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The Baltic States and the implementation of Conventions 87 and 98 of the ILO

1. Introduction

The paper is structured in the form of separate Country reports for each one of the three Baltic States. The author first shortly tries to give as a starting point a few background facts and also a description of the approach to international Conventions within the respective national legal system. Thereafter the implementation of ILO Conventions 87 and 98 is discussed based primarily on ILO surveillance.

2. Estonia

2.1 Background

Trade Union membership in Estonia is estimated to be slightly below 10 %, divided on two organizations: The Confederation of Estonian Trade Unions (EAKL) and The Estonian Employees´Unions Confederation (TALO). The Estonian Employers´Confederation represents the private sector employers. The Coverage of collective bargaining has however at least during some periods been about 30 % due to extension mechanisms used in some sectors.

The legal system of Estonia is based on the 1992 Constitution. Art. 29.5 of the Constitution sets out that everyone is free to belong to unions and federations of employees and employers. According to the Constitution unions and federations of employees and employers may assert their rights and lawful interests by means which are not prohibited by law. Furthermore the conditions and procedures for the exercise of the right to strike are provided by law. The principle of non-discrimination is codified in the Constitution.

The fundamental political rights are also enshrined in the Constitution. According to Art. 47 everyone has the right to assemble peacefully and to conduct meetings without prior permission.

In Chapter IX of the Constitution issues related to foreign relations and international treaties are regulated. In Art. 123 it is stated that the Republic of Estonia may not enter into treaties which are in conflict with the Constitution. Furthermore it is stated that when laws or other legislation of Estonia are in conflict with an international treaty ratified by the Riigikogu, provisions of the international treaty apply.

2.2 Freedom of Association (Conventions 87 and 98)

There have been some incidents and court cases in Estonia regarding discrimination against trade union members. In order to strengthen the freedom of association the Penal Code was amended and section 155 entered into force 1 January 2015. Hereby some sanctions where introduced to guarantee the right to form and join trade unions.

Estonia has had a long standing debate with the supervisory bodies of the ILO regarding the freedom of association rights for public servants. The issue was at stake in a case that emanated from a complaint submitted by the EAKL to the CFA (Freedom of Association Committee) arguing that by totally prohibiting the right to strike in the public sector, the Government of Estonia violated workers´rights. The Committee and consequently ILO gave several detailed recommendations already in 2008:

- The Committee expects that the legislation will be soon amended, in consultations with representative workers' and employers' organizations concerned, so as to ensure that public servants, who do not exercise authority in the name of the State, enjoy the right to strike.

- The Committee requests the Government, within the framework of consultations on the reform of the Public Service Law, to ensure that the mechanisms available to workers who are deprived of an essential means of defending their socio-economic and occupational interests (mediation, conciliation and/or arbitration) are impartial and rapid.

- The Committee expects that a list of enterprises or agencies where minimum services should be maintained during a strike will be soon adopted, in full consultation with the workers' and employers' organizations concerned.

- The Committee requests the Government to ensure that priority is given to collective bargaining as a means of determining the employment conditions of public servants, rather than adopting legislation to restrain wages in the public sector.

This issue was followed up by the CEACR (Committee of Experts) at several occasions until Estonia finally adopted the Public Service Act (or Civil Service Act) in June 2012 which entered into force on 1 April 2013. In this Act Section 7 the law draws a distinction between officials appointed to a post in authority which involves the exercise of official authority on one hand and employees on the other whose jobs do not involve the exercise of public authority, but only work in support of the exercise of such authority. The strike ban applies only to the officials (Section 59). This solution formally satisfies the old recommendation from the CEACR that the Estonian government should ensure that the right to strike is guaranteed to all public servants, with the only possible exception of those exercising authority in the name of the State. With this solution however some problems still remain. Under Art. 9 Convention 87 the extent to which the guarantees of the Convention shall apply to the armed forces and the police can be determined by national law, but when restrictions are placed on the right to strike in the public service these restrictions should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part. Second the group defined as exercising public authority seems to be very broadly defined in Estonia. It therefore seems that the problem still remains partly unsolved in Estonia.

3. Latvia

3.1. Background

Trade union membership in Latvia is estimated to around 13 %. The Confederation to which most significant trade unions belong is the Free Trade Union Confederation of Latvia (LBAS). On the employers side the Employers´Confederation of Latvia (LDDK) employs at large 35 % of employees in Latvia. The most important level for bargaining is the company level, but sectoral bargaining occurs in some sectors Collective bargaining is also largely conducted in the public sector although the Act On Remuneration of Officials and Employees of State and Local Government Authorities (2010) limits the scope and effects of collective bargaining in the public sector.

