

THE PROTECTION OF THE WORKER'S RIGHT TO FREEDOM OF ASSOCIATION: THE ECtHR CASE-LAW

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The author declares that she was not involved in the analysed activities and has no relations with these bodies.

THE PROTECTION OF THE WORKER'S RIGHT TO FREEDOM OF ASSOCIATION: THE ECtHR CASE-LAW

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Abstract The article is devoted to the study of the freedom of association of workers as an important element of the mechanism of the protection of labour rights, and also as a tool for effective social dialogue aimed at improving working conditions and ensuring the socio-economic well-being of workers. It is established that although the right to form and join trade unions under the ECHR is part of the right to freedom of association, its content is quite broad, as it is determined by the purpose of such association, which is to protect the interests of workers. Therefore, a wide range of collective redress, including the right to collective bargaining and the right to strike, are now an integral part of the right of workers to form or join trade unions. The study pays special attention to the analysis of the case-law of the ECtHR, which allowed the author to identify key elements of the content of the right of employees to association and determine the positive and negative obligations of the state that are necessary to ensure its effectiveness and protection. Taking this analysis into account and examining the national case-law, gaps in the legal regulation of freedom of association of workers in Ukraine have been identified, and proposals for their elimination have been made.

Keywords: freedom of association; trade union; protection against discrimination; strike; collective bargaining; case-law of the ECtHR

1 INTRODUCTION

The right of workers to form and join associations in order to protect their socio-economic interests is an integral part of a democratic society and modern legal regulation of labour. This right is of particular importance for the protection of labour rights because the employee, despite the declared equality, is a weaker party in the employment relationship compared to the employer. Accordingly, the association of workers, especially the creation of trade unions, gives them additional opportunities to 'be on an equal footing' with the employer. A trade union, as a separate subject of labour law, is endowed with significant powers and rights to represent and protect the interests of its members, which strengthen and supplement the catalogue of individual labour rights of employees.

The right to freedom of association of workers in the domestic legal doctrine is most often considered through the prism of trade union activity. Thus, O.O. Pifko studied the constitutional and legal status of trade unions in Ukraine and several EU countries in detail, determining the content of the right to association and its place in the system of constitutional human rights.¹ A thorough analysis of the labour and legal status of trade

¹ O Pifko, 'Constitutional and legal principles of the formation and activities of trade unions in Ukraine and in the EU member countries: A comparative study' (Dr of Law thesis, Uzhhorod National University 2019).

unions was conducted by Yu.M. Shchotova. The author particularly defined the principles of trade unions in the transformation of labour relations and made proposals on how to improve the regulation of their activities, including the need to specify the responsibilities of trade unions as an important means of protecting the interests of their members.² The realisation of the right of employees to unite through the creation of trade unions, its restrictions, and areas of improvement was studied by O.G. Sereda,³ J.W. Simutina,⁴ N.A. Tsyganchuk,⁵ and others.

The works of Yu.V. Kyrychenko,⁶ O.Yu. Pogrebniak,⁷ and O.A. Triukhan⁸ are devoted to the analysis of the normative regulation of the right to freedom of association in trade unions at the international and national levels. It is also worth noting the theoretical and legal study of V.V. Solominchuk,⁹ who not only analysed the peculiarities of trade union participation in the process of interaction between civil society and the state and the limits of the latter's interference in trade union activities but also identified the role and forms of trade union participation in human rights. Some aspects of trade union participation in the protection of workers' rights are covered in a study by T. Semigina¹⁰ (on the right to professional development), R.Ya. Butynska (on the exercise of the right to collective bargaining and resolution of collective disputes),¹¹ and O.V. Zhadan (on the protection of workers from informal employment).¹²

The right to freedom of association of workers is also studied in the context of trade union activity by many foreign researchers. Thus, M. Seeliger, I. Wagner,¹³ and B. Larsson¹⁴ emphasise the importance of the right to unite in trade unions at the supranational level, especially for the formation of EU policy. Regarding the analysis of the role of the principle of freedom of association in the protection of labour rights, we should also mention the works of M.

- 2 Yu Shchotova, 'Legal mechanism for implementing the functions of trade unions as subjects of labour law' (Dr of Law thesis abstract, Taras Shevchenko National University of Kyiv 2013).
- 3 O Sereda, 'Powers of trade unions in the mechanism of legal protection of workers' rights' (2015) 15 (1) Scientific Bulletin of the International Humanities University. Series: Jurisprudence 123–125.
- 4 Ya Simutina, 'The moment of emergence of the legal personality of the trade union in the context of the principle of prohibition of abuse of rights' (2017) 27 (2) Scientific Bulletin of the International Humanities University. Series: Jurisprudence 41–44.
- 5 N Tsyhanchuk, 'Trade unions as subjects of labour law' (PhD of Law thesis abstract, National University of Internal Affairs 2004).
- 6 Yu Kirichenko, 'The right to freedom of association: the conformity of Ukraine's constitutional practice with European standards' (2014) 10 (1) Scientific Bulletin of the International Humanities University. Series: Jurisprudence 70–73.
- 7 Yu Pogrebnyak, 'The principle of freedom of association in the acts of the International Labour Organization and its implementation in the legislation of Ukraine' (2015) 3(9) Subcarpathian Law Herald 111–114.
- 8 O Triukhan, 'Exercising the right of workers to join trade unions' (2016) 1 (2) Scientific Bulletin of Kherson State University 93–97.
- 9 V Solominchuk, 'Participation of trade unions in the development of a sociolegal state (theoretical and legal aspect)' (Dr of Law thesis, National Pedagogical Dragomanov University, VN Karazin Kharkiv National University 2018).
- 10 T Semigina, 'Participation of trade unions in the development of the system of professional qualifications' (2020) Collected Works ΛΟΓΟΣ 137–139 <<https://doi.org/10.36074/21.02.2020.v1.46>> accessed 10 December 2020.
- 11 R Butynska, *The legal status of subjects of collective labour relations* (Raster-7 Publishing House 2020).
- 12 O Zhadan, 'Prospects for the development of trade unions in the transformation of the system of regulation of social and labour relations' (2020) 4 (71) Theory and Practice of Public Administration 155–162.
- 13 M Seeliger, I Wagner, 'A socialization paradox: Trade union policy cooperation in the case of the enforcement directive of the posting of workers directive' (2018) Socio-Economic Review <<https://doi.org/10.1093/ser/mwy037>> accessed 10 December 2020.
- 14 B Larsson, 'Trade union channels for influencing European Union policies' (2015) 5 Nordic Journal of Working Life Studies 101–121.

Wilhelm, A. Kadfakb,¹⁵ N. Egels-Zandéna H. Lindholm,¹⁶ and L. Goerke, M. Pannenberg.¹⁷ Many researchers emphasise the importance of intensifying trade union activities to ensure employment (Y. Wang, K. Ouattarab¹⁸), the protection of platform workers (M. Grahama, J. Woodcock, R. Heeksb,¹⁹ U. Brand, M. Niedermoser²⁰), the implementation of the concept of decent work (Sh. Rai, B. Brown, K. Ruwanpurac²¹), and maintaining the mental health of workers (J. Wels²²).

The purpose of this article is to analyse the current content of the right to freedom of association according to the case-law of the ECtHR, to study the peculiarities of its application by national courts, and to establish the role of trade unions to protect labour rights and interests.

