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

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**Case Document No. 9**

***Bedriftsforbundet v. Norway***  
Complaint No. 103/2013

**OBSERVATIONS FROM THE EUROPEAN TRADE UNION  
CONFEDERATION (ETUC)**

**Registered at the Secretariat on 14 July 2014**



**Observations**  
**by the European Trade Union Confederation (ETUC)**  
  
**in the case**  
***Bedriftsforbundet v. Norway***  
**Complaint No. 103/2013**  
  
(14/07/2014)

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## I. Introduction

1. In availing itself of the opportunity provided for in the Collective Complaints Procedure Protocol (CCPP - Article 7(2)) the European Trade Union Confederation (ETUC) would like to present the following observations in the case no. 103/2013 (*Bedriftsforbundet v. Norway*). The complaint alleges that the practice at Norwegian ports, requiring that workers<sup>1</sup> have membership of the dock worker union in order to be allowed to take up work, constitutes a breach of Article 5 of the Revised European Social Charter ("RESC" or "Charter"). The complaint has been declared admissible by decision dated 14 May 2014.
2. These observations are to an important extent based information and material which was provided by ETUC's Norwegian affiliate 'Landsorganisasjonen i Norge' (Norwegian Confederation of Trade Unions - LO) which itself had consulted its respective member organisation, the 'Norsk Transportarbeiderforbund' (Norwegian Transport Federation - NTF).
3. From the outset, it might be relevant to recall that the two previous collective complaints of employers' organisations<sup>2</sup> were also related to Article 5 of the Charter, the first of which was also focused on the negative freedom of association.

## II. The legal and factual background

4. It appears important to describe the background on the present problem in a more extensive way by referring to the international dimension of dock workers' protection (see below A.), its implementation by way of collective agreements (see below B.) before providing factual information for the present case (see below C.).
5. Concerning the legal background it should be noted that Norway is not only bound by ILO-Convention No. 137 (see below A.) but also by ILO-Convention No. 87<sup>3</sup> and the two UN-Covenants<sup>4</sup>. The description will however concentrate on the first mentioned ILO-Convention, whereas the legal assessment will also refer to the latter instruments (see below para 96).

### A. ILO-Convention No. 137

6. The Convention concerning the Social Repercussions of New Methods of Cargo Handling in Docks (Dock Work Convention, 1973 (No. 137))<sup>5</sup> entered into force on 24 Jul 1975). Norway has ratified the Convention in 1974.

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<sup>1</sup> Besides translations which might use the term 'employee' these observations are based on the general term 'worker' used in international instruments like in the Charter (in particular Article 5)

<sup>2</sup> Collective Complaints No. 12/2002 *Confederation of Swedish Enterprise v. Sweden*, No. 35/2006 *Federation of Finnish Enterprises v. Finland*)

<sup>3</sup> Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), ratified by Norway on 4 July 1949

<sup>4</sup> International Covenant on Civil and Political Rights (CCPR) and International Covenant on Economic, Social and Cultural Rights (CESCR), both ratified by Norway on 13 September 1972

<sup>5</sup> Adoption: Geneva, 58th ILC session (25 Jun 1973)

## 1. Main content of ILO-Convention No. 137

7. The **objective** of ILO-Convention No. 137 provides dock workers with special protection against the social consequences of new methods of cargo handling in the ports. The means employed to this end was to ensure “regularisation of employment and stabilisation of income” for dock workers through priority of engagement for dock work.<sup>6</sup>
8. The Convention **applies** to persons who are regularly available for work as dock workers and who depend on such work for their main annual income, stating in its Art. 1(2) i.a. that the terms **dock workers** and **dock work** mean persons and activities defined as such by national law or practice:

“2. For the purpose of this Convention the terms **dockworkers** and **dock work** mean persons and activities defined as such by national law or practice. The organisations of employers and workers concerned shall be consulted on or otherwise participate in the establishment and revision of such definitions. Account shall be taken in this connection of new methods of cargo handling and their effect on the various dockworker occupations.”

9. Art. 3 defines an essential means to make the objective work in practice. In its para. (1) it requires registers to be established and maintained for all occupational categories of dock workers, in a manner to be determined by national law or practice. Para. (2) requires that registered dock workers shall have priority of engagement for dock work. Para. (3) again refers to national law or practice:

“1. Registers shall be established and maintained for all occupational categories of dockworkers, in a manner to be determined by national law or practice.

2. Registered dockworkers shall have priority of engagement for dock work.

3. Registered dockworkers shall be required to be available for work in a manner to be determined by national law or practice.”

## 2. Implementation of ILO-Convention No. 137 by Norway

10. In Norway, the Convention is **implemented** (and made effective) by means of collective agreements that cover dock work. Since the ratification the Norwegian Government has reported to the ILO on the implementation of the Convention several times.
11. There is a wide consensus that ILO-Convention no. 137 is satisfied in Norway by collective agreements that provide a defined group of dock workers (those who are registered) with a prior right to perform loading and unloading work. There is also a consensus that the prior right only covers loading and unloading work, not other work tasks performed in the ports (like terminal work).
12. As to the key terms of Art. 1 and the scope of the Convention, Norway declared as follows in their first report for the period 1st July 1974 to 30 June 1976 pursuant to Art. 22 of the ILO Constitution:

"Article 1

§ 1 The terms "dock workers" and "dock work" are not formally defined but the special rules that apply to unemployment benefits for dock workers and the collective agreements apply to

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<sup>6</sup> See Royal Proposition no. 97 (1973-1974).

all workers that have dock work as their main occupation and who regularly work for and are required to be available for work for a particular office established by virtue of a collective agreement between national confederations of employers and workers or operated by one of these organisations."

13. In 2002 a General Survey concerning Convention no. 137 and Recommendation no. 145 by the Committee of Experts on the Application of Conventions and Recommendations (CEACR)<sup>7</sup> was discussed at International Labour Conference in Geneva. In line with the CEACR's recommendations, proposals to review the instruments were rejected by the Conference. To the contrary, their relevance in general and the principle of registration for prior work was underscored as follows:

"235. It is the view of the Committee that **Convention No. 137** and Recommendation No. 145, which are the only instruments addressing the questions of employment and conditions of work of dock workers in detail, **retain their relevance**, both where the nature of dock work has not changed and in situations of transition. This occupation continues to require specific protection measures, and the instruments offer alternative means of addressing situations of, often massive, workforce reductions. The three major **principles of permanent or regular employment, of a minimum income and of the system of registration** prescribed by the Convention, have proven to be relevant, even in countries which have a highly developed mechanized port system requiring only a small number of dock workers. The instruments also remain relevant to countries and ports which continue to remain outside the process of modernization, where the protection of the workers through the application of the instruments remains essential. Moreover, the need to adapt to the changes, as foreseen in the instruments, is of the greatest importance for all dock workers affected by port reforms." (Emphasis added)

14. There is some controversy as to whether the scope of ILO-Convention no. 137 is restricted to public ports. LO is quite critical of the Ministry's statements to that effect.<sup>8</sup> The disagreement as to the scope of the Convention in this respect echoes the social partners' disagreement on the scope of the exception clause of § 2(1) FA.