The Constitution of the Republic of Latvia sets out the fundamental human rights which the State shall recognize and protect in accordance with the Constitution, laws and international agreements binding upon Latvia (Art 89). In Latvia there is a Constitutional Court which can review the conformity of the laws with the Constitution. International human rights treaties can be directly applied in Latvian courts. The principle of freedom of association is confirmed in the Constitution (Art. 102). According to Article 108 "Employed persons have the right to a collective labour agreement, and the right to strike. The State shall protect the freedom of trade unions". It is further stated that everyone has the right to freely choose their employment and workplace according to their abilities and qualifications. Forced labour is prohibited (Art. 106). Human rights shall be realized without discrimination of any kind (Art.91.2).

3.2. Freedom of association (Conventions 87 and 98)

The regulatory framework for freedom of association and collective bargaining is the Law on Trade Unions (2014), the Employers´organisations and Associations Law (1999), the Labour Dispute law (2003), the Act on Strikes (2005) and the Labour Law (2002) and especially Part B on Collective agreements (Sections 17-27).

Latvia received during a long period criticism from the ILO regarding its threshold set for establishing trade unions, which according to the 1990 legislation was set at 50 members or at least one quarter of the workforce and which ILO regarded as too high and likely to create an obstacle to the establishment of trade unions on an enterprise level.

In the 2014 Trade Union Act this requirement was revised, the requirement of 50 members apply now only to industrial unions (established outside an undertaking), while the requirement otherwise is at least 15 members or less than one fourth of the total members of employees of the undertaking which may not be less than 5 employees (Section 7).

Among the barriers to lawful strikes, as identified by the ILO, is the obligation to observe an excessive quorum or to obtain an excessive majority support for the strike action. The decision to strike must be taken by a three-quarter majority at a meeting attended by at least 75% of all employees in company-wide strikes or 75% of members of the trade union in sector-wide strikes. Other restrictions concern the objectives of a strike. Solidarity strikes are considered illegal unless the dispute concerns a 'general agreement', i.e. a sectoral-level collective agreement. Since sectoral agreements are rare, this leads to strikes being even rarer. Political strikes are also illegal. Finally, there are restrictions to the right to strike for various

groups of public servants (e.g. firefighters, police officers, judges, public prosecutors etc.). The ILO has repeatedly asked the Latvian government to extend the application of collective bargaining procedures to public servants who are not directly exercising public authority. In 2014 the Constitutional Court ruled that the prohibition on border guards to form and join trade unions was incompatible with the Constitution; however, the prohibition of strike action was considered constitutional (case No. 2013-15-01). Finally, the list of 'essential services' that have to be ensured during a strike is very broad since it covers not only "life and health", but also "security".

According to the Act on Strikes, during the strike a minimum quantity of "essential services", the discontinuation of which would threaten the security, health and life of the state, of the whole of society, of a group of the population or of some individuals, shall be continued in enterprises or joint ventures, organisations and institutions. Essential services include: medical science and first aid services; public transportation services; drinking water supply services; services producing and supplying electrical energy and gas; communications services; air service control and the service supplying meteorological information to the air service control; services relating to the security of all kinds of transportation; waste and sewage collection and water purification services; radioactive goods and waste storage, utilisation and control services and civil protection services.

4. Lithuania

4.1 Background

Trade Union membership in Lithuania is estimated to around 10 %, divided on three main confederations LPSK, LDF and Solidarumas. Collective bargaining coverage in the country is estimated to be rather low, around 10 % and the company level is the principal level for bargaining.

Trade union activities are regulated by the Lithuanian Constitution. It states that "trade unions shall be freely established and shall function independently. They shall defend the professional, economic and social rights and interests of employees." Furthermore all trade unions shall have equal rights. (Art. 50). Also the right to strike has been enshrined in the Constitution: "While defending their economic and social interests, employees shall have the right to strike. The limitations of this right and the conditions and procedure for its implementation shall be established by law." (Art. 51)

The most important legislative instrument on the Lithuanian labour market is the Labour Code. At present the 2002 Labour Code is still in force as amended 2010 and 2014, but the Lithuanian Parliament has adopted a new Labour Code in 2016. This coming into force of this piece of legislation has however been postpone for half a year until 1.7.2017 in order to give the Tripartite Council in Lithuania a possibility to discuss and agree on some amendments in the contested Code.

The legislative situation in Lithuania is therefore rather special: We have an old Labour Code that is still in force and a new one that has been adopted, but is still not in force and might undergo some changes before getting into force. In accordance with the preferences from NFS the following report deals with both the present and the future Labour Code. The law in

force is described as the Labour Code, when the adopted future Labour Code is discussed it is referred to as the Labour Code 2016, when it was adopted by the Lithuanian parliament.