The right to freedom of association is an important tool for achieving social justice through social dialogue between workers and employers (*Sindicatul Păstorul cel Bun v Romania*,²³ para. 130). On the other hand, according to the International Labour Organization (ILO), the preconditions for a sound social dialogue include strong, independent organisations of workers and employers with the technical capacity to access to relevant information, as well as respect for the fundamental rights of freedom of association and collective bargaining.²⁴ When social dialogue functions properly, it promotes justice and legality and allows long-term solutions to be found to the most difficult problems in the field of labour, which are then applied by those who participated in their development.²⁵

Employees participate in social dialogue through the creation of associations, as social dialogue relations are collective. Thus, according to the Law of Ukraine 'On Social Dialogue in Ukraine', the parties to the social dialogue at the national, sectoral, and territorial levels include the trade union side, and only at the production level can there be a trade union or

- 15 M Wilhelm et al, 'Private governance of human and labour rights in seafood supply chains – The case of the modern slavery crisis in Thailand' (2020) 115 *Marine Policy* <<https://doi.org/10.1016/j.marpol.2020.103833>> accessed 10 December 2020.
- 16 N Egels-Zandéna, H Lindholm, 'Do codes of conduct improve worker rights in supply chains? A study of Fair Wear Foundation' (2015) 107 *Journal of Cleaner Production* 31–40 <<https://doi.org/10.1016/j.jclepro.2014.08.096>> accessed 10 December 2020.
- 17 L Goerke, M Pannenberg, 'Trade union membership and sickness absence: Evidence from a sick pay reform' (2015) 33 *Labour Economics* 13–25 <<https://doi.org/10.1016/j.labeco.2015.02.004>> accessed 10 December 2020.
- 18 Y Wang, K Ouattarab, 'Employment double dividend hypothesis with the presence of a trade union' (2020) 193 *Economics Letters* <<https://doi.org/10.1016/j.econlet.2020.109273>> accessed 10 December 2020.
- 19 M Grahama, J Woodcock et al, 'The Fairwork Foundation: Strategies for improving platform work in a global context' (2020) 112 *Geoforum* 100–103 <<https://doi.org/10.1016/j.geoforum.2020.01.023>> accessed 10 December 2020.
- 20 U Brand, M Niedermoser, 'The role of trade unions in social-ecological transformation: Overcoming the impasse of the current growth model and the imperial mode of living' (2019) 225 *Journal of Cleaner Production* 173–180 <<https://doi.org/10.1016/j.jclepro.2019.03.284>> accessed 10 December 2020.
- 21 Sh Rai, B Brown, K Ruwanpurac, 'SDG 8: Decent work and economic growth – A gendered analysis' (2019) 113 *World Development* 368–380 <<https://doi.org/10.1016/j.worlddev.2018.09.006>> accessed 10 December 2020.
- 22 J Wels, 'The role of labour unions in explaining workers' mental and physical health in Great Britain. A longitudinal approach' (2020) 247 *Social Science & Medicine* <<https://doi.org/10.1016/j.socscimed.2020.112796>> accessed 10 December 2020.
- 23 *Sindicatul 'Păstorul cel Bun' v Romania* App no 2330/09 (ECtHR, 9 July 2013) <<http://hudoc.echr.coe.int/eng?i=001-122763>> accessed 10 December 2020.
- 24 International Labour Organization, 'Tripartism and social dialogue' <<https://www.ilo.org/global/topics/workers-and-employers-organizations-tripartism-and-social-dialogue/lang--en/index.htm>> accessed 10 December 2020.
- 25 International Labour Organization, 'Work for a Brighter Future: report of the Global Commission on the Future of Work' (2019) 23 <<https://www.ilo.org/infostories/en-GB/Campaigns/future-work/global-commission>> accessed 10 December 2020.

freely elected collective bargaining representatives (Art. 4).²⁶ Therefore, the right of workers to freedom of association is important not only to protect their socio-economic interests but also to improve the legal regulation of labour, improve working conditions, and ensure social justice in labour relations through social dialogue. At the same time, without the proper regulation of guarantees for the freedom of association of employees, social dialogue cannot be realised. This is because regulation provides for bilateral or tripartite consultations and negotiations of the subjects, which must be independent and free in their activities. Otherwise, social dialogue is formal, legitimising the decisions of public authorities through collective bargaining and collective agreements.

Freedom of trade union activity is recognised as a prerequisite for continued progress under the 1944 ILO Declaration on the Goals and Objectives.²⁷ The content of the right of employees to association is currently most thoroughly reflected in the case-law of the ECtHR. Thus, Art. 11 of the 1950 ECHR,²⁸ which defines the jurisdiction of the ECtHR, enshrines ‘the right to freedom of association with others, including the right to form and join trade unions for the protection of one’s interests’.

In this case, the provisions of the ECHR are not applied separately but together with the system of standards enshrined in international law in the relevant field. For example, the decision of the *National Union of Rail, Maritime and Transport Workers v the United Kingdom*²⁹ (para. 76) states that the ECHR cannot be applied ‘in a vacuum’ but should be interpreted in light of the general principles of international law. A similar provision is reflected in the decisions of *Manole and ‘Romanian Farmers Direct’ v Romania*³⁰ (paras. 61, 67) and *Demir and Baykara v Turkey*³¹ (paras. 85, 230), which further emphasise that in defining the meaning of terms and notions in the text of the ECHR, the Court can and must take into account elements of international law, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. In all these cases, the ECtHR emphasises the need to interpret the scope of trade union freedom to the extent that is generally accepted in international law.

Therefore, in addition to the ECHR and the case-law of the ECtHR, the European Social Charter (revised) of 1996³² and a number of ILO conventions, including two fundamental conventions (Freedom of Association and Protection of the Right to Organise Convention No. 87 of 1948³³ and Right to Organise and Collective Bargaining Convention No. 98 of 1949) are important in determining the content and specifics of the protection of workers’ rights to freedom of association:³⁴

- 26 The Law of Ukraine ‘On Social Dialogue in Ukraine’ 2862-VI [2010] Vidomosti of the Verkhovna Rada 28/255.
- 27 International Labour Organization, *Declaration concerning the aims and purposes of the ILO* (Declaration of Philadelphia, 1944) <https://zakon.rada.gov.ua/laws/show/993_328> accessed 10 December 2020.
- 28 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* [1950] <https://zakon.rada.gov.ua/laws/show/995_004#Text> accessed 10 December 2020.
- 29 *National Union of Rail, Maritime and Transport Workers v the United Kingdom* App no 31045/10 (ECtHR, 8 April 2014) <<http://hudoc.echr.coe.int/eng?i=001-142192>> accessed 10 December 2020.
- 30 *Manole and ‘Romanian Farmers Direct’ v Romania* App no 46551/06 (ECtHR, 16 June 2015) <<http://hudoc.echr.coe.int/eng?i=001-155631>> accessed 10 December 2020.
- 31 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) <<http://hudoc.echr.coe.int/eng?i=001-89558>> accessed 10 December 2020.
- 32 Council of Europe, *European Social Charter* (revised) [2006] Official Gazette of Ukraine 40/2660.
- 33 International Labour Organization, *C87 Freedom of Association and Protection of the Right to Organise Convention* [1948] <https://zakon.rada.gov.ua/laws/show/993_125#Text> accessed 10 December 2020.
- 34 International Labour Organization, *C98 Right to Organise and Collective Bargaining Convention* [1949] <<https://www.ilo.org/legacy/english/inwork/cb-policy-guide/righttoorganiseandcollectivebargainingconventionno98.pdf>> accessed 10 December 2020.