### 3. Organisation of dock work in other European countries

15. Like Norway, a number of countries have ratified the ILO-Convention No. 137.<sup>9</sup> To LO's knowledge, dock work is largely organized as in Norway, with work pools or administration offices for loading and unloading operations. This is the case in Belgium, Denmark, Finland, France, Portugal, Spain and Sweden. In the largest ports, such as (Danish) Aarhus, the big

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<sup>7</sup> *International Labour Office*, Report III (Part IB) Third item on the agenda: Information and reports on the application of Conventions and Recommendations – General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973 Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) International Labour Conference 90<sup>th</sup> Session 2002, Geneva 2002, [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2002-90-1B\)114.pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2002-90-1B)114.pdf)

<sup>8</sup> In LO's view, the ownership restructuring of a number of Norwegian ports cannot result in a restricted scope of application of the Convention. The purpose of said Convention is to ensure stable employment and income for dock workers, independently of whether the majority shareholder is a public or private entity.

<sup>9</sup> Out of the total of 25 ratifications 10 EU-Member States have ratified the Convention: Finland, France, Italy, Netherlands, **Norway**, Poland, Portugal, Romania, Spain and Sweden.

terminal companies (such as Maersk) have their own workers at the terminal but hire dock workers from the administration office to do all work carried out onboard the ships. As far as we know, dock workers are registered in line with information provided by the concerned unions; nevertheless, the definition of a dock worker may vary somewhat between countries.

## B. The relevant collective agreements

### 1. Introduction

16. By way of introduction, it should be noted that before the collective agreements were established, stevedores were casual labour who turned up for work with no guarantee of employment or income. This unpredictability forced dock workers to unionize early on, so as to successfully fight for decent wage and working conditions. The first Norwegian collective agreements for stevedores came into being at the beginning of 1900. The first collective agreements covered only individual companies.

- Subsequently, a series of company agreements merged into the Southern Norway agreement and Northern Norway agreement, respectively, which in 1988 amalgamated into one, single agreement, the **Southern and Northern Norway Agreement (SNNA)**, which is a piece rate pay agreement.
- Because of this wage system, it is not very well suited to the biggest ports, which need more stable labour. This paved the way for the 1976 **Framework Agreement (FA)** on fixed wage systems for dock workers. A judgement of the Norwegian labour<sup>10</sup> court explains why the FA came into being:

"The Framework agreement was established in 1976 as an alternative to the "Collective Agreement for Dock Workers in Southern Norway" – hereinafter called the Collective Agreement for Southern Norway. In 1988 the latter was amalgamated with the Loading and Unloading Agreement for Northern Norway into the Collective Loading and Unloading Agreement for Southern and Northern Norway – hereinafter called the Loading and Unloading Agreement. These national agreements have all along been based on a system that assumed that the social partners in each port would set up a loading and unloading operations office or administrative body" – to which the loading and unloading operations are assigned. When a ship docks in the individual port or terminal, operators book the necessary number of dock workers as set out in detail in the agreements."

17. On the basis of this historical development the relation between the two main collective agreements may be described in the sense that the SNNA is the general collective agreement. FA being the more specific agreement<sup>11</sup> requires that both the employers' association and the NTF have to agree before switching from SNNA FA. If the parties disagree, the SNNA will continue to be used.

18. Among the great quantity of common features in the FA as well as in the SNNA it should be noted that the text of ILO-Convention No. 137 is appended to both of them. Although not constituting an integral part of the agreements in the legal sense of the term, the Convention is of specific importance for the social partners in Norway. By directly linking the Convention

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<sup>10</sup> Published in Arbeidsrettslig domssamling ARD2001 (Labour Court Journal 2001), p. 49

<sup>11</sup> See the geographical scope in § 1(1) FA in note 13.

to the collective agreements its relevant provisions will therefore have to be interpreted in the light of ILO-Convention No. 137

19. Another common feature is the “Guidelines for Deduction of the Trade Union Fee to Norwegian Transport Union and its Local Divisions” appended to both collective agreements.

### 1. The Framework Agreement (FA) in 13 major ports

20. When FA was negotiated in 1976, an important change took place: the dock workers received a weekly wage guarantee (fixed pay), but in return had to surrender the majority on the boards of directors of the loading and unloading offices to the employers. This represented a paradigm shift. It meant the end of the unions’ power in the ports. And it meant the end of closed shop – formally and in fact.

21. The FA on the time rate system for unloading and loading workers (2012 – 2014) between

- Næringslivets Hovedorganisasjon (NHO) and NHO LOGISTIKK OG TRANSPORT (Logistics and Transport - NHO LT) on the one side and
- Landsorganisasjonen i Norge (LO) and Norsk Transportarbeiderforbund (NTF) on the other side<sup>12</sup>

applies to the 13 major ports in Norway (FA ports)<sup>13</sup>. The FA evidently does not contain any provision on a closed shop regime in the FA ports.

22. Concerning the ‘prior rights’ § 2 subsections (1) and (2) FA stipulate:

“(1) For vessels weighing 50 tons or more, departing from Norwegian harbours – foreign harbours or vice versa, the loading and unloading work shall be carried out by loading and unloading workers. All loading and unloading at the company’s own facilities where the company’s own employees are used for loading and unloading, are exempt.

(2) The employer commissions the number of workers needed to handle ships or other work.”

23. As regards the structure of the organisation there are two levels. The first relates to the ‘administration body’ which is composed of a board (of directors) and the ‘manager’. However, this allegation does not and cannot represent the reality in the FA ports. According to the FA § 3(2)

“An *administration body* is established in each of the docks, with a **board** consisting of 2 representatives from the workers and 3 from the employers. This organ will ensure the practical implementation of the Staff Committee’s resolutions according to item a), and make a decision as to the proposal acc. to item b). **The Board undertakes employments and terminations of loading and unloading workers and employees with the body’s administration.**

The manager is in charge of management of day-to-day operations of the office. He answers to the Board and participates in the Board meetings, without voting rights.” (Emphasis added)

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<sup>12</sup> Agreement no. 190, Expiry 31.03. 2014 (translation – also concerning the quoted provisions)

<sup>13</sup> § 1(1) FA: Oslo - Stavanger - Bergen - Trondheim - Drammen - Skien/Porsgrunn - Kristiansand - Fredrikstad - Moss - Mo i Rana - Larvik - Ålesund - Sandnes

## 2. The South and North Norwegian Agreement (SNNA)

24. Based on a longstanding development (see para. 16) the South and North Norwegian Agreement (SNNA) has been concluded as 'Loading and Unloading Agreement for South and North Norway (2012 – 2014) Agreement'<sup>14</sup> between

- Næringslivets Hovedorganisasjon (The Confederation of Norwegian Business and Industry) NHO Logistics and Transport and affiliated shipping transporters, steward companies, shippers and companies to the extent that the above-mentioned NHO's members take over the forwarding or the work for them on the one side and
- Landsorganisasjonen i Norge (The Norwegian Federation of Trade Unions), Norwegian Transport Workers' Association and the loading and unloading workers' associations concerned on the other side.