Art. 8 of the Labour Code codifies the principle that international Conventions can be directly applicable in Lithuania by stating that "Where international treaties to which the Republic of Lithuania is a party establish rules other than those laid down by this Code and other labour laws of the Republic of Lithuania, the rules of the international treaties to which the Republic of Lithuania is a party shall be applied" and that "International treaties to which the Republic of Lithuania is a party shall be directly applied to employment relationships, except in cases where international treaties provide that the application thereof requires a special regulatory act of the Republic of Lithuania".

While the Labour Code gives clear precedence to international Conventions over national law the Labour Code 2016 is less clear on this point. It states in Art. 3 p. 4 regarding the sources of Lithuanian labour law that "the international treaties of the Republic of Lithuania shall apply to employment relations directly only in cases when direct application of the international treaty stems therefrom". Since the direct effect of an International treaty provision is rarely required in the instrument, this might have an undermining effect on the significance of international instruments in Lithuania, although if the Lithuanian courts and authorities follow the principle that national law as far as possible should seek conformity with international instruments this difference might have restricted significance in practice.

4.2. Freedom of association (Conventions 87 and 98)

In relation to the Labour Code and the present Act on Trade Unions there has been some issues that have been raised in the dialogue between the ILO supervisory bodies (especially the Committee of Experts, CEACR).

The issue of criteria for establishment and membership of a trade union has been discussed and resolved positively.

The categories of civil servants whose freedom of association rights are restricted has been the reason for some concern.

The army professional employees in the Lithuanian army seems to be completely outside the right to organize in a trade union, certain other groups.

The procedure for declaring the strike has been much debated. The Labour Code had a clause until 2014 which stated that one condition for declaring a strike on enterprise level was that at least half of the employees in the enterprise concerned voted in favor of the strike in a secret ballot. This was regarded as an extensive requirement by the ILO supervisory system, which regarded it as unjustified to include non voting employees into the assessment, and arguing that at least the majority among voting employees should be sufficient. As a result of this dialogue the requirement was deleted and left to be regulated by the internal statutes of the trade unions.

In the Labour Code (2016) the requirement for a voting ballot has been reintroduced, but now the required majority is a quarter of the members of the trade union. This seems to apply both to enterprise level strikes and branch level strikes. It also seems that all trade union members regardless of whether they will participate in the strike or not are entitled to participate in the ballot.

A matter of concern has also been the way in which the minimum service is defined during a conflict and the compensatory measures undertaken for those employees who are deprived of the strike weapon because they participate in providing vital services to the public during the strike.

Regarding the procedure for defining the minimum services, this task is now giving to the impartial body hearing the labour dispute (arbitration) which is in accordance with ILO requirements.

In relation to the Labour Code 2016 there are some new issues which might raise concerns in regard of the obligations for Lithuania under ILO Conventions No 87 and 98.

Especially the new Employee representation system as described in Art. 165 might undermine the position of trade unions and collective bargaining. The new system is prescribed in the following way:

Article 165. System of the representation of employees

1. The representation of employees shall mean the protection of employees' rights and interests and their representation in relations with other parties of social partnership, in labour disputes resolution bodies and institutions of social partnership as well as the creation and changes of their rights and duties or other participation when determining employees' labour, social and economic rights and duties in accordance with the procedure established by labour law norms.

2. The representatives of employees shall be a trade union, works council or employees' trustee.

3. Trade unions shall collectively represent their members – employees and persons working of equivalent to labour relations provided for in the Employment Law of the Republic of Lithuania in accordance with the procedure established by this Code or other laws. Trade unions shall also individually defend their members and represent them in individual labour relations. Collective bargaining, the conclusion of collective agreements and the initiation of collective labour disputes of interests shall be the exclusive right of trade unions.

4. The works council and the trustee of employees shall be independent representative organs of employees and represent all employees in information, consultation and other procedures of participation, whereby the employees and their representatives shall be involved in the employer's decision-making processes on employer level in the cases and in accordance with the procedure established in this Code or on the place of employment level, if it is stipulated in this Code or agreements of social partners. The employees' representatives on employer level shall be considered the employees' representatives on the place of employment level, unless labour law norms or agreements of social partners provide otherwise.

5. The activities of employees' representatives shall be organised and exercised by their co-operation and in such a way so that the general interests and rights of employees are protected as efficiently as possible. The works council may not exercise the functions of employee representation which, according to this Code, are considered exclusive rights of trade unions.

