TRAINING PROGRAMME FOR JUDGES

European Social Charter and case law of the European Committee of Social Rights

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Part I

Introduction to the European Social Charter

The European Social Charter and its revision

The European Social Charter is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which refers to civil and political rights. The Charter guarantees a broad range of everyday human rights related to employment, housing, health, education, social protection and welfare and lays specific emphasis on the protection of vulnerable persons such as elderly people, children, people with disabilities and migrants. No other legal instrument at pan-European level can provide such an extensive and complete protection of social rights which is the reson for seeing the Charter as the Social Constitution of Europe. The ESC is also a reference point for European Union law, in particular the EU Charter of Fundamental Rights which based a number of its rights on those of the ESC.

The history of the European Social Charter knows three major milestones. The initial European Social Charter was adopted in 1961 as a result of nearly 10 years of preparatory work. During this process, one central document, Opinion no. 5 of 1953, formulated that the European Social Charter should guide the Member States in the field of social policy, and shall be seen as the counterpart of the European Convention on Human Rights in this area.[1] In the late 1980s and (early) 1990s a political and legal process to modernise the Charter and to increase its impact began. In 1988, a first Additional Protocol added new rights[2] to the 1961 Charter and in 1991 the supervisory mechanism[3] of the Charter was improved. This reform process culminated in 1996 with the adoption of the Revised Charter,[4] which added a set of new rights while at the same time incorporating the basic content of the 1961 Charter and its protocols.[5] Finally, in 1995, another Additional Protocol[6] providing for a system of collective complaints was adopted which significantly strengthened the monitoring system of the Charter.

Today, 43 out of the Council of Europe's 47 member states[7] have ratified either the 1961 Charter (8

1. Parliamentary Assembly, Opinion No. 5 (1953), adopted by the Assembly at its twenty-first Sitting, on 23rd September, 1953, *http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13744&lang=en (accessed 8 November 2018)*.
2. Council of Europe, European Social Charter, Collected texts (2015), 25-30.
3. Ibid, 31-34.
4. For the 1996 Charter text see *https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93.*
5. The 1961 Charter and the Revised Charter will continue to co-exist until all State Parties have adopted the Revised Charter.
6. Ibid, 35-37.
7. The following states have signed but not ratified the Charter: Liechtenstein, Monaco, San Marino and Switzerland.

states) or the Revised Charter (35 states including Ukraine).[8] As this process continues, nearly all states will be bound by the Revised Charter at some point in the future.[9]

Unlike other human rights treaties, the Charter establishes so-called à la carte ratification. According to Article A of the 1961 Charter, each state party must accept so-called 'core articles' which are articles 1, 5, 6, 12, 13, 16 and 19. In the corresponding provision of the Revised Charter the core articles are 1, 5, 6, 7, 12, 13, 16, 19 and 20. In addition, the state must accept enough additional provisions to be bound by not to be less than 10 articles or 45 numbered paragraphs of the 1961 Charter, and not less than 16 articles or 63 numbered paragraphs in total of the Revised Charter. This leads to a certain hierarchisation of rights and consequently, to a prioritisation in implementation. The system of à la carte ratification leads to a 'protection patchwork' with certain rights left out depending on the selection by the state in question. For example, France and Portugal have accepted all provisions of the Revised Charter, while Ukraine have committed itself to 76 paragraphs.[10]

Overlapping provisions of the Charter

This 'protection patchwork' is somewhat offset by a number of provisions which overlap with each other. For example, article 2§4 on the elimination of risks in dangerous occupations significantly overlaps with article 3 on right to safe and healthy working conditions; article 16 on the right of the family to social, legal and economic protection provides in the Committee's interpretation a right to shelter and housing for families which is also included in the right to housing (article 31); Article 4(3) on fair remuneration for women and men and article 20 on gender equality in employment protect equal pay; similarly, article 23 overlaps with other provisions of the Charter which protect elderly persons as members of the general population, such as article 11 (right to protection of health), article 12 (right to social security), Article 13 (right to social and medical assistance) and Article 30 (right to protection against poverty and social exclusion).

Thus, some degree of protection is provided by articles that capture elements of other rights even though the state has not ratified these provisions of the Charter.

Documents accompanying the Charter

Pursuant to Article N, the appendix to the Charter shall form an integral part of it. The appendix defines the personal scope of the Revised European Social Charter. The first paragraph of the Appendix attached at the end of ESC specifies in very clear terms that:

> Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19. This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties.

8. A detailed chart of signatures and ratifications can be found at the European Social Charter website, *https://rm.coe.int/16806f399d (accessed 17 May 2018).*

9. The countries which still have neither ratified the 1961 Charter nor the Revised Charter are Liechtenstein, Monaco, San Marino and Switzerland.

10. *https://www.coe.int/en/web/european-social-charter/home.*

The **"Explanatory Report to the European Social Charter (Revised)"** has no binding value and was drafted only with a view to explaining the content of the Revised Charter. Still, it is an official document prepared and published by the Council of Europe.

The scope and structure of the Explanatory Report to the European Social Charter (Revised) is connected with the evolution of the Charter. There is no Explanatory Report to the 1961 Charter; the first Explanatory Report was prepared to the Additional Protocol to the European Social Charter (1988).

The structure of the Explanatory Report is as follows:

- ***Articles 1 to 19*** - as there is no explanatory report to the 1961 Charter, it was considered preferable not to explain the rights established in Articles 1 to 19 contained in Part II of the Revised Social Charter as they reproduce the text of the corresponding Articles of the 1961 Charter. Only the differences are therefore mentioned in the Explanatory Report to the European Social Charter (Revised);
- ***Articles 20 to 23*** – as there is Explanatory Report to the Additional Protocol of 1988 and rights established in Articles 20 to 23 correspond to the provisions of Articles 1 to 4 of the Additional Protocol of 1988, the Explanatory Report to the Additional Protocol of 1988 remains relevant and is used for Articles 20 to 23;
- ***Articles 24 to 31*** – as they are new provisions established in the European Social Charter (Revised) the Explanatory Report to the European Social Charter (Revised) covers explanations of the rights established in these articles.

Personal scope of the Charter

The personal scope of the European Social Charter is defined in the Appendix to the Charter. It generally limits the application *ratione personae* to **'nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned'**. Foreign nationals must therefore satisfy three conditions for entitlement to the rights in the Charter on the same basis as nationals, they have to be:

- nationals of one of the states parties to the Charter;
- lawfully resident, in other words authorised to enter and reside in the state's territory;
- and/or be working regularly, which means be authorised to enter and work in the state's territory.

Consequently, the Charter does not grant foreign nationals in general a right of entry or freedom of movement in the territory of other states parties. However, according to the wording of the Charter and the Committee's interpretation, states parties are required to implement a flexible immigration policy towards nationals of other states parties by liberalising the regulations governing the employment of foreign workers (see article 18§§1-3 of the Charter) and facilitating family reunion (see article 19§6 of the Charter). The Appendix explicitly mentions refugees and stateless persons who, if lawfully residing in the territory of a state party, shall be granted 'treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable' to these groups of persons.

The Committee held in a number of collective complaints decisions that, because of the nature of the Charter as a living human rights instrument as well as in view of its object and purpose, the personal scope limitation of the Appendix cannot be interpreted to deny the protection of the most basic rights offered by the Charter to states parties nationals who fall within the category of irregular migrants. Still, this extension would only apply in exceptional situations in view of the personal scope.

Restriction of Rights – Article G

The Charter in Article G contains a rights restrictions clause that sets out the limitations for rights realisation in much the same way as the European Convention on Human Rights. The wording of Article G and its interpretation by the Committee requires a restrictive reading of the possible limitation of rights in the Charter.

Article G is applicable to all provisions of Articles 1 to 31 of the Charter. Any restriction to a right is only in conformity with the Charter if it satisfies the conditions stipulated in article G. Given the severity of the consequences of a restriction on Charter rights, Article G lays down specific preconditions for applying such restrictions. Thus, any restriction has to:

- be prescribed by law;
- pursue a legitimate purpose;
- be necessary in a democratic society for the pursuance of these purposes.

First and foremost, any restriction has to be prescribed by law, which means by statutory law or any other text or case-law, provided that the text is sufficiently clear and satisfies the requirements of precision and foreseeability[11].

Legitimate purpose can be the protection of the rights and freedoms of others, public interest, national security, public health or morals. According to the Committee's interpretation, States Parties have a margin of appreciation in defining the public interest. However, obligations undertaken under the Charter cannot be abandoned without an appropriate level of protection adequate to meet basic social needs.[12]

Restrictive measures must be necessary in a democratic society, which means even under extreme circumstance, they must ensure proportionality between the goals pursued and their negative consequences for the enjoyment of social rights. They may not go beyond what is necessary to reach the goal, they may only be applied for the purpose for which they were intended, and they must maintain a level of protection which is adequate.[13] In addition, a balancing analysis of the effects of the legislative measures should be conducted by the authorities, notably of their possible impact on the most vulnerable groups as well as a genuine consultation with those most affected by the measures.[14]

Protection against discrimination - Article E

Article E of the European Social Charter concerns non-discrimination. It is a general provision on non-discrimination, defining that the enjoyment of the rights set forth in the Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

The wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in

11. Digest 2018, p. 234.
12. Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, decision on the merits of 23 March 2017, § 85, <*http://hudoc.esc.coe.int/eng?i=cc-111-2014-dmerits-en*>, (18 November 2019).; IKA-ETAM v. Greece, Complaint No. 76/2012, decision on the merits of 7 December 2012, §70, <*http://hudoc.esc.coe.int/eng?i=cc-76-2012-dmerits-en*>, (14 January 2020).
13. Id, § 87.
14. Id, § 90.

interpreting Article 14 and most recently in the Thlimmenos case[15], the principle of equality that is reflected therein means treating equals equally and unequals unequally. In particular it is said in the above mentioned case:

> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different[16].

The European Committee of Social Rights considered that the insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein. It further considered that its function is to help secure the equal effective enjoyment of all the rights concerned regardless of difference. Therefore, it does not constitute an autonomous right which could in itself provide independent grounds for a complaint[17]. Hence, the situation can be considered as allegedly violating other Articles of the Charter also in cases when read in combination with Article E.

It should be noted that Article E concerns **all forms of discrimination**. According to **the European Committee of Social Rights** Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all[18].

The wording of Article E shows that **prohibited grounds of discrimination** are presented in it as a non exhaustive list. This was noted in a number of positions of the European Committee of Social Rights. For instance, in one of the cases the latter stated that although disability is not explicitly listed as a prohibited ground of discrimination under Article E, the Committee considers that it is adequately covered by the reference to "other status". Such an interpretative approach, which is justified in its own rights, is fully consistent with both the letter and the spirit of the Political Declaration adopted by the 2nd European conference of ministers responsible for integration policies for people with disabilities (Malaga, April, 2003), which reaffirmed the anti-discriminatory and human rights framework as the appropriate one for development of European policy in this field[19]. The same applies to the health status, the socio-economic status or the territorial location[20].

It is important to note that both in theory and in the case-law of various international bodies the principle of equality presupposes that all people in the same situation must be treated equally. At the same time, it also implies that people in different situations must be treated differently. Hence, the State Parties will be considered to violating the Charter when, without an objective, reasonable, proporionate and legitimate justification, they fail to treat differently persons whose situations are different. In this regard, the European Committee of Social Rights considered that such indirect discrimination may arise by failing to take due and positive account of all relevant

15. Thlimmenos c. Grèce [GC], no 34369/97, CEDH 2000-IV, § 44.
16. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, decision on the merits of 4 November 2003, §52
17. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, decision on the merits of 4 November 2003, §51
18. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, decision on the merits of 4 November 2003, §52
19. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, decision on the merits of 4 November 2003, §51
20. IPFEN v. Italy, Complaint No, 87/2012, decision on the merits of 10 September 2013, §190-194

differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all[21].

It should be noted that a difference of treatment is not discriminatory only in cases when it is legitimate, based on an objective and reasonable justification, and is proportionate to the legitimate objective pursued[22].

Moreover, as in all the other discrimination cases, comparability of the situation for the groups or individuals should also be affirmed.

The case-law of the European Court of Human Rights is also worth mentioning with this regard, according to which not all the differences in treatment – or failure to treat differently persons in relevantly different situations – constitute discrimination, but only those devoid of "an objective and reasonable justification"[23].

Hence, the European Court of Human Rights applies the following test when deciding cases on discrimination:

1. Has there been a difference in treatment of persons in analogous or relevantly similar situations – or a failure to treat differently persons in relevantly different situations?

2. If so, is such difference – or absence of difference – objectively justified? In particular,

- a. Does it pursue a legitimate aim?
- b. Are the means employed reasonably proportionate to the aim pursued?[24]

What about **the burden of proof**, according to the European Committee of Social Rights in disputes about discrimination in matters covered by the Revised Charter, adopted in the framework of reporting procedure, the burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment. It also applies to the collective complaints procedure.[25]

Monitoring mechanism – The European Committee of Social Rights (ECSR)

The honouring of commitments entered into under the Charter by the States Parties is subject to the supervision of the European Committee of Social Rights. Its 15 independent, impartial members are elected by the Council of Europe's Committee of Ministers for a period of six years, renewable once.

The European Committee of Social Rights monitors compliance with the Charter under two complementary mecanisms: through collective complaints lodged by the social partners and

21. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, decision on the merits of 4 November 2003, §52
22. See, for instance, European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §41; Associazione Nazionale Giudici di Pace v. Italie, Complaint No 102/2013, decision on the merits of 5 July 2016, § 82; Associazione sindacale « La Voce dei Giusti » v. Italie, Complaint No 105/2014, decision on the merits of 18 October 2016, §74
23. Molla Sali v. Greece [GC], 2018, § 135; Fabris v. France [GC], 2013, § 56; D.H. and Others v. the Czech Republic[GC], 2007, § 175; Hoogendijk v. the Netherlands (dec.), 2005
24. Guide on Article 14 of the European Conventionon Human Rightsand onArticle 1 of Protocol No. 12 to the Convention, https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf
25. Mental Disability Advocacy Center (MDAC) v. Bulgaria, Complaint No. 41/2007, decision on the merits of 3 June 2008, §52

other non-governmental organisations **(Collective Complaints Procedure)**, and through national reports drawn up by Contracting Parties **(Reporting System)**. The Committee of Ministers intervenes in the last stage of the Charter's monitoring mechanism through the adoption of Resolutions and Recommendations. It ensures the follow-up of the conclusions and decisions adopted by the European Committee of Social Rights[26].

The Reporting Procedure

The reporting system is set out in Part IV of the 1961 Charter as amended by the 1991 Turin Protocol. In the framework of the reporting system, States Parties regularly submit written reports on the implementation of the Charter in law and in practice. They are obliged to communicate the reports not only to the Committee but also to representative national trade unions and employers' organisations.[27] Thus, these organisations have the possibility to submit comments on the report of their government. The reports and the comments are examined by the Committee which decides whether the situation is in conformity for each provision accepted by each state.

Following the decision taken by the Committee of Ministers in 2006, the provisions the Charter have been divided into four thematic groups. States parties present a report on the provisions relating to one of the four thematic groups on an annual basis. Consequently each provision of the Charter is reported on once every four years. The four groups of provisions are as follows:

- **Group 1:** Employment, training and equal opportunities */ Article 1 - Article 9 - Article 10 - Article 15 - Article 18 - Article 20 - Article 24 - Article 25.*

- **Group 2:** Health, social security and social protection *Article 3 - Article 11 - Article 12 - Article 13 - Article 14 - Article 23 - Article 30.*

- **Group 3:** Labour rights */ Article 2 - Article 4 - Article 5 - Article 6 - Article 21 - Article 22 - Article 26 - Article 28 - Article 29.*

- **Group 4:** Children, families, migrants */ Article 7 - Article 8 - Article 16 - Article 17 - Article 19 - Article 27 - Article 31.*

Since 2014, states parties which have accepted the collective complaints procedure are subject to a reporting procedure 'light' and have to submit a national report only every two years.[28] Every other year, states parties draw up a simplified report which includes the follow-up action taken in response to the decisions of the Committee on collective complaints. The new system entered into force for all states parties which have already accepted the procedure since October 2014 and, for other states parties, it will enter into force one year after acceptance of the collective complaints procedure.

The reporting procedure gives a broad overview over the status quo of social rights regarding these thematic groups in the state concerned. It provides information on legislative changes, state practice and relevant data to assess rights compliance. However, what it cannot deliver is a more in-depth look into the social rights of specific groups. This is a matter for the collective complaints procedure.

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26. https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights
27. See Articles 21 and 23 of Part IV of the 1961 Charter, as well as Article 1 of the Amending Protocol of 1991 which amends Article 23; Article C of Part IV of the Revised Charter refers to the same supervision procedure as under the 1961 Charter.
28. Governmental Committee of the European Social Charter and the European Code of Social Security, Ways of streamlining and improving the reporting and the monitoring system of the European Social Charter, Decision 4.7 during the 1196th meeting, 2-3 April 2014, (CM(2014)26)).

The Collective Complaints Procedure

The Collective Complaints Procedure is a unique form of collective redress in the human rights system, reflecting a systemic approach in addressing social problems which affect specific groups of persons. To date, 15 States Parties to the Charter have accepted the 1995 Collective Complaints Protocol. Ukraine has not accept it so far.

The collective complaints mechanism is a process which does not solely focus on past violations but aims at preventing their reoccurrence in the future. Certain organizations may file complaints of a collective nature alleging that a state is in breach of the Charter. Four categories of organizations are eligible to submit such complaints:[29] the international organizations of trade unions and employers organizations; the trade unions and employers' organizations in the country concerned; non-governmental organizations which have consultative status and have been put on a list[30] drawn up by the Governmental Committee; and national non-governmental organizations. This last category is only entitled to submit complaints if the state explicitly agrees to it.[31]

The Collective Complaints Procedure incorporates various features of a judicial process. The arguments of both parties are considered, the applicable norms are applied to the facts of the case, and the reasoning of the decision follows a judicious fashion. Thus, the collective complaints system of the Charter can be regarded as a quasi-judicial process, the first such complaint mechanism in international law specifically for social rights. In terms of enforcement, there are however some limitations. For example, the powers of the Committee to impose monetary sanctions are marginal.

The Committee's case-law

The Committee's "case-law" consists of all the sources in which the ECSR sets out its interpretation of the Charter's provisions. These include:

1) Decisions on collective complaints: decisions on admissibility, decisions on the merits, striking out decisions and decisions on immediate measures;

2) Conclusions, arising from the reporting procedure and published each year according to the following referencing system:

- a. for the 1961 Charter, the volumes are numbered I, II, III, IV..., XX-1, XX-2, XX-3 etc;
- b. for the Revised Charter, they are numbered 2002 (...), 2019, 2020 etc.

3) Statements of Interpretation, included in the volumes of conclusions.

Until 1997, the conclusions were presented article by article and the statements appeared at the start of each chapter. Since 1998, conclusions have been published country by country, with

29. See Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No.158, *http://conventions.coe.int/Treaty/en/Treaties/Html/158.htm* (accessed 28 May 2018). Other civil society organizations, although not eligible to file complaints, may intervene in the process by separate submissions which the Committee may decide to include in its findings. This has for example been the case in collective complaint No. 87/2012 on the right to women in Italy to access abortion services.
30. In order to be eligible for this list, the organization has to demonstrate 'access to authoritative sources of information and is able to carry out the necessary verifications, to obtain appropriate legal opinions etc. in order to draw up complaint files that meet the basic requirements of reliability'. Committee of Ministers Decision of 22 June 1995, as summarized by the Explanatory Report to the Revised European Social Charta, para. 20.
31. The only country that has accepted collective complaints by national NGOs is Finland.

statements of interpretation repeated in each country chapter. To avoid such repetition, as of 2006 these statements appear in the general introduction to the conclusions[32].

The Council of Europe publishes all these documents. They are also available on the **HUDOC** database, which is accessible on the Council of Europe's internet site: *www.coe.int/socialcharter*.

The Digest

The **"Digest of the Case Law of the European Committee Of Social Rights"** presents the interpretation given by the European Committee of Social Rights to each of the provisions of the European Social Charter, in its revised version of 3 May 1996. It is prepared by the Secretariat of the Committee, it is most current version was published in December 2018.

It includes a compilation, article by article and for each paragraph, of the main explanations of the text of the Charter resulting from the examination of the national situations of States Parties on the basis of national reports since 1968, and the processing of complaints submitted since 1998. It also contains a presentation of the principles of interpretation of the Charter and a description of the collective complaints procedure[33].

HUDOC database

HUDOC is a database which contains „the case-law" of the supervisory organs of the Council of Europe Conventions. It is divided into nine parts – each containing „the case-law" of a different supervisory organ and so dedicated to a different Convention. The part containg the case-law of the European Committee of Social Rights and so dedicated to the European Convention on Human Rights is HUDOC-ESC.

The judgments, decisions, resolutions, recommendations and reports of these bodies are held in a database and can be consulted via a search mechanism. The European Court of Human Rights has issued a „HUDOC user manual" , in which all aspects connected with using the database and its functionalities are crearly explained. The database is also available in CD-ROM format and book format (publisher: Carl Heymanns Verlag)".

32. Digest 2018, p. 11.
33. Digest 2018, p. 2.

Part II

Rights protected under the European Social Charter

Group 1: Employment, training and equal opportunities

The right to work (Article 1)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees everyone the opportunity to earn his living in an occupation freely entered upon. (Part I, point 1)

The right conferred in Article 1 ESC (part II) is overlapping with:

- Articles 4 § 3 and 20 ESC in terms of the right to equal pay on the basis of sex;
- Article E ESC in terms of protection against discrimination;
- Articles 9, 10 § 3 and 15 § 1 in terms of the right to vocational guidance and training.

Pursuant to Art. 1 ESC:

> **Article 1 – The right to work**
>
> With a view to ensuring the effective exercise of the right to work, the Parties undertake:
>
> 1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
>
> 2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
>
> 3. to establish or maintain free employment services for all workers;

4. to provide or promote appropriate vocational guidance, training and rehabilitation.

Pursuant to the **Appendix**[34]:

Article 1, paragraph 2

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

b) Decisions and conclusions of the European Committee of Social Rights

By accepting **Article 1 § 1** of the Charter, States Parties undertake to pursue a policy of full employment. This means that States Parties:

- must adopt and follow an economic policy which is conducive to creating and preserving jobs;

- and must take adequate measures to assist those who become unemployed in finding and/ or qualifying for a job[35].

Article 1§1 is an obligation of conduct rather than of result, which means that failure to achieve full employment not even the existence of high rate of unemployment will not as such be regarded as being a breach of the Charter.[36] However, the efforts made by States Parties to reach the goal of full employment must be adequate in the light of the economic situation and the level of unemployment[37].

The decline of unemployment alone is not a sufficient indication of efforts towards the achievement of full employment. On the other hand, an increase in the rate of unemployment would not prevent the Committee from concluding that the Charter was being satisfied, so long as a substantial effort is made to improve the labour market situation.[38]

The assessment of conformity rests on a number of economic and social indicators and takes into account the results achieved by States Parties in transforming economic growth into employment and providing assistance to unemployed persons.[39]

34. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.
35. Digest 2018, p. 56.
36. Conclusions I (1969), Statement of Interpretation on Article 1§1.
37. Digest 2018, p. 56.
38. Conclusions III (1973), Statement of Interpretation on Article 1§1.
39. Digest 2018, p. 56.

Article 1 § 2 covers three different issues:

- 1) the prohibition of all forms of discrimination in employment,
- 2) the prohibition of forced or compulsory labour,
- 3) the prohibition of any practice that might interfere with workers' right to earn their living in an occupation freely entered upon[40].

Prohibition of all forms of discrimination in employment

> Article 1§2 requires the States having accepted it to effectively protect the right of workers to earn their living in an occupation freely entered upon. This obligation requires, inter alia, the elimination of all forms of discrimination in employment regardless of the legal nature of the professional relationship.[41]

Discrimination is defined as a difference in treatment between persons in comparable situations, where the treatment does not pursue a legitimate aim, is not based on objective and reasonable grounds or is not proportionate to the aim pursued.[42] **Indirect discrimination** may arise by failing to take due and positive account of all relevant differences between persons in a comparable situation or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.[43] Discrimination may also result from **failing to take positive account** of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.[44]

Discriminatory acts prohibited by Article 1§2 are those that may occur in connection with recruitment[45] or with employment conditions in general, in particular with regard to remuneration, training, promotion, transfer and dismissal or other detrimental action.[46]

Under Article 1§2, legislation should prohibit any discrimination in employment inter alia on grounds of sex, race, ethnic origin, religion, disability, age[47], sexual orientation, political opinion, or beliefs including on grounds of conscientious objection or non-objection[48]. Both direct and indirect discrimination shall be prohibited[49].

40. Digest 2018, p. 57.
41. Decision on admissibility and the merits: Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 91/2013, § 235; Syndicat national des Professions du Tourisme v. France, Complaint No. 6/1999, decision on the merits of 10 October 2000, §24; Quaker Council for European Affairs (QCEA) v. Greece, Complaint No. 8/2000, decision on the merits of 25 April 2001, §20; FFFS v. Norway, cited above, §104.
42. Syndicat national des Professions du Tourisme v. France, Complaint No. 6/1999, decision on the merits of 10 October 2000, §§24-25; Conclusions XVI-1 (2002), Greece.
43. Autism-Europe v. France, Complaint No. 12/2002, decision on the merits of 4 November 2003, §52.
44. International Association Autism-Europe (IAAE) v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003, §52; Centre on Housing Rights and Evictions (COHRE) v. Italy, Complaint No. 58/2009, decision on the merits of 25 June 2010, § 35; International Federation of Human Rights (FIDH) v. Belgium, Complaint No. 62/2010 decision on the merits of 21 March 2012 §49; Médicins du Monde v. France, Complaint No. 67/2011 decision on the merits of 11 September 2012 §§ 107,132,144,153 and 163.
45. Conclusions XVI-1 (2002), Austria.
46. Conclusions XVI-1, 2002, Austria.
47. Fellesforbundet for Sjøfolk (FFFS) v. Norway, Complaint No. 74/2011, Decision on the merits of 2 July 2013, §115-117.
48. Conclusions 2006, Albania, Conclusions 2012 Iceland, Moldova and Turkey; Confederazione Generale italiana del Lavoro (CGIL) v. Italy, Complaint No 91/2013, Decision on the merits of 12 October 2015, § 240.
49. Conclusions XVIII-I (2006), Austria.

There must be adequate legal safeguards against discrimination in respect of part-time work. In particular, there must be rules to prevent non-declared work through overtime, and equal pay, in all its aspects, between part-time and fulltime employees.[50]

> In order to comply with Article 1§2 states should take legal measures to safeguard the effectiveness of the prohibition of discrimination. These measures must at least provide:
>
> - that any provision contrary to the principle of equal treatment which appears in collective labour agreements, in employment contracts or in firms' own regulations may be declared null or be rescinded, abrogated or amended;
>
> - appropriate and effective remedies in the event of an allegation of discrimination;
>
> - protection against dismissal or other retaliatory action by the employer against an employee who has lodged a complaint or taken legal action;
>
> - in the event of a violation of the prohibition of discrimination, sanctions that are a sufficient deterrent to employers as well as adequate compensation proportionate to the damage suffered by the victim[51].

In order to make the prohibition of discrimination effective, domestic law must at least provide for the power to set aside, rescind, abrogate or amend any provision contrary to the principle of equal treatment which appears in collective labour agreements, in employment contracts or in firms' own regulations.[52]

Domestic law must provide **appropriate and effective remedies** in the event of an allegation of discrimination[53].

Firstly, there must be a **right to appeal to a court** in case of alleged discrimination. Recognising the right of trade unions to take action in cases of employment discrimination, including action on behalf of individuals; granting groups with an interest in obtaining a ruling that the prohibition of discrimination has been violated, the right to take collective action and the setting up of a special, independent body to promote equal treatment, particularly by providing discrimination victims with the support they need to take proceedings also contributes to combating discrimination in accordance with Article 1§2 of the Charter[54].

Secondly, there must be a protection against **dismissal or other retaliatory action** by the employer against an employee who has lodged a complaint or taken legal action.[55]

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50. Conclusions XVI-1 (2002), Austria.
51. Conclusions XVI-1 - Iceland - Article 1-2.
52. Conclusions XVI-1 (2002), Iceland.
53. Digest 2018, p. 59.
54. Conclusions XVI-1 (2002), Iceland.
55. Conclusions XVI-1 (2002), Iceland; Syndicat de Défense des fonctionnaires v. France Complaint No. 73/2011, decision on the merits 13 September 2012, §59.

Thirdly, domestic law should provide for a shift in the burden of proof in favour of the plaintiff in discrimination cases.[56] In respect of complaints alleging discrimination, the burden of proof should not rest entirely on the complainant organisation, but should be shifted appropriately.[57]

Fourthly, remedies available to victims of discrimination must be adequate, proportionate and dissuasive[58]. Therefore, compensation for all acts of discrimination including discriminatory dismissal, must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers. A ceiling on compensation that may preclude damages from making good the loss suffered and from being sufficiently dissuasive is proscribed.[59]

As to the specific issue of **access of foreigners to certain jobs**, States may make foreign nationals' access to employment on their territory subject to possession of a work permit but they cannot ban nationals of States Parties, in general, from occupying jobs for reasons other than those set out in Article G of the Charter. The only jobs from which foreigners may be banned therefore are those that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority.[60]

Exclusion of individuals from functions, either in the form of refusal to recruit or dismissal, on grounds of previous political activities, is prohibited when it is not necessary within the meaning of Article G in that it does not apply solely to services which have responsibilities in the field of law and order and national security or to functions involving such responsibilities.[61]

Prohibition of forced or compulsory labour

Forced or compulsory labour in all its forms must be prohibited. The definition of forced or compulsory labour is based on Article 4 of the European Convention on Human Rights and on ILO Convention 29 on forced labour: "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" (Article 2§1).

Under Article 1§2 the coercion of any worker to carry out work against his wishes and without his freely expressed consent is contrary to the Charter. The same applies to the coercion of any worker to carry out work he previously freely agreed to do, but which he subsequently no longer wants to carry out[62].

The prohibition of forced labour implies that disobedience to orders or the interruption or abandonment of service by certain categories of staff (as in the merchant navy or aviation) cannot be subjected to penal measures unless the act giving rise to the charge endangered or was capable of endangering, the safety of the ship or aircraft or the life or health of those on board[63]. The peculiar status of the military may justify penal sanctions for breach of a voluntary engagement without constituting a breach of the prohibition of forced labour[64].

56. Conclusions 2002 France; Syndicat de Défense des fonctionnaires v. France Complaint No. 73/2011, decision on the merits 13 September 2012, §59.
57. Mental Disability Advocacy Center (MDAC) v. Bulgaria, Complaint No. 41/2007, decision on the merits of 3 June 2008, §52; IPPF EN v. Italy, cited above, §189.
58. Decision on the merits: Syndicat de Défense des Fonctionnaires v. France, Collective Complaint No. 73/2011; Conclusions 2006, Albania.
59. Conclusions 2012, Andorra.
60. Conclusions 2006, Albania; Conclusions 2012, Albania.
61. Conclusions 2006, Lithuania; Digest 2018, p. 60.
62. Conclusions III - Statement of interpretation - Article 1-2.
63. Conclusions V - Statement of interpretation - Article 1-2.
64. Conclusions III - Statement of interpretation - Article 1-2.

The non-application of national legislation containing elements which were in conflict with this principle of the Charter would not be considered sufficient for the purpose of ensuring the application of this provision on this point and that consequently such legislation would have to be amended[65].

The prohibition of forced or compulsory labour may be infringed when e.g.[66]:

- provisions authorise criminal sanctions in the event of disciplinary offences on the part of seamen or sanctions for seamen who abandon their post, even when the safety of a ship or the lives or health of the people on board are not at stake[67];

- career army officers who have received several periods of training are required to complete a term of compulsory service that may last up to twenty-five years[68] or the decision to grant early retirement is left to the discretion of the Minister of Defence, which could lead to a period of service which would be too long to be regarded as compatible with the freedom to choose and leave an occupation[69];

- powers of requisition in exceptional circumstances are too broadly defined[70]. Any such powers must be defined with sufficient clarity and fall within the scope of Article G of the Charter[71].

Domestic work and work in family enterprises may give rise to forced labour and exploitation, State Parties should adopt legal provisions to combat forced labour in domestic environment and protect domestic workers as well as take measures to implement them.[72]

Prisoners' working conditions must be properly regulated, particularly if they are working, directly or indirectly, for employers other than the prison service. In accordance with the principle of non-discrimination, this regulation, which may be carried out by means of laws, regulations or agreements (particularly where companies act as subcontractors in prison workshops), must concern pay, hours and other working conditions and social protection (in the sphere of employment injury, unemployment, health care and old age pensions)[73].

> In general, the conditions to which the payment of unemployment benefits is subjected, including any obligations to take up offered employment, should be assessed under Article 12§1 of the Charter (or Article 12§3 in the case of new developments). However, in certain cases and under certain circumstances **the loss of unemployment benefits on grounds of refusal to accept offered employment** could amount, indirectly, to a restriction on the freedom to work and as such the situation would be assessed under Article 1§2[74].

65. Conclusions III, Statement of Interpretation on Article 1§2.
66. Digest 2018, p. 60.
67. International Federation of Human Rights Leagues (FIDH) v. Greece, Complaint No. 7/2000, Decision on the merits of 5 December 2000, §22; Conclusions 2012 Portugal.
68. International Federation of Human Rights Leagues (FIDH) v. Greece, Complaint No. 7/2000, Decision on the merits of 5 December 2000, §21.
69. Conclusions 2004, Ireland; Conclusions 2012, Ireland.
70. Conclusions XVI-1 (2002), Greece.
71. Digest 2018, p. 60.
72. Conclusions 2008, Statement of Interpretation on Article 1§2.
73. Conclusions 2012, General Introduction, Statement of Interpretation on Article 1§2. Conclusions XX-1 - Statement of interpretation - Article 1-2.
74. Conclusions XIX-1 - Statement of interpretation - Article 12-1, 1-2.

The loss of benefit or assistance "when an unemployed person rejects a job offer may constitute a restriction on freedom to work where the person concerned is compelled, on pain of losing benefit, to accept any job, notably a job:

- which only requires qualifications or skills far below those of the individual concerned;

- which pays well below the individual's previous salary;

- which requires a particular level of physical or mental health or ability, which the person does not possess at the relevant time;

- which is not compatible with occupational health and safety legislation or, where these exist, with local agreements or collective employment agreements covering the sector or occupation concerned and therefore may affect the physical and mental integrity of the worker concerned;

- for which the pay offered is lower than the national or regional minimum wage or, where one exists, the norm or wage scale agreed on for the sector or occupation concerned, or where it is lower, to an unreasonable extent, than all of the unemployment benefits paid to the person concerned at the relevant time and therefore fails to ensure a decent standard of living for the worker and his/her family;

- which is proposed as the result of a current labour dispute;

- which is located at a distance from the home of the person concerned which can be deemed unreasonable in view of the necessary travelling time, the transport facilities available, the total time spent away from home, the customary working arrangements in the person's chosen occupation or the person's family obligations (and in the latter case, provided that these obligations did not pose any problem in the person's previous employment);

- which requires persons with family responsibilities to change their place of residence, unless it can be proved that these responsibilities can be properly assumed in the new place of residence, that suitable housing is available and that, if the situation of the person so requires, a contribution to the costs of removal is available, either from the employment services or from the new employer, so respecting the worker's right to family life and housing."[75]

> In all cases in which the relevant authorities decide on the permanent withdrawal or temporary suspension of unemployment benefit because the recipient has rejected a job offer, this decision must be open to review by the courts in accordance with the rules and procedures established under the legislation of the State which took the decision[76].

The prohibition of any practice that might interfere with workers' right to earn their living in an occupation freely entered upon

The length of **service to replace military service** (alternative service during which persons are deprived of the right to earn their living in an occupation freely entered) must be reasonable, proportionate to the period of military service and not excessive. The Committee has in the past

75. Conclusions 2012 - Statement of interpretation - Article 1-2.
76. Conclusions 2012 - Statement of interpretation - Article 1-2.

stated that alternative service which is not more than 1.5 times the length of military service is in principle in conformity with the Charter. The general rule is that the longer the period of military service is, the stricter the Committee evaluates the reasonableness of any additional length of the alternative service[77].

Under Article 1§2 any **minimum period of service** in state agencies e.g. in the professional armed forces must be of a reasonable duration and in cases of longer minimum periods due to education or training that an individual has benefitted from, the length must be proportionate to the duration of the education and training. Likewise, any fees/costs to be repaid on early termination of service must be proportionate.[78]

The right to undertake work freely includes the right to be protected against interferences with **the right to privacy**. The Committee noted that „the emergence of the new technologies which have revolutionised communications have permitted employers to organise a continuous supervision of employees and in practice enable employees to work for their companies at any time and in any place, including their homes with the result that the frontier between professional and private life has been weakened. The result is an increased risk of work encroaching upon all reaches of private life, even outside working hours and outside the place of work. (…) Therefore, it is essential that the fundamental right of workers to privacy should be asserted within the employment relationship so as to ensure that this right is properly protected"[79].

To fulfill the obligations under Article 1§2, individuals must be protected from interference in their **private or personal lives** associated with or arising from their employment situation. Modern electronic communication and data collection techniques have increased the chances of such interference. Since the term "private life" may be defined with varying degrees of strictness it may be preferable to speak of "infringements of private or personal life"[80].

> " In the first place, employers may place unnecessary restrictions on their employees' freedom of action. These include interference in their personal, or non-working, lives, even though the activities included in this autonomous sphere may be viewed as "public" because they occur in public. Examples include dismissing employees for attending a political rally or for buying a make of car in competition with that sold by their employer. The Charter's insistence that anyone is entitled to earn his living in an occupation freely entered upon (…) means that employees must remain free persons, in the sense that their employment obligations, and hence the powers of management, are limited in scope[81].

The principle is indisputable, even though it is sometimes difficult to determine the precise boundary between the occupational and non-occupational spheres, bearing in mind the nature of the work and the purpose of the business. Admittedly, Article 1§2 only refers explicitly to the time when workers enter into employment. Logically, though, the fundamental principle of freedom which the Charter refers to with respect to this particular occasion must continue to apply thereafter in the non-work sphere[82].

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77. Conclusions XX-1 - Statement of interpretation - Article 1-2.
78. Conclusions 2012, France; Digest 2018, p. 62.
79. Conclusions XX-1 - Statement of interpretation - Article 1-2.
80. Conclusions XVIII-1 - Statement of interpretation - Article 1-2.
81. Conclusions XVIII-1 - Statement of interpretation - Article 1-2.
82. Conclusions XVIII-1 - Statement of interpretation - Article 1-2.

Article 1§3 provides for the right to **free employment services**. All workers enjoy this right and therefore services must operate effectively throughout the national territory and with respect to all sectors of the economy. The main function of such services is to place unemployed job–seekers in employment as well as employed workers looking for another job. Basic placement services such as registration of job-seekers and notification of vacancies must be provided free of charge for both employees and employers[83] and must be effective[84].

Fees imposed on employers for the notification of vacancies are contrary to Article 1§3, even where the fees are small and aimed only at covering administrative costs[85]. The existence of fee-charging by private employment agencies is not contrary to Article 1§3 provided that fully-fledged free employment services exist in all occupational sectors and geographical areas[86]. Trade union and employers' organisations must have the possibility of participating in the organisation and running of the employment services[87].

Article 1§4 guarantees the **right to vocational guidance, continuing vocational training** for employed and unemployed persons and **specialised guidance and training for persons with disabilities**[88]. In order to satisfy the requirements of Article 1 § 4, a State must not only have institutions providing vocational guidance, training and rehabilitation, but must also ensure access to the institutions for all those interested, including foreigners, nationals of the States parties to the Charter, and persons with disabilities[89].

The indicators allowing an assessment of the effectiveness of vocational guidance services are: their funding, their staffing and the number of beneficiaries.[90]

No length of residence requirement may be imposed on students or trainees who reside in whatever capacity or are authorised to reside, because of their links with persons legally residing in the country, in the territory of the party concerned, before they can begin their training. If such a length of residence requirement exists for foreigners wishing to receive vocational guidance, training or rehabilitation this situation constitutes an unequal treatment contrary to the Charter.[91]

c) Implementation in Ukraine

Despite the enshrinement of the right to work in the Constitution of Ukraine, national legislation, the Committee found in its Conclusions 2016 that the situation in Ukraine was not in conformity with the requirements under all paragraphs of Article 1 of the Charter.[92]

Paragraph 1

The national report that was examined by the Committee in 2016 did not provide information on active labour market measures available to job seekers; on the number of beneficiaries in the different types of active measures; the overall activation rate etc. The Committee recalled about requirements to demonstrate targeted, effective and regularly monitored labour market measures. However, the lack of information on the abovementioned criteria did not provide the opportunity to evaluate the effectiveness of employment policies in Ukraine and led to the conclusion of

83. Conclusions XIV-1 (1998), Statement of Interpretation on Article 1§3.
84. Digest 2018, p. 63.
85. Conclusions XIV-1 (1998), Turkey.
86. Digest 2018, p. 63.
87. Conclusions XV-1 (2000), Addendum, Poland.
88. Conclusions 2003, Bulgaria.
89. Conclusions XII-2 - Statement of interpretation - Article 1-4.
90. Conclusions XX-1 (2012), Iceland.
91. Conclusions 2008, Bulgaria.
92. ECSR, Conclusions – Ukraine. 2016. P.3

non-conformity the situation in Ukraine with Article 1 §1 on the ground that employment policy efforts had not been adequate in combatting unemployment and promoting job creation.[93] Such a conclusion was also a consequence of non-providing the information requested in previous report.[94]

Paragraph 2

Within the examination of prohibition of discrimination in employment, the Committee noted in its conclusions 2016 that the previous conclusions 2012 were deferred due to the total lack of necessary information. However, the information regarding implementation of the relevant legislation in practice, including appropriate case-law, was missed again and the Committee had to adopt negative conclusions on effectively implemented the prohibition of discrimination in employment in practice.[95] The situation in Ukraine was also found not in conformity with Article 1 §2 due to the obligation of the plaintiff to prove discrimination and not establishing in national legislation a shift in the burden of proof in discrimination cases. It was also asked next report to provide the detailed information on concrete positive measures/actions taken or envisaged to promote equality in employment and to combat all forms of discrimination in employment.

The Committee examined the issue of discrimination on grounds of nationality in employment sphere and access of foreigners to certain jobs and asked for the specification of ban on foreign nationals to be employed in civil service.

According to requirements of prohibition of forced labour, the Committee asked for up-to-date information on work, social protection of prisoners, including information on employment injury, unemployment, health care and old age pensions, and about the information on the legal provisions adopted to combat forced labour in the domestic environment. The further absence of such an information leads to negative conclusions on the issue.[96]

In the Conclusions 2016, the Committee repeated its questions about minimum periods of service in the armed forces of Ukraine, information on the impact of studies or training courses followed by military personnel on the duration of their service in the armed forces and on the possible financial repercussions of early termination of service.[97] The Committee emphasised that Ukraine has to take into account the Statement of Interpretation on Article 1§2 in the General Introduction to Conclusions 2012 on the requirement to accept the offer of a job or training, on the remedies available for the persons concerned to dispute decisions to suspend or withdraw unemployment benefit.[98] The absence of this information leads to the conclusions of inconformity the situation in Ukraine with the requirements under Article 2 §2. It was also reiterated that the right to earn one's living in an occupation freely entered upon includes the protection of personal data of workers and the appropriate up-dated information need to be included to the reports.

Finally, the Committee found in its Conclusions 2016 non-conformity of the situation on Ukraine with the requirements of Article 2 §2 on two grounds: the prohibition of discrimination in employment had not effective practical implementation, non-providing a shift in the burden of proof in discrimination cases by national legislation.[99] However, the conclusions included a range of repeated requests for the information that the lack of which would lead to more negative assumptions within next examination.

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93. Ibid., p. 5.
94. ECSR, Conclusions – Ukraine. 2012. – Article 1 – 1. URL: http://hudoc.esc.coe.int/eng?i=2012/def/UKR/1/1/EN
95. ECSR, Conclusions – Ukraine. 2016. p. 6.
96. Ibid., p.7-8.
97. Ibid., p.8.
98. Ibid., p.8.
99. Ibid., p.9.

Paragraph 3

The Committee stated that fees imposed on employers for the notification of vacancies to the State Employment Service, in spite of its amount and aim, contradicted to requirements of Article 2 §3.

In the Conclusions 2012 the Committee asked Ukraine about the effectiveness of employment services, including the performance of indicators, such as the number of vacancies notified to employment services, the number of placements made by these services and the average length of time in filling vacancies.[100] The absence of information on performance indicators did not allow to assess the effectiveness of employment services in Ukraine in the Conclusions 2016. [101] Moreover, the Committee detailed and expanded the list of questions for the next report.

Paragraph 4

Within the examination of situation regarding vocational guidance, training and rehabilitation, the Committee took into account the ratification Articles 9, 10§3, 15§1 of the Charter by Ukraine which are related to this issue. Therefore, the Committee stressed that the fulfillment of obligations under the mentioned articles have to be taken also into account with the examination the situation under Article 2 §4. Because of founding the breach of obligations under Article 9 as regard to non-establishing the guaranties the right to vocational guidance within the labour market, the Committee considered that the situation in Ukraine was inconformity with Article 1 §4 on the same ground.[102]

100. ECSR, Conclusions – Ukraine. 2012. – Article 1 – 3. URL: http://hudoc.esc.coe.int/eng?i=2012/def/UKR/1/3/EN
101. ECSR, Conclusions – Ukraine. 2016. p. 10.
102. ECSR, Conclusions – Ukraine. 2016. p. 11.

Group 3: Labour rights

The right to just conditions of work (Article 2)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers the right to just conditions of work. (Part I, point 2)

The right conferred in Article 2 ESC (part II) is overlapping with Article 4§2 in terms of overtime work.

Pursuant to Art. 2 ESC:

Article 2 – The right to just conditions of work

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

1. to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit;

2. to provide for public holidays with pay;

3. to provide for a minimum of four weeks' annual holiday with pay;

4. to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations;

5. to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest;

6. to ensure that workers are informed in written form, as soon as possible, and in any event not later than two months after the date of commencing their employment, of the essential aspects of the contract or employment relationship;

7. to ensure that workers performing night work benefit from measures which take account of the special nature of the work.

Pursuant to the **Appendix**[103]:

> **Article 2, paragraph 6**
>
> Parties may provide that this provision shall not apply:
>
> a) to workers having a contract or employment relationship with a total duration not exceeding one month and/or with a working week not exceeding eight hours;
>
> b) where the contract or employment relationship is of a casual and/or specific nature, provided, in these cases, that its non-application is justified by objective considerations.

b) Decisions and conclusions of the European Committee of Social Rights

Working time (Article 2§1)

> Article 2§1 guarantees workers the right to reasonable limits on daily and weekly working hours, **including overtime**. The aim is to protect worker's safety and health. Every worker must therefore receive rest periods adequate for recovering from the fatigue of work and of preventive value in reducing risks of health impairment which could result from accumulation of periods of work without the necessary rest.[104]

To this end, a reasonable period of work, including overtime, must be guaranteed through legislation, regulations, collective agreements or any other binding means. In order to ensure that the limits are respected in practice, an appropriate authority must supervise whether the limits are being respected.[105]

The Charter does not expressly define what constitutes **reasonable working hours**. Situations are therefore assessed on a case by case basis: extremely long working hours e.g. 16 hours within a period of 24 hours[106] or, under certain conditions, more than 60 hours in one week[107] are contrary to the Charter. These limits should apply to all categories of workers and can only be exceeded in situations that go beyond what can be considered as exceptional circumstances (i.e. natural disasters, situations of force majeure).[108] The Committee has held that „what is reasonable under the Charter varied from place to place and from time to time. Moreover, the progressive reduction of working hours depends on "the increase of productivity and other relevant factors". Such other factors are the nature of the work, including the risks to which the workers' safety and health are exposed. As the Committee has pointed out on many occasions, risks are higher for workers occupied for long hours over a considerable period of time".[109] Even if a reasonable limit is set to weekly working hours, this cannot compensate the fact that on a given day, hours may be above the authorised maximum[110].

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103. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.
104. Conclusions XIV-2 (1998), Statement of interpretation on Article 2§1; Confédération Générale du Travail (CGT) v. France, Complaint No. 22/2003, Decision on the merits of 7 December 2004, §34.
105. Conclusions I (1969), Statement of Interpretation on Article 2§1.
106. Conclusions XIV-2 (1998), Norway; Conclusions (2014), Armenia.
107. Conclusions XIV-2 (1998), Netherlands.
108. Conclusions (2014), Netherlands; Digest 2018, p. 65.
109. Conclusions XIV-2 - Statement of interpretation - Article 2-1.
110. Conclusions XIV-2 - Statement of interpretation - Article 2-1.

> **Flexibility measures** regarding working time are not as such in breach of the Charter[111] (…). In order to be found in conformity with the Revised European Social Charter, national laws or regulations must fulfil three criteria:
>
> (i) they must prevent unreasonable daily and weekly working time
>
> (ii) they must operate within a legal framework providing adequate guarantees
>
> (iii) they must provide for reasonable reference periods for the calculation of average working time.[112]

When determining the conformity of flexible working time systems with the Revised Charter, the Committee takes account of the length of the reference period which is used to calculate average working time[113]. The reference periods must not exceed six months[114]. They may be extended to a maximum of one year in exceptional circumstances, if it is justified by objective or technical reasons or reasons concerning the organisation of work[115]. Workers on flexible working time arrangements with long reference periods (i.e. one year) should not be asked to work unreasonable hours or an excessive number of long working weeks.[116]

Working **overtime** must not simply be left to the discretion of the employer or the employee.

> The utilisation and/or the length of overtime should be limited in order to avoid exposing the worker to the risks of accidents at the end of a working day.[117]

The **periods of the on-call duty** ("périodes d'astreinte"), during which the employee has not been required to perform work for the employer, although they do not constitute effective working time, cannot be regarded as a rest period in the meaning of Article 2 of the Charter, except in the framework of certain occupations or particular circumstances and pursuant to appropriate procedures.

The "périodes d'astreinte" are in effect periods during which the employee is obliged to be at the disposal of the employer with a view to carrying out work, if the latter so demands. However, this obligation, even where the possibility of having to carry out work is purely hypothetical, unquestionably prevents the employee from the pursuit of activities of his or her own choosing, planned within the limits of the time available before the beginning of work at a fixed time and not subjected to any lack of certainty resulting from the exercise of an occupation or from the situation of dependency inherent in that exercise.

The absence of effective work, determined a posteriori for a period of time that the employee a priori did not have at his or her disposal, cannot therefore constitute an adequate criterion for regarding such a period as a rest period.[118]

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111. see in particular General Introduction, Conclusions XIV-2, p. 33.
112. Decision on the merits: Confédération Française de l'Encadrement (CGC) v. France, Collective Complaint No. 9/2000, § 29.
113. see in particular General Introduction, Conclusions XIV-2, p. 34.
114. Conclusions XIV-2 (1998), Statement of interpretation on Article 2§1.
115. Conclusions XIX-3 (2010), Spain.
116. Conclusions XX-3 (2014), Germany.
117. Conclusions XIV-2 - Statement of interpretation - Article 2-1; Conclusions XIV-2 (1998), Statement of Interpretation on Article 2§1.
118. Confédération Française de l'Encadrement CFE-CGC v. France, Complaint No. 16/2003, Decision on the merits of 12 October 2004, §§50-53; see aso Confédération générale du travail (CGT) v. France, Complaint No 55/2009, Decision on the Merits of 23 June 2010, §§ 64-65;; Digest 2018, p. 66.

> For the purpose of protecting the private and family life of workers, the Committee attaches importance to the fact that they must be clearly and duly informed about any changes to their working hours[119].

Public holiday with pay (Article 2§2)

Article 2§2 guarantees the right to public holidays with pay, in addition to weekly rest periods and annual leave. Public holidays may be specified in law or in collective agreements.

The Charter does not stipulate the number of public holidays. The number of public holidays varies, depending on the State parties. There has been no finding of non-conformity with this provision because of States Parties granting too few public holidays.[120]

As a rule, work should be prohibited during public holidays. However, work can be carried out on public holidays under specific circumstances set by law or collective agreements.[121]

Work performed on a public holiday entails a constraint on the part of the worker, who should be compensated. Considering the different approaches adopted in different countries in relation to the forms and levels of such compensation and the lack of convergence between States Parties in this regard, States Parties enjoy a margin of appreciation on this issue, subject to the requirement that all employees are entitled to an adequate compensation when they work on a public holiday.[122]

In assessing whether the compensation for work performed on public holidays is adequate, levels of compensation provided for in the form of increased salaries and/or compensatory time off under the law or the various collective agreements in force are taken into account, in addition to the regular wage paid on a public holiday, be it calculated on a daily, weekly or monthly basis.[123]

> Work performed on a public holiday requires a constraint on the part of the worker, who should be compensated with a higher remuneration than that usually paid. Accordingly, in addition to the paid public holiday, work carried out on that holiday must be paid at least double the usual wage. The remuneration may also be provided as compensatory time-off, in which case it should be at least double the days worked[124].

A compensation corresponding to the regular wage increased by 75% is not sufficiently high to constitute an adequate level of compensation for work performed on a public holiday.[125]

Annual holiday with pay (Article 2§3)

Article 2§3 guarantees the right to a minimum of four weeks (or 20 working days) annual holiday with pay. The taking of annual holiday may be subject to the requirement that the twelve working months for which it is due have fully elapsed[126].

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119. Conclusions XIV-2 - Statement of interpretation - Article 2-1.
120. Digest 2018, p. 66.
121. Conclusions 2014, Netherlands.
122. 2 Conclusions 2014, Andorra.
123. Conclusions 2014, France; Digest 2018, p. 67.
124. Conclusions XIX-3 - Statement of interpretation - Article 2-2.
125. Conclusions XX-3 (2014), Greece; Digest 2018, p. 67.
126. Conclusions I (1969) Statement of interpretation on Article 2§3.

The obligation arising under Article 2§3 was fulfilled by a Contracting State provided that the great majority of workers in that State enjoyed the advantages stipulated[127].

> An employee must take at least two weeks uninterrupted annual holidays during the year the holidays were due. Annual holidays exceeding two weeks may be postponed in particular circumstances defined by domestic law, the nature of which should justify the postponement[128].

The right to an annual holiday guaranteed by Article 2§3 (…) cannot be waived even with the free consent of the workers concerned and even in consideration of an extra payment by the employer[129].

> As a result, Article 2 para. 3 requires that a worker who is incapacitated for work by reason of illness or injury during all or part of his/her annual holiday must be entitled to take at some other time the days thereby lost, at least insofar as is necessary to guarantee the worker the two week annual holiday provided for by the Charter. This requirement applies in all cases, whether the incapacity commences before or during the holiday period, as well as in cases of employment in which there is a fixed holiday period for all workers in an enterprise.[130]

The Committee recognised, however, that this principle does not prevent the payment of a lump sum to an employee at the end of his employment in compensation for the paid holiday to which he was entitled but which he had not taken.[131]

Elimination of risks in dangerous or unhealthy occupations (Article 2§4)

The first part of Article 2§4 requires States Parties to eliminate risks in inherently dangerous or unhealthy occupations. This part is closely linked to Article 3 of the Charter (right to safe and healthy working conditions). Whilst the elimination of dangerous and unhealthy occupations was an ideal to strive for, paragraph 4 of Article 2 required that specific measures should be taken so long as these occupations still existed[132].

States Parties enjoy a certain margin of discretion to determine the activities and risks concerned.[133] They must at least consider sectors and occupations that are manifestly dangerous or unhealthy, such as mining, quarrying, steel making and shipbuilding and occupations exposing employees to ionising radiation,[134] extreme temperatures and noise.[135] This choice is however still subject to review[136].

The second part of Article 2§4 requires States Parties to ensure some form of compensation for workers exposed to risks that cannot be or have not yet been eliminated or sufficiently reduced

127. Conclusions I - Statement of interpretation - Article 2-3.
128. Conclusions 2007 - Statement of interpretation - Article 2-3.
129. Conclusions I - Statement of interpretation - Article 2-3.
130. Conclusions XII-2 - Statement of interpretation - Article 2-3.
131. Conclusions I - Statement of interpretation - Article 2-3.
132. Conclusions V - Statement of interpretation - Article 2-4
133. Conclusions II (1971), Statement of Interpretation on Article 2§4; STTK ry and Tehy ry v. Finland, Complaint No. 10/2000, Decision on the merits of 17 October 2001, §20.
134. STTK ry and Tehy ry v. Finland, Complaint No. 10/2000, Decision on the merits of 17 October 2001, §27; Digest 2018, p. 68.
135. Conclusions XIV-2 (1998), Norway; Digest 2018, p. 68.
136. Conclusions II, p. 9.

either in spite of the effective application of the preventive measures referred to above or because they have not yet been applied[137].

Measures intended to compensate workers for exposure to residual risks must be regulated at the central level and must not be left to the agreements between the social partners.[138]

Article 2§4 mentions two forms of compensation: reduced working hours and additional paid holidays. In view of the emphasis in this provision on health and safety objectives, however, other approaches to reducing exposure to risks may also ensure conformity with the Charter.[139] They need to be assessed on a case by case basis.[140]

The aim of the compensation must be to offer those concerned sufficient and regular time[141] to recover from the associated stress and fatigue, and thus maintain their vigilance.[142] Under no circumstances can financial compensation be considered a relevant and appropriate measure to achieve the aims of Article 2§4,[143] nor is early retirement[144] or the provision of food supplements.[145] Compensation measures such as one additional day's holiday and a maximum weekly working time of 40 hours have been considered inadequate in that they do not offer workers exposed to risks regular and sufficient time to recover.[146]

Weekly rest (Article 2§5)

Article 2§5 guarantees a weekly rest period, which insofar as possible shall coincide with the day traditionally or normally recognised as a day of rest in the country or region concerned. Although the rest period should be "weekly", it may be deferred to the following week, as long as no worker works more than twelve days consecutively before being granted a two–day rest period[147].

Derogations to this rule might be in conformity with Article 2§5 when the postponement is truly exceptional and surrounded by strict safeguards (such as the authorisation of the labour inspectorate, with the agreement of the trade union or, as the case may be, the representatives of the employees, or the possibility for the safety representative to react if the employer does not respect the relevant rules)[148].

The right to weekly rest periods may **not be replaced by compensation** and workers may not be permitted to give it up. However, the rest period can be taken on a day other than the traditional day, either when the type of activity requires it, or for reasons of an economic nature. At all events, another day of rest during the week must be provided for.[149] Periods of on-call duty during a weekly rest period and during which an employee has not been required to work, cannot be regarded as a weekly rest period.[150]

137. Conclusions XII-1 (1991), United Kingdom; Conclusions XX-3 (2014), Germany; Digest 2018, p. 68.
138. Conclusions 2014, Netherlands.
139. Conclusions 2005, Statement of Interpretation on Article 2§4.
140. Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §236.
141. Conclusions V (1977), Statement of Interpretation on Article 2§4; Digest 2018, p. 68.
142. Conclusions III (1973), Ireland; Digest 2018, p. 68.
143. Conclusions XIII-3 (1995) Greece.
144. Conclusions 2003, Bulgaria.
145. Conclusions 2007, Romania.
146. Conclusions XX-3 (2014), Greece.
147. Digest 2018, p. 69.
148. Conclusions 2010, Romania; Conclusions 2014, Sweden; Conclusions XX-3 (2014) Denmark; Digest 2018, p. 69.
149. Conclusions XIV-2 (1998), Statement of Interpretation on Article 2§5; Conclusions I - Statement of interpretation - Article 2-5.
150. Confédération Générale du Travail (CGT) v. France, Complaint No. 22/2003, Decision on the merits of 7 December 2004, §§35-39.