Thus, Convention No. 87 stipulates:

- the right of employees to create an organisation of their choice without prior permission, as well as the right to join such organisations (Art. 2), with a single restriction – the relevant organisations must act in accordance with the law (Art. 8);
- the obligation of public authorities to refrain from interfering in the activities of the relevant organisations of employees (Art. 3), including their dissolution or temporary prohibition in the administrative order (Art. 4).

Convention No. 98 guarantees workers' protection against discrimination on the grounds of trade union membership (Art. 1) and elaborates the guarantees of the prohibition of state interference in the activities of workers' organisations (Art. 2). At the same time, the Convention lays down the legal basis for social dialogue to regulate social and labour relations. Thus, according to Art. 4, states should take measures to encourage and promote the use of collective bargaining between workers' and employers' organisations in order to regulate working conditions.

The principle of freedom of association and the effective recognition of the right to collective bargaining is one of the four fundamental principles and rights at work (ILO Declaration on Fundamental Principles and Rights at Work, 1998).³⁵ That is, the International Labour Organization assumes that freedom of association (freedom of association in the context of Art. 11 of the ECHR) and the right to collective bargaining are interrelated. This connection is also emphasised in the current case-law of the ECtHR, although for a long time, collective bargaining was not defined by the ECtHR as an element of the right to freedom of association.

Thus, without a proper guarantee of the freedom of association of workers, the exercise of the right to collective bargaining is either limited or impossible, as the workers' union itself participates in negotiations with employers (trade unions or other bodies authorised by workers, but usually trade unions). Conversely, it is through effective collective bargaining that a union can gain additional recognition from employees, ensure that more people join it, and, through representativeness, have more leverage with the employer.

The European Social Charter (revised) of 1996 also enshrines the right of workers to form or join organisations for the protection of their economic and social interests (Art. 5). The right of association in the Charter is quite general in comparison with the ECHR. At the same time, defining the content of the right to collective bargaining, the Charter enshrines the positive obligations of states to facilitate joint consultations and negotiation mechanisms between workers and employers, as well as the need to regulate the right of workers and employers to collective action, including the right to strike (Art. 6). Therefore, in its practice, the ECtHR refers to the provisions of the Charter when interpreting certain elements of the right to freedom of association of workers and defining the limits of state intervention in the restriction of this right. The extension of the content of the right to freedom of association into trade unions by identifying opportunities for collective bargaining and strikes in the case-law of the ECtHR has taken place, *inter alia*, under the influence of the provisions of the revised Charter.

35 International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work* [1998] <https://www.ilo.org/declaration/thedeclaration/textdeclaration/WCMS_716633/lang--en/index.htm> accessed 10 December 2020.

2 POSITIVE AND NEGATIVE OBLIGATIONS OF THE STATE IN PROTECTING THE RIGHT TO FREEDOM OF ASSOCIATIONS

One of the most important objectives of Art. 11 of the ECHR, according to the case-law of the ECtHR, is to protect people from arbitrary interference by public authorities in the exercise of the right to freedom of association (*Manole and Romanian Farmers Direct v Romania*,³⁶ *Sindicatul 'Păstorul cel Bun' v Romania*,³⁷ etc.). The key focus of the article is to define the negative obligations of the state, which are to limit its state intervention in the realisation of the human right to form or join trade unions. At the same time, many decisions of the ECtHR emphasise the positive commitment to the effective exercise of this right.

For example, in *Wilson, National Union of Journalists and Others v the United Kingdom*³⁸ (paras. 41, 43, 47–48), a violation of Art. 11 of the ECHR was found on account of the state's failure to fulfil its positive obligations. Thus, the offer to employees who agreed not to be represented by trade unions of more favourable employment conditions (in particular, wage increases) by the employer did not provide for direct state intervention. However, the United Kingdom's liability arose because it had failed to provide applicants with the right to freedom of association in accordance with the law. In particular, the law did not provide for remedies by which applicants could prevent the employer from establishing less favourable conditions for workers who were not prepared to renounce their trade union rights. The court found that there were regulations in the United Kingdom that allowed employers to hinder the union's ability to protect the interests of its members. By allowing financial incentives to be waived in the face of trade union rights, the state had violated its positive obligation to ensure the exercise of the right to freedom of association.

Another example of the ECtHR's recognition of a breach by a state of its positive obligation in the context of Art. 11 of the ECHR is *Demir and Baykara v Turkey*. The Court found³⁹ that Turkey had not provided an opportunity for municipal officials to exercise their right to form a trade union. Interestingly, in the analysed case, there are violations by the state both in the form of actions (non-recognition of the legal personality of the trade union *Tüm Bel Sen*) and inaction (lack of legislative changes to implement the right to form a trade union for civil servants). In view of this combination, the Court emphasised the possibility of examining the complaint in terms of a breach of Turkey's negative obligations (both state interference in Art. 11) and positive obligations. As a result of the Court's examination of all the circumstances of the case, the priority for the legal consequences for the applicants was the failure to fulfil a positive obligation. The state did not provide legislative opportunities to exercise trade union rights due to the non-recognition of the right of municipal employees to form a trade union (although it ratified the relevant ILO Convention No. 87, which enshrines such a right).

In view of the present case, as well as on the basis of other case-law of the ECtHR, it should be noted that there are no clear boundaries between the positive and negative obligations of the state in the context of Art. 11 of the ECHR. Therefore, in finding a violation of Art. 11, the Court often proceeds from the particular circumstances of the case in order to determine the factors that have had a greater effect on the applicants: direct state interference or inaction.

36 *Manole and Romanian Farmers Direct v Romania* (n 30) para 57.

37 *Sindicatul 'Păstorul cel Bun' v Romania* (n 23) para 131.

38 *Wilson, National Union of Journalists and Others v the United Kingdom* App nos 30668/96, 30671/96 and 30678/96 (ECtHR, 2 July 2002) <<http://hudoc.echr.coe.int/eng?i=001-60554>> accessed 10 December 2020.

39 *Demir and Baykara v Turkey* (n 31) paras 116, 125–127.

At the same time, the Court emphasises in its judgments the need to apply uniform principles for resolving a case, regardless of whether it is analysed in terms of the state's call for appropriate measures to implement Art. 11 or in terms of interference by public authorities that must be justified under Art. 11 para. 2. The Court considers the key criterion for determining the effectiveness of such obligations in both cases to be a fair balance between the interests of the individual worker and society as a whole (for example, *Sindicatul 'Păstorul cel Bun' v Romania*, *Demir and Baykara v Turkey*, etc.).

In the context of ensuring such a balance, a special place in the practice of the ECtHR is occupied by the **state ensuring the balance between the interests of the trade union** as a collective entity **and the interests of a particular employee**, a member of the trade union. Thus, within the limits of its positive obligations, the state must create opportunities to protect the worker from the abuse of trade unions by its dominant position. For example, in *Associated Society of Locomotive Engineers & Firemen (ASLEF) v the United Kingdom*⁴⁰ (para. 43), it is stated that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail. Therefore, for an individual's right to join a union to be effective, the state must provide mechanisms to protect the worker from abuse by the unions, which are often the dominant subjects in the context of the implementation of Art. 11 of the ECHR.