25. § 1(2) SNNA stipulates:

### **“Ships in foreign routes:**

For vessels weighing 50 tons or more, departing from Norwegian harbours – foreign harbours or vice versa, the loading and unloading work shall not be carried out by the crew on the vessel. All loading and unloading at the company's own facilities where the company's own employees are used for loading and unloading, are exempt. Neither does the provision apply to ships on routes abroad which on a leg of their journey also carry out coastal trade, maintaining the present practice.”

26. This agreement is used in smaller ports. There is a long and deep-seated tradition of port users subject to collective bargaining agreements and the local trade union jointly determining the size of the fixed group of loading and unloading workers who are to be registered as dock workers.

## 3. Further collective agreements

27. In addition to the two major collective bargaining agreements (FA and SNNA) there are also a number of small agreements. In Narvik NTF has a separate collective agreement for dock workers employed at the Port of Narvik (LKAB). The Port Agreement (PA)<sup>15</sup> is a collective agreement that - contrary to FA and SNNA - applies to dockworkers employed directly by the company which is bound by the PA. It is also distinct from the LKAB collective agreement. Local agreements based on the SNNA are also used in a few ports.

## C. The factual background

### 1. Workers affected

#### *a) “Registered” dock workers*

28. In 1974 around 3000 regular dock workers were registered in Norway,<sup>16</sup> whereas the number had diminished enormously to somewhat below 500 in 42 ports in more recent times. This dramatic reduction in numbers is related to employers' not implementing the valid collective agreements in good faith, a trend that has been observed internationally as well. Accordingly, relatively few people work in the Norwegian ports. There are 3 – 5 up to 30 – 35 registered

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<sup>14</sup> Agreement no. 179, expiry 31.03. 2014 (translation – also concerning the quoted provisions)

<sup>15</sup> In later reports from Norway PA is referred to as the Harbour Tariff (HT)

<sup>16</sup> See item V in Norway's first report to the ILO.

dock workers in individual ports. The average Norwegian port has fewer than 15 registered dock workers.

29. Concerning trade union membership, the reported figures for **2004** show that there is no correlation between the total number of dock workers and the number of NTF members: a total of 381 dock workers in 33 ports, in addition to the 111 dock workers that are permanently employed at the LKAB iron-ore port in Narvik.<sup>17</sup> Only 365 of these were registered members of the NTF, including 103 at LKAB in Narvik.<sup>18</sup> Adding the PA covered workers brings the total number of dock workers to 492 and the NTF members to 402.
30. The **2012** report of the Norwegian Government to the ILO states that the number of NTF-members is 413 (divided into FA, SNNA, LKAB and PA on the one side and the Direct Agreements on the other side) in 42 harbours. However, in order to be comparable with the above mentioned situation the total number of dock workers was reduced to approximately 420 and the NTF members to 350 (on the basis of 34 harbours where a collective agreement (FA, SNNA, LKAB and PA) between LO and NHO was applied).
31. Summing up the development it might be stated that the membership of NTF amounted to just a bit more than 80%:

	<b>2003/4</b>	<b>2012*</b>
<b>Workers</b>	492	420
<b>NTF members</b>	402	350
<b>percentage (%)</b>	81,7	83,3

\*estimations

#### *b) "Supplementary" dock workers*

32. In order to fulfil the work required beyond volume provided for by the permanent and registered dock workers "supplementary work" is often referred to. It is normally performed by temporary workers who are hired as required. The ports continue to use a large number of "supplementary" workers.
33. NTF has never been able to organise more than a small number of these supplementary workers. It has proved difficult to organise this group. There is therefore no doubt that there has always been a significant percentage of workers at the ports who have not been affiliated with a union.
34. In some ports (Stavanger and Ålesund) there are examples of port users establishing competing worker groups who have assumed loading and unloading tasks in competition with established loading and unloading offices. NTF has never had the power to prevent this.

## **2. Loading and unloading operations offices**

35. In most Norwegian ports operations are managed by a loading and unloading operations office that either hires out labour to the port users or undertakes loading and unloading operations as a company. As early as the beginning of the 1920s, dock workers were managed by a separate loading and unloading operations office that hired workers out to the port users. In the beginning, these offices were most often established by the local

<sup>17</sup> Norwegian Government's report for 2004, p. 1

<sup>18</sup> *Ibid.* p. 2

employers' association. By way of example we quote Art. 1 of the 1922 collective agreement between *Norsk arbeidsgiverforening (NAF)* (the Norwegian Employers' Association) and *Christiania Dampskipsekspeditørers Forening* (Christiania Steam Boat Shipping Agents' Association) on the one hand, and the *NTF and the local union branch*, on the other:

"Permanent workers at Christiania Dampskipsekspeditørers Forening's employment office shall be paid NOK. 72 per week."

36. As stated above (see paras. 23 and 37) employers are in the majority on the boards of the administrative bodies (the loading and unloading offices). § 3(2) FA establishes that the boards must comprise "two representatives of the workers and three representatives of the employers". It can be assumed that employers in the ports would not wish to coerce new workers into joining a union.
37. As stated above (see para. 23) employers find themselves in a majority position (NHO-members). They have the power to employ dock workers. Representatives of the employers who are parties to the collective bargaining agreement sit on the boards. The board employs a general manager. It is the general manager who interviews and in practice (in principle by way of delegation) employs the dock workers. It would be more than surprising if NHO members required trade union membership in NTF for applicants seeking a job as a dockworker. The employers have no desire to help the NTF to gain more members. In the light of this NHO's support to Bedriftsforbundet's complaint appears rather strange and not substantial.

### 3. Registration of dock workers

38. Dock workers are registered in two ways in Norway:
39. (1) A loading and unloading office is established and a group of loading and unloading workers are employed by the above office. Those workers who are permanently employed at the loading and unloading office are deemed to be registered dock workers covered by the prior right. The FA is used as the collective bargaining agreement in these ports.
40. (2) In small ports, where there is no basis for establishing a loading and unloading office, the local parties determine the size of a fixed group of loading and unloading workers. Those workers that belong to the fixed group are covered by the prior right.