Written information on employment contract (Article 2§6)

> Article 2§6 of the Charter guarantees workers the right to written information at the start of their employment relating to the "essential aspects of the contract or employment relationship". This information must cover at least the following essential aspects: the identity of the parties; the workplace; the date on which the employment contract or the employment relationship commenced; if the employment contract or relationship is a temporary one - the foreseeable length of the contract or the relationship; the length of paid leave; the legth of the notice to be given in the event of termination of the contract or the employment relationship; remuneration; the standard daily and weekly working hours and; references to any collective agreements governing the employee's conditions of work[151].

Night work (Article 2§7)

Article 2§7 guarantees compensatory measures for persons performing night work. Domestic law or practice must define what is considered to be "night work" within the context of this provision, namely what period is considered to be "night" and who is considered to be a "night worker".[152]

The measures which take account of the special nature of the work must at least include the following:

- regular medical examinations, including a free compulsory medical examination prior to taking up employment on night work;
- the provision of possibilities for transfer to daytime work;
- continuous consultation with workers' representatives on the introduction of night work, on night work conditions and on measures taken to reconcile the needs of workers with the special nature of night work.[153]

The Committee concluded that the situation in the country is not in conformity with Article 2§7 of the Charter on the grounds that:

> - possibilities of transfer to daytime work are not sufficiently provided for;
>
> - laws and regulations do not provide for continuous consultation with workers' representatives on night work conditions and on measures taken to reconcile the needs of workers with the special nature of night work;

151. Decision on the merits: Syndicat de Défense des Fonctionnaires v. France, Collective Complaint No. 73/2011, § 17; Conclusions 2003, Bulgaria; Conclusions 2010, Andorra and Portugal.
152. Conclusions 2014, Bulgaria.
153. Digest 2018, p. 71; Conclusions 2003, Romania.

- there is no provision in the legislation for compulsory medical examinations prior to employment on night work and regularly thereafter[154].

c) Implementation in Ukraine

Paragraph 1

The situation in Ukraine regarding reasonable working time was found in conformity with Article 2 §1 in each conclusion since the ratification of the Charter adopted in 2010, 2014, 2018.[155] The Committee stated that the national legislation in the sphere of working time duration has not been changed since the first conclusions in 2010. The Committee also noted that the Ukraine had obligations to bring the legislation into accordance with standards of Directive 2003/88/EC in the context of the implementation of the Association Agreement between Ukraine and the European Union. The special attention was paid to the regulation of standby/ on-call duty in Ukraine.

Paragraph 2

The Committee found the situation in Ukraine regarding the payment for work performed on a public holiday in conformity with the §2 of Article 2 of the Charter. All conclusions adopted in different years was positive in this concern. The Committee took into account that increasing remuneration was guaranteed to all category of workers in both the public and the private sector.[156]

Paragraph 3

Ukraine has not accepted §3 of Article 2. However, the Committee underlined the absence of significant obstacles, in Ukrainian law and in practice, to ratify this provision of the Charter.[157] Article 2.3 guarantees the right to minimum of 4 weeks (or 20 working days) annual holiday with pay. The same standards are required by the Directive 2003/88/EC that was necessary to be taken into account by Ukraine in the light of fulfillment its obligations under the Association Agreement between Ukraine and EU.

Paragraph 4

Within the examination situation regarding elimination of risks in dangerous or unhealthy occupations, the Committee recall the general obligation of States Parties of the Charter to "eliminate risks in inherently dangerous or unhealthy occupations and to apply compensatory measures to workers exposed to risks which cannot be or have not yet been eliminated or sufficiently reduced"[158] and stressed its negative Conclusions 2017 on the situation in Ukraine concerning sufficiency of the coverage of occupational hazards by specific occupational health and safety legislation and regulations according to Article 3 of the Charter.

In 2018, the Committee repeated its request on comprehensive and updated information on the effective implementation of measures aimed at eliminating or reducing occupational risks and stated that if the next report didn't provided the appropriate information it would be nothing to

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154. Conclusions 2018 - Ukraine - Article 2-7.
155. ECSR, Conclusions 2014 - Ukraine - Article 2-1, URL: http://hudoc.esc.coe.int/eng?i=2014/def/UKR/2/1/EN, Conclusions 2010 - Ukraine - Article 2-1, URL: http://hudoc.esc.coe.int/eng?i=2010/def/UKR/2/1/EN, Conclusions 2018, Ukraine. p.5
156. ECSR, Conclusions 2018, Ukraine. p.6.
157. Danuta Wisniewska-Cazals Procedure on non-accepted provisions of the European Social Charter. September 2020. p.13
158. ECSR, Conclusions 2018, Ukraine. p.7.

establish that the situation in Ukraine is in conformity with this issue.[159] The lack of mentioned information led to defer the assessment.

In this conclusions 2018, the Committee also examined information that was asked before about the forms of compensation that offered to the workers concerned sufficient and regular time to recover from the stress and fatigue associated to their work, and thus maintain their vigilance and emphasised that early retirement or financial compensation could not be considered an appropriate response in the light of paragraph 4.[160] The situation in Ukraine was found in conformity with the standards in this sphere. However, further details on the type of compensatory measures were asked for the next report.

Paragraph 5

There were different Conclusions of the Committee on the situation in Ukraine regarding weekly rest period. In 2010 the Committee found that Ukraine legislation and practice on the issue was in conformity with the requirements of this paragraph. However, the Committee requested the information on exceptions to the rules on weekly rest periods.[161]

The provision of national legislation on the possibility to grant compensation without providing another day of rest contradicted to the requirement of Article 2§5 to guarantee that workers cannot waive their right to a weekly rest period or accept that it be replaced by compensation. Consequently, in 2018 when this information has been received, the Committee adopted the negative conclusions on the ground that workers may give up their right to compensatory time off in exchange for a financial compensation. The question about work more than twelve consecutive days before being granted a two day rest period was also reiterated; the absence of requested information next time will be considered as non-conformity.[162]

Paragraph 6

Within all conclusions the Committee expressed its deep concern about not always mandatory form for the employment contract in Ukraine. In case when an employment contract is not concluded in writing, it has to be formalised anyway by an order or instruction and workers are entitled to written information covering at least the main elements interpreted by the Committee. These elements were several times underlined in the conclusions for Ukraine. In 2018 the lack of this information led to a postponement of conclusions.[163]

Paragraph 7

The situation in Ukraine regarding night work has been found inconsistent with the requirements of Article 2 §7 on the ground that possibilities of transfer to daytime work were not sufficiently provided for; laws and regulations did not provide for continuous consultation with workers' representatives on night work conditions and on measures taken to reconcile the needs of workers with the special nature of night work; there was no provision in the legislation for compulsory medical examinations prior to employment on night work and regularly thereafter. The Ukraine has the obligation to bring national legislation into conformity with the Directive 2003/88/EC that prescribed the same night work standards.[164]

159. Ibid.
160. ECSR, Conclusions 2014 - Ukraine - Article 2-4, URL: http://hudoc.esc.coe.int/eng?i=2014/def/UKR/2/4/EN
161. ECSR, Conclusions 2010 - Ukraine - Article 2-5, URL: http://hudoc.esc.coe.int/eng?i=2010/def/UKR/2/5/EN
162. ECSR, Conclusions 2018 . Ukraine. p. 9.
163. ECSR, Conclusions 2018 . Ukraine. p. 10.
164. ECSR, Conclusions 2018 . Ukraine. p. 11.

Group 2: Health, social security and social protection

The right to safe and healthy working conditions (Article 3)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers the right to safe and healthy working conditions. (Part I, point 3)

Pursuant to Art. 3 ESC:

> **Article 3 – The right to safe and healthy working conditions**
>
> With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations:
>
> 1. to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment;
>
> 2. to issue safety and health regulations;
>
> 3. to provide for the enforcement of such regulations by measures of supervision;
>
> 4. to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.

Pursuant to the **Appendix**[165]:

> Article 3, paragraph 4
>
> It is understood that for the purposes of this provision the functions, organisation and conditions of operation of these services shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions.

165. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.

b) Decisions and conclusions of the European Committee of Social Rights

The right of every worker to a safe and healthy working environment is a widely recognised principle, stemming directly from the right to personal integrity, one of the fundamental principles of human rights.[166] The purpose of Article 3 is thus directly related to that of Article 2 of the European Convention on Human Rights, which recognises the right to life.[167] It applies to the whole economy, covering both the public and private sectors, employees and the self-employed.[168]

In relation to the application of the right to safe and healthy working conditions set out in Article 3, the Committee highlights „that the Charter is a living instrument, whose purpose is to protect rights not merely theoretically but also in fact(…)[169]. It therefore interprets the rights and freedoms set out in the Charter in the light of current conditions[170]. New trends such as:

> ”increased competition; free movement of persons; new technology; organisational constraints; self-employment, outsourcing and employment within small and medium-sised enterprises; increased work intensity, produce constant change in the work environment and new forms of employment which generate, increase and shift factors of risk to the workers' health and safety. In particular, new technology, organisational constraints and psychological demands favour the development of psychosocial factors of risk, leading to work-related stress, aggression, violence and harassment. These may in turn cause mental health problems for the persons concerned, with serious consequences on work performance, illness rates, absenteeism, accidents and staff turnover. They have also been identified as some of the most significant factors of disease and disability worldwide, cutting across age, sex and social strata, impacting low-income and high-income countries alike.[171]

Policy on health and safety and the working environment (Article 3§1)

> ”In Article 3§1, States Parties undertake to formulate, implement and periodically review a coherent occupational health and safety policy in consultation with social partners[172]

taking into account work-related stress, aggression and violence.[173] The main policy objective must be to foster and preserve a culture of prevention in the areas of health and safety at national level,[174] as opposed to a purely curative or compensatory approach[175]. The policies and strategies adopted must be regularly assessed and reviewed, particularly in the light of changing risks[176].

166. Conclusions I (1969), Statement of Interpretation on Article 3.
167. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3.
168. Conclusions II (1971), Statement of Interpretation on Article 3.
169. International Commission of Jurists v. Portugal (Complaint No. 1/1998 decision on the merits of 9 September 1999, §32.
170. Decision on the merits: Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Collective Complaint No. 30/2005, p. 194.
171. Conclusions 2013 - Statement of interpretation - Article 3.
172. Conclusions 2003, Statement of Interpretation on Article 3§1; see in particular Conclusions 2003, Bulgaria.
173. Conclusions 2013, Statement of Interpretation on Article 3§1.
174. Conclusions 2009, Armenia.
175. Digest 2018, p. 73.
176. Conclusions 2005, Lithuania.

A culture of prevention implies that all the partners – authorities, employers and workers – are actively involved in occupational risk prevention, working within a well-defined framework of rights and duties and predetermined structures.[177] In respect of companies the main aspects are, besides compliance with protective rules, the assessment of work-related risks and the adoption of preventive measures geared to the nature of risks as well as information and training for workers[178].

In respect of public authorities the main aspects are the development of an appropriate system of public prevention and supervision of the implementation of occupational safety and health rules.[179] The only aspect of labour inspection covered by Article 3§1 is the duty, as part of information, training and prevention activities, to share the knowledge about risks and risk prevention acquired during inspections and investigations.[180]

When devising and implementing national policies and strategies chosen by the relevant authorities, consultation with employers' and workers' organisations, must take place at national, sectoral and company level.[181] Article 3§1 requires consultation not only for tripartite co-operation between authorities, employers and workers to seek ways of improving their working conditions and working environment but also for the co-ordination of their activities and co-operation on key safety and prevention issues[182].

Health and safety regulations (Article 3§2)

States Parties' first obligation under Article 3 is to ensure the right to safe and healthy working standards of the highest possible level. Under §2, this obligation entails issuing safety and health regulations providing for preventive and protective measures against workplace risks recognised by the scientific community and laid down in Community and international regulations and standards.[183]

The Charter does not actually define the risks to be regulated. The risks currently referred to are as follows[184]:

> ” i. Psychosocial risks[185], stress, aggression and violence in the workplace[186]
>
> ii. Establishment, alteration and upkeep of workplaces — Work equipment[187]
>
> – workplaces and equipment, particularly the protection of machines, manual handling of loads, work with display screen equipment;
>
> – hygiene (shops and offices);
>
> – maximum weight;

177. Digest 2018, p. 73.
178. Conclusions 2009, Armenia.
179. Conclusions 2007, Cyprus.
180. Conclusions 2009, Malta; Digest 2018, p. 74.
181. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3.
182. Digest 2018, p. 74.
183. Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, Decision on the merits of 6 December 2006, §224.
184. Digest 2018, p. 76.
185. Conclusions 2013, Statement of Interpretation on Article 3.
186. Conclusions 2013, Statement of Interpretation on Article 3§2 (i.e. on Article 3§1 of the 1961 Charter).
187. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§2 (i.e. on Article 3§1 of the 1961 Charter).

– air pollution, noise and vibration; personal protective equipment; safety and/or health signs at work.

iii. Hazardous agents and substances[188]

– chemical, physical and biological agents, particularly carcinogens, including: white lead (in paint), benzene, asbestos, vinyl chloride monomer, metallic lead and its ionic compounds and ionising radiation;

– control of major accident hazards involving dangerous substances.

iv. Sectoral risks[189]

– indication of weight on packages to be transported by boat;

– protection of dockers against accidents;

– dock handling;

– building safety rules, temporary or mobile construction sites;

– mines, extractive industries using drilling and opencast or underground mining;

– ships and fishing vessels;

– prevention of major industrial accidents;

- agriculture;

- transport[190].

The level of protection and acceptable limits of risks must be aligned with those adopted in international reference standards such as the ILO Conventions and European Union Directives on health and safety at work.[191] It is understood that State Party has satisfied this general requirement if it has transposed most of the *acquis communautaire* on occupational safety and health into its domestic legislation.[192] In sectors of activity in which the acquis is incomplete, e.g. in shipping or fishing, main international standards are offered by the ILO conventions.[193]

States Parties are required to pay particular attention with regard to asbestos and ionising radiation, producing evidence that workers are protected up to a level at least equivalent to that set by international reference standards[194].

188. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§2 (i.e. on Article 3§1 of the 1961 Charter).
189. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§2 (i.e. on Article 3§1 of the 1961 Charter).
190. Digest 2018, p. 76.
191. Conclusions XIV-2 (1998), Italy.
192. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§2 (i.e. on Article 3§1 of the 1961 Charter); Conclusions 2005, Cyprus.
193. Conclusions 2013, Malta.
194. See more: Digest 2018, p. 77-78.

All workers, all workplaces and all sectors of activity must be covered by occupational safety and health regulations.[195] The term "workers" used in Article 3 covers both employed and self-employed persons, especially as the latter are often employed in high-risk sectors.[196] The aim is to ensure that the working environment is safe and healthy for all operators, where necessary by adopting rules adapted to the operators' specific situation.[197] The protection of interim, temporary, seasonal workers and those on fixed-term contracts, without necessarily being specific, must take the exposure to dangerous agents and substances accumulated with several successive employments into account, in order to avoid any discrimination in respect of occupational safety and health with permanent workers.[198]

No workplace, even if habited, can be "exempted" from the application of health and safety rules. Workers employed on residential premises, i.e. domestic Staff and home workers, must therefore be covered[199] but the rules may be adapter to the type of activity and the relatively risk-free nature of these workers' occupations and be worded in general terms.[200] Independent workers who intervene in several workplaces must suffer no discrimination in occupational safety and health matters, as compared to wageearning workers or civil servants, and hence must also be covered by the regulations.[201]

Enforcement of safety and health regulations (Article 3§3)

The aim of Article 3§3 is to guarantee the effective implementation of the right to safety and health at work. This implies monitoring development of the number of injuries at work and occupational diseases, checking the application of regulations and consulting employers' and workers' organisations on this subject.[202]

Frequency and trends in occupational injuries are decisive in assessing the effective implementation of the rights set out in Article 3§3.[203] The situation is considered incompatible with the Charter where, for several years, this frequency is clearly too high for it to be maintained that the right to health and safety at work is being effectively secured. This assessment can be made on the basis of absolute figures[204] or in relation to the average in the States Parties to the Charter.[205]

The same approach applies to the number of fatal occupational accidents and to their number in relation to the workforce. A fatal accident rate of more than double the European Union average indicates that measures taken to reduce fatal accidents are inadequate and the situation is therefore not in conformity with the Charter.[206]

States Parties must take measures to combat possible non-reporting and/or concealment of accidents and diseases. An ineffective or failing system of reporting of accidents and diseases may lead to a finding of non-conformity.[207]

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195. Conclusions II (1971), Statement of Interpretation on Article 3§2 (i.e. on Article 3§1 of the 1961 Charter).
196. Conclusions 2005, Estonia.
197. Conclusions III (1973), Statement of Interpretation on Article 3§2 (i.e. on Article 3§1 of the 1961 Charter); Conclusions IV (1975), Statement of Interpretation on Article 3§2 (i.e. on Article 3§1 of the 1961 Charter); Conclusions XIII-4 (1996), Belgium.
198. Conclusions 2009, Andorra; Digest 2018, p. 78.
199. Conclusions XIII-1 (1993), Statement of Interpretation on Article 3§2 (i.e. on Article 3§1 of the 1961 Charter).
200. Conclusions XIV-2 (1998), Belgium.
201. Conclusions 2005, Estonia.
202. Marangopoulos Foundation for Human Rigths (MFHR) v. Greece, Complaint No 30/2005, decision on the merits of 6 December 2006, §231.
203. Conclusions 2017, France.
204. Conclusions 2003, Slovenia
205. Conclusions XIV-2 (1998), Portugal.
206. Conclusions 2013, Lithuania.
207. Conclusions 2013, Albania.

The enforcement of safety and health regulations by measures of supervision is carried out in light of Part III Article A§4 of the Charter, whereby States Parties shall maintain a system of labour inspection appropriate to national conditions.[208] Article 3§3 does not prescribe any standard model for the organisation of labour inspection as article A§4 of Part III refers to a system "appropriate to national conditions". Labour inspection services may be divided between several bodies having specialised jurisdiction.[209] The excessive divide of services between several monitoring bodies that work under a lack of resources and imperfect cooperation may, however, deprives labour inspection of its efficiency.[210]

Inspectors must be entitled to inspect all workplaces, including residential premises, in all economic sectors,[211] private as public.[212] They must also have sufficient and appropriate means of information and powers of investigation and enforcement, in particular powers to take emergency measures where they notice an immediate danger to the health or safety of workers.[213]

The system of penalties in the event of breaches of the regulations must be efficient and dissuasive.[214]

Occupational health services (Article 3 § 4)

Article 3§4 requires to promote, in consultation with employers' and workers' organisations, the progressive development of occupational health services that are accessible to all workers, in all branches of economic activity and for all enterprises. If those services are not established within all enterprises, public authorities must develop a strategy, in consultation with employers' and workers' organisations, for that purpose.[215]

c) Implementation in Ukraine

According to the Committee's Conclusions 2017, the situation in Ukraine was not in conformity with all paragraphs of Article 3, except the §1 on which the conclusion was deferred due to the lack of necessary information and answers for questions asked by the Committee.

Paragraph 1

Due to the lack of information about regularly revision of occupational health and safety policy in the light of changing risks, the Committee took into account Recommendations for Ukraine presented by the ILO Committee of Experts on the Application of Conventions under Occupational Safety and Health Convention No. 155.

Duty to carry out activities in terms of research, knowledge and communication relating to psychosocial risks was underlined and the Committee asked Ukraine to present information concerned within next report.[216] The Committee also asked to prepare answers about the activities implemented and results obtained by the National Social Programme on the Improvement of Occupational Safety and Health and the Working Environment.[217]

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208. Digest 2018, p. 81.
209. Conclusions 2013, Austria; Digest 2018, p. 81.
210. Conclusions 2013, Ukraine; Digest 2018, p. 81.
211. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§3 (i.e. on Article 3§2 of the 1961 Charter).
212. Conclusions 2013, Statement of interpretation on Article 3§3 (i.e. of Article 3§2 of the 1961 Charter).
213. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§3 (i.e. on Article 3§2 of the 1961 Charter).
214. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§3 (i.e. on Article 3§2 of the 1961 Charter); Conlusions 2017, Estonia; Digest 2018, p. 82.
215. Conclusions 2003, Bulgaria; Digest 2018, p. 83.
216. ECSR, Conclusions 2017. Ukraine. – p.1203.
217. ECSR, Conclusions 2017. Ukraine. – p.1202-1204.

The range of other questions were also reiterated by the Committee on the results of previously listed initiatives for developing an occupational health and safety policy and which have helped to create a culture of prevention in respect of occupational health and safety in practice in different sectors (except coal mining sector); about the implementation measures aimed at organising occupational risk prevention in sectors other than mining, questions concerning improvement of occupational safety and health, about information on consultation with the competent occupational health and safety bodies within enterprises, in particular enterprises where there are no workers' representatives and truly tripartite system for consulting social partners. Moreover, the Committee stated that consultation was required not only for tripartite cooperation between authorities, employers and workers to seek ways of improving their working conditions and working environment, but also for the co-ordination of their activities and co-operation on key safety and prevention issues.[218] Necessity to create specialised bodies made up of representatives of the government and of employers' and workers' organisations, which are consulted by the public authorities, was recalled as obligatory criteria for commitments obligation in the light of the right to consultation.[219]

Ultimately, the Committee re-emphasised that not providing the requested information in the next report would lead to the situation when there will be nothing to establish that the situation in Ukraine is in conformity with Article 3§1 of the Charter in this respect.[220]

Paragraph 2

The coverage of occupational hazards by specific occupational health and safety legislation and regulations was repeatedly declared insufficient. The national report 2016 referred to the obligations of Ukraine under the Association Agreement the European Union (EU) and Ukraine (Annex XL to Chapter 21) in the sphere of occupational safety and health.[221] However, the Committee stated that the fact that national provisions were in conformity with the EU Directive did not automatically render them in conformity with the Charter. The Committee also required as general obligations under Article 3 §2 to cover in accordance with international standards most of the risks listed in the general introduction to Conclusions XIV-2.

On the question of the prevention and protection levels in relation to the establishment, alteration and upkeep of workplaces, the Committee reiterated that the lack of information asked could lead to negative conclusions in the next report.[222]

The last national report presented in 2016 didn't cover the issue of the implementation the National Programme regarding the protection of workers against asbestos and information on application of the rules and regulations in practice in this sphere, include general hygiene requirements for enterprises, institutions and organisations using chrysotile and chrysotile-containing materials and products, sanitary and hygiene requirements for packaging, storage, transportation and handling operations etc. Nothing was mentioned about prevention and protection workers against ionising radiation.

The importance of inventory of all contaminated buildings and materials in the light of the right to health of the population which examined under Article 11 was underlined.

According to atypical employment, the Committee asked for next report to provide with the

218. Ibid., p.1204.
219. Ibid.
220. Ibid.
221. Annex XL to the Chapter 21, Association Agreement between the European Union and Ukraine. p. 43-47. URL: https://www.kmu.gov.ua/storage/app/media/uploaded-files/ANNEXES%20OF%20TITLE%20V.pdf
222. ECSR, Conclusions 2017. Ukraine. 1206.

information on training system on labour protection for other categories of workers then were described in the State report 2016, including the information on training on occupational health and safety, and medical surveillance is made available to self-employed.[223]

Within the general obligation under §2 of Article 3, importance of using tripartite system for co-ordination of their activities and co-operation in the drafting of laws and regulations at all levels and in all sectors, except other abovementioned spheres was highlighted by the Committee.

In general, the Committee repeated the previous conclusions 2013 that the situation in Ukraine did not conform with the requirements of Article 3 §2 on the ground that the coverage of occupational hazards by specific occupational health and safety legislation and regulations is insufficient.[224]

Within the examination the situations under 3 §1 and 3 §2, it could be stated that a lot of requested information has not been provided in national report that led to repeated questions of the Committee, which would be unable to establish that the situation in Ukraine is in conformity with corresponded Articles. Taking into account broad range of obligation of Ukraine under the Association Agreement on the safety and health at work, Ukraine often stated in national reports, that national legislation had been brought into accordance with the provisions of EU Directives. However, the Committee stressed that this fact non-automatically stipulated the conformity with the Charter.

Paragraph 3

Concerning the issue of accidents at work and occupational diseases, the report of Ukraine satisfactory explained difference in statistic between the number of fatal accidents indicated in the report and published by ILOSTAT, the procedure for investigation and records of accidents at work. Moreover, the information on steps taken to reduce the high level of fatal accidents and diseases was not performed as well as the statistics on the number of occupational diseases. The Committee asked the next report to provide the whole package of information on occupational diseases, including legal definition the mechanism for recognising, list of occupational diseases, the incidence rate and the number of recognised and reported cases, the preventive measures taken etc.[225]

Despite the creation in 2014 the State Labour Service by reorganising and merging former authorities in the labour Inspectorate sphere, the situation in Ukraine remained unsatisfactory due to not sufficiently developed labour inspection structures in practice, small amount and the number of fines imposed to have a dissuasive effect. The Committee also recalled that the largest possible number of workers should be covered by inspection visits to satisfy the requirements under Article 3 §3.[226]

Generally, all Committee's conclusions made for Ukraine under Article 3.3. have been negative.

Paragraph 4

On the issue relating to occupational health services, Ukraine did not present the information repeatedly asked by the Committee. According to the report 2016, the Committee pointed out omission of strategy to institute access to occupational health services for all workers in all sectors of the economy and significant amendments in the national legislation during the reference period. Hence, the Committee stated in its Conclusion 2017 that the situation in Ukraine was found not in conformity with §4 of Article 3.

223. Ibid., p.1208.
224. Ibid.
225. Ibid., p.1210.
226. Ibid., p.1211.

Group 3: Labour rights

The right to a fair remuneration (Article 4)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers the right to a fair remuneration sufficient for a decent standard of living for themselves and their families (Part I, point 4).

The right conferred in Article 4 ESC (part II) is overlapping with Article 20 ESC in terms of the right to equal pay on the basis of sex and with Article E ESC in terms of protection against discrimination.

Pursuant to Art. 4 ESC:

Article 4 – The right to a fair remuneration

With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

1 to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living;

2 to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;

3 to recognise the right of men and women workers to equal pay for work of equal value;

4 to recognise the right of all workers to a reasonable period of notice for termination of employment;

5 to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards.

The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.

Pursuant to the **Appendix**[227]:

Article 4, paragraph 4

This provision shall be so understood as not to prohibit immediate dismissal for any serious offence.

227. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.

Article 4, paragraph 5

It is understood that a Party may give the undertaking required in this paragraph if the great majority of workers are not permitted to suffer deductions from wages either by law or through collective agreements or arbitration awards, the exceptions being those persons not so covered.

b) Decisions and conclusions of the European Committee of Social Rights

> The right of workers to a fair remuneration is at the heart of the Charter's guarantee of conditions of work that are reasonable and ensure a fair reward for labour performed. Inadequate pay creates poverty traps, which may affect not just individuals and their families, but whole communities. Inadequate pay is also an obstacle to full participation in society and thus a marker for social exclusion. More broadly, pay which lags significantly behind average earnings in the labour market are incompatible with social justice[228].

The right has to be practical and effective, and not merely theoretical or illusory[229].

Decent remuneration (Art. 4§1)

Article 4§1 guarantees the right to a fair remuneration such as to ensure a decent standard of living. It applies to all workers, including to civil servants and contractual staff in the state, regional and local public sectors[230], to branches or jobs not covered by collective agreement, to atypical jobs (assisted employment)[231], and to special regimes or statuses (minimum wage for migrant workers)[232].

Article 4 obliges Contracting States to take appropriate measures to ensure a decent standard of living for workers and their families and requires the states „to make a continuous effort to achieve the objectives set by this provision of the Charter."[233]

> [A] 'decent standard of living' which is at heart of this provision of the Charter, goes beyond merely material basic necessities such as food, clothing and housing, and includes resources necessary to participate in cultural, educational and social activities. It follows that guaranteeing a decent standard of living means ensuring a minimum wage (and supplemented by any additional benefits where applicable) the level of which should be sufficient to meet these needs[234].

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228. ECSR, Decision on the merits: University Women of Europe (UWE) v. Belgium, Collective Complaint No. 124/2016, p. 105.
229. International Commission of Jurists (ICJ) against Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32.
230. Conclusions XX-3 (2014), Greece, Digest 2018, p. 85.
231. Conclusions 2014, France, Digest 2018, p. 85.
232. Conclusions 2014, Andorra, Digest 2018, p. 85.
233. Conclusions I, p. 26.
234. Conclusions XIX-3 - Statement of interpretation - Article 4-1.

"Remuneration" relates to the compensation – either monetary or in kind – paid by an employer to a worker for time worked or work done. **Remuneration** for the purposes of the assessment under Article 4§1 must be understood as

> the net value, ie. after deduction of social security contributions and taxes, of the total wages, in principle both monetary and in kind, paid regularly by an employer to a worker for work carried out. Account shall, where applicable, be taken of bonuses and gratuities not paid regularly with each pay packet. (…) Social transfers or welfare benefits which are not directly linked to the wage [shall] not be taken into consideration as Article 4 para. 1 concerns remuneration for work as such[235].

Pursuant to the recurring formula used by the Committee, in order for the situation to be in conformity with the Charter, **the lowest wage** should not fall too far behind the national average wage in a country. To be considered fair within the meaning of Article 4§1, the minimum wage paid in the labour market must not fall below 60% of the net average national wage. The minimum interprofessional wage falling below 60 % is considered incompatible with Article 4§1[236]. The assessment is based on net amounts, i.e. after deduction of taxes and social security contributions. Where net figures are difficult to establish, it is for the State Party concerned to provide estimates of this amount[237]. However, a wage does not meet the requirements of the Charter, irrespective of the percentage, if it does not ensure a decent living standard in real terms for a worker, ie. it must be clearly above the poverty line for a given country.[238]

If the lowest wage does not satisfy the 60% threshold, but does not fall very far below (in practice between 50% and 60%), the Government may provide detailed evidence that the lowest wage is sufficient to give the worker a decent living standard even if it is below the established threshold. In particular, consideration must be given to the costs of having health care, education, transport, etc.[239] In extreme cases, for instance where the lowest wage is less than half the average wage the situation is held to be in breach of Charter independently of such evidence.[240]

It should be noted though, that providing for a lower minimum wage to younger workers who are under 25 years old is not contrary to the Charter if, and only if, it furthers a legitimate aim of employment policy and is proportionate to achieve that aim.[241] The Committee has considered the reduction of the minimum wage below the poverty level in the situation where the wage was applied to all workers under the age of 25 to be disproportionate and not in compliance with the Charter.[242]

Overtime (Art. 4§2)

Article 4§2 is inextricably linked to Article 2§1, which guarantees the right to reasonable daily and weekly working hours. Overtime is work performed in addition to normal working hours.[243]

235. Conclusions XIV-2 - Statement of interpretation - Article 4-1.
236. Conclusions 2018 - Andorra - Article 4-1.
237. Conclusions XVI-2 (2003), Denmark, Digest 2018, p. 85.
238. Conclusions XIV-2 - Statement of interpretation - Article 4-1.
239. Digest 2018, p. 85.
240. Conclusions XIV-2 (1998), Statement of Interpretation on Article 4§1.
241. General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011, Decision on the merits of 23 May 2012, §60.
242. General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011, Decision on the merits of 23 May 2012, §§68 and 70.
243. Conclusions I (1969), Statement of Interpretation on Article 4§2; Digest 2018, p. 86.

The principle of this provision is that work performed outside normal working hours requires an increased effort on the part of the worker, who therefore should be **paid at a rate higher than the normal wage**.[244] This increase must apply in all cases[245], including flat-rate payments.[246]

Granting leave to compensate for overtime (instead of granting an increased remuneration) is in conformity with Article 4§2, on condition that this leave is longer than the overtime worked. It is not sufficient, therefore, to offer employees leave of equal length to the number of overtime hours worked.[247] Where remuneration for overtime is entirely given in the form of time off, Article 4§2 requires that this time be longer than the additional hours worked[248].

Mixed systems for compensating overtime, for example where an employee is paid the normal rate for the overtime worked but also receives time in lieu, are not contrary to Article 4§2.[249]

In a number of countries, working time is calculated on the basis of average weekly hours over a period of several months. Over such periods, weekly working hours may vary between specified maximum and minimum figures without any of them counting as overtime, and thus qualifying for a higher rate of pay. Arrangements of this kind do not, as such, constitute a violation of Article 4§2, provided that the conditions laid down in Article 2§1 are respected.[250] Whether flexible working time arrangements ensure effective compliance with Article 4§2 shall be assessed on a case-by-case basis[251].

The right of workers to an increased rate of remuneration for overtime work can have **exceptions** only in certain specific cases. These exceptions apply to "senior officials" of state employees and management executives[252]. However, the Committee has ruled that certain limits must apply, particularly on the number of hours of overtime not paid at a higher rate[253].

„Senior officials" include, for example, police commissioners[254] or administrative court judges[255]. Exceptions to a higher rate of overtime pay for all police members irrespective of their rank and their responsabilities[256], or for all state employees or public officials, irrespective of their level of responsibility does not conform with Article 4§2[257].

As to the group of managers, exceptions may be applied to all senior managers. However, certain limits must apply, particularly on the number of hours of overtime not paid at a higher rate[258].

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244. Conclusions XIV-2, Statement of Interpretation of Article 4§2; Conclusions I (1969), Statement of Interpretation on Article 4§2.
245. European Council of Police Trade Unions (CESP) v. France, Complaint No. 68/2011, Decision on the merits of 5 November 2012, §76, 77 and 86 to 88.
246. European Council of Police Trade Unions (CESP) v. France, complaint No. 57/2009, Decision on the merits of 1st December 2010, § 35.
247. Conclusions XIV-2 (1998), Belgium; Conclusions XIV-2, Statement of Interpretation of Article 4§2.
248. Conclusions XIV-2, Belgium, p. 134.
249. European Council of Police Trade Unions (CESP) v. Portugal Complaint No. 60/2010, decision on the merits of 17 October 2011, § 21; Conclusions XX-3 (2014), Slovenia.
250. Conclusions XIV-2 (1998), Statement of Interpretation on Article 4§2; Conclusions XX-3 (2014), Portugal.
251. Conclusions XIV-2 - Statement of interpretation - Article 2-1, 4-2.
252. Conclusions IX-2 (1986), Ireland; 414 Conclusions X-2 (1990), Ireland.
253. Confédération Française de l'Encadrement CFE-CGC v. France, Complaint No. 9/2000, Decision on the merits of 16 November 2001, §45.
254. Conseil Européen des Syndicats de Police (CESP) v. France, Complaint No 57/2009, Decision on the merits of 1 December 2010, §42-44.
255. Union syndicale des magistrats administratifs (USMA) v. France, Complaint No. 84/2012, Decision on the merits of 2 December 2013, §§ 67 and 69.
256. Conseil Européen des Syndicats de Police (CESP) v. France, Complaint No 38/2006, Decision on the merits of 3 December 2007, §22.
257. Conclusions XV-2 (2001), Poland.
258. Confédération Française de l'Encadrement CFE-CGC v. France, Complaint No. 9/2000, Decision on the merits of 16 November 2001, §45.

Restrictions to an increased remuneration for additional hours of work can exist only if they are provided by law, pursue a legitimate aim and are proportionate to that aim[259].

Equal pay for equal work (Art. 4§3)

Article 4§3 guarantees the right to equal pay without discrimination on grounds of sex.[260] This is one aspect of the right to equal opportunities in matters of employment guaranteed by Article 20. As a result, the case-law under Article 20 applies mutatis mutandis to Article 4§3. Only aspects specifically linked to equal pay are dealt with hereinafter[261].

> The equal pay principle applies both to equal work and work of equal or comparable value. The concept of remuneration must cover all elements of pay, that is basic pay and all other benefits paid directly or indirectly in cash or kind by the employer to the worker by reason of the latter's employment[262].

The equal pay principle must also apply between full-time and part-time employees[263].

> The legislation of a state which has accepted Article 4§3 must prescribe that:
>
> - men and women workers must receive equal pay not only for equal work but also for work of equal value;
>
> - any clauses of collective agreements or individual contracts which contravene this principle must be declared null and void by law;
>
> - the protection of this right must be ensured through adequate remedies;
>
> - workers must enjoy effective protection from measures of retaliation arising from their claim for equal pay (notably protection against dismissal)[264].

The right of women and men to "equal pay for work of equal value" must be **expressly provided for in legislation**[265].

> States Parties are obliged to enact legislation explicitly imposing equal pay. It is not sufficient to merely state the principle in the Constitution. States must ensure that there is no direct or

259. Confédération Générale du Travail (CGT) v. France, complaint No. 55/2009, decision on the merits of 23 June 2010, §§ 87-89; Digest 2018, p. 87.
260. Conclusions XIII-5 (1997), Statement of Interpretation on Article 1 of Additional Protocol.
261. Digest 2018, p. 88.
262. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 125; Conclusions I (1969), Statement of Interpretation on Article 4§3.
263. Conclusions XVI-2 (2003), Portugal.
264. Conclusions VIII - Statement of interpretation - Article 4-3.
265. Conclusions XV-2 (2001), Slovak Republic; Conclusions XX-3 (2014), Georgia; Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 125.

indirect discrimination between men and women with regard to remuneration[266].

The principle of equal pay precludes unequal pay irrespective of the mechanism that produces such inequality. The source of discriminatory pay may be the law, collective agreements, individual employment contracts, internal acts of an employer[267].

Any legislation, regulation or other administrative measure that fails to comply with the principle of equal pay must be repealed or revoked. The non-application of discriminatory legislation is not sufficient for a situation to be considered in conformity with the Charter. It must be possible to set aside, withdraw, repeal or amend any provision in collective agreements, individual employment contracts or internal company regulations that is incompatible with the principle of equal pay[268].

Domestic law must provide for **appropriate and effective remedies** in the event of alleged pay discrimination. Workers who claim that they have suffered discrimination must be able to take their case to court. Effective access to courts must be guaranteed for victims of pay discrimination. Therefore, proceedings should be affordable and timely.[269]

Anyone who suffers pay discrimination on grounds of sex must be entitled to **adequate compensation**, i.e. compensation that is sufficient to make good the damage suffered by the victim and to act as a deterrent. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and from being sufficiently dissuasive is contrary to the Charter[270].

The burden of proof must be shifted. The shift in the burden of proof consists in ensuring that where a person believes she or he has suffered discrimination on grounds of sex and establishes facts which make it reasonable to suppose that discrimination has occurred, the onus is on the defendant to prove that there has been no infringement of the principle of non-discrimination[271].

Retaliatory dismissal in cases of pay discrimination must be forbidden. Where a worker is dismissed on grounds of having made a claim for equal pay, the worker should be able to file a complaint

266. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 126.
267. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 127.
268. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 128; Conclusions XIII-5, Statement of Interpretation on Article 1 of the1988 Additional Protocol.
269. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 131; Conclusions I (1969), Statement of Interpretation on Article 4§3.
270. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 132; Conclusions XIX-3 - Germany - Article 4-3.
271. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 133; Conclusions XIII-5, Statement of interpretation on Article 1 of the 1988 Additional Protocol.

for dismissal without valid reason. In this case, the employer must reinstate her/him in the same or a similar post[272]. If reinstatement is not possible, the employer must pay compensation, which must be sufficient to compensate the worker (i.e. cover pecuniary and non-pecuniary damage) and to deter the employer[273].

The competence to fix the amount of such compensation shall be attributed to courts and not to the legislator[274]. Courts must be free to decide upon the amount aimed at compensating the damage caused by the termination of the working relationship; any ceiling on the compensation payable to employees dismissed as a reprisal must be seen as violating Article 4§3[275].

The European Committee of Social Rights perceives **pay transparency** as instrumental in the effective application of the principle of equal pay for work of equal value. Transparency contributes to identifying gender bias and discrimination and it facilitates the taking of corrective action by workers and employers and their organisations as well as by the relevant authorities[276].

> States should take measures in accordance with national conditions and traditions with a view to ensuring adequate pay transparency in practice, including measures such as those highlighted in the EU Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, notably an obligation for employers to regularly report on wages and produce disaggregated data by gender. The Committee regards such measures as indicators of compliance with the Charter in this respect[277].

In order to establish whether work performed is **equal or of equal value**, factors such as the nature of tasks, skills, educational and training requirements must be taken into account. The Committee further observes that the notion of equal work or work of equal value has a qualitative dimension and may not always be satisfactorily defined, thus undermining legal certainty. States should therefore seek to clarify this notion in domestic law as necessary, either through legislation or case law. In this respect, job classification and evaluation systems should be promoted and where they are used, they must rely on criteria that are gender-neutral and do not result in indirect discrimination. Moreover, such systems must consider the features of the posts in question rather than the personal characteristics of the workers[278].

The possibility of making **job comparisons** is essential to ensuring equal pay. Lack of information on comparable jobs and pay levels could render it extremely difficult for a potential victim of pay discrimination to bring a case to court. Workers should be entitled to request and receive information on pay levels broken down by gender, including on complementary and/or variable components of the pay package. However, general statistical data on pay levels may not be sufficient to prove discrimination. Therefore, in the context of judicial proceedings it should be

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272. Conclusions XIX-3 (2010), Iceland.
273. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 134; Conclusions XIII-2 (1994), Malta.
274. Conclusions XIX-3 (2010), Germany.
275. Conclusions XIX-3 - Germany - Article 4-3.
276. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 141.
277. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 142.
278. Conclusions XV-2, Article 4§3, Poland.

possible to request and obtain information on the pay of a fellow worker while duly respecting applicable rules on personal data protection and commercial and industrial secrecy[279].

Moreover, national law should not unduly restrict the scope of job comparisons, e.g. by limiting them strictly to the same company. Domestic law must make provision for comparisons of jobs and pay to extend outside the company concerned where this is necessary for an appropriate comparison. The Committee views this as an important means of ensuring that the equal pay principle is effective under certain circumstances, particularly in larger companies or specific sectors where the workforce is predominantly, or even exclusively, of one sex[280]. The Committee considers notably that job comparisons should be possible across companies, where these form part of a group of companies owned by the same person or controlled by a holding or a conglomerate[281] or for employees of several undertakings or establishments covered by the same collective works agreement or regulations[282].

Reasonable notice of termination (Art. 4§4)

Paragraph 4 forms part of Article on remuneration, as the main purpose of giving a reasonable notice is to allow the person concerned a certain time to look for other work before his or her current employment ends, i.e. while he or she is still receiving wages.[283]

The **concept of "reasonable" notice** has not been defined in abstracto nor ruled on the function of the period of notice or the compensation in lieu thereof. Therefore, the courts must assesses the situations on a case by case basis.[284]

The major criterion for the assessment of reasonableness is length of service.[285] The Committee has concluded, for example, that notice period of one day per month worked (up to 90 days) was in conformity with Article 4§4 of the Charter. On the other hand, the following periods of notice and/or compensation in lieu thereof were not in conformity to the Charter[286]:

- five days' notice after less than three months of service;[287]
- one week's notice after less than six months of service;[288]
- two weeks' notice after more than six months of service;[289]
- less than one month's notice after one year of service;[290]
- eight weeks' notice after at least ten years of service;[291]
- twelve weeks' notice for workers dismissed for long-term working incapacity who have five or more years of service.[292]

Receipt of wages in lieu of notice is admitted, provided that the sum paid is equivalent to that which the worker would have earned during the corresponding period of notice.[293] Periods of notice and/or compensation in lieu thereof may, however, not be left at the sole disposal of the parties to

279. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 144.
280. Statement of interpretation on Article 20, Conclusions 2012.
281. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 145.
282. Conclusions XX-3 (2014), Romania.
283. Digest 2018, p. 90.
284. Conclusions XIII-3 (1995), Portugal.
285. Conclusions 2007, Armenia.
286. Digest 2018, p. 90.
287. Conclusions 2007, Albania.
288. Conclusions XIII-3 (1995), Portugal.
289. Conclusions XVI-2 (2003), Poland.
290. Conclusions XIV-2 (1998), Spain.
291. Conclusions 2010, Turkey.
292. Conclusions 2010, Estonie.
293. Conclusions 2010, Turkey.

the employment contract.[294] The Committee found the severance pay, equal to 25 days of salary per year of service (up to 365 days) insufficient for workers with less than ten years of service.[295]

Article 4§4 does not apply solely to dismissals, but to all cases of termination of employment, such as termination due to bankruptcy, invalidity or death of the employer who is a natural person.[296]

> [U]nder Article 4§4 the right to reasonable notice of termination of employment applies to **all categories of workers** independently of their status, including those in non–standard employment, such as fixed-term, temporary, part-time, intermittent, seasonal or complementary employment. It applies to civil servants and contractual staff in the civil service, to manual workers and in all sectors of activity. It also applies during the probationary period[297] and upon early termination of fixed-term contracts. Domestic law must be broad enough to ensure that no workers are left unprotected.[298]

> When a decision to terminate employment on grounds other than disciplinary is subject to certain procedures being followed, the period of notice shall start only after the decision has been taken. The period of notice for part-time workers is calculated on the basis of length of service and not of the effective weekly working time. That of workers with consecutive fixed-term contracts is calculated on the basis of length of service accrued on all consecutive contracts. Any reduction of the legal period of notice by collective agreement is allowed only insofar as a reasonable period of notice is maintained. The period of notice applied in the probationary period may be shorter provided that it remains reasonable in relation to the authorised maximum length of the probationary period.[299]

The absence of provision of a notice period or severance pay during the probationary period of one year has been declared a violation of Article 4§4 of the Charter[300].

According to the appendix to Article 4§4, the only **exception to the principle of reasonable notice** provided for in the Revised Charter concerns immediate dismissal for **serious offences,** however, pursuant to the recurring formula used by the Committee the accumulation of several less serious breaches with written warnings from the employer may amount to a serious offence.[301]

By way of example, the Committee considered that the following facts amounted to serious offences[302]:

- violation of equal opportunities policy or sexual harassment[303];

294. Conclusions 2014, Russian Federation; Digest 2018, p. 90.
295. Conclusions 2018 - Andorra - Article 4-4; Conclusions 2014 - Andorra - Article 4-4.
296. Conclusions XIV-2 (1998), Spain.
297. Conclusions 2018 - Andorra - Article 4-4.
298. Decision on the merits: Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, p. 199.
299. Decision on the merits: Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, p. 200; Conclusions 2014, Estonia.
300. Decision on the merits: Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, p. 201.
301. Conclusions 2010, Albania.
302. Digest 2018, p. 91.
303. Conclusions 2014, Lithuania.

- refusal to provide information as required by law, regulation or work regulations[304];
- disclosure of state, professional, commercial or technological secrets[305];
- working under the influence of alcohol, narcotic or toxic substances[306];
- abandonment of post[307];
- refusal to undergo mandatory medical checks[308];
- immoral acts making it impossible for workers to be kept in teaching positions[309];
- unjustified absences of more than five consecutive days or more than ten days per year[310];
- abnormal decrease in productivity[311].

On the other hand, immediate dismissal on the following grounds has been rejected[312]:

- a failure by the worker to perform[313];
- a loss of trust in the worker[314];
- a call up of the worker for military service[315];
- death of the employer who is a natural person or winding-up of the company[316];
- withdrawal of administrative licenses required to perform the job[317];
- request by bodies or officials authorised by the law[318];
- duly certified unfitness for work[319];
- economic, technological or organisational circumstances requiring changes in the workforce[320];
- insufficient qualification for the post[321];

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304. Conclusions 2014, Lithuania.
305. Conclusions 2014, Lithuania.
306. Conclusions 2014, Lithuania.
307. Conclusions 2014, Lithuania.
308. Conclusions 2014, Lithuania.
309. Conclusions 2014, Russian Federation.
310. Conclusions 2014, Portugal.
311. Conclusions 2014, Portugal.
312. Digest 2018, p. 92.
313. Conclusions 2010, Armenia.
314. Conclusions 2010, Armenia.
315. Conclusions 2010, Armenia.
316. Conclusions 2014, Georgia.
317. Conclusions 2014, Lithuania.
318. Conclusions 2014, Lithuania.
319. Conclusions 2014, Lithuania.
320. Conclusions 2014, Malta.
321. Conclusions 2014, Russian Federation.

- transfer of the employment contract to a successor employer[322];
- force majeure[323];
- arrest and custody[324].

Wage deductions (Art. 4§5)

Article 4§5 guarantees worker's right to receive his wages in full and establishes the principle that deductions from wages can be authorised only "under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards". Other deductions must be considered as contrary to the Charter.[325]

Pursuant to Article 4§5 of the Appendix, it is understood that a Party may give the undertaking required in this paragraph if the great majority of workers are not permitted to suffer deductions from wages either by law or through collective agreements or arbitration awards, the exceptions being those persons not so covered.

The examination of the contents of biennial reports relating to Article 4, paragraph 5, prompted the Committee to clarify its interpretation of the scope of the appendix to this provision. In fact, if on the one hand this provision obliges contracting States to permit deductions from wages in respect of all workers only "under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards" thus implying that any other deductions must be considered as contrary to the Charter; on the other hand, the appendix states that "if the great majority of workers are not permitted to suffer deduction from wages..." the undertaking laid down in the Charter is satisfied.

> As the "travaux préparatoires" show that the text of the appendix was inserted in order to permit states to satisfy the Charter even if only the great majority of workers were protected as required by Article 4, paragraph 5, the deductions not permitted by the Appendix are those which are not authorised either by law or regulations nor fixed by collective agreements or arbitration awards and which are consequently not in conformity with Article 4, paragraph 5, of the Charter. It follows that a state must be regarded as acting in conformity with this provision when deductions from wages are permitted for the large majority of workers only when they are expressly authorised by laws, regulations, collective agreements or arbitration awards[326].

The Committee pointed out that a State cannot be regarded as meeting its obligation under the terms of Paragraph 5 unless these conditions and limitations are respected[327]. Article 4§5 applies also to civil servants and contractual staff in the civil service.[328]

322. Conclusions 2014, Slovenia.
323. Conclusions 2014, Turkey.
324. Conclusions 2014, Turkey.
325. Conclusions V - Statement of interpretation - Article 4-5.
326. Conclusions V - Statement of interpretation - Article 4-5.
327. Conclusions I - Statement of interpretation - Article 4-5.
328. Conclusions 2014, Portugal.

Wage deductions must be subject to reasonable limits and should not per se result in depriving workers and their dependents of their means of subsistence.[329] Article 4§4 covers all forms of deduction, including trade union dues, disciplinary fines, maintenance payments, repayment or wage advances, tax debts, compensation for benefits in kind, wage assignments or transfers, etc.[330]

Workers should not be allowed to waive their right to limitation of deductions from their wage and the way in which such deductions are determined should not be left at the disposal of the sole parties to the employment contract.[331]

By way of example, the Committee concluded that the situation in the country is not in conformity with Article 4§5 of the Charter on the grounds that:

- deductions from wages may deprive employees with the lowest pay and their dependants of their means of subsistence;[332]
- withdrawal of wages in case of flawed products, for which the employee is responsible, deprives employees and their dependants of their means of subsistence;[333]
- guarantees in place to prevent workers from waiving their right to limitation of deduction from wages are insufficient;[334]
- there are no guarantees in place to prevent workers from waiving their right to limitation of deduction from wages;[335]
- deductions from wages may deprive civil servants, state employees, blue collar workers, seafarers and their dependents of their means of subsistence.[336]

c) Implementation in Ukraine

Article 4 of the Charter reflects the different approaches to the Charter's standards by Ukraine. Paragraph 1 of Article 4 is not ratified by Ukraine in spite of the Constitutional guarantees the right to remuneration no less than the minimum wage as determined by law (Article 43 of Constitution of Ukraine). In 2016 within the procedure on non-accepted provisions the Committee found that the situation in Ukraine on 4 §1 was not fully in compliance with the Charter.

According to the conclusions given in 2018, the commitments under one paragraph was found in conformity with the Charter (4 §2) then two other situations breached Article 4 (§ 3 and § 4).

During the examination of the commitments under provision about the non-discrimination between women and men with respect to remuneration, the Committee stated that national legislation according to which the claimant has to prove that the discrimination took place has not been changed since conclusions under Article 20 in 2016. Therefore, the situation in Ukraine was considered not on conformity with §3 of Article 4 on the ground that legislation does not provide for a shift in the burden of proof in gender discrimination cases.[337] The Committee also asked a range of questions that should be answered by next report, as following:

329. Conclusions XI-1 (1991), Greece.
330. Conclusions 2014, Estonia.
331. Conclusions 2005, Norway.
332. Conclusions 2018 - Armenia - Article 4-5; Conclusions 2018 - Armenia - Article 4-5; Conclusions 2018 - Ukraine - Article 4-5.
333. Conclusions 2018 - Armenia - Article 4-5.
334. Conclusions 2018 - Armenia - Article 4-5; Conclusions 2018 - Ukraine - Article 4-5.
335. Conclusions 2018 - Cyprus - Article 4-5.
336. Conclusions 2018 - Cyprus - Article 4-5.
337. Ibid., p.13.

Paragraph 2

The Committee stated that national legislation met the requirements of §2 of Article 4, and therefore, situation in Ukraine was in conformity with it. Nonetheless, the additional information was requested on the exceptional rule of work outside regular working hours to perform exigent or unforeseen tasks for exclusively limited group of workers.[338]

Paragraph 3

Within the examination of insurance of equal pay for women and men with the same qualification and working conditions in Ukraine, the Committee asked whether the prohibition was guaranteed for both direct and indirect discrimination.[339]

The Committee recalled that under Ukrainian legislation the claimant shall provide reliable facts which confirm that discrimination took place in discrimination cases. The appropriate provisions of national legislation have been analysed and found non-compliant with the requirements of Article 20 of the Charter. Taking into account that the legislation has not been changed since that time, in the Conclusions 2018 the Committee stipulated that obligations was not in conformity with Article 4 §3.[340]

The information on the level and limits on compensation for pecuniary and non-pecuniary damage granted by the court in practice was required as well as the information on pay comparison within a holding company, definition of "equal work or work of equal value", "the same qualification and working conditions," measures were taken to reduce the equal pay gap etc.

Concerning the Association Agreement between Ukraine and the EU, Ukraine took the obligation to implement the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation as it was prescribed by the Directive 2006/54/EC. In this regard, the Committee asked the information on legislative amendments made in this respect.[341]

Paragraphs 4

The Committee repeatedly found in its Conclusions 2018, 2014 that the situation in Ukraine was not in conformity with Article 4 §4 of the Charter due to unreasonable notice periods in different circumstances[342], such as:

- dismissal as a result of changes in the organisation of production or labour or a reduction in staff numbers;
- dismissal for unfitness for medical reasons, lack of qualifications or the reinstatement of the previous post holder,
- for workers with more than seven years of service;
- termination of employment or dismissal on all other grounds, beyond five years of service.[343]

338. ECSR, Conclusions 2018. Ukraine. p.12.
339. Ibid., p.13.
340. Ibid., p. 13.
341. Ibid., p.14.
342. ECSR, Conclusions 2018. Ukraine. p.15, Conclusions 2014. Ukraine. – Article 4-4.
343. ECSR, Conclusions 2018. Ukraine. p.15.

Paragraph 5

In the Conclusions 2010, 2014 and 2018, the Committee reiterated its assumptions on non-conformity the situation in Ukraine with requirements under paragraph 5 of Article 4 on ground that following all authorised deductions, the wages of workers with the lowest pay were not sufficient to enable them to provide for themselves or their dependents.[344]

Moreover, within the Conclusions 2018, it was found that guarantees in place to prevent workers from waiving their right to limited deductions of wages were insufficient.[345]

The provisions enshrined in Article 4 have been repeatedly considered by national courts. The national courts considered cases on discrimination in the sphere of employment, including remuneration. For example, in the decision of the Third Administrative Court of Appeal of 17 January 2019, the applicant alleged discrimination against her on the grounds of age, education, etc. in working and dismissal from the civil service on the basis of the Regulation "On the formation of the personnel reserve for civil servants of the National Bank of Ukraine". The Court analysed national legislation on the prohibition of discrimination, the Constitution of Ukraine, the European convention on human rights and case-law of the European Court of Human Rights, applied to Universal declaration on human rights, International covenant on economic, social and cultural rights.[346] On other hand, the unified register of court decisions had no matches to the request for equal work for men and women.

National courts considered also the issue of violation of the notice period for dismissal of employees. In judgment of the Supreme Court adopted on 11 September 2019, the notice period for dismissal was wrong calculated and moreover, it was stated that among other requirements, the attention had to be paid to the obligation to propose all vacancies existed on the day of dismissal.[347]

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344. ECSR, Conclusions2018. Ukraine.p.16, Conclusions 2014 – Article 4-5, Conclusions 2010. Ukraine Article 4-5.
345. ECSR, Conclusions 2018. Ukraine. p.16.
346. Third Administrative Court of Appeal, jud. 17 January 2019
347. Supreme Court, judgment of Civil Cassation Court, 11 September 2019, case 280/89/18

Group 3: Labour rights

The right to organise (Article 5)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers and employers the right to freedom of association in national or international organisations for the protection of their economic and social interests. (Part I, point 5)

Pursuant to Art. 5 ESC:

Article 5 – The right to organise

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

b) Decisions and conclusions of the European Committee of Social Rights

Freedom of associations (Article 5)

Article 5 sets out the principle that employers and workers have the right to form national or international associations, for the protection of their economic and social interest. The Committee noted that two obligations are embodied in this provision, having a negative and positive aspect respectively. The implementation of the first obligation requires the absence, in the municipal law of each Contracting State, of any legislation or regulation or any administrative practice such as to impair the freedom of employers or workers to form or join their respective organisations. By virtue of the second obligation, the Contracting State is obliged to take adequate legislative or other measures to guarantee the exercise of the right to organise and, in particular, to protect workers' organisations from any interference on the part of employers.[348]

The main object of worker's and employers' right to form organisations is to engage in collective bargaining for the defence of their interests, and this can not be qualified by any requirement to deposit money in order to obtain a negotiating licence. At most, the Committee might concede that the Charter has been respected if everyone wishing to organise for purposes that are not prejudicial to "l'ordre public" are automatically entitled to such a license, or if payment demanded covers only minimal administrative costs"[349].

348. Conclusions I - Statement of interpretation - Article 5.
349. Conclusions IV - Statement of interpretation - Article 5.

Requirements as to minimum numbers of members comply with Article 5 if the number is reasonable and presents no obstacle to the founding of organisations.[350] If fees are charged for the registration or establishment of an organisation, they must be reasonable and designed only to cover strictly necessary administrative costs.[351]

Trade unions and employers' organisations must be free to form federations and join similar national and international organisations[352] and so States Parties may not limit the degree to which they are authorised to organise. There must also be provision in domestic law for a right of appeal to the courts to ensure that all these rights are upheld.[353]

Article 5 of the Charter is intended to guarantee the full enjoyment of the freedom to organise to, in principle, **every category of employers and workers, including the entire public sector**.[354] The right to organise under Article 5 covers not only **workers in activity** but also persons who exercise rights resulting from work.[355] **Unemployed and retired workers** may join and remain in trade unions. However, States are not required to allow them to form trade unions, as long as they are entitled to form organisations which can take part in consultation processes that may impact on their rights and interests[356].

Article 5 allows States

> ” to impose restrictions upon the right to organise of members of **the armed forces** and grants them a wide margin of appreciation in this regard, subject to the terms set out in Article G of the Charter. However, these restrictions may not go as far as to suppress entirely the right to organise, such as the blanket prohibition of professional associations of a trade union nature and of the affiliation of such associations to national federations/confederations.[357]

With regard to the police,

> ” although Article 5 authorises, in the case of members of the **police force**, restrictions on freedom of organisation, the complete suppression of that freedom is not compatible with the article. The Charter is not satisfied by statutes or regulations under which such personnel are forbidden to form their organisations or to join organisations of their own choosing, but compelled to become members of an organisation established by or under the statute or regulation itself. The Committee also thinks it right to point out that a distinction exists between the right to establish a union and to join it and the right of negotiation and collective action (provided for in Article 6). The one does not imply the other. Hence,

350. Conclusions XIII-5 (1997), Portugal.
351. Conclusions XV-1 (2000), United Kingdom; Conclusions XVI-1 (2002), United Kingdom.
352. Conclusions I (1969), Statement of Interpretation on Article 5.
353. Conclusions 2016, Malta.
354. Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 140/2016, decision on the merits of 22 January 2019, §69.
355. Conclusions XVII-1 (2004), Poland.
356. Conclusions 2010 - Statement of interpretation - article 5.
357. CESP v. France, Complaint No.101/2013, §84.