Conversely, the appropriate balance provides for the need for proper protection of the rights of the union, taking into account its interests and the interests of a particular employee as a member of the union. Thus, in the same case, *Associated Society of Locomotive Engineers & Firemen (ASLEF) v the United Kingdom*, a British railway workers' union argued that the right to freedom of association had been violated by interfering with the union's ability to freely elect its members. The national courts ordered the union to renew the membership of one of its employees (Mr Lee), who had been expelled for promoting political views that contradicted the union's values. The ECtHR found a violation of Art. 11 of the ECHR, stating that the state's interference in the activities of the trade union in order to protect its member from the organisation itself was unjustified. Noting that there was no abuse or unreasonable treatment by the applicant trade union against Mr Lee, the Court emphasised the right of the trade union to elect its members as an integral part of the right to freedom of association (para. 38). This conclusion of the Court is conditioned by the provision of Art. 3 of the ILO Convention No. 87, which:

- guarantees workers' organisations the right to regulate the principles and program of their activities through statutes and administrative regulations, to freely elect representatives;
- prohibits the state from interfering in the freedom of formulation and implementation of program activities of workers' organisations.

The approach to non-interference of the state in the internal activities of trade unions is reflected in the judicial practice of Ukraine. Thus, the Resolution of the Grand Chamber of the Supreme Court of 26 February 2020 (case No. 210/5659/18)⁴¹ states that the issue of membership belongs to the exclusive competence of trade unions and their internal organisational activities, so it is not subject to judicial review. At the same time, the Supreme Court found arguments of the plaintiffs about the violation of their labour rights due to termination of powers of the chairman and deputy chairman of the union unfounded because the relationship was not of labour nature; the dispute was related to membership in the organisation and therefore should have been resolved according to trade union legislation. A similar approach is set out in the decision of the Civil Court of Cassation of

40 *Associated Society of Locomotive Engineers & Firemen (ASLEF) v the United Kingdom* App no 11002/05 (ECtHR, 27 February 2007) <<http://hudoc.echr.coe.int/eng?i=001-79604>> accessed 10 December 2020.

41 Resolution of the Grand Chamber of the Supreme Court (No 10/5659/18) 26 February 2020 <<https://reyestr.court.gov.ua/Review/88138146>> accessed 10 December 2020.

the Supreme Court of 28 March 2018 (case No. 341/1490/17⁴²) and the decision of the Lviv Court of Appeal of 24 January 2019 (case No. 461/4538/17⁴³).

Just as a trade union has the right to determine the conditions for membership in it, so too does the employee have the right to join or not join the trade union. Accordingly, Art. 11 of the ECHR also includes *a person's negative right to join*, ie, the right not to join or leave a trade union and not to be compelled to join a trade union. Thus, in *Sigurður A Sigurjónsson v Iceland*,⁴⁴ a violation of Art. 11 was found, as obtaining a license to drive a taxi was made conditional on joining the Frami Automobile Association. Despite the state's arguments concerning the public law nature of the organisation's activities, the ECtHR recognised it as an association within the meaning of Art. 11 of the ECHR and found unjustified state interference (by adopting relevant legislation) in the right to freedom of association. The ECtHR also noted that most states that have ratified the ECHR guarantee the negative aspect of freedom of association, ie, the freedom not to join or leave the association.

If in the analysed case, it was a question of non-fulfilment of negative obligations by the state, then in *Sørensen and Rasmussen v Denmark*⁴⁵ (paras. 59, 61, 76), the court found a breach of positive obligations. The state was unable to protect the applicants' negative right to freedom of association, as they had to become members of a particular trade union in order to be employed. Despite the applicants' acceptance of trade union membership as a mandatory condition of employment, the Court emphasised that this did not alter the fact that they had joined the trade union against their will. First, refusing to join a union automatically meant not getting a job. Second, one of the applicants was dismissed without notice after leaving the union, although the membership requirement did not relate to his ability to perform a particular job. In this judgment, the ECtHR further emphasises (para. 56) that both the positive and negative aspects of the right to freedom of association must have the same level of protection by states.

Another positive obligation of states in the context of Art. 11 of the ECHR is *the need to establish effective protection against discrimination*. There are two separate aspects to this issue. First, Art. 14 of the ECHR enshrines the need to ensure the right to freedom of association without discrimination on a number of grounds that are not exhaustive (sex, race, colour, language, religion, political or other opinion, national or social origin, belonging to national minorities, property status, birth, or other characteristics). Secondly, one of the anti-discrimination features is trade union membership, so it is necessary to ensure the right to non-discrimination, regardless of the exercise of the positive right to freedom of association.

Yes, in *Danilenkov and Others v Russia*⁴⁶ (paras. 123, 136), it is emphasised that the wording of Art. 11 explicitly states the right of 'everyone', which means the possibility of not being discriminated against for choosing to exercise the right to trade union protection. The ECtHR also emphasises that discrimination on the basis of trade union membership is one of the most significant violations of freedom of association, which threatens the very existence of a trade union (discrimination for membership in a certain trade union may lead to the withdrawal of employees from it, restrict the entry of other persons at risk of being subjected

42 Resolution of the Supreme Court (No 341/1490/17) 28 March 2018 <<https://reyestr.court.gov.ua/Review/73157069>> accessed 10 December 2020.

43 Resolution of the Lviv Court of Appeal (No 461/4538/17) 24 January 2019 <<https://reyestr.court.gov.ua/Review/79744471>> accessed 10 December 2020.

44 *Sigurður A Sigurjónsson v Iceland* App no 16130/90 (ECtHR, 30 June 1993) <<http://hudoc.echr.coe.int/eng?i=001-57844>> accessed 10 December 2020.

45 *Sørensen and Rasmussen v Denmark* App nos 52562/99 and 52620/99 (ECtHR, 11 January 2006) <<http://hudoc.echr.coe.int/eng?i=001-72015>> accessed 10 December 2020.

46 *Danilenkov and Others v Russia* App no 67336/01 (ECtHR, 10 December 2009) <<http://hudoc.echr.coe.int/eng?i=001-93854>> accessed 10 December 2020.

to such discrimination). The analysed decision found a violation of Art. 14 of the ECHR in conjunction with Art. 11, as the state had not established a mechanism for effective judicial protection against discrimination on the grounds of trade union membership.

Instead, in *National Union of Belgian Police v Belgium*,⁴⁷ the ECtHR did not find discrimination in the joint application of Art. 11 and 14 of the ECHR. The applicant emphasised discriminatory treatment, which was the application's removal from the process of collective consultation on municipal police in contrast to a number of other trade unions. However, the ECtHR established the legality of the restriction, emphasising that not all differences are discriminatory, but only those that are not reasonable and objectively justified or that the means of achieving the aim are not proportionate to the aim (paras. 47, 49).

