had negotiated their collective agreement with the Government on 2 August 2012. In Annex I of the collective agreement, inter alia, they agreed that for civil servants, the Christmas bonus would not apply in 2012 and 2013; the holiday bonus and jubilee award would not apply in 2013; and travelling allowances would be reduced from HRK.170 to HRK.150 (the same that was offered to the public service employees).

Civil servants in this case were, in practice, discriminated against, since the material rights for both categories of employees were ensured in the state budget. For that reason, the Government decided to regulate the rights contained in Annex I of the BCA equally for all, both civil servants and public service employees, under the Act of 20 December 2012. On the basis of that Act, the right to a Christmas bonus in 2012 and 2013, and a holiday bonus in 2013, no longer applied.

This decision was taken in order to urgently maintain the fiscal stability of the public service system under the deteriorating economic conditions and to achieve a balance in the rights of both categories of officials.

In order to bring the branch collective agreements in line with the BCA, the Government entered into negotiations at the beginning of 2013 with representative trade unions of each public service (in health care, social welfare, culture and primary and secondary education sectors.). In 2013, the collective agreement was concluded for the health-care sector. Collective agreements for the social welfare, culture and primary and secondary education sectors were all concluded in 2014.

As of today, only branch collective agreement for science and higher education had not been concluded, although the Government entered into negotiations with the complainant in May 2013.

b) Representativeness

- 21 Concerning the *Act on the Criteria for Participation in Tripartite Bodies and Representativeness for Collective Bargaining of 28 July 2012* the Government provides the following information:

With respect to the adoption of the Act on the Criteria for Participation in Tripartite Bodies and Representativeness for Collective Bargaining of 28 July 2012, the Government would like to inform that the Act is no longer in force, as a new Act on Trade Unions and Employers Associations Representativeness has been adopted in July 2014 and entered into force on August 7th 2014.

The new Act was prepared in close cooperation and after numerous consultations with all representative social partners at the national level (four representative trade union confederations, including the complainant, and Croatian Employers Association (CEA), and with professional assistance of experts from ILO and national experts, as was the previous one, of 2012. According to the new Act on Trade Unions and Employers Associations Representativeness, in order to obtain the status of a representative trade union, a professional union must fulfil the general criterion, as all other trade unions. No possibility for employer to initiate procedure for establishing trade union's representativeness before the Commission was regulated.

Although the Act on the Criteria for Participation in Tripartite Bodies and Representativeness for Collective Bargaining adopted in 2012, (by which, as complainant believes, the system of collective bargaining was completely destroyed), is no longer in force, the Government would like, nevertheless, to present circumstances preceding its adoption.

Activities for the preparation of a single regulation which would determine in a satisfactory manner the criteria for establishing representativeness of higher-level employers' and trade union associations for participation in tripartite bodies on the national level, as well as the criteria for establishing representativeness of trade unions for collective bargaining, have begun in 2008, four years prior to the adoption of the Act on the Criteria for Participation in Tripartite Bodies and Representativeness for Collective Bargaining (hereinafter: "Act").

The Government of the Republic of Croatia has tried, in the spirit of social partnership to encourage social partners and enable the conditions for their agreement on the text of the Act on Representativeness, however, the agreement was not reached due to the following reasons:

In June 2008, the Coordination of Croatian trade union confederations assumed the obligation of submitting a proposal of the Act on Representativeness to the Government, so that it may be submitted for legislative procedure. This deadline has been repeatedly extended upon request of the trade unions, given that the trade unions were unable to reach an

agreement on the text of the Act, even though experts from the International Labour Organisation have provided them with expert assistance. In July 2009, the representatives of trade union confederations declared that they had not reached an agreement on the content of the Act and proposed that the draft act be prepared by the Government, which had also prepared the working draft, with professional assistance from ILO and national experts, however, these proposals were not accepted. Therefore, it was agreed that the Government would prepare the working draft of the Act, while any disagreements arising in connection with it should be settled by an arbitrary body consisting of independent experts. However, in spite of previous agreement, after the Ministry had prepared two working documents, three out of five trade union confederations, refused arbitration. Subsequently, in 2011, the draft act was to be prepared in consultation with social partners by a group of national and foreign experts proposed by employers and trade unions. The trade union confederations failed to submit their official proposal of experts, so an expert team, consisting of an appointed representative of ILO and two professors of law proposed only by the Croatian Employers' Association and one trade union confederation, was appointed, however, even then their proposal was not acceptable.