> Article 5 is not satisfied merely by the fact that a statutory or other compulsory organisation effectively engages in procedures resembling collective bargaining[358].

Legislation or regulations which forbid policemen to set up their own trade union or to join a trade union of their own choice; or oblige policemen to join a trade union imposed by statute, are contrary to the Charter because they effectively completely suppress the freedom to organise[359].

Workers must be free not only to join but also not to join a trade union.[360] Domestic law must guarantee the right of workers to join a trade union and include effective punishments and remedies where this right is not respected. Trade union members must be protected from any harmful consequence that their trade union membership or activities may have on their employment, particularly any form of reprisal or discrimination in the areas of recruitment, dismissal or promotion because they belong to a trade union or engage in trade union activities.[361] Where such discrimination occurs, domestic law must make provision for compensation that is adequate and proportionate to the harm suffered by the victim.[362]

To secure the freedom, domestic law must clearly prohibit all pre-entry or post-entry closed shop clauses and all union security clauses (including automatic deductions from the wages of all workers, whether union members or not, to finance the trade union acting within the company).[363] Consequently, clauses in collective agreements or legally authorised arrangements whereby jobs are reserved in practice for members of a specific trade union are in breach of the freedom guaranteed by Article 5.[364] The same rules apply to employers' freedom to organise.[365]

Trade unions and employers' organisations must be autonomous in respect of their organisation or functioning. Trade unions are entitled to choose their own members and representatives.[366] The following examples constitute infringements in breach of Article 5: prohibiting the election of or appointment of foreign trade union representatives, substantially limiting the use that a trade union can make of its assets and substantially limiting the reasons for which a trade union is entitled to take disciplinary action against its members.[367]

Domestic law may restrict participation in various consultation and collective bargaining procedures to representative trade unions alone. For the situation to comply with Article 5, the following conditions must be met[368]:

- a) decisions on representativeness must not present a direct or indirect obstacle to the founding of trade unions;[369]

- b) areas of activity restricted to representative unions should not include key trade union prerogatives;[370]

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358. Conclusions II - Statement of interpretation - Article 5.
359. Conclusions III - Statement of interpretation - Article 5.
360. Conclusions I (1969), Statement of Interpretation on Article 5.
361. Conclusions 2010, Republic of Moldova; Digest 2018, p. 95.
362. Conclusions 2004, Bulgaria; Digest 2018, p. 95.
363. Conclusions VIII (1984), Statement of Interpretation on Article 5, Confederation of Swedish Enterprises v Sweden, Complaint No 12/2002, Decision on the merits of 22 May 2003, §42.
364. Conclusions XIX-3 (2010), Iceland.
365. Digest 2018, p. 95.
366. Conclusions XIII-3 (1995)- United Kingdom.
367. Conclusions 2010, Georgia, Conclusions XX-3 (2014) United Kingdom; Digest 2018, p. 95.
368. Digest 2018, p. 96.
369. Conclusions 2014, Andorra.
370. Conclusions XV-1 (2000), Belgium.

c) criteria used to determine representativeness must be reasonable, clear, predetermined, objective, prescribed by law and open to judicial review.[371]

c) Implementation in Ukraine

Within the examination of the right to organise, the Committee several times found breaches of the requirements under Article 5 of the Charter. In 2014 the situation in Ukraine was found non-conformity with Article 5 on 4 grounds: unreasonable fees charged for the registration of the employers' organisations; non-establishing that domestic law provides effective sanctions and remedies in case of discrimination and reprisals based on trade union membership and activities; failure to establish that domestic law provides for compensation that is adequate and proportionate to the harm suffered by the victim in case of discrimination and reprisals based on trade union membership and activities; failure to prove that criteria used to determine representativeness were open to judicial review.[372]

Regarding to the examination of forming trade unions and employers' organisations, freedom to join or not to join a trade union, discrimination and harassment of trade union activists, representativeness, the Committee asked to be kept informed on the changes, complaints from the International Labour Organisation and the Secretary-General of the International Confederation of Trade Unions, asked about the prohibition of closed shop clauses. The received information in the national report was sufficient to establish absence of violations on before mentioned ground. Therefore, this should be seen as a progress of Ukraine in meeting its commitments under Article 5.

However, the prohibition for nationals of other Contracting Parties to the Charter to form trade unions was indicated as a situation of non-conformity with Article 5 in the Conclusions 2018.[373]

Despite the improvement the situation with the fulfillment of obligations under Article 5, various issues in the sphere of trade unions' functioning and activities were considered by national courts, including the Supreme Court. For example, Civil Cassation Court of the Supreme Court in its judgment adopted on 28 October 2020, considered the case on recognition of illegal and cancellation of the decision on refusal in the state registration of changes to the Statute documents of trade union on the basis of the decision of extraordinary trade union conference[374], on 20 January 2020 the Civil Cassation Court considered the case devoted to non-fulfillment of the employer's obligation to provide premises for the work of the trade union body and to hold a meeting of the staff with all the necessary equipment, communication, lighting, etc.[375], the judgment of the Great Chamber of the Supreme Court adopted 26 February 2020 was devoted to the issue of deprivation of the chairman and deputy chairmen of trade union membership.[376] In the last mentioned case judges applied to European convention on Human Rights in conjunction with the case-law of the European Court of Human Rights. Nonetheless, references to the ESC by national courts in the issues enshrined within Article 5 were not found.

371. Conclusions XV-1 (2000), France.
372. ECSR, Conclusions 2014 – Article 5. URL: http://hudoc.esc.coe.int/eng?i=2014/def/UKR/5/EN
373. ECSR, Conclusions 2018. Ukraine. p.18-19
374. Supreme Court, judgment of Civil Cassation Court 28 October, 2020, case 160/12689/19
375. Supreme Court, judgment of Civil Cassation Court 20 January, 2020, case 265/7296/16-ц
376. Supreme Court, judgment, 26 February 2020, case 210/5659/18

Group 3: Labour rights

The right to bargain collectively (Article 6)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers and employers the right to bargain collectively. (Part I, point 6)

The right conferred in Article 6 ESC (part II) is overlapping with Article 21 in terms of consultation among employees and employers at the level of the enterprise.

Pursuant to Art. 6 ESC:

Article 6 – The right to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

8. to promote joint consultation between workers and employers;

9. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;

10. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;

and recognise:

11. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

Pursuant to the **Appendix**[377]:

Article 6, paragraph 4

It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G.

377. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.

b) Decisions and conclusions of the European Committee of Social Rights

Joint consultation (Article 6§1)

Within the meaning of Article 6§1, joint consultation is consultation between employees and employers or the organisations that represent them.[378] Such consultation can take place within tripartite bodies provided that the social partners are represented in these bodies on an equal footing.[379]

Consultation must take place on several levels: national, regional/sectoral and enterprise.[380] It should take place in the private and public sector (including the civil service).[381] Consultation must cover all matters of mutual interest, and particularly: productivity, efficiency, industrial health, safety and welfare, and other occupational issues (working conditions, vocational training, etc.), economic problems and social matters (social insurance, social welfare, etc.)[382]

It is open to States Parties to require trade unions to meet representativeness criteria subject to certain conditions. Such a requirement must not excessively limit the possibility of trade unions to participate effectively in consultation. In order to be in conformity with Article 6§1, representativity criteria should be prescribed by law, should be objective and reasonable and subject to judicial review which offers appropriate protection against arbitrary refusal.[383]

Negotiation procedures (Article 6§2)

On the basis of Article 6§2 of the Charter

> Contracting Parties undertake not only to recognise, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreement if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other (…).[384]

States Parties should not interfere in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned, including the use of collective action. Trade unions must be allowed to strive for the improvement of existing living and working conditions of workers and in this area the rights of trade unions should not be limited by legislation to the attainment of minimum conditions.[385]

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378. Conclusions I (1969), Statement of Interpretation on Article 6§1.
379. Conclusions V (1977), Statement of Interpretation on Article 6§1.
380. Conclusions 2010, Ukraine, Article 6§1.
381. Conclusions III (1973), Denmark, Germany, Norway, Sweden; Centrale générale des services publics (CGSP) v. Belgium, Complaint No. 25/2004, Decision on the merits of 9 May 2005, §41.
382. Conclusions I (1969), Statement of Interpretation on Article 6§1; Conclusions V (1977), Ireland.
383. Conclusions 2006, Albania; Digest 2018, p. 99.
384. Conclusions I (1969), Statement of Interpretation on Article 6§2.
385. Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on admissibility and the merits of 3 July 2013, §§111 and 120.

> Nothing in the wording of Article 6 of the Charter entitles States Parties to enact restrictions on the right to bargain collectively on the part of the police or armed forces in particular.[386]

The extent to which collective bargaining applies to public officials, including members of **the police and armed forces**, may be determined by law. Officials nevertheless always retain the right to participate in any processes that are directly relevant for the determination of procedures applicable to them.[387]

> A mere hearing of a party on a predetermined outcome will not satisfy the requirements of Article 6§2 of the Charter. On the contrary, it is imperative to regularly consult all parties throughout the process of setting terms and conditions of employment and thereby provide for a possibility to influence the outcome. Especially in a situation where trade union rights have been restricted, it must maintain its ability to argue on behalf of its members through at least one effective mechanism[388].

An outright ban on collective bargaining of all **self-employed workers** must be seen as excessive as it runs counter to the object and purpose of Article 6 § 2. In establishing the type of collective bargaining that is protected by the Charter, it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining.[389]

It is open to States Parties to require trade unions to meet an obligation of representativeness subject to certain conditions. With respect to Article 6§2 such a requirement must not excessively limit the possibility of trade unions to participate effectively in collective bargaining. In order to be in conformity with Article 6§2, the criteria of representativeness should be prescribed by law, should be objective and reasonable and subject to judicial review which offers appropriate protection against arbitrary refusals.[390] It was considered that the restriction to the collective bargaining to trade unions representing at least 33% of the employees concerned by this bargaining, was in violation of the Article 6§2.[391]

The extension of collective agreements "should take place subject to tripartite analysis of the consequences it would have on the sector to which it is applied".[392]

386. Decision on the merits: Unione Generale Lavoratori - Federazione Nazionale Corpo forestale dello Stato (UGL–CFS) and Sindacato autonomo polizia ambientale forestale (SAPAF) v. Italy, Complaint No. 143/2017, § 116; European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012, decision on the admissibility and merits of 2 December 2013, §159; CESP v. France, Complaint No. 101/2013, op. cit., §118; EUROMIL v. Ireland, Complaint No. 112/2014, op. cit., §85 ; CGIL v. Italy, Complaint No.140/2016, op. cit., §105.
387. Conclusions III, (1973) Germany; European Council of Police Trade Unions (CESP) v. Portugal, Complaint No. 11/2002, Decision on the merits of 22 May 2002, §58.).
388. EuroCOP v. Ireland, Complaint No. 83/2012, Decision on admissibility and merits 2 December 2013, §176-177, European Organisation of Military Associations (EUROMIL) v. Ireland Complaint No. 112/2014, Decision on the merits of 12 September 2017,§§ 87-88.
389. ICTU v. Ireland, Complaint No. 123/2016, decision on the merits of 12 September 2018, §§37-40; Digest 2018, p. 100.
390. Conclusions 2006, Albania.
391. Conclusions XIX-3 (2010), "the former Yugoslav Republic of Macedonia".
392. Conclusions 2010, Statement of Interpretation on Article 6§2; Digest 2018, p. 101.

Conciliation and arbitration (Article 6§3)

According to Article 6§3, „conciliation, mediation and/or arbitration procedures must be instituted to facilitate the resolution of collective conflicts. They may be instituted by law, collective agreement or industrial practice. Article 6§3 applies also to the public sector." [393]

> Article 6§3 applies to conflicts of interest, i.e. generally conflicts which concern the conclusion of a collective agreement or the modification, through collective bargaining, of conditions of work contained in an existing collective agreement. It does not concern conflicts of rights, i.e. conflicts related to the application and interpretation of a collective agreement, or to political disputes.[394]

Conciliation is a process aimed at the peaceful settlement of a labour conflict, while arbitration can resolve the conflict on the basis of a decision taken by one or more individuals selected by the parties. The result of a conciliation proceeding is not binding on the parties. On the contrary, the result of the arbitration proceedings is binding on the parties.[395]

Arbitration systems must be independent, and the outcome of arbitration may not be predetermined by pre-established criteria.[396] Any form of compulsory recourse to arbitration is a violation of this provision, whether domestic law allows one of the parties to defer the dispute to arbitration without the consent of the other party or allows the Government or any other authority to defer the dispute to arbitration without the consent of one party or both. Such a restriction is only allowed within the limits prescribed by Article G.[397]

Collective action (Article 6§4)

Article 6§4 guarantees the right to strike and the right to call a lock-out. The right may result from statutory law or case-law.[398]

Limiting the right to call a strike to the representative or the most representative trade unions constitutes a restriction which is not in conformity with Article 6§4.[399] A general prohibition of lock-out is not in conformity with Article 6§4,[400] although it is not protected to the same degree as the right to strike.[401]

The decision to call a strike can be taken only by a trade union provided that forming a trade union is not subject to excessive formalities.[402] The Committee considered that the reference to "workers" in Article 6§4 relates to those who are entitled to take part in collective action but says nothing about those empowered to call a strike. In other words, this provision does not require states to grant any group of workers authority to call a strike but leaves them the option of deciding which groups shall have this right and thus of restricting the right to call strikes to trade unions. On the

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393. Decision on the merits: Matica Hrvatskih Sindikata v. Croatia, Complaint No. 116/2015, § 105.
394. Decision on the merits: Matica Hrvatskih Sindikata v. Croatia, Complaint No. 116/2015, § 106.
395. Conclusions 2014, Republic of Moldova.
396. Conclusions XIV-1 (1998), Iceland.
397. Conclusions 2006, Moldova, Article 6§3; Digest 2018, p. 101.
398. Conclusions I (1969), Statement of Interpretation on Article 6§4.
399. Conclusions XV-1 (2000), France; Decision on the merits: Matica Hrvatskih Sindikata v. Croatia, Complaint No. 116/2015, p. 117.
400. Conclusions I (1969), Statement of Interpretation on Article 6§4; Conclusions VIII (1984), Statement of Interpretation on Article 6§4.
401. Conclusions VIII (1980) Statement of interpretation on Article 6§4.
402. Conclusions 2004, Sweden; Conclusions 2014, Germany; Digest 2018, p. 103.

contrary, limiting the right to call a strike to the representative or the most representative trade unions constitutes a restriction which is not in conformity with Article 6§4.[403]

Once a strike has been called, any employee concerned, irrespective of whether he is a member of the trade union having called the strike or not, has the right to participate in the strike.[404]

Article 6§4 applies to conflicts of interests. It does not concern conflicts of rights, i.e. related to the existence, validity or interpretation of a collective agreement and to the violation of a collective agreement.[405] Political strikes are not covered by Article 6, which is designed to protect "the right to bargain collectively", such strikes being obviously quite outside the purview of collective bargaining.[406]

> The right of trade unions to collective action is not an absolute one. Nevertheless, a restriction to this right can be considered in conformity with Article 6§4 of the Charter only if, as set forth by Article G, the restriction: **a)** is prescribed by law; **b)** pursues a legitimate purpose - i.e. the protection of rights and freedoms of others, of public interest, national security, public health or morals – and, **c)** is necessary in a democratic society for the pursuance of these purposes, i.e. the restriction has to be proportionate to the legitimate aim pursued.[407]

Excessive or abusive forms of collective action, such as extended blockades, which would put at risk the maintenance of public order or unduly limit the rights and freedoms of others (such as the right of co-workers to work, or the right of employers to engage in a gainful occupation) may be limited or prohibited by law. In this context, the Committee considers that the prohibition of certain types of collective action, or even the introduction of a general legislative limitation of the right to collective action in order to prevent initiatives aimed at achieving illegitimate or abusive goals (e.g. goals which do not relate to the enjoyment of labour rights, or relate to discriminatory objectives) would not be necessarily contrary to Article 6§4 of the Charter.[408]

> National legislation which prevents a priori the exercise of the right to collective action, or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards would not be in conformity with Article 6§4 of the Charter, as it would infringe the fundamental right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers. In this context, within the system of values, principles and fundamental rights embodied in the Charter, the right to collective bargaining and collective action is essential in ensuring the autonomy of trade unions and protecting the employment conditions of workers: if the substance of this

403. Conclusions XV-1 (2000), France; Digest 2018, p. 103.
404. Conclusions XVI-1 (2002), Portugal; Digest 2018, p. 103.
405. Conclusions I (1969), Statement of Interpretation on Article 6§4.
406. Conclusions II (1971), Statement of Interpretation on Article 6§4.
407. Decision on admissibility and the merits: Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, p. 118.
408. Decision on admissibility and the merits: Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, p. 119.

> right is to be respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and its scope should not be limited by legislation to the attainment of minimum conditions.[409]

Article 6§4 guarantees also the right to participate in secondary action.[410]

Prohibiting strikes in sectors which are essential to the community is deemed to serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health.[411] However, simply banning strikes even in essential sectors – particularly when they are extensively defined, i.e. "energy" or "health" – is not deemed proportionate to the specific requirements of each sector. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6§4.[412]

The prohibition of the right to strike of members of the armed forces does not amount to a violation of Article 6§4 of the Charter.[413] Restrictions on the right to strike for member of **the armed forces** may be in conformity with the Charter. As regards the right of public servants to strike, the Committee recognised that, by virtue of Article G of the Revised Charter, the right to strike of certain categories of public servants may be restricted, including members of the police and armed forces, judges and senior civil servants. On the other hand, the Committee took the view that a denial of the right to strike to public servants as a whole cannot be regarded as compatible with the Charter.[414] „Under Article G of the Charter, these restrictions should be limited to public officials whose duties and functions, given their nature or level of responsibility, are directly related to national security, general interest, etc."[415]

> As regards **police officers** the Committee has, in the context of the diversity of the legal systems in this area, also taken note of the evolution towards the expansion of the right to strike to police officers. Their right to collective action may be restricted. Such a restriction may nevertheless only be compatible with the Charter if the requirements of Article G are met, i.e. if the restriction is established by law, pursues a legitimate aim and is objectively necessary in a democratic society, that is to say proportionate to the aim pursued. Concerning police officers, an absolute prohibition on the right to strike can be considered in conformity with Article 6§4 only if there are compelling reasons justifying it. On the other hand the imposition of restrictions as to the mode and form of such strike action can be in conformity to the Charter.[416]

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409. Decision on admissibility and the merits: Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, p. 120.
410. Conclusions XX-3 (2014), United Kingdom.
411. Conclusions I (1969), Statement of Interpretation on Article 6§4; Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" and European Trade Union Confederation (CES) v. Bulgaria, Complaint No. 32/2005, Decision on the merits of 16 October 2006, §24.
412. Conclusions XVII-1 (2004), Czech Republic.
413. Decision on the merits : European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, p. 118.
414. Conclusions I (1969), Statement of Interpretation on Article 6§4.
415. Decision on the merits : European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, § 113; Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" and European Trade Union Confederation (ETUC) v. Bulgaria, Complaint No. 32/2005, decision on the merits of 16 October 2006, §46.
416. Decision on the merits : European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, p. 114; Decision on admissibility and the merits: European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012, §§203-204.

The use of compulsory arbitration to terminate a strike is contrary to the Charter except in the cases established by Article G.[417]

Subjecting the exercise of the right to strike to prior approval by a certain percentage of workers is in conformity with Article 6§4, provided that the ballot method, the quorum and the majority required are not such that the exercise of the right to strike is excessively limited.[418]

The exhaustion of conciliation/mediation procedures requirement before strike is in conformity with Article 6§4 – given Article 6§3 – as long as such machinery is not so slow that the deterrent effect of a strike is affected.[419] Periods of notice or cooling-off periods prescribed in connection with pre-strike conciliation procedures are in conformity with Article 6§4 as long as they are of a reasonable duration.[420]

A strike should not be considered a violation of the contractual obligations of the striking employees entailing a breach of their employment contract. It should be accompanied by a prohibition of dismissal. If however, in practice, strikers are fully reinstated when the strike has ended and their previously acquired entitlements (e.g.[421] concerning pensions, holidays and seniority) are not affected, then formal termination of the employment contract does not violate Article 6§4.

Any deduction from strikers' wages should not exceed the proportion of their wage that would be attributable to the duration of their strike participation.[422] Workers participating in a strike, who are not members of the trade union having called the strike, are entitled to the same protection as trade union members.[423]

c) Implementation in Ukraine

Paragraph 1

The Committee found that consultations on a bipartite basis took place between the parties to social dialogue at all levels in both the private and public sectors that was confirmed by high number of collective agreements in force and hence, compliance with the requirements of Article 6 §1 was confirmed in the Conclusions 2018.[424]

Paragraph 2

The Committee repeatedly stated in its Conclusions 2014, 2018 that the situation regarding negotiation procedures was in conformity with Article 6. However, the additional information was been asked about all developments in special procedures for the extension the scope of collective agreements and about proportion of workers covered by collective agreements.[425]

Paragraph 3

The situation in Ukraine regarding conciliation and arbitration was found to meet the requirements of the Charter in Conclusions 2014, 2018. The Committee noted that Ukrainian legislation did not

417. Conclusions 2014, Norway, Article 6§4.
418. Conclusions II (1971), Cyprus; Conclusions XIV-1 (1998), United Kingdom; Digest 2018, p. 106.
419. Conclusions XVII-1 (2004), Czech Republic.
420. Conclusions XIV-1 (1998), Cyprus.
421. Conclusions I (1969), Statement of Interpretation on Article 6§4; Digest 2018, p. 106.
422. Conclusions XIII-1 (1993), France; Confédération française de l'Encadrement –(CFE-CGC) v. France, Complaint No. 16/2003, Decision on the merits of 12 October 2004, §63; Digest 2018, p. 106.
423. Conclusions XVIII-1 (2006), Denmark; Digest 2018, p. 106.
424. ECSR, Conclusions 2018. Ukraine. p.20.
425. Ibid.

prohibit or provide for any special procedures/ machinery for conciliation and arbitration for civil servants, however, the confirmation of applying them to civil servants need to be proved within additional information.[426]

Paragraph 4

Regarding to collective action the Committee's conclusions have been changed from positive to negative since 2014. According to the national report 2017 the procedure for decision to call a strike that require support by a majority of the workers or two-thirds of the delegates at the conference vote in its favour were going to be changed for the majority of workers (delegates) present at the meeting. Therefore, the Committee asked for information on all developments of national legislation on this issue.

The Committee reconfirmed its negative conclusion on the situation in Ukraine in the sphere of restrictions to the right to strike and procedural requirements. Since 2014 there were no changes in prohibition of organising or taking part in strikes for persons of the ordinary and commanding staff of the civil protection service, staff of professional rescue services, workers of paramilitary emergency rescue services in the coal and mining industries, of electric power plants, in the nuclear industry.[427] [428] National legislation on strikes in transport sector has to be amended due to the obligation to implement the ECtHR judgment in the case of "Veniamin Tymoshenko and others v. Ukraine", where the violation of Atricle 11 of the ECHR has been stated because of unlawful ban of a strike as a result of the absence of clear and foreseeable legislation. In this case the ECtHR applied also the Committee's practice. This judgment was classified as complex problem. Regarding to general measures took by Ukraine, updated action plan on 15 March 2017 provided to the Committee of Ministers of the Council of Europe stated that criticised provisions of the Transport Act were no longer applied and that the legal reasoning from the judgment in the Veniamin Tymoshenko case has been directly applied by the courts in proceedings concerning strikes not related to transportation industry, at the same time Section 18 of the Transport Act prohibiting strikes in the transport sector is still in force, thus information would be useful on examples of case-law from the moment the judgment became final when the strikes on transport companies took place, in spite of this legislative provisions.[429]

The Committee emphasised that the restriction of strikes is possible in some sectors "since strikes in these sectors could pose a threat to public interest, national security and/or public health".[430] However, the simple ban of strikes for certain categories of employees in national legislation of Ukraine is constitute a breach of the requirements of Article 6 §4 of the Charter. Therefore, the situation in Ukraine was found not compliant with the Charter by the Committee in 2018. The same conclusions the Committee made in accordance with the prohibition of strikes for all civil servants in Ukraine.

Analysing Ukrainian legislation on procedural requirements for strike, the Committee paid special attention to the fact, that the requirement to notify the duration of the strike to the employer prior to strike action was contrary to Article 6§4 of the Charter and took into account explanation about the absence of limitation the duration of strike in Ukraine.

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426. Ibid.
427. Ibid., p.23.
428. ECSR, Conclusions 2014. Ukraine. Article 6-4. URL: http://hudoc.esc.coe.int/eng?i=2014/def/UKR/6/4/EN
429. ECtHR, 1288th meeting (June 2017) (DH) - Action plan (15/03/2017) - Communication from Ukraine concerning the case of Veniamin Tymoshenko and Others v. Ukraine (Application No. 48408/12), DH-DD(2017)355 23/03/2017. URL: http://hudoc.exec.coe.int/eng?i=004-37058
430. ECSR, Conclusions 2018. Ukraine. p.24, Conclusions I, 1969.

National courts of Ukraine, usually, consider the cases on strikes under national legislation and could make a references to the ECHR and case-law of the European Court of Human Rights. For example, the Supreme Court 29 April 2020 considered the case concerning dismissal of the applicant on the ground on absence from work without serious grounds and participation on the strike which was recognised illegal was indicated in the employment record book, applied to the ECHR.[431] On the judgment adopted on 26 April 2018, the Court of Appeal of Dnipropetrovsk region considered the case on the on declaring illegal the strike of employees of the structural subdivision of the Mine Management Department of ArcelorMittal company. The applicants argued that the court of first instance had failed to give a proper legal assessment to the decision of the European Court of Human Rights in Veniamin Timoshenko and Others v. Ukraine, such an argument was not accepted by the panel of judges, as the European Court of Human Rights had ruled that the Article 18 of the Law of Ukraine "On Transport", which did not apply to the legal relations of the parties in this case.[432] The examples given show that judges apply the Convention on Human Rights in matters concerning strikes.

431. Supreme Court, judgment of the Civil Cassation Court 20 April 2020, case № 158/1839/17, URL: https://reyestr.court.gov.ua/Review/89034678

432. Court of Appeal of Dnipropetrovsk region, judgment of 26 April 2018, case № 214/4164/17, URL: https://reyestr.court.gov.ua/Review/73740087

Group 4: Children, families, migrants

The right of children and young persons to protection (Article 7)

a) Analysis of the provisions of ESC (revised)

Children and young persons under the Charter are persons below the age of 18. The Charter contains two main articles regarding this group: Article 7 on children and young persons in employment and Article 17 on the right of children and young persons to social, legal and economic protection. Article 7 focuses on the regulation of employment – with due regard to the right to education – and the protection in specific employment-related situations (night work, unhealthy occupations), as well as against 'moral dangers' directly or indirectly linked to employment, such as child trafficking. Moreover, Article E prohibits discrimination based on age.

Pursuant to Article 7 ESC

> **Article 7 – The right of children and young persons to protection**
>
> With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake:
>
> 1. to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education;
>
> 2. to provide that the minimum age of admission to employment shall be 18 years with respect to prescribed occupations regarded as dangerous or unhealthy;
>
> 3. to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;
>
> 4. to provide that the working hours of persons under 18 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training;
>
> 5. to recognise the right of young workers and apprentices to a fair wage or other appropriate allowances;
>
> 6. to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day;

7. to provide that employed persons of under 18 years of age shall be entitled to a minimum of four weeks' annual holiday with pay;

8. to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations;

9. to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control;

10. to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

Pursuant to the **Appendix**:

” Article 7, paragraph 2

This provision does not prevent Parties from providing in their legislation that young persons not having reached the minimum age laid down may perform work in so far as it is absolutely necessary for their vocational training where such work is carried out in accordance with conditions prescribed by the competent authority and measures are taken to protect the health and safety of these young persons.

Article 7, paragraph 8

It is understood that a Party may give the undertaking required in this paragraph if it fulfils the spirit of the undertaking by providing by law that the great majority of persons under eighteen years of age shall not be employed in night work.

Pursuant to the **Explanatory Report to the European Social Charter**

” Article 7 – The right of children and young persons to protection

40. Three paragraphs have been amended (paragraphs 2, 4 and 7), the others remain unchanged:

Paragraph 2

41. The minimum age required by this provision for admission to employment in prescribed occupations regarded as dangerous or

unhealthy, which was not specified by the Charter, has been fixed at 18 years in the Revised Charter. This provision has been inspired by the Council of the European Communities Directive 94/33 on the protection of young peopleat work.

Paragraph 4

42. The minimum age-limit provided for by this provision for regulation of the working hours has been raised to 18 years as compared to the 16 years provided for in the Charter.

Paragraph 7

43. The length of annual holidays with pay for young workers has been increased, from the three weeks provided in the Charter to four weeks.

b) Decisions and conclusions of the European Committee of Social Rights

According to **Article 7§1**, states parties shall set the minimum age of admission to employment at 15 years. The Committee views this standard to apply to all economic sectors, including agriculture, and all places of work, including work within family enterprises and in private households.[433] It also extends to all forms of economic activity (employed, self-employed, work in the family enterprise, etc.). The minimum age standard it must be effectively applied in practice and supervised, also in view of work at home.[434] Here, the role of the Labour Inspectorate is decisive.[435]

The only exception to the prohibition of child employment is so-called "light work". Light work has been defined by the Charter as work that does not entail any risk to the "health, morals, or education" of children. States Parties are required to define the types of work which may be considered light, or at least to establish a list of types of work that are not considered light. Work considered to be light stops to be so if it is performed for an excessive duration of time.[436] The following activities have been considered as light work: participation in cultural events or performances, sports events, or short promotional activities.[437] Children under the age of 15 who are subject to compulsory education should not perform light work during school holidays for more than 6 hours per day and 30 hours per week in order to avoid any risks that the performance of such work might have for their health, development or education.[438]

Article 7§2 stipulates that States Parties shall set 18 as the minimum age for occupations regarded as "dangerous or unhealthy." There must be an adequate statutory framework to identify potentially hazardous work, which either lists such forms of work or defines the types of risk which such work may cause.[439] According to the Appendix to the Charter, states parties may legislate that

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433. Conclusions I (1969), Statement of Interpretation on Article 7§1, <http://hudoc.esc.coe.int/eng?i=I_Ob_-28/Ob/EN>, (2 January 2017).
434. Conclusions 2011, Statement of Interpretation on Article 7§3, <http://hudoc.esc.coe.int/eng?i=2011_163_01/Ob/EN>, (18 November 2019).
435. Id, §32.
436. Id.
437. Conclusions 2011, Slovakia, <http://hudoc.esc.coe.int/eng?i=2011/def/SVK/7/1/EN>, (1 March 2019).
438. ECSR, Conclusions 2015, Statement of Interpretation on Article 7§1 and 7§3, <http://hudoc.esc.coe.int/eng?i=2015_163_01/EN>, (2 January 2017).
439. ECSR, Conclusions 2006, France, <http://hudoc.esc.coe.int/eng?i=2006/def/FRA/7/2/EN>, (2 January 2017). See also CoE (2018), Digest of the Case Law of the European Committee of Social Rights, p. 60.

young persons under that minimum age perform work under the following conditions: the work performed is absolutely necessary for their vocational training; it is carried out in accordance with conditions prescribed by the competent authority; and measures are taken to protect the youth's health and safety at work. According to the Committee's interpretation, this kind of work must be done under strict expert supervision and only for the time necessary; the labour inspectorate must monitor these arrangements.[440]

Article 7§3 prohibits the employment of children "that would deprive them of the full benefit of their education." The Committee applies the same standard of permissible light work as under art. 7§1.[441] During school term, the time during which children may work must be limited in order not to interfere with their school attendance and school homework. The Committee therefore assesses the national conditions for light work and the maximum permitted duration of such work, similar to the requirements under Article 7§1. The Committee takes account of the length and distribution of holidays, the uninterrupted period of rest, the nature and the length of the light work and the control efficiency of the labour inspectorate.[442]

Allowing children to work before school in the morning has been found by the Committee to be in breach of the Charter. The same has been found for children aged 15 years who are still subject to compulsory education who deliver newspapers from 6 a.m. for up 2 hours per day, 5 days per week before school.[443] Moreover, States Parties have to set a mandatory and uninterrupted period of rest of no less than 2 weeks during summer holidays. The assessment by the Committee of compliance over the school year takes account of the length and distribution of holidays, the timing of uninterrupted period of rest, the nature and the length of the light work and of the efficiency of control by the labour inspectorate.[444] The Committee also requires that children should not perform light work during school holidays for more than 6 hours per day and 30 hours per week.[445]

Under **Article 7§4**, national law must limit the working hours of persons under 18 who are no longer subject to compulsory schooling "in accordance with the needs of their development, and particularly with their need for vocational training." This limitation may be implemented by legislation, regulations, contracts or practice.[446] According to the Committee, for young persons under 16, a limit of eight hours a day or forty hours a week is in breach of the Charter.[447] For persons over 16 years, these limits are in conformity with the Charter.[448]

Under **Article 7§5**, States Parties have to recognize a fair wage for young workers and appropriate allowances as regards apprentices. According to the Committee, this right may be implemented by legislation, collective agreements or equivalents in the national legal system.[449] Under this provision, the Committee assesses the fairness of the wage and the appropriateness of the allowance in comparison with the starting wage or minimum net wage paid to a single adult.[450]

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440. ECSR, Conclusions 2006, Norway, <http://hudoc.esc.coe.int/eng?i=2006/def/NOR/7/2/EN>, (2 January 2017).
441. ECSR, Conclusions I (1969), Statement of Interpretation on Article 7§3, <http://hudoc.esc.coe.int/eng?i=I_Ob_-29/Ob/EN>, (2 January 2017).
442. ECSR, Conclusions 2011, Statement of Interpretation on Article 7§3, <http://hudoc.esc.coe.int/eng?i=2011_163_01/Ob/EN>.
443. CoE (2018), Digest of the Case Law of the European Committee of Social Rights, p. 108f.
444. Conclusions 2011, Statement of Interpretation on Article 7§3, <http://hudoc.esc.coe.int/eng?i=2011_163_01/Ob/EN>.
445. ECSR, Conclusions 2015, Statement of Interpretation on Article 7§1 and 7§3, <http://hudoc.esc.coe.int/eng?i=2015_163_01/EN>, (2 January 2017).
446. ECSR, Conclusions 2006, Albania, <http://hudoc.esc.coe.int/eng?i=2006/def/ALB/7/4/EN>. CoE (2018), Digest of the Case Law of the European Committee of Social Rights, p. 109.
447. ECSR, Conclusions XI-1 (1991), Netherlands, <http://hudoc.esc.coe.int/eng?i=XI-1/def/NLD/7/4/EN>, (2 January 2017).
448. ECSR, Conclusions 2002, Italy, <http://hudoc.esc.coe.int/eng?i=2002/def/ITA/7/4/EN>, (2 January 2017).
449. ECSR, Conclusions 2015, Serbia, <http://hudoc.esc.coe.int/eng?i=2015/def/SRB/7/5/EN>, (2 January 2017); Conclusions 2011, Ukraine, <http://hudoc.esc.coe.int/eng?i=2011/def/UKR/7/5/EN>, (2 January 2017).
450. Conclusions XI-1 (1991), United-Kingdom, <http://hudoc.esc.coe.int/eng?i=XI-1/def/GBR/7/5/EN>, (2 January 2017).

Regarding young workers, their wage may be less than the adult starting or minimum wage, but any difference must be reasonable and the gap must close fairly quickly.[451] Here, the Committee has developed detailed standards: for 15 to 16 year-olds, a wage which is 30% lower than the adult starting wage is acceptable; for 16 to 18 year-olds, the difference may not exceed 20%.[452] The adult reference wage must in all cases be sufficient to comply with the fairness criteria of Article 4§1 of the Charter (right to adequate remuneration). For example, if young workers between 16 and 18 were paid 80% of a minimum wage in line with the Article 4§1 fairness threshold (60% of the net average wage), the situation would be in conformity.[453] If the reference wage is too low, a young worker's wage is a fortiori not considered fair.[454]

Regarding apprentices, they may be paid lower wages, since the value of the on-the-job training they receive is taken into account. However, the apprenticeship system must not be used to circumvent the payment of fair wages to young workers. Accordingly, the terms of apprenticeship should not last too long and, as skills are gained, the allowance should be gradually increased throughout the contract period,[455] starting from at least one-third of the adult starting wage or minimum wage at the commencement of the apprenticeship, to at least at two-thirds at the end of it.[456]

According to **Article 7§6**, time spent on vocational training by young people during normal working hours is part of the working day. Such training should, in principle, be done with the employer's consent and be related to the young person's work.[457] This right also applies if it is not financed by the employer.[458] Therefore, training time is to be remunerated as normal working time, and there can be no obligation to make up for the time spent in training, which would de facto increase the total number of hours worked.[459]

Article 7§7[460] stipulates that young persons under eighteen must be given at least four weeks' annual holiday with pay.[461] According to the Committee's interpretation, young employees who cannot work because of illness or accident during the whole or part of their annual leave must have the right to take the leave lost at some other point in time at least to the extent needed to give them the four weeks' paid annual leave stipulated in the Charter. This applies in all circumstances, regardless of whether incapacity begins before or during leave, and also in cases where a company requires its workers to take leave at a specific time.[462]

According to **Article 7§8**, national law must prohibit night work of young persons under eighteen. This prohibition concerns all economic sectors and must be rigorously supervised by the Labour Inspectorate.[463] Exceptions are narrowly defined by the Committee and can only be made in view of occupations explicitly mentioned in national law, necessary for the functioning of the economic

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451. Conclusions II (1971), Statement of Interpretation on Article 7§5, <http://hudoc.esc.coe.int/eng?i=II_Ob_-9/Ob/EN>, (2 January 2016).
452. Conclusions 2006, Albania, <http://hudoc.esc.coe.int/eng?i=2006/def/ALB/7/5/EN>, (2 January 2017).
453. Conclusions 2015, Slovenia, <http://hudoc.esc.coe.int/eng?i=2015/def/SVN/7/5/EN>, (19 November 2019).
454. Conclusions XII-2 (1992), Malta, <http://hudoc.esc.coe.int/eng?i=XII-2/def/MLT/7/5/EN>, (2 January 2017).
455. ECSR, Conclusions II (1971), Statement of Interpretation on Article 7§5, <http://hudoc.esc.coe.int/eng?i=II_Ob_-9/Ob/EN>.
456. ECSR, Conclusions 2006, Portugal, <http://hudoc.esc.coe.int/eng?i=2006/def/PRT/7/5/EN>, (2 January 2017).
457. Conclusions XV-2 (2001), Netherlands, <http://hudoc.esc.coe.int/eng?i=XV-2/def/NLD/7/6/EN>, (2 January 2017).
458. Id.
459. Conclusions V (1977), Statement of Interpretation on Article 7§6, <http://hudoc.esc.coe.int/eng?i=V_Ob_-12/Ob/EN>, (2 January 2017).
460. Under the 1961 Charter, the requirement is three weeks.
461. General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011, Decision on the merits of 23 May 2012, §§ 30-32, <http://hudoc.esc.coe.int/eng?i=cc-66-2011-dmerits-en>. The standards are the same as for adults under Art. 2(3) of the Charter.
462. Conclusions 2006, France, <http://hudoc.esc.coe.int/eng?i=2006/def/FRA/7/7/EN>. CoE (2018), Digest, p. 111.
463. Conclusions XIX-4 (2011), Czech Republic, <http://hudoc.esc.coe.int/eng?i=XIX-4/def/CZE/7/8/EN>.

sector and if the number of young workers concerned is low.[464] According to the Appendix to the Charter, States Parties fulfil this requirement if the law provides that the great majority of persons under eighteen years of age are not employed in night work.[465] In the definition of night work, states parties have a wider margin of discretion. It is up to national laws or regulations to define the period of night time.[466]

Article 7§9 provides for compulsory regular medical check-ups[467] for under-eighteen year olds employed in occupations as specified by national laws or regulations. These check-ups must be adapted to the specific situation of young workers and the particular risks that they face.[468] They may, however, also be carried out by the occupational health services, if these services have the specific training to do so.[469] The right stipulated in Article 7§9 includes a full medical examination on recruitment and regular check-ups thereafter.[470] The intervals between check-ups must not be too long. In this regard, an interval of two years has been considered by the Committee to be too long.[471]

Article 7§10 is a very broad provision and guarantees the right of children to be protected against physical and moral risks in and outside employment. This includes in particular the protection of children against all forms of exploitation. This paragraph – as interpreted by the Committee – also covers trafficking of human beings as a severe form of exploitation. Given its wide scope and relevance for the physical and mental integrity of minors, the Committee has developed quite an elabourate case law on this provision.[472] Given its relevance, it applies to all minors[473] on the territory of the state party.[474]

This provision is closely linked with and overlaps with Article 17. In case States Parties have accepted both provisions (which is the case for Ukraine), the Committee focuses on the following aspects regarding Article 7§10: the protection of children against moral dangers at work and outside work and the involvement of children in the sex industry and in begging. The situations dealt with under Article 17 are in particular the protection of children from ill-treatment, including corporal punishment.[475]

The following aspects have evolved in the course of the interpretative work of the Committee: protection against sexual exploitation; protection from the misuse of information technology; and protection from other forms of abuse. According to the Committee, an effective policy against commercial sexual exploitation of children should cover child prostitution, child pornography and trafficking of children.[476] The Committee defines child prostitution as the offer, procurement, use or provision of a child for sexual activities for remuneration or any other kind of contribution to

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464. Conclusions XVII-2 (2005), Malta, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/MLT/7/8/EN>.
465. ESC Appendix, Article 7, paragraph 8; ECSR Conclusions 2011, Belgium, <http://hudoc.esc.coe.int/eng?i=2011/def/BEL/7/8/EN>.
466. Conclusions I (1969), Statement of Interpretation on Article 7§8, <http://hudoc.esc.coe.int/eng?i=I_Ob_-31/Ob/EN>.
467. Conclusions IV (1975), Statement of Interpretation on Article 7§9, <http://hudoc.esc.coe.int/eng?i=IV_Ob_-8/Ob/EN>.
468. Conclusions 2006, Albania, <http://hudoc.esc.coe.int/eng?i=2006/def/ALB/7/9/EN>.
469. Conclusions VIII (1984), Statement of Interpretation on Article 7§9, <http://hudoc.esc.coe.int/eng?i=VIII_Ob_-4/Ob/EN>; Conclusions XIII-2 (1994), Italy.
470. Conclusions XIII-1 (1993), Sweden, <http://hudoc.esc.coe.int/eng?i=XIII-1/def/SWE/7/9/EN>.
471. Conclusions 2011, Estonia, <http://hudoc.esc.coe.int/eng?i=2011/def/EST/7/9/EN>.
472. Conclusions 2004, Bulgaria, <http://hudoc.esc.coe.int/eng?i=2004/def/BGR/7/10/EN>.
473. This is one of the few interpretative exceptions to the personal scope of the Charter which only protects persons of other states parties who are either legally residing or regularly working in the territory of the state party in question.
474. Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012, §§ 85-86, <http://hudoc.esc.coe.int/eng?i=cc-69-2011-dmerits-en>.
475. Conclusions XV-2 (2001), Statement of Interpretation of Article 7§10, <http://hudoc.esc.coe.int/eng?i=XV-2_Ob_V1-1/Ob/EN>; Association for the protection of All Children (APPROACH) Ltd. v. Cyprus, Complaint No. 97/2013, decision on admissibility of July 2013, §10, <http://hudoc.esc.coe.int/eng?i=cc-97-2013-dadmiss-en>,; Mental Disability Advocacy Center (MDAC) v. Bulgaria, Complaint No. 41/2007, decision on admissibility of 26 June 2007, §8, <http://hudoc.esc.coe.int/eng?i=cc-41-2007-dadmiss-en>.
476. Conclusions 2004, Bulgaria, <http://hudoc.esc.coe.int/eng?i=2004/def/BGR/7/10/EN>.

it.[477] Child pornography includes the procurement, production, distribution, making available and possession of material that visually depicts a child engaged in sexually explicit conduct or realistic images representing a child engaged in sexually explicit conduct.[478] The Committee also takes into account that new technologies may lead to new forms of child pornography.[479] Trafficking of children is the recruiting, transporting, transferring, harbouring, delivering, selling or receiving of children for the purposes of sexual exploitation.[480]

States parties must take effective measures to prohibit and combat all forms of sexual exploitation of children, in particular children's exploitation in the sex industry. This prohibition must be accompanied by an adequate supervisory mechanism and sanctions.[481] The Committee developed the following minimum requirements from the application of art. 7(10): legislation which prohibits all acts of sexual exploitation and includes sanctions of criminal law; and a national action plan to combat the sexual exploitation of children.[482]

The Committee allows States Parties a margin of appreciation when implementing this requirement, and it is therefore up to the state to adopt the specific framework of criminalisation as it sees fit. However, States Parties must criminalise the defined activities regarding all children under 18 years irrespective of lower national ages of sexual consent.[483] Child victims of sexual exploitation should not be prosecuted for any behaviour connected with the exploitative act. [484]

In order to combat sexual exploitation of children through the use of internet technologies, States Parties must adopt effective measures in law and in practice. This includes legislation that Internet service providers be responsible for controlling the material they host, encouraging the development and use of a monitoring system for activities on the net and logging procedures (for example filtering and rating systems).[485] Internet service providers should be under an obligation to remove or prevent accessibility to illegal material on which they have knowledge and internet safety hotlines should be set up through which illegal material can be reported.[486]

States Parties must also prohibit the use of children by other forms of exploitation such as, domestic/labour exploitation, including trafficking for the purposes of labour exploitation, begging, etc. through legislation and its effective implementation.[487] They must take preventive measures regarding street children and assist them in regaining a dignified and protected living situation[488].

In the case European Committee for Home-Based Priority Action for the child and the family (EUROCEF) v. France, the complainant organisation alleged that France was in breach of inter alia Article 7§10 of Charter in view of the accommodation and care of foreign unaccompanied minors. The Committee held that due to overcrowded reception facilities and the lack of reception homes, a certain number of minors had to live on the street. This exposed them to serious physical and moral hazards, which may even lead to trafficking, exploitation of begging and sexual exploitation, and was thus in breach of Article 7§10[489].

477. Conclusions 2015, Romania, <http://hudoc.esc.coe.int/eng?i=2015/def/ROU/7/10/EN>.
478. Conclusions XVII-2 (2005), Portugal, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/PRT/7/10/EN>.
479. Conclusions 2015, Slovak Republic, <http://hudoc.esc.coe.int/eng?i=2015/def/SVK/7/10/EN>.
480. Conclusions 2015, Serbia, <http://hudoc.esc.coe.int/eng?i=2015/def/SRB/7/10/EN>. CoE (2018), Digest of the Case Law of the European Committee of Social Rights, p. 113.
481. Conclusions 2004, Bulgaria, <http://hudoc.esc.coe.int/eng?i=2004/def/BGR/7/10/EN>.
482. Conclusions XVI-2 (2003), Poland, <http://hudoc.esc.coe.int/eng?i=XVI-2/def/POL/7/10/EN>.
483. Conclusions XVII-2 (2005), Czech Republic, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/CZE/7/10/EN>.
484. Conclusions XVII-2 (2005), United Kingdom, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/GBR/7/10/EN>.
485. Conclusions 2004, Romania, <http://hudoc.esc.coe.int/eng?i=2004/def/ROU/7/10/EN>.
486. Conclusions XIX-4 (2011), Croatia, <http://hudoc.esc.coe.int/eng?i=XIX-4/def/HRV/7/10/EN>.
487. Conclusions 2015, Estonia, <http://hudoc.esc.coe.int/eng?i=2015/def/EST/7/10/EN>.
488. Conclusions 2004, Romania, <http://hudoc.esc.coe.int/eng?i=2004/def/ROU/7/10/EN>.
489. Complaint No. 114/2015, decision on the merits of 24 January 2018, http://hudoc.esc.coe.int/fre/?i=cc-114-2015-dmerits-en.

c) Implementation in Ukraine

Paragraph 1

From the moment of the ESC ratification in 2006, Ukraine has three times provided the reports on Article 7 of the Charter. In each of these reports Committee found that situation in Ukraine is not in conformity with Article 7§1 of the Charter on the grounds that the definition of light work is not sufficiently defined and the prohibition of employment under the age of 15 is not guaranteed in practice.[490]

The Committee recalls that the prohibition of the employment of children under the age of 15 applies to all economic sectors, including agriculture, and all places of work, including work within family enterprises and in private households. It further recalls that the prohibition also extends to all forms of economic activity, irrespective of the status of the worker (employee, self-employed, unpaid family helper or other).[491]

In the recent Eleventh National Report of the Government, Ukraine referred to the draft of Labour Code of Ukraine which resolved this situation and thus it prohibits the use of minors in the work where they may be at risk of physical, psychological or sexual violence, or whose performance may harm their health or lead to negative consequences in moral development.[492] By the end of November 2020 it has not been adopted by Verkhovna Rada.

Paragraph 2

The Committee Conclusion of 2015 found that the situation in Ukraine is in conformity with Article 7§2 of the Charter, but it requests additional information on possible arrangements for performing hazardous work during vocational training and how the monitoring was ensured. Also it asks to provide information on the number and nature of violations detected as well as on sanctions imposed for breach of the regulations regarding prohibition of employment of young workers under 18 in dangerous or unhealthy activities.[493]

Based on the provided information on the following report the Committee recalls that in the application of Article 7§2 there must be an adequate statutory framework in order to identify potentially hazardous work, which either lists such forms of work or defines the types of risk (physical, chemical, biological) which may arise in the course of work. Also the Committee requires the next report to indicate whether the relevant legislation in Ukraine provides such lists of potentially hazardous works or gives the definition of work risks. As the result of the reviewing of all the information provided, the Committee concludes that the situation in Ukraine is not in conformity with Article 7§2 of the Charter reasoning that the prohibition of employment under the age of 18 for dangerous or unhealthy activities is not effectively guaranteed.[494]

Paragraph 3

Upon examination of Ukrainian report the Committee refers to its findings regarding light work in its conclusion on Article 7§1 and considers that the situation in Ukraine is not in conformity with Article 7§3 of the Charter on the ground that the definition of light work is not sufficiently precise.[495]

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490. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/1/EN>, (5 December 2019).
491. Ibid.
492. Eleventh National Report of the Government of Ukraine on the implementation of the provisions of the European Social Charter (revised) concerning Articles 7, 8, 16, 17, 27, 31. URL: https://www.msp.gov.ua/content/spivrobitnictvo-z-radoyu-evropi.html
493. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/2/EN>, (4 December 2015).
494. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/2/EN>, (5 December 2019).
495. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/3/EN>, (5 December 2019).

In Conclusions 2015,[496] the Committee examined the legislation concerning working time for children who are still subject to compulsory education. It is noted that young employees aged from 16 to 18 years old may work up to 36 hours per week. It also takes into consideration the total duration of the general secondary education which is 11 years. It is therefore referred to its statement of interpretation on Article 7§1 and 7§2 and concluded that the situation was not in conformity with the Charter on the ground that the duration of working time for children aged 16-18 who are still subject to compulsory education is excessive and cannot be qualified as light work.[497]

The Committee notes that the draft of Labour Code has not yet been adopted and asks Ukraine to provide information on any developments in this regard. Also, the Government requested the relevant information to be provided in next report, including the number of inspection conducted, the number of violations found and the sanctions imposed with specific regard children who still subject to compulsory schooling in order to examine the application of such provisions in practice.

Paragraph 4

Having analysed the information provided by the Government of Ukraine on the Seventh National Report[498] related the requirements to the working time of the children the Committee concludes that the situation in Ukraine is in conformity with the Charter. However, the Committee recalls that the situation in practice should be regularly monitored and therefore asks to provide information on the number and nature of violations detected as well as on sanctions imposed on employers for the breach of the regulations regarding the working time for young workers under the age of 18.[499]

Taking into account the information provided in the Eleventh National Report of the Government of Ukraine[500] the Committee notes that the report does not provide information on the sanctions imposed in practice in cases of violations found. Therefore, pending the receipt of the information requested by the Committee has deferred its conclusion of conformity with the Charter.[501]

Paragraph 5

In Conclusion 2015,[502] the Committee stated that the minimum wage corresponded to only 34.44% of the net average wage, which is too low to secure a decent standard of living for young workers. Accordingly, the situation in Ukraine was not in conformity with Article 7§5 of the Charter.

Upon examination of following Ukrainian report on this right, the Committee deferred its conclusion, because of the lack of the information necessary to draw the conclusions. The Committee requests the next report that provides the information on the net monthly minimum wage and the net average wage paid.[503]

Within the respect of this Article, the Committee also examines fair allowances paid to apprentices. However, the Ukrainian report does not contain any information on the allowances paid to apprentices. The Committee repeated its question in this respect and asks for the information on the

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496. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/3/EN>, (4 December 2015).
497. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/3/EN>, (5 December 2019).
498. Seventh National Report of the Government of Ukraine on the implementation of the provisions of the European Social Charter (revised) concerning Articles 7, 8, 16, 17, 27, 31. URL: https://www.msp.gov.ua/content/spivrobitnictvo-z-radoyu-evropi.html
499. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/4/EN>, (4 December 2015).
500. Eleventh National Report of the Government of Ukraine on the implementation of the provisions of the European Social Charter (revised) concerning Articles 7, 8, 16, 17, 27, 31. URL: https://www.msp.gov.ua/content/spivrobitnictvo-z-radoyu-evropi.html
501. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/4/EN>, (5 December 2019).
502. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/5/EN>, (4 December 2015).
503. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/5/EN>, (5 December 2019).

monitoring of the remuneration to young workers and how legislation is implemented in practice and for apprentices. Pending receipt of the information requested, the Committee reserves its position on this point.[504]

Paragraph 6

The Committee previously examined the situation in Ukraine and found it to be in conformity with Article 7§6 of the Charter (Conclusions 2011[505], 2015[506]).

Despite that the Committee emphasizes that provisions cannot be guaranteed exclusively by the operation of legislation if this is not effectively implemented into practice and strictly controlled. Because of that the Committee requested the information on the monitoring of the authorities, the data of violations detected, sanctions enforced for the breach of the regulations regarding the inclusion of time spent on vocational training by young workers in the normal working time. The Committee further requests to provide information about implementation in practice and, pending receipt of this information, reserves its position on this point.[507]

Paragraph 7

The Government of Ukraine pointed out to the national legislation preserved that young workers under 18 were granted an annual leave of 31 calendar days. The Committee examined the situation in Ukraine and found it to be in conformity with Article 7§6 of the Charter (Conclusions 2011[508], 2015[509], 2019[510]). On Conclusion 2019, the Committee requests information on enterprises inspected, number of inspections conducted, violations found and sanctions imposed related guaranty of paid annual holidays for young workers under 18.[511]

Paragraph 8

The situation in Ukraine always has been found in conformity with the Article 7§8 of the Charter since it ratification. The Government of Ukraine reported that according to the Labour Code, young workers under 18 may not be employed in night work, overtime work and work on days off.

On Conclusion 2019, the Committee asks the next report to provide information on the number and nature of violations detected as well as on sanctions imposed for breach of the regulations regarding prohibition of night work for young workers under the age of 18.[512]

Paragraph 9

The Government of Ukraine pointed that according to the Labour Code all persons under the age of eighteen are hired only after a preliminary medical examination and thereafter, until the age of 21, are subject to a mandatory annual medical examination.[513] This provision was not changed

504. Ibid.
505. Conclusions 2011, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2011/def/UKR/7/6/EN>, (9 December 2011).
506. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/6/EN>, (4 December 2015).
507. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/6/EN>, (5 December 2019).
508. Conclusions 2011, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2011/def/UKR/7/7/EN>, (9 December 2011).
509. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/7/EN>, (4 December 2015).
510. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/7/EN>, (5 December 2019).
511. Ibid.
512. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/8/EN>, (5 December 2019).
513. The third national report of the Government of Ukraine on the implementation of the provisions of the European Social Charter (revised) URL: https://www.msp.gov.ua/content/spivrobitnictvo-z-radoyu-evropi.html

during next reports periods. The Committee examined the situation in Ukraine and found it to be in conformity with Article 7§9 of the Charter (Conclusions 2011[514], 2015[515], 2019[516]).

On Conclusion 2019, the Committee asks the next report to indicate the percentage of enterprises inspected annually by the Labour Inspectorate in respect to the mandatory medical examinations of young workers under the age of 18 out of the total number of enterprises, as well as to provide information on the monitoring activity of the Labour Inspectorate, on the number and nature of violations detected, as well as on the measures taken and whether fines were imposed on the employers who had not complied with the prohibition of night work for young workers under 18.[517]

Paragraph 10

The Committee examined the situation in Ukraine on conformity with Article 7§10 of the Charter on aspects of protection against sexual exploitation, protection against the misuse of information technologies and protection from other forms of exploitation.

The overall result of the Committee's examination is that the situation in Ukraine is not in conformity with Article 7§10 of the Charter on the grounds that not all children under the age of 18 are protected against sexual exploitation.[518]

Protection against sexual exploitation

In the Conclusions 2015, the Committee considered that the situation in Ukraine was not in conformity with the Charter on the grounds that legislation did not protect children under the age of 18 from child prostitution; the use of children in the production of pornographic materials was not criminalised if it was proved that the child had been paid for their services or consented to being involved and the simple possession of child pornography was not a criminal offence.[519]

In the next report from the Government of Ukraine it was stated that the several laws had been adopted during the reference period to protect children against sexual exploitation, in particular Law No. 2229-VIII of 7 December 2017 "On Preventing and Combating Domestic Violence" which contains provisions aimed at protecting children under the age of 18 against violence.[520] Also, for this period there were adopted amendments to the Criminal Code to strengthen the protection of children from sexual abuse and exploitation.

In this context the Committee asks that the next report shall provide information on the adoption and implementation the draft law "On Amendments to Certain Legislative Acts of Ukraine in Connection with the Ratification of the Convention of the Council of Europe on the Protection of Children against Sexual Exploitation and Sexual Abuse".[521]

Also the next report which the Committee asks to provide shall contain updated information on the extent of the problem of the use, procuring or offering children of under the age of 18 for prostitution, for the production of pornography and for pornographic performances, as well as

514. Conclusions 2011, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2011/def/UKR/7/9/EN>, (9 December 2011).
515. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/9/EN>, (4 December 2015).
516. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/9/EN>, (5 December 2019).
517. Ibid.
518. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/10/EN>, (5 December 2019).
519. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/10/EN>, (4 December 2015).
520. Eleventh National Report of the Government of Ukraine on the implementation of the provisions of the European Social Charter (revised) concerning Articles 7, 8, 16, 17, 27, 31. URL: https://www.msp.gov.ua/content/spivrobitnictvo-z-radoyu-evropi.html
521. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/10/EN>, (5 December 2019).

it requests to provide statistical information on the number and nature of violations reported, investigations, prosecutions, convictions and criminal penalties imposed.[522]

Protection against the misuse of information technologies

The Committee emphasised that the report provided by the Government of Ukraine does not provide updated information on children protection against the misuse of information technologies. Because of that, the Committee requests that the next report shall provide updated information on precise measures taken to protect children against the misuse of information technologies and on the results achieved.[523]

Protection from other forms of exploitation

The Ukrainian report specifies the steps taken during the reference period to prevent trafficking in human beings, increase the effectiveness of the detection of the individuals who commit or facilitate such offences, ensure the protection of the rights of victims of trafficking, in particular children, and to provide them with assistance.[524]

Nevertheless, from the GRETA report the Committee concludes that statistical data on human trafficking in Ukraine remains largely unconsolidated: law enforcement agencies collect data on the number of victims of trafficking registered in the course of criminal investigations, the Ministry of Social Policy keeps records of people who have formally applied for the status of victim, and the IOM Office, NGOs and social service providers keep their own statistics on victims and presumed victims of trafficking assisted by them.[525] Based on above, the Committee asks to be provided with information of the steps taken to form a consolidated statistical system on trafficking in human beings.