Ukrainian law contains some contradictory provisions on guaranteeing the right to freedom of association in trade unions without discrimination. Thus, part 3 of Art. 36 of the Constitution of Ukraine guarantees the right to participate in trade unions in order to protect their labour and socio-economic rights and interests only to citizens of the state.⁴⁸ According to Art. 6 of the Law of Ukraine 'On Trade Unions, Their Rights and Guarantees of Activity',⁴⁹ the right to form trade unions is granted only to citizens of Ukraine, while foreigners and stateless persons may only join trade unions if the statutes of the latter provide such an opportunity. In addition, part 1 of Art. 7 of the Law provides for the right to freely choose a trade union to join only for citizens of Ukraine. Accordingly, foreigners and stateless persons working legally in Ukraine do not have the right to form trade unions or to freely choose a trade union to join. Such a choice is limited, in particular, by whether the trade union statute envisages the right of foreigners and stateless persons to join a union. Therefore, if there is no trade union in the enterprise, institution, or organisation where foreigners work, they may be restricted in their right to form an association to protect their own interests. We consider such a restriction discriminatory on the grounds of nationality and contrary to the ILO Convention No. 97, which guarantees the right of all workers to create an organisation of their choice without distinction (Art. 2), and the ILO Convention No. 98, which regulates the right of all workers to adequate protection from discriminatory actions to restrict freedom of association. However, the purpose of restricting the rights of foreigners and stateless persons is not defined in national legislation, so the relevant provisions, in our opinion, need to be brought into line with international standards.

An important guarantee of trade union activity, which follows from the case-law of the ECtHR, is the need for state regulation of opportunities not only to create relevant associations but also **to ensure activities throughout its existence**. The case of *United Communist Party of Turkey and Others v Turkey*⁵⁰ (para. 33) emphasised that if the guarantees of Art. 11 of the ECHR extended only to the formation of associations, the right would be declarative, as it would not preclude the dissolution of the associations immediately after their creation. That is why the protection of the ECHR in this case extends to the entire period of trade union existence.

A significant limitation to the effective exercise of trade union rights may be the existence of **liability for trade union activists**. In the decision of *Trade Union of the Police in the Slovak Republic and Others v Slovakia*⁵¹ (para. 55), the ECtHR emphasised the need for the

47 *National Union of Belgian Police v Belgium* App no 4464/70 (ECtHR, 27 October 1975) <<http://hudoc.echr.coe.int/eng?i=001-57435>> accessed 10 December 2020

48 Konstytucja Ukrainy [Constitution of Ukraine] [1996] Vidomosti of the Verkhovna Rada 30/141.

49 The Law of Ukraine 'On trade unions, their rights and guarantees of activity' 1045-XIV [1999, revised 2019] Vidomosti of the Verkhovna Rada 45/397.

50 *United Communist Party of Turkey and Others v Turkey* App no 133/1996/752/951 (ECtHR, 30 January 1998) <<http://hudoc.echr.coe.int/eng?i=001-58128>> accessed 10 December 2020.

51 *Trade Union of the Police in the Slovak Republic and Others v Slovakia* App no 11828/08 (ECtHR, 11 February 2013) <<http://hudoc.echr.coe.int/eng?i=001-113335>> accessed 10 December 2020.

state to ensure that there are no disproportionate penalties that would prevent trade union representatives from representing and defending the interests of their members. According to the decision in *Urcan and Others v Turkey*⁵² (para. 34), criminal or disciplinary sanctions for trade union activities may be an obstacle to the lawful participation in strikes and other active actions to protect the professional interests of workers.

However, the causal link between the employee's trade union activity and the application of liability is important. For example, in *Trofimchuk v Ukraine*⁵³ (para. 37), the applicant emphasised her dismissal for absenteeism as a restriction on her right to association. The ECtHR did not establish a link between the disciplinary action in the form of dismissal and the applicant's establishment of a trade union, as she had not proved either her participation in its establishment or the obstruction by the employer of her participation in the activity; that is, the trade union. Therefore, no violation of Art. 11 of the ECHR was established.

3 THE LEGAL NATURE AND CONTENT OF THE RIGHT TO FREEDOM OF ASSOCIATION

In the case-law of the ECtHR, it has been repeatedly emphasised that freedom of unions (the right to form or join trade unions to protect one's interests) is not a separate, independent right, but only a form or special aspect of freedom of association. (eg, *National Union of Belgian Police v Belgium* (para. 38), *Manole and 'Romanian Farmers Direct' v Romania* (para. 57), *Associated Society of Locomotive Engineers and Firemen (ASLEF) v the United Kingdom* (para. 37), *Wilson, National Union of Journalists and Others v the United Kingdom*, (para. 42), *Sigurður A Sigurjónsson v Iceland* (para. 32), etc.).

The following conclusions follow from this:

- the peculiarities of the application and interpretation of the ECtHR of Art. 11 in the context of non-union freedom of association may also be applied to the right to join trade unions in so far as this is appropriate having regard to the nature of the employment relationship. In particular, this concerns the application of Art. 11 part 2 of the ECHR concerning restrictions on the exercise of the right of association;
- The ECHR does not provide for special treatment by the state of trade unions or their members (*Sindicatul 'Păstorul cel Bun' v Romania*⁵⁴) compared to other types of associations. However, special regulation of the content of freedom of association in relation to trade unions should be noted. The right to freedom of association is defined in general, without regulating the goals or purpose of such an association. In *National Union of Belgian Police v Belgium*,⁵⁵ the ECtHR emphasises that in this way, the ECHR guarantees the protection of the interests of trade union members through trade union actions, the list of which may differ from one state to another. It is this broad goal that determines the constant development of the case-law of the ECtHR concerning determining the means to achieve it (to which, to date, the ECtHR includes, among others, collective bargaining and strikes).

The wide range of means to protect the interests of trade union members in the laws of different countries is due, *inter alia*, to the delicate nature of social and political issues related

52 *Urcan and Others v Turkey* App nos 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04 (ECtHR, 17 October 2008) <<http://hudoc.echr.coe.int/eng?i=001-87634>> accessed 10 December 2020.

53 *Trofimchuk v Ukraine* App no 4241/03 (ECtHR, 28 January 2011) <https://zakon.rada.gov.ua/laws/show/974_846#Text> accessed 10 December 2020.

54 *Sindicatul 'Păstorul cel Bun' v Romania* (n 23) para 133.

55 *National Union of Belgian Police v Belgium* (n 47) para 39.

to ensuring an appropriate balance between the interests of workers and employers (*Manole and 'Romanian Farmers Direct' v Romania*,⁵⁶ *Sørensen and Rasmussen v Denmark*, *Sindicatul 'Păstorul cel Bun' v Romania*,⁵⁷ etc.) Therefore, the freedom of states to ensure positive obligations in this area is practically not limited.

The essence of the right to freedom of association in accordance with the case-law of the ECtHR is determined by two interrelated principles:

- 1) maximum freedom of discretion of the state in determining measures to ensure positive obligations;
- 2) minimum freedom of discretion during the intervention of states in the exercise of the right to freedom of association and in the regulation of those aspects of the content of freedom of association, without which the relevant right cannot be properly exercised.

Accordingly, when regulating measures to promote the effective exercise of the right to freedom of association, determining restrictions on its exercise at the legislative level, the state must take into account those elements of the content of this right that the ECtHR considers essential. Therefore, we will examine such elements further according to the case-law of the Court.