After a series of meetings and consultations with social partners, the Act on the Criteria for Participation in Tripartite Bodies and the Representativeness for Collective Bargaining was adopted and entered into force on 28th July 2012.

Furthermore, data indicate that the implementation of the Act did not, in practice, block or negatively influence the procedures of collective bargaining.

For example, in the period of 28 months starting from the application of the Act, 57 new collective agreements applicable on the whole area of Republic of Croatia and 60 amendments to applicable collective agreements were signed, according to the record of collective agreements kept by the Ministry of Labour and Pension System, not including the number of new collective agreements and amendments signed in this period and applied only at local level, the record of which is kept by state administration offices in (21) counties, which means the stated figures are actually higher. As for the influence of the Act on the additional fragmentation of trade unions and hindering the process of collective bargaining, as has already been mentioned, in this period, the trend of increased founding of trade unions on the national level was not recorded, while the number of newly concluded collective agreements (57) and amendments to applicable ones (60) on the national level was slightly higher than the average, which implies that the implementation of the Act did not influence the limitation of the procedures of collective bargaining neither with respect to limiting their extended application nor with respect to criteria and procedure.

2. Response from the complainant

a) *Annulment of collective agreements*

(1) Cancellation of 2010 Basic Collective agreement (BCA)

22 In response, the complainant provides further information:

In its Response to the Collective complaint the Government is stating that negotiations with trade unions about the Basic Collective Agreement (hereinafter: BCA) started in June 2012. Also, in its Response the Government states that more than half of the employees in public services, on whom the BCA applied, are working in health and education systems, and thereby it acknowledges the importance of a possible strike, which Government has eliminated by initiating negotiations after the end of the academic and school year.

During the negotiations on the amendments of the BCA stated in the Government's Response, four of the eight representative trade unions, organizing more than two thirds of all members in the area of public services, refused to accept the specified amendments without securing that the above rights shall be paid when economic conditions for such payment are met. However, the Government refused such a compromise with trade unions.

In its Response the Government states that, considering the possibility of solving the dispute in an arbitration procedure stipulated by Article 9 of the BCA, it has offered trade unions an amicable settlement of disputes, but the trade unions refused to sign the Amendments to the BCA. The Government states that the unions have refused such solution but in doing so it does not quote the reasons. Namely, in their statement dated July 20th 2012, the trade unions have quoted that they do not want to enter into dispute settlement by means of arbitration until their members express their opinion at a referendum about the proposal of Amendments to the BCA since it is not permissible that an arbitration outcome deprives the members of their response to the above proposal. At that time the trade unions did not rule out the possibility that the members could agree with the above quoted Amendments to the BCA, whereby it would not be required to conduct the arbitration procedure. They have also stated that, in case the members refused the proposal, there would be the possibility to solve the dispute by arbitration. Since employees in public services are using the major part of their annual leave in July or August, it was not possible to conduct the referendum about the disputed issue until September and therefore the beginning of the arbitration procedure in July was not acceptable.

As stated in the filed Complaint, 84% of trade unions' members have accessed the referendum in September. 91,1% of all members who accessed the referendum voted against the proposal of the Government. After the trade unions' referendum was conducted and the voting results were published, on September 14th 2012, the Government of the Republic of Croatia did not again call upon the trade unions to resolve the dispute in an arbitration procedure, but it adopted the decision on Cancelling the Basic Collective Agreement at its telephone session on September 17th 2012. The above quoted Decision was not confirmed at the first following Government session although this was obligatory in accordance with the Rules of Procedure of the Government of the Republic of Croatia. Also, the Decision of the Government does not contain an explanations of the reasons for cancelling the BCA but it is solely in short stated that significantly changed economic conditions have occurred. However, such a reason does not have its economic foundation since significantly changed economic conditions did not occur, especially such that could not have been foreseen at the time of concluding the agreement.