With regard to children in street situations, the Committee refers to the General Comment No. 21 of the UN Committee on the Rights of the Child which provides authoritative guidance to States on developing comprehensive, long-term national strategies on children in street situations using a holistic, child rights approach and addressing both prevention and response in line with the Convention on the Rights of the Child, which has been ratified by Ukraine.[526] Relatively, the Committee requests to be provided in next report with the information on the extent of the problem and the measures taken to improve the protection and assist children in street situations.

The case-law of national courts of applying the article 7 of the Charter has not been found.

522. Ibid.
523. Ibid.
524. Eleventh National Report of the Government of Ukraine on the implementation of the provisions of the European Social Charter (revised) concerning Articles 7, 8, 16, 17, 27, 31. URL: https://www.msp.gov.ua/content/spivrobitnictvo-z-radoyu-evropi.html
525. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/10/EN>, (5 December 2019).
526. Ibid.

Group 4: Children, families, migrants

The right of employed women to protection of maternity (Article 8)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees employed women, in case of maternity, the right to a special protection. (Part I, point 8)

Pursuant to Art. 8 ESC:

> **Article 8 – The right of employed women to protection of maternity**
>
> With a view to ensuring the effective exercise of the right of employed women to the protection of maternity, the Parties undertake:
>
> 12. to provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks;
>
> 13. to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period;
>
> 14. to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;
>
> 15. to regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants;
>
> 16. to prohibit the employment of pregnant women, women who have recently given birth or who are nursing their infants in underground mining and all other work which is unsuitable by reason of its dangerous, unhealthy or arduous nature and to take appropriate measures to protect the employment rights of these women.

Pursuant to the **Appendix**[527]:

> **Article 8, paragraph 2**
>
> This provision shall not be interpreted as laying down an absolute prohibition. Exceptions could be made, for instance, in the following cases:
>
> c) if an employed woman has been guilty of misconduct which justifies breaking off the employment relationship;
>
> d) if the undertaking concerned ceases to operate;
>
> e) if the period prescribed in the employment contract has expired.

b) Decisions and conclusions of the European Committee of Social Rights

Paid maternity leave (Article 8§1)

Article 8§1 involves two obligations:

- to provide for women to take at least 12 weeks' maternity leave; and
- to ensure that women are adequately compensated for their loss of earnings during the period of leave[528].

The leave must be guaranteed by law[529] and shall last at least 14 weeks.[530] The type of employment and the nature of the employment contract must have no effect on the protection secured by Article 8 § 1 and 2.[531] It must be guaranteed for all categories of employees[532] and the leave must be maternity leave and not sick leave.[533]

Domestic law may permit women to opt for a shorter period of maternity leave. However, in all cases there must be a compulsory period of leave of no less than six weeks which may not be waived by the woman concerned.[534]

> Maternity leave must be accompanied by the continued payment of the individual's remuneration or by the payment of social security benefits or benefits from public funds. The modality of compensation is within the margin of appreciation of the States Parties and may be either a paid leave (continued payment of wages by the employer), social security maternity benefit, any alternative benefit from public funds or a combination of such compensations. Regardless of the modality of payment, the level

527. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.
528. Conclusions III - Statement of interpretation - Article 8-1.
529. Conclusions III - Statement of interpretation - Article 8-1.
530. Conclusions III (1973), Statement of Interpretation on Article 8§1.
531. Conclusions XV-2 - Statement of interpretation - Article 8-1.
532. Conclusions XV-2 (2001), Addendum, Malta.
533. Digest 2018, p. 116.
534. Digest 2018, p. 116; Conclusions VIII (1984), Statement of Interpretation on Article 8§1; Conclusions XIX-4 (2011), Statement of Interpretation on Article 8§1.

> shall be adequate. In case of continued payment of wages or earnings-related benefits, these shall be equal to the previous salary or close to its value, and not be less than 70% of the previous wage. A ceiling on the amount of compensation for high salary earners is not, in itself, contrary to Article 8§1.[535]

However, the minimum rate of compensation shall not fall below the poverty threshold defined as 50% of median equivalised income, calculated on the basis of the Eurostat at-risk-of-poverty threshold value.[536] Various elements are taken into account in order to assess the reasonable character of the reduction, such as the upper limit for calculating benefit, how this compares to overall wage patterns and the numer of women in receipt of a salary above this limit.[537]

> The right to compensation may be subject to entitlement conditions such as a minimum period of employment or contribution. However, such conditions shall not be excessive; in particular, qualifying periods should allow for some interruptions in the employment record.[538]

Illegality of dismissal (Article 8§2)

Under Article 8§2, it must be unlawful to dismiss employees form the time they notify the employer of their pregnancy to the end of their maternity leave.[539] Article 8§2 applies equally to women on fixed-term and open-ended contracts.[540]

> Job security for a worker on maternity leave means that the contract of employment must not be terminated during this period. This is guaranteed by the prohibition on giving notice of dismissal at such a time that the period of notice would expire during the absence on leave. The giving of notice during maternity leave initiates the period of notice and, where appropriate, the interview, consultation or conciliation procedures to be carried out during this period. The Committee felt that, given the purposes of maternity leave and the unlawfulness of dismissal during this period, notice of dismissal as such was not incompatible with the Charter provided that the period of notice and any procedures were suspended until the end of the leave. The same rules governing suspension of the period of notice and procedures during maternity leave must apply in the event of notice of dismissal prior to maternity leave, irrespective of the length of the period of notice.[541]

The notification of the dismissal, by the employer, during the period of protection does not as such amount to a violation of article 8§2 provided that the period of notice and any procedures are

535. Conclusions 2015, Statement of Interpretation on Article 8§1.
536. Conclusions 2015, Statement of Interpretation on Article 8§1.
537. Conclusions XV-2 (2001), Belgium.
538. Conclusions 2015, Statement of Interpretation on Article 8§1.
539. Digest 2018, p. 117.
540. Conclusions XIII-4 (1996), Austria.
541. Conclusions XIII-4 - Statement of interpretation - 8-2.

suspended until the end of the leave.[542] The same rules governing suspension of the period of notice and procedures must apply in the event of notice of dismissal prior to the period of protection.[543]

However, Article 8§2 does not lay down an absolute prohibition. Pursuant to the Appendix, the dismissal of a pregnant woman is not contrary to this provision, in the following cases:

- if an employed woman has been guilty of misconduct which justifies breaking off the employment relationship;
- if the undertaking concerned ceases to operate;
- if the period described in the employment contract has expired.

These exceptions are strictly interpreted.

In cases of illegal dismissal, domestic law legislation must provide for adequate and effective remedies, employees who consider that their rights in this respect have been violated must be entitled to take their case before the courts.[544]

In the case of dismissal contrary to this provision, the reinstatement of the women should be the rule.[545] Exceptionally, if this is impossible (e.g. where the enterprise closes down) or the woman concerned does not wish it, adequate compensation must be ensured.

> The compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed. If there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation), and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time.[546]

Nursing breaks (Article 8§3)

According to Article 8§3, all employed mothers (including domestic employees[547] and women working at home) who breastfeed their babies shall be granted time off for this purpose. Time off for nursing should in principle be granted during working hours and should be treated as normal working time and remunerated as such.[548]

542. Conclusions XIII-4 (1996), Statement of Interpretation on Article 8§2.
543. Digest 2018, p. 117.
544. Digest 2018, p. 117.
545. Conclusions 2005, Cyprus.
546. Conclusions XIX-4 - Statement of interpretation - Article 8-2; Conclusions 2011 - Statement of interpretation - Article 8-2, 27-3.
547. Conclusions XVII-2 (2005), Spain.
548. Conclusions XIII-4 (1996), Netherlands.

However provision for part time work may be considered to be sufficient where loss of income is compensated by a parental benefit or other allowance.[549] Time off for nursing must be granted at least until the child reaches the age of nine months.[550]

The practical ways of implementing this Article are appreciated on a case-bycase basis: legislation providing for two daily breaks for a period of one year for breastfeeding, two half–hour breaks where the employer provides a nursery or room for breastfeeding,[551] one–hour daily breaks[552] and entitlement to begin or leave work earlier have all been found to be in conformity with the Charter.[553]

Night work (Article 8§4)

Article 8§4 requires States Parties to regulate night work for pregnant women, women who have recently given birth and women nursing their infants, in order to limit the adverse effects on the health of the woman. It does not apply to all women.[554]

The regulations must:

- only authorise night work where necessary, having due regard to working conditions and the organisation of work in the firm concerned;[555]

- lay down conditions for night work of pregnant women, e.g. prior authorisation by the Labour Inspectorate (when applicable), prescribed working hours, breaks, rest days following periods of night work, the right to be transferred to daytime work in case of health problems linked to night work, etc.[556]

Dangerous, unhealthy or arduous work (Article 8§5)

Article 8§5 applies to all pregnant women, women who have recently given birth or who are nursing their infant, in paid employment, including civil servants. Only self-employed women are excluded.[557]

With regard to the undertaking to "prohibit the employment of women workers in underground mining', the Committee clarified its case lay by specifying that the above-mentioned prohibition is concerned only with the employment of women on underground extraction work in mines, to the exclusion of all other occupations, and in particular those of a social or medical nature, management, inspection, etc.[558]

As regards the second part of sub-paragraph, prohibiting employment of women "as appropriate", on all other work which is unsuitable for them by reason of its dangerous, unhealthy or arduous nature", the expression "as appropriate" permits stated bound by this provision of the Charter to limit the prohibition of employment of women in the above-mentioned occupations to the sole cases where this is necessary, in particular to protect motherhood, notably pregnancy, confinement and the post-natal period, as well as future children.[559]

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549. Conclusions 2005, Sweden; Digest 2018, p. 118.
550. Conclusions 2005, Cyprus; Digest 2018, p. 118.
551. Conclusions I (1969), Italy; Digest 2018, p. 118.
552. Conclusion I (1969), Germany; Digest 2018, p. 118.
553. Conclusions 2005, France; Digest 2018, p. 118.
554. Digest 2018, p. 119.
555. Conclusions 2003, France.
556. Conclusions X-2 (1990), Statement of Interpretation on Article 8§4; Digest 2018, p. 119.
557. Digest 2018, p. 119.
558. Conclusions X-2 - Statement of interpretation - Article 8-4.
559. Conclusions X-2 - Statement of interpretation - Article 8-4.

Certain other dangerous activities, such as those involving exposure to lead, benzene, ionising radiation, high temperatures, vibration or viral agents, must be prohibited or strictly regulated for the group of women concerned depending on the risks posed by the work. Domestic law must ensure a high level of protection against all known hazards to the health and safety of women who come within the scope of this provision.[560]

Domestic law must make provision for the re-assignment of women who are pregnant or breastfeeding if their work is unsuitable to their condition, with no loss of pay, if this is not possible such women should be entitled to paid leave. Such women should retain the right to return to their previous employment.[561]

c) Implementation in Ukraine

Paragraph 1

The Commission stated in all its conclusions 2015, 2017, 2019 made for Ukraine on Article 8 §1, except for 2011, when the assumption was postponed, that Ukraine had failed to fulfill its obligations regarding maternity leave on the ground on non-establishing adequate safeguards in law and in practice to protect employees from undue pressure inciting them to take less than six weeks' postnatal leave.[562] The necessary information, including the information on the legal safeguards set up to protect women who have recently given birth from pressure inciting them to shorten their maternity leave, figures on the average length of maternity leave actually taken, was requested again in the Conclusions 2019. It was also highlighted that the national legal provision on duration of maternity leave before and after the birth did not prescribed a compulsory period of postnatal leave of at least six weeks, which was obligatory requirement for being in conformity with requirements of Article 8 §1. At the same time the Committee stressed on the nature of maternity leave as a right not obligation, that included right to continue to work of woman's own free will despite the medical certificate issued to authorise her to take maternity leave, or if she resumes work earlier, the social insurance body only covers the actual days of leave taken.[563]

Within the examination of the answer, providing to the question about correspondence of minimum amount of maternity benefits to at least 50% of the median equivalised income in Ukraine, the Committee was confused due to the figures showed that minimum maternity benefit was considerably higher than the minimum wage. Consequently, it was underlined that failure to provide relevant information in the next report[564] would lead to the conclusion that the situation in Ukraine was not comply with the requirements of Article 8 §1 of the Charter.[565]

Paragraphs 2,3

Regarding the illegality of dismissal during maternity leave and redress in case of unlawful dismissal and time off for nursing mothers, the Committee repeated in 2019 its previous conclusions about conformity the situation in Ukraine with §2, §3 of Article 8 of the Charter.[566] One question asked by the Committee for answer in the next report concerned rules that applied to women working part-time on the matter of time off for nursing mothers.

560. Conclusions 2003, Bulgaria.
561. Conclusions 2005, Lithuania.
562. ECSR, Conclusions. 2019. Ukraine. – Article 8-1. URL: http://hudoc.esc.coe.int/eng?i=2019/def/UKR/8/1/EN, Conclusions. 2017. Ukraine. – Article 8-1. URL: http://hudoc.esc.coe.int/eng?i=2017/def/UKR/8/1/EN, Conclusions. 2015. Ukraine. – Article 8-1. URL: http://hudoc.esc.coe.int/eng?i=2015/def/UKR/8/1/EN, Conclusions. 2011. Ukraine. – Article 8-1. URL: http://hudoc.esc.coe.int/eng?i=2011/def/UKR/8/1/EN
563. ECSR, Conclusions. 2019. Ukraine. p.19.
564. Taking into account that it was stated concerning the report 2018, the next has to be submitted in 2022.
565. ECSR, Conclusions. 2019. Ukraine. p.20.
566. ECSR, Conclusions. 2019. Ukraine. p.21-22.

Ukrainian courts applied the provisions of Article 8 §2 in some cases concerning dismissal of pregnant women. For example, in judgment adopted on 18 March 2019, the Supreme Court considered the case concerning dismissal of woman due to reduction in the number of employees, she was warned, worked the less time than others for the company and had the smallest experience, so in fact did not object to the dismissal. After that she was hospitalised and she went to work with a certificate of incapacity for work, stating the diagnosis "7 weeks of pregnancy, however, on the same day she was fired and issued the workbook. The Supreme Court underlined that in accordance with the provisions of paragraph 2 of Article 8 of the European Social Charter, it was illegal for an employer to dismiss a woman during her pregnancy or absence from work in connection with leave, or in the period after her return to work established by national law.[567]

Paragraph 4

In 2019, the situation in Ukraine under Article 8 §4 was examined in conjunction with Committee's conclusions 2018 on non-conformity the situation in Ukraine with Article 2 §7 on a set of grounds, including non-sufficient providing of possibilities of transfer to daytime work.[568] The request about the transferring of employed women to a daytime post until their child was three years old and rules applied if such a transfer were not possible was reiterated. It was also stated that the absence of requested information in the next report, would be considered as a breach of obligations under the mentioned issue. The Committee drew attention of Ukraine to its Statement of Interpretation on Articles 8 §4 and 8 §5, given in 2019, and asked confirmation of no loss of pay results from the changes in the working conditions or reassignment to a different post in cases of pregnancy and maternity, and information on the right of women to return to previous employment at the end of the protected period.[569]

Therefore, no assumptions were made and the conclusions were deferred till obtaining the necessary information.

Paragraph 5

In regard to information provided in national report 2019 on the changing of national legislation about prohibited dangerous, unhealthy or arduous work for all women, the detailed information on its content was asked. Due to the changes of national legislation, the Committee also asked to confirm the prohibition or strict regulation of underground work in mines and that other dangerous activities for employment of pregnant women, women who have recently given birth and are nursing their infant.[570]

In the context of the lack of guarantees the employees' right to return to their previous employment at the end of their maternity/nursing period that was found out in previous Conclusions 2011, 2015, the Committee repeatedly requested to provided information on the right to return to the post that women held before they were reassigned on maternity grounds. In Conclusions 2019, the Committee stated again that Ukraine failure to fulfillment obligations under Article 8 §5 on the ground indicated above.[571]

The Committee emphasised that Article 8 §4, §5 enshrined specific rights protecting employed women during pregnancy and maternity.[572]

> ❞ Non-provision of specific rights aimed at protecting the health and safety of a mother and a child during pregnancy and maternity

567. Supreme Court, judgment of Civil Cassation Court 18 March 2019, case № 505/3097/17-ц
568. ECSR, Conclusions. 2019. Ukraine. p.23.
569. Ibid.
570. ECSR, Conclusions. 2019. Ukraine. p.24.
571. Ibid. p.25.
572. Ibid., p.24.

or the erosion of their rights due to special protection during such a period are also direct gender discrimination…in the case a woman cannot be employed in her workplace due to health and safety concerns and as a result, she is transferred to another post or, should such transfer not be possible, she is granted leave instead, States must ensure that during the protected period, she is entitled to her average previous pay or provided with a social security benefit corresponding to 100% of her previous average pay. Further, she should have the right to return to her previous post.[573]

573. ECSR, Conclusions 2019. General Introduction. Statement of Interpretation on Articles 8§4 and 8§5. p.5-6.

Group 1: Employment, training and equal opportunities

The right to vocational guidance (Article 9)

a) Analysis of the provisions of ESC (revised)

Education rights are covered, in particular, by Articles 9 and 10 of the European Social Charter (revised). Article 9 covers the main issues with regard to vocational guidance.

Pursuant to Article 9 ESC

> **Article 9 – The right to vocational guidance**
>
> With a view to ensuring the effective exercise of the right to vocational guidance, the Parties undertake to provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity: this assistance should be available free of charge, both to young persons, including schoolchildren, and to adults."

Pursuant to **the Explanatory Report to the European Social Charter**

> **Article 9 – The right to vocational guidance**
>
> 52. No amendment.

b) Decisions and conclusions of the European Committee of Social Rights

According to the European Committee of Social Rights the purpose of this article is to make it compulsory for those states having accepted it to operate a service that helps all persons, free of charge, to solve their problems relating to vocational guidance[574].

On examining the reports submitted as part of the fourth cycle of supervision, the European Committee of Social Rights stressed the importance of vocational guidance in a modern economy especially at time of economic recession and defined it as the service which assists all persons to solve problems related to occupational choice and with due regard to the individual's characteristics and their relation to occupational opportunity[575].

The following positions of the Committee are worth mentioning in this context:

> General social and employment trends during the latest reference period have revealed a growing need for and increasing importance of vocational guidance as a mechanism for striking a balance between social integration and personal professional fulfillment. The globalisation of the labour market, and the use of

574. Conclusions I (1969), Statement of Interpretation on Article 9.
575. Conclusions IV (1975), Statement of Interpretation on Article 9.

new technologies have led to a rise in the rate of unemployment, especially in the more traditional branches of industry. In particular, long-term unemployment and unemployment among young people have reached high levels. Changing demographic trends, increased mobility of the work force, the economic recession and the political changes in Europe and around the world were factors that also influenced the labour market's absorption capacity and structure. Traditionally vulnerable categories, such as women, young and older workers, unskilled or semi-skilled workers and migrants were the most affected by unemployment and consequently found themselves in search of new qualifications and professional re-orientation. Hence the greater need for improved, adapted, widely available guidance over the reference period. In view of these changes, the Committee attaches a growing interest to the ways in which the member states have succeeded in finding appropriate solutions to the new guidance demands. It evaluates in particular the variety, efficiency and accessibility of the services provided, whether they are free of charge, with the overall aim of ensuring that all the segments of the population benefit from equal, adequate and real education and employment opportunities. As in its previous conclusions, the Committee has taken the view that Article 9 foresees a two-fold obligation for the Contracting Parties: on one hand the promotion and provision of guidance relating to education possibilities, and on the other hand, guidance services for vocational opportunities. The Committee appreciates that in the majority of countries the interdependence between the authorities responsible for educational guidance, usually the ministries of education and the labour market administration (Ministry of Labour, employment offices, etc.) has been reinforced. The presence of the social partners has also been more visible in the decision-making process for the content and structures of the guidance services. Among the main indicators taken into consideration by the Committee in evaluating the commitment of states to providing appropriate guidance facilities are:

i. whether guidance service are subject to a fee, and the budget dedicated to this service out of the total GDP;

ii. the number and qualification of the specialised staff serving as guidance providers (teachers, psychologists, administrators, etc);

iii. the geographical location and institutional distribution of both types of guidance;

iv. the type of information available and the means used for its dissemination,

v. the number of people benefiting from guidance, their age, social origin and educational level[576].

It should be highlighted that the core of Article 9 remains **the principle of equality of opportunities for all members of society**. Hence, the means employed by the states to make vocational guidance, training and retraining opportunities should be accessible to the whole population without any form of discrimination, on the sole criteria of individual competence. **Gender equality** plays an important part in all education and guidance services. The social reintegration of **people with disabilities** through suitable and adequate programmes is another aspect of equality of opportunities in the mentioned context. The usual practice observed in the member states is to integrate the disabled within the mainstream programmes, while individualising services offered to respond to the particular needs of the person assisted and increasing the overall budget dedicated to their effective training and guidance. Anyway, vocational guidance of persons with disabilities is dealt with under Article 15 of the Charter for States Parties having accepted both provisions. Another issue in the mentioned context is the **equal treatment of nationals of Contracting Parties** legally resident or regularly working in another country. The European Committee of Social Rights has observed that the majority of the states undertook measures to facilitate the integration of foreign nationals. These measures took either direct forms such as ensuring a proper legal framework and coherence in the application of non-discriminatory measures and abolishing any existing prejudicial differentiation, or indirect measures such as issuing guidance documentation in English language (Norway) in view of facilitating the access to guidance for non-nationals. In one of the cases (case of Poland) the Committee stressed that the existing length of the residence requirement implies that equal access to vocational guidance is provided only to non-nationals residing on the territory since at least three years. Further, the Committee concluded that the situation in Poland is not in conformity with Article 9 of the Charter because equal treatment for nationals of other Contracting Parties to the 1961 European Social Charter and of the Parties to the Revised European Social Charter lawfully resident or regularly working in Poland with respect to vocational guidance is not guaranteed.

It should be noted that though the European Committee of Social Rights considers that the Contracting Parties are undertaking continuous efforts to adapt and develop the structure of guidance services in order to respond to the contemporary changes, however, the dissemination of information and effective equality of chances still remain areas where implementation should be improved and to which the national authorities need to devote their activities[577].

c) Implementation in Ukraine

In the Conclusions 2012, 2016, the Committee reiterated to Ukraine the main requirements of States Parties under Article 9: that equal treatment with respect to vocational guidance has to be guaranteed to everyone; it has to be provided free of charge, including non-nationals from other Parties of the Charter; by qualified and sufficient staff; with an adequate budget; to a significant number of persons and by aiming at reaching as many people as possible; and without any requirements for length of residence, even for students and trainees, or employment requirements and/or the application of the reciprocity clause.[578]

In this regard, Ukraine was asked to clarify the provisions of free access for foreign nationals to vocational guidance services not related to the unemployment status and to answer the question repeated about the number of staff involved in the provision of vocational guidance within

576. Conclusions XIV-2 (1998), Statement of Interpretation on Article 9.
577. Conclusions XIV-2 (1998), Statement of Interpretation on Article 9; Conclusions XVI-2 (2003), Poland; Conclusions 2003, France.
578. ECSR, Conclusions. Ukraine 2016. p. 15, Conclusions. Ukraine 2012 – Article 9.

the education system and the overall expenditure.[579] The Committee states that the absence of requested information in the next report would lead to conclusions of non-conformity the situation in Ukraine with this matter.

Within the examination of national legislation, the Committee asked for clarification about the accessibility of providing vocational guidance services not only to people registered as unemployed but also, to workers, who seek guidance on how to develop their career or wish to change career.

Moreover, it was also emphasised, that constant non-providing of information about the estimated expenditure devoted to vocational guidance services in the labour market and counsellors involved in the provision of vocational guidance established had to be considered as a breach of obligations under Article 9. Furthermore, the Committee stressed that all future reports has to systematically present up-to-date information on all main items, especially figures on the resources, staff and number of beneficiaries of vocational guidance in the labour market.[580]

Taking into account the examination presented report and the lack of providing information, the previous deferred conclusion in 2012, the Committee in the Conclusion 2016 stated that the situation in Ukraine was not in compliance with obligations under Article 9 regarding the lack of guarantees of the right to vocational guidance within the labour market.[581]

579. ECSR, Conclusions. Ukraine 2016. p. 15.
580. Ibid.
581. ECSR, Conclusions. Ukraine 2016. p. 15.

Group 1: Employment, training and equal opportunities

The right to vocational training (Article 10)

a) Analysis of the provisions of ESC (revised)

Education rights are covered, in particular, by Articles 9 and 10 of the European Social Charter (revised). Article 10 concerns the right to vocational training.

Pursuant to Article 10 ESC

Article 10 – The right to vocational training

With a view to ensuring the effective exercise of the right to vocational training, the Parties undertake:

1. to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude;

2. to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments;

3. to provide or promote, as necessary:

a. adequate and readily available training facilities for adult workers;

b. special facilities for the retraining of adult workers needed as a result of technological development or new trends in employment;

4. to provide or promote, as necessary, special measures for the retraining and reintegration of the long-term unemployed;

5. to encourage the full utilisation of the facilities provided by appropriate measures such as:

a. reducing or abolishing any fees or charges;

b. granting financial assistance in appropriate cases;

c. including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment;

d. ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally.

Pursuant to the Explanatory Report to the European Social Charter

Article 10 – The right to vocational training

53. One paragraph has been added (paragraph 4); the others remain unchanged, therefore paragraph 4 of the Charter has become paragraph 5 of the Revised Charter.

Paragraph 4

54. The idea behind this new paragraph, which has been added to Article 10, is that it is necessary to adopt "special" measures for the retraining and reintegration of the long-term unemployed, as their possibilities of re-entering the labour market are particularly few.

b) Decisions and conclusions of the European Committee of Social Rights

Article 10§1 of the Charter states that with a view to ensuring the effective exercise of the right to vocational training, the Parties undertake to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude.

The right to vocational training is a universal right and implies an obligation to promote technical and vocational training for all persons[582]. Hence, **the principle of equal treatment** should be applicable in the mentioned context. According **to the European Committee of Social Rights** under Article 10 it should also verify that equal treatment in access to training institutions and programmes is ensured for all those interested, including **nationals of other Contracting Parties** legally residing or regularly working in the territory[583]. According to the **Appendix to the Charte**r, equality of treatment shall be provided to nationals of other Parties lawfully resident or regularly working on the territory of the Party concerned. This implies that no length of residence is required from students and trainees residing in any capacity, or having authority to reside in reason of their ties with persons lawfully residing, on the territory of the Party concerned before starting training. This does not apply to students and trainees who, without having the above-mentioned ties, entered the territory with the sole purpose of attending training[584].

Vocational training for disabled persons remains an important concern to the European Committee of Social Rights. At the same time, for the sake of clarity in the presentation of its conclusions, the Committee refers to this issue under Article 15 for those Contracting Parties which have accepted both provisions[585]. Hence, vocational training for disabled persons is dealt with Article 15 for State Parties which accepted both provisions.

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582. Conclusions I (1969), Statement of Interpretation on Article 10§1.
583. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§1.
584. Conclusions 2003, Slovenia.
585. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§1.

According to **the European Committee of Social Rights** Article 10§1 covers all kind of higher education. In view of the current evolution of national systems, which consists in the blurring of the boundaries between education and training at all levels within the dimension of lifelong learning, the Committee considers that, today, the notion of vocational training of Article 10§1 covers initial training, i.e. general and vocational secondary education, university and non-university higher education, and continuing training. University and non-university higher education are considered to be vocational training as far as they provide students with the knowledge and skills necessary to exercise a profession[586].

According to the European Committee of Social Rights the importance of vocational training should be emphasised at a time of economic recession and underlined that priority should be given to young persons, who are particularly hit by unemployment[587].

Providing vocational training, State Parties must:

- adopt the most recent measures to promote vocational training, including general and vocational secondary education, university and non-university higher education, apprenticeship, and continuing training;

- highlight the bridges between secondary vocational education and university and non-university higher education;

- outline the mechanisms for the recognition/validation of knowledge and experience acquired in the context of training/working activity in order to achieve a qualification or to gain access to general or technical education;

- underline the measures to make general secondary education and general higher education qualifications relevant from the perspective of professional integration in the job market;

- outline the mechanisms for the recognition of qualifications awarded by continuing vocational education and training[588].

It is important to note that access to higher technical or university education based solely on individual aptitude cannot be achieved only by setting up educational structures which facilitate the recognition of knowledge and experience as well as the transfer from one type or level of education to another; this also implies that registration fees or other educational costs do not create financial obstacles for some candidates[589]. Moreover, the European Committee of Social Rights stressed on the situation in Ukraine with this regard that facilities other than financial assistance to students should be granted to ease access to technical or university higher education based solely on individual aptitude. This obligation can be achieved namely by:

- avoiding that registration fees or other educational costs create financial obstacles for some candidates;
- setting up educational structures which facilitate the recognition of knowledge and experience, as well as the possibility of transferring from one type or level of education to another[590].

586. Conclusions 2003, France.
587. Conclusions IV (1975), Statement of Interpretation on Article 10.
588. Conclusions 2003, France.
589. Conclusions 2003, France.
590. Conclusions 2012, Ukraine.

The main indicators reflecting state commitment to "provide and promote" vocational training are the following: total expenditure (e.g. as a share of GDP), the total capacity of the system, in particular the availability of training places for all applicants, the proportion of young people completing a vocational education and geographical coverage[591].

Article 10§2 of the European Social Charter (revised) obliges State Parties to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments with a view to ensuring the effective exercise of the right to vocational training.

Under **Article 10§2 the European Committee of Social Rights** considers apprenticeship arrangements taking place within the framework of an employment relationship between the employer and the apprentice and leading to vocational education[592]. The Committee has consistently underlined the importance of combining theoretical and practical training and of maintaining a close contact between training institutions and the world of work[593].

Apprenticeship and its compliance to Article 10§2 are assessed on the basis of the following criteria: length of the apprenticeship and division of time between practical and theoretical learning; selection of apprentices; selection and training of trainers; remuneration of apprentices; termination of the apprenticeship contract[594]. The adequacy of apprenticeship arrangements, e.g. in terms of the number of participants, the availability of apprenticeship places for applicants, the proportion of trainees completing an apprenticeship and geographical coverage, are also important in assessing the compliance of the situation to Article 10§2[595].

Equal treatment is a significant indicator also in the aspect of this provision. Under all of the first three paragraphs of Article 10 a major preoccupation of the European Committee of Social Rights is to verify that equal treatment in access to training institutions and programmes is ensured for all those interested, including nationals of other Contracting Parties legally residing or regularly working in the territory[596]. Moreover, according to the Appendix to the Charter, equality of treatment shall be provided to nationals of other Parties lawfully resident or regularly working on the territory of the Party concerned. This implies that no length of residence is required from students and trainees residing in any capacity, or having authority to reside in reason of their ties with persons lawfully residing, on the territory of the Party concerned before starting training. This does not apply to students and trainees who, without having the above-mentioned ties, entered the territory with the sole purpose of attending training[597].

With a view to ensuring the effective exercise of the right to vocational training **Article 10§3 of the European Social Charter (revised)** obliges State Parties to provide or promote, as necessary: a adequate and readily available training facilities for adult workers; b special facilities for the retraining of adult workers needed as a result of technological development or new trends in employment.

Under **paragraph 3 the Committee** examines all forms of labour market training and education for adult workers[598].

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591. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§1, Conclusions, 2003.
592. Conclusions XIX-1 (2008), Slovak Republic; Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§2.
593. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§2.
594. Conclusions XVI-2 (2003), Malta.
595. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§2.
596. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§5 (i.e. Article 10§4 of the 1961 Charter).
597. Conclusions 2003, Slovenia.
598. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§3.

Indicators of particular interest for assessing the compliance to Article 10§3 are the number of participants, the development in national expenditure, the results of the effort, i.e. the employment effect[599].

The following aspects are also taken into consideration while assessing the compliance to the discussed provision: existence of legislation on the possibility of individual leave for training and, in particular, subject to what conditions, on whose initiative, of what length and whether it is paid or not; sharing of the burden of the cost of vocational training among public bodies (state or other collective bodies), unemployment insurance systems, enterprises, and households as regards continuing training[600].

Moreover, according to the European Committee of Social Rights the purpose of Article 10§3 of the Charter is, among others, to oblige states to provide facilities for training and retraining of adult workers, in particular the arrangements for retraining redundant workers and workers affected by economic and technological change. The aim is to prevent the deskilling of still active workers at risk of becoming unemployed as a consequence of technological and/or economic progress[601].

The right under Article 10§3 must be guaranteed also to unemployed people. The European Committee of Social Rights stressed with this regard that each national report on this provision should provide information on vocational training courses available for the unemployed, the activation rate i.e. the ratio between the annual average number of previously unemployed participants in active measures divided by the number of registered unemployed persons and participants in active measures[602]. Moreover, according to the Committee special effort should be made on their behalf, so that unemployed migrant workers may benefit from the same help in the matter of vocational training and retraining as nationals[603]. Here **the principle of equal treatment** becomes essential. In one of the cases the Committee concluded that the situation is not in conformity with Article 10§3 of the Charter because of indirect discrimination against nationals of the other Contracting Parties to the 1961 European Social Charter and nationals of the States Parties to the Revised European Social Charter, lawfully residing or regularly working in the state, who are potentially more affected by the length of residence requirement in order to access continuing vocational training[604].

With a view to ensuring the effective exercise of the right to vocational training **Article 10§4 of the Charter** obliges State Parties to provide or promote, as necessary, special measures for the retraining and reintegration of the long-term unemployed.

The European Committee of Social Rights considers a person who has been without work for twelve months or more to be long-term unemployed[605].

As in case of other provisions of Article 10, the main criteria for assessing compliance with Article 10§4 are the types of training and retraining measures available on the labour market, the number of persons in this type of training, the impact of the measures on reducing long-term unemployment, etc.

Again, as in all the other provisions of Article 10, equal treatment is an important element in the mentioned context.

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599. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§3.
600. Conclusions 2003, Slovenia.
601. Conclusions XIX-1 (2008), Spain.
602. Conclusions XIX-1 (2008), Hungary.
603. Conclusions IV (1975), Statement of Interpretation on Article 10§3.
604. Conclusions XVI-2 (2003), Addendum, Ireland.
605. Conclusions 2003, Italy.

Article **10§5 of the European Social Charter (revised)** defines additional measures, which are important for making the right to vocational training effective.

The principle of equal treatment should be taken into consideration under the mentioned provision. According to **the Appendix to the Charter**, equality of treatment shall be provided to nationals of other Parties lawfully resident or regularly working on the territory of the Party concerned. This implies that no length of residence is required from students and trainees admitted to reside in any capacity other than being a student or a trainee, or having authority to reside by reason of their ties with persons lawfully residing, on the territory of the Party concerned before starting training. This does not apply to students and trainees who, without having the above-mentioned ties, entered the territory with the sole purpose of attending training. To this purpose, the Committee recalls that it has held that length of residence or employment requirements for vocational training financial assistance are contrary to the provisions of the Charter[606].

Subparagraph a) of Article 10§5 implies that states must ensure that vocational training is provided free of charge or the fees are reduced.

Subparagraph b) of Article 10§5 obliges State Parties to grant financial assistance in appropriate cases. According to **the European Committee of Social Rights** the importance of financial assistance in the framework of vocational training is, in fact, so great that the very existence of the right protected by Article 10 of the Charter may depend on it[607]. With regard to the granting of financial assistance in appropriate cases, the Committee considers that this meant providing financial assistance to persons who would not otherwise be in a position to undergo apprenticeship or training[608]. Moreover, the level of social scholarship should be adequate in relation to the cost of living[609]. The following criteria for assessing the compliance to the noted provision are also important: a full description of all the allowances and grants available for different training programmes: criteria for awarding allowances, size of allowances, number of allowances granted in relation to number of applicants[610].

Subparagraph c) of Article 10§5 obliges State Parties to include time spent on supplementary training taken by the worker, at the request of his employer, during employment in the normal working hours. This means that the supplementary training taken at the request of employer during employment should be included in the normal working hours.

Subparagraph d) of Article 10§5 obliges State Parties to ensure, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally. It should be noted that **the European Committee of Social Rights** considers participation of workers' organisations in supervising the effectiveness of training schemes as an important element for ensuring the mentioned provision[611].

c) Implementation in Ukraine

Paragraph 1

Regarding to general obligations of States Parties under §1 of Article 10 in the light of secondary and higher education, including insurance of general and vocational secondary education,

606. Conclusions XVI-2 (2003), United Kingdom.
607. Conclusions VIII (1984), Statement of Interpretation on Article 10§5.
608. Conclusions XIII-1 (1993), Turkey.
609. Conclusion XVI-2 (2004), Slovak Republic.
610. Conclusions XIV-2 (1998), Ireland.
611. Conclusions XIV-2 (1998), United Kingdom.

university and non-university higher education and other forms of vocational training, creation mechanisms for the recognition/validation of knowledge and experience acquired in the context of training/working activity etc., the Committee emphasised, that the repeated failure to provide it with requested information as it was stated in the Conclusions 2012,[612] has led to a statement of non-compliancy of the situation in Ukraine with the requirements of Article 10 §1 on the ground of non-establishing the efficient operation of the system of secondary and higher vocational education.[613]

The Committee also pointed out that granting facilities other than financial assistance to students in order to simplify access to technical or university higher education have to be based solely on individual aptitude, and asked next report to provide necessary information on this issue and fulfillment of main indicators interpreted by the Committee, otherwise the next conclusion on this issue could state about con-conformity.[614]

Paragraph 2

Within the examination of Ukrainian legislation concerning apprenticeship, in the Conclusion 2016 Committee reiterated its definition as training based on a contract of employment between the employer and the apprentice that leads to vocational education, which has to combine theoretical and practical training, and recalled the basic criteria for apprenticeship.[615] The Committee requested the appropriate information in the next report, including division of time between practical and theoretical learning, basis of apprenticeship on the contract of employment between the employer and the apprentice and the total spendings.

Generally, it was found that the situation in Ukraine was unconformity with the requirements of Article 10 §2 on the ground of non-establishing an effective system of apprenticeship.[616]

Paragraph 3

In the light of States Parties obligations regarding vocational training and retraining of employed persons under Article 10 §3, the Committee asked Ukraine to provide the information on percentage of employees have undertaken training and about legal regulation of individual leave for training and its characteristics, including length, remuneration, and the initiative to take it.[617]

Regarding unemployed persons, the committee asked statistical information on figures on the total number of unemployed persons having participated in training and in proportion to the total number of unemployed persons, as well as the percentage of those who found a job afterwards.

The presented information in the report for the Conclusion 2016 was not enough as it has already been in the previous cycle. Therefore, the Committee was forced to defer its conclusion.[618]

Paragraph 4

The Committee emphasised twice in its Conclusions 2012, 2016 that there was obligation of State Party to provide the requested information and the absence of it amounted to a breach of the

612. ECSR, Conclusions 2012. Ukraine – Article 10-1. URL: http://hudoc.esc.coe.int/eng?i=2012/def/UKR/10/1/EN
613. ECSR, Conclusions 2016. Ukraine – Article 10-1. URL: http://hudoc.esc.coe.int/eng?i=2016/def/UKR/10/1/EN
614. Ibid.
615. ECSR, Conclusions 2016. Ukraine. Article 10 – 2. P.20.
616. Ibid.
617. ECSR, Conclusions 2016. Ukraine. Article 10 – 3. p.21.
618. Ibid., p.22, ECSR, Conclusions 2012. Ukraine. Article 10 – 3. URL: http://hudoc.esc.coe.int/eng?i=2012/def/UKR/10/3/EN

reporting obligation under the Charter.[619] Taking into account that Ukraine did not provide any information requested, including information on the types of vocational training provided for long-term unemployed persons, reasons for the significant decrease of long-term unemployed individuals that attended vocational training and information on any special measures for the retraining and reintegration of the long-term unemployed, the Committee stated that Ukraine failed to fulfill its obligations under Article 10 §4 on the ground of non-establishing effectively provided or promoted special measures for the retraining and reintegration of the long-term unemployed.[620]

Paragraph 5

Within the examination of the system of financial assistance for vocational education for those in need in Ukraine, the Committee recalled in its Conclusions 2016 about the obligation to provide financial assistance either universally or subject to a means-test, or awarded on the basis of the merit.

However, the repeated absence of any information in national reports on the types of financial assistance available as well as scholarships and loans for vocational education, including higher vocational education forced the Committee to declare the inconformity of the situation in Ukraine to the requirements of Article 10 §5 regarding to non-establishing the system of financial assistance for vocational education and training.[621]

The Committee asked a number of questions for the next report, including coverage of foreigners and stateless persons, residing in Ukraine on legal grounds, with financial assistance for vocational education; information about the inclusion of supplementary time spent on training to the normal working hours, measures taken to evaluate vocational training programmes for young workers.[622]

619. ECSR, Conclusions 2016. Ukraine. Article 10 – 4. p.22, Conclusions 2012. Ukraine. Article 10 – 4. URL: http://hudoc.esc.coe.int/eng?i=2012/def/UKR/10/4/EN
620. ECSR, Conclusions 2016. Ukraine. Article 10 – 4. p.22.
621. ECSR, Conclusions 2016. Ukraine. Article 10 – 5. p.24.
622. Ibid.

Group 2: Health, social security and social protection

The right to protection of health (Article 11)

a) Analysis of the provisions of ESC (revised)

The right to protection of health guaranteed in Article 11 of the Charter is fundamental to enjoyment of all other social rights. It is closely linked to Article 2 (right to life) and Article 3 (right to be free from torture, inhuman or degrading treatment) of the European Convention on Human Rights as interpreted by the ECtHR.[623] The principle of human dignity is the fundamental principle underpinning the right to health, and adequate health care is a prerequisite for the preservation of human dignity.[624]

Pursuant to Article 11 ESC

Article 11 – The right to protection of health

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;

2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;

3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Pursuant to the Explanatory Report to the European Social Charter

Article 11 – The right to protection of health

55. One paragraph has been amended (paragraph 3); the others remain unchanged:

Paragraph 3

56. This paragraph corresponds to Article 11, paragraph 3 of the Charter, with the addition of the word "and accidents". What is required from the Parties is to follow a policy of accident prevention, but each State will be able to decide on its own measures to that end.

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623. Conclusions 2005, Statement of Interpretation on Article 11, <http://hudoc.esc.coe.int/eng?i=2005_Ob_1-1/Ob/EN>, (2 January 2017).
624. International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, Decision on the merits of 3 November 2004, §31, <http://hudoc.esc.coe.int/eng?i=cc-14-2003-dmerits-en>, (2 January 2017).

b) Decisions and conclusions of the European Committee of Social Rights

The **Committee's case law** on this right is very elabourate and detailed. Its interpretation of art. 11 pertains to the content of the 'highest possible standard of health', access to healthcare, and state measures on health education and awareness-raising.

Article 11 (1)

The Committee interprets health as physical and mental well-being, in line with the definition of health in the Constitution of the World Health Organisation (WHO).[625] It analyses the following specific criteria: the right to the highest possible standard of health, and the right of access to health care.

States parties undertake to ensure the best possible state of health for the population according to existing knowledge. This includes both positive obligations to realise the best possible state of health through, inter alia, adequate health services, and negative obligations to refrain from interfering directly or indirectly with this right.[626] For example, any treatment, which is not necessary from a health perspective is in breach of art. 11 if such treatment is a precondition to obtain another right.[627] Similarly, medical treatment without free and informed consent is not in conformity with art. 11.[628]

The main indicators which are assessed by the Committee are life expectancy and principal causes of death. These indicators must show an improvement and should not be lagging far behind the European average.[629] According to the Committee, infant and maternal mortality are additional decisive indicators of the operation of a state party's overall health system.[630] Infant and maternal mortality are avoidable risks and every step should be taken to eliminate these risks.[631] A recurring problem of non-conformity under art. 11(1) is the high infant and maternal mortality rate in some countries, which reveal severe shortcomings in the health system when examined together with other basic health indicators.[632]

Regarding access to healthcare services, the main principle is that the health care system must be accessible to everyone. Restrictions on the application of art. 11 may not result in impeding, in particular, disadvantaged groups' exercise of their right to health. This approach requires a human rights conducive interpretation of the way the personal scope of the Charter is applied in conjunction with art. 11(1),[633] meaning that the restriction through the personal scope should not be read in such a way as to deprive persons not falling within this scope, for example migrants in an irregular situation, of the protection of their most basic rights, such as the right to life or to physical integrity.[634]

625. Conclusions 2005, Statement of Interpretation on Article 11, <http://hudoc.esc.coe.int/eng?i=2005_Ob_1-1/Ob/EN>.
626. CoE (2018), Digest, 127; on negative obligations see Transgender Europe and ILGA Europe v. Czech Republic, complaint no. 117/2015, decision on the merits of 15 May 2018, §74, <http://hudoc.esc.coe.int/eng?i=cc-117-2015-dmerits-en>.
627. Transgender Europe and ILGA Europe v. Czech Republic, supra, § 79.
628. Here, the Committee refers to definition of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: „informed consent is (…) a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers." UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, report A./64/272 of 1 August 2009, cited in Transgender Europe and ILGA Europe v. Czech Republic, §81.
629. Conclusions 2005, Lithuania, <http://hudoc.esc.coe.int/eng?i=2005/def/LTU/11/1/EN>.
630. Conclusions 2003, Romania, <http://hudoc.esc.coe.int/eng?i=2003/def/ROU/11/1/EN>.
631. Conclusions 2003, France, <http://hudoc.esc.coe.int/eng?i=2003/def/FRA/11/1/EN>.
632. CoE (2018), Digest, (fn. 96), 129. Conclusions 2013, Ukraine, <http://hudoc.esc.coe.int/eng?i=2013/def/UKR/11/1/EN>.
633. Conclusions 2005, Statement of Interpretation on Article 11, <http://hudoc.esc.coe.int/eng?i=2005_Ob_1-1/Ob/EN>.
634. Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012, §28), <http://hudoc.esc.coe.int/eng?i=cc-69-2011-dmerits-en>; International Federation of Human Rights Leagues (FIDH) v. France, Complaint No.14/2003, Decision on the Merits of 8 December 2004, §§ 30-31.

The Committee has developed detailed criteria regarding access to health:

- the cost of health care should be borne, at least partly, by the "collective bodies" in the health care system;[635] it may not lead to an excessively heavy burden for the individual. Out-of-pocket payments should not be the main source of funding of the health system.[636] Steps must also be taken to reduce the financial burden on patients from disadvantaged communities;[637]

- arrangements for access to health care must not lead to unnecessary delays. The management of waiting lists and waiting times must be based on transparent criteria, agreed at national level, taking into account the risk of deterioration in either clinical condition or quality of life of the patient;[638]

- the number of health care professionals and equipment must be adequate given the national situation. In the case of hospitals, the objective laid down by the WHO of 3 beds per thousand population is one key indicator.[639] A low density of hospital beds in combination with waiting lists, could be an obstacle to access to health care and therefore a ground for non-conformity with art. 11(1).[640] Conditions in hospitals, including psychiatric hospitals, must be satisfactory and generally compatible with the principle of human dignity.[641]

As part of the positive obligations arising from art. 11(1), the Committee requires states parties to provide appropriate and timely care on a non-discriminatory basis, including services relating to sexual and reproductive health. As a result, a health care system which does not provide for the specific health needs of women, for example in view of pregnancy, will not be in conformity with art. 11, or with art. E RESC (non-discrimination) in conjunction with art. 11.[642]

Article 11 (2)

According to the Committee's interpretation, there are two obligations under art. 11(2): education and awareness-raising, as well as counselling and screening services.

In view of education and awareness-raising, the Committee requires that public health policy pursues the promotion of public health in conformity with the objectives set by the WHO. National rules must provide for information of the public, education and participation regarding health policies. States parties have to demonstrate through concrete measures that they implement a public health education policy in favour of the general population and population groups affected by specific health issues.[643] Informing the public, particularly through awareness-raising campaigns, must be a public health priority. The precise extent of these activities will vary according to the nature of the national public health concerns.[644] Measures should be introduced to prevent activities that are damaging to public health, such as smoking, alcohol and drugs, and

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635. Conclusions I (1969), Statement of Interpretation on Article 11, <http://hudoc.esc.coe.int/eng?i=I_Ob_-43/Ob/EN>; Conclusions XV-2 (2001), Cyprus, <http://hudoc.esc.coe.int/eng?i=XV-2/def/CYP/11/1/EN>.
636. Conclusions 2013, Georgia, <http://hudoc.esc.coe.int/eng?i=2013/def/GEO/11/1/EN>.
637. Conclusions XVII-2 (2005), Portugal, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/PRT/11/1/EN>.
638. The Committee refers to CoE Committee of Ministers Recommendation (99)21 on „criteria for the management of waiting lists and waiting times in health care". See Conclusions XV-2 (2001), United Kingdom, <http://hudoc.esc.coe.int/eng?i=XV-2/def/GBR/11/1/EN>; Conclusions XX-2 (2013), Poland, <http://hudoc.esc.coe.int/eng?i=XX-2/def/POL/11/1/EN>.
639. Conclusions XV-2 (2001), Turkey, <http://hudoc.esc.coe.int/eng?i=XV-2/def/TUR/11/1/EN>.
640. Conclusions XV-2 (2001), Denmark, <http://hudoc.esc.coe.int/eng?i=XV-2/def/DNK/11/1/EN>.
641. Conclusions 2005, Statement of Interpretation on Article 11, <http://hudoc.esc.coe.int/eng?i=2005_Ob_1-1/Ob/EN>, (2 January 2017); Conclusions 2005, Romania, <http://hudoc.esc.coe.int/eng?i=2005/def/ROU/11/1/EN>.
642. International Planned Parenthood Federation – European Network (IPPF EN) v. Italy, complaint No. 87/2012, decision on the merits of 10 September 2013, § 66, <http://hudoc.esc.coe.int/eng?i=cc-87-2012-dmerits-en>.
643. Marangopoulos Foundation for Human Rights (MFHR) v. Greece, complaint No. 30/2005, decision on the merits of 6 December 2006, §§ 216 and 219, <http://hudoc.esc.coe.int/eng?i=cc-30-2005-dmerits-en>.
644. Conclusions 2007, Albania, <http://hudoc.esc.coe.int/eng?i=2007/def/ALB/11/2/EN>.

to develop a sense of individual responsibility, including issues such as a healthy diet, sexual and reproductive health, and protection of the environment.[645]

Health education must be carried out throughout school life and be part of the school's curriculum.[646] Health education in schools must be provided throughout the entire period of schooling and should cover the following subjects: prevention of smoking and alcohol abuse, sexual and reproductive health education,[647] in particular with regard to prevention of sexually transmitted diseases and AIDS, road safety and promotion of a healthy diet.[648]

The Committee takes into account that cultural and religious norms, social structures, economic factors etc. vary across Europe and that States Parties have a margin of appreciation regarding content and delivery of sexual and reproductive health education.

However, the following standards should be taken into account which the Committee developed in International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, complaint No. 45/2007, decision on the merits of 30 March 2009:

- sexual and reproductive health education is part of the school curriculum;
- the education provided is adequate in quantitative terms, i.e. in respect of the time and other resources devoted to it (teachers, teacher training, teaching materials, etc.).
- the form and substance of education, including teaching methods, are culturally appropriate and of sufficient quality, based on contemporary scientific evidence, and does not involve withholding or intentionally misrepresenting information, for example as regards contraception and different means of maintaining sexual and reproductive health;
- a procedure is in place for monitoring and evaluating the education with a view to effectively meeting the above requirements[649].

With regard to medical counselling and screening, there must be free and regular consultation and screening services for pregnant women and children throughout the country.[650] Free medical checks must be carried out throughout the period of schooling. The assessment of compliance takes into account the frequency of school medical examinations, their objectives, the proportion of school children concerned and the number of staff.[651] There should be screening for all diseases that are major causes of death.[652] Where it has proved to be an effective means of prevention, screening must be used to its full extent.[653]

Article 11 (3)

Three thematic areas are examined by the Committee in order to assess compliance under art. 11(3): prevention of various forms of accidents; a healthy environment; drug use, immunisation & epidemiological monitoring.

Regarding accidents, states parties must take concrete steps of prevention, in particular through

645. International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, complaint No. 45/2007, decision on the merits of 30 March 2009, §43, <http://hudoc.esc.coe.int/eng?i=cc-45-2007-dmerits-en>. CoE (2018), Digest, 131.
646. In this respect, the Committee of Ministers' Recommendation No R(88)7 on school health education and the role and training of teachers is taken into account by the Committee as a relevant standard. CoE (2018), Digest, 131.
647. International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, complaint No. 45/2007, decision on the merits of 30 March 2009, §46, <http://hudoc.esc.coe.int/eng?i=cc-45-2007-dmerits-en>.
648. Conclusions 2013, Montenegro, <http://hudoc.esc.coe.int/eng?i=2013/def/MNE/11/2/EN>.
649. <http://hudoc.esc.coe.int/eng?i=cc-45-2007-dmerits-en>
650. Conclusions 2005, Moldova, <http://hudoc.esc.coe.int/eng?i=2005/def/MDA/11/2/EN>.
651. Conclusions XV-2 (2001), France, <http://hudoc.esc.coe.int/eng?i=XV-2/def/FRA/11/2/EN>.
652. Conclusions XV-2 (2005), Moldova, <http://hudoc.esc.coe.int/eng?i=2005/def/MDA/11/2/EN>.
653. Conclusions XV-2 (2001), Belgium, <http://hudoc.esc.coe.int/eng?i=XV-2/def/BEL/11/2/EN>.

awareness-raising and training programmes. The Committee interprets the scope of accidents quite widely (accidents at work, at home, at school, and during leisure activities.)[654] However, trends in accidents at work are mainly considered under art. 3 (health and safety at work).[655]

In view of the preventive nature of art. 11(3), states parties must apply the precautionary principle, which means that when a preliminary scientific evaluation indicates that there are reasonable grounds for concern regarding potentially dangerous effects on human health, the state party must take adequate measures to prevent those risks.

This principle was developed in collective complaint no. 72/2012, International Federation of Human Rights v. Greece, the ECSR held that the severe industrial pollution of the Aesopos River amounted to a violation of the right to health of the people living in that region[656].

Regarding a healthy environment, the Committee examines a wide range of issues. Besides pollution, states parties have to report on the situation regarding water management, nuclear waste, asbestos, and food security.[657]

Overcoming pollution is an objective that can only be achieved gradually and is therefore subject to progressive realisation. States parties must strive to attain this objective within a reasonable time, by showing measurable progress and making the best possible use of the resources at their disposal.[658] The measures taken are assessed with reference to national legislation and regulations and legal commitments vis-à-vis the European Union and the United Nations,[659] and how the relevant legal framework is applied in practice.

According to the Committee, the protection of a healthy environment requires States Parties to:

- develop and regularly update sufficiently comprehensive environmental legislation and regulations;[660]

- take specific steps, such as modifying equipment, introducing threshold values for emissions and measuring air quality, to prevent air pollution at local level[661] and to help to reduce it globally. In the case of global pollution, emission control is assessed with reference to the objectives set for implementation of the UN Framework Convention on Climate Change (UNFCC) of 9 May 1992, and of the Kyoto Protocol to the UNFCC of 11 December 1997;[662]

- ensure that environmental standards and rules are properly applied, through appropriate supervisory machinery, including measures such as sanctions which are sufficiently dissuasive and have a direct effect on polluting emission levels;[663]

- assess health risks through epidemiological monitoring of the groups concerned.[664]

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654. Conclusions 2005, Moldova, <http://hudoc.esc.coe.int/eng?i=2005/def/MDA/11/3/EN>.
655. For details see art. 3 RESC.
656. Collective Complaint No. 72/2011, decision on the merits of 23 January 2013, § 150, <http://hudoc.esc.coe.int/eng?i=cc-72-2011-dmerits-en>
657. CoE (2018), Digest, 133-134.
658. Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §§ 203 and 205, <http://hudoc.esc.coe.int/eng?i=cc-30-2005-dmerits-en>.
659. Conclusions XV-2 (2001), Italy, <http://hudoc.esc.coe.int/eng?i=XV-2/def/ITA/11/3/EN>.
660. Conclusions XV-2 (2001), Slovak Republic, <http://hudoc.esc.coe.int/eng?i=XV-2/def/SVK/11/3/EN>.
661. Supra, fn. 854.
662. Supra, fn. 854.
663. Supra, fn. 853, §§ 203, 209, 210 and 215.
664. Id, fn. §§ 203 and 220.

Moreover, States Parties have to take preventive and protective measures concerning clean water. A situation where availability of drinking water is still a problem for a significant proportion of the population is in breach of the Charter.[665]

The Committee has also developed standards to protect the right to health in view of nuclear hazards, asbestos, noise pollution, and food safety.

As regards drug abuse, anti-smoking measures are particularly relevant for the compliance with art. 11 since smoking is a major cause of avoidable death in Europe. The WHO has set a target for European countries of raising the proportion of non-smokers in the population to at least 80% and protecting non-smokers against involuntary exposure to tobacco smoke.[666] WHO indicators and the Framework Convention on Tobacco Control are taken into consideration for the Committee's assessment of compliance with art. 11(3).[667] In order to be effective, any prevention policy must restrict the supply of tobacco products through controls on production, distribution, advertising and pricing.[668] In particular, the sale of tobacco products to young persons must be banned,[669] as must smoking in public places,[670] including public transport, and advertising it with posters and in the press.[671] The effectiveness of such policies is assessed on the basis of statistics on tobacco consumption. This assessment also applies mutatis mutandis to alcohol and drug addiction measures.

Regarding immunisation and epidemiological monitoring, the Committee requires the implementation of widely accessible immunisation programmes. States parties have to maintain high coverage rates as large-scale vaccination is recognised as the most efficient and most economical means of combating infectious and epidemic diseases.[672] States parties must demonstrate their ability to cope with infectious diseases, through arrangements such as reporting and notifying about diseases, special treatment for AIDS patients and emergency measures in the case of epidemics.[673]

In April 2020, the Committee issued a **statement on the right to protection of health in times of pandemics** which further outlined state obligations regarding the right to health in this specific situation[674].

c) Implementation in Ukraine

Paragraph 1

Measures to ensure the highest possible standard of health

The Committee has analysed the information provided by the Government of Ukraine, WHO and the World Bank data related to the life expectancy and death rate and considers that the prevailing high infant and maternal mortality rates, examined together with the low life expectancy rate, show that the situation in Ukraine is below the average in other European countries which confirms the weaknesses in the health system. The low progress toward mentioned indicators has caused the previous conclusion of non-conformity to be kept.[675]

665. Conclusions 2013, Georgia, <http://hudoc.esc.coe.int/eng?i=2013/def/GEO/11/3/EN>.
666. Conclusions XV-2 (2001), Greece, <http://hudoc.esc.coe.int/eng?i=XV-2/def/GRC/11/3/EN>.
667. Conclusions 2013, Malta, <http://hudoc.esc.coe.int/eng?i=2013/def/MLT/11/3/EN>.
668. Conclusions XVII-2 (2005), Malta, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/MLT/11/3/EN>.
669. Conclusions XV-2 (2001), Portugal, <http://hudoc.esc.coe.int/eng?i=XV-2/def/PRT/11/3/EN>.
670. Conclusions 2013, Andorra, <http://hudoc.esc.coe.int/eng?i=2013/def/AND/11/3/EN>.
671. Conclusions XV-2 (2001), Greece, <http://hudoc.esc.coe.int/eng?i=XV-2/def/GRC/11/3/EN>.
672. Conclusions XV-2 (2001), Belgium, <http://hudoc.esc.coe.int/eng?i=XV-2/def/BEL/11/3/EN>.
673. Conclusions XVII-2 (2005), Latvia, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/LVA/11/3/EN>.
674. https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640
675. Conclusions 2017, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2017/def/UKR/11/1/EN>, (8 December 2017)

Access to health care

The Committee emphasizes that arrangements for access to care must not lead to excessive delays in its provision. The Committee requests to provide the next report with statistical data on the actual average waiting time for primary and specialised care as well as inpatient and outpatient care, including surgeries. Similarly there was requested the information on the possibility of mental health care and treatment services, including information on the prevention of mental disorders and recovery measures.