### 4. Prior right

41. Historically, in the 1920s the prior right to loading and unloading operations was also established in collective agreements, with the purpose of securing a sufficient and tolerably stable workload for the offices, which in turn gave the dock workers sufficient and tolerably stable incomes. This was also in the interest of the employers, because the system helped to ensure a stable workforce in the ports.
42. By way of illustration Art. 3 (on employment exchange) of the 1927 collective agreement between the *Norsk arbeidsgiverforening (NAF)* (the Norwegian Employers' Association), *Dampskipsekspeditørenes arbeidsgiverforening* (The Steam Boat Shipping Agents Employers' Association), and *AS Fredrikstad Stuerkontor* (AS Fredrikstad Stevedores' Office), on the one hand, and *NTF and the respective local union branches in Fredrikstad*, on the other is quoted:

"Loading and unloading operations that the different ship-owners or shipping companies demand be carried out by Fredrikstad Stevedores' Office A/S, shall be transferred to Fredrikstad Stuerforening (Fredrikstad Stevedores' Association) or Fredrikstad Kullosseforening (Fredrikstad Coal Stevedores' Association). Members of the Stevedores' Office shall transfer to the Office all loading and unloading operations, inasmuch as this is within their decision-making powers."

43. The prior right to cargo loading and unloading is currently established in the FA and SNNA (see above paras. 22 and 25) in the following terms:

- "the loading and unloading work shall be carried out by loading and unloading workers" (§ 2(1) FA) and
- "the loading and unloading work shall not be carried out by the crew on the vessel" (§ 1(2) SNNA.)

Although the formulation is different (for historical reasons) the practice in the harbours has been the same. The Company in questions has to hire primarily registered dockworkers from a pool of workers in the port (for example from Drammen loading and unloading operations office (see above para. 35), the administrative body established in the port of Drammen according to § 3 FA (see above para. 23). Consequently, the Company bound by either the FA or the SNNA is primarily not permitted to use own workers or others like members of crews in the vessels to perform stevedore services. However, if registered dockworkers do not utilize their prior right (e.g. because of lack of capacity) the Company is permitted to use others.

44. The "Sola Port judgment"<sup>19</sup> describes the context as follows:

"The Framework Agreement and the provisions in Art. 2 -1 are a universally recognised collective agreement with traditions in ports. It has its roots in the particular conditions of dock workers, who were originally casual labour with no guarantee of employment or wages. The justification for the provision and the development of the collective agreement system for dock workers is evident from the judgment of the Court of Appeal. I add that the provision in Art. 2-2 of the Framework Agreement has been considered an element of Norway's fulfilment of national obligations the ILO Dock Work Convention (no. 137). Pursuant to Article 3 in said Convention, registered dock workers shall have priority of engagement for dock work."

#### **5. Norwegian court's case law and consequences drawn by LO and affiliated trade unions vis-à-vis closed shop clauses**

45. The situation in the seventies must be seen in connection with the legal view at the time. Closed shop clauses were not seen as contrary to international law before the British Rail judgement from the European Court of Human Rights in 1981.<sup>20</sup> In the following decades the European Convention on Human Rights (ECHR) and other international legal bodies developed a total ban on closed shop clauses.

46. At a national level this development led to a couple of Norwegian Supreme Court judgements that banned closed shop clauses. The first of them was the "Norwegian Peoples Aid" (NPA)

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<sup>19</sup> Norsk Retstidende (Rt.) 1997, p. 334

<sup>20</sup> ECtHR (Plenary) 13 August 1981 - no. 7601/76; 7806/77 - *Young, James and Webster / The United Kingdom*

judgment”.<sup>21</sup> Subsequently, the LO in a Secretariat meeting between LO’s management and LO union members in early 2002 adopted the following resolution:

“The closed shop clauses should be removed from all employment contracts”.

This resolution created certainty within the unions with regard to these issues.<sup>22</sup> After 2002, there was no doubt in the LO unions about the positive and negative aspects of freedom of association in Norwegian working life.

## 6. Background of the present conflict

47. The **general** background of the complaint might be better understandable when taking into account that the FA is not very popular among NHO's member enterprises. For lack of success in changing the FA (and the South and North Norwegian Agreement) in the regular negotiations NHO tries to leave the current collective agreements by all available means. One of the means is to support the complainant organisation by alleging that the practice in Norwegian ports would be characterised by mandatory membership in NTF in order to get employed.
48. More **concretely**, Holship Norway AS (hereinafter: Holship) is a member of the complainant organisation. The company operates in the Port of Drammen since 2000. Holship is not formally bound by any collective agreement.
49. Nevertheless, for several years Holship adhered to the FA on fixed pay for dock workers and thus used registered dock workers from Drammen Losse- og Lastekontor (hereinafter the Drammen loading and unloading operations office), the administrative body established in the port of Drammen according to § 3 FA. However, as of January 2013 Holship dropped the practice of applying the FA.
50. In their letter to Holship of 10 April 2013, the NTF demanded that the company sign up to a collective agreement for loading and unloading operations in The Port of Drammen. When Holship rejected the demand for a collective agreement, NTF sent notice of a boycott in a letter of 11 June 2013. The Framework agreement was annexed to the letter *"as a bargaining initiative,"* while NTF also pointed out that
- "the union is willing to negotiate reasonable solutions in order to minimise adverse effects on other workers as a consequence of the implementation of the Norwegian Transport Workers' Union's contractual demands."
51. In their letter of 11 June, NTF also gave notice of their intention to file a civil suit with the Drammen District Court to establish the legality of the boycott as notified, cf. Art. 3 of the Boycott Act, while also making clear that the boycott would be called, at the earliest, after the District Court has resolved the legality issue (see Art. 3(1) of the Boycott Act). The NTF notice of proceedings was filed with the Court on 12 June 2013. In Drammen District Court’s judgment of March 19 2014 the legality of the boycott was concluded. Holship has appealed. Hearings in Borgarting Court of Appeal will be held in the end of August 2014.

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<sup>21</sup> Norsk Retstidende (Rt.) 2001 p. 1413

<sup>22</sup> It was stated in the Annex that in 2002 LO took the view that LO and the unions could preserve the closed shop in their own administrations. However, this was also subsequently amended. LO and the unions currently do not impose a closed shop on their own workers.

52. It is against this background of that Bedriftsforbundet has lodged a complaint against Norway with the ECSR.
53. In this context, it should be recalled according to § 3(2) FA (see above para. 23) to which both ports mentioned in the complaint are bound (Drammen (Holship) and Oslo) it is the same employers' organisation that represents the employers who are in the majority on the boards of directors in the major ports are providing assistance to Holship in this case. This is a paradox. The employers hold the power in the ports, but in this case are attempting to make it look as if the NTF holds that power (see above para. 37). It is absolutely unthinkable that these employers should have any wish for a closed shop system.

### **III. Refutation of the specific allegations**

54. The complaint is based on two allegations the first of which is obviously the more important: an alleged closed shop practice (A.). The second is to be considered more as subsequent allegation stemming mainly from the first one and transposing it from the individual to the collective level (B.).