Available official data in September 2010 were showing a decline in real GDP of 2,7% in the first quarter of 2010 and 3% in the second quarter of 2010. The Government evidently did not consider the above data a relevant hindrance for signing collective agreements. In 2011 the GDP stagnated which also did not represent a reason for the Croatian Government to question the validity of the BCA. In 2012, on the day of cancelling the BCA, i.e. September 17th 2012, the Government had knowledge solely of the data that in the first quarter of that year the real GDP declined by 1,3% which, in relation to the period of concluding the BCA, represents a level of change which is not a significant change, nor does it justify the cancellation of the collective agreement since the even higher decline in the first two quarters of 2010 was not a reason for not concluding the above BCA. Furthermore, even if the change of GDP at the beginning of 2012 had pointed to significantly changed circumstances at the beginning of 2012, the Croatian Government did not have the right to cancel the BCA based on that fact. Namely, at the moment of cancellation the Government did not have the data on GDP trends throughout the year 2012 and therefore neither the knowledge on the real

potential of the national economy which could have led to the conclusion of impossibility of fulfilling contractual obligations, and this especially to the working people of the Republic of Croatia. Also, it is important to emphasize that the Croatian Government did not foresee the decline of GDP neither in 2012 nor in 2013 in its official documents. On the contrary, in the Explanation of the national budget and financial plans of extrabudgetary users for 2012 and projections for 2013 and 2014, from February 2012, the Government of the Republic of Croatia had planned a growth of real GDP rate of 0,8%, and a growth of 1,5% in 2013. Hence, the trade unions accepted to waive their rights in good faith even though this waiver was not an imperative of economic or budgetary necessity, but they requested the funds for remunerations and the rights related to these remunerations to be returned when economic indicators become more favourable. On the other hand, the Government obviously had other reasons for cancelling the BCA because the savings measures, even if they were economically justified (about which there are serious disputes among today's leading economic experts) could have been achieved in different ways whereby it was not necessary to primarily infringe the rights of workers.

The new BCA was concluded in accordance with the then valid Act on Criteria for Participation in Tripartite Bodies and Representativeness for Collective Bargaining which entered into force during negotiations about the amendments to BCA from 2010. The Government states that it has signed the new BCA with six of eleven representative trade unions, but it does not quote that the trade unions signatories of that Agreement do not represent even a third of members of the total number of employees in public services. The above absurd Situation was legitimate in accordance with the then valid Act, on which fact trade unions as social partners were warning about during the drafting of the quoted Act.

(2) Act on Withdrawal of Certain Material Rights of the Employed in Public Services dated December 20th 2012

23 In response to the Government's submission, the complainant provides further information:

It is true that, despite concluding the new BCA and Addendum I , by which an agreement for the reduction or temporary withdrawal of certain material rights was reached, in accordance with the principle of the Labour Act by which the more favourable right is applied, the rights reduced by Addendum I continued to be applied. Namely, in branch collective agreements the same rights were agreed for every public service individually (health system, social care system, primary and secondary education, science, higher education and culture). Under the pretext of urgent maintenance of fiscal stability of public services systems considering the increasingly worsening economic conditions, the Government, instead of primarily initiating negotiations with public services trade unions for branch collective agreements which still contained the above quoted rights, adopted the Act on Withdrawal of Certain Material Rights of the Employed in Public Services. The Government initiated negotiations about branch collective agreements in public services systems only after adopting the Act concerned. By the Act on Withdrawal the Government, as an employer which also has the possibility to propose legal regulations, violated the obligations it accepted in collective agreements, contrary to the nature and purpose of concluding collective agreements and contrary to international sources of labour law which are obliging it. We emphasize that this was only the first in a series of regulations on withdrawing the rights agreed in collective agreements.

Furthermore, it is not clear why the Government considers that in this case civil servants are discriminated in relation to employees in public services. Namely, trade unions representing civil servants have finished negotiating their Collective Agreement with the Government in August 2012 and in Addendum I to Collective Agreement they also agreed that Christmas

bonuses shall not be paid to civil servants in 2012 and 2013 and that vacation allowances and anniversary awards shall not be paid in 2013 and that travel expenses shall be reduced from 170 HRK to 150 HRK. The same was also offered to trade unions in public services which, as already quoted above, were willing to accept the waiver of the quoted rights, but not unconditionally. The process of collective negotiating is voluntary and it has to be such, and the rights agreed in that process also depend on the strength of a trade union and its pressure on the employer. Taking into consideration that the process of collective negotiating is voluntary and that every union is autonomous in making decisions, we consider that there is no foundation for the claim on discrimination of civil servants.

Also unclear is the statement of the Government that it is negotiating with the complainant about the branch collective agreement for science and higher education when the Government itself, in its Response correctly emphasized that the complainant (MATICA - Association of Croatian Trade Unions) as the representative higher level association of unions has the right to collectively negotiate solely about concluding a collective agreement which would be applied to workers employed at employers associated in a higher level employers' association.

b) *Representativeness*

24 Responding to the Government's submission the complainant provides the following information:

The complainant emphasizes to be aware of the fact that the Act on Criteria for Participation in Tripartite Bodies and Representativeness for Collective Bargaining dated July 281h 2012 is no longer in force, but that the provisions of that Act are relevant because the valid BCA was signed in accordance with those provisions.