While analysing the data the Committee pointed out the cost of health care that must not represent an excessively heavy burden for the individual and the out-of-pocket payments should not be the main source of funding of the health system.[676] Summing up the above mentioned the Committee concludes that the situation is not in conformity with Article 11§1 of the Charter based on unsatisfactory measures that have been taken to effectively guarantee the right of access to health care.

Paragraph 2

The Committee evaluated the situation in Ukraine on conformity with Article 11§2 of the Charter on two aspects: education and awareness raising; counselling and screening.

Education and awareness raising

The Committee previously examined the situation in Ukraine and found that it was not in conformity with Article 11§2 of the Charter (Conclusions 2013,[677] 2015)[678] on the ground that it has not been recognised that public information and awareness raising is the main concern of public health.

It was reminded that health education should be provided at school and be are part of school curricula. The same is related the sexual and reproductive health education. In that regards the Committee referred to the decision of INTERIGHTS v. Croatia which stated that

> States Parties must ensure that sexual and reproductive health education forms part of the ordinary school curriculum; that the education provided is adequate in quantitative terms; that the form and substance of the education, including curricula and teaching methods, are relevant, culturally appropriate and of sufficient quality, in particular that it is objective, based on contemporary scientific evidence and does not involve censoring, withholding or intentionally misrepresenting information, for example as regards contraception and different means of maintaining sexual and reproductive health; and that a procedure is in place for monitoring and evaluating the education with a view to effectively meeting the above requirements.[679]

The Committee requests the information on how sexual and reproductive education is delivered in schools in Ukraine to be provided in the next report.[680]

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676. Ibid.
677. Conclusions 2013, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2013/def/UKR/11/2/EN>, (6 December 2013)
678. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/11/2/EN>, (4 December 2015)
679. International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, Complaint No. 45/2007, Decision on the merits of 30 March 2009, §47, <http://hudoc.esc.coe.int/eng/?i=cc-45-2007-dmerits-en>
680. Conclusions 2017, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2017/def/UKR/11/2/EN>, (8 December 2017)

Counselling and screening

Taking into account the rate of maternal mortality the Committee asks information on the frequency and results of the consultation and screening for pregnant women throughout the country. The same request was also related to the information on population at large.

The Committee emphasised the same as in the conclusion for Moldova[681] that should provide screening for the diseases which cause the major cause of death. The Committee has stated that "where it has proved to be an effective means of prevention, screening must be used to the full" as in the conclusion made for Belgium.[682]

Based on the provided information from the Government of Ukraine the Committee stated that there are no screening programs existing for all the population. That Ukrainian situation is not in conformity with Article 11§2 of the Charter on the ground that prevention through screening is not used as a contribution to the health of population.

Paragraph 3

The situation in Ukraine was examined by the Committee on conformity with Article 11§3 of the Charter related following approaches: healthy environment; tobacco, alcohol and drugs; immunisation and epidemiological monitoring; and accidents.

Healthy environment

The Committee had analysed the different sections of Ukrainian legislation and regulations provided in different periods on the reduction of environmental risks in respect of the air quality, water and waste management, environmental noise, food safety and ionising radiation.

In the latest conclusion the Committee asks for the information on measures applied to reduce environmental risks and tendencies in respect of air pollution, asbestos, contamination of drinking water and food intoxication.

Tobacco, alcohol and drugs

Taking into account the WHO Report on the global tobacco epidemic, the Committee wonders whether the indoor offices and workplaces are not smoke-free locations in Ukraine and requested the information on action are taken to resolve this issue. Also, it asks on updated data on the levels and tendencies with regard to tobacco, alcohol and drugs consumption, and the measures taken to decrease and prevent the consumption.

Immunisation and epidemiological monitoring

At the beginning of monitoring the situation in Ukraine the Committee pointed the low vaccination coverage rate of infants. In this regards it requests the data on the vaccination coverage rate for the vaccines included in the National Immunisation Programme.[683]

The Committee recalls the conclusions to Belgium stating that States Parties must operate widely accessible immunisation programmes. "They must maintain high coverage rates not only to reduce the incidence of these diseases, but also to neutralise the reservoir of the virus and thus achieve

681. Conclusions 2005, Moldova, <http://hudoc.esc.coe.int/eng/?i=2005/def/MDA/11/2/EN>, (30 June 2005)
682. Conclusions 2001, Belgium, <http://hudoc.esc.coe.int/eng/?i=XV-2/def/BEL/11/2/EN>, (31 December 2001)
683. Conclusions 2017, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2017/def/UKR/11/3/EN>, (8 December 2017)

the goals set by WHO to eradicate several infectious diseases."[684] As well as in the conclusions to Latvia it is repeated that countries must demonstrate their ability to cope with infectious diseases, including arrangements for reporting and notifying diseases, special treatment for AIDS patients, emergency measures in case of epidemics.[685]

Based on above, the Committee has evaluated that the situation in Ukraine is not in conformity with Article 11§3 of the Charter taking into account that efficient immunisation and epidemiological monitoring programmes are not relevant to the general requirements.

Accidents

The Ukrainian report does not provide information in this respect and the Committee requires the information on measures or policies taken for reduction and prevention the number of different type of accidents including the road and domestic accidents as well as tendencies in this sphere.

There is not relevant national case-law of applying article 11 of the Charter.

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684. Conclusions 2001, Belgium, <http://hudoc.esc.coe.int/eng/?i=XV-2/def/BEL/11/3/EN>, (31 December 2001)
685. Conclusions 2005, Latvia, <http://hudoc.esc.coe.int/eng/?i=XVII-2/def/LVA/11/3/EN>, (30 June 2005)

Group 2: Health, social security and social protection

The right to social security (Article 12)[686]

a) Analysis of the provisions of ESC (revised)

Social security and social protection play significant role in proper and thorough implementation of social rights. The discussed area is covered by the European Social Charter (revised) via various articles and rights. **Part I of the ESC** sets forth the right of all workers and their dependents to social security. Further, provisions of Article 12 (the right to social security), Article 14 (the right to benefit from social welfare services), Article 16 (the right of the family to social, legal and economic protection), Article 17 (the right of children and young persons to social, legal and economic protection), Article 23 (the right of elderly persons to social protection), Article 30 (the right to protection against poverty and social exclusion), Article 31 (the right to housing), etc. define regulations on this or that aspect of social security and social protection.

Article 12 of the European Social Charter (revised) states the obligations Parties undertake with a view to ensuring the effective exercise of the right to social security. It is considerable that according to **the European Committee of Social Rights** this right concerns also the self-employed workers[687].

Pursuant to Article 12§1 ESC

> **Article 12 The right to social security**
>
> With a view to ensuring the effective exercise of the right to social security, the Parties undertake:
>
> 1. to establish or maintain a system of social security;
>
> 2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
>
> 3. to endeavour to raise progressively the system of social security to a higher level;
>
> 4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
>
> a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;

686. Nowadays, Ukraine has not accepted paragraphs 1 and 2 of the Article 12 of the ESC.
687. Conclusions XIV-1 (1998), Ireland.

b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

Pursuant to the **Appendix**

" 1. Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19…

… ***Article 12, paragraph 4***

The words "and subject to the conditions laid down in such agreements" in the introduction to this paragraph are taken to imply inter aliathat with regard to benefits which are available independently of any insurance contribution, a Party may require the completion of a prescribed period of residence before granting such benefits to nationals of other Parties.

Pursuant to the **Explanatory Report to the European Social Charter**

" 57. One paragraph has been amended (paragraph 2); the others remain unchanged:

Paragraph 2

58. Reference is made in this paragraph to the European Code of Social Security. The difference between ILO Convention No. 102 and the European Code of Social Security relates to the minimum requirements as to how many parts must be accepted for the ratification of these instruments (three for the Convention; six for the Code). The ratification of the Revised Code requires a higher standard of social security than is required for the ratification of ILO Convention No. 102.

59. The authors of the text considered that the European Code of Social Security (Revised) could be taken into account in relation to Article 12, paragraph 3.

b) Decisions and conclusions of the European Committee of Social Rights

Article 12§1 requires State Parties to ensure this right through establishing and maintaining a system of social security, which should be established by law and function in practice.

According to the **case-law of the European Committee of Social Rights** the principle of collective funding is a fundamental feature of a social security system as foreseen by Article 12 as it ensures that the burden of risks are spread among the members of the community in an equitable and economically appropriate manner and contributes to avoiding discrimination of vulnerable categories of workers[688]. According to the European Committee of Social Rights the mere existence of a social security system is not satisfactory: the system in question should cover a significant percentage of the population and at least offer effective benefits in several areas[689]. Within the meaning of Article 12§1 social security system should also cover the traditional risks and therefore provide the following benefits: medical care, sickness benefit, unemployment benefit, old age benefit, employment injury benefit, family benefit, and maternity benefit[690]. The system should cover a significant percentage of the active population as regards income-replacement benefits, such as sickness, maternity and unemployment benefits, pensions, and work accidents or occupational diseases benefits.

It is also important to note that according to the European Committee of Social Rights social security benefits and other benefits, notably social assistance benefits, should be distinguished.

> In making the distinction between social security benefits and social assistance benefits under Article 12 and Article 13 respectively it pays attention to the purpose of and the conditions attached to the benefit in question. As far as social security benefits are concerned, these are benefits granted in the event of risks which arise but they are not intended to compensate for a potential state of need which could result from the risk itself (Statement of interpretation on Articles 12 and 13, Conclusions XIII-4)[691].

> Social security, which includes universal schemes as well as professional ones, is seen by the Committee in its application of Article 12 of the Charter as including contributory, non-contributory and combined allowances related to certain risks (sickness, disablement, maternity, family, unemployment, old age, death, widowhood, vocational accidents and illnesses). These are benefits granted in the event of risks which arise but they are not intended to compensate for a potential state of need which could result from the risk itself.[692]

Article 12§2 of the European Social Charter (revised) obliges States Parties to establish and maintain a social security system at a satisfactory level which is at least equal to that required for ratification of the European Code of Social Security. The European Code of Social Security

688. Conclusions 2006, the Netherlands.
689. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12.
690. Conclusions 2006, Bulgaria; Conclusions 2013, Georgia.
691. Finnish Society of Social Rights v. Finland, Complaint No. 108/2014, §27, Decision on the merits of 4 December 2016.
692. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12.

aims at encouraging the development of social security in all member States of the Council of Europe in order that they may gradually reach the highest level possible. The Code fixes a series of standards which Parties undertake to include in their social security systems. The Code defines norms for social security coverage and establishes minimum levels of protection which Parties must provide in such areas as medical care, sickness benefits, unemployment benefit, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits, survivors' benefits, etc.

According to **the case-law of the European Committee of Social Rights** in order to comply with Article 12§2 of the Charter the social security system of states party shall satisfy, at least, six risks (old-age counting per three under the European Code of Social Security)[693]. When the State concerned has not ratified the European Code of Social Security, the social security system is assessed in order to decide on the conformity with Article 12§2[694]. In order to examine whether the social security system is at a level at least equal to that necessary for the ratification of the Code thorough information should be provided regarding the branches covered, the personal scope and the level of benefits offered. Findings under Article 12§1 are also taken into account.

Article 12§3 of the European Social Charter (revised) obliges state parties to endeavour to raise progressively the system of social security to a higher level.

Clarifying the content of the discussed obligation, **the European Committee of Social Rights** stated that Article 12§3 requires states to improve their social security system. In particular, expansion of schemes, protection against new risks or increase of benefits are examples of such improvement. In order to ascertain whether the changes introduced do not infringe the principle and spirit of social security, the Committee makes a reasoned assessment of changes to the situation[695]. Moreover, the Committee considers that Article 12§3 does not presuppose existence of a social security system of a higher level than that required under Article 12§1 or Article 12§2. A situation of progress may consequently be in conformity with Article 12§3 even though the social security system has not attained the levels required under the two first paragraphs of Article 12. A partly restrictive evolution in the social security system is not automatically in breach of Article 12§3[696]. The following information and criteria are used for the assessment of the situation in each concrete case:

- The nature of the changes (field of application, conditions for granting allowances, amounts of allowance, lengths etc...);

- The reasons given for the changes (the aims pursued) and the framework of social and economic policy in which they arise;

- The extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);

- The existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made (this information can be submitted under Article 13);

- The results obtained by such changes (their adequacy)[697].

693. Conclusions 2006, Italy.
694. Conclusions XIV-1 (1998), Finland.
695. Conclusions 2013, Georgia.
696. Conclusions 2009, Statement of Interpretation on Article 12§3.
697. Conclusions XVI-1 (2002), Statement of Interpretation on Article 12§3.

The **decision of the European Committee of Social Rights** of 7 December 2012 is worth mentioning in this context, which found a violation of Article 12§3 based on the following statements:

> 78. In contrast, the Committee considers that the cumulative effect of the restrictions, as described in the information provided by the complainant trade union (see paragraphs 56-61 above), and which were not contested by the Government, is bound to bring about a significant degradation of the standard of living and the living conditions of many of the pensioners concerned.
>
> 79. Even taking into account the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions, the Committee furthermore considers that the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society. Neither has it discussed the available studies with the organisations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue.
>
> 80. As a result, the Committee considers that it has not been discovered whether other measures could have been put in place, which may have limited the cumulative effects of the contested restrictions upon pensioners.
>
> 81. In general, the Committee thus concludes that the Government has not established, as is required by Article 12§3, that efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about a large scale pauperisation of a significant segment of the population, as has been observed by various international organisations (see paragraphs 36 and 47 above).
>
> 82. The Committee finally holds, as has been done by the Court as concerns the Convention, that any decisions made in respect of pension entitlements must respect the need to reconcile the general interest with individual rights, including any legitimate expectations that individuals may have in respect of the stability of the rules applicable to social security benefits. The Committee concludes that the restrictive measures at stake, which appear to have the effect of depriving one segment of the population of a very substantial portion of their means of subsistence, have been introduced in a manner that does not respect the legitimate

expectation of pensioners that adjustments to their social security entitlements will be implemented in a manner that takes due account of their vulnerability, settled financial expectations and ultimately their right to enjoy effect access to social protection and social security. However, the Committee considers that other mechanisms are more suited to address complaints relating to the effects of the contested legislation on individual pensioners' right to property. In this regard, also domestic courts are in a significant role.

83. The Committee holds, consequently, that due to the cumulative effect of the restrictive measures and the procedures adopted to put them into place, contained in the laws Nos. 3845 of 6 May 2010, Act No. 3847 of 11 May 2010, Act No. 3863 of 15 July 2010, Act No. 3865 of 21 July 2010, Act No. 3896 of 1 July 2011, Act No. 4024 of 27 October 2011, Act No. 3833 of 15 March 2010, Act No. 3866 of 26 May 2010, Act No. 3986 of 1 July 2011, Act No. 4002 of 22 August 2011, Act No. 4051 of 28 February 2012 and Act No. 4093/2012 of12 November 2012, they constitute a violation of Article 12§3 of the 1961 Charter[698].

Hence, even if specific restrictive measures are in conformity with the Charter, their cumulative effect could amount to a violation of Article 12§3. In view of the close relationship between the economy and social rights, the pursuit of economic goals is not incompatible with Article 12. At the same time, any modifications should not undermine the effective social protection of all members of society against social and economic risks and should not transform the social security system into a basic social assistance system or a system of minimum assistance. In any event any changes to a social security system must nonetheless ensure the maintenance of a basic compulsory social security system which is sufficiently extensive and did not prevent members of society from continuing to enjoy effective protection against social and economic risks[699].

According to the Committee, the effective social protection of all the members of society, which should be the aim of all the states having accepted Article 12 para. 3, involves maintaining in the Contracting Parties social security systems functioning through solidarity, as this represents a basic safeguard against differentiation in this field. Financing by the community as a whole in the form of contributions and/or taxes is a vital factor of this safeguard, as it guarantees the sharing of risks between the various members of the community[700].

The position of the European Committee of Social Rights is also worth mentioning, according to which

" the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter.

698. Federation of employed pensioners of Greece (IKA-ETAM) v. Greece, Complaint No. 76/2012, Decision on the merits of 7 December 2012, §§78-83.
699. Federation of employed pensioners of Greece (IKA-ETAM) v. Greece, Complaint No. 76/2012, decision on the merits of 7 December 2012, §71; Conclusions XIV-1 (1998), Statement of Interpretation on Article 12; Finnish Society of Social Rights v. Finland, Complaint No.88/2013, decision on the merits of 9 September 2014, §85-86.
700. Conclusions XIV-1 (1998); Statement of Interpretation on Article 12.

> Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most[701].

Article 12§4 subparagraph a) obliges State Parties to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties.

Paragraph 1 of the Appendix to the European Social Charter is worth mentioning for defining the personal scope of the discussed provision. It, in particular, reads:

> Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.

The personal scope of Article 12§4 extends to refugees and stateless persons. Self-employed workers are also covered by the discussed provision[702].

Article 12§4 subparagraph b) obliges State Parties to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

The maintenance of accruing rights may be implemented either via conclusion of appropriate bilateral and multilateral agreements or unilaterally – by various legislative or administrative measures.

According to **the European Committee of Social Rights**

> ... the appendix to Article 12 para. 4 allow Contracting Parties to require the recipients of non-contributory benefits who are nationals of other Contracting Parties to complete a prescribed period of residence. However, ... the Committee reserves the right to assess the proportionality of length of residence required[703].

Moreover, the wording "and subject to the conditions laid down in such agreements" in the introduction to Article 12§4 may imply inter alia that a Party may require the completion of a prescribed period of residence before granting such benefits to nationals of other Parties.

701. Conclusions 2013, Lithuania.
702. Conclusions XIV-1 (1998), Turkey.
703. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12§4.

In one of the cases the Committee concluded:

> The report confirms that in order to become entitled to benefits which are based on permanent residence status, a foreign national must have been living in Lithuania without interruptions for the past five years. The Committee considers that this amounts to a length of residence requirement which is not in conformity with the Charter where contributory social security benefits are concerned. Moreover, although the Appendix to Article 12§4 permits states to require the completion of a prescribed period of residence before granting non-contributory benefits to non-nationals, the Committee considers a period of five years to be too long[704].

At the same time, the position of the European Committee of Social Rights should be taken into account that "[Article 12 para. 4] does not require reciprocity: it directly empowers the Contracting Parties to implement its principles by means other than concluding bilateral or multilateral agreements"[705]. Hence, Article 12§4 did not require that bilateral agreements exist, nor was it based on principles of reciprocity. Any state having accepted it could comply either through bilateral agreement or through unilateral action[706].

The right to equal treatment is concerned in the frames of the discussed provisions of the Charter. According to the European Committee of Social Rights it, in particular, presupposes:

> ... equal treatment between the nationals of all the Contracting Parties to the Charter presupposes ... not to grant entitlement to social security benefits solely to their own nationals or those of specific Contracting Parties, [nor] to impose additional conditions on nationals of other Contracting Parties. This rule has its limits because the appendix to Article 12 para. 4 allow Contracting Parties to require the recipients of non-contributory benefits who are nationals of other Contracting Parties to complete a prescribed period of residence. However, ... the Committee reserves the right to assess the proportionality of length of residence required[707].

The right to equal treatment presupposes exception of any form of discrimination, namely, both direct and indirect discrimination. In one of its conclusions the European Committee of Social Rights stated that

> the Contracting Parties should avoid indirect discrimination, for instance conditions which are imposed on both their own nationals and those of other Contracting Parties but are more difficult for the latter to meet and which therefore represent a greater obstacle for them[708].

704. Conclusions 2004, Lithuania.
705. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12§4.
706. Conclusions XIII-2 (1994), Norway.
707. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12§4.
708. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12§4.

What about the **child benefits the European Committee of Social Rights** concluded that a residence requirement in respect of children is in conformity with Article 12§4[709]. At the same time, the Committee stated that

> As regards the payment of family benefits, the Committee considers that according to Article 12§4, any child resident in a state party is entitled to the payment of family benefits on an equal footing with nationals of the state concerned. Therefore, whoever is the beneficiary under the social security system, i.e. whether it is the worker or the child, state party are under the obligation to secure through unilateral measures the actual payment of family benefits to all children residing on their territory. In other words, imposing an obligation of residence of the child concerned on the territory of the state is compatible with Article 12§4 and its Appendix. However since not all countries apply such a system, states applying the 'child residence requirement' are under the obligation, in order to secure equal treatment within the meaning of Article 12§4, to conclude within a reasonable period of time bilateral or multilateral agreements with those states which apply a different entitlement principle[710].

In this context it should also be noted that equality of treatment does not necessarily mean that family allowances should be paid at the same amount when the children for whom it is granted are not residents of the same country as the recipient. The European Committee of Social Rights considers that the level of benefit may in this case be reduced where the cost of living in the child's country of residence is significantly lower. Hence, family allowance can in principle be paid at a reduced rate when the children do not reside within the territory of the institution paying the benefit, provided that the cost of living in the children's country of residence is considerably lower and the reduction is proportional to the difference in the cost of living between the countries in question[711].

What about the invalidity benefit, old age benefit, survivor's benefit and occupational accident or disease benefit acquired under the legislation of one state according to the eligibility criteria laid down under national legislation are maintained irrespective of whether the beneficiary moves between the territories[712]. Due to the particular nature of unemployment benefit, which is a short-term benefit closely linked to trends in the labour market, Article 12§4 does not require it to be exported[713].

What about **Article 12§4(b)**, according to **the European Committee of Social Rights** states that have ratified the European Convention on Social Security are presumed to have made sufficient efforts to guarantee the retention of accruing rights and to secure equal treatment as regards aggregation of insurance or employment periods towards non-nationals[714].

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709. Conclusions 2006, Statement of Interpretation on Article 12§4.
710. Conclusions 2006, Cyprus.
711. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12§4; Conclusions XIV-1 (1998), Germany.
712. Conclusions XIV-1 (1998), Finland; Conclusions XIV-1(1998) Norway.
713. Conclusions XVI-1 (2002), Belgium.
714. Conclusions 2006, Italy.

c) Implementation in Ukraine

Initially, when Ukraine ratified the ESC in 2006, none of the paragraphs of the Article 12 of the Charter had been accepted.

Upon examination of Ukrainian report on non-accepted provisions 2017, the Committee stated that there were no significant obstacles, in law and practice, for the acceptance paragraphs 12.2 and 12.3 of the Charter by Ukraine. However, the necessity of additional clarification led to defer the final opinion about the 12.2.

By contrast, the Committee reached the opposite conclusions on paragraphs 1 and 4 of Article 12 of the Charter. In the Committee's view, the situation in Ukraine was not fully in compliance with mentioned parts of the Article 12.[715]

Later that year, when the result of the Committee's examination was presented, Ukraine decided to be bound by paragraphs 3 and 4 of the Article 12 of the Charter.

Non-accepted paragraphs 1, 2 of the Article 12

Paragraph 1

Nowadays, Ukraine has not accepted paragraphs 1 and 2 of the Article 12 of the ESC.

In the Conclusions 2017, the ESC agreed that the social security system of Ukraine has covered the traditional risks demanded by Article 12§1, but the Committee underlined that a social security system had to guarantee the adequacy of the benefits served and reiterated its opinion according to which, some types of benefits was found insufficient to meet the criteria of adequacy within the first examination. From that time, no information indicating that the level of benefits had been significantly improved, was provided.[716]

The Ukrainian social security system is based on several dozens of comprehensive laws and hundreds of regulatory acts. Many of them have a lack of harmonisation with budget expenditures; some acts are outdated, do not correspond to present-day realities in social security and are discordant inter se. The system of social benefits, subsidies and types of aid is rather extensive and confusing; there is no precise official data on the number of existing types of different payments, benefits, allowances and supplements.[717] The amount of some social payments is unexplained. The victims of the Chornobyl disaster have a right to annual rehabilitation benefit under the Cabinet of Ministers Order No 562,12 July 2005 with amendments "On annual rehabilitation benefits to citizens suffered following the Chornobyl disaster". According to this Act the sums of payments still are between 75 and 120 UAH which equalled approximately two and three and a half euros respectively.

In accordance with the Verkhovna Rada Resolution "On the recommendations of the parliamentary hearing "Problems of calculation of the subsistence level in Ukraine" No 620-IX,19 May 2020, the global verification of all social benefits calculated on the basis of subsistence minimum level, to

715. Wisniewska-Cazals Danuta Procedure on non-accepted provisions of the European Social Charter. Council of Europe, September, 2020. - 20p.

716. European Committee of Social Rights, Second report on the non-accepted provisions of the European Social Charter, Ukraine. April 2017. – P.7.

717. Fedorova A. Analysis of the national legislation of Ukraine providing for social benefits in the context of the execution of the European Court of Human Rights judgements in the Burmych and Others v. Ukraine group of cases, other ECtHR judgements on the non-enforcement of decisions of the Ukrainian national courts on social issues// Council of Europe Project "Promoting social human rights as a key factor of sustainable democracy in Ukraine", September, 2020, P. 7.

identify the levels of budgetary expenditures to fund them, separately under each type of social benefits and each category of their beneficiaries had to be presented to the Verkhovna Rada in August 2020. By the end of November, the results of such verification have not been presented to the public yet.

Paragraph 2

As it was mentioned before, the Committee has not found the significant obstacles for the ratification the 12.2 by Ukraine[718]. In 2016, Ukraine signed the European Code of Social Security, afterwards, ratified ILO Convention No 102 on social security (Minimum standards). Therefore, the first steps towards to the ratification of the 12.2 have been made. However, the general situation with the social protection system of Ukraine, which needs reform, remains difficult.

Next examination of non-accepted provisions by Ukraine will be held in 2021.

Accepted paragraphs 3, 4 of the Article 12

The amendments to the Law of Ukraine "On the Ratification of the European Social Charter (Revised)" which added paragraphs 3 and 4 of the Article 12 to the list of ratified provisions of the Charter by Ukraine, was adopted on 17 May 2017.[719] Consequently, the Ukrainian report on the thematic group "Health, social security and social protection" that States Parties had to prepared by 31 October 2016, could not include the analysis of article 12 and even more so, the Committee indicated in its conclusions adopted on January 2018 that Ukraine has accepted all provisions from the Group except articles 12 and 13 of the Charter.

Therefore, the situation with the compliance the obligations under the paragraphs 3 and 4 of the Article 12 will be the subject of the Committee's consideration not earlier than 2021.

The application of the Article 12 by the national courts

Despite the partial ratification of the article 12 in 2017 (ten years after the Charter entered into force for Ukraine), national courts, including the Supreme Court applied the article 12, especially in pension matters, with increasing frequency.

In case № 640/14865/16-a regarding the refusal of the plaintiff to reinstate the payment of previously granted pension for retirement and oblige the defendant to renew the payment of the previously assigned pension for years of service, the Supreme Court in its judgment taken 20 October 2020 underlined:

20. According to Article 12 of the Charter, in order to ensure the effective realisation of the right to social security, the Parties undertake, in particular, to establish a social security system or to maintain its functioning; to maintain the social security system at a satisfactory level, at least at a level equal to the level required for the ratification of the European Social Security Code; take measures, by concluding relevant bilateral and multilateral agreements or otherwise, and in accordance with the conditions set out in such agreements, to ensure, inter alia, equality between their own nationals and nationals of other State Parties with regard to social security rights,

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718. Ukraine has not provided the Committee with the specific information on the paragraph 12.2 within the second report on non-accepted provisions of the ESC, therefore, the Committee made references to the previous report. See more: European Committee of Social Rights, Second report on the non-accepted provisions of the European Social Charter, Ukraine. April 2017.

719. Law of Ukraine, On the Amendments to paragraph 2 of the "Law of Ukraine on the Ratification of the European Social Charter (Revised)", N 2034-VIII, 17 May, 2017. URL: https://zakon.rada.gov.ua/laws/show/2034-19#Text

including the preservation of benefits provided by the legislation on social security, regardless of the movement of protected persons in the territories of the States Parties.[720]

In another judgment adopted 19 December 2019 in case № 442/8041/15-a, the Administrative Cassation Court quoted the Article 12 entirely.[721]

Considering the case of the termination of pension benefits of internally displaced person according to the grounds not provided by the laws of Ukraine, the Supreme Court, listing the international acts ratified by Ukraine, in which the principles of the welfare state are embodied, also indicated the European Social Charter, and then, the Court referred separately to Article 12 of the Charter:

…In particular, according to Article 12 of the European Social Charter (revised) of 3 May 1996, the state is obliged to maintain the functioning of the social security system, its satisfactory level, to make efforts to gradually strengthen it, and so on…[722]

In 2010, the former Supreme Administrative Court of Ukraine in the case on granting the status of a participant of military activities and issuing a certificate of a participant in military activities, considered the applicant's reference to Article 12 of the Charter and defined that:

> ”…the European Social Charter has been ratified, but Article 12 has not been included in the list of ratified provisions of the Charter, in connection with this, Ukraine has no international obligations under this exact article and it is not applicable in this case…[723]

The presented examples demonstrate various approaches of national judges to the application the Article 12 of the Charter. Although the application to the relevant paragraph/paragraphs of the article 12 of the Charter has not been found.

720.The Supreme Court, Judgment of 20 October 2020, case 640/14865/16-a, URL: https://reyestr.court.gov.ua/Review/92334240

721.The Supreme Court, Judgment of 19 December 2019, case № 442/8041/15-a, URL: https://reyestr.court.gov.ua/Review/86460178

722. The Supreme Court, Judgment of 31 October 2018, Case № 263/4121/17 URL: https://reyestr.court.gov.ua/Review/77587024

723. The Supreme Administrative Court of Ukraine, judg., case №2a-7265/09/1570, 3.08.2010, URL: https://reyestr.court.gov.ua/Review/10584688

Group 2: Health, social security and social protection

The right to benefit from social welfare services (Article 14)

a) Analysis of the provisions of ESC (revised)

Article 14 of the European Social Charter (revised) concerns the right to benefit from social welfare services. It is interrelated with other rights, defining regulations on this or that aspect of social security and social protection, in particular, social services for specific target groups. For instance, Article 7 (the right of children and young persons to protection), Article 12 (the right to social security), Article 13 (the right to social and medical assistance), Article 16 (the right of the family to social, legal and economic protection), Article 17 (the right of children and young persons to social, legal and economic protection), Article 23 (the right of elderly persons to social protection), Article 30 (the right to protection against poverty and social exclusion), Article 31 (the right to housing).

Pursuant to Article 14 ESC

> **Article 14 - The right to benefit from social welfare services**
>
> With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Parties undertake:
>
> 1. to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment;
>
> 2. to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

Pursuant to the **Explanatory Report to the European Social Charter**

> **Article 14 – The right to benefit from social welfare services**
>
> 61. No amendment.

b) Decisions and conclusions of the European Committee of Social Rights

With a view to ensuring the effective exercise of the right to benefit from social welfare services, **Article 14§1** obliges the Parties to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment.

The right to social welfare services potentially applies to all individuals and groups in the community. However, several groups were specified in **the case-law of the European Committee of Social Rights**. For instance, children, the elderly, people with disabilities, young people in difficulty and young offenders, minorities (migrants, Roma, refugees, etc.), the homeless, alcoholics and drug addicts, battered women and former detainees. As mentioned above, the list is not exhaustive as

the right to social welfare services must be open to all individuals and groups in the community. It does, however, give an idea of the groups in which the Committee systematically takes an interest because of their more vulnerable situation in society[724].

It should be noted that Article 14 provides a general right to benefit from social welfare services. At the same time, the other provisions of the Charter deal with social services for specific target groups and define services "with a narrowly specialised objective", for instance, Article 13§3. Hence, in cases when these various provisions have not been accepted by a State Party the situation with regard to social services for the specific target groups concerned is examined under Article 14. The European Committee of Social Rights stated with this regard that issues such as childcare, child-minding, domestic violence, family mediation, adoption, foster and residential childcare, services relating to child abuse, and services for the elderly are primarily covered by Articles 7§10, 16, 17, 23 and 27. Co-ordination measures to fight poverty and social exclusion are dealt with under Article 30 of the Revised European Social Charter, while social housing services and measures to combat homelessness are dealt with under Article 31 of the Revised European Social Charter[725].

According to the European Committee of Social Rights social services include in particular counselling, advice, rehabilitation and other forms of support from social workers, home help services (assistance in the running of the home, personal hygiene, social support, delivery of meals), residential care, and social emergency care (shelters)[726].

With regard to the quality of social welfare services the European Committee of Social Rights defines: "The right to social services must be guaranteed in law and in practice. Effective and equal access to social services implies that:

- The general eligibility criterion regulating access to social services is the lack of personal capabilities and means to cope. The goal of welfare services is the well-being, the capability to become self-sufficient and the adjustment to the social environment of the individual;

- An individual right of access to counselling and advice from social services shall be guaranteed to everyone likely to need it. Access to other kind of services can be organised according to eligibility criteria, which shall be not too restricted and at any event ensure care in case of urgent need;

- The rights of the client shall be protected: any decision should be made in consultation with and not against the will of the client; remedies shall be available in terms of complaints and a right to appeal to an independent body in urgent cases of discrimination and violation against human dignity;

- Social services may be provided subject to fees, fixed or variable, but they must not be so high as to prevent the effective access of these services. For persons lacking adequate financial resources in the terms of Article 13§1 such services should be provided free of charge;

- The geographical distribution of these services shall be sufficiently wide;

- Recourse to these services must not interfere with people's right to privacy, including protection of personal data. Social services must have resources matching their responsibilities and the changing needs of users.

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724. Conclusions 2009, Statement of Interpretation on Article 14§1.
725. Conclusions 2005, Bulgaria.
726. Conclusions 2005, Bulgaria.

This implies that:

- staff shall be qualified and in sufficient numbers;
- decision–making shall be as close to users as possible;
- there must be mechanisms for supervision the adequacy of services, public as well as private"[727].

With a view to ensuring the effective exercise of the right to benefit from social welfare services, **Article 14§2 of the European Social Charter (revised)** obliges the Parties to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

The European Committee of Social Rights states with this regard:

> "Article 14§2 requires States to provide support for voluntary associations seeking to establish social welfare services. This does not imply a uniform model, and States may achieve this goal in different ways: they may promote the establishment of social services jointly run by public bodies, private concerns and voluntary associations, or may leave the provision of certain services entirely to the voluntary sector. The "individuals and voluntary or other organisations" referred to in paragraph 2 include the voluntary sector, private individuals, and private firms. The Committee examines all forms of support and care mentioned under Article 14§1 as well as financial assistance or tax incentives for the same purpose. It also verifies that the Parties continue to ensure that services are accessible on an equal footing to all and are effective, in keeping with the criteria mentioned in Article 14§1. Specifically, Parties must ensure that public and private services are properly coordinated, and that efficiency does not suffer because of the number of providers involved. In order to control the quality of services and ensure the rights of the clients as well as the respect of human dignity and basic freedoms, effective preventive and reparative supervisory system is required. Article 14§2 also requires States to encourage individuals and organisations to play a part in maintaining services. The Committee looks at action taken to strengthen dialogue with civil society in areas of welfare policy which affect the social welfare services. This includes action to promote representation of specific user–groups in bodies where the public authorities are also represented, and action to promote consultation of users on questions concerning organisation of the various social services and the aid they provide[728].

Moreover, according to the European Committee of Social Rights Article 14§2 also requires States to encourage individuals and organisations to play a part in maintaining services. The Committee looks at action taken to strengthen dialogue with civil society in areas of welfare policy which affect the social welfare services. This includes action to promote representation of specific

727. Conclusions 2005, Bulgaria.
728. Conclusions 2005, Bulgaria, Statement of Interpretation on Article 14§2.

user–groups in bodies where the public authorities are also represented, and action to promote consultation of users on questions concerning organisation of the various social services and the aid they provide[729].

c) Implementation in Ukraine

According to the previous questions of the Committee, Ukraine underlined in its report 2017 that everyone and separate groups of persons being in difficult life circumstances are entitled to social services irrespective of the fact whether they have relatives or not. Moreover, social services are available for foreigners and stateless persons who live in Ukraine. The Committee also requested clarification about the cost of services and the possibility to obtain them free of charge, as well as whether the geographical distribution of social services is broad enough.

However, the main concern of the Committee was about quality of social services, including the amount of public spending and implementation the Methodical Recommendations for Monitoring and Assessment of Quality of Social Services adopted in 2012.

Within the provided information the Committee was not able to make an exact conclusion on the para. 1 of the Article 14. The absence of a conclusion cannot be considered as a positive tendency due to the negative Committee's opinion of the previous conclusions, acknowledged that Ukraine did not fulfil its obligations under article 14, paragraph 1. Nevertheless, during the reporting period that was finished in 2020, the range of new acts of the social services were elabourated, including the Law of Ukraine "On social services"[730] in 2019, the Law of Ukraine "On the organisation of social services"[731] in 2020, etc. The opinion of the Committee may change in the following conclusions of 2021.

The Committee also analysed the national legislation and practice on the issue relating to the voluntary activities in providing social services and made the same positive conclusion as it had taken in the previous reporting period.

The case-law of national courts of applying the article 14 of the Charter have not been found.

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729. Conclusions 2005, Bulgaria

730. The Verhovna Rada, Law of Ukraine On social services, No 2671-VIII, 17.01.2019, URL: https://zakon.rada.gov.ua/laws/show/2671-19#Text

731. The Cabinet of Ministers of Ukraine, Resolution of the Cabinet of Ministers "On the organisation of social services", No 01.06.2020, URL: https://zakon.rada.gov.ua/laws/show/587-2020-%D0%BF#Text

Group 1: Employment, training and equal opportunities

The right of persons with disabilities to independence, social integration and participation in the life of the community (Article 15)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees persons with disabilities the right to independence, social integration and participation in the life of the community (Part I, point 15). All of these must be exercised without discrimination based on disability (Part V, Art. E).

The most important and detailed regulation of protection of persons with disabilities is included in Article 15 ESC. Pursuant to Art. 15 ESC:

> **Article 15 – The right of persons with disabilities to independence, social integration and participation in the life of the community**
>
> With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:
>
> 1 to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private;
>
> 2 to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services;
>
> 3 to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

> The words "effective exercise of the right to independence" contained in the introductory sentence to the provision imply,

inter alia, that persons with disabilities should have the right to an independent life[732].

> The underlying vision of Article 15 ESC is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of "independence, social integration and participation in the life of the community"[733]. In the light of this, the non-discrimination norm has a very important role in the disability context and forms an integral part of Article 15 of the Charter[734].

An equality of treatment should exist, not only by law but also in practice, between persons with and without disabilities - nationals of the Contracting Party and foreigners - "in so far as they are nationals of other Parties" and "are lawfully resident or regularly working within the territory of the Party concerned"[735]. "The rights apply to all persons with disabilities regardless of the nature and origin of their disability and irrespective of their age"[736].

In the regulations of the Council of Europe there is no legal definition of disability, person/people with disability or discrimination on the basis of disability. In its decisions and conclusions[737] the European Committee of Social Rights turns directly to the definition of "disability" and "person/people with a disability" endorsed by the WHO in its International Classification of Functioning, Disability and Health (known as the ICF)[738] and to the definition of "discrimination on the basis of disability" used in the United Nations Convention on the Rights of Persons with Disabilities ("CRPD") based on the ICF's model.

The ICF is a classification of health and health-related domains and the WHO framework for measuring health and disability at both individual and population levels. The ICF was officially endorsed by all 191 WHO Member States in the Fifty-fourth World Health Assembly on 22 May 2001[739] as the international standard to describe and measure health and disability. The idea of the ICF is that **disability is a complex phenomena** that is both a problem at the level of a person's body and a complex and primarily social phenomena. Disability is always an interaction between features of the person and features of the overall context in which the person lives. Some aspects of disability are almost entirely internal to the person, while other are almost entirely external[740]. ICF defines disability as an umbrella term for impairments, activity limitations and participation restrictions. Disability is the interaction between individuals with a health condition (e.g. cerebral palsy, Down syndrome and depression) and personal and environmental factors (e.g. negative attitudes, inaccessible transportation and public buildings, and limited social supports).

While assessing state legislations under Article 15 ESC, the European Committee of Social Rights finds incompatibility of definitions of disability with the ESC where the definitions of disability and

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732. Explanatory Report to the European Social Charter (Revised) Strasbourg, 3.V.1996, p. 63.
733. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 48; Conclusions 2003 - Interpretative Statement - Article 15; Digest 2018, p. 157.
734. Conclusions 2003, Statement of Interpretation on article 15; Digest 2018, p. 157.
735. ESC/RevESC Appendix, item 1; Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 48; Conclusions XIV-2 (1998), Statement of Interpretation on article 15; Digest 2018, p. 157.
736. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 48.
737. The ECSR, Conclusions 2016 - Hungary - Article 15 § 1.
738. The World Health Organisation, International Classification of Functioning, Disability and Health (ICF), available at: https://www.who.int/classifications/icf/en/.
739. Resolution WHA 54.21.
740. WHO, Towards a Common Language for Functioning, Disability and Health ICF, World Health Organisation, Geneva 2002, p.8-9, available at https://www.who.int/classifications/icf/icfbeginnersguide.pdf?ua=1.

persons with disabilities focus on impairments of an individual rather than on the barriers that he/she faces as such definitions fail to encompass all persons with disabilities, including e.g. those with psychosocial disabilities[741].

Article 15§1 ESC establishes the right of persons with disabilities to guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private. Securing a right to education for children and others with disabilities plays an important role in advancing their citizenship rights and guaranteeing their fundamental rights[742].

The rights to vocational guidance and training are laid down in Article 1§4 and Articles 9 and 10 ESC, and Article 15§1 ESC refers specifically to persons with disabilities. Article 15 ESC, by establishing a separate right to guidance, education and vocational training for people with disabilities, aims to offer increased protection to these persons in an area, namely education and employment, in which they are more vulnerable than the rest of the listeners and workforce. Under the approach adopted in Article 15 ESC, the state is responsible for adopting measures to help persons with disabilities participate fully and actively in the community. In other words, the effective exercise of the right of persons with disabilities to vocational training and rehabilitation requires specific measures to be taken, which may, if need be, take the form of positive action designed to improve the "employability" of persons with disabilities and their access to and ability to remain in employment. In addition, particular emphasis must be put on the protection of persons who are disabled as a result of an occupational accident or illness[743].

Under Article 15§1 ESC, the existence of non-discrimination legislation is considered necessary as an important tool for the advancement of the inclusion of children with disabilities into general or mainstream educational schemes. Such legislation should, as a minimum, require a compelling justification for special or segregated educational systems and confer an effective remedy on those who are found to have been unlawfully excluded or segregated or otherwise denied an effective right to education. Legislation may consist of general anti-discrimination legislation, specific legislation concerning education, or a combination of the two[744].

According to Article 15§1 ESC, all persons with disabilities (children, adolescents and adults who face particular disadvantages in education, such as persons with intellectual disabilities) have the right to education and training: primary education, general and vocational secondary education as well as other forms of vocational training. Vocational training under Article 15 encompasses all types of higher education[745].

Article 15§1 ESC makes it an obligation for States Parties to provide education for persons with disabilities, together with vocational guidance and training, in one or other of the pillars of the education system, in other words mainstream or special schools. The priority to be given to education in mainstream establishments, which is referred to explicitly in the Article, is subject to a conditionality clause, which if interpreted as it ordinarily would be and with due regard for the context and purpose of the provision, indicates to the public authorities that in order to secure the independence, social integration and participation in the life of the community of persons with disabilities through their education, they must take account of the type of disability concerned, how serious it is and a variety of individual circumstances to be examined on a case-by-case basis. Consequently, Article 15§1 of the Charter does not leave States Parties a wide margin

741. The ECSR, Conclusions 2016 - Hungary - Article 15 § 1.
742. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 48; Digest 2018, p. 157.
743. Conclusions XIV-2 - Statement of interpretation - Article 15.
744. Conclusions 2007 - Statement of interpretation - Article 15 § 1.
745. Conclusions 2012, Ireland; Digest 2018, p. 157.

of appreciation when it comes to choosing the type of school in which they will promote the independence, integration and participation of persons with disabilities, as this must clearly be a mainstream school[746].

Lessons provided in mainstream schools and, if need be, in special schools must be adequate[747]. This means that in order to guarantee an equal and non-discriminatory treatment of persons with disabilities, mainstream and special schools must ensure adapted teaching[748]. State Parties to ESC are required to provide the human assistance needed for the school career of the persons concerned. Such assistance is a particularly important mean of being able to keep, especially children and adolescents with autism, in mainstream schools[749]. The margin of appreciation in that matter applies only to the means that State Parties deem most appropriate to ensure that this assistance is provided, bearing in mind the cultural, political or financial circumstances in which their education system operates. However, this is subject to the provision that, at all events, the choices made and the means adopted are not of a nature or are not applied in a way that deprives the established right of its effectiveness and turns it into a purely theoretical right[750].

State must take measures (such as the support of teachers and the accessibility of premises) in order to enable integration and must demonstrate that tangible progress is being made in setting up education systems which exclude nobody[751]. 'Integration' and 'inclusion' are two different notions and one does not necessarily lead to the other. The right to an inclusive education is about the child's right to participate in mainstream school and the school's obligation to accept the child taking account the best interests of the child as well as its abilities and educational needs as a primary consideration[752].

Education and training are the essential foundation to obtain a position in the open labour market and to be able to lead a self-determined life. Young persons with disabilities with an education below the upper secondary level are per se subject to various disadvantages on the employment market. States must take measures in order to enable integration and guarantee that both mainstream and special schools ensure adequate teaching. Furthermore, States must demonstrate that tangible progress is being made in setting up inclusive and adapted education systems[753].

Specialised institutions shall ensure, through their internal organisation and/or their working methods, the predominance of guidance, education and vocational training over the other functions and duties that they may be required to perform under domestic law[754].

Article 15§1 ESC establishes one of the rights protected by the Charter which are exceptionally complex and particularly expensive to resolve. Therefore, the measures taken by a State to achieve the Charter's objectives must meet the following three criteria:

746. European Action of the Disabled (AEH) v. France, complaint No. 81/2012, Decision on the merits of 11 September 2013, §78; Digest 2018, p. 158.
747. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 48.
748. European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, Decision on the merits of 11 September 2013, § 85.
749. European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, Decision on the merits of 11 September 2013, § 85.
750. European Action of the Disabled (AEH) v. France, complaint No. 81/2012, Decision on the merits of 11 September 2013, §§ 80-81; Digest 2018, p. 158.
751. Conclusions 2005, Cyprus.
752. MDAC v. Belgium, Complaint No. 109/2014, Decision on the merits of 16 October 2014, § 66; Digest 2018, p. 158.
753. Conclusions XX-1 (2012), Austria; Digest 2018, p. 158.
754. European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, Decision on the merits of 11 September 2013, §111; Digest 2018, p. 158.

> (i) a reasonable timeframe,
>
> (ii) measurable progress and
>
> (iii) financing consistent with the maximum use of available resources[755].

The European Committee of Social Rights in the process of assessing whether the situation in the state stays in conformity with Art. 15§1 ESC concentrates on four areas: definition of disability, anti-discrimination regulations, education and vocational training.

The European Committee of Social Rights in the process of assessing whether the situation in the state is in conformity with Art. 15§1 ESC and so if children and adults with disabilities have effective equal access to education and vocational training, takes into consideration[756]:

- the total number of persons with disabilities, including the number of children;
- the number of students with disabilities attending mainstream education and vocational training courses;
- the number of students with disabilities attending special education and training courses;
- the number of children with disabilities who are not in education and the measures taken to remedy this[757];
- the number of persons with disabilities who leave the education system with no qualifications[758];
- the percentage of students with disabilities entering the labour market following mainstream or special education and/or training[759];
- data on the success rate of children with disabilities by comparison with other children and the success rate in terms of access to vocational training, continuation of studies or entry into the open labour market[760];
- data on the number of people receiving vocational training in a mainstream or a special establishment compared to the number of requests for admission;
- data on the percentage of students with disabilities entering the labour market following mainstream or special education and/or training[761].

The European Committee of Social Rights found violation of Art. 15 § 1 ESC in cases of:

- lack of effective integration of children and youths with disabilities into the mainstream education and into mainstream vocational training facilities - where youths with disabilities are

755. Autism-Europe v. France, cited above, § 53.
756. Conclusions 2016 - Serbia - Article 15 § 1.
757. Conclusions 2016 - Hungary - Article 15 § 1.
758. Conclusions 2016 - Hungary - Article 15 § 1.
759. Conclusions 2016 - Serbia - Article 15 § 1.
760. Conclusions 2016 - Hungary - Article 15 § 1.
761. Conclusions 2016 - France - Article 15 § 1.

little integrated into mainstream institutions and into mainstream vocational training facilities, and so special and separate facilities remain the norm[762] or where minority[763] or almost half of pupils with special educational needs attend special schools[764];

- lack of equal access of children with disabilities to education – in situation where many children with disabilities are placed in institutions, particularly those with mental disabilities (who account for about 80% of all children living in institutions), and do not therefore have equal access to education[765].

Article 15§2 ESC establishes the right of persons with disabilities to promote their access to employment and to adjust the working conditions to the needs of the persons with disabilities or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services. It is understood that the term "sheltered employment" also covers working co-operatives[766].

Art. 15§2 ESC requires states to promote access to employment on the open labour market for persons with disabilities. It applies to both persons with physical and intellectual disabilities[767]. To this aim, legislation must prohibit discrimination on the basis of disability in employment as well as the dismissal on the basis of disability, to create genuine equality of opportunities on the open labour market[768]. In addition, regarding work conditions, there must be obligations on the employer to take steps in accordance with the requirement of reasonable accommodation to ensure effective access to employment and to keep in employment persons with disabilities, in particular persons who have become disabled while in their employment as a result of an industrial accident or occupational disease[769]. Apart from that, regulations must confer an effective remedy on those who are found to have been unlawfully discriminated[770].

State Parties to ESC enjoy a margin of discretion concerning the other measures they take in order to promote access to employment of persons with disabilities. Article 15§2 ESC does not require the introduction of quotas[771].

Sheltered employment facilities must be reserved for those persons with disabilities who, due to their disability, cannot be integrated into the open labour market. They should aim to assist their beneficiaries to enter the open labour market[772]. Persons working in sheltered employment facilities where production is the main activity are entitled to the basic provisions of labour law and in particular the right to fair remuneration and trade union rights[773].

The European Committee of Social Rights in the process of assessing whether the situation in the state is in conformity with Art. 15§2 ESC concentrates on three areas: employment of persons with disability, anti-discrimination regulations and measures to encourage the employment of persons with disabilities.

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762. Conclusions XVI-2 - Malta - Article 15 § 1.
763. Conclusions 2016 - Ukraine - Article 15 § 1.
764. Conclusions 2016 - Austria - Article 15 § 1, Conclusions 2016 - Romania - Article 15 § 1.
765. Conclusions 2016 - Serbia - Article 15 § 1.
766. Explanatory Report to the European Social Charter (Revised) Strasbourg, 3.V.1996, p. 65.
767. Conclusions XX-1 (2012), Czech Republic; Conclusions I (1969), Statement of Interpretation on article 15 § 2.
768. Conclusions 2003, Slovenia; Conclusions 2012, Russian Federation.
769. Conclusions 2007, Statement of Interpretation on Article 15 § 2.
770. Conclusions XIX-1 (2008), Czech Republic.
771. Conclusions XIV-2 (1998), Belgium.
772. Digest 2018, p. 158.
773. Conclusions XVII-2 (2005), Czech Republic.

The European Committee of Social Rights in the process of assessing whether the situation in the state stays in conformity with Art. 15§2 ESC and so if persons with disabilities have effective equal access to employment, takes into consideration not only proper legislation, including the judicial and non-judicial remedies provided for in the event of discrimination on the ground of disability, but also its justiciability and practical aspects such as e.g. the figures on the total number of persons with disabilities, the number of people with disabilities of working age, the number in employment (in the open market or in sheltered employment), the number benefiting from employment promotion measures, the number seeking employment and the number who are unemployed[774].

The European Committee of Social Rights found violation of Art. 15 § 2 ESC in cases of:

- lack of legislation prohibiting discrimination on grounds of disability in the field of employment[775];
- lack of adequate protection against discrimination on the grounds of disability – lack of measures protecting employees with disabilities from dismissal and lack of obligation for the employers to continue to employ a person who becomes disabled following an occupational injury or disease[776];
- excessively low wage levels in sheltered employment facilities (persons employed performing production orientated work in sheltered workshops were not subject to the usual terms and conditions of employment and that their pay was much lower than that in the open working environment (varying between 5 % and 30 %)[777];
- lack of guaranteed effective access to the open labour market[778];
- not respected legal obligation to provide reasonable accommodation[779].

Article 15 § 3 ESC establishes the right of persons with disabilities to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

The right of persons with disabilities to social integration provided for by Art. 15§3 ESC implies that barriers to communication and mobility be removed in order to enable access to transport (land, rail, sea and air), housing (public, social and private), cultural activities and leisure (social and sporting activities)[780]. To this end Art. 15§3 ESC requires the existence of comprehensive non-discrimination legislation covering both the public and private sphere in fields such as housing, transport, telecommunications and cultural and leisure activities and effective remedies for those who have been unlawfully treated[781]. Such legislation may consist of general anti-discrimination legislation, specific legislation or a combination of the two[782].

Article 15§3 ESC also requires the adoption of a coherent policy in the disability context: positive action measures to achieve the goals of social integration and full participation of persons with disabilities. Such measures should have a clear legal basis and be coordinated[783]. People with disabilities should have a voice in the design, implementation and review of policies concerning them[784].

To give meaningful effect to this, undertaking mechanisms must be established to assess the barriers to communication and mobility faced by persons with disabilities and identify the support

774. Conclusions 2016 - Armenia - Article 15 § 2.
775. Conclusions XVI-2 - Belgium - Article 15 § 2; Conclusions XVI-2 - Spain - Article 15 § 2.
776. Conclusions XVI-2 - Denmark - Article 15 § 2.
777. Conclusions XVI-2 - Denmark - Article 15 § 2.
778. Conclusions 2016 - Serbia - Article 15 § 2.
779. Conclusions 2016 - Serbia - Article 15 § 2.
780. Conclusions 2005, Norway.
781. Conclusions 2007, Slovenia.
782. Conclusions 2012, Estonia.
783. Digest 2018, p. 161.
784. Conclusions 2003, Italy.

measures that are required to assist them in overcoming these barriers. Furthermore, technical aids must be available either for free or subject to a contribution towards their cost and taking into account the beneficiary's means. Such aids may for example take the form of prostheses, walkers, wheelchairs, guide dogs and appropriate housing support arrangements. Support services, such as personal assistance and auxiliary aids, must be available, either for free or subject to an appropriate contribution towards their cost and taking into account the beneficiary's means[785].

Telecommunications and new information technology must be accessible and sign language must have an official status[786]. Public transports (land, rail, sea and air), all newly constructed or renovated public buildings, facilities and buildings open to the public, and cultural and leisure activities should be physically accessible[787].

The needs of persons with disabilities must be taken into account in housing policies, including the construction of an adequate supply of suitable, public, social or private, housing. Further, financial assistance should be provided for the adaptation of existing housing[788].

The European Committee of Social Rights in the process of assessing whether the situation in the state is in conformity with Art. 15§3 ESC concentrates on nine areas: anti-discrimination legislation and integrated approach, consultation, forms of financial aid to increase the autonomy of persons with disabilities, measures to overcome obstacles, technical aids, communication, mobility and transport, housing, culture and leisure. It takes into consideration not only proper legislation, including the judicial and non-judicial remedies provided for in the event of discrimination on the ground of disability, but also its justifiability and practical aspects such as e.g.: the availability of different grants to adjust the environment to the needs of a person with disability - convert housing, car, remove architectural and communication barriers, purchase assistance products; the eligibility for supporting goods and services free of charge or with reduced price - technical aids, public transport; actions being taken to encourage access to new communication technologies.

The European Committee of Social Rights found violation of Art. 15§3 ESC in cases of:

- lack of anti-discrimination legislation for persons with disabilities which specifically covers the areas of housing, transport, communications, culture and leisure[789];
- lack of effective remedies available to people with disabilities alleging discriminatory treatment[790];
- lack of effective access to housing[791];
- lack of effective accessibility for people with disabilities to different means of transport[792];
- lack of effective access to technical aids[793].

c) Implementation in Ukraine

Paragraph 1

Regarding the anti-discrimination legislation in the sphere of vocational training for persons with disabilities, the Committee asked 2016 Ukraine in its Conclusion 2016 to include information on the measures taken to ensure effective remedies against alleged discrimination in education and

785. Conclusions 2008, Statement of interpretation on Article 15 § 3; Digest 2018, p. 161 – 162.
786. Conclusions 2005, Estonia; Conclusions 2003, Slovenia.
787. Conclusions 2003, Italy.
788. Conclusions 2003, Italy.
789. Conclusions 2016 - Estonia - Article 15 § 3.
790. Conclusions 2016 - Andorra - Article 15 § 3, Conclusions 2016 - Hungary - Article 15 § 3.
791. Conclusions 2012 - Andorra - Article 15 § 3, Conclusions 2016 - Hungary - Article 15 § 3.
792. Conclusions 2016 - Armenia - Article 15 § 3.
793. Conclusions 2012 - Andorra - Article 15 § 3.

training on grounds of disability.[794] It was also required next report to provide appropriate case law. The Committee repeated some of its questions asked in previous cycle 2012, including the questions about measures taken to reduce the institutionalisation of children, clarifications of the figures of children with disabilities attending general educational institutions in comparison of the total number of children with disabilities, although asked about number of children have dropped out of school, children with no experience of school and the percentage of students with disabilities entering the labour market following mainstream or special education.[795]

In the light of vocational training, the information on activities for persons with disabilities of State Employment Service, Fund for social protection of persons with disabilities, employers and NGOs and other actors was requested for the next report 2020.

In general, analysing the Ukrainian legislation, the Committee concluded that the situation in Ukraine failed to meet the requirements under Article 15 §1 of the Charter on the ground that the right of persons with disabilities to mainstream education is not effectively guaranteed.[796] The previous first for Ukraine conclusions 2012 on this issue was deferred due to the absence of the necessary information.[797]

Paragraph 2

Analysing the national anti-discrimination legislation concerning employment of persons with disabilities, the Committee requested information (repeatedly for majority of questions) on national legislation on criminal liability in relation to the employment of persons with disabilities, the measures taken to ensure effective remedies against alleged discrimination in employment on grounds of disability, including the relevant case-law. The special attention was paid to the obligation to ensure reasonable accommodation and its fulfillment in practice, as well as impact from fulfillment to increasing is of employment of persons with disabilities in the open labour market. Taking into account all information presented and conclusions deferred in previous cycle 2012, the Committee decided that the situation in Ukraine was not in conformity with the requirement of Article 15 §2 due to non- effective guarantees for the reasonable accommodation obligation.[798]

Concerning measures to encourage the employment of persons with disabilities, the Committee asked Ukraine to provide information on the number or percentage of persons with disabilities employed in the open market, the number of beneficiaries of sheltered employment, and progress of such persons into the market. Also it was asked about the role of trade unions in sheltered facilities.[799]

As a result of examination the national report in 2016, breach of obligations under Article 15 §2 on two grounds was found: non-effective respect of reasonable accommodation obligation and non-effective guarantees of mainstreaming in employment in respect of persons with disabilities.[800]

Paragraph 3

Within the analysis of the national anti-discrimination legislation regarding integration and participation of persons with disabilities in the life of the community in Ukraine, the Committee asked for clarification of the spheres of its covering, as existence throughout the country of

794. ECSR, Conclusions 2016. Ukraine. p. 25.
795. Ibid., p. 26.
796. Ibid., p. 27.
797. ECSR, Conclusions 2012. Ukraine. Article 15-1. URL:http://hudoc.esc.coe.int/eng?i=2012/def/UKR/15/1/EN
798. Ibid., p. 28-29.
799. Ibid., p.29.
800. Ibid.

effective remedies against discrimination as regards housing, transport, communications, culture and leisure, on integrated planning programmes of all authorities involved in implementing policies for persons with disabilities. Moreover, the Committee decided that Ukraine did not fulfill its obligations Article 15 §3 due to non-establishing effective protection persons with disabilities against discrimination in the fields of housing, transport, communications and culture and leisure activities.[801] The attention was also paid to the adoption of the Action Plan for the implementation of the United Nations Convention on the Rights of Persons with Disabilities and asked about the results achieved.