#### **A. Alleged closed-shop practice**

55. In its Conclusions, the complaint submits as first main allegation the violation of the right not to join a trade union. In general terms it reads:

“The practice of compulsory membership in Norsk Transportarbeiderforbund in order to take up and keep work in Norwegian public ports is a breach of the European Social Charter article 5 (negative organizational freedom).”

56. The complaint as well as in the additional information provided for in the two supplementing documents to the complaint contain some more specific allegations in this respect but they are unfounded (see below 1.). Conversely, there is information demonstrating that the allegations are false (see below 2.).

#### **1. Factual allegations**

57. From the outset it should be noted that the documents/statements referred to by the complainant are mainly public statements on a situation but do not provide evidence on the situation as such. Therefore, they are, in principle, not relevant. They can only be interpreted as the expression of the union representative to be able to recruit as many workers as possible for his union. This is primarily to be considered as propaganda, and not an expression of the reality of the situation. Nevertheless, the allegations will be replied to in detail.<sup>23</sup>

##### **a) Information in the Complaint**

58. Whereas the first allegation is placed in the more general part of the complaint the following references are taken from point 4.2 of the complaint.

59. The complaint states:

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<sup>23</sup> In order to facilitate the references this part will be divided according to the observations by the complainant organisation (i.e. complaint, additional information 1 and 2).

“It is submitted that the Norwegian government has acknowledged and accepted the closed shop practice at all public ports in Norway. In addition, the Norwegian government has set up a system where the union Norsk Transportarbeiderforbund/LO registers all workers at Norwegian ports. These numbers are later reported to the ILO through the Norwegian Government (**attachment 4**). In this context, the government is supporting a system that helps the union in establishing and maintaining a closed shop operation, cf. the additional protocol article 4.”

60. This allegation is not true or at least misleading. In particular, NTF neither “registers” (in the sense of the ‘registered dock workers’) nor takes account of “all workers at Norwegian ports”. Conversely, NTF obviously holds book on its own trade union members.
61. What the complaint is describing is the factual situation how the Government receives important information to fulfil its international reporting obligations under Art. 22 of the ILO Constitution. Indeed, in preparing the Government’s report to the ILO the Norwegian Labour Inspection Authority addresses information requests to NTF in order to gain an overview of the (scope and effectiveness of the) implementation of the relevant ILO-Convention No. 137. The particular reason for this request is the Government’s (as well as the social partners’) view that this Convention is implemented by collective agreements (and not by legislation). NTF as one party to the relevant collective agreement can and indeed does provide the information it collects for its own trade union purposes, in particular “those loading and unloading workers who are members of NTF and workers at the loading or unloading offices”<sup>24</sup>. By the way, nothing would prevent the complainant organisation to give their (contradicting?) information to the Government.
62. Moreover, the complaint refers to an email from Thor Chr. Hansteen of NHO,<sup>25</sup> in which he claims that Per Østvold had stated that “in Norway the NTF and the authorities have agreed that registration in accordance with ILO is effected through employment at the loading and unloading offices, and membership of NTF”. This claim was put to Per Østvold during the review of the boycott case against Holship heard by Drammen District Court, who in his witness statement claimed that he was quite certain that he had not expressed himself in such an over-simplified way with regard to this matter.
63. In its elements of “evidence of a closed shop operation at the Norwegian public ports for dock work is apparent” (under point 4.2 of the complaint) the complainant organisation states at first:
- “It is admitted by the vice chairman of the NTF in an interview on 5 August 2013 (**attachment 7**), verified the day after (**attachment 8**).”
64. These statements should not be evaluated out of the context in which they were made. Indeed, the vice chairman of NTF was talking about Norway’s compliance with ILO-Convention 137. By securing that unionized and other registered workers in the ports having prior right to work, Norway has fulfilled its obligations according to the ILO-Convention No. 137. In any event, this response cannot be interpreted as meaning that Norway practises a closed shop. Obviously, he could and indeed should have expressed himself more precisely. But these statements represent more ‘old ways’ of talking, not realities.
65. The complaint continues:

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<sup>24</sup> Annex 4-3 of the complaint

<sup>25</sup> Annex 4-4 of the complaint

“It is also admitted by the chairman of Norsk Havnearbeiderforening (The dock workers union, part of NTF) in an interview on 18 July 2008 (**attachment 9**).”

66. First it should be noted that this statement was made about six years ago. Secondly, this statement has again to be interpreted in the context in which it was made which is the connection to the 50<sup>th</sup> birthday of the former leader of the Norwegian Dockers' Union (affiliated to the NTF), Mr. Terje R. Samuelsen. The on-line article taken from the NTF's website i.a. states the following

“At the same time he changed union and joined NTF. Not that he had any choice. At the ports you have to be a member of NTF to get a permanent job as a loading and unloading worker. That's just the way it is. The dock workers have always kept these things under control. Unity and strength are two sides of the same coin, in the view of the dock workers.”

67. The content obviously is not a statement of facts describing the reality of the situation today. In substance, it expresses the desire of the then leader. Moreover, it should be noted that in 2008, when the article was displayed on the NTF website, the NTF's influence in the ports had already been significantly weakened in reality. Mr. Samuelsen was aware of this. Wishing to recruit more members he wanted to give a political signal at the occasion of his 50<sup>th</sup> birthday. It should be added that Mr. Samuelsen in the article describes the situation in 1988, when he was employed as a dockworker. The situation today is quite different, by virtue of the development in international and national law.

68. Moreover, the complaint states:

“Furthermore it is verified by the main employer's organization in Norway, Naeringslivets Hovedorganisasjon - Logistikk & Transport (Norwegian Logistics and Freight Association), the collective counterpart in the collective agreement with NTF. The practice is upheld even though the employers do not support it (**attachment 10**). NTF is however in a dominant position vis-a-vis the employers at the ports.”

69. First, these allegations are most general without any figure, example or document on or whatsoever 'verification'. It is therefore impossible to comment on or to draw any relevant conclusion. It is simply an assertion. Second, these statements are rather part of the employers' fight to abolish the collective bargaining agreements for dock workers in Norway. In this context, it should be noticed that three ports in Norway have been on strike or sympathy strike for an extended period. This has developed into a long-term, deadlocked conflict. The employers' arguments in this case are coloured by the conflict situation and their desire to abolish the collective bargaining agreements in the ports.

70. Furthermore, the complaint states:

“Naeringslivets Hovedorganisasjon Logistikk & Transport also verifies that there is cooperation between the authorities in registering all dock workers before the numbers are sent to the ILO. Thus, the authorities must take responsibility and be held accountable for the illegal practice and the system required to maintain and effectuate such practice.”