Notwithstanding possible disagreements between social partners during the preparation of draft bills, the Government as the proposer of final legislation is responsible for the efficiency of proposed solutions and legal security. Even though the implementation of the Act did not block in practice or negatively influence all procedures of collective negotiating, it had an exceptionally negative influence on negotiations in public services.

By the Act concerned the system of collective negotiating was seriously infringed and the stability of collective agreements of public services was in full excluded. The result of such legal provisions was the concluding of the Basic Collective Agreement dated December 121h 2012 and the Addendum I to the same, signed solely by six public services trade unions representing merely one third of members in public services, but which is applied to all employees in public services. Hence, the absurdity of the above quoted situation is that the majority of unions (six out of eleven) which signed the BCA in fact represent only the minority of all employees, and thereby also the minority of employees in public services organized in trade unions.

3. *Assessment*

a) *Annulment of collective agreements*

(1) Cancellation of 2010 Basic Collective agreement (BCA)

25 In assessing the situation at least two elements have to be taken into account. The first question will concern the arbitration procedure. Both parties refer to Article 9 of the BCA. Although the text of this provision does not appear to be available in English it might not be

decisive for the assessment in relation to Article 6§2 as long as this does not amount to compulsory arbitration which does not seem to be the case.

26 The second and probably main question which arises is whether the cancelation of the BCA was in conformity with Article 23 BCA. If one might assume that the procedural requirements have been met it would have to evaluated whether the substantive requirement of "significantly changed economic circumstances" (Article 23(2) BCA) has been met. First, it should be noted that such a clause should be interpreted narrowly because of its exemption character in relation to the principle of 'pacta sunt servanda'. Moreover, the specificity of collective agreements normally requires a special protection in relation to its denunciation, i.e. the continuation of its content until a new collective agreement has been concluded. If such a principle is not recognised in national law it requires an even more narrow interpretation of the denunciation clause. Against this background, the fact that the Government does not provide any pertinent information in this respect (see above para. 1.a)(1)) whereas, on the other hand, the complainant's response contains detailed information (see above para. 2.a)(1)) which makes it difficult to assume that the threshold of 'significantly' has been reached it would have to be considered that (at least) the burden of proof lies with the Government. Having not provided the respective proof, it would have to be concluded that Article 6§2 has been violated in this respect.

(2) Act on Withdrawal of Certain Material Rights of the Employed in Public Services dated December 20th 2012

- 27 From the outset, it should be noted that already the translation of the title of the act into English differs between the parties (Government: suspension, complainant: withdrawal). The effect of the real non-payment to certain amounts of entitlements would appear to speak in favour of the latter translation.
- 28 In substance, this legislation is directly influencing negatively the previous entitlements based originally on collective agreements. Pursuant to this Act certain financial rights (like Christmas bonuses) have not been paid to persons employed in public services in 2012 and 2013 as well as vacation bonuses in 2013 which are guaranteed by collective agreements (and it appears that the Government prolonged the application of the mentioned Act for 2014, and again till the end of 2015).
- 29 In its initial Observations, the ETUC had already referred to all the principles and Committee's case law i.a. on austerity applicable in such a case. It had concluded that this interference by legislation violated Article 6§2. The Government now advances two main arguments trying to justify its interference: the non-discrimination principle and the economic situation.
- 30 In principle, those arguments are not sufficiently motivated to be able to even serve as a basis for the examination of a justification in relation to the non-regression principle. This would at least require much more detailed information. This all the more the case when taking into account the case law of the Committee, for example, on austerity measures.
- 31 In any event, those two arguments are not convincing. The non-discrimination principle in relation to civil servants is used by the Government to justify the reduction of rights contained in other collective agreements (see above para. 20, 2nd and 3rd paras.). However, this sort of

downwards equality cannot be justified because using the State prerogatives by legislation against collective agreements totally undermines the system of collective bargaining. If the Government in its role as Social Partner has concluded a collective agreement it cannot use its other (State) powers to abolish the content of such a collective agreement. Moreover, the complainant provides further arguments against a possible justification (see above para.23, 2nd para.).