The Committee analysed and took notes of the method for calculating disability pension, financial assistance available to persons with disabilities; however, additional questions were not raised.[802]

Regarding to technical aids for persons with disabilities prescribed in national legislation, the question on mechanisms established to assess the barriers to communication and mobility faced by individual persons with disabilities and to identify the technical aids and support measures that may be required to assist them in overcoming these barriers was raised. In the Conclusions 2012 the Committee pointed out that technical aids has to be available either for free or subject to a contribution towards their cost.[803]

Furthermore, the Committee examined the information on mobility and transport, access to public sites for persons with disabilities, equipment buildings and other sites open to the public with signs used internationally to indicate their accessible for persons with disabilities, and asked next report in 2020 to provide the relevant information on the progress made in accessibility of transport.[804]

The question about the guarantees the right to housing for persons with disabilities was reiterated in the conclusions 2016 and the Committee stated that the failure to present information requested in the next report would lead to the conclusion of non-conformity the situation in Ukraine with the requirements of Article 15 §3 on the matter.

Therefore, the Committee found in its Conclusions 2016 that Ukraine did not commit its obligations under Article 15 §3 of the Charter due to non-establishing the anti-discrimination legislation covering the fields of housing, transport and communications.[805]

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801. ECSR, Conclusions 2016. Ukraine. p. 30.
802. Ibid., 31.
803. ECSR, Conclusions 2012. Ukraine. Article – 15-3. URL: http://hudoc.esc.coe.int/eng?i=2012/def/UKR/15/3/EN
804. ECSR, Conclusions 2016. Ukraine. p. 32.
805. Ibid.

Group 4: Children, families, migrants

The right of the family to social, legal and economic protection (Article 16)

a)Analysis of the provisions of ESC (revised)

Article 16 of the European Social Charter (revised) concerns the right of the family to social, legal and economic protection. It is interrelated with some other rights and areas covered by the European Social Charter (revised). In particular, Article 7 (the right of children and young persons to protection), Article 12 (the right to social security), Article 13 (the right to social and medical assistance), Article 14 (the right to benefit from social welfare services), Article 17 (the right of children and young persons to social, legal and economic protection), Article 23 (the right of elderly persons to social protection), Article 30 (the right to protection against poverty and social exclusion), Article 31 (the right to housing).

Pursuant to Article 16 ESC

> **Article 16 – The right of the family to social, legal and economic protection**
>
> With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

Pursuant to the **Explanatory Report to the European Social Charter**

> 66. The text of the Article itself has not been amended, although as the protection offered to "mothers" by Article 17 of the Charter has not been maintained in the new version of Article 17 contained in the Revised Charter, Article 16 of the latter instrument will now cover this group. It must be pointed out that the "mothers" in question may be single parents, but they may also be living in a couple. The protection particularly concerns women who are not covered by Article 8 and/or who are not covered by any social security scheme providing the necessary financial assistance during a reasonable period before and after confinement, as well as adequate medical care during confinement.
>
> 67. The Revised Charter contains a statement in the appendix to this provision, to the effect that the protection afforded by it also covers single-parent families.

Pursuant to the **Appendix**

Article 16

It is understood that the protection afforded in this provision covers single-parent families.

b) Decisions and conclusions of the European Committee of Social Rights

Firstly, it is important to reveal how the **term "family"** should be understood under the discussed provision. The notion of the "family" is variable according to the different definitions in domestic law. Hence, the Charter refers to the definitions used in domestic law of each State Party and considers every constellation defined as "family" by domestic law as being covered by Article16. However, domestic law must not provide for an unduly restrictive definition and the scope of Article 16 is not restricted to family based on marriage[806]. **The European Committee of Social Rights** examines the means used by states to ensure the social, legal and economic protection of the various types of families in the population, especially single parent families, with a particular emphasis on vulnerable families, including Roma ones[807]. Moreover, **Appendix to the European Social Charter** considers that the protection afforded in this provision covers also single-parent families.

It should be emphasised that **the requirement of equal treatment** is applicable also in the context of Article 16 of the European Social Charter. In particular, States Parties must ensure equal treatment of foreign nationals of other States Parties who are lawfully resident or regularly working in their territory with respect to family benefits. As was stated by the European Committee of Social Rights "Since family allowances are non-contributory social security benefits, the Committee accepts, by analogy with Article 12 para. 4, that the Contracting Parties, in order to prevent abuses, require beneficiaries to be resident in the country for a certain period before they qualify for benefits. It reserves the right, however, to determine whether the required period of residence is in proportion with the desired result. In this case the Committee considers it reasonable to require one of the parents to have been resident in the country for six months"[808]. At the same time, as was analysed in the frames of the study of Article 12, the proportionality of such length of residence requirements is examined on a case-by-case basis, noting also the nature and purpose of the benefit. For instance, in one of the cases a period of 6 months was considered as reasonable and therefore in conformity with Article 16[809]. In another case periods of 1 year and 3 years were considered as excessive and therefore in violation of Article 16[810].

As it derives from the wording of Article 16, social protection of family life is implemented by various means, such as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

Though the right to housing is stipulated under Article 31 of the Charter, according to the European Committee of Social Rights this does not preclude a consideration of relevant housing issues arising under Article 16 which addresses housing in the context of securing the right of families to social, legal and economic protection.

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806. Conclusions 2011, Azerbaijan.
807. Conclusions 2006, Statement of Interpretation on Article 16.
808. Conclusions XIV-1 (1998), Sweden.
809. Conclusions XIV-1 (1998), Sweden.
810. Conclusions XVIII-1 (2006), Denmark.

> In this context and with respect to families, Article 16 focuses on the right of families to an adequate supply of housing, on the need to take into account their needs in framing and implementing housing policies and ensuring that existing housing be of an adequate standard and include essential services[811].

Moreover, the right to housing permits the exercise of many other rights – both civil and political as well as economic, social and cultural. It is also of central importance to the family. The Committee has also stated that adequate housing refers not only to a dwelling which must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence. Furthermore the obligation to promote and provide housing extends to security from unlawful eviction[812].

With regard to **the evictions the European Committee of Social Rights** stated:

> The Committee notes with regard to Article 31§2 that States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and that alternative accommodation is available (see Conclusions 2003, Article 31§2, France, p. 225, Italy, p. 345, Slovenia, p. 557, and Sweden, p. 653). The law must also establish eviction procedures, specifying when they may not be carried out (for example, at night or during winter), provide legal remedies and offer legal aid to those who need it to seek redress from the courts. Compensation for illegal evictions must also be provided[813].

What about **childcare facilities**, it should be noted that where a State Party has accepted Article 27 of the Charter child care facilities and arrangements are examined under the discussed provision[814]. Childcare structures can be public or private. According to **the European Committee of Social Rights** State Parties are required to ensure that childcare facilities are available, affordable and of good quality (coverage with respect to the number of children aged 0-6, ratio of staff to children, staff training, suitable premises and cost of childcare to parents, etc.)[815].

Moreover, in order to ensure that the views of families are taken into account in the formulation of family policy, all civil organisations representing families should be consulted by the relevant authorities[816].

Under Article 16 State Parties are also required to ensure the economic protection of the family by appropriate means. The primary means should be family or child benefits provided as part of social security, available either universally or subject to a means-test.

What about the family benefits, they must constitute an adequate income supplement for a significant number of families. Adequacy is assessed with respect to the median equivalised income (Median equivalised income (Eurostat): the income of a household is established by

811. European Roma Rights Center (ERRC) v. Bulgaria, Complaint No. 31/2005, Decision on admissibility of 10 October 2005, §9.
812. European Roma Rights Centre (ERRC) v. Greece, Complaint No. 15/2003, Decision on the merits of 8 December 2004, §24.
813. European Roma Rights Centre (ERRC) v. Italy, Complaint No. 27/2004, Decision on the merits of 7 December 2005, §41
814. Conclusions 2011, Azerbaijan.
815. Conclusions XVII-1 (2004), Turkey.
816. Conclusions 2006, Statement of Interpretation on Article 16.

summing all monetary income received from any source by each member of the household. In order to reflect differences in household size and composition, this total is divided by the number of "equivalent adults" using a standard scale (the so-called modified OECD equivalence scale). The resulting figure is attributed to each member of the household).

The level of benefit should be adjusted as necessary to keep pace with inflation. Other forms of economic protection, such as birth grants, additional payments to large families or tax relief in respect of children, are also relevant to the implementation of this provision[817].

c) Implementation in Ukraine

Legal protection of families

According to the legal protection of the family, the Committee drew attention to 2 aspects. The first, rights and obligations of spouses, settlement of disputes including in respect of children and mediation services. In its conclusions of 2011, 2015 and 2019, the European Committee of Social Rights constantly recognised that Ukrainian legislation and practice was in conformity with the requirements of Art. 16 in this issue.

On the other side, the Committee issued opposite conclusions on the seconds issue, on domestic violence against women. The ECSR reiterated that States Parties are required to ensure an adequate protection with respect to women, both in law and in practice. Adequate protection of women should be dealt with in the context of the Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe to member States on the protection of violence against women and Parliamentary Assembly Recommendation 1681 (2004) on a campaign to combat domestic violence against women in Europe.[818]

In general, the Committee not only analyzes the national law and practice of the state described in the report, but also has the opportunity to include, if necessary, the materials and conclusions of other international institutions. Thus, the ECSR drew attention of Ukraine to the Opinion of the UN Committee on the Elimination of Discrimination against Women in 2017 and asked Ukraine for additional information.

To bring the national legislation into accordance of the Council of Europe standards, the Criminal Code and Code of Criminal Procedure was amended in order to increase the effectiveness of the mechanism of the prevention and counteraction to domestic violence and ratify finally the Istanbul Convention (2017), also the special Law of Ukraine "On preventing and combating domestic violence" (2018) was adopted. New legislation has already been examined by the Committee due to the period of examination, but the Istanbul Convention has not been ratified up to the end of 2020.

The Committee asked Ukraine to provide comprehensive and updated information on case-law in order to assess in particular how the new legislation is interpreted and applied and its impact in preventing and reducing domestic violence.

Despite the non ratification of the Istanbul Convention, Ukrainian courts has already applied it. For instance, the Criminal Cassation Court in its judgment in case № 647/1931/19 adopted on 7 April 2020, stipulated:

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817. Conclusions 2006, Estonia, Statement of Interpretation on Article 16.
818. European Committee of Social Rights, Conclusions 2019. Ukraine. 20 March, 2020. – P.26.

15. The Court considers that Law № 2227, which amended Article 284 § 1 (7) of the Code of Criminal Procedure… at issue in the present case, seeks to implement the provisions of the Council of Europe Convention on the Prevention of Violence against Women and Domestic Violence.

17. Although the Istanbul Convention has not been ratified yet by Ukraine, the Court's direct reference to it in the Law, obliges the Court to take into account not only national law but also the understanding of the "domestic violence" and "domestic violence crime" in the light of the provisions of this Convention, as well as other international treaties and the relevant practice of international bodies, in so far as they are relevant to the understanding of its provisions.[819]

At the same time, the references to the Article 16 in the national judicial practice have not been found.

Social and economic protection of families

Within the examination of childcare facilities, the Committee payed attention to alternative family-oriented care systems that according to Unicef information, were underdeveloped and thousands of children were separated from their families and living in various child-care institutions. So, the updated information was asked for the next report.

In the context of equal access to family benefits for foreign nationals, the ECSR recalled Ukraine that States may apply a length of residence requirement as regards non-contributory benefits on condition that the length is not excessive. 6 –month period is reasonable within the requirements of Article 16, and on the contrary, a period of a year and more would not be in conformity with requirements for length of residence.[820]

Level of family benefits

Analysing the information provided by Ukraine and the correlation between the amount of payments and the subsistence level, the Committee emphasised on the necessity of "child allowances to constitute an adequate income supplement, which is the case when they represent a significant percentage of the median equivalised income".[821] However, the lack of requested information in the report, including information about the median income, led to the negative conclusions of the Committee.

During the entire period of the monitoring Ukraine's commitments of its obligations under Art.16, the Committee pointed to 2 situations: women were not ensured adequate protection against domestic violence, in law and in practice; it has not been established that the level of family benefits was adequate.[822]

819. The Supreme Court, Judgment of 7 April 2020, case № 647/1931/19 URL: https://zakononline.com.ua/court-decisions/show/89035028
820. European Committee of Social Rights, Conclusions 2019. Ukraine. 20 March, 2020. – P.27.
821. Ibid., P.28.
822. Ibid.

Group 4: Children, families, migrants

The right of children and young persons to social, legal and economic protection (Article 17)

a) Analysis of the provisions of ESC (revised)

Children and young persons under the Charter are persons below the age of 18. The Charter contains two main articles regarding this group: Article 7 on children and young persons in employment and Article 17 on the right of children and young persons to social, legal and economic protection.

Article 17 concerns the right of children and young persons to social, legal and economic protection.

Pursuant to Article 17 ESC

> **Article 17 – The right of children and young persons to social, legal and economic protection**
>
> With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:
>
> 1. a. to ensure that children and young persons, taking account of the rights and dutiesof their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
>
> b. to protect children and young persons against negligence, violence or exploitation;
>
> c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
>
> 2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

Pursuant to the **Appendix**:

> **Article 17**
>
> It is understood that this provision covers all persons below the age

of 18 years, unless under the law applicable to the childmajority is attained earlier, without prejudice to the other specific provisions provided by the Charter, particularly Article 7.

This does not imply an obligation to provide compulsory education up to the above-mentioned age.

Pursuant to the **Explanatory Report to the European Social Charter**

Article 17 – The right of children and young persons to social, legal and economic protection

68. Article 17 has been amended.

69. Whereas the general protection ofchildren in the Charter is contained in Article 7, which refers almost exclusively to the protection of children at work, this Article of the Revised Charter offers protection for children and young persons outside the context of work and addresses the special needs arising from their vulnerability.

70. This provision protects children, irrespective of such factors as their birth status and the marital status of their parents. In confirmation of the case law of the Committee of Independent Experts, according to which certain rights such as the right of children to inheritance are covered by Article 17 of the Charter, the word "legal" has been added to its title.

71. The appendix to Article 17 defines the scope of the provision in that it covers all personsbelow the age of 18 years, unless under the law applicable to the child majority is attained earlier. The provision covers these children without prejudice to the other specific provisions provided by the Charter, particularly Article 7.

Paragraph 1

72. The word "parents" in paragraph 1.a should be understood as also including legal guardians or other individuals legally responsible for the child.

Paragraph 2

73. Under this paragraph, children and young persons have the right to access to free primary andsecondary education, which does not imply that they have a right to exercise this right for example in a private school.

74. It follows from the appendix that this paragraph does not imply an obligation to provide compulsory education up to the age of 18 years. The reason that there is no mention of compulsory education in the paragraph itself is that in some states only primary education is compulsory, whereas in others secondary education is also compulsory.

b) Decisions and conclusions of the European Committee of Social Rights

Under Article 17 the Committee assesses the following issues: the legal status of the child; rights of children in public care; protection of children from violence, ill-treatment and abuse; young offenders; the right to assistance for children and the situation of children in poverty; and the right to education.

Under **Article 17§1**, States Parties need to ensure that children and young persons "have the care, the assistance, the education and the training they need" (1.a); protect them against "negligence, violence and exploitation" (1.b.); and provide protection and aid for children and young persons "deprived of their family's support" (1.c.). Thus, the Committee assesses a wide range of situations.

According to the Committee's interpretation, children have the right to know their origins. The Committee examines the procedures available for the establishment of maternity and paternity and the situations where the establishment of maternity or paternity is not possible and/or this right is restricted.[823] The Committee also interprets Article 17§1 to prohibit discrimination of children born outside and within marriage, particularly in respect of care obligations and inheritance rights.[824] Regarding the minimum age for marriage, the Committee raised questions with States Parties when there is a difference in the minimum age for marriage for males and females, on the ground that this may be discriminatory.[825]

The Committee has developed very detailed standards for children in public care.[826] The main criterion is that placement must be an exceptional measure, and is only justified when it is based on the needs of the child, namely if remaining in the family represents a danger for the child. The financial conditions or material circumstances of the family should not be the sole reason for placement. Appropriate alternatives to placement should be explored first, taking into account the views expressed by the child, his or her parents and other members of the family.[827] The long-term care of children outside their home should take place primarily in suitable foster families and only if necessary in institutions.[828]

According to the Committee's interpretation, Article 17§1 entails a prohibition and penalisation of all forms of violence against children, including all forms of corporal punishment,[829] in the home, as well as in all education settings, public and private, and in alternative care. These are acts likely to affect the physical integrity, dignity, development or psychological well-being of children. The relevant legislation must be sufficiently clear, binding and precise.[830] Moreover, states parties must act diligently to ensure that such violence is effectively eliminated in practice.[831]

823. Conclusions 2003, France, <http://hudoc.esc.coe.int/eng?i=2003/def/FRA/17/1/EN>.
824. Conclusions XVII-2 (2005), Malta, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/MLT/17//EN>.
825. Id; Conclusions 2011, Ukraine, <http://hudoc.esc.coe.int/eng?i=2011/def/UKR/17/1/EN>.
826. For details see CoE (2018), Digest of the Case Law of the European Committee of Social Rights, p. 170f.
827. Conclusions 2011 (XIX-4), Statement of Interpretation on Articles 16 and 17, <http://hudoc.esc.coe.int/eng?i=XIX-4_035_04/Ob/EN>.
828. Id.
829. Conclusions XIX-4 (2011) United Kingdom, <http://hudoc.esc.coe.int/eng?i=XIX-4/def/GBR/17//EN>.
830. World Organisation against Torture (OMCT) v. Portugal, Complaint no. 34/2006, Decision on the merits of 5 December 2006, §19-21, <http://hudoc.esc.coe.int/eng?i=cc-34-2006-dmerits-en>.
831. Conclusions 2011, France, <http://hudoc.esc.coe.int/eng?i=2011/def/FRA/17/1/EN>.

In the cases **Association for the Protection of All Children (APPROACH) v. France, Ireland, Italy, Slovenia, Czech Republic, Cyprus, and Belgium**, the complainant organisation alleged that because of the lack of explicit and effective prohibition of all corporal punishment of children in the family, schools and other settings, and because the states in question had failed to act with due diligence to eliminate such punishment in practice, they were in breach of Article 17§1. Regarding the majority of countries, the Committee held that they were in violation of Article 17§1 because the respective legislations did not set out an express and comprehensive prohibition on all forms of corporal punishment of children and there was no case law by superior courts showing that the legislations have been interpreted as prohibiting all forms of violence against children[832].

Regarding young offenders, the age of criminal responsibility must not be too low.[833] The criminal procedure relating to children and young persons must be adapted to their age and proceedings involving minors must be conducted rapidly. Minors should only exceptionally be detained pending trial for serious offences, for short periods of time[834] and should in such cases be separated from adults.[835] Prison sentences should only exceptionally be imposed on young offenders. They should only be for a short duration[836] and the length of sentence must be laid down by a court. Young offenders should not serve their sentence together with adult prisoners.[837]

According to the Committee's interpretation, Article 17§1 guarantees the right of children and young persons to care and assistance, including medical and social assistance when the parents are unable to provide such assistance or if they are non-accompanied minors.[838] States Parties must take appropriate measures to guarantee the care and assistance needed and to protect them from negligence, violence or exploitation.[839] Immediate assistance includes the satisfaction of the material needs, as well as medical or psychological care in the structured form of a child support plan.[840] Regarding unaccompanied foreign minors, the system of reception must respect the dignity of the child. The detention of minors in waiting areas, together with adults, and/or accommodated in hotels, deprived by the assistance of a guardian cannot be in the best interest of the child and is thus contrary to the Charter.[841]

The Committee also assesses more generally the situation of children in poverty, and bases its assessment on the Guiding Principles on extreme poverty and human rights.[842]

Finally, the Committee assesses the right to education as a fundamental right for the achievement and maintenance of other critical rights of children. Here, the Committee particularly focuses on

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832. APPROACH v. Belgium, collective complaint no. 98/2013, decision on the merits of 20 January 2015, <http://hudoc.esc.coe.int/eng/?i=cc-98-2013-dmerits-en>.
833. Conclusions 2011, Ireland, <http://hudoc.esc.coe.int/eng?i=2011/def/IRL/17/1/EN>; Conclusions XIX-4 (2011) United Kingdom, <http://hudoc.esc.coe.int/eng?i=XIX-4/def/GBR/17//EN>.
834. Conclusions 2005, France, <http://hudoc.esc.coe.int/eng?i=2005/def/FRA/17/1/EN>; Conclusions XIX-4 (2011), Denmark, <http://hudoc.esc.coe.int/eng?i=XIX-4/def/DNK/17//EN>.
835. European Committee for Home Based Priority Action for the Child and the Family (EUROCEF) v. France, Complaint No. 114/2015, decision on the merits of 24 January 2018, § 99, <http://hudoc.esc.coe.int/eng?i=cc-114-2015-dmerits-en>.
836. Conclusions 2011, Norway, <http://hudoc.esc.coe.int/eng?i=2011/def/NOR/17/1/EN>.
837. Conclusions 2011, Belgium, <http://hudoc.esc.coe.int/eng?i=2011/def/BEL/17/1/EN>; Conclusions XV-2 (2001), Statement of Interpretation on Article 17, <http://hudoc.esc.coe.int/eng?i=XV-2_Ob_V1-2/Ob/EN>; CoE (2018), Digest, p. 169.
838. International Federation of Human Rights Leagues (FIDH) v. France, Complaint No 14/2003, decision on the merits of September 2004, §36, <http://hudoc.esc.coe.int/eng?i=cc-14-2003-dmerits-en>; Defence for Children International (DCI) v. Netherlands, Complaint 47/2008, Decision on the merits of 20 October 2009, §§70-71, <http://hudoc.esc.coe.int/eng?i=cc-47-2008-dmerits-en>; European Federation of National Organisations working with the Homeless (FEANTSA) v, Netherlands, Complaint No. 86/2012, decision on the merits of 2 July 2014, §50, <http://hudoc.esc.coe.int/eng?i=cc-86-2012-dmerits-en>.
839. Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012, §82, <http://hudoc.esc.coe.int/eng?i=cc-69-2011-dmerits-en>.
840. CoE (2018), Digest, p. 172.
841. European Committee for Home Based Priority Action for the Child and the Family (EUROCEF) v. France, Complaint No. 114/2015, decision on the merits of 24 January 2018, § 100, 136, <http://hudoc.esc.coe.int/eng?i=cc-114-2015-dmerits-en>.
842. Magdalena Sepúlveda Carmona, Guiding principles on extreme poverty and human rights, adopted by the United Nations Human Rights Council on 27 September 2012.

equal access to education as art. 17 under both its paragraphs guarantees the right of all children to education.[843] Here, the Committee pays particular attention to state protection for children in vulnerable situations from minorities, children seeking asylum, refugee children, children in hospitals, children in care, pregnant teenagers, teenage mothers, and children deprived of their liberty. Children belonging to these groups must be integrated into mainstream educational facilities and schemes. Where necessary, special measures should be taken to ensure equal access to education.[844] However, special measures for Roma children should not involve the establishment of separate schools or classes only for this group which may lead to segregation.[845] As regards children with disabilities, their right to education is guaranteed both by paragraphs 1 and 2 of Article 17 as well as by Article 15§1[846] and Article 10. Article 15 is the lex specialis to be applied for children with disabilities.[847]

Article 17§2

This provision guarantees the right of children to primary and secondary education, including the right to inclusive education. According to the Appendix, it covers all persons below the age of 18 years, unless under the applicable law the threshold is attained earlier, without prejudice to the other specific provisions of the Charter, particularly Article 7. According to the Appendix, his does not imply an obligation to provide compulsory education up to the age of 18.

The education system should comply with two criteria: accessibility and effectiveness. States Parties have the positive obligation to ensure equal access to education for all children. Regarding access to education for Roma children, even though educational policies for this group may be accompanied by flexible structures to meet the diversity needs and may take into account the fact that some groups lead an itinerant or semi-itinerant lifestyle, there should be no separate schools for Roma children.[848] Concerning children with disabilities, a distinction between children with and without disabilities, which takes into account differences in capabilities, is acceptable in the application of Article 17§2. The integration of children with disabilities into mainstream schools, in which arrangements are made to address their special needs, should be the norm and teaching in specialised schools the exception.[849] For any form of special education to be in conformity with Article 17§2, the children concerned must be given sufficient instruction and training and complete their schooling in equivalent proportions to those of children in mainstream schools.[850] Regarding unlawfully present children, the denial of access to education will exacerbate their vulnerability. Access to education is crucial for every child's life and development. Therefore, children, whatever their residence status, come within the personal scope of Article 17§2. Consequently, States Parties are required under Article 17§2 of the Charter, to ensure that children unlawfully present in their territory have effective access to education.[851]

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843. Mental Disability Advocacy Centre (MDAC) v. Bulgaria, Collective Complaint No. 41/2007, decision on the merits of 3 June 2008, §34, <http://hudoc.esc.coe.int/eng?i=cc-41-2007-dmerits-en>. Autism-Europe v. France, Complaint No.13/2002, decision on the merits of 4 November 2003, §49, <http://hudoc.esc.coe.int/eng?i=cc-13-2002-dmerits-en>.
844. Mental Disability Advocacy Centre (MDAC) v. Bulgaria, supra, §34.
845. Conclusions 2011, Slovakia, <http://hudoc.esc.coe.int/eng?i=2011/def/SVK/17/1/EN>.
846. Conclusions 2003, Bulgaria, <http://hudoc.esc.coe.int/eng?i=2003/def/BGR/17/2/EN>.
847. European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, decision on the merits of 11 September 2013, §§24-30, <http://hudoc.esc.coe.int/eng?i=cc-81-2012-dmerits-en>.
848. Policies on the education of Roma children should be in conformity with, inter alia, the principles laid down in Recommendation No R (2000) 4 of the Committee of Ministers to member States on the education of Roma children in Europe and those of the Framework Convention on the Protection of National Minorities.
849. Autism-Europe v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003, §49, <http://hudoc.esc.coe.int/eng?i=cc-13-2002-dmerits-en>; Mental Disability Advocacy Centre (MDAC) v. Bulgaria, Collective Complaint No. 41/2007, decision on the merits of 3 June 2008, §35, <http://hudoc.esc.coe.int/eng?i=cc-41-2007-dmerits-en>.
850. Id, §36.
851. Conclusions 2015, Slovenia, <http://hudoc.esc.coe.int/eng?i=2015/def/SVN/17/2/EN>; Conclusions 2015, Netherlands, <http://hudoc.esc.coe.int/eng?i=2015/def/NLD/17/2/EN>.

Regarding the criterion of quality, states parties have to establish and maintain a well-functioning education system. Here, the Committee requires, inter alia, a functioning system of primary and secondary education, which includes an adequate number of schools fairly distributed over the geographical area, in particular between rural and urban areas. Class sizes and the teacher-pupil ratio must be reasonable. There must also be a mechanism to control the quality of teaching and the methods used in public as well as private educational institutions. These are the same criteria as applied under Article 17§1.

According to the wording of Article 17§2, primary and secondary education, which comprises the basic education system must be free of charge. Other costs such as books or uniforms must be reasonable and assistance must be available to limit their costs for the most disadvantaged children. The Committee examines state measures to encourage school attendance and to actively reduce the number of children dropping out or not completing compulsory education and the rate of absenteeism. States Parties have a margin of discretion in developing and implementing concrete measures to combat absenteeism depending on causes and national situations.

c) Implementation in Ukraine

Paragraph 1

The Committee examined the situation in Ukraine on its conformity with Article 17§1 of the Charter on aspects the legal status of the child, protection from ill-treatment and abuse, rights of children in public care, right to education, children in conflict with the law, right to assistance and child poverty.

The overall result of the Committee's examination the situation in Ukraine is not in conformity with Article 17§1 of the Charter on the ground that the ratio of children in institutional care to the number of children in foster-care or other forms of family-based care is too high.[852]

The legal status of the child

The main interest of the Committee related to the legal status of a child was devoted to the measures which have been taken by the Government of Ukraine to reduce statelessness including relevant procedures for obtaining nationality and taking measures to identify children unregistered at birth. Also, the Committee asks to specify the procedures that have been taken to facilitate birth registration, particularly for vulnerable groups of people in Ukraine, such as Roma, asylum seekers and children in a difficult situation.

Protection from ill-treatment and abuse

The Committee repeats that it previously found the situation to be in conformity in this respect, all forms of corporal punishment are prohibited in all settings.[853]

Rights of children in public care

Evaluating the situation with respect of rights of children in public care the Committee was very concerned on the procedure for removing children from their families, following the judgment of the European Court of Human Rights in the case Saviny v. Ukraine[854].

852. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/17/1/EN>, (5 December 2019).
853. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/17/1/EN>, (4 December 2015).
854. European Court of Human Rights, Saviny v. Ukraine, <http://hudoc.echr.coe.int/eng/?i=001-90360>, (18 December 2008).

The Committee also previously asked of the situation regarding the development of foster care and deinstitutionalisation; it also asked about the average size of a single institution for child care. Not having received the relevant information on these contexts the Committee asks the next report to provide full information on the progress made in deinstitutionalisation of children, including the number of children in institutions, foster families and other forms of care.[855]

The Committee finds the situation not to be in conformity with the Charter on the grounds that the ratio of children in institutional care to the number of children in foster-care or other forms of family-based care is too high.[856]

Right to education

On the aspects of education, the Committee refers to its conclusion under Article 17§2.

Children in conflict with the law

The Committee emphasised that prison sentences should only exceptionally be imposed on young offenders as a measure of last resort and be of short duration and be regularly reviewed. That also includes provisions of the law that allows children to be detained for 12 months pending trial. The Government of Ukraine does not provide significant information in this context and the Committee reiterates its request for this information and considers that if this information is not provided in the next report there will be nothing to establish that the situation is in conformity with the Charter on this point.[857]

Additionally the Committee asks about the measures which have been taken to abolish solitary confinement for children, as the report of the Committee for the Prevention of Torture following its visit to Ukraine shows the situation with placement of juveniles in disciplinary solitary confinement which shall be abolished.

Right to assistance

The right to assistance was linked to the situation in Ukraine that the detention of children on the basis of their or their parents' immigration status. Such practice in the view of the Committee is contrary to the best interests of the child.

The Committee asks Ukraine to provide the information on accommodation facilities for migrant children whether accompanied and unaccompanied, including measures taken to ensure that children are accommodated in appropriate conditions. It also requests further information on the assistance given to unaccompanied children, in particular to protect them from exploitation and abuse. Also it requests information as to whether children who are irregularly present in the State accompanied by their parents or not, may be detained and if so under which circumstances.[858]

Child poverty

The Committee requests the information on the data of child poverty and the measures taken to decrease it with the inclusion of the activities focused on struggling discrimination against and promoting equal opportunities for children from particularly vulnerable groups.

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855. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/17/1/EN>, (4 December 2015).
856. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/17/1/EN>, (5 December 2019).
857. Ibid.
858. Ibid.

Paragraph 2

The Committee evaluated the situation in Ukraine on conformity with Article 17§2 of the Charter on enrolment rates, absenteeism and drop-out rates, costs associated with education, vulnerable groups, anti-bullying measures and the voice of the child in education. The overall conclusion was deferred on pending receipt of the information.

Enrolment rates, absenteeism and drop-out rates

The Committee use the data from UNESCO related the enrolment rate and its low for Ukraine. Because of that the Committee asks the next report to provide up to date information on enrolment rates, absenteeism and drop-out rates as well as information on measures taken to address issues related to these rates.

Vulnerable groups

The Committee on the aspects of vulnerable groups pointed out the access to general secondary education of children in an irregular migration situation and wishes to receive updated information in this respect. The Committee noted that unless this information is provided in the next report, it will impossible to establish whether the situation is in conformity with the Charter.

Additionally, the Committee requests information on access to education for Roma children and children from vulnerable families, such as internally displaced persons, children living in rural areas etc.[859]

Anti-bullying measures

The Committee wondering what measures has been taken to introduce anti bullying policies in schools.

The voice of the child in education

The conclusion of the Committee emphasizes needs of child participation across a broad range of decision-making and activities related to education. The Committee asks about measures which have been taken by the State to facilitate child participation in this regard.[860]

The reference to Article 17 in the national judicial practice has not been found.

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859. Conclusions 2019, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/17/2/EN>, (5 December 2019).
860. Ibid.

Group 1: Employment, training and equal opportunities

The right to engage in a gainful occupation in the territory of other Parties (Article 18)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees the nationals of any one of the Parties the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons. (Part I, point 18)

Pursuant to Art. 18 ESC:

> **Article 18 – The right to engage in a gainful occupation in the territory of other Parties**
>
> With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake:
>
> 1. to apply existing regulations in a spirit of liberality;
>
> 2. to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;
>
> 3. to liberalise, individually or collectively, regulations governing the employment of foreign workers;
>
> and recognise:
>
> 4. the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties.

b) Decisions and conclusions of the European Committee of Social Rights

Article 18 applies to employees and the self-employed who are nationals of States which are party to the Charter. It also covers members of their family allowed into the country for the purposes of family reunion.[861] Article 18 relates not only to workers already on the territory of the State concerned, but also to workers outside the country applying for a permit to work on the territory.[862]

Liberal application of existing regulations (Article 18§1)

Article 18§1 requires each State Party to ensure to the nationals of any other Party the effective exercise of the right to engage in a gainful occupation in its territory, by applying existing

861. Conclusions X-2 (1990), Austria.
862. Conclusions XIII-1 (1993), Sweden.

regulations in a spirit of liberality[863]. The assessment of the degree of liberality used in applying existing regulations is based on figures showing the refusal rates for work permits. To this end, the figures supplied must be broken down by country and must also distinguish between first-time applications and renewal applications.[864]

As the Committee has already observed, economic or social reasons might justify limiting access of foreign workers to the national labour market. This may occur, for example, with a view to addressing the problem of national unemployment by means of favouring employment of national workers[865]. However, the implementation of such policies limiting access of third-country nationals to the national labour market, should neither lead to a complete exclusion of nationals of non-EU (or non-EEA) States parties to the Charter from the national labour market, nor substantially limit the possibility for them of acceding the national labour market.[866]

> The Committee considers to be also in conformity with Article 18§§1 and 3, the fact that a State Party, in view of ensuring free movement of workers within a given economic area of European States, such as the EU or the EEA, gives priority in access to the national labour market not only to national workers, but also to foreign workers from other European States members of the same area. An example of such a situation can be found in the application of the so called "priority workers" rule, provided for by the EU Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment. This Resolution states inter alia that EU Member States will consider requests for admission to their territories for the purpose of employment only where vacancies cannot be filled by national and Community manpower, or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market.[867]

> In this regard the Committee notes, however, that in order not to be in contradiction with Article 18 of the Charter, the implementation of such policies limiting access of third-country nationals to the national labour market, should neither lead to a complete exclusion of nationals of non-EU (or non-EEA) States parties to the Charter from the national labour market, nor substantially limit the possibility for them of acceding the national labour market. Such a situation, deriving from the implementation of "priority rules" of the kind just mentioned, would not be in conformity with Article 18§1, of the Charter, since it would prove an insufficient degree of liberality in applying existing regulations with respect

863. Conclusions XX-1 - Statement of interpretation - Article 18-1, 18-3.
864. Conclusions XVII-2 (2005), Spain; Digest 2018, p. 175.
865. Conclusions XX-1 - Statement of interpretation - Article 18-1, 18-3; Conclusions 2012 - Statement of interpretation - Article 18-1, 18-3.
866. Conclusions 2012, Statement of Interpretation of Article 18§1 and 18§3.
867. Conclusions XX-1 - Statement of interpretation - Article 18-1, 18-3; Conclusions 2012 - Statement of interpretation - Article 18-1, 18-3.

to the access to the national labour market of foreign workers of a number of States Parties to the Charter.[868]

Simplification of formalities (Article 18§2)

According to Article 18§2 of the Charter, with a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, States Parties are under an obligation to reduce or abolish chancery dues and other charges paid either by foreign workers or by their employers. The Committee observed that in order to comply with such an obligation, States must, first of all, not set an excessively high level for the dues and charges in question, that is a level likely to prevent or discourage foreign workers from seeking to engage in a gainful occupation, and employers from seeking to employ foreign workers[869].

> In addition, States have to make concrete efforts to progressively reduce the level of fees and other charges payable by foreign workers or their employers. States are required to demonstrate that they have taken measures towards achieving such a reduction. Otherwise, they will have failed to demonstrate that they serve the goal of facilitating the effective exercise of the right of foreign workers to engage in a gainful occupation in their territory.[870]

With regard to the formalities to be completed, conformity with Article 18§2 presupposes the possibility of completing such formalities in the country of destination as well as in the country of origin[871] and obtaining the residence and work permits at the same time and through a single application.[872] It also implies that the documents required (residence/work permits) will be delivered within a reasonable time.[873]

Liberalisation of regulations (Article 18§3)

Article 18§3 requires each State Party to liberalise regulations governing the employment of foreign workers, in order to ensure to the workers from other States parties the effective exercise of the right to engage in a gainful occupation. In view of ensuring the effective exercise of this right, the States Parties' engagement in liberalisation shall include regulations governing the recognition of foreign certificates, professional qualifications and diplomas, to the extent that such qualifications and certifications are necessary to engage in a gainful occupation as employees or self-employed workers[874].

The conditions laid down for access by foreign workers to the national labour market must not be excessively restrictive, in particular with regard to the geographical area in which the occupation can be carried out and the requirements be met[875].

> A requirement that foreign worker be in possession of certificates, professional qualifications or diplomas issued only by national

868. Conclusions XX-1 - Statement of interpretation - Article 18-1, 18-3; Conclusions 2012 - Statement of interpretation - Article 18-1, 18-3.
869. Conclusions XX-1 - Statement of interpretation - Article 18-2.
870. Conclusions XX-1 - Statement of interpretation - Article 18-2.
871. Conclusions XVII-2, Finland.
872. Conclusions XVII-2, Germany.
873. Conclusions XVII-2, Portugal.
874. Conclusions 2012 - Interpretive statement - Article 18-3.
875. Conclusions V, Germany.

authorities, schools, universities, or other training institutions, without opening the possibility of recognising as valid and appropriate substantially equivalent certificates, qualifications or diplomas issued by authorities, schools, universities or other training institutions of other States parties, which have been obtained as a result of training courses or professional careers carried out within other States Parties, would represent a serious obstacle for foreign workers to access the national labour market, and an actual discrimination against non-nationals. For this reason the Committee, taking inspiration also from the example of the legislative and jurisdictional practice of EU institutions aimed at guaranteeing the right to establishment by the harmonisation and mutual recognition of qualifications, considers it necessary that States Parties make efforts to liberalise regulations governing the recognition of foreign certificates, professional qualifications and diplomas, progressively reducing the disadvantages for foreign workers to engage in a gainful occupation due to lack of recognition of foreign diplomas or professional qualifications substantially equivalent to those issued by national authorities, schools, universities or other training institutions[876].

” Both the granting and the cancellation of work and temporary residence permits may well be interlinked, in as much as they refer to the same case in question- whether or not to enable a foreigner to engage in a gainful occupation. However, in case a work permit is revoked before the date of expiry, either because the employment contract is prematurely terminated, or because the worker no longer meets the conditions under which the work permit was granted, it would be contrary to the Charter to automatically deprive such worker of the possibility to continue to reside in the State concerned and to seek another job and a new work permit, unless there are exceptional circumstances which would authorise expulsion of the foreign worker concerned, in the meaning of Article 19§8[877].

Right of nationals to leave the country (Article 18§4)

According to Article 18§4, States undertake not to restrict the right of their nationals to leave the country to engage in gainful employment in other Parties to the Charter. The only permitted restrictions are those provided for in Article G of the Charter, i.e. those which are "prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals."[878]

876. Conclusions 2012 - Interpretive statement - Article 18-3.
877. Conclusions 2012 - Statement of interpretation - Article 18-3.
878. Conclusions XI-1, Netherlands; Conclusions 2005, Cyprus; Digest 2018, p. 178.

c) Implementation in Ukraine

Paragraph 1

Within the examination of national legislation in the sphere of the employment of foreigners, stateless persons presented by Ukraine in 2015, the Committee asked about further information on the conditions and procedures for issuing or renewing each type of work permit.

Furthermore, the Committee indicated the criteria of assessment of the degree of liberality to comply with the requirements under this paragraph of Article 18, which included granting and refusal rates for work permits for nationals of States Parties, consequently, high rank of successful applications for work permits and for renewal of work permits.[879] Despite no distinguish between the number of first-time applications and renewal of work permit were provided in the national report 2015, the Committee took into account the high percentage of successful applications for work permits for the decision that the situation in applying existing regulations in a spirit of liberality in Ukraine was in conformity with the requirements of the Charter.[880]

Paragraph 2

Within the examination administrative formalities and time frames for obtaining the documents needed for engaging in a professional occupation in Ukraine, the Committee paid attention to the absence of possibility to obtain the residence and work permits simultaneously through a single application and the clarification on the sequence of obtaining these permits. In this context, the requirement to provide the possibility of completing such formalities in the country of destination as well as in the country of origin and obtaining the residence and work permits at the same time and through a single application was recalled as well.[881]

According to the rule not to establish excessive chancery dues and other charges for residence and work permits, the Committee found out the lack of information and explanations on the amount of fee for a work permit and its regulation. Moreover, the lack of appropriate information led to the conclusion of non-conformity the situation in Ukraine with Article 18 §2 due to non-simplifying existing formalities and reducing chancery dues and other charges payable by foreign workers or their employers.[882]

Paragraph 3

The Committee examined the fulfillment of commitments under paragraph 3 regarding access to the national labour market in the line with §1 of this Article, with examined the situation with work permits for foreigners and stateless persons; legal regulation of self-employment of foreigners in Ukraine and required information on the grounds for refusal to a national of other States Parties wishing to work as self-employed or employees of obtaining a residence and work permit; measures taken to liberalise of recognition of foreign certifications, professional qualifications and diplomas and statistics of such recognitions.[883]

The possibility of withdrawal residence permit in case of losing the job under Ukrainian legislation was examined by Committee and it was underlined the requirements under Article 18 §3 of the Charter that "loss of employment must not lead to the cancellation of the residence permit,

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879. ECSR, Conclusions 2016. Ukraine. p. 33
880. Ibid. p.34.
881. Ibid. p.35.
882. Ibid. , p.36.
883. ECSR, Conclusions 2016. Ukraine. p. 38.

thereby obliging the worker to leave the country as soon as possible".[884] Therefore, the Committee decided that Ukraine did not fulfill above-mentioned obligation.

Paragraph 4

Since the ratification the Charter, Ukraine has not provided the Committee with information required that led to defer the conclusions 2012, 2016.[885] The Committee reiterated its main requirements under this paragraph, including not to establish restrictions of the right of State Party nationals to leave the country to engage in a gainful employment in other Parties to the Charter, except the restrictions provided for in Article G of the Charter, and asked Ukraine to clarify the legal grounds of restricting the rights of nationals to leave the country.[886]

884. Ibid.
885. ECSR, Conclusions 2016. Ukraine. p. 39, Conclusions. Ukraine 2012. – Article 18- 4.
886. ECSR, Conclusions 2016. Ukraine. p. 39.

Group 1: Employment, training and equal opportunities

The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Part I, point 20).

The right conferred in Article 20 ESC (part II) is overlapping with Article 1 § 2 ESC in terms of the general framework for guaranteeing equality between women and men[887]; Article 4 § 3 ESC in terms of the right to equal pay[888]; Article 8 in terms of protection connected with parental and family obligations[889] and Article E ESC in terms of protection against discrimination[890].

Pursuant to Art. 20 ESC:

> **Article 20 –The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex**
>
> With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:
>
> a). access to employment, protection against dismissal and occupational reintegration;
>
> b). vocational guidance, training, retraining and rehabilitation;
>
> c). terms of employment and working conditions, including remuneration;
>
> d). career development, including promotion.

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887. For States which have accepted both Article 1 § 2 and Article 20, the Committee examines under the later the general framework for guaranteeing equality between women and men (equal rights, specific protection measures, situation of women in employment and training schemes, measures to promote equal opportunities). As a result it does not deal specifically with discrimination based on sex under Article 1 § 2 ESC. (ECSR, Conclusions 2002 - Statement of interpretation - Article 1-2, 20).

888. Since the right to equality under Article 20 covers remuneration, the Committee no longer examines the national situation in this respect under Article 4§3 (right to equal pay). Consequently, States which have accepted both provisions, are no longer required to submit a report on the application of Article 4 § 3 ESC. (ECSR, Conclusions 2002 - Statement of interpretation - Article 1-2, 20).

889. The Committee examines aspects relating to maternity protection and family responsibilities under Articles 8 and 27 of the Charter (ECSR, Conclusions 2016 - Andorra - Article 20).

890. In accordance with the well-established case law of the ECSR, the assessment of equality of pay for women and men for equal work or work of equal value „more appropriately belongs under Articles 4 § 3 and 20 of the Charter. As regards Article E, (..), it is clear from the very wording of Articles 4 § 3 and 20 of the Charter that their scope includes the prohibition of discrimination"(ECSR, Decision on the merits: University Women of Europe (UWE) v. Belgium, Collective Complaint No. 124/2016, p. 109).

Pursuant to the **Appendix**[891]:

Article 20

1. It is understood that social security matters, as well as other provisions relating to unemployment benefit, old age benefit and survivor's benefit, may be excluded from the scope of this article.

2. Provisions concerning the protection of women, particularly as regards pregnancy, confinement and the post-natal period, shall not be deemed to be discrimination as referred to in this article.

3. This article shall not prevent the adoption of specific measures aimed at removing de facto inequalities.

4. Occupational activities which, by reason of their nature or the context in which they are carried out, can be entrusted only to persons of a particular sex may be excluded from the scope of this article or some of its provisions. This provision is not to be interpreted as requiring the Parties to embody in laws or regulations a list of occupations which, by reason of their nature or the context in which they are carried out, may be reserved to persons of a particular sex".

Pursuant to **Article 1 Par. 1 of the Explanatory Report to the Additional Protocol of 1988, which remains relevant (as stated in point 82 of the explanatory report to the ESC 1996)**

20. The obligation on the Parties (…) is, inter alia, to "ensure" or to "promote" the application of the right to equal treatment; this is to allow for the fact that the obligation in question may be met as much by government action (legislation, regulations, etc.) as by action by employers and labour (collective agreements) or individuals (bilateral agreements and contracts). The obligation to ensure equal treatment may further be met both by judicial processes and by such other appropriate means as exist or may be instituted by each Party.

21. The list of fields in which the provision is applicable reflects developments since the Charter's adoption. Reference is made, for instance, to occupational resettlement, a concept which does not appear as such in the Charter. The expression "occupational resettlement" covers several situations: the resumption of employment after a voluntary or involuntary break, moving from one job to another without a break, possibly after retraining. The term "retraining" covers any supplementary training to

891. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.

enable workers to adapt their knowledge and skills to industrial, technological and scientific progress.

22. The expression "terms of employment and working conditions" refers to all rights and situations associated with the specific position of the worker in his or her occupational relations and working environment. As stated, however, in the appendix, social security matters "may be excluded" (…).

23. It was understood that by the expression "terms of employment [...] including remuneration;" in the third sub-paragraph (…), the equal treatment intended by this provision is wider in scope than the principle of "equal pay for work of equal value" in Article 4, paragraph 3, of the Charter. "Remuneration" shall, moreover, be understood to mean basic or minimum wages or salary plus all other benefits paid directly or indirectly in cash or kind by the employer to the worker by reason of the latter's employment.

b) Decisions and conclusions of the European Committee of Social Rights

Article 20 affirms the right to equality of opportunity and equal treatment in the field of employment and occupation, without discrimination based on sex. The principle is understood to mean the absence of any discrimination on grounds of sex, whether direct or indirect[892].

Discrimination in breach of the Charter is constituted by a difference in treatment between people in comparable situations which does not pursue a legitimate aim and is not based on objective and reasonable grounds[893]. In determining whether a legitimate aim is being pursued and the measures taken are reasonably proportionate, the Committee applies Article G[894].

The acceptance of Article 20 ESC entails **the following obligations for States**:

- the obligation to promulgate this right in legislation;

- the obligation to take legal measures designed to ensure the effectiveness of this right. In this regard, the (…) measures must provide for the nullity of clauses in collective agreements and individual contracts which are contrary to the principle, for adequate appeal procedures where the right has been violated and for the effective protection of workers against any retaliatory measures (dismissal or other measures) taken as a result of their demand to benefit from the right;

- the obligation to define an active policy and to take practical measures to implement it[895].

The right of women and men to **equality must be guaranteed by law**. The Charter requires "States not only to provide for equal treatment but also to protect women and men from discrimination in employment and training. This means that they are obliged to enact a sufficiently detailed

892. ECSR, Conclusions XIII-5, Sweden, Article 1 of the Additional Protocol.
893. Syndicat national des Professions du Tourisme v. France, Complaint No. 6/1999, Decision on the merits of 10 October 2000, §25.
894. Conclusions XVI-1, Greece, Article 1§2; Digest p. 191.
895. ECSR, Conclusions XII-5 - Statement of interpretation - Article 1-2, 4-3, 1 Addditional Protocol; Conclusions XIII-3 - Statement of interpretation - Article 1 Additional Protocol.

legislation explicitly imposing equal treatment in all aspects."[896] It is not sufficient merely to state the principle in the Constitution.

Any legislation, regulation or other administrative measure that fails to comply with the equality principle must be repealed or revoked. The non-application of discriminatory legislation is not sufficient for a situation to be considered in conformity with the Charter[897].

It must be possible to set aside, withdraw, repeal or amend any provision in collective agreements, employment contracts or firms' internal regulations that is incompatible with the principle of equal treatment[898].

The right „has to be practical and effective, and not merely theoretical or illusory"[899].

Domestic law must provide for **appropriate and effective remedies** in the event of alleged discrimination. Employees who consider that they have suffered discrimination must be able to take their case to an independent body[900].

The burden of proof must be shifted[901]. The shift in the burden of proof consists in ensuring that where a person believes he or she has suffered discrimination on grounds of sex and establishes facts which make it reasonable to suppose that discrimination has occurred, **the onus is on the defendant** to prove that there has been no infringement of the principle of equal treatment[902]. The purpose of this rule is to enable courts to deal with discrimination in the light of the effects produced by a rule, act, or practice and hence that the shift in the burden of proof is a key factor in the effective application of rules on protection against discrimination[903].

By analogy with the case-law in relation to Article 1 § 2, a number of other legal steps should be taken to make the right of appeal fully effective, such as authorising trade unions and other bodies to take action in employment discrimination cases, including action on behalf of individuals[904] or setting up an independent body to promote equal treatment and provide legal assistance to victims.

Anyone who suffers discrimination on grounds of sex must be entitled to **adequate compensation**, i.e. compensation must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers[905].

Adequate compensation means:

- reinstatement or retention of employment and compensation for any pecuniary damage suffered in the event of unlawful or unfair dismissal;
- compensation proportionate to the damage suffered, i.e. to cover pecuniary and non-pecuniary damage, where the dismissed employee does not wish to be reinstated or continuation of the

896. ECSR, Conclusions XIII-3 (1995), Statement of Interpretation on Article 1 of the Additional Protocol; Conclusions XV-2 (2001) Addendum, Slovak Republic, Article 1 of the Additional Protocol; Conclusions XVII-2 (2005), Netherlands (Aruba), Article 1 of the Additional Protocol.
897. Conclusions XIII-3 (1995), Statement of Interpretation on Article 1 of the Additional Protocol.
898. Conclusions XIII-5 (1997), Statement of Interpretation on Article 1 of the Additional Protocol.
899. ECSR, International Commission of Jurists (ICJ) against Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32.
900. Conclusions XIII-3 (1995), Statement of Interpretation on Article 1 of the Additional Protocol.
901. Conclusions 2004, Romania, article 20; Digest p. 192.
902. Conclusions XIII-5 (1997), Statement of Interpretation on Article 1 of the Additional Protocol; Digest p. 192.
903. Syndicat SUD Travail et Affaires Sociales v. France, Complaint No. 24/2004, Decision on the merits of 8 November 2005, §34; Digest p. 192.
904. Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol.
905. Conclusions 2012 (Article 1§2) Albania.

employment relationship is impossible[906];
- in all other cases, bringing the discrimination to an end and awarding compensation proportionate to the pecuniary and non-pecuniary damage suffered[907].

Any ceiling on compensation that may preclude damages from making good the loss suffered and from being sufficiently dissuasive is proscribed[908].

Protection against reprisals

Employees who try to enforce their right to equality must be legally protected against any form of reprisals from their employers[909], including not only dismissal, but also downgrading, changes to working conditions and so on. National legislation must provide for the same consequences where an employee is a victim of reprisal measures as those described above in the sections on appeal procedures and compensation[910].

Access to certain occupations

Exceptionally and subject to strict interpretation certain jobs and occupational activities may be limited to persons of one sex, if this is due to the nature of such jobs and activities or the context and conditions in which they are carried out. Such a limitation can only be in conformity in respect of jobs/activities where gender constitutes a genuine occupational requirement (Appendix to Article 20, § 4). In determining whether, because of the conditions in which police activities are conducted, sex constitutes a decisive factor in the police force, the army, etc., States Parties may take account of public order or national security-related requirements provided that they are prescribed by law, pursue a legitimate aim and are necessary in a democratic society (Article G). Like any measure that derogates from the rights guaranteed by the Charter, the exception must be interpreted restrictively and not exceed the legitimately pursued aim[911].

Particular rights of women - Specific protection measures

According to the Appendix to Article 20 (§1), provisions concerning the protection of women are not deemed to be discrimination. Such provisions must be objectively justified by needs that apply exclusively to women, such as those relating to maternity (pregnancy, childbirth and the post-natal period). These particular rights are also guaranteed by Article 8 of the Charter (right of employed women to protection of maternity)[912].

On the other hand, prohibiting women from performing night work or underground mining while authorising men to do so is contrary to the principle of equal treatment for, while night work is harmful, it is just as detrimental to men as to women[913].

Equal opportunities and positive measures

Since "the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact" and conformity with the Charter cannot

906. Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol; Digest p. 192-193.
907. Conclusions XVII-2, Finland, Article 1 of the Additional Protocol; Digest p. 192-193.
908. Conclusions 2012 (Article 1§2) Albania; Digest p. 192-193.
909. Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol; Digest p. 192-193.
910. Digest, p. 193.
911. Conclusions XVI-2, Greece, Article 1 of the Additional Protocol; Digest p. 193.
912. Digest, p. 193.
913. Conclusions XVII-2, Netherlands (Aruba), Article 1 of the Additional Protocol; Conclusions 2012 Bosnia Hereogovinia, Article 20; Digest p. 193.

be ensured solely by the operation of legislation[914], States Parties must take practical steps to promote equal opportunities[915].

Appropriate measures include:

- adopting and implementing national equal opportunities action plans;

- requiring individual undertakings to draw up enterprise or company plans to secure greater equality between women and men;

- encouraging employers and workers to deal with equality issues in collective agreements;

- setting more store by equality between women and men in national action plans for employment[916].

Action taken must be based on a comprehensive strategy for incorporating the gender perspective into all labour market policies[917].

The Appendix to Article 20 (§3) makes it clear that specific measures designed to remove de facto inequalities are permitted. As this provision simply upholds the very purpose of Article 20 in that it guarantees the right to equal opportunities, the Committee has interpreted it as placing a positive obligation on the States Parties. Besides the fact that legislation may not prevent the adoption of positive measures or positive action[918], the States Parties are required to take specific steps aimed at removing de facto inequalities affecting women's training or employment opportunities[919].

Article 20 guarantees **the right to equality at all stages of working life** – access to employment, remuneration and other working conditions, vocational training and guidance and promotion, prohibits dismissal and other forms of detriment on grounds of sex. Article 20 is the lex specialis in relation to Article 1 § 2 of the Charter, which prohibits all discrimination at work[920]. This means that in practice where a state has accepted Article 20 issues concerning gender equality will be dealt with under this provision[921].

The right comprises of two main parts: equal rights and equal opportunities.

Article 20 „embodies the same **guarantee of equal pay** as Article 4 § 3, and further encompasses other aspects of the right to equal opportunities and equal treatment in matters of employment, such as access to employment, vocational guidance and career development"[922]. **The guarantee of equal pay has been discussed in details under Article 4 § 3 ESC.**

The ECSR found violation of Article 20 ESC in cases:

- of lack of legislation providing for a shift in the burden of proof in gender discrimination cases[923];

914. International Commission of Jurists (CIJ) v. Portugal, Complaint No. 1/1998, Decision on the merits of 9 September 1999, §32; Digest p. 193.
915. Conclusions XVII-2, Netherlands (Antilles and Aruba), Article 1 of the Additional Protocol; Digest p. 193.
916. Conclusions XVII-2, Greece, Article 1 of the Additional Protocol; Digest p. 193.
917. Digest, p. 194.
918. Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol; Digest p. 193.
919. Conclusions 2002, Romania; Digest p. 193.
920. Conclusions 2002 Statement of Interpretation on Article 20.
921. ECSR, Digest p. 191.
922. ECSR, Decision on the merits: University Women of Europe (UWE) v. Belgium, Collective Complaint No. 124/2016, p. 107.
923. ECSR, Conclusions XXI-1 - Netherlands Aruba - Article 20; Conclusions 2016 - Russian Federation - Article 20; Conclusions 2016 - Ukraine - Article 20.

- where the unadjusted pay gap was manifestly too high (around 35%[924] or 28.3% while the EU 28 average was 16.1% at the same time)[925];

- where there was no explicit statutory guarantee of equal pay for work of equal value[926];

- where in equal pay litigation cases legislation pay comparisons were not allowed to be made across companies/undertakings[927];

- where legislation prohibited women from performing certain occupations[928] or where not all professions were open to women[929], which constitutes discrimination based on sex;

- where the right to equal treatment in employment without discrimination on grounds of sex was not guaranteed in practice[930] – due to the persistent gender wage gap; women's disproportionately high unemployment, especially among Roma women, women with disabilities and rural women; the increasing feminisation of certain professions; the lack of opportunities to reconcile work and family obligations; the sexual harassment of women in the workplace; and the lack of disaggregated data on the situation of women in the labour market[931];

- where the limits imposed on compensatory awards in gender discrimination cases might prevent such violations from being adequately remedied and effectively prevented.[932]

c) Implementation of ESC in Ukraine

Despite the ratification of the Article 20 of the Charter by Ukraine in 2007, the first Committee's analysis of the situation in Ukraine was appeared in its Conclusion 2016 because of the lack of the information necessary for the conclusions in the previous report.

In 2016, the Committee analysed the national legislation regarding to the burden of proof in sex discrimination cases and recalled that the burden of proof must be shifted in this category of cases.[933] The absence of this provision in national legislation led to the conclusion that situation in Ukraine was not in conformity with the Article 20 of the Charter.[934]

In Ukraine the burden of proof in the discrimination cases usually is regarded exclusively under national legislation. For example, the Civil Cassation Court in the judgment adopted on 5 September, 2019, considered:

...according to the second part of Article 81 of the CPC of Ukraine in cases of discrimination, the plaintiff is obliged to provide factual data confirming that discrimination took place, but no evidence to prove the existence of discrimination under the Article 2-1 of the Code of Labour Laws of Ukraine was provided by the plaintiff, and therefore the conclusions of the courts of previous

924. Conclusions 2016 - Armenia - Article 20.
925. ECSR, Conclusions 2016 - Estonia - Article 20.
926. ECSR, Conclusions 2016 - Georgia - Article 20.
927. Conclusions 2016 - Malta - Article 20.
928. Conclusions 2016 - Montenegro - Article 20; Conclusions 2016 - Russian Federation - Article 20; Conclusions 2016 - Turkey - Article 20.
929. Conclusions 2016 - Moldova - Article 20.
930. Conclusions 2016 - Ukraine - Article 20; Conclusions 2016 - Serbia - Article 20.
931. Conclusions 2016 - Serbia - Article 20.
932. Conclusions 2016 - Armenia - Article 20; Conclusions 2016 - Turkey - Article 20.
933. European Committee of Social Rights, Conclusions 2016. Ukraine. Article 20. URL: http://hudoc.esc.coe.int/eng?i=2016/def/UKR/20/EN
934. Ibid.

instances in this part are also true…[935] The international documents, including the European Social Charter were not applied.