Thus, in the decision in *Demir and Baykara v Turkey*,⁵⁸ the broadest list of elements of the right to form and join trade unions was identified. It includes the right to form and join trade unions, the prohibition on concluding employment agreements exclusively with members of a particular trade union, and the right to demand that the employer hear a position on behalf of its members, the right to collective bargaining with the employer. However, this list is not exhaustive and varies depending on the development of labour relations and international labour regulation.

For example, prior to this judgment, the ECtHR has repeatedly stated in its case-law that the establishment of a legislative mechanism for collective bargaining should not be considered a mandatory component of the mechanism for exercising the right to freedom of association (eg, *National Union of Belgian Police v Belgium*,⁵⁹ *Wilson, National Union of Journalists and Others v the United Kingdom*⁶⁰). In support of this position, the ECtHR noted that while the European Social Charter regulates the obligation to facilitate joint consultations between workers and employers, it allows states not to make such an obligation when ratifying the Charter. Accordingly, it cannot be assumed that the right to collective bargaining implicitly follows from Art. 11 part 1 of the ECHR and the ECtHR therefore emphasised that collective bargaining may be one way of protecting the interests of its members by trade unions but is not necessary for effective freedom of association.

Interestingly, in the decision of *Wilson, National Union of Journalists and Others v the United Kingdom* (2002), it is stated that the Court is not yet ready to recognise that the freedom of trade union to express its vote presupposes the employer's obligation to recognise the trade union. However, in 2008, in *Demir and Baykara v Turkey*, the ECtHR has reviewed its case-law in this regard. In particular, the ECtHR now holds that the right to collective bargaining with employers has become one of the main elements of the right to form trade unions (para. 154) and that a collective agreement is an essential means of promoting and protecting trade union interests (para. 157). The change in approaches is linked both to the development of

56 *Manole and 'Romanian Farmers Direct' v Romania* (n 30) para 60.

57 *Sørensen and Rasmussen v Denmark, Sindicatul 'Păstorul cel Bun' v Romania* (n 45) para 133.

58 *Demir and Baykara v Turkey* (n 31) para 229.

59 *National Union of Belgian Police v Belgium* (n 47) para 38.

60 *Wilson, National Union of Journalists and Others v the United Kingdom* (n 38) para 44.

international labour standards and to the ECtHR's analysis of the practice of contracting states in this area.

Along with collective bargaining, an important component of the right to freedom of association is **the right to strike** (Wilson, *National Union of Journalists and Others v the United Kingdom*,⁶¹ *Schmidt and Dahlström v Sweden*⁶² (para. 36), etc.) In *National Union of Rail, Maritime and Transport Workers v the United Kingdom*,⁶³ citing a number of other judgments, the ECtHR emphasised that restricting the right to organise and conduct a strike restricts the right to freedom of association, so the right to strike is protected by Art. 11 of the ECHR. In its decisions, the ECtHR recognised the restrictions on strikes set by law as unreasonable and disproportionate to the purpose of the restrictions (for example, *Hrvatski liječnički sindikat v Croatia*,⁶⁴ *Enerji Yapı-Yol Sen v Turkey*,⁶⁵ *Veniamin Tymoshenko and others v Ukraine*⁶⁶).

Thus, in *Veniamin Tymoshenko and Others v Ukraine*, the ECtHR found a violation of the applicants' right to strike as a result of state intervention – the establishment of unjustified restrictions on strikes for transport workers. Instead, in the judgment in *Trofimchuk v Ukraine*,⁶⁷ a conclusion can be drawn that the Court clearly distinguishes between the right to freedom of peaceful gathering and the right to strike as an element of the right to freedom of association. Thus, the applicant took part in a picket against her employer, which is the exercise of her right to freedom of peaceful assembly but does not provide guarantees of absence from work, unlike a legal strike, which ensures immunity from disciplinary action.

National courts are guided by the ECtHR's view that the right to strike is protected by Art. 11 of the ECHR. Thus, referring to the decision of the *National Union of Rail, Maritime and Transport Workers v the United Kingdom* and *Trofimchuk v Ukraine*, the Popasnyansky District Court of Luhansk Oblast, in its judgment from 2 November 2016 (case No. 423/3238/16-c)⁶⁸ stated that interference with the right to strike was possible only if it was 'established by law', pursued one or more legitimate goals and is 'necessary in a democratic society' to achieve these goals. A similar position is supported by the decision of the Stryi City District Court of the Lviv Oblast of 17 August 2017 (case No. 456/2397/17).⁶⁹ At the same time, these decisions established the illegality of the strike due to the violation of the procedure of its holding. At the same time, the courts referred to the arguments of the ECtHR, including those cited above in *Trofimchuk v Ukraine*. The courts restricted the right to strike by defining a clear procedure for complying with the requirements of Art. 11 part 2 of the ECHR, as it pursued a legitimate aim: to enable the employer to take measures to avoid or minimise the negative effects of the strike. Similar arguments with reference to the case-law of the ECtHR were used by the courts to declare the strikes illegal in the decisions of the Svitlovodsk City District Court of Kirovohrad

61 *ibid*, para 45.

62 *Schmidt and Dahlström v Sweden* App no 5589/72 (ECtHR, 6 February 1976) <<http://hudoc.echr.coe.int/eng?i=001-57574>> accessed 10 December 2020.

63 *National Union of Rail, Maritime and Transport Workers v the United Kingdom* (n 29) para 84.

64 *Hrvatski liječnički sindikat v Croatia* App no 36701/09 (ECtHR, 27 November 2014) <<http://hudoc.echr.coe.int/eng?i=001-148181>> accessed 10 December 2020.

65 *Enerji Yapı-Yol Sen v Turkey* App no 68959/01 (ECtHR, 06 November 2009) <<http://hudoc.echr.coe.int/eng?i=001-92267>> accessed 10 December 2020.

66 *Veniamin Tymoshenko and others v Ukraine* App no 48408/12 (ECtHR, 02 January 2015) <https://zakon.rada.gov.ua/laws/show/974_a44#Text> accessed 10 December 2020.

67 *Trofimchuk v Ukraine* (n 53) paras 38–45.

68 Decision of the Popasna District Court of Luhansk Region No 423/3238/16-ц (2 November 2016). <<https://reyestr.court.gov.ua/Review/62396610>> accessed 10 December 2020.

69 Decision of the Stryi City District Court of the Lviv Region No 456/2397/17] (17 August 2017). <<https://reyestr.court.gov.ua/Review/68357601>> accessed 10 December 2020.

Oblast from 19 September 2017 (case No. 401/2326/17)⁷⁰ and the Kivertsiv District Court of Volyn Oblast from 20 December 2016 (case No. 158/2007/16-c),⁷¹ etc

The existence of a significant number of court decisions declaring strikes illegal in Ukraine is evidence of a complex legislative procedure for organising and conducting strikes. Thus, according to the Law of Ukraine 'On the Procedure for Resolving Collective Labour Disputes (Conflicts)',⁷² the minimum duration of the period from the formation of employees' demands to the beginning of a strike in case of non-compliance with labour legislation or collective agreement is 20 days, while the maximum is 50 days, not including the time for organising the events: the collection of signatures, decision-making by the general meeting (conference) of the labour collective on the requirements for the employee, and then on the announcement of a strike, the formation of labour arbitration, etc. In the case of, for example, non-payment of wages by the employer (and, consequently, the inability of the employee to provide for himself and his family members), this period is too long. In addition, the procedure of organising a strike is quite complex and requires an understanding of a significant number of legal nuances. We believe that ensuring the effectiveness of the right to strike requires simplification of the procedure for its organisation, taking into account, *inter alia*, the results of the generalisation of national case-law in this area.