- 32 The second argument relates to the economic situation (see above para. 20, 4th para.). Using the qualification of 'urgently' does not replace any sort of detailed information. Even taking into account the framework data in the introductory and final parts of the Government's submission they do not justify this interference by themselves all the less so, when looking for the need of alternative measures.
- 33 In conclusion, the ETUC would see its assessment in the initial Observations of a violation of Article 6§2 in respect of both items even reinforced.

b) Representativeness

- 34 In its initial Observations, the ETUC was not yet sufficiently clear about the extent and impact of this legislation. From the submissions by the parties it is clear that this Act had already been abrogated before filing the complaint. From the complainant's response (see above para. 24), it would appear that this was not meant to be a violation as such but that it was aggravating the problems in relation to the other elements of Article 6§2.¹¹

c) Conclusions

- 35 The main issue of the complaint being the alleged violation of the obligation to promote collective bargaining in accordance with Article 6§2, the ETUC would continue to see this provision as being violated at least by two measures (being aggravated by the Act on Criteria for Participation in Tripartite Bodies and Representativeness for Collective Bargaining), see above para. 34) for which the Government is responsible:

- Cancellation of 2010 Basic Collective agreement (see above para. 26),
- Act on Withdrawal of Certain Material Rights of the Employed in Public Services (see above para. 33).

C. Article 6§4

1. Submission by the Government

- 36 Concerning the two first items criticised in the complaint (back to work order and claims for damages by employers) the Government's submission contains no additional information or counter-argument.
- 37 However, refuting the complainant's allegations concerning the level of trade union organisation entitled to call a strike as incorrect the Government states the following:

¹¹ See below for the specific issues on Article 4 of this Act in relation to the right to strike paras. 41 ff.).

Article 205 of the Labour Act prescribes that in the event of any dispute related to conclusion, amendment or renewal of a collective agreement, the right to call and undertake a strike shall have trade unions which have been determined as representative, under specific provisions, for collective bargaining and conclusion of a collective agreement and which have negotiated the conclusion of a collective agreement.

As regards higher level trade unions, specific provisions to which Labour Act is referring and which apply, is contained in the Article 4 of the 2014 Act on Trade Unions and Employers Associations Representativeness, by which representative union organisation of a higher level participating in tripartite bodies at national level, shall have the right to participate in collective bargaining over collective agreements covering employees who work for employers which are members of a higher-level employer organisation. Since determined as representative for collective bargaining, under specific provisions, in the event of any dispute related to conclusion, amendment or renewal of a collective agreement which have negotiated, representative union organisations of a higher level are entitled to call on strike.

2. Response from the complainant

- 38 In replying to the Government' submission limited to the level of trade union organisation entitled to call a strike, the complainant states the following:

In its Response, reflecting solely on Article 205 of the Labour Act, the Government again did not comprehend the meaning of the complaint from the submitted Complaint. Namely, the complainant quotes, in the context of reasons due to which it is possible to initiate a strike, that trade unions or their higher level associations have the right to call a strike solely due to salaries, respectively salary compensation in case of their non-payment within 30 days as of their maturity date. Even though by the Act it is stipulated that the legitimate reason for a strike is also the furtherance and protection of economic and social interests of trade unions' members, through court practice this was proven to be wrong. In addition, not only that the trade unions were exposed to the danger that their strike initiated with the goal of furthering and protecting their members' economic and social interests shall be considered illegal, but the new Labour Act was also preventing higher level trade union associations to initiate a strike due to the same reasons. Namely, as the Government of the Republic of Croatia is quoting in its Response, in accordance with Article 4 of the Act on Representativeness of Employer Associations and Trade Unions and Article 205 of the Labour Act, a representative higher level trade union organization participating in tripartite bodies at national level has the right to collectively negotiate on concluding a collective agreement which would be applicable on workers employed at employers joint in a higher level employers association and in case of any dispute related to concluding, amending or renewing that collective agreement, has the right to call a strike and organize the same. However, in the Republic of Croatia there is no tradition of concluding such general collective agreement and thus from the above quoted it is arising that at this moment higher level trade union associations almost do not have any possibility to call a strike.

3. Assessment

- 39 Concerning the right to strike the ETUC would refer to its initial Observations, particularly in relation to the international law and materials as well as to its conclusions. The reference to the right to strike is even more enhanced by the latest report of the UN Special Rapporteur on Freedom of Association stating i.a. that the 'right to strike has, in fact, become customary international law.' (see above para. 3).