Noting that Ukrainian report did not include relevant information, statistics about the ensuring equal opportunities and equal treatment in the sphere of employment and occupation on the grounds of sex in practice, the Committee found that the commitments under the Article 20 were violated by Ukraine in the context of this situation. The Committee payed special attention to the equal payment for women and men, and reiterated that it had to be possible to make pay comparisons across companies, where the differences in pay could be attributed to a single source.[936] According to the Committee, there would be nothing to show that the situation in Ukraine is in conformity with the Charter on this point if the necessary information has not been provided in the next report.[937]

Various aspects of the prohibition of discrimination on the ground of sex in employment and occupation sphere have been considered by the national courts of Ukraine. Sometimes, national judges applied ILO Conventions, the ECHR, including the case-law of the European Court of Human Rights, nevertheless, references to the European Social Charter has not been found. For example, the question about the discrimination on the ground of sex on the possibility of dismissing an employee during childcare leave raised in the case № 804/16289/15 that was considered by the Administrative Cassation Court on 15 March, 2019.[938] The judges applied, except the Constitution of Ukraine, appropriate provisions of national legislation, including the Code of Labour Laws of Ukraine, Laws of Ukraine "On ensuring equal rights and opportunities for women and men", "On Principles of Prevention and Combating Discrimination in Ukraine", the range of international documents:

The Universal Declaration of Human Rights of December 10, 1948, states that everyone should have all the rights and freedoms set forth in this declaration, regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, status, or other position.

The International Labour Organisation Convention concerning Discrimination in Respect of Employment and Occupation №111 of 1960 defines the concept of discrimination, which includes, in particular, any distinction, exclusion or preference based on race, color, sex, religion, political opinion, of foreign origin or social origin and leads to the destruction or violation of equality of opportunity or treatment in the field of labour and occupation.

The case law of the European Court of Human Rights stipulate that discrimination means the treatment of individuals in different ways, without objective and reasonable justification, in relatively similar situations… The issue of substantiation of discriminatory approaches to the provision of rights in the field of labour (service) of parents was assessed by the European Court of Human Rights for compliance with Article 8 and Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms in case "Konstantin Markin v. Russia"…[939]

However, the European Social Charter has not even been mentioned in that judgment.

In general, the national courts considered not many cases of discriminatory matters on the grounds of sex in the sphere of employment and occupation and, unfortunately, the examples of references to the ESC in this category of cases were not found.

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935. The Civil Cassation Court, the Supreme Court, case № 274/4455/17, judg., 5 September, 2019. URL: https://reyestr.court.gov.ua/Review/84152837
936. Ibid.
937. Ibid.
938. The Supreme Administrative Court of Ukraine, the Administrative Cassation Court, judg., case №804/16289/15, 15 March 2019.
939. Ibid.

Nowadays, the commitments under the Article 20 should be considered in conjunction with the Ukrainian obligations on the prohibition of discrimination in the sphere of employment and occupation under the Association agreement between Ukraine and EU. Ukraine obliged to bring the national legislation into accordance with all EU anti-discrimination Directives in this sphere. Although, implementation schedule of the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 "On the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation" will be determined additionally by the Council of Association.[940]

940. The Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, 21/03/2014., URL: https://zakon.rada.gov.ua/laws/show/984_a11#Text

Group 3: Labour rights

The right to information and consultation (Article 21)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers the right to be informed and to be consulted within the undertaking. (Part I, point 21)

Pursuant to Art. 21 ESC:

Article 21 – The right to information and consultation

With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice:

a) to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and

b) to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.

Pursuant to the **Appendix**[941]:

Article 21

1. For the purpose of the application of these articles, the term "workers' representatives" means persons who are recognised as such under national legislation or practice.

2. The terms "national legislation and practice" embrace as the case may be, in addition to laws and regulations, collective agreements, other agreements between employers and workers' representatives, customs as well as relevant case law.

3. For the purpose of the application of these articles, the term "undertaking" is understood as referring to a set of tangible and intangible components, with or without legal personality, formed

941. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.

to produce goods or provide services for financial gain and with power to determine its own market policy.

4. It is understood that religious communities and their institutions may be excluded from the application of these articles, even if these institutions are "undertakings" within the meaning of paragraph 3. Establishments pursuing activities which are inspired by certain ideals or guided by certain moral concepts, ideals and concepts which are protected by national legislation, may be excluded from the application of these articles to such an extent as is necessary to protect the orientation of the undertaking.

5. It is understood that where in a state the rights set out in these articles are exercised in the various establishments of the undertaking, the Party concerned is to be considered as fulfilling the obligations deriving from these provisions.

6. The Parties may exclude from the field of application of these articles, those undertakings employing less than a certain number of workers, to be determined by national legislation or practice.

b) Decisions and conclusions of the European Committee of Social Rights

Article 21 guarantees the right of workers to information and consultation within the undertaking. Pursuant to the Appendix, Part II, to the Revised Charter, the term "undertaking" is understood as referring to "a set of tangible and intangible components, with or without legal personality, formed to produce goods or provide services for financial gain and with power to determine its own market policy". Consequently, even though Article 21 may apply to workers in state-owned enterprises, public employees are as a whole not covered by these provisions[942]. It follows that the right of police staff to information and consultation does not fall within the scope of application of Article 21 of the Revised Charter[943].

This provision applies to all undertakings, whether private or public. States Parties may exclude from the scope of this provision those undertakings employing less than a certain number of workers, to be determined by national legislation or practice. All categories of employee (in other words all employees with an employment contract with an undertaking, whatever their status, length of service or workplace) must be taken into account when calculating the number of employees covered by the right to information and consultation.[944]

States Parties may exclude from the scope of this provision those undertakings employing less than a certain number of workers, to be determined by national legislation or practice. For example, the thresholds established by Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002: undertakings with at least 50 employees or establishments with at least 20 employees in any one EU member state are in conformity with this provision.[945]

942. Conclusions XIII-5, Norway, p. 284.
943. Decision on the merits: European Council of Police Trade Unions (CESP) v. Portugal, Collective Complaint No. 40/2007, § 42.
944. Conclusions XIX-3 (2010), Croatia; Digest 2018, p. 196.
945. Conclusions XIX-3 (2010), Croatia; Digest 2018, p. 196.

Workers and/or their representatives (trade unions, worker's delegates, health and safety representatives, works' councils) must be informed on all matters relevant to their working environment[946] except where the conduct of the business requires that some confidential information not be disclosed. Furthermore, they must be consulted in good time with respect to proposed decisions that could substantially affect the workers' interests, in particular those which may have an impact on their employment status. These rights must be effectively guaranteed. In particular, workers must have legal remedies when these rights are not respected.[947] There must also be sanctions for employers which fail to fulfil their obligations under this Article.[948]

These rights must be accompanied by guarantees ensuring their effective exercise, in particular the possibility for workers or their representatives of lodging a complaint where they have been infringed.[949]

c) Implementation in Ukraine

Since Ukraine ratified the Charter, the Committee acknowledged that the situation in Ukraine regarding the right of workers to be informed and consulted was complied with the requirements of Article 21 of the Charter.[950]

According to the national report presented in 2017, the Committee stressed that the right to information and consultation to the employees is guaranteed by Ukrainian legislation for all categories of workers, without exceptions regardless of the number of employees at the enterprise which was demanded by the Charter. However, regarding the Committee requested again to provide updated statistics on the total number of private and public sector employees benefiting in practice from the right of trade unions or elected representatives to receive information and consultation, because of very low figures indicated in the report.

Within the examination of employers' obligations to inform workers, information on supervision, penalties can be imposed on employers who fail to fulfill their obligation on the issue, examination of the administrative and/or judicial procedures available to employees, or their representatives, who consider that their right to information and consultation within the undertaking has not been respected etc., the Committee concluded in 2018 that Ukraine fulfilled its obligations under Article 21.[951] Though, the question about national judicial practice on the implementation of the right to information and consultation was repeated. The failure to respond to the Committee's request for several times could lead to the breach of the requirements of the Charter. According to the information obtained from the unified register of court decisions in Ukraine, the case law of appeal or cassation courts on the right to information and consultation employees during last years was not found.

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946. Conclusions 2010, Belgium; Digest 2018, p. 196.
947. Conclusions 2003, Romania; Digest 2018, p. 196.
948. Conclusions 2005, Lithuania; Digest 2018, p. 196.
949. Conclusions XIII-3 - Statement of interpretation - Article 2 Additional Protocol, 3 Additional Protocol.
950. ECSR, Conclusions 2018. Ukraine. – Article 21 URL: http://hudoc.esc.coe.int/eng?i=2018/def/UKR/21/EN, Conclusions 2014. Ukraine. – Article 21 URL: http://hudoc.esc.coe.int/eng?i=2014/def/UKR/21/EN, Conclusions 2010. Ukraine. – Article 21 URL: http://hudoc.esc.coe.int/eng?i=2010/def/UKR/21//EN
951. ECSR, Conclusions 2018. Ukraine. p.27.

Group 3: Labour rights

The right to take part in the determination and improvement of the working conditions and working environment (Article 22)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers the right to take part in the determination and improvement of the working conditions and working environment. (Part I, point 22)

Pursuant to Art. 22 ESC:

> **Article 22 – The right to take part in the determination and improvement of the working conditions and working environment**
>
> With a view to ensuring the effective exercise of the right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice, to contribute:
>
> c) to the determination and the improvement of the working conditions, work organisation and working environment;
>
> d) to the protection of health and safety within the undertaking;
>
> e) to the organisation of social and socio-cultural services and facilities within the undertaking;
>
> f) to the supervision of the observance of regulations on these matters.

Pursuant to the **Appendix**[952]:

> **Article 21 and 22**
>
> 7. For the purpose of the application of these articles, the term "workers' representatives" means persons who are recognised as such under national legislation or practice.
>
> 8. The terms "national legislation and practice" embrace as the case may be, in addition to laws and regulations, collective

952. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.

agreements, other agreements between employers and workers' representatives, customs as well as relevant case law.

9. For the purpose of the application of these articles, the term "undertaking" is understood as referring to a set of tangible and intangible components, with or without legal personality, formed to produce goods or provide services for financial gain and with power to determine its own market policy.

10. It is understood that religious communities and their institutions may be excluded from the application of these articles, even if these institutions are "undertakings" within the meaning of paragraph 3. Establishments pursuing activities which are inspired by certain ideals or guided by certain moral concepts, ideals and concepts which are protected by national legislation, may be excluded from the application of these articles to such an extent as is necessary to protect the orientation of the undertaking.

11. It is understood that where in a state the rights set out in these articles are exercised in the various establishments of the undertaking, the Party concerned is to be considered as fulfilling the obligations deriving from these provisions.

12. The Parties may exclude from the field of application of these articles, those undertakings employing less than a certain number of workers, to be determined by national legislation or practice.

Article 22

1. This provision affects neither the powers and obligations of states as regards the adoption of health and safety regulations for workplaces, nor the powers and responsibilities of the bodies in charge of monitoring their application.

2. The terms "social and socio-cultural services and facilities" are understood as referring to the social and/or cultural facilities for workers provided by some undertakings such as welfare assistance, sports fields, rooms for nursing mothers, libraries, children's holiday camps, etc."

Pursuant to **Article 3 of the Explanatory Report to the Additional Protocol of 1988, which remains relevant (as stated in point 82 of the explanatory report to the ESC 1996)**

" 47. The matters listed in this article are frequently covered by collective agreements or other agreements between employers and workers' representatives.

48. Sub-paragraph c comes from a proposal of the Assembly (see Opinion No. 131) and, for a better understanding of the text, a certain number of the services and facilities thus referred to have been listed in the appendix.

49. This article in no way prejudices the right to bargain collectively provided for in Article 6 of the Charter, as is clear from Article 8 of the Protocol.

50. The expression "to take part in" covers all situations in which workers or their representatives are in any way whatsoever associated with the procedures for making decisions or taking certain measures, without, however, enjoying a right of joint decisionmaking or of veto over decisions still the responsibility of the head of the undertaking.

51. The contribution to the "supervision of the observance" of health and safety regulations is to be effected pursuant to the rules in force in each country and without prejudice to the jurisdiction and responsibilities of the bodies and authorities vested with the necessary powers. The role of workers or their representatives is not to replace the bodies responsible for this supervision but rather to ensure that supervision is as effective as possible.

b) Decisions and conclusions of the European Committee of Social Rights

Article 22 applies to all undertakings, whether private or public. States Parties may exclude from the scope of this provision those undertakings employing less than a certain number of workers, to be determined by national legislation or practice[953] and tendency undertakings.

Workers and/or their representatives (trade unions, worker's delegates, health and safety representatives, works councils) must be granted an effective right to participate in the decision-making process and the supervision of the observance of regulations in all matters referred to in this provision, such as:

- the determination and improvement of the working conditions, work organisation and working environment;

- the protection of health and safety within the undertaking. The right of workers' representatives to consultation at the enterprise level in matters of health and safety at the workplace is equally guaranteed by Article 3 (right to safe and healthy working conditions);

- the organisation of social and socio-cultural services within the undertaking. The right to take part in the organisation of social and socio-cultural services and facilities only applies in undertakings where such services and facilities are planned or have already been established. Article 22 of the Charter does not require that employers offer social and socio-cultural services and facilities to their employees but requires that workers may participate in their organisation, where such services and facilities have been established.[954]

953. Conclusions 2005, Estonia; Digest 2018, p. 198.
954. Conclusions 2007, Italia; Conclusions 2007, Armenia; Digest 2018, p. 198.

Workers must have legal remedies when these rights are not respected.[955] There must also be sanctions for employers which fail to fulfil their obligations under this Article.[956]

c) Implementation in Ukraine

Since Ukraine ratified the Charter, the Committee found that Ukraine fulfilled its obligations under the Article 22 of the Charter regarding to the right of workers to take part in the determination and improvement of working conditions and working environment. Nevertheless, within the Conclusions 2010, 2014, 2018 a range of repeated questions and requests on information were made to Ukraine.[957]

The Committee reiterated its requests about the possibilities for employees to implement, exercise this right in case of absence of trade union representatives or elected representatives in the undertaking; involvement of employees in the organisation of social and socio-cultural services and how decisions are taken and who should have access to such facilities and services; procedure and remedies available for workers in case of violation of the right to take part in the determination and improvement of working conditions and working environment.[958]

955. Conclusions 2003, Bulgaria; Digest 2018, p. 198.
956. Conclusions 2003, Slovenia; Digest 2018, p. 198.
957. ECSR, Conclusions 2018. Ukraine. – Article 22, URL: http://hudoc.esc.coe.int/eng?i=2018/def/UKR/22/EN, Conclusions 2014. Ukraine. – Article 22, URL: http://hudoc.esc.coe.int/eng?i=2014/def/UKR/22/EN, Conclusions 2010. Ukraine. – Article 22, URL: http://hudoc.esc.coe.int/eng?i=2010/def/UKR/22//EN
958. ECSR, Conclusions 2018. Ukraine. p.28.

Group 2: Health, social security and social protection

The right of elderly persons to social protection (Article 23)

a) Analysis of the provisions of ESC (revised)

Every elderly person has the right to social protection (Part I, point 20).

Article 23 of the Charter is the first human rights treaty provision to specifically protect the rights of the elderly,[959] aimed to enable elderly persons to remain full members of society. The scope of Article 23 extends to social protection of elderly persons outside the employment field and include protecting them against discrimination on grounds of age in certain domain[960], namely in access to goods, facilities and services, healthcare, education, services such as insurance and banking products, participation in policy making/civil dialogue, allocation of resources and facilities[961] and provide for a procedure of assisted decision making.[962] The right to take part in society's various fields of activity should be granted to everyone active or retired, living in an institution or not.[963]

Article 23 overlaps with other provisions of the Charter which protect elderly persons as members of the general population, such as Article 11 (Right to protection of health), Article 12 (Right to social security), Article 13 (Right to social and medical assistance) and Article 30 (Right to protection against poverty and social exclusion). Article 23 requires States Parties to make focused and planned provision in accordance with the specific needs of elderly persons.[964]

Pursuant to Article 23 ESC

Article 23 – The right of elderly persons to social protection

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

- to enable elderly persons to remain full members of society for as long as possible, by means of: aadequate resources enabling them to lead a decent life and play an active part in public, social and cultural life; bprovision of information about services and facilities available for elderly persons and their opportunities to make use of them;

- to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

a. provision of housing suited to their needs and their state of

959. Conclusions XIII-3, Statement of Interpretation of Article 4 of the Additional Protocol (Article 23).
960. ESCR, Digest 2018, p. 199.
961. Conclusions 2009, Andorra, Digest of the case law of the ECSR, Appendix, 2018, p. 270 (1199).
962. Conclusions 2013, Statement of Interpretation Article 23, ESCR, Digest 2018, p. 200.
963. ESCR, Digest 2018, p. 199.
964. Ibid.

health or of adequate support for adapting their housing;

b. the health care and the services necessitated by their state;

- to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution."

Pursuant to the **Appendix**[965]:

Article 23, paragraph 1

For the purpose of the application of this paragraph, the term "for as long as possible" refersto the elderly person's physical, psychological and intellectual capacities.

According to **the Explanatory Report to the Additional Protocol of 1988**, which remains relevant (as stated in point 82 of the explanatory report to the ESC 1996):

54. The expression "full members" means that elderly persons must suffer no ostracism on account of their age, since the right to take part in society's various fields of activity is not granted or refused depending on whether an elderly person has retired or is still vocationally active or whether such a person is still of full legal capacity or is subject to some restrictions in this respect.

55. The concept of "adequate resources" is to be interpreted in the light of Article 13 and, if necessary, Article 12 of the Charter (…).

56. The ability of elderly people to remain in their familiar surroundings should be assessed in relation to their psychological and physical state, their living conditions, the standard of their accommodation etc.

57. The "services" referred to in sub-paragraph 2.b include, where appropriate, admission to specialised institutions for elderly persons. (…) therefore assumes the existence of an adequate number of institutions and should be interpreted in the light of the introduction to the article, whereby each Party undertakes to adopt or promote appropriate measures either on its own or in co-operation with relevant public or private organisations.

59. Respect for privacy is mentioned only in relation to elderly persons living in institutions, a situation warranting special mention. Everyone in all circumstances is naturally entitled to

965. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 23, para.1.

respect for his or her private life as guaranteed by the European Convention on Human Rights.[966]

b) Decisions and conclusions of the European Committee of Social Rights

The Committee stated that a fundamental measure to combat age discrimination outside the employment is an adequate legal framework.[967] The framework should be

> related to assisted decision making for the elderly guaranteeing their right to make decisions for themselves unless it is shown that they are unable to make them. (…) The incapacity to make their own decision should be established in relation to the nature of the decision, its purpose and the state of health of the elderly person at the time of making it, and not only being associated with a particular medical condition or disability, or lack of legal capacity.[968]

The Committee provided with in-depth interpretation of capability of elderly persons to make their own decision. It was stated that:

> all possible ways of communicating, including words, pictures and signs, should be used before concluding that they cannot make the particular decision on their own. In this connection, the national legal framework must provide appropriate safeguards to prevent the arbitrary deprivation of autonomous decision making by elderly persons, also in case of reduced decision making capacity. It must be ensured that the person acting on behalf of elderly persons interferes to the least possible degree with their wishes and rights.[969]

States Parties are required to take appropriate measures against elder abuse and neglect, including raising awareness, evaluation the extent of the problem, adoption of legislation. The Committee has not formulated the definition of elder abuse, but proposed to apply the interpretation given in the Toronto Declaration on the Global Prevention of Elder Abuse.[970]

According to Article 23 States parties are obliged to guarantee the possibility for elderly persons to remain full members of society for as long as possible by means of adequate resources. Adequate resources which means, above all, pensions and all social protection measures, "must be sufficient in order to allow elderly persons to lead a "decent life" and play an active part in public, social and cultural life". All social benefits, such as pensions, contributory or non-contributory, and other complementary cash benefits available to elderly persons must be comparable with the median equivalised income.[971]

966. Explanatory Report to the Additional Protocol of 1988.
967. Conclusions 2009, Andorra, Digest of the case law of the ECSR, Appendix, 2018, p. 270 (1199).
968. Conclusions 2013, Statement of Interpretation, Article 23.
969. Ibid.
970. In the Conclusions 2009 for Andorra, the Committee recalled that elder abuse is defined in the Toronto Declaration on the Global Prevention of Elder Abuse (2002) as "a single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person"
971. Conclusions 2013, Statement of Interpretation Article 23.

In addition to adequate resources States Parties are required to inform elderly persons about services and facilities available for them. Despite the absence of direct requirements to ensure the existence of services and facilities and that elderly persons have the right to certain services and facilities, the Committee examines existence, extent and cost of services and facilities themselves.[972]

Monitoring the quality of services and independent inspection body, licensing of institutions where elderly persons are living, are also examined by the Committee.[973]

The situation can be recognised non-conforming with the requirements of Article 23 due to insufficient regulation of fees for services that led to legal uncertainties to elderly persons in need of care due to diverse and complex fee policies. While municipalities may adjust the fees, there are no effective safeguards to assure that appropriate access to services is guaranteed to every elderly person in need of services required by their condition.[974]

Clarifying States obligation to ensure the right of elderly persons to choose their lifestyle freely and to lead independent lives in their familiar surroundings for as long as they wish and are able to, the Committee requires states' policies to include support of elderly persons to remain in their own homes for as long as possible through the provision of sheltered/supported housing and assistance for the adaptation of homes.[975]

In the context of Article 23 special medical programmes for elderly must be provided, including domiciliary nursing/health care services, help for any psychological problems, adequate palliative care services.[976]

Accordingly to the case –law of the Committee, the set of rights of elderly persons living in institutions was enshrined:

- to appropriate care and adequate services and to affordable cost for care in institutions,
- to privacy,
- to personal dignity,
- to participate in decisions concerning the living conditions in the institution, the protection of property,
- to maintain personal contact with persons, close to the elderly person
- to complain about treatment and care in institutions.[977]

The Committee repeatedly reiterates that any inspection system should be independent of the entity that establishes or manages the residential facility and asks whether steps are envisaged to create an independent inspection mechanism (…) to examine in particular, the quality of care, or whether such a system exists.[978]

The Council of Europe elabourates and adopts a range of other documents relevant for human rights of the older persons:

Recommendation CM/Rec(2014)2 to member States on the promotion of human rights of older persons

Recommendation CM/Rec(2009)6 on ageing and disability in the 21st century: sustainable frameworks to enable greater quality of life in an inclusive society

972. Conclusions 2003, France (Article 23), Digest, 2018. p.201.
973. Conclusions 2009 Andorra (Article 23), Conclusions XX-2 (2013) Czech Republic Digest, 2018, p. 201-202.
974. Central Association of Carers in Finland v. Finland complaint no 71/2011 decision on the merits of 4 December 2012, §53.
975. Conclusions 2005, Slovenia, Conclusions 2013, Andorra (Article 23), Digest of the case law of the ECSR, 2018. p. p.201.
976. Conclusions 2003, France, Article 23
977. Digest of the case law of the ECSR, 2018. p.202.
978. Conclusions 2003, France, Slovenia, Digest of the case law of the ECSR, Appendix, 2018. p. 272 - 273.

- Recommendation PACE 1796 (2007) on "The situation of elderly persons in Europe"; Recommendation PACE 1749 (2006), Resolution PACE 1502 (2006) on "Demographic challenges for social cohesion"

- Recommendation PACE 1591 (2003) on "Challenges of social policy in Europe's ageing societies"

- Recommendation CM/Rec(94)9 concerning elderly people.

c) Implementation of ESC in Ukraine

In 2017, the Committee repeated that the situation in Ukraine was not in conformity with Article 23. The conclusion based on the level of the minimum pension which was found manifestly inadequate.[979]

Examining the adequacy of resources, the Committee pointed out that its task was to assess not only the law, but also the compliance of practice with the obligations arising from the Charter. For this purpose, the Committee compares resources with median equivalised income and also takes into consideration relevant indicators relating to at-risk-of-poverty rates for persons aged 65 and over.

The enhancement the minimum amount of social assistance, pension and other efforts, minimum pension was "still lower than the poverty threshold and even slightly lower than the extreme poverty threshold". Moreover, the relative-criterion-based poverty rate and the extreme poverty level were taken into account for recognition the violation of Article 23 by Ukraine.

The Committee reiterated the main aim of Article 23 of the Charter is to enable elderly persons to remain full members of society and the obligation to have appropriate legislation to combat age discrimination outside the employment and provide for a procedure of assisted decision making.

According to the legal framework about age discrimination, the absence of response to the question about remedies which are available to victims of discrimination was noted by the Committee, which asked also about the national case-law or statistics dealt with in relation to age discrimination outside employment.

More different questions in the various aspects of the Article were asked, in particular, about the impact of reduction of social service centres to the elderly persons and the proportion of the elderly on the Ukrainian population, proportion what elderly people must pay for services and about monitoring of their quality[980], as well as questions about participation of elderly in decision-making, also with regard to the deprivation of legal capacity, awareness and prevention of elderly abuse, quality and availability of social services for the elderly, the participation of ageing population in cultural and leisure facilities and availability of information concerning such opportunities, the implementation of the right to suitable social accommodation, accessibility and quality of specialised health services, including domiciliary nursing services, availability of places in institutional facilities, rules concerning payment or non-payment of fees as well as their supervision and accountability.[981] [982]

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979. ECSR, Conclusions 2017, Ukraine. P. 1230.
980. ECSR, Conclusions 2017, Ukraine. P. 1228.
981. Assessment of Ukraine's policy and legal framework related to the rights of older people to social protection in the light of article 23 of the Revised European Social Charter. Prepared by Ms Ivana Roagna, Ms Olena Ivanova, Ms Yana Simutina. October, 2020.
982. ECSR, Conclusions 2017, Ukraine, p. 1230.

Analysing health care for elderly persons, capacity and geographical location were taking into account to decision that "elderly persons' healthcare needs were generally only partly met".[983]

The Committee also stressed that number of older people in Ukraine grew every year, it needed to

> strengthen legal protection of elderly, provide them with a decent standard of living, increase the role of families in caring for them, organise effective care and psychological support and ensure that they have access to information.[984]

Despite non-compliance the requirements of Article 23 by Ukraine, national judges refer to it in cases on social, pension and other matters.

The Administrative Cassation Court, considering termination of pension payments due to moving the plaintiff abroad to another county for permanent residence, applied to Article 23 of the Charter alongside other international treaties:

[…] Article 22 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Economic, Social and Cultural Rights, Article 23 of the European Social Charter (revised) enshrine the right to social protection, including the situation of full, partial or temporary disability, loss of family breadwinner (survivors' benefits), unemployment due to circumstances beyond their control, as well as in old age and in other cases provided by law.[985]

In a range of cases the point 23 of the Part 1 of the Charter was applied instead of Article 23. For example, the Administrative Cassation Court in the judgment of 9 October 2020 regarding the refusal to include a certain period of work in the total length of service and provide recalculation of the pension, considered:

[…] 22. The European Social Charter (revised) of 3 May 1996, ratified by the Law of Ukraine of 14 September 2006 № 137-V, which entered into force on 1 February 2007, stipulates that every elderly person has the right to social protection. (23, Part I). By ratifying the mentioned Charter, Ukraine has undertaken an international obligation to implement by all appropriate means the achievement of conditions under which the rights and principles enshrined in Part I of the Charter can be effectively realised.

23. Thus, a person's right to receive a pension as an integral part of the right to social protection is his/her constitutional right, which is guaranteed by Ukraine's international obligations.[986]

The same reference to the point 23 of Part 1 of the Charter was found in other judgments, as the following: Judgment of the Administrative Cassation Court of 30 April 2020, case №805/153/18-a (pension payment for person living abroad), Judgment of the Administrative Cassation Court of 24 December 2019, case №826/11829/16 (pension payments exclusively within the account in Oschadbank (State Savings Bank of Ukraine) for IDPs, verification procedure, issuance of bank cards, which are also a pension certificate), Judgment of the Administrative Cassation Court of 6 August 2019, case № 433/172/16-a (on recognition of illegal inaction of the defendant on non-payment of pension to the person during anti-terrorist operation, and also impossibility to leave

983. ECSR, Conclusions 2017, Ukraine, p. 1229.
984. Ibid., p. 1230
985. Supreme Court, judgment of the Administration Cassation Court, 14 March 2019, case №761/6781/14-a. URL: https://reyestr.court.gov.ua/Review/80457859
986. Supreme Court, judgment of the Administration Cassation Court, 9 October 2020, case № 341/460/17 URL: https://reyestr.court.gov.ua/Review/92172952

Luhansk because of age and bad state of health) etc. The mentioned point of Part 1 of the Charter in conjunction with the point 4 was applied regarding the appointment of the pension in the Judgment of the Administrative Cassation Court of 25 March 2020 (case № 252/18396/16-a).

While the above examples demonstrate the increasing amount of references to the right of older persons to the social protection enshrined in the Charter, the application provisions of Article 23 remain low.

Group 1: Employment, training and equal opportunities

The right to protection in cases of termination of employment (Article 24)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers the right to protection in cases of termination of employment. (Part I, point 24)

The right conferred in Article 24 ESC (part II) is overlapping with a series of Articles requiring increased protection against termination of employment on certain grounds such as:

- Articles 1§2, 4§3 and 20: discrimination
- Article 5: trade union activity
- Article 6§4: strike participation
- Article 8§2: maternity
- Article 15: disability
- Article 27: family responsibilities
- Article 28: worker representation.

Pursuant to Art. 24 ESC:

> **Article 24 – The right to protection in cases of termination of employment**
>
> With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:
>
> g) the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
>
> h) the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.
>
> To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.

Pursuant to the **Appendix**[987]:

987. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.

Article 24

13. It is understood that for the purposes of this article the terms "termination of employment" and "terminated" mean termination of employment at the initiative of the employer.

14. It is understood that this article covers all workers but that a Party may exclude from some or all of its protection the following categories of employed persons:

a) workers engaged under a contract of employment for a specified period of time or a specified task;

b) workers undergoing a period of probation or a qualifying period of employment, provided that this is determined in advance and is of a reasonable duration;

c) workers engaged on a casual basis for a short period.

15. For the purpose of this article the following, in particular, shall not constitute valid reasons for termination of employment:

a) trade union membership or participation in union activities outside working hours, or, with the consent of the employer, within working hours;

b) seeking office as, acting or having acted in the capacity of a workers' representative;

c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

e) maternity or parental leave;

f) temporary absence from work due to illness or injury.

16. It is understood that compensation or other appropriate relief in case of termination of employment without valid reasons shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions.

Pursuant to **Article 24 of the Explanatory Report to the European Social Charter**

> 84. This provision, which must be accepted in its entirety, sets out two general principles:
>
> a. the right not to be dismissed unless there are valid grounds;
>
> b. the right to adequate compensation or other relief in cases of unfair dismissal.
>
> 85. It further establishes the right for a worker who considers that his rights under paragraph a have been interfered with to an appeal to obtain, if appropriate, his rights under paragraph b.
>
> 86. The provision has been inspired by ILO Convention No. 158 (Termination of Employment) of 1982. As to the nature of the impartial body mentioned in the last paragraph of the Article, reference is made to Article 8 of the ILO Convention.
>
> 87. The appendix clarifies the terms "termination of employment" and "terminated" which shall mean termination of employment at the initiative of the employer.
>
> 88. The second paragraph of the appendix deals with the scope ratione personae of the provision. It makes it possible for the Parties to exclude some categories of employed persons from its scope.
>
> 89. The third paragraph of the appendix contains a non-exhaustive list of non-valid grounds for termination of employment.
>
> 90. The fourth paragraph of the appendix clarifies that compensation or other appropriate relief in case of termination of employment without valid reasons shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions.

b) Decisions and conclusions of the European Committee of Social Rights

Article 24 relates to termination of employment at the initiative of the employer and obliges states to establish regulations with respect to termination of employment for all workers. To assess whether the regulations applied in cases of termination of employment are in conformity with Article 24, the examination must be

> based on:
>
> – the validity of the grounds for dismissal under the general rules on termination of employment and increased protection

against certain forms of dismissal (Article 24 a and the Appendix to Article 24);

– penalties and compensation in cases of unfair dismissal and the status of the body empowered to rule on such cases (Article 24 b)[988].

Under Article 24 of the Charter

> all workers who have signed an employment contract are entitled to protection in the event of termination of employment. According to the Appendix to the Charter, certain categories of workers can be excluded, among them workers undergoing a period of probation. However, exclusion of employees from protection against dismissal for six months or 26 weeks in view of probationary period is not reasonable if applied indiscriminately, regardless of the employee's qualification.[989]

Article 24 establishes in an exhaustive manner the valid grounds on which an employer can terminate an employment relationship[990]. Exclusion of any other category of employee is not in conformity with the Charter.[991]

> Two types of grounds are considered valid, namely on the one hand those connected with the capacity or conduct of the employee and on the other hand those based on the operational requirements of the enterprise (economic reasons)[992].

Among reasons connected with the capacity or conduct of the employee, the Committee found a prison sentence delivered in court for employment-related offences a valid reason for dismissal. This is not the case with prison sentences for offences unrelated with the person's employment, which cannot be considered valid reasons unless the length of the custodial sentence prevents the person from carrying out their work.[993]

Economic reasons for dismissal must be the reasons based on the operational requirements of the undertaking, establishment or service. The assessment relies on the domestic courts' interpretation of the law. The courts must have the competence to review a case on the economic facts underlying the reasons of dismissal and not just on issues of law.[994]

Employers must notify employees of their dismissal in writing.[995]

Pursuant to the decisions of the Committee,

988. Conclusions 2003 - Bulgaria - Article 24.
989. Conclusions 2005, Cyprus.
990. Conclusions 2012 - Turkey - Article 24.
991. Conclusions 2012, Ireland; Digest 2018, p. 204.
992. Conclusions 2012 - Turkey - Article 24.
993. Digest 2018, p. 205.
994. Conclusions 2012, Turkey; Conclusions 2003, France.
995. Digest 2018, p. 205.

> under Article 24 dismissal of the employee at the initiative of the employer on the ground that the former has reached the normal pensionable age (age when an individual becomes entitled to a pension) will be contrary to the Charter, unless the termination is properly justified with reference to one of the valid grounds expressly established by this provision of the Charter.[996]

The legislation which enables dismissal directly on grounds of age and does not, therefore, effectively guarantee the right to protection in cases of termination of employment, is contrary to the Charter[997].

> Dismissal on grounds of age will not constitute a valid reason for termination of employment except in accordance with a valid retirement age justified by the operational requirements of the undertaking, establishment or service. States should take adequate measures to ensure protection for all workers against dismissal on grounds of age[998].

In case of temporary absence from work due to illness or injury, a time limit can be placed on protection against dismissal in such cases.[999] Absence can constitute a valid reason for dismissal if it severely disrupts the smooth running of the undertaking and a genuine, permanent replacement must be provided for the absent employee[1000].

> As regards dismissal without notice in the event of permanent invalidity, the following factors are taken into consideration for the assessment:
>
> – is dismissal without notice for reasons of permanent invalidity permitted regardless of the origin of the invalidity? In particular, may this occur in cases of employment injuries or occupational diseases?
>
> – are employers required to pay compensation for termination in such cases?
>
> – if, despite the permanent invalidity, the worker can still carry out light work, is the employer required to offer a different placement? If the employer is unable to meet this requirement, what alternatives are available?[1001]

Any employee who considers him- or herself to have been dismissed without valid reason must have the right to appeal to an impartial body. The burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment between employee and employer.[1002]

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996. Conclusions 2012 - Statement of interpretation - Article 24.
997. Fellesforbundet for Sjøfolk (FFFS) v. Norway, Complaint No. 74/2011, Decision on the merits of 2 July 2013, §§ 86, 89, 97, 99.
998. Conclusions 2007 - Statement of interpretation - Article 24.
999. Conclusions 2012, Ukraine.
1000. Digest 2018, p. 205.
1001. Digest 2018, p. 204.
1002. Conclusions 2008, Statement of Interpretation on Article 24.

Employees dismissed without valid reason must be granted adequate compensation or other appropriate relief. Compensation systems are considered appropriate if they include the following provisions:

- reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;[1003]
- the possibility of reinstatement[1004]; and/or
- compensation of a high enough level to dissuade the employer and make good the damage suffered by the employee.[1005]

Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed. If there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation), and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time.[1006]

National legislation or case-law must contain express safeguards against retaliatory dismissal. Safeguarding persons who resort to the courts or other competent authorities to enforce their rights against reprisals is essential in any situation in which a worker alleges a violation of the law. In the absence of any explicit statutory ban, States Parties must be able to show how national legislation conforms to the requirement of the Charter.[1007]

c) Implementation in Ukraine

The first conclusions under Article 24 made for Ukraine in 2012 was deferred due to the lack of necessary information to assess the fulfillment of obligations, in 2016 the Committee examined the answers provided and decided that the situation in Ukraine was in conformity with requirements of Article 24 of the Charter.[1008]

Within the examination of the national legislation and practice, the Committee made a set of general comments on it. For example, regarding to obligation to provide valid reasons for termination of employment, the Committee recalled the meaning of the term "termination of employment", formulated in the Appendix to the Charter as termination of employment at the initiative of the employer.[1009] It was also underlined that "situations where a mandatory retirement age is set by statute, as a consequence of which the employment relationship automatically ceases by operation of law, do not fall within the scope of this provision".[1010] However, the Committee explained, that dismissal of the employee at the initiative of the employer on the ground of reaching the normal pensionable age would be considered as a breach of the Charter, unless the termination is properly justified with reference to one of the valid grounds expressly established by this provision of the Charter.[1011] Regarding to temporary absence from work due to illness or injury, it was recalled that a time limit protection against dismissal in such cases has to be established.

1003. Conclusions 2012, Slovak Republic; Conclusions 2003, Bulgaria.
1004. Conclusions 2012, Finland.
1005. Conclusions 2012, Turkey.
1006. Conclusions 2012, Slovenia; Conclusions 2012, Finland.
1007. Conclusions 2003, Statement of Interpretation on Article 24.
1008. ECSR, Conclusions. 2016. Ukraine. p. 44
1009. Ibid., p.45.
1010. Ibid.
1011. Ibid., p.46.

The Committee recalled also about the appropriate adjustment of division of the burden of proof between employee and employer and not to put it entirely on the complainant in cases concerning dismissal at the initiative of the employer. In this context, the appropriate information on such an adjustment was required in the next report.[1012]

1012. Ibid., p.47.

Group 3: Labour rights

The right to dignity at work (Article 26)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers the right to dignity at work. (Part I, point 26)

Pursuant to Art. 26 ESC:

> **Article 26 – The right to dignity at work**
>
> With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations:
>
> 1. to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct;
>
> 2. to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.

Pursuant to the **Appendix**[1013]:

> **Article 26**
>
> It is understood that this article does not require that legislation be enacted by the Parties.
>
> It is understood that paragraph 2 does not cover sexual harassment."

Pursuant to **Article 26 of the Explanatory Report to the European Social Charter**

> 97. The purpose of this Article is to guarantee workers the right to dignity at work and in connection with work. It emphasises the promotion of awareness and prevention of sexual
>
> harassment and victimisation, but does not require that Parties ensure protection against such conduct. In addition, it follows from the appendix that Parties do not need to enact legislation. However, they are required to take "all appropriate measures" to protect workers.

1013. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.

98. The two paragraphs contained in the Article may be accepted separately.

Paragraph 1

99. This paragraph deals exclusively with sexual harassment, which may be defined as

unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of workers, including the conduct of superiors and colleagues.

Paragraph 2

100. This paragraph aims at forms of victimising conduct affecting the right to dignity at work (victimisation, defined as bullying) other than sexual harassment and has been defined in the text of the provision itself. The definition has been taken from existing national regulations dealing with this problem and comprises recurrent reprehensible or distinctly negative and offensive acts by superiors and colleagues affecting the dignity of a worker in the workplace or in relation with work. An example illustrating this would be that of a worker who for reasons of hostility on the part of the employer and/or his colleagues, is systematically excluded from discussions relating to the organisation of work to which his colleagues are invited to take part. Another example could be not giving a worker an office or duties corresponding to his grade and functions for similar reasons.

101. The appendix specifies that this paragraph does not cover sexual harassment.

b) Decisions and conclusions of the European Committee of Social Rights

Article 26 guarantees the right of workers to dignity by protection against sexual and moral harassment.

Sexual harassment (Article 26§1)

Article 26§1 requires States to take appropriate preventive measures (information, awareness-raising and prevention campaigns in the workplace or in relation to work) in order to combat sexual harassment. In particular, in consultation with social partners,[1014] they should inform workers about the nature of the behaviour in question and the available remedies.[1015]

The Appendix to Article 26§1 specifies that States Parties have no obligation to enact legislation relating specifically to harassment, provided that the legal framework, as interpreted by the relevant

1014. Conclusions 2005, Lithuania.
1015. Conclusions 2003, Italy.

national authorities ensures an effective protection in law and in practice against harassment in the workplace or in relation to work.[1016]

Sexual harassment is defined as a breach of equal treatment characterised by the adoption, towards one or more persons, of preferential or retaliatory conduct, or other forms of insistent behaviour, which may undermine their dignity or harm their career.[1017] Irrespective of admitted or perceived grounds, harassment creating a hostile working environment shall be prohibited and repressed in the same way as acts of discrimination, independently from the fact that not all harassment behaviours are acts of discrimination, except when this is explicitly presumed by law.[1018]

Workers must be afforded an effective protection against harassment by domestic law, irrespective of whether this is a general anti-discrimination act or a specific law against harassment.[1019]

This protection must include the right to appeal to an independent body in the event of harassment, the right to obtain adequate compensation and the right not to be retaliated against for upholding these rights.[1020]

It must be possible for employers to be held liable when sexual harassment occurs in relation to work, or on premises under their responsibility, but it is suffered or perpetrated by a third person, not employed by them, such as independent contractors, self-employed workers, visitors, clients, etc.[1021]

Under civil law, effective protection of employees requires a shift in the burden of proof, making it possible for a court to find in favour of the victim on the basis of sufficient prima facie evidence and the personal conviction of the judge or judges[1022].

Victims of sexual harassment must have effective judicial remedies to seek reparation for pecuniary and non-pecuniary damage.[1023] These remedies must, in particular, allow for appropriate compensation of a sufficient amount to make good the victim's pecuniary and non-pecuniary damage and act as a deterrent to the employer.[1024] In addition, the right to reinstatement should be guaranteed to employees who have been unfairly dismissed or have been pressured to resign for reasons related to sexual harassment.[1025]

Moral harassment (Article 26§2)

Article 26§2 of the Charter establishes a right to protection of human dignity against harassment creating a hostile working environment related to a specific characteristic of a person.[1026] The Committee considers that

> ” there is no requirement for a state's legislation to make express reference to harassment where that state's law encompasses

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1016. Conclusions 2005, Moldova; Digest 2018, p. 209.
1017. Conclusions 2003, Bulgaria; Conclusions 2005, Moldova; Digest 2018, p. 209.
1018. Conclusions 2007, Statement of Interpretation on Article 26; Digest 2018, p. 209.
1019. Conclusions 2003, Bulgaria; Conclusions 2005, Moldova.
1020. Conclusions 2007, Statement of Interpretation on Article 26; Digest 2018, p. 210.
1021. Conclusions 2014, Finland; Digest 2018, p. 210.
1022. Conclusions 2007, Statement of Interpretation on Article 26; Conclusions 2014, Azerbaijan; Digest 2018, p. 210.
1023. Conclusions 2005, Moldova; Digest 2018, p. 210.
1024. Conclusions 2005, Lithuania; Conclusions 2007, Slovenia; Digest 2018, p. 210.
1025. Conclusions 2003, Bulgaria.
1026. Digest 2018, p. 210.

> measures making it possible to afford employees effective protection against these phenomena[1027].

Under Article 26§2

> irrespective of admitted or perceived grounds, harassment creating a hostile working environment characterised by the adoption towards one or more persons of persistent behaviours which may undermine their dignity or harm their career shall be prohibited and repressed in the same way as acts of discrimination. And this independently from the fact that not all harassment behaviors are acts of discrimination, except when this is presumed by law[1028].

Article 26§2 requires the States Parties to take adequate preventive measures against moral harassment. In particular, they should inform workers about the nature of the behaviour in question and the available remedies[1029]. States parties are required to take all necessary preventive and compensatory measures to protect individual workers against recurrent reprehensible or distinctly negative and offensive actions directed against them at the workplace or in relation to their work[1030].

> This protection must include the right to appeal to an independent body in the event of harassment, the right to obtain adequate compensation and the right not to be retaliated against for upholding these rights. It further considers that, from the procedural standpoint, effective protection of employees may require a shift in the burden of proof to a certain extent, making it possible for a court to find in favour of the victim on the basis of sufficient prima facie evidence and the conviction of the judge or judges".[1031]

Article 26§2 of the Charter imposes positive obligations on states, to take preventative action to ensure moral harassment does not occur in particular in situations where harassment is likely. The Committee has found a violation of Article 26§2 of the Charter for example in the situation of a failure of the Government to take any preventative action, training or awareness raising to ensure the protection of non-objecting medical practitioners[1032].

c) Implementation in Ukraine

Paragraph 1

In Conclusions for Ukraine 2014, 2016, 2018, the Committee found non-conformity the situation in Ukraine with the requirements of Article 26 §1.[1033]

1027. Conclusions 2007 - Statement of interpretation - Article 26-2.
1028. Conclusions 2007 - Statement of interpretation - Article 26-2; Decision on admissibility and the merits: Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 91/2013, p. 290.
1029. Conclusions 2010, Albania, Article 26§2; Conclusions 2007, Statement of Interpretation of Article 26§2.
1030. Decision on admissibility and the merits: Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 91/2013, p. 291.
1031. Conclusions 2007 - Statement of interpretation - Article 26-2.
1032. Decision on admissibility and the merits: Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 91/2013, p. 297.
1033. ECSR, Conclusions 2018. Ukraine. – Article 26, URL: http://hudoc.esc.coe.int/eng?i=2018/def/UKR/26/1/EN, Conclusions 2016. Ukraine. – Article 26, URL: http://hudoc.esc.coe.int/eng?i=2016/def/UKR/26/1/EN, Conclusions 2014. Ukraine. – Article 26, URL: http://hudoc.esc.coe.int/eng?i=2014/def/UKR/26/1/EN

Regarding the prevention sexual harassment, the Committee recalled its request concerning broader preventive measures which would be directed at actors other than employers and included information, awareness-raising and prevention campaigns in the workplace or in relation to work, the role of social partners in consultation on above-mentioned measures. The Committee also repeated in its Conclusions 2018 the question about employer's liability applied in cases not falling under the Criminal Code, including the case of failure to take adequate measures to prevent sexual harassment from occurring or to bring it to an end.[1034] Moreover, the lack of asked information in the next report would lead to the negative conclusions of the Committee on the issue.[1035]

Within the examination of national legislation on the burden of proof, it was asked about the clarification of the provisions and its application in practice. The Committee repeatedly asked in 2010, 2014, 2016, 2018 the information on right to reinstatement for employees unfairly dismissed or pressured to resign for reasons related to sexual harassment and amount of compensation provided in cases of sexual harassment and the appropriate case law. The Conclusions 2018 stated that national report provided the information on the absence of examples of judicial practice regarding sexual harassment in the workplace.

Although, according to the unified register of court decisions in Ukraine, last few years the courts have considered cases regarding sexual harassment at work. For example, in 2019, the Odessa Court of Appeal considered the case of non-including the applicant's candidacy for the voting for the position of professor, taking into account his immoral and unethical behavior with colleagues, humiliation of women working at the university and his previous work as a vice-rector, professor[1036], the Civil Cassation Court adopted a judgment 7 October 2020 in a case concerning the issuance of a restraining order due to sexual harassment by the client of the company in which the applicant works[1037], the case regarding recognition of information as unreliable, its refutation, protection of honor, dignity, business reputation of applicant, compensation for moral damage in connection with accusations of sexual harassment of subordinate employees was considered by the Court of Appeal of Luhansk region in 2017,[1038] in 2019 the Supreme Court considered this case[1039]. All mentioned cases were considered without application international standards.

Taking into account the lack of information provided by Ukraine, the Committee repeated in Conclusions 2018 its previous assumptions and stated that the situation was not in conformity with Article 26 §1 on the ground of non-establishing the appropriate and effective redress (compensation and reinstatement) in cases of sexual harassment.[1040]

Paragraph 2

In the Conclusions for Ukraine on 2014, 2016, 2018, the Committee found that the situation in Ukraine regarding moral harassment was not in conformity with Article 26 §2 of the Charter.[1041] The Committee recalled Ukraine about obligation to establish appropriate preventive measures in

1034. ECSR, Conclusions 2018. Ukraine. p.29.
1035. Ibid.
1036. Odessa Court of Appeal, judgment 16 April 2019, case № 522/24585/17. URL: https://reyestr.court.gov.ua/Review/81370944
1037. Supreme Court, Civil Cassation Court judgment 7 October 2020, case № 642/1286/19. URL: https://reyestr.court.gov.ua/Review/92173336
1038. Court of Appeal of Luhansk region, judgment 4 October 2017, case № 423/1405/17. URL: https://reyestr.court.gov.ua/Review/69427574
1039. Supreme Court, Civil cassation court, judgment 19 September 2019, case № 423/1405/17, URL: https://reyestr.court.gov.ua/Review/84406411
1040. ECSR, Conclusions 2018. Ukraine. p.30.
1041. ECSR, Conclusions 2018. Ukraine . Article 26 – 2 URL: http://hudoc.esc.coe.int/eng?i=2018/def/UKR/26/2/EN, Conclusions 2016. Ukraine. Article 26 – 2 URL: http://hudoc.esc.coe.int/eng?i=2016/def/UKR/26/2/EN, Conclusions 2014. Ukraine. Article 26 – 2 URL: http://hudoc.esc.coe.int/eng?i=2014/def/UKR/26/2/EN

order to combat moral (psychological) harassment and asked for information on involving the social partners in the drafting of the Code of Ethics. Analysing the national legislation and the definition of harassment, the Committee underlined the absence of information on the right to appeal to an independent body in the event of harassment and the right not to be retaliated against for upholding these rights, employer's liability towards persons employed or not employed by them (independent contractors, self-employed workers, visitors, etc.) who have suffered harassment from employees under their responsibility or, on premises under their responsibility.[1042] The lack of requested information led to Committee's findings that sufficient and effective remedies against moral (psychological) harassment at work were not established in Ukraine that consisted the breach of requirements of Article 26 §2.[1043]

Examine the requirements on the burden of proof, the Committee asked for the clarification of the provisions of national legislation as it was done for paragraph 1 of this article. According to compensation for financial loss and moral damage that victims of moral (psychological) harassment were entitled, it was also asked repetitively in all conclusions about kinds and amount of compensation provided in such cases, examples of appropriate case law along with the awards of damages. The Committee paid attention in its conclusions 2018 to the same information in national report submitted on 26 July 2018[1044], about no availability of examples of case law were concerning moral (psychological) harassment in the workplace as it was provided for sexual harassment.[1045]

The Committee asked also about the right to reinstatement for employees unfairly dismissed or pressured to resign for reasons related to moral (psychological) harassment. The lack of necessary information on abovementioned questions led to the conclusions of the Committee in 2018 on the absence of adequate and effective redress granted in practice and, consequently, non-fulfillment of obligations under this issue.

1042. ECSR, Conclusions 2018. Ukraine. p.31.
1043. Ibid.
1044. Government of Ukraine, 10th National report on the implementation of the European Social Charter. 26.07.2018. Cycle 2018. P.65.
1045. Ibid.

Group 4: Children, families, migrants

The right of workers with family responsibilities to equal opportunities and equal treatment (Article 27)

a) Analysis of the provisions of ESC (revised)

Article 27 of the European Social Charter (revised) concerns the right of workers with family responsibilities to equal opportunities and equal treatment. Article 27 is closely interrelated with Article E, which is a general provision on non-discrimination.

Pursuant to Article 27 ESC

> **Article 27 – The right of workers with family responsibilities to equal opportunities and equal treatment**
>
> With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workersand other workers, the Parties undertake:
>
> 1. to take appropriate measures:
>
> a. to enable workers with family responsibilities to enter and remain in employment, as well as to reenter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training;
>
> b. to take account of their needs in terms of conditions of employment and social security;
>
> c. to develop or promote services, public or private, in particular child daycare services and other childcare arrangements;
>
> 2. to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice;
>
> 3. to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.

Pursuant to the **Appendix**:

> **Article 27**
>
> It is understood that this article applies to men and women workers with family responsibilities in relation to their dependent children

as well as in relation to other members of their immediate family who clearly need their care or support where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity. The terms "dependent children" and "other members of their immediate family who clearly need their care and support" mean persons defined as such by the national legislation of the Party concerned.

Pursuant to **the Explanatory Report to the European Social Charter**

Article 27 – The right of workers with family responsibilities to equal opportunities and equal treatment

102. This provision provides for equality of opportunity and treatment for workers with family responsibilities. It has been inspired by ILO Convention No. 156 (Workers with Family Responsibilities) of 1981 as well as Recommendation No. 165 (Workers with Family Responsibilities) of 1981.

103. The appendix to this Article gives a definition of men and women workers with family responsibilities. It refers to national legislation for a definition of the terms "dependent children" and "other members of their immediate family who clearly need their care and support.

Paragraph 1

104. The term "appropriate" in this paragraph shall mean suitable to national conditions and possibilities.105. Sub-paragraph b corresponds to Article 4, paragraph b of the ILO Convention.

b) Decisions and conclusions of the European Committee of Social Rights

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers **Article 27§1 subparagraph a of the Charter** obliges State Parties to take appropriate measures to enable workers with family responsibilities to enter and remain in employment, as well as to reenter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training.

According to **the European Committee of Social Rights** the aim of Article 27§1a of the Charter is to provide people with family responsibilities with equal opportunities in respect of entering, remaining and re-entering employment. It underlines that persons with family responsibilities may face difficulties on the labour market due to their family responsibilities. Therefore, measures need to be taken by States to ensure that workers with family responsibilities are not discriminated against due to these responsibilities and to assist them to remain, enter and re-enter the labour market, in particular in the field of vocational guidance, training and re-training[1046]. The

1046. Conclusions 2005, Statement of Interpretation on Article 27§1a, see for instance, Estonia.

disadvantage of such people lies within the very nature of family responsibilities, which exclude people not only from an employment relation but, what is most important, from professional life; they often do not have time to monitor labour market developments and take measures in order to stay competitive on it. To be able to return to professional life, they need special assistance in terms of vocational guidance and training. At the same time, if the standard employment services (those available to everyone) are well developed, than the lack of extra services for people with family responsibilities cannot be regarded as a human right violation according to the European Committee of Social Rights[1047].

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers **Article 27§1 subparagraph b** obliges State Parties to take account of their needs in terms of conditions of employment and social security.

According to the **European Committee of Social Rights** measures need to be taken to implement this provision, especially measures concerning the length and organisation of working time. Furthermore, workers with family responsibilities should be allowed to work part-time or to return to full-time employment[1048]. Moreover, the Committee notes that part-time work may be agreed to upon agreement of the employee and the employer. If requested by inter alia a pregnant woman, a nursing mother, a woman or single parent raising a child (children) under 14 years of age or a disabled child under 16 years of age, or a person nursing a sick family member, part-time work schedule must be agreed to. The Committee also notes that there is no obligation to agree to part-time work for a father who is not single. The Committee considers this to constitute discrimination and can therefore, not be considered to be in conformity with Article 27§1 of the Charter combined with Article E[1049].

Periods of unemployment due to family responsibilities should be taken into account in the calculation of pension schemes or in the determination of pension rights.

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers **Article 27§1 subparagraph c** obliges State Parties to develop or promote services, public or private, in particular child daycare services and other childcare arrangements.

In one of the cases **the European Committee of Social Rights** asked information on whether the corresponding legislation provides for arrangements enabling parents to reduce or cease their professional activity because of serious illness of a child[1050]. Hence, under Article 27§1c parents should be allowed to reduce or cease work because of the serious illness of a child.

It should be noted in the mentioned context that if State has accepted Article 16, childcare arrangements are dealt with under that provision.

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers **Article 27§2 of the European Social Charter (revised)** obliges State Parties to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice.

1047. Conclusions 2003, Sweden.
1048. Conclusions 2005, Statement of Interpretation on Article 27§1b, see for instance, Estonia.
1049. Conclusions 2005, Lithuania.
1050. Conclusions 2005, Italy.Conclusions 2011, Armenia.

According to **the European Committee of Social Rights** the focus of Article 27§2 are parental leave arrangements which are distinct from maternity leave and come into play after the latter. All categories of employees are entitled to parental leave. Article 27§2 requires States to provide the possibility for either parent to obtain parental leave. An important element for the reconciliation of professional, private and family life are parental leave arrangements for taking care of a child. The duration and conditions of parental leave should be determined by States Parties. At the same time, according to the Committee considers national regulations should entitle men and women to an individual right to parental leave on the grounds of the birth or adoption of a child. With a view to promoting equal opportunities and equal treatment between men and women, the leave should, in principle, be provided on a non-transferable basis to each parent[1051].

What about the remuneration of parental leave (be it continuation of pay or via social assistance/ social security benefits) the Committee considers that it plays a vital role in the take up of childcare leave, in particular for fathers or lone parents[1052].

European Committee of Social Rights also states that under Article 27§2 of the Charter the States Parties are under a positive obligation to encourage the use of parental leave by either parent. States shall ensure that an employed parent is adequately compensated for his/her loss of earnings during the period of parental leave. The modalities of compensation is within the margin of appreciation of the States Parties and may be either paid leave (continued payment of wages by the employer), a social security benefit, any alternative benefit from public funds or a combination of such compensations. Regardless of the modalities of payment, the level shall be adequate[1053].

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers **Article 27§3 of the European Social Charter (revised)** obliges State Parties to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.

As mentioned above, according to **the Appendix to the Revised European Social Charter**, the notion of **"family responsibilities"** is to be understood as obligations in relation to dependent children and also other members of the immediate family who need care and support**. The European Committee of Social Rights** states that the purpose of Article 27§3 is to prevent these obligations from restricting preparation for and access to working life, exercise of an occupation and career advancement[1054]. According to the Committee Article 27§3 of the Revised Charter requires that courts or other competent bodies are able to order reinstatement of an employee unlawfully dismissed and/or a level of compensation that is sufficient both to deter the employer and proportionate to the damage suffered by the victim[1055]. The Committee further stated that compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed. If there is a ceiling on compensation for pecuniary damage, the victim must be able to seek unlimited compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation), and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time[1056].

1051. Conclusions 2011, Armenia.
1052. Conclusions 2011, Armenia.
1053. Conclusions 2015, Statement of Interpretation on Article27§2.
1054. Conclusions 2003, Statement of Interpretation on Article 27§3.
1055. Conclusions 2007, Finland.
1056. Conclusions 2011; Statement of interpretation on Articles 8§2 and 27§3.

c) Implementation in Ukraine

Paragraphs 1, 3

The Situation in Ukraine concerning participation in working life (§1) and Illegality of dismissal on the ground of family responsibilities (§3) was repeatedly found in conformity with the requirements of paragraphs 1 and 3 of Article 27 in the Conclusions 2015, 2019.[1057] The Committee did not ask new questions, except the updated information on the matters for the next reporting cycle.