The experience of individual European countries should be used to improve the legislation that determines the mechanism for exercising the right to strike in Ukraine. In many European countries, the norm provides for other collective actions, in addition to traditional strikes: picketing, solidarity actions, work according to the rules, slowing down the work, pre-emptive strike, etc.⁷³ They are often limited in time but have a fairly simple organisation procedure and allow the employer to see the real intentions of employees to assert their rights.

The right to strike does not in itself imply the right to win (*National Union of Rail, Maritime and Transport Workers v the United Kingdom*),⁷⁴ but it provides unions with additional means to protect the rights of their members and, in many cases, is an effective way of leverage on the employer. By analogy, the right to collective bargaining is not equal to the right to collective agreement. For example, the parties may disagree or decide on the inexpediency of concluding a collective bargaining agreement, and the collective bargaining mechanism itself is important because it provides an opportunity for trade unions to convey to the employer the interests of its members.

4 RESTRICTIONS ON THE FREEDOM OF TRADE UNIONS

An important guarantee of the exercise of the right to freedom of association is protection against unrestricted state interference in its exercise. However, para. 2 of Art. 2 of the ECHR lays down a number of legal restrictions on the exercise of this right. Appropriate restrictions must be met in order to be justified:

70 Decision of the Svitlovodsk City District Court of the Kirovohrad Region No 401/2326/17 (19 September 2017) <<https://reyestr.court.gov.ua/Review/69071089>> accessed 10 December 2020.

71 Decision of the Kivertsiv District Court of the Volyn Region No 158/2007/16-ц (20 December 2016) <<https://reyestr.court.gov.ua/Review/63549884>> accessed 10 December 2020.

72 The Law of Ukraine 'On the Procedure for Resolving Collective Labour Disputes (Conflicts)' 5458-VI [Revised 2012] Vidomosti of the Verkhovna Rada 34/227.

73 Federation of Trade Unions of Ukraine, 'The Right to Strike in EU Countries: Comparative Characteristics. The state of Ukrainian legislation on the right to strike and bring it into line with international norms' <<https://pon.org.ua/novyny/4222-pravo-na-strajk-ukrayina-yes.html>> accessed 10 December 2020.

74 *National Union of Rail, Maritime and Transport Workers v the United Kingdom* (n 29) para 85.

- 1) be established by law;
- 2) have a legitimate goal, be proportionate to this goal.

The criterion of ‘establishment by law’ is interpreted by the ECtHR quite broadly. Even if restrictions on the right to freedom of association are established by state law, they will not always be justified. According to the ECtHR case-law, both the existence of a relevant restriction in national law and the quality of the law are assessed – its accessibility, accuracy, and predictability of consequences.

Thus, in the case of *NF v Italy*,⁷⁵ reaffirming previous case-law, the ECtHR emphasised that the expression ‘established by law’ in Art. 11 of the ECHR not only implies that the impugned restriction is enshrined in the law of the respondent state but also requires the relevant legislation to be available to interested parties and its consequences (para. 26). With regard to the requirement of predictability, the ECtHR clarifies that it means the accuracy of the wording which allows a person (independently or by consultation) to regulate his conduct (*NF v Italy*,⁷⁶ *Veniamin Tymoshenko and Others v Ukraine*,⁷⁷ *Verentsov v Ukraine*⁷⁸ (para. 52), *Shmushkovich v Ukraine*⁷⁹ (para. 37), etc.). In addition, the quality of the law presupposes that it must clearly define the scope of the restrictions and the manner in which they are applied (*Maestri v Italy*⁸⁰ (para. 30), *NF v Italy* (para. 29)).

Thus, in *Veniamin Tymoshenko and Others v Ukraine*,⁸¹ the ECtHR found that the interference with the applicants’ rights under Art. 11 of the ECHR was not based on sufficiently precise and predictable legislation. The ban on strikes by transport workers was based on the norm established by the Law of Ukraine ‘On Transport’, but the relevant provision contradicted the Law of Ukraine ‘On the Procedure for Resolving Collective Labour Disputes (Conflicts)’. At the same time, the ECtHR emphasised that the restrictive norm of the Law ‘On Transport’ was applied for 16 years after the state enshrined in the transitional provisions of the Law of Ukraine ‘On Procedure for Resolving Collective Labour Disputes (Conflicts)’ the norms on the application of provisions of other laws only in the part that did not contradict it. Accordingly, the criterion of predictability of the restriction was not met, and the ECtHR found a violation of Art. 11 of the ECHR.

In *Koretsky and Others v Ukraine*⁸² (para. 48), the ECtHR also found a violation of the criterion of predictability with regard to the provisions of Ukrainian law in the field of registration of associations of citizens. The ECtHR found such regulations to be too vague, which gives the authorities too wide discretion and limits of discretion when deciding whether to register or refuse to register a public organisation. In such a case, even the judicial protection procedure available to the applicants could not prevent the arbitrary refusal to register. On that basis, the ECtHR found, *inter alia*, a violation of Art. 11 of the ECHR.

75 *NF v Italy* App no 37119/97 (ECtHR, 12 December 2001) <<http://hudoc.echr.coe.int/eng?i=001-59622>> accessed 10 December 2020.

76 *NF v Italy* (n 75) para 29.

77 *Veniamin Tymoshenko and others v Ukraine* (n 66) 80.

78 *Verentsov v Ukraine* App no 20372/11 (ECtHR, 11 July 2013) <https://zakon.rada.gov.ua/laws/show/974_945#Text> accessed 10 December 2020.

79 *Shmushkovych v Ukraine* App no 3276/10 (ECtHR, 14 February 2014) <https://zakon.rada.gov.ua/laws/show/974_990#Text> accessed 10 December 2020.

80 *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) <<http://hudoc.echr.coe.int/eng?i=001-61638>> accessed 10 December 2020.

81 *Veniamin Tymoshenko and others v Ukraine* (n 66) 81–86.

82 *Koretsky and others v Ukraine* App no 40269/02 (ECtHR, 3 April 2008) <https://zakon.rada.gov.ua/laws/show/974_446#Text> accessed 10 December 2020

In a similar case concerning the refusal to register an association, *Jafarov and Others v Azerbaijan*⁸³ (paras. 70, 81), the ECtHR also emphasised that in assessing the lawfulness of an interference and determining the predictability of the law, it is necessary to take into account, in addition to the text of the law itself, the manner of its application and the available official interpretations (para. 70). At the same time, judicial interpretation is especially important, as it provides for the application of the rule in accordance with the specific situation and circumstances. Therefore, the presence of several possible interpretations of one rule does not automatically make the law unpredictable. On the contrary, interpretation in a particular situation is one of the key tasks of the trial.

In addition to legality, restrictions on the freedom of association must have a legitimate aim, which is linked in the ECHR primarily to national or public interests and the protection of human rights and freedoms. Thus, under Art. 11 para. 2, the exercise of the right of association may be established if it is 'necessary in a democratic society in the interests of national or public security, to prevent riots or crimes, to protect health or morals or to protect the rights of and the freedoms of others.' Since the provisions of the article are quite general, the ECtHR, in determining the validity of specific restrictions, proceeds from an analysis of their purpose, the proportionality of the interference, and its validity to achieve the relevant purpose. At the same time, it is determined that the objective is consistent with the general principles for establishing the limits set out in Art. 11 para. 2 of the ECHR.