71. This is not the case. Even assuming that the first Norwegian reports to the ILO could be interpreted as stating that all registered dock workers had to be affiliated with NTF this has not been the case over the last decades. The ports have been subject to a very extensive rationalisation process. The number of permanent workers has been significantly reduced. At the same time the local unions' power and influence has been weakened (see above paras. 28 - 31). Moreover, the “Norwegian Peoples Aid” judgment (see above paras. 45 and 46)

also created a greater awareness of freedom of association. Over the last decades NTF has lost its dominant position in the ports. The claim of a closed shop practice carries no weight today.

*b) Additional information (Case Document No. 3)*

72. The additional information contained in Case Document No. 3 refers to three allegations, the first of which states:

“Oslo dock worker office (Oslo losse- og lastekontor) administer the dock workers at the port of Oslo, the largest Norwegian port. Each month, the dock worker office receive claim for payment of trade union contribution on behalf of the dock workers organized in the union Norsk Transportarbeiderforbund/LO (**attachment 1**). The lists consist of all employees at the dock worker office, hence illustrating the closed shop system.”

73. While it may be correct that all of the 37 permanent dock workers employed at the Oslo dock worker office (loading and unloading office) are members of the NTF, the office also has some permanent supply workers who are not union members.

74. In addition, there is nothing suspicious about the NTF asking the loading and unloading office to deduct union dues from the dock workers' pay. In fact this is stipulated in the collective agreement, which the employers have signed. The relevant FA includes a separate annex regarding the deduction of union dues from wages (see above para. 19). Obviously, if the worker is not a member of a union then obviously no dues are deducted from his wages. It is therefore not the case that all workers automatically have union dues deducted from their wages. Nor is it the case that the union can demand that union dues be deducted from wages if the worker is not a member of the union.

75. In this context it should be noted that this is a common practice in Norway since the same system involving the deduction of union dues from wages is practised by the majority of companies in Norway established by collective agreements to which all the major employers' organisations have adhered and accepted it. It is a well-established system that functions very well.

76. As second allegation in this document the complainant organisation states:

“The trade union contribution-list constitutes the day-to-day rotation scheme for the registered dock workers. This implied that membership in the union is a prerequisite in order to be granted work at the docks.”

77. This assertion is based on a misunderstanding of the system that is used at the Port of Oslo. The objective of the system is that all dock workers should receive approximately the same wages over the period of a year. However, it is not the case that only members of the NTF are included in the work rotation scheme. In fact, all workers at the loading and unloading office take part in the rotation.

78. The third allegation refers to the following statement:

“In an article published in the aftermath of the present complaint, at the website for Shortsea Promotion Center Norway, vice-president of Norsk Transportarbeiderforbund Lars M. Johnsen gives a statement to the complaint (**attachment 2**). In conjunction with the alleged infringement of the Charter article 5, Lars Johnsen declares that all registered dock workers, subject to the collective agreement in the docks, are members of Norsk

Transportarbeiderforbund. This must be considered as an admission to the closed shop system practiced at Norwegian docks.”

79. Again, (political) statements are not a relevant evidence for proofing closed shop practices. This is ‘propaganda’ from a union leader. Since 1976, when the Framework Agreement was introduced in the major ports, it has not been possible, neither formally nor in reality, for the NTF to run a closed shop as has been shown above (see i.a. paras. 28 - 31).

*c) Additional information (Case Document No. 4)*

80. Case document No. 4 contains one additional allegation:

“Attached is the response from the main employer's organisation in Norway, The Confederation of Norwegian Enterprise (NHO), who is part of and has the collective agreements in Norwegian ports with counterpart The Norwegian Transport Workers' Union (NTF). Hence they are in position to know whether there is organisational freedom or not among the dock workers. They conclude that Bedriftsforbundets complaint is correct: The practise in Norwegian ports is a mandatory membership in NTF in order to get at job (except temporary workers, students on call etc), look at the top of page 3 in their letter of 21 November 2013, ref. attachment 1. The vice president of the NTF also accepts this description again in the main business newspaper today, DN, ref. attachment 2.”

81. The statements from the Confederation of Norwegian Enterprise (NHO) are not credible. This is shown by the figures of workers affected (see above paras. 28 - 31). Moreover, NHO is well aware of the fact that

- its local members, in other words the employers in the ports, are in the majority on the boards of directors for the loading and unloading offices in all major ports,
- it is NHO's members who employ the general managers in these ports,
- it is the general manager who (in practice, in principle by delegation) employs the dock workers, and
- NHO's local members in the ports control everything that takes place in the loading and unloading offices.

However, NHO does not mention any of these crucial elements. Why not? The answer will most probably be that - against the background of described deadlocked conflict situation in three large ports - there is no interest to give an accurate description of the situation.

**2. No closed-shop practice**

82. In contrast to the above-mentioned (and refuted) allegations it appears important to refer to a concrete example denying expressly closed-shop practices which is reproduced in the LO newsheet Fri Fagbevegelse on 5 December 2013.<sup>26</sup> This statement coming from a ‘directly affected’ worker is in character different from general (political) statements. It reads as follows:

**“There’s no closed shop here”**

In Ålesund, Johan Eriksson cannot understand all the fuss about having to be a member of the NTF in order to be a dock worker in Norway. He has worked as a dock worker since 1999 without being a union member.

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<sup>26</sup> [http://frifagbevegelse.no/transportarbeideren/\\_ingen\\_organisasjonstvang\\_her\\_226520.html](http://frifagbevegelse.no/transportarbeideren/_ingen_organisasjonstvang_her_226520.html) (in Norwegian) – only first half of the article

There has been a lot of conflict about the dock workers and their rights this autumn. Near Stavanger, there is a boycott at Risavika Terminal because the company would not enter into a collective bargaining agreement giving registered dock workers prior right for loading and unloading. In Drammen, the Norwegian Business Association has filed a complaint referring Norway to the Council of Europe because it believes that Norway is violating human rights over the right to organise, as they allege that workers have to be members of the NTF in order to be able to work as a dock worker, and in Oslo there is open conflict between the employers and the employees.

### **Not pressured**

Now the Liberal MP Sveinung Rotevatn has also sent a written question to the Minister of Labour and Social Affairs, Robert Eriksson, asking whether the government will take measures to ensure that workers can be employed in the ports without being union members. According to Johan Eriksson from Östersund in Sweden, there is absolutely no need for any such measures. He has worked in ports along the entire coast for almost 15 years without being a union member.

“I have worked as a registered dock worker all the time, without being a member of any union. And I have never experienced any pressure to join,” points out the 36-year-old, who after many years in Norway speaks better Norwegian than Fredrik Skavlan does on TV on Friday nights.

“The media describes a reality I cannot recognise.” – Johan Eriksson, non-unionised dock worker

### **Myth**

Five years ago he moved to Ålesund, and he has been employed by the Ålesund Loading and Unloading Workers' Association since last year. Even here, where the local trade union representative, Bjørn Steffensen, is the vice chairman of the Norwegian Dock Workers' Association, he has not experienced any pressure.