- 40 As to the two first items (back to work order and claims for damages by employers) no new elements have been provided by the parties. Therefore, the conclusions in the ETUC's initial Observations would remain valid.
- 41 As regards the third element of the complaint (the level of trade union organisation entitled to call a strike), two provisions have to be taken into account. First, the general question of who is entitled to call a legal strike is defined in Article 205(1) of the Labour Act by providing that 'trade unions' shall have the right to call and undertake a strike defining two situations for doing so legally:

Trade unions shall have the **right to call and undertake a strike**

- in order to protect and promote the economic and social interests of their members or
- on the ground of non-payment of remuneration and compensation, or a part thereof, if they have not been paid by their maturity date. [Emphases added]

- 42 Second, concerning more specifically the higher level organisation of Article 4 Act on Trade Unions and Employers Associations Representativeness

Representative union organisations and employer organisations **of a higher level** participating in tripartite bodies at national level, shall have the right to: ...

4) **participate in collective bargaining** over collective agreements covering employees who work for employers which are members of a higher-level employer organisation. [Emphases added]

- 43 The complainant interprets the relationship between these two provisions by considering Article 4(4) of the Act on Representativeness of Employer Organizations and Trade Union Organizations as being more specific and limited (to collective bargaining without the mentioning of the right to strike), thus requiring priority and excluding the more general principle of Article 205(1) of the Labour Act. In contrast, the Government states:

Since determined as representative for collective bargaining, under specific provisions, in the event of any dispute related to conclusion, amendment or renewal of a collective agreement which have negotiated, **representative union organisations of a higher level are entitled to call on strike**. [Emphasis added]

- 44 The Government's statement appears to recognise the right to strike also for higher level trade union organisations. This is obviously a new attitude. However, this is not 'legislation'. Looking therefore at the three cumulative conditions necessary to justify a restriction on Article 6§4 (according to Appendix on Article 6§4 in conjunction with Article 31(1)) it appears clear that already the first it is not fulfilled. Indeed, contradicting legislation cannot be considered as sufficiently clear and thus not foreseeable as fulfilling the criterion of 'prescribed by law'.

- 45 Concerning the condition 'prescribed by law' the ECtHR has examined a situation in which a national legislation had provided in one law that other laws should be brought into compliance with it but the other law still did not expressly comply with it: Even in such a situation the ECtHR held that it violated Article 11 ECHR (guaranteeing the right to strike in its case law) in so far as the restriction imposed by the other law was not 'prescribed by law':

84. It is remarkable that, although the Resolution of Labour Disputes Act provides in its Final Provisions that **other laws** and regulations should be applicable only in the part which does

not contradict that Act, and that they **should be brought into compliance** with it, the Transport Act nonetheless has so far **continued to apply without amendment** for the sixteen or so years since the Resolution of Labour Disputes Act entered into force in 1998 (see, by comparison, *Vyerentsov v. Ukraine*, no. 20372/11, § 55, 11 April 2013). This remains the case despite the fact that the above-mentioned inconsistency and the necessity of bringing the Transport Act into conformity with the Ukrainian Constitution and the Resolution of Labour Disputes Act has been admitted on many occasions (see, in particular, paragraphs 30, 31 and 38 above).

85. The foregoing considerations are sufficient to enable the Court to conclude that the interference with the applicants' rights under Article 11 of the Convention was **not based on sufficiently clear and foreseeable legislation**. [Emphases added]¹²

46 According to the Committee's case law this legal assessment by the ECtHR is directly transferable to the ESC¹³, all the more so as both human rights instruments follow the same concept of examining the conditions of licit restrictions in particular in relation to Article 6§4.

47 Accordingly and in conclusion, the ETUC continues to be of the opinion that Article 6§4 is violated (besides the two items referred to in its initial Observations) also in this respect.

III. Conclusions

48 Referring to its initial Observations the ETUC sees its previous Conclusions as to a violation of Article 6 confirmed if not strengthened in relation to

- Article 6§1 (see above para. 18),
- Article 6§2 (see above para. 35),
- Article 6§4 (see above para. 47).

¹² ECtHR (Fifth Section) Judgment 2 October 2014 - No. 48408/12 – *Veniamin Tymoshenko a.o. / Ukraine*.

¹³ See Lörcher, *The Increasing Authority of the European Convention on Human Rights in Relation to the European Social Charter*, in: Mulder/Hotvedt/Nesvik/Sundet (eds.), *Sui generis, Festskrift til Stein Evju*, Universitetsforlaget Oslo, 2016, p.420, 426, 428-9.

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