For example, the Constitution of Ukraine prohibits the formation and operation of public organisations (including trade unions) whose program goals or actions are aimed at eliminating Ukraine's independence, forcibly changing the constitutional order, violating the sovereignty and territorial integrity of the state, and undermining its security, illegal seizure of state power, propaganda of war, violence, incitement of interethnic, racial, religious hatred, encroachment on human rights and freedoms, and public health (Art. 37). It is clear that such restrictions comply with the general principles of restrictions on freedom of association under Art. 11 para. 2 of the ECHR. At the same time, a certain guarantee for minimising interference in trade union activities is the provisions of the Basic Law, according to which the prohibition of associations of citizens is carried out only in court (Art. 37 para. 4), and the principles of their formation and operation are determined exclusively by Ukrainian law (Art. 92). The restriction of the right of foreigners and stateless persons legally working in Ukraine to freely choose trade unions to join does not comply with the general principles of the restrictions set out in the ECHR.

The right to freedom of association, including the constitutional right to form a trade union, may not be restricted by such requirements that may not be objectively fulfilled. This position of the Constitutional Court of Ukraine led to the recognition of certain provisions of the Law of Ukraine 'On Trade Unions, Their Rights and Guarantees of Activity' as unconstitutional (decision of 18 October 2000 No. 11-rp/2000⁸⁴). Thus, the restriction on a number of quantitative criteria for joining a trade union at a certain level was lifted, as well as on the condition of legalisation of trade unions related to the moment of registration, which the Constitutional Court recognised as equivalent to the requirement of prior permission to form a trade union. The right to association may be limited to certain categories of employees. Thus, Art. 11 para. 2 of the ECHR allows for the imposition of legal restrictions

83 *Jafarov and Others v Azerbaijan* App no 27309/14 (ECtHR, 25 July 2019) <<http://hudoc.echr.coe.int/eng?i=001-194613>> accessed 10 December 2020.

84 Decision of the Constitutional Court of Ukraine in the case on constitutional petitions of People's Deputies of Ukraine and the Commissioner of the Verkhovna Rada of Ukraine for Human Rights on compliance with the Constitution of Ukraine (constitutionality) of Art 8, 11, 16 of the Law of Ukraine 'On Trade Unions, Their Rights and Guarantees' formation of trade unions) No 11-rp/2000 (18 October 2000) <<https://zakon.rada.gov.ua/laws/show/v011p710-00#Text>> accessed 10 December 2020.

on persons who are members of the armed forces, police, or administrative authorities of a state. At the same time, it is a question of establishing certain restrictions on the exercise of the right to freedom of association and not its abolition in general for these categories. This is emphasised, in particular, in the decision of *Demir and Baykara v Turkey*.⁸⁵

In certain decisions, the ECtHR also emphasises the requirement of proportionality to impose restrictions on these categories of persons for the purpose for which they are imposed. Thus, in *Trade Union of the Police in the Slovak Republic and Others v Slovakia*,⁸⁶ it is stated that such interference would be lawful only if it pursued one or more legitimate aims and was necessary for a democratic society to achieve them. A similar position is expressed in the decision of *Adefdromil v France*.⁸⁷

5 CONCLUSIONS

The right of workers to form and join trade unions, enshrined in the ECHR, is part of the universal human right to freedom of association. Accordingly, all the peculiarities concerning the content of freedom of association and its restriction, according to the case-law of the ECtHR, apply to the freedom of association in trade unions, taking into account the specifics of labour relations.

Despite defining the right of workers to freedom of association as an element of the right to freedom of association, the ECHR and the relevant case-law of the ECtHR define a number of its specific features. First and foremost, for workers, freedom of association has a clear purpose – to protect their own interests (while in general, freedom of association can be exercised for different purposes). Accordingly, the right to form or join trade unions is not merely an example of freedom of association in the context of Art. 11 of the ECHR. Given the purpose of creating associations, certain types of trade union activities aimed at achieving them are an integral part of the right to association. First of all, this should include the right to bargain collectively and the right to strike.

Art. 11 of the ECHR creates both positive and negative obligations for the state, although there are no clear boundaries between them. At the same time, there is maximum discretion of the state in determining measures to ensure positive obligations. The most common violations of the ECtHR are violations of the following positive obligations:

- ensuring a balance between the interests of the union as a collective entity and the interests of a particular employee;
- the need to create opportunities to protect the employee from the abuse by trade unions of their dominant position;
- regulation of opportunities both for the creation of associations of workers and for maintenance of their activity during all period of existence;
- the need to create effective protection against discrimination on the grounds of trade union membership.

With regard to negative obligations, the effective exercise of the right to freedom of association by workers is possible only with limited state intervention in its implementation. Restrictions on the right to association are justified only if they meet the following criteria: 1) established by law (which the ECtHR interprets not only as the existence of regulations on

85 *Demir and Baykara v Turkey* (n 31) 119.

86 *Trade Union of the Police in the Slovak Republic and Others v Slovakia* (n 51) 62.

87 *Adefdromil v France* App no 32191/09 (ECtHR, 02 October 2014) para 45 <<http://hudoc.echr.coe.int/eng?i=001-147058>> accessed 10 December 2020.

relevant restrictions, but also their availability, accuracy, and predictability of consequences in the relevant rules); 2) have a legitimate purpose, are proportional to this goal. Therefore, the analysis of the case-law of the ECtHR allows us to conclude about the minimum discretion in the intervention of states in the exercise of the right to freedom of association and in regulating those aspects of the content of freedom of association without which the right cannot be properly exercised.

The right of workers to freedom of association is important both for the protection of other labour rights and for the satisfaction of socio-economic interests in labour relations. Thus, associations of workers (primarily trade unions) are endowed with vast powers to protect their rights, including through public control over the employer's compliance with labour laws, the ability to obtain any information about working conditions, consent to dismiss members of the union or the right to demand the dismissal of the manager, etc. Individual employees do not have such opportunities. In addition, collective labour rights, such as the right to bargain collectively, the right to strike, etc., can only be exercised by workers by exercising their right to association.

The content of the right to freedom of association is dynamic, changing with the development of labour relations, improvement of international labour standards, and practices of individual states. At the same time, the case-law of the ECtHR contributes to improving the legal regulation of the right of workers to form and join trade unions. When the ECtHR finds a violation of Art. 11 of the ECHR, states bring their legislation and practice into line with the requirements of the international community.

In Ukraine, the case-law on the protection of employees' right to association is rather limited. At the same time, in a number of cases, including the Supreme Court, a ban on interference in the internal organisational activities of trade unions has been established, which is in line with the case-law of the ECtHR. At the same time, a large number of court decisions declaring strikes illegal allow us to conclude that it is important to simplify the procedure for organising a strike, to introduce other types of collective action (for example, pre-emptive strikes) to ensure greater effectiveness of workers' right to association. The case-law of the ECtHR on Art. 11 of the ECHR should also be used in the reform of labour legislation to maximise the state's positive obligations, which can also be an impetus for the intensification of trade union activities.

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