“There was never any talk of being a union member where I worked before, and it was never an issue for me. Here in Ålesund I have noticed that there is a greater interest in unionisation, but it was never said that I would have to join the union in order to work here,” he says.

This is confirmed by the association's vice chairman, Bjørn Steffensen.

“It is a myth that you have to be a member of the NTF in order to get a job in Norwegian ports, but there has been a good old tradition of being unionised. This is because there have been a lot of battles at the ports, and this has contributed to a high level of unionisation,” he points out.

Steffensen estimates that four or five dock workers are non-unionised in Ålesund, and that half of the terminal workers are not union members either.

### **Irritated**

This is exactly the experience of the 36-year-old Swede.

“I am a bit irritated when I read what the media says about the dock workers. A lot of it is wrong, and the criticism is unfounded – pure invention. The media describes a reality I cannot recognise,” states Eriksson.

## **B. Alleged union monopoly**

83. As second main allegation, the complaint in its Conclusions contains the assertion of a trade union monopoly:

“The preference in the collective agreement of the docks, making a monopoly for Norsk Transportarbeiderforbund in Norwegian public ports is a breach of the European Social Charter article 5 (positive organizational freedom).”

84. Again, this allegation is not correct. There is no trade union monopoly by NTF. This is demonstrated by the example of another organisation having succeeded in recruiting members and establishing a collective bargaining agreement for dock workers: At the LKAB port in Narvik, the Confederation of Vocational Unions (YS) Parat union managed to recruit members in competition with NTF. The Parat union has established a collective bargaining agreement for dock workers with the Confederation of Norwegian Enterprises (NHO). Therefore at LKAB's dock in Narvik there are two competing trade unions organised under two different parent organisations, where both trade unions have established a collective bargaining agreement for their dock workers:

- Confederation of Vocational Unions (YS)/Parat agreement at LKAB (in Norwegian)<sup>27</sup>
- LO/NTF Agreement with LKAB (only 2010 agreement available online, in Norwegian)<sup>28</sup>

### **C. Interim conclusions**

85. As shown previously, the main two allegations

- closed-shop practice (see above under A.) and
- trade union monopoly (see above under B.)

are ill-founded in relation to the alleged violation Article 5 RESC. It has been demonstrated that all evidence adduced by the complainant organisation was either not relevant, not correct, or at least misleading.

## **IV. Legal assessment**

### **A. No violation of Article 5 RESC**

86. In principle, the legal assessment could be very short. There is obviously no violation of Article 5 RESC in relation to closed-shop practices in relation to dock workers because the complainant organisation has been unable to produce one single example of a dock workers being presented with a demand that they must be unionised to the NTF in order to get a job as dock workers or having been threatened with dismissal if they were employed but not members of the NTF. Nor does the number of NTF members in relation to the total number of dock workers show any such situation, quite the opposite (see above paras. 28 - 31). Finally, the factual allegations do not support the conclusion of a violation of Article 5 RESC (see above para. 85). In conclusion, the complaint must be dismissed.

87. Independently, it is not conceivable to imagine a violation of Article 5 RESC if the employers complaining about closed shop practices have themselves the power to employ someone or not (and the unions are prevented from doing so). The employers would therefore be the first who could stop an alleged closed-shop practice.

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<sup>27</sup> <https://www.parat.com/TariffDetail.aspx?m=1225&amid=355220>

<sup>28</sup>

[http://www.transportarbeider.no/kunder/ntf/mm.nsf/lupgraphics/LKAB\\_avtalen\\_2010\\_2012.pdf/\\$file/LKAB\\_avtalen\\_2010\\_2012.pdf](http://www.transportarbeider.no/kunder/ntf/mm.nsf/lupgraphics/LKAB_avtalen_2010_2012.pdf/$file/LKAB_avtalen_2010_2012.pdf)

## **B. As to the interpretation and application of Article 5 RESC**

88. Nevertheless, it might appear helpful if not necessary to clarify certain additional elements of the interpretation<sup>29</sup> and application of Article 5 RESC.

### **1. Closed-shop arrangements and practices**

89. From the outset, it should be noted that the complaint only refers to closed-shop 'practices'. This means that also the complainant organisation is of the view that neither legislation nor collective agreements (possibly defined as 'closed-shop arrangements') are violating Article 5 RESC.

#### ***a) Conformity with Article 5 RESC in respect of Norway***

90. In its 'Conclusions 2006' the Committee stated:

"It deferred its previous conclusion (Conclusions XVI-1, p. 520) pending information on the position of the Supreme Court concerning the closed shop clauses in the A. v. Norwegian People's Aid case. The Supreme Court disagreed with the High Court and in a judgment of 9 November 2001 ruled that the contested clause was null and void because it breached Section 55A sub-paragraphs 1 and 3 of the 1977 Worker Protection and Working Environment Act as well as Article 5 of the Charter.

The report states that following this ruling the Norwegian Confederation of Trade Unions (LO) reconsidered the matter, which resulted in a general agreement that such clauses should be totally abolished, other than for particular posts, namely when trade union policy and membership was considered to be important for promoting the organisation's goals.

In the light of the principles outlined in Complaint No. 12/2002 (Confederation of Swedish Enterprise v. Sweden, decision on the merits, 23 May 2003, paras. 26-30), the Committee considers that following the Supreme Court's decision on the lawfulness of trade union closed shop clauses, the situation in Norway is in conformity with Article 5 of the Revised Charter in this regard.

The Committee also asked in its previous conclusion whether closed shop clauses were unlawful in each of the sectors not covered by the 1977 legislation. The report states that neither Act No. 18 of 1975, which covers seamen and to some extent employees in hunting and fishing, nor the regulations on military aviation contain any regulations concerning closed shop clauses, but that in any case the Supreme Court's interpretation of Section 55A of the 1977 Act (see above) must be seen as creating a general principle concerning the lawfulness of closed shop clauses.

The Committee concludes that the situation in Norway is in conformity with Article 5 of the Revised Charter."

91. It will be also be recalled that the Committee confirmed this positive conclusion in its most recent Conclusions 2010 in the following terms:

"In reply to the Committee's request for an update, the report indicates that the legal framework previously found in conformity with Article 5 (Conclusions 2006) has remained the same during the reference period. It draws attention to a judgment of the Supreme Court of 24

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<sup>29</sup> As to legal impact of the 'Interpretation in harmony with other rules of international law' see the ETUC Observations in No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden - Case Document no. 4, Observations by the European Trade Union Confederation (ETUC), paras. 32 and 33.

November 2008 which reaffirmed the fundamental nature of the right to join or not to join a trade union as protected by Article 5 in a case where it found that unions cannot claim fees from non-members covered by a collective agreement which they have negotiated.