Paragraph 2

Within the examination of national legislation on parental leave benefit and allowance for children under the age of three, the Committee analysed the amount of childcare assistance that was aggregated with childbirth allowance into a single childbirth allowance, and stated that the level of parental leave benefit was too low and inadequate under the requirements of Article 27 §2.

Moreover, the Committee paid its attention to non-providing in national legislation the individual and non-transferable part of parental leave and emphasised that "in order to promote equal opportunities and equal treatment between men and women, the leave should, in principle, be provided to each parent and at least some part of it should be non-transferable".[1058] In case of granting both parents the right to parental leave without an individual, nontransferable part, the requirements under Article 27 would be found unsatisfied. Thereby, the situation in Ukraine was found not in conformity with the mentioned Article due to not guaranteeing of an individual, non-transferable right to parental leave.[1059]

1057. ECSR, Conclusions 2019. Ukraine. p.35,37.
1058. Ibid., p.36.
1059. Ibid.

Group 3: Labour rights

The right of workers' representatives to protection in the undertaking (Article 28)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees workers' representatives the right to protection against acts prejudicial to them and the entitlement to be afforded appropriate facilities to carry out their functions. (Part I, point 28)

Pursuant to Art. 28 ESC:

> **Article 28 – The right of workers' representatives to protection in the undertaking**
>
> With a view to ensuring the effective exercise of the right of workers' representatives to carry out their functions, the Parties undertake to ensure that in the undertaking:
>
> i) they enjoy effective protection against acts prejudicial to them, including dismissal, based on their status or activities as workers' representatives within the undertaking;
>
> j) they are afforded such facilities as may be appropriate in order to enable them to carry out their functions promptly and efficiently, account being taken of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.

Pursuant to the **Appendix**[1060]:

> **Article 28**
>
> For the purpose of the application of this article, the term "workers' representatives" means persons who are recognised as such under national legislation or practice.

Pursuant to **Article 28 of the Explanatory Report to the European Social Charter**

> 106. This provision of the Revised Charter aims to protect workers' representatives in the enterprise, a group which is not covered by Article 5 unless the representative is also a trade union representative. The provision has been inspired by ILO Convention No. 135 (Workers' Representatives) of 1971.

1060. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.

107. A definition of the term "workers' representatives" is given in the appendix to the Article which describes it as meaning persons who are recognised as such under national legislation or practice. This definition is based on that of the appendix to Articles 21 and 22. It is understood that national legislation or practice may provide that workers' representatives are elected representatives or trade union delegates.

108. Sub-section b of the Article, which corresponds to Article 2 of the ILO Convention, provides that workers' representatives shall be afforded such facilities as will enable them to carry out their functions. The only limitation in the context of the Revised Charter is that account shall be taken of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned. Examples of facilities to be granted to workers' representatives may be found in ILO Recommendation No. 143 (Workers' Representatives) of 1971.

b) Decisions and conclusions of the European Committee of Social Rights

Article 28 guarantees the right of workers' representatives to protection in the undertaking and to certain facilities. It complements Article 5, which recognises a similar right in respect of trade union representatives.[1061]

Pursuant to the Appendix of Article 28, the term "workers' representatives" means persons who are recognised as such under national legislation or practice. States Parties may therefore establish different kinds of workers' representatives either trade union representatives or other types of representatives or both. Representation may be exercised, for example, through workers' commissioners, workers' council or workers' representatives on the enterprise's supervisory board.[1062]

Workers' representatives must be protected both from dismissal and prejudicial acts other than dismissal. Protection afforded to workers shall be extended for a reasonable period after the effective end of period of their office[1063]. The extension of the protection granted to workers' representatives to at least six months after the end of their mandate is considered reasonable[1064]. Granting protection from dismissal solely during the exercise of the representative's mandate was found to be in non-conformity with the Charter[1065].

Remedies must be available to worker representatives to allow them to contest their dismissal.[1066] Where a dismissal based on trade union membership has occurred, there must be adequate compensation proportionate to the damage suffered by the victim. The compensation must at least correspond to the wage that would have been payable between the date of the dismissal and the date of the court decision or reinstatement.[1067]

1061. Conclusions 2003, Bulgaria.
1062. Conclusions 2003, Bulgaria.
1063. Conclusions 2018 - Azerbaijan - Article 28.
1064. Conclusions 2010, Bulgaria.
1065. Conclusions 2018 - Azerbaijan - Article 28.
1066. Conclusions 2010, Norway; Digest 2018, p. 217.
1067. Conclusions 2007, Bulgaria; Digest 2018, p. 217.

As regards the facilities, protected workers must be granted at least:

> paid time off to represent employees, financial contributions to work councils, the use of premises and materials for works councils, as well as other facilities mentioned by the R143 Recommendation concerning protection and facilities to be afforded to workers representatives within the undertaking adopted by the ILO General Conference of 23 June 1971 (support in terms of benefits and other welfare benefits because of the time off to perform their functions, access for workers representatives or other elected representatives to all premises, where necessary, the access without any delay to the undertaking's management board if necessary, the authorisation to regularly collect subscriptions in the undertaking, the authorisation to post bills or notices in one or several places to be determined with the management board, the authorisation to distribute information sheets, factsheets and other documents on general trade unions' activities)[1068].

> The Committee also considers that participation in training courses on economic, social and union issues should not result on a loss of pay. Training costs should not be borne by the workers' representatives.[1069]

c) Implementation of ESC in Ukraine

Within the examination of conformity the situation in Ukraine concerning Article 28, the Committee found the breach of obligations in its Conclusions 2018, 2016, 2014 (the Conclusions 2010 was deferred) due to non-granting adequate protection to workers' representatives, other than trade union representatives.[1070] The Committee repeatedly stated that protection against dismissal has to be guaranteed to all types of workers' representatives, not just trade union representatives.[1071] The Committee underlined that protection for workers' representatives had to cover not only dismissal, but also any prejudicial acts other than dismissal. In this regard the Committee found that the situation in Ukraine was also not in conformity with Article 28.[1072]

Taking into account the amendments to national legislation on compensation available to workers' representatives in case of a dispute over a dismissal or other detrimental treatment, the Committee asked for detailed information.

Regarding to information received on facilities granted to trade union representatives, the Committee asked about the extension of such facilities to other types of workers' representatives in its Conclusion 2018.[1073]

1068. Conclusions 2010 - Statement of interpretation - article 28.
1069. Conclusions 2010 - Statement of interpretation - article 28.
1070. ECSR, Conclusions. Ukraine. 2018. Article 28 URL: http://hudoc.esc.coe.int/eng?i=2018/def/UKR/28/EN, Conclusions. Ukraine. 2016. Article 28. URL: http://hudoc.esc.coe.int/eng?i=2016/def/UKR/28/EN,
Conclusions. Ukraine. 2014. Article 28. URL: http://hudoc.esc.coe.int/eng?i=2014/def/UKR/28/EN,
Conclusions. Ukraine. 2010. Article 28. URL: http://hudoc.esc.coe.int/eng?i=2010/def/UKR/28//EN
1071. ECSR, Conclusions. Ukraine. 2018. Article 28. URL: http://hudoc.esc.coe.int/eng?i=2018/def/UKR/28/EN
1072. Ibid.
1073. Ibid.

Group 3: Labour rights

The right to information and consultation in collective redundancy procedures (Article 29)

a) Analysis of the provisions of ESC (revised)

The European Social Charter guarantees all workers the right to information and consultation in collective redundancy procedures. (Part I, point 29)

The right conferred in Article 29 ESC (part II) is overlapping with Article 21 in terms of the right to be informed and consulted within the undertaking.

Pursuant to Art. 29 ESC:

> **Article 29 – The right to information and consultation in collective redundancy procedures**
>
> With a view to ensuring the effective exercise of the right of workers to be informed and consulted in situations of collective redundancies, the Parties undertake to ensure that employers shall inform and consult workers' representatives, in good time prior to such collective redundancies, on ways and means of avoiding collective redundancies or limiting their occurrence and mitigating their consequences, for example by recourse to accompanying social measures aimed, in particular, at aid for the redeployment or retraining of the workers concerned.

Pursuant to the **Appendix**[1074]:

> Article 29
>
> For the purpose of the application of this article, the term "workers' representatives" means persons who are recognised as such under national legislation or practice.

Pursuant to Article 29 of the Explanatory Report to the European Social Charter

> 109. Under this Article the Parties undertake to ensure that employers inform and consult workers' representatives prior to collective redundancies. When drafting this Article the Committee examined European Community Directive 92/56 of 1992 amending Directive 75/129 on the approximation of the laws of the member States relating to collective redundancies as well as ILO Convention No. 158 (Termination of Employment) of 1982. The information and consultation shall concern the

1074. European Social Charter (Revised). Strasbourg, 3.V.1996. Appendix, European Treaty Series 163, Article 20.

possibilities of avoiding collective redundancies, limiting their number or mitigating their consequences. Recourse to social measures providing aid for redeploying or retraining the workers concerned is mentioned as an example of ways of mitigating the consequences of collective redundancies.

110. It is understood that recourse to social measures in this context is not solely the responsibility of the employer.

111. A definition of the term "workers' representatives" is given in the appendix to the Article as meaning persons recognised as such under national legislation or practice. This definition is based on that of the appendix to Articles 21 and 22.

b) Decisions and conclusions of the European Committee of Social Rights

Article 29 guarantees the right of workers to information and consultation in collective redundancy procedures. It

> requires that state parties establish an information and consultation procedure which should precede the process of collective redundancies. Its provisions are directed – on the one hand – towards ensuring that workers are made aware of reasons and scale of planned redundancies, and – on the other hand – towards ensuring that the position of workers is taken into account when their employer is planning collective redundancies, in particular as regards the scope, mode and manner of such redundancies and the extent to which their consequences can be avoided, limited and/or mitigated.[1075]

Under Article 29 the **collective redundancies** are redundancies affecting several workers within a period of time set by law and decided for reasons which have nothing to do with individual workers, but correspond to a reduction or change in the firm's activity.[1076] The definition of redundancies in domestic law, however, must not be too restrictive.[1077]

In order to give effect to the requirements of Article 29, national law must thus provide for the following guarantees:

> When employers implement information and consultation procedures preceding collective redundancies, **employees should be represented** by persons acting on behalf of all workers employed in the workplace. Such representatives may be either bodies operating in the employer's enterprise (for example, trade unions or workers' councils) or ad hoc representatives appointed to take part in this processes. National law should ensure that

1075. Conclusions 2014 - Statement of interpretation - Article 29.
1076. Conclusions 2003, Statement of Interpretation on Article 29.
1077. 7 Conclusions 2014, Azerbaijan.

employees may appoint representatives even when they are not otherwise represented in the context of a particular workplace by a trade union or other representative body. Such representatives should represent all employees who may be potentially subject to collective redundancies and should not suffer any negative consequences as a consequence of their activities in this regard.

The appendix to the Charter defines **workers' representatives** as persons who are recognised as such under national legislation or practice, in accordance with ILO Convention No. 135 on workers' representatives. In other words, trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions, or elected representatives, namely, representatives who are freely elected by the workers of the undertaking and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned. This wording means that States Parties are free to decide how the workers' representatives who have to be informed and consulted are to be appointed (general or ad hoc system).[1078]

Employers should be required to provide employees' representatives with all the **relevant information** necessary to ensure the integrity and effectiveness of the information and consultation process. This information should in particular include the reasons for the proposed redundancies, the criteria for determining which employees are to be made redundant, the proposed order and scheduling of such redundancies, the amount of any cash benefits or other forms of compensation and the scope and content of any planned social measures which are designed to mitigate the consequences of this proces.[1079]

In principle, all relevant **information should be provided** to employees' representatives **prior to the commencement of the consultation process**, but national law should also guarantee the right of employees' representatives to be provided with all relevant information throughout the entire duration of the consultation process[1080]. Article 29 provides for the employer's duty to consult with workers' representatives and the purpose of such consultation. Simple notification of redundancies to workers or their representatives is not sufficient.[1081]

The information and consultation process should be conducted 'in good time prior to collective redundancies' as required by the text of Article 29. National law should thus ensure that employers are obliged to provide employees with

1078. Conclusions 2003 Sweden; Digest 2018, p. 218.
1079. Conclusions 2014 - Statement of interpretation - Article 29.
1080. Conclusions 2014 - Statement of interpretation - Article 29.
1081. Conclusions 2014, Georgia.

> information about planned collective redundancies sufficiently far in advance of the process, so as to enable employees and their representatives to become familiar with the key aspects of the planned redundancies. Consultation should also be conducted within a time period that is sufficient to ensure that employees' representatives have an opportunity to present suitable proposals with a view to avoiding, limiting or mitigating the effect of the proposed redundancies.[1082]

All relevant documents must be supplied before consultation starts, including the reasons for the redundancies, planned social measures, the criteria for being made redundant and information on the order of the redundancies.[1083]

> "The information and consultation **process should be directed towards** not only the possible avoidance or minimisation of the scope of collective redundancies, but also at mitigating their consequences. It should therefore cover the possibility of undertaking actions aimed at retraining and redeployment of the workers concerned. As part of this process, employers should be required to cooperate with administrative authorities or public agencies which are responsible for the policy counteracting unemployment, by for example notifying them about planned collective redundancies and/or cooperating with them in relation to retraining employees who are made redundant or providing them with other forms of assistance with a view to obtaining a new job.[1084]

Consultation rights must be accompanied by **guarantees that they can be exercised in practice**. Where employers fail to fulfil their obligations, there must be at least some possibility of recourse to administrative or judicial proceedings before the redundancies are made to ensure that they are not put into effect before the consultation requirement is met[1085].

c) Implementation in Ukraine

In 2018, the Committee made the first conclusions on the compliance of the situation in Ukraine with the requirements of Article 29 of the Charter since its ratification.[1086] Previous conclusions were deferred due to the failure Ukraine to provide the necessary information in the national reports. The Committee examined in its conclusions 2018 the provisions of national legislation on the employer's notion of collective redundancy and asked about any exceptions for certain categories of workers or enterprises. Regarding the information provided by national report about employer's obligation to submit information, to consult the trade unions and to take measures to prevent collective redundancy or minimize the dismissals, to submit information to the competent territorial bodies, the Committee presumed that effective dissemination included provision of all

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1082. Conclusions 2014 - Statement of interpretation - Article 29.
1083. Conclusions 2005, Lithuania.
1084. Conclusions 2014 - Statement of interpretation - Article 29.
1085. Conclusions 2007, Sweden; Digest 2018, p. 220.
1086. ECSR, Conclusions 2018. Ukraine - Article 29. URL: http://hudoc.esc.coe.int/eng?i=2018/def/UKR/29/EN, Conclusions 2014. Ukraine. – Article 29. URL: http://hudoc.esc.coe.int/eng?i=2014/def/UKR/29/EN, Conclusions 2010. Ukraine. – Article 29. URL: http://hudoc.esc.coe.int/eng?i=2010/def/UKR/29//EN

relevant documents necessary to hold joint consultations and asked to confirm this within the next report in 2021.[1087]

According to possibility of creating special commissions to develop the appropriate set of measures for the enterprise and proposals for territorial and local employment programmes, the examples in this regard were required.[1088]

Taking into account the statement of interpretation of Article 29 in Conclusions 2003, the Committee asked Ukraine to confirm the information provided about liability and criminal prosecution in case of infringement of law relating to information, possibilities for the trade union to refuse planned dismissal.[1089]

Finally, the Committee found the situation in Ukraine in conformity with the requirements of Article 29.

1087. ECSR, Conclusions 2018. Ukraine - Article 29. p.34.
1088. Ibid.
1089. Ibid.

Group 2: Health, social security and social protection

The right to protection against poverty and social exclusion (Article 30)

a) Analysis of the provisions of ESC (revised)

Article 30 of the European Social Charter (revised) prescribes the right to protection against poverty and social exclusion. Close links exist between the effectiveness of the right recognised by Article 30 of the Charter and the enjoyment of the rights recognised by other provisions, such as the right to work (Article 1), access to health care (Article 11), social security allowances (Article 12), social and medical assistance (Article 13), the benefit from social welfare services (Article 14), the rights of persons with disabilities (Article 15), the social, legal and economic protection of the family (Article 16) as well as of children and young persons (Article 17), right to equal opportunities and equal treatment in employment and occupation without sex discrimination (Article 20), the rights of the elderly (Article 23) or the right to housing (Article 31), without forgetting the important impact of the non-discrimination clause (Article E), which obviously includes non-discrimination on grounds of poverty.

Pursuant to Article 30 ESC

Article 30 – The right to protection against poverty and social exclusion

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

a. to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;

b. to review these measures with a view to their adaptation if necessary.

Pursuant to **the Explanatory Report to the European Social Charter**

Article 30 – The right to protection against poverty and social exclusion

112. This Article provides for a comprehensive and co-ordinated approach, with relief of poverty and social exclusion as the essential and explicit aim. It also provides that measures corresponding to this approach are reviewed and adapted to new situations.

113. The purpose of the Article is not to repeat the juridical aspects

of the protection covered by other Articles of the Revised Charter although Parties may naturally refer to information given in respect of other provisions when reporting under this provision.

114. The term "poverty" in this context covers persons who find themselves in various situations ranging from severe poverty, which may have been perpetuated for several generations, to temporary situations entailing a risk of poverty. The term "social exclusion" refers to persons who find themselves in a position of extreme poverty through an accumulation of disadvantages, who suffer from degrading situations or events or from exclusion, whose rights to benefit may have expired a long time ago or for reasons of concurring circumstances. Social exclusion also strikes or risks to strike persons who without being poor are denied access to certain rights or services as a result of long periods of illness, the breakdown of their families, violence, release from prison or marginal behaviour as a result for example of alcoholism or drug addiction.

115. It must be noted that the Article does not expressly mention the guarantee of minimum resources. The reason is that such protection is already provided for by Article 13 of the Revised Charter and covered by this Article where reference is made in paragraph a to "effective access to [....] social assistance".

116. Among the obligations subscribed to under Article 30, a series of measures is included, which may or may not imply financial benefits, and which concern both persons in a situation of exclusion and those who risk finding themselvesin such a situation. States subscribing to this provision are encouraged to restrict financial benefits to those who cannot help themselves by their own means.

117. The review of mechanisms under paragraph b of the Article is of a general character and each Party shall decide how it should be organised, depending on national conditions. This review may, in order for the measures mentioned in the provision to be effective, include consultations with the social partners and various other organisations, including organisations representing persons who find themselves in a situation of poverty or social exclusion.

b) Decisions and conclusions of the European Committee of Social Rights

According to the European Committee of Social Rights living in a situation of poverty and social exclusion violates the dignity of human beings. With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion Article 30 requires States parties to adopt an overall and coordinated approach, which shall consist of an analytical framework, a set

of priorities and corresponding measures to prevent and remove obstacles to access to social rights as well as monitoring mechanisms involving all relevant actors, including civil society and persons affected by poverty and exclusion. It must link and integrate policies in a consistent way moving beyond a purely sectoral or target group approach. The measures taken in pursuance of the approach must promote access to social rights, in particular employment, housing, training, education, culture and social and medical assistance. The Committee also emphasised that this list does not exhaust the areas in which measures must be taken to address the multidimensional poverty and exclusion phenomena. The measures should strengthen entitlement to social rights, their monitoring and enforcement, improve the procedures and management of benefits and services, improve information about social rights and related benefits and services, combat psychological and socio-cultural obstacles to accessing rights and where necessary specifically target the most vulnerable groups and regions. As long as poverty and social exclusion persist they should also represent an increase in the resources deployed to realise social rights. Finally, the measures should be adequate in their quality and quantity to the nature and extent of poverty and social exclusion in the country concerned[1090].

The Committee takes into account a set of indicators in order to assess in a more precise way the effectiveness of policies, measures and actions undertaken by States Parties within the framework of this overall and co-ordinated approach. One of the key indicators in this respect is the level of resources (including any increase in this level) that have been allocated to attain the objectives of the strategy[1091], in so far as "adequate resources are an essential element to enable people to become self-sufficient"[1092].

Concerning the **repercussions of the economic crisis on social rights**, the Committee held that, by acceding to the Charter, the Parties have accepted to pursue by all appropriate means, the attainment of conditions in which inter alia the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised. Accordingly, it has concluded that "the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most[1093].

The Committee also considers that what applies to the right to health and social protection should apply equally to labour law and that while it may be reasonable for the crisis to prompt changes in current legislation and practices in one or other of these areas to restrict certain items of public spending or relieve constraints on businesses, these changes should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter[1094].

One of the most important points in this context is the fact that the two dimensions of Article 30, poverty and social exclusion, constitute an expression of the principle of indivisibility which is also contained in other provisions of the Charter. The European Committee of Social Rights considers that the reference to the social rights enshrined in Article 30 should not be understood too narrowly. In fact, the fight against social exclusion is one area where the notion of the indivisibility of fundamental rights takes a special importance. In this regard, the right to vote, as with other rights relating to civic and citizen participation, constitutes a necessary dimension in social integration and inclusion and is thus covered by article 30[1095].

1090. Statement of interpretation of Article 30, Conclusions 2003, France.
1091. Statement of Interpretation of Article 30, Conclusions 2005.
1092. Statement of Interpretation of Article 30, Conclusions 2003, France.
1093. General Introduction to Conclusions XIX-2 (2009).
1094. GENOP-DEI and ADEDY v. Grèce, Complaint No. 65/2011, Decision on the merits of 23 May 2012, para. 17.
1095. ERRC v. France, Complaint No. 51/2008, Decision on the merits of 19 October 2009, para. 99.

It should also be noted that close links exist between the effectiveness of the right recognised by Article 30 of the Charter and the enjoyment of the rights recognised by other provisions, such as the right to work (Article 1), access to health care (Article 11), social security allowances (Article 12), social and medical assistance (Article 13), the benefit from social welfare services (Article 14), the rights of persons with disabilities (Article 15), the social, legal and economic protection of the family (Article 16) as well as of children and young persons (Article 17), right to equal opportunities and equal treatment in employment and occupation without sex discrimination (Article 20), the rights of the elderly (Article 23) or the right to housing (Article 31), without forgetting the important impact of the non-discrimination clause (Article E), which obviously includes non-discrimination on grounds of poverty.

Hence, together with the indicators mentioned above, when assessing the respect of Article 30, the Committee also takes into consideration the national measures or practices which fall within the scope of other substantive provisions of the Charter in the framework of both monitoring systems (the reporting procedure and the collective complaint procedure). This approach does not mean that a conclusion of non-conformity or a decision of violation of one or several of these provisions automatically or necessarily lead to a violation of Article 30, but such a conclusion or decision may, depending on the circumstances, be relevant in assessing conformity with Article 30.

For instance, in one of its decisions the European Committee of Social Rights stated:

> ” Admittedly, as is stated in the complaint, family allowances can form a substantial share of the income of persons living below the poverty threshold. In this respect, the possibility of being placed in uncertain economic and social circumstances through the partial withdrawal of family allowances may result in a reduction of the economic and social protection of families under Article 16 (see above). However, as such, this measure cannot be seen to undermine the coordinated approach of the protection against poverty and social exclusion that should be afforded under Article 30 of the revised Charter[1096].

c) Implementation in Ukraine

The situation in Ukraine has never been found in conformity with the Article 30 since the ratification of the Charter. In the conclusions 2017, the Committee analysed the statistics on poverty (extreme, relative) in Ukraine and concerned about increasing rates.

The Committee asked Ukraine to elabourate and adopted the adequate overall and coordinated approaches to combat poverty and social exclusion which should consist of an analytical framework, a set of priorities and measures to prevent and remove obstacles to access fundamental social rights. In addition, the Committee reiterated its conclusions made for France in 2003, that "the measures taken to combat poverty and social exclusion must promote and remove obstacles to access to fundamental social rights, in particular employment, housing, training, education, culture and social and medical assistance".[1097] Consequently, non-availability of such approach led to the general negative conclusion that Ukraine breached the commitments under the mentioned Article.

1096. EUROCEF v. France, Complaint No. 82/2012, Decision on the merits of 19 March 2013, para. 59.
1097. European Committee of Social Rights, Conclusions 2017. Ukraine. January, 2018, P.1232.

Special attention was payed to omission of any specific expenditures for the implementation of measure for overcoming poverty in the country according to the National Programme for Overcoming and Preventing Poverty. One of the Committee's question was also about the budgetary resources allocated to combating poverty and social exclusion and sufficiency of their amount. This issue is being vigorously discussed, in particular, in the context of the finding ways to enforce the judgment of the European Court of Human Rights in case "Burmych and Others v. Ukraine" and other judgments of the European Court on non-enforcement of decisions of the Ukrainian courts on social matters. The situation is getting worse every year due to financial failure of Ukraine to fulfil its social obligations prescribed by nation law in force.[1098] The social obligations that Ukraine has undertaken and enshrined in its national legislation often do not correspond to its financial capabilities and the Law of Ukraine on the State budget.

Within the respect of this Article, the Committee highlighted the complementary and interrelated nature of the provisions of the Charter, that, except the negative conclusion on the Article 30, caused to conclusions on non-conformity under other articles of the Charter, which are linked to the Article 30 (in particular, art. 23, art. 31.2 etc.).

1098. Analysis of the national legislation of Ukraine providing for social benefits in the context of the execution of the European Court of Human Rights judgment in the Burmych and Others v. Ukraine case, others ECtHR judgments on non-enforcement of decisions of the Ukrainian national courts on social issues. Analysis was prepared by A. Fedorova within the Council of Europe Project "Promoting social human rights as a key factor of sustainable democracy in Ukraine", September, 2020. – 23 p.

Group 4: Children, families, migrants

The right to housing (Article 31)

a) Analysis of the provisions of ESC (revised)

Article 31 of the European Social Charter (revised) concerns the right to housing. For the States it imposes a positive obligation to take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question.

It should be noted that Article 16 (the right of the family to social, legal and economic protection) and Article 31, though different in personal and material scope, partially overlap with respect to several aspects of the right to housing.

Pursuant to Article 31 ESC

> **Article 31 – The right to housing**
>
> With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
>
> 1. to promote access to housing of an adequate standard;
>
> 2. to prevent and reduce homelessness with a view to its gradual elimination;
>
> 3. to make the price of housing accessible to those without adequate resources.

Pursuant to **the Explanatory Report to the European Social Charter**

> **Article 31 – The right to housing**
>
> 118. In order to ensure a right to housing, this provision obliges Parties to take measures in so far as possible aiming to progressively eliminate homelessness, to promote access to housing of an adequate standard and to make the price of housing accessible to those without adequate resources. By housing of an "adequate standard" is meant housing which is of an acceptable standard with regard to health requirements. For a definition of the terms "without adequate resources" reference is made to Article 13.
>
> 119. It will be for the competent authorities of each State to decide, at national level, on appropriate housing standards.

b) Decisions and conclusions of the European Committee of Social Rights

For the States this Article imposes a positive obligation to take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question.

States enjoy a margin of discretion in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources. Nonetheless, according to **the case-law of the European Committee of Social Rights** "when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources[1099]. Moreover, implementation of the Charter requires state parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein[1100].

The actual wording of Article 31 of the Charter cannot be interpreted as imposing on states an obligation of "results". However, the European Committee of Social Rights considers that the rights recognised in the Social Charter must take a practical and effective, rather than purely theoretical, form. This means that, for the situation to be in conformity with the treaty, states party must:

- a) adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;

- b) maintain meaningful statistics on needs, resources and results;

- c) undertake regular reviews of the impact of the strategies adopted;

- d) establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;

- e) pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.

According to **Article 31§1 of the Charter** with a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed to promote access to housing of an adequate standard.

The European Committee of Social Rights considers that parties shall guarantee **equal treatment** with respect to housing on the grounds of Article E of the Charter. Equal treatment must be assured to the different groups of vulnerable persons, particularly low-income persons, unemployed, single parent households, young persons, persons with disabilities including mental health problems, persons internally displaced due to wars or natural disasters etc. The principle of equality of treatment and non-discrimination covers not only paragraph one but the rest of Article 31 as well[1101].

In this context it is important to reveal what the wording **"adequate housing"** means. According to **the European Committee of Social Rights** "adequate housing" means dwelling which is structurally secure, safe from a sanitary and health point of view and not overcrowded, with secure tenure supported by the law if it possesses all basic amenities, such as water, heating, waste disposal; sanitation facilities; electricity; etc and if specific dangers such as, for example, the presence of lead or asbestos are under control[1102]. With this regard the Committee also noted that over-crowding means that the size of the dwelling is not suitable in light of the number of persons

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1099. European Roma Rights Center (ERRC) v. Bulgaria, Complaint n°31/2005, Decision on the merits of 18 October 2006, §35.
1100. International Movement ATD Fourth World v. France, complaint n° 33/2006, Decision on the merits of 5 December 2007, §61.
1101. Conclusions 2003, Italy.
1102. Conclusions 2003, France.

and the composition of the household in residence. Security of tenure, in turn, means protection from forced eviction and other threats, and it will be analysed in the context of Article 31§2.

It is important to note that according to the Committee, the standards of adequate housing shall be applied not only to new constructions, but also gradually, in the case of renovation to the existing housing stock. They shall also be applied to housing available for rent as well as to housing occupied by their owners[1103].

European Committee of Social Rights considers that it is incumbent on the public authorities to ensure that housing is adequate through different measures such as, in particular, an inventory of the housing stock, injunctions against owners who disregard urban development rules and maintenance obligations for landlords. Public authorities must also guard against the interruption of essential services such as water, electricity and telephone[1104].

Even if under domestic law, local or regional authorities, trade unions or professional organisations are responsible for exercising a particular function, States Parties to the Charter are responsible, under their international obligations to ensure that such responsibilities are properly exercised. Thus, ultimate responsibility for policy implementation, involving at a minimum supervision and regulation of local action, lies with the Government which must be able to show that both local authorities and itself have taken practical steps to ensure that local action is effective[1105].

It is also important to note that according to the European Committee of Social Rights effectiveness of the right to adequate housing implies its legal protection. This means that tenants or occupiers must have access to affordable and impartial judicial or other remedies[1106]. Moreover, any appeal procedure must be effective[1107].

According to **Article 31§2 of the Charter** with a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed to prevent and reduce homelessness with a view to its gradual elimination.

The European Committee of Social Rights considers as homeless those individuals not legally having at their disposal a dwelling or other forms of adequate shelter[1108]. The Committee considers that the parties must prevent categories of vulnerable people from becoming homeless. This requires states to introduce a housing policy for all disadvantaged groups of people to ensure access to social housing[1109]. Reducing homelessness requires the introduction of emergency measures, such as the provision of immediate shelter. It likewise requires measures to help the homeless to overcome their difficulties and to prevent them from returning to a situation of homelessness[1110].

Though State authorities enjoy a wide margin of discretion in measures to be taken concerning town planning, according to the European Committee of Social Rights they must strike a balance between the general interest and the fundamental rights of the individuals, in particular the right to housing and its corollary of ensuring individuals do not become homeless[1111].

1103. Conclusions 2003, France.
1104. Conclusions 2003, France.
1105. European Roma Rights Center (ERRC) v. Italy, Complaint No. 27/2004, Decision on the merits of 7 December 2005, § 26; European Federation of National Organisations Working with the Homeless (FEANTSA) c. France, Complaint No 39/2006, Decision on the merits of 5 December 2007, § 79.
1106. Conclusions 2003, France.
1107. European Federation of National Organisations Working with the Homeless (FEANTSA) c. France, Complaint No 39/2006, decision on the merits of 5 December 2007, §§ 80-81.
1108. Conclusions 2003, Italy.
1109. Conclusions 2005, Lithuania.
1110. Conclusions 2003, Italy.
1111. European Roma Rights Center (ERRC) v.Bulgaria, Complaint No. 31/2005, Decision on the merits of 18 October 2006, §54

In this context the issues with regard to **eviction** should also be analysed. At first it should be noted that according to the European Committee of Social Rights Articles 16 and 31, though different in personal and material scope, partially overlap with respect to several aspects of the right to housing. In this respect, the notions of adequate housing and forced eviction are identical under Articles 16 and 31[1112].

The European Committee for Social Rights states with regard to forced eviction: "Forced eviction can be defined as the deprivation of housing which a person occupied due to insolvency or wrongful occupation. Legal protection for persons threatened by eviction must include, in particular an obligation to consult with the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction. The law must also prohibit evictions carried out at night or during winter and provide legal remedies and offer legal aid to those who are in need to seek redress from the courts. Compensation for illegal evictions must also be provided. When an eviction is justified by the public interest, authorities must adopt measures to re-house or financially assist the persons concerned"[1113].

It is important to note that according to the Committee illegal occupation of a site or dwelling may justify the eviction of the illegal occupants. However the criteria of illegal occupation must not be unduly wide, the eviction should take place in accordance with the applicable rules of procedure and these should be sufficiently protective of the rights of the persons concerned[1114]. States Parties must also make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and that alternative accommodation is available. The law must also establish eviction procedures, specifying when they may not be carried out (for example, at night or during winter), provide legal remedies and offer legal aid to those who need it to seek redress from the courts. Compensation for illegal evictions must also be provided[1115].

According to **Article 31§2**, homeless persons must be offered shelter as an emergency solution. Moreover, to ensure that the dignity of the persons sheltered is respected, shelters must meet health, safety and hygiene standards and, in particular, be equipped with basic amenities such as access to water and heating and sufficient lighting. One of the basic requirements is also the security of the immediate surroundings[1116].

European Committee of Social Rights considers that Article 31§2 obliges Parties to gradually reduce homelessness with a view to its elimination. Reducing homelessness implies the introduction of measures, such as provision of immediate shelter and care for the homeless and measures to help such people overcome their difficulties and prevent a return to homelessness[1117]. With regard to persons accommodated in emergency shelters, who are regularly resident or regularly working within the territory of the State Party concerned, the Committee recalls that the provision of shelter, however adequate, cannot be considered a lasting solution. They thus must be offered either long-term accommodation suited to their circumstances or housing of an adequate standard as provided by Article 31§1 within a reasonable time[1118].

1112. Centre on Housing Rights and Evictions (COHRE) v. Italy, Complaint No. 58/2009, Decision on the merits of 25 June 2010, §115.
1113. Conclusions 2003, Sweden.
1114. European Roma Rights Center (ERRC) v. Greece, Complaint n°15/2003, decision on the merits of 8 December 2004, §51.
1115. European Roma Rights Center (ERRC) v. Bulgaria, Complaint n°31/2005, decision on the merits of 18 October 2006, §52.
1116. Conference of European Churches (CEC) v. the Netherlands Complaint No. 90/2013, decision on the mertis of 1 July 2014, §§138; Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, decision on the merits of 20 October 2009, § 62.
1117. Conclusions 2003, Italy.
1118. Conference of European Churches (CEC) v. the Netherlands Complaint No. 90/2013, decision on the merits of 1 July 2014, §140.

Moreover, the Committee considers that eviction from shelter of persons present within the territory of a State Party in an irregular manner should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness, which is contrary to the respect for their human dignity. States are not obliged to provide alternative accommodation in the form of permanent housing within the meaning of Article 31§1 for migrants in an irregular situation. The Committee mentioned in its Conclusion with regard to the situation in Ukraine that a national situation is not in conformity with Article 31§2 of the Charter, where the right to shelter is not guaranteed to persons irregularly present, including children, for as long as they are within the jurisdiction of the state[1119].

Article 31§3 with a view to ensuring the effective exercise of the right to housing, obliges Parties to take measures designed to make the price of housing accessible to those without adequate resources. **However, this provision is not accepted by Ukraine.**

According to **the European Committee of Social Rights** housing is considered to be affordable when the household can afford to pay the initial costs (deposit, advance rent), the current rent and/or other costs (utility, maintenance and management charges) on a long-term basis and still be able to maintain a minimum standard of living, as defined by the society in which the household is located[1120]. The Committee considers that, in order to establish that measures are being taken to make the price of housing accessible to those without adequate resources, States Parties to the Charter must show not the average affordability ratio required of all those applying for housing, but rather that the affordability ratio of the poorest applicants for housing is compatible with their level of income, something that is clearly not the case with former holders of the Housing Right, in particular elderly persons, who have been deprived not only of this right, but also of the opportunity to purchase the flat they live in, or another one, on advantageous terms, and of the opportunity to remain in the flat, or move to and occupy another flat, in return for a reasonable rent[1121].

According to the Committee Parties are required to adopt appropriate measures for the construction of housing, in particular social housing[1122]. Moreover, a clear policy mechanism should be in place to ensure that due priority is given to the provision of housing for the most deprived members of the community, and that the assessment of the needs of the most deprived is built into the programme of providing social housing[1123].

In one of the cases the European Committee of Social Rights stated:

> ” In addition, the system of legal redress for people who are denied social housing, is also subject to serious shortcomings, namely: the mediation commissions foreseen by the Act to examine applications which are pending after an excessive waiting time have only been created in a minority of municipalities. The Committee considers that this remedy is not sufficiently efficient, and therefore that the situation on this point is not in conformity with Article 31§3 of the Revised Charter[1124].

1119. Conference of European Churches (CEC) v. the Netherlands Complaint No. 90/2013, decision on the mertis of 1 July 2014, §§128-129; Conclusions 2011, Ukraine.
1120. Conclusions 2003, Sweden.
1121. FEANTSA) v. Slovenia, Complaint No. 53/2008, decision on the merits of 8 September 2009, § 72.
1122. Conclusions 2003, Sweden.
1123. International Movement ATD Fourth World v. France, complaint n° 33/2006, decision on the merits of 5 December 2007, §§ 98-100.
1124. International Movement ATD Fourth World v. France, complaint n° 33/2006, decision on the merits of 5 December 2007, §131.

The Committee considers that Parties are required...to introduce housing benefits for the low-income and disadvantaged sectors of the population[1125].

It should also be noted that the mentioned right should be provided without discrimination, including with respect of Roma and travellers[1126].

c) Implementation in Ukraine

Ukraine has been ratified paragraphs 1 and 2 of the Article 31, except the paragraph 3.

Criteria for adequate housing

In the submitted report, Ukraine pointed out to the national legislation enshrined criteria for adequate housing that entered into force in 2006. However, the possibility of its application to the housing stock existed before was not indicated. Thereby, the Committee reiterated for Ukraine that criteria for adequate housing must be applied not only to new constructions, but also gradually to the existing housing stock".[1127] Also in the next report, the Committee requests updated information on the minimum size of housing.

Furthermore, emphasising the importance of establishing proper supervision of housing standards, responsibilities for adequate housing, the Committee took into account its previous conclusions of non-conformity of supervision mechanism of housing standards to the Committee's requirements.

Analysing the legally enshrined right of everyone in Ukraine to apply to a court for the protection property or non-property rights and interests, the Committee asked for the information on the national case-law on the matter.

The Committee thoroughly examined the measures taking by Ukraine in favour of ensuring the right to adequate housing for vulnerable groups, especially internally displaced persons, Roma nationals etc. The statistics of 7 % of internally displaced persons lived in accommodation provided by national authority led to the question for the next report about the measures taken to guarantee this right to housing for IDPs.[1128]

Finally, the ECSR stated that Ukraine didn't fulfill the commitments because of lack of sufficient measures taken to improve the substandard housing conditions of Roma.

The article 47 of the Constitution of Ukraine declares a ban on forced deprivation of housing other than on the basis of the law under the court decision. In addition, citizens in need of social protection are provided with housing by the state and local governments free of charge or for a fee available to them in accordance with the law. However, identifying the lack of information provided on the prevention of homelessness the Committee reserved the situation until receiving further information and reiterated its previous unsatisfactory findings about non-conformity. The Committee assumed that the legal protection of persons threatened by forced eviction is insufficient and the fact that the right to shelter is adequately guaranteed in Ukraine cannot be recognised.

1125. Conclusions 2003, Sweden.
1126. International Movement ATD Fourth World v. France, complaint n° 33/2006, decision on the merits of 5 December 2007, §§ 149-155.
1127. Ibid., P.38.
1128. Ibid., P.40.

Ukraine has not ratified paragraph 3 of Article 31 of the ESC. In 2017, the Committee analysis stated that among other issues the situation in Ukraine had not been fully in compliance with requirements of para.3 of Article 31 of the Charter. The Committee came to this conclusion based on the information provided by the state on the suspension of funding for many housing and affordable credit programs in 2014.

Part III

Implementation of the European Social Charter in Ukraine

The process of ratification of the European Social Charter by Ukraine

Ukraine became the member of the Council of Europe in 1995 and agreed to be bound by the obligations and commitments, enshrined in the PACE Opinion 190 (1995) that included among others the obligation to study with a view to ratification of the Council of Europe's Social Charter.[1129] The first step to the ratification of the Charter was taken in 1999 when Ukraine signed the ESC revised. However, the absence of clear specific time-frame for studying and ratification of the ESC has led to fact that Ukraine spent a decade in general for completing the process of its ratification.

The special Action Plan for the enhancing the honouring obligations and commitments of Ukraine to the Council of Europe, achieving compliance with the Copenhagen political criteria of the European Union membership and taking into account the Parliamentary Assembly of the Council of Europe's Resolution No. 1466 and Recommendation No. 1722 of 5 October 2005 was adopted in 2006 by the Decree of the President of Ukraine.[1130] The improvement of situation with social rights of citizens and preparing and submission the Draft Law on the Ratification of the European Social Charter (revised) according to PACE Resolution 1466, PACE Recommendation 1722 has been one of the action that has to be taken in order to ensure the protection of human rights and freedoms.

Later that year this approach made possible the adoption of Law of Ukraine "on the Ratification of the European Social Charter (revised)"[1131]. Finally, **the European Social Charter Revised was ratified by Ukraine on 21 December, 2006 and the ESC has become binding for Ukraine since the 1st February, 2007**.[1132] Since that date the ratified provisions of the ESC (r) have become the part of Ukrainian national legislation accordingly to the article 9 of the Constitution of Ukraine. This represents all ratified provisions have been automatically incorporated into domestic law of Ukraine and could be treated as a source of law.

1129. Parliamentary Assembly, Application by Ukraine for membership of the Council of Europe, Opinion 190 (1995). URL: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13929&lang=en
1130. President of Ukraine, On the Action Plan for the Honouring by Ukraine of its Obligations and Commitments to the Council of Europe, Decree of the President of Ukraine 20 January 2006 No. 39/2006. URL: https://minjust.gov.ua/m/str_7003
1131. Law of Ukraine, On ratification of the European Social Charter revised, N 137-V, 14.09.2006. URL: https://zakon.rada.gov.ua/laws/show/137-16/ed20060914#Text
1132. Treaty office of the Council of Europe, Chart of signatures and ratifications of Treaty 163. European Social Charter (revised). URL: https://www.coe.int/en/web/conventions/full-list/- /conventions/treaty/163/signatures?p_auth=dsRWYCH7

ESC (r) is one of the pivotal international legal acts which belong to the system of economic and social rights sources. The Law of Ukraine "On International Treaties of Ukraine" establishes that an international treaty of Ukraine is any treaty concluded in writing with a foreign state or other entity under international law and governed by the international law, regardless of whether the treaty is made in one or more related documents, and regardless of its particular name (treaty, agreement, convention, pact, protocol, etc.).[1133]

Thus, accordingly the paragraph 2 of Article 19 of the Law of Ukraine "On International Treaties of Ukraine" stipulates that if an international treaty of Ukraine establishes the rules other than those provided for in the relevant act of legislation of Ukraine, the rules of the international treaty shall be applied.

Proceeding from the provisions of the Vienna Convention on the Law of Treaties,[1134] to which Ukraine is a party,[1135] the conclusions and recommendations of the European Committee of Social Rights are the part of the international treaty. The list of all conclusions made by Committee to Ukraine is available on HUDOC database.[1136]

The ratified and non-accepted provisions of the European Social Charter revised by Ukraine

Within the ratification of the ESC Ukraine accepted 76 of the 98 paragraphs of the Charter revised.[1137] Ukraine considered itself bound by 6 Articles of 9 mandatory articles of the Charter, fulfilled the minimum requirements:

- Article 1 – The right to work
- Article 5 – The right to organise
- Article 6 – The right to bargain collectively
- Article 7 – The right of children and young persons to protection
- Article 16 – The right of the family to social, legal and economic protection
- Article 20 – The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

In addition, the Law of Ukraine "On ratification of the European Social Charter revised" was amended in 2017 and Ukraine agreed to accept last 2 paragraphs of the article 12 - The right to social security (paragraph 3 and paragraph 4)[1138] and has bounded itself by them since 1 September, 2017. Despite the progress achieved, other two parts of the Article 12 - The right to social security, enshrined the obligations for the state parties to establish or maintain a system of social security, maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security are continued to not be accepted by Ukraine

1133. Law of Ukraine, On International Agreements of Ukraine, N 1906-IV, 29.06.2004. URL: https://zakon.rada.gov.ua/laws/show/1906-15#Text
1134. Vienna Convention on the law of treaties. URL: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf
1135. Decree of Presidencies of the Verkhovna Rada of Ukrainian RSR, On the accession of the Ukrainian Soviet of the Socialist Republic to the Vienna Convention on the law of international treaties, N 2077-XI, 14.04.1986. URL: https://zakon.rada.gov.ua/laws/show/2077-11#Text
1136. http://surl.li/zpar
1137.
1138. Law of Ukraine, On the Amendements to pararagrah 2 of the "Law of Ukraine on the Ratification of the European Social Charter (Revised)", N 2034-VIII, 17 May, 2017. URL: https://zakon.rada.gov.ua/laws/show/2034-19#Text

as well as two more articles: 13 – The right to social and medical assistance and 19 - Article 19 – The right of migrant workers and their families to protection and assistance.

Although, under the article 46 of the Constitution of Ukraine, citizens have the right to social protection including the right to financial security in cases of complete, partial, or temporary disability, loss of the principal wage-earner, unemployment due to circumstances beyond their control, old age, and in other cases determined by law… Pensions and other types of social payments and assistance that are the principal sources of subsistence shall ensure a standard of living not lower than the minimum living standard established by law.[1139] Other provisions of the Constitution enshrined the range of rights fixed in the non-accepted provisions of the ESC, such as right to housing (art.47), right to a standard of living sufficient for themselves and their families including adequate nutrition, clothing, and housing (art.48), right to health protection, medical care and medical insurance (art.49) etc.

Except the mentioned provisions, Ukraine has not ratified the following article and provisions of the European Social Charter revised:

Article 2 -The right to just conditions of work, par. 3 about the minimum duration of annual holiday with pay,

Article 4 - The right to a fair remuneration, par. 1 about the right of workers to a remuneration such as giving them and their families a decent standard of living,

Article 25 - The right of workers to the protection of their claims in the event of the insolvency of their employer,

Article 31 - The right to housing, par. 3 about taking measures designed the price of housing accessible to those without adequate resources.

All articles and paragraphs that have not been accepted did not constitute the part of Ukrainian national legislation and have not been incorporated into domestic law. In addition, *Ukraine has not accepted the collective complaints procedure*.

Table of accepted provisions

1.1	**1.2**	**1.3**	**1.4**	**2.1**	**2.2**	2.3	**2.4**	**2.5**	**2.6**	**2.7**	**3.1**
3.2	**3.3**	**3.4**	4.1	**4.2**	**4.3**	**4.4**	**4.5**	**5**	**6.1**	**6.2**	**6.3**
6.4	**7.1**	**7.2**	**7.3**	**7.4**	**7.5**	**7.6**	**7.7**	**7.8**	**7.9**	**7.10**	**8.1**
8.2	**8.3**	**8.4**	**8.5**	**9**	**10.1**	**10.2**	**10.3**	**10.4**	**10.5**	**11.1**	**11.2**
11.3	12.1	12.2	**12.3**	**12.4**	13.1	13.2	13.3	13.4	**14.1**	**14.2**	**15.1**
15.2	**15.3**	**16**	**17.1**	**17.2**	**18.1**	**18.2**	**18.3**	**18.4**	19.1	19.2	19.3
19.4	19.5	19.6	19.7	19.8	19.9	19.10	19.11	19.12	**20**	**21**	**22**
23	**24**	25	**26.1**	**26.2**	**27.1**	**27.2**	**27.3**	**28**	**29**	**30**	**31.1**
31.2	31.3										

Tab.1[1140]

1139. The Verkhovna Rada (the Parliament) of Ukraine, the Constitution of Ukraine, June 28, 1996. URL: https://rm.coe.int/constitution-of-ukraine/168071f58b

1140. See more information about accepted, non-accepted provisions, ratification of the ESC (r) by Ukraine https://rm.coe.int/16805ac112#:~:text=Ukraine%20ratified%20the%20Revised%20European,the%20system%20of%20collective%20complaints.&text=Automatic%20incorporation%20into%20domestic%20law.

The process of implementation the European Social Charter at national level by Ukraine

Ukraine presented its first report about the implementation the ESC in October 2008. In the conclusions made by the European Committee in 2009, situation with the honouring the obligations by Ukraine within the thematic group "Health, social security and social protection" was the following: from the 7 articles which include 19 paragraphs, 8 paragraphs was not ratified at that moment by Ukraine, the necessary information was not provided for the decisions under 8 paragraphs. In additional, the Committee has found that Ukraine complied with the obligations under only 2 paragraphs while one has been recognised not in conformity with the Charter's requirements. The Committee stipulated that Ukraine had violated its obligations under Article 23 which established a fundamental right of elderly persons to social protection. A decade later in Conclusions 2017, the Committee repeated its previous findings about inadequacy of the minimum level of pension and reinterred arrange of questions that were asked before. Although, the national judges apply the principle 23 of Part 1 of the Charter in the pension cases in recent years but not article 23.

The last full cycle of ECSR's recommendations according to four thematic groups has reflected the lack of achievements had made by Ukraine. So, the statistics are following[1141]:

Thematic group 1 "Employment, training and equal opportunities". European Committee of social rights in its Recommendations 2016 for Ukraine found out that from total 24 situations:

2 – in conformity

20 – non-conformity

2 - needs more information

Thematic group 2 "Health, social security and social protection". European Committee of social rights in its Recommendations 2017 for Ukraine found out that from total 11 situations:

1 – in conformity

8 – non-conformity

2 - needs more information

Thematic group 3 "Labour rights". European Committee of social rights in its Recommendations 2018 for Ukraine found out that from total 21 situations:

9 – in conformity

10 – non-conformity

2 - needs more information

Thematic group 4 "Children, families, migrants". European Committee of social rights in its Recommendations 2019 for Ukraine found out that from total 23 situations:

1141. Ukraine and the European Social Charter. Signatures, ratifications and accepted provisions.

7 – in conformity

11 – non-conformity

5 - needs more information

Problematic situations are stated in the Conclusions on many other articles and paragraphs of the ESC. The ECSR returns to the issues and recommendations that were provided earlier. Unfortunately, in many cases there is a lack of significant changes, which entails a repetition of the negative assessment of Ukraine's implementation of its commitments under the articles and paragraphs independently selected for ratification. Additionally, the ECSR could be waiting for some statistical information from Ukraine long enough. In 2015, the Committee adopted a negative conclusion on the reduction of homelessness (paragraph 2 of Article 31 of the ECHR) and requested information on the number of homeless people in the country. The lack of materials and statistics provided, led the Committee to the negative conclusion and wider recommendation on the issue in 2019.

The legal acts adopted to improve the implementation the ESC at national level

Since the Charter has been ratified, several acts have been adopted at the domestic level. First of all, in 2007 immediately upon the ESC entered into force the Cabinet of Ministers of Ukraine approved the Action plan for the implementation of the European Social Charter for 2007-2010.[1142] Next year the Parliamentary hearings devoted to the process of the implementation the European Social Charter "On the state of implementation[1143] of the European Social Charter" was hold in the Verhovna Rada of Ukraine in order to identify actual problems of the process of its implementation. The recommendations of the Parliamentary hearings were approved by the Decision of the Verhovna Rada N 773 – VI on 18 December 2008. The Verhovna Rada of Ukraine Committee on social policy and labour recognised the Cabinet of Ministers's work non satisfactory, the recommendations to ratify all provisions of the Charter and accepted the collective complaints procedure were given in 2010. Furthermore, in 2013 the Committee recommended, among other propositions, to apply to the Supreme Court of Ukraine for generalisation of judicial practice of application of the provisions of the ECC in court proceedings on issues of socio-economic human rights; to analyze the recommendations of the ECSR to Ukraine and to identify specific measures to bring national legislation into line with the requirements of the Charter.

The regulations of the Charter contain a number of imperative and dispositive norms of law. One of the peculiarities of the latter is the empowering the Contracting Parties to independently establish the content of dispositive obligations depending on the existing economic and social conditions. Meanwhile, the key indicator that the state complies with these obligations is the general trend of responsibility for the set goal and the constant increase of social guarantees. The second peculiarity of the Charter's dispositive norms implementation is the need to take into account the interpretations of such provisions of the ECSR.

Despite all actions taken, not enough progress achieved in implementation the ESC rights, the national legislation and practice were not brought into conformity with the provisions of the Charter. Regarding the problems of implementation of the Charter, "The action plan to ensure

1142. Cabinet of Ministers of Ukraine, Action plan for the implementation of the European Social Charter revised for 2007-2010, Order of the Cabinet of Ministers of Ukraine, N 237-p, 26 April, 2007.URL: https://zakon.rada.gov.ua/laws/show/237-2007-%D1%80#Text

1143. The Verkhovna Rada of Ukraine, The Verkhovna Rada of Ukraine Committee on Social Policy and Labour holds Parliamentary Hearings on the Subject: "On the State of Implementation of the European Social Charter (revised) in Ukraine". URL: https://iportal.rada.gov.ua/en/news/page/news/News/upcoming_events/13656.html

the implementation of the provisions of the European Social Charter (revised) for 2015-2019" was adopted.[1144]

In 2020 the social and labour legislation and practice in Ukraine still need the reforms and continuation of the process of implementation.

The Judicial practice of implementation of the ESC in Ukraine

As the process of fulfilling the obligations under the Charter continues, it is the national courts that can be the driving force of its implementation in Ukraine. In recent years, Ukrainian judges have applied the Charter with increasing frequency in an increasing category of cases. The judges referred to the Charter in broad range of pension issues, awarding and paying social benefits, allowance, in a labour cases etc. A particularly marked increase could be found in the practice of the Administrative Cassation Court of the Supreme Court. Thus, the Supreme Court mentioned the Charter in the following judgments:

- Judgment of the Supreme Court on August 6, 2019 (case №433 / 172/16-a) to declare unlawful omission of the defendant regarding non-payment of pension to a person because of anti-terrorist operation and due to the age and poor health cannot travel outside of Lugansk.
- Judgment of the Supreme Court on 30 January, 2020 (case №489 / 5194/16-a) on the recalculation and renewal of pension payments.
- Judgment of the Supreme Court of March 31, 2020 (case №826 / 14837/16) on the appointment and payment of pensions to persons residing abroad.

In all these decisions the Court apply to the paragraph 23 of Part I and stated that:

…The European Social Charter (revised), 03 May 1996, ratified by Ukraine…, stipulates that every elderly person has the right to social protection (paragraph 23 of Part I)... By ratifying the Charter, Ukraine has undertaken an international commitment to implement by all appropriate means the achievement of conditions under which the rights and principles enshrined in Part I of the Charter can be effectively exercised. Therefore, a person's right to receive a pension as an integral part of the right to social protection is his/her constitutional right, which is guaranteed by international obligations of Ukraine.

Another example of reference to the Charter that could be provided is the judgment of the Supreme Court in case 752/18396/16-a (March 25, 2020) on the appointment of a pension. The Court underlined:

… Subparagraphs 4, 23 of the Part One of the European Social Charter…, ratified by the Law of Ukraine "On Ratification of the European Social Charter (revised)" stipulates that all employees are entitled to fair remuneration that will ensure sufficient living standards for themselves and their families and every elderly person has the right to social protection.

The special attention must be paid to the provision that was applied by different judges. Principle 23 reflects the article 23 The right of elderly persons to social protection, that was ratified by Ukraine and could be implemented as a source of law, principle 4, on the contrary, reflects the non-accepted part of the article 4 which enshrined the right to a fair remuneration.

1144. Cabinet of Ministers of Ukraine, On approval of the action plan to ensure the implementation of the provisions of the European Social Charter (revised) for 2015-2019, Order of the Cabiner of Ministers of Ukraine, № 450-p, 14 May, 2015.

In some cases, judges applied to the non-ratified articles of the Charter. For example, the judgment of city district court of Bolehiv, case № 2a-516/2010, 7 Dec.2010, was proclaimed:

…guided by the provisions of Art. 12 of the European Social Charter (revised) 1996…[1145]

Dobropil City District Court in its judgment, adopted on 7 May, 2008 on reduction of social benefits prescribed by national law mentioned the Charter in general and referred to article 12:

…The principles of the welfare state are also embodied in international acts ratified by Ukraine: the International Covenant on Economic, Social and Cultural Rights 1966, the European Social Charter (revised) 1996, the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and the European Court of Human Rights. In particular, according to Article 12 of the European Social Charter (revised), the state is obliged to maintain a system of the social security, its satisfactory level, to make efforts to raise progressively to a higher level, etc.[1146]

Moreover, there were examples when the Highest Courts clearly specified that the exact provision of the Charter could not be applied due to its non ratification by Ukraine. So, the Supreme Administrative Court of Ukraine in its judgment in case № 2a-7265/09/1570 took 3.08.2010 stated:

…With regard to the cassator's references in support of his position on the provisions of Article 12 of the European Social Charter (revised), adopted on 3 May 1996 and ratified by the Law of Ukraine on 14 September 2006 № 137-V, the panel of judges notes that the European Social Charter has been ratified, but Article 12 has not been included in the list of ratified clauses and articles of the Charter, in connection with this, Ukraine has no international obligations under this article and this article is not applicable in this case…[1147]

Nowadays, statistical data of the Unified state register of court decisions shows that more than 1 000 judgments of different national courts contain the reference to the ESC. However, there is not much diversity in the court practice.

Due to the manner of reference to the Charter the vast majority of the judgments could be divided into five main groups:

- 1) the ECJ is mentioned among other international human rights documents, such as UDHR, ICESCR etc.,
- 2) judges refer to specific items and articles that Ukraine has not ratified (mostly in 2008-2010),
- 3) judges apply to the specific paragraphs of Part 1 of the ECJ, which contains the principles, even in cases when appropriate paragraph of the article has been ratified,
- 4) judges refer to specific article of the ESC as to additional legal source.

No reference to the ECSR's practice, interpretations of the Charter was found.

The law enforcement of ESC provisions within the attorney's community is rather low. This can be proved, in particular, on the basis of a survey conducted in mid-2020 by the staff of the free legal

1145. District court of Bolehiv, judg., case № 2a-516/2010, 7 Dec.2010. URL: https://reyestr.court.gov.ua/Review/13383280
1146. Case 2-1079/2008
1147. The Supreme Administrative Court of Ukraine, judg., case №2a-7265/09/1570, 3.08.2010, URL: https://reyestr.court.gov.ua/Review/10584688

aid network running within the project of the Council of Europe "Promoting social human rights as a key factor of sustainable democracy in Ukraine".[1148]

The attorneys showed below the average level of knowledge of the ESC provisions. In particular, only 39% of respondents considered themselves aware of the provisions of the ESC, and 26% rated their level of awareness of the ESC as 3, 4 or 5 points out of 5 maximum. In the course of determining the prevalence and application of ESC provisions it was found that only 17% of the respondents apply the ESC provisions in their professional activities. The level of awareness of the activities of the ECSR can be described as low. Only 17% of respondents stated they knew about ECSR activities.[1149]

Main problems of the implementation of the European Social Charter by Ukraine

Ukraine's failure to fulfill its commitments under the European Social Charter depends on many factors. The lack of understanding of the Charter's basic requirements among a wide range of legal professionals in Ukraine is one of main factors. The total absence of Ukrainian translations of recommendations to any state parties, as well as general recommendations for any cycle, decisions of the Committee have to be also taken into account.[1150]

Despite the declaration of the vast majority of the Charter's rights by the Constitution of Ukraine, the functioning of the national social legislation remains unsatisfactory in Ukraine, as well as honoring the commitments and obligations were taken under the revised European Social Charter. This is confirmed by the European Committee of Social Rights