An undermining mechanism might be that Works Councils are made the main bodies for interaction between workers and employers. It is understandable, that complementary mechanisms in addition to trade union representation are needed since the trade unions often lack representativity, but the border line between collective bargaining and procedures involving the works councils are seriously blurred in the Labour Code 2016, although there is an attempt in the law to clarify the border line and introduce a dual channel system. As a

starting point Works Councils are given all functions with the exception for collective bargaining, the conclusion of collective agreements and the initiation of collective labour disputes of interests, which are the exclusive right of trade unions. On the other hand the lists of matters that can be covered by collective agreements seem to indicate a considerable amount of overlapping.[1]

The obligation for the State Part under the ILO Convention 98 is to "encourage and promote" collective bargaining. The fact that the Works Council under the Labour Code 2016 has been made the primary body on employer-level through a clause stating that collective bargaining cannot reduce the statutory power of the Works Council has together with the provision in Art. 197 regarding the application of collective agreements according to which the agreement shall only apply to the members of the trade union that is a party to the agreement (can apply to all workers only if it is approved by the general meeting of all employees) in fact undermines collective bargaining as a general primary tool for regulating working conditions. This does not seem to be in compliance with the principles of freedom of association.

Compliance could easily be achieved if the main principle for collective agreements would be to apply them to all employees (if not otherwise stipulated in the agreement) in combination with flexible rules regarding the competences of the Works councils, which could give them complementary powers regarding information and consultation rights

[1] Article 193. Contents of collective agreements
1.In a collective agreement the parties shall specify employment, social and economic terms and conditions and guarantees of the employees, as well as mutual rights, obligations and liability of parties.
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4. The parties may consider, in a national (inter-branch), territorial or branch (production, services, professional) collective agreement:
1) matters related to the setting of wages for employees of several employers or employers operating within the same branch or territory, working norms and other wage-related matters;
2) health and safety at work;
3) matters related to the employees' employment, professional training and requalification;
4) social partnership support measures enabling the avoidance of collective labour disputes;
5) other working, social and economic conditions relevant to the parties;
6) procedures for making amendments and additions to the collective agreement, its term of validity, enforcement system and procedures, and other organisational matters related to the conclusion and carrying out of the collective agreement.
5 The parties may consider, in an employer-level collective agreement or a collective agreement on a level of a place of employment:
1) terms of conclusion, amendment and termination of employment contracts;
2) remuneration conditions;
3) working and rest time conditions;
4) health and safety at work measures;
5) conditions of providing one another with information;
6) procedures for the exercise of the rights to information, consultations and other participation of employees' representatives in the employer's decision adoption process, *without reducing the statutory powers of the work council (NB);*
7) other working, economic and social conditions relevant to the parties;
8) procedure for the carrying out of the collective agreement;
9) procedures for making amendments and additions to the collective agreement, its term of validity, enforcement system and procedures, and other organisational matters related to the conclusion and carrying out of the collective agreement.

Other issues: Dismissal protection for trade union representative. In the Labour Code Art.134- 135 there is a right of priority to retain the job in the case of redundancy for elected representatives and those who have been granted priority in collective agreements. The Labour Code 2016 introduces a mechanism with special competences for the State Labour Inspectorate regarding discrimination for persons representing employees at work places. The problem is that the priority seem to be lacking, there is only a procedure where the State Labour Inspectorate is checking that discrimination does not take place, but in a redundancy situation where two employees out of ten will face dismissals, the employer apparently lawfully can choose the trade union representative.

Labour Code Art. 83 sets out some principles regarding action prohibited for the employer during industrial action. An example is that replacing striking workers with new recruitments is not allowed. The new Labour Code 2016 seems to be silent on this point. Does that indicate a new approach from the Lithuanian legislator in this regard?

5. Conclusions

Progress: Formal limitations on the right to establish and form trade unions have been removed.

General problem: Lack of any government policy for active promotion of collective bargaining in accordance with ILO 98. Especially the development regarding representation of workers in Lithuania seem to indicate a transition towards a dual channel system (Works Councils/Trade Unions). There is a clear risk that any future (legislative?) increase of worker influence will not include trade unions and collective bargaining.

A government policy that promotes collective bargaining would actively explore use of extension mechanisms and at least recognize that collective agreements on enterprise level normally should apply to all employees in the group concerned. Furthermore it would establish mechanisms that can facilitate the bringing of different trade unions together in a bargaining process on the enterprise level.

The right to collective bargaining in the public sector still seems to a problem in all the Baltic States, because of limitations in the persons included, the scope and limitations in the right to take industrial action.

The protection of shop stewarts and trade union representatives, especially in practice is a problem.