Conclusion

The Committee concludes that the situation is in conformity with Article 5 of the Revised Charter.”

*b) Conformity with Article 5 RESC as regards collective agreements in particular*

92. In order to come to the more specific aspect of collective agreements it might be recalled that the ESCR in Case 12/2002<sup>30</sup> stated:

“The pre-entry closed shop clauses under consideration in this case are clauses contained in so-called substitute agreements, i.e. collective agreements concluded between trade unions and individual employers who are not members of an employers’ organisation. The clauses, which differ in wording, **provide in essence that the employer shall give priority to trade union members when recruiting employees**. If an employer does not act in accordance with such a clause the trade union may in principle invoke a breach of the collective agreement.”<sup>31</sup> (Emphasis added)

93. Looking at the wording of ‘closed-shop’ clauses in the collective agreements in the then relevant Swedish construction sector they read:

“Members of the Building Workers’ Union, resident in the municipality where the workplace is situated, take precedence in cases of employment.” Or later:

“The parties to this collective agreement agree on the value of workers’ trade union membership.”

94. None of these formulations or their substance do, in fact, appear in any collective agreement at issue in the present case. Accordingly, this confirms the conclusion that (even basing the legal assessment on the ECSR’s conclusions) there cannot be any violation of Article 5 RESC on this ground.

*c) Conformity with Article 5 RESC by taking especially into account the increasing conflict with the (positive) ‘right to join’ a trade union*

95. This case demonstrates the problems trade unions face as soon as they are (rightly) abandoning closed-shop arrangements and practices. At least this is one reason for declining numbers in trade union membership. If employers’ organisations are now trying to get into trade union organising this would increasingly conflict with the positive obligations of the ratifying States deriving from Article 5 RESC. In order to attract new members they must remain able to show the personal, social and financial advantages of trade union membership and they must remain able to defend the interests of their members.

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<sup>30</sup> See above note 2, Decision 15 May 2003

<sup>31</sup> *Ibid.* para. 12

96. From the legal point of view the ETUC has already developed an argumentation based on the wording of both **UN-Covenants**<sup>32</sup> and **ILO-Convention No. 87**<sup>33</sup> as well as the case-law of the relevant Supervisory Committees,<sup>34</sup> in particular the CEACR stating in its latest General Survey 2012:<sup>35</sup>

“In the view of the Committee, and in accordance with the preparatory work, Article 2 of the Convention leaves it to the practice and regulations of each State to decide whether it is appropriate to guarantee the right of workers not to join an occupational organization, or on the other hand, to authorize and, where necessary, to regulate the use of union security clauses in practice. The only condition imposed by the Committee is that such clauses are the result of free negotiation between workers’ organizations and employers including public employers.”<sup>36</sup>

97. This in line with the wording of Article 5 RESC (1<sup>st</sup> sentence) not referring in any way to the right ‘not’ to form or join a trade union organisation

“With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organizations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom.”

as well as in particular the “Appendix to the Revised European Social Charter” to Article 1(2) RESC<sup>37</sup> which reads:

“Article 1, paragraph 2

This provision shall not be interpreted as prohibiting or authorising any union security clause or practice.”

98. The complaint refers to Article 11 **ECHR** in general and to the *Sørensen and Rasmussen v. Denmark* judgment<sup>38</sup> in particular in the following terms:

“In the case *Sørensen and Rasmussen against Denmark* (EMD-1999-52562), based on the European Convention on Human Rights article 11, the European Court of Human Rights has extended this freedom to include the right not to organize. ESP article 5 holds great resemblance to the mentioned article.”

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<sup>32</sup> See above note 4

<sup>33</sup> See above note 3

<sup>34</sup> ETUC Observations 30 August 2002 in Case 12/2002 (see note 2) under II.

<sup>35</sup> *International Labour Office*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008 - Third item on the agenda: Information and reports on the application of Conventions and Recommendations - Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) - International Labour Conference, 101st Session, 2012 - Report III (Part 1B), Geneva 2012

<sup>36</sup> *Ibid.* para. 99

<sup>37</sup> “Article 1 –The right to work

With a view to ensuring the effective exercise of the right to work, the Parties undertake: ...

2 to protect effectively the right of the worker to earn his living in an occupation freely entered upon; ...”

<sup>38</sup> ECtHR 11 January 2006 – Nos. 52562/99 and 52620/99 –*Sørensen v. Denmark and Rasmussen v. Denmark*

99. Concerning this judgment, several aspects should be highlighted. There were clear collective agreements on closed shops in certain sectors which is not an issue the present case. Moreover, the ECtHR stated *inter alia*:

“Although compulsion to join a particular trade union may not always be contrary to the Convention, a form of such compulsion which, in the circumstances of the case, strikes at the very substance of the freedom of association guaranteed by Article 11 will constitute an interference with that freedom (see *Gustafsson v. Sweden* judgment of 25 April 1996, Reports of Judgments and Decision 1996-II, § 45; *Young, James and Webster*, § 55, and *Sigurður Sigurjónsson*, § 36, both cited above).”<sup>39</sup>

“In the area of trade-union freedom and in view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how the freedom of trade unions to protect the occupational interests of their members may be secured (see *Swedish Engine Drivers’ Union v. Sweden*, judgment of 6 February 1976, Series A no. 20, pp. 14-15, § 39; *Gustafsson*, cited above, pp. 652-53, § 45; and *Schettini and Others v. Italy* (dec.), no. 29529/95, 9 November 2000; *Wilson & the National Union of Journalists and Others*, cited above, § 44).”<sup>40</sup>

100. Against this background and in any event, the ETUC is of the opinion that the ECSR appears to be prevented from further extending its case-law on the ‘negative’ freedom of association. Conversely, it should take more account of the ‘positive’ aspect of this right.

## 2. Trade union monopoly

101. As demonstrated above there is no trade union monopoly in practice (see above 84) and even less in legislation. In this context, it should be recalled that the CEACR only considers ILO-Convention No. 87 violated if this monopoly is provided for in legislation:

“Although it is generally to the advantage of workers and employers to avoid a proliferation of competing organizations, the right of workers to be able to establish organizations of their own choosing, as set out in *Article 2* of the Convention, implies that trade union diversity must remain possible in all cases. The Committee considers that it is important for workers to be able to change trade union or to establish a new union for reasons of independence, effectiveness or ideological choice. Consequently, ***trade union unity imposed directly or indirectly by law is contrary to the Convention.***”<sup>41</sup>

## V. Conclusions

102. On the basis of the information provided for and the argumentation developed above the ETUC it is of the view that the complaint should be dismissed on both grounds (alleged violation of Article 5 RESC on the negative and positive freedom of association).

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<sup>39</sup> *Ibid.* para. 54

<sup>40</sup> *Ibid.* para. 58

<sup>41</sup> See note 35, para. 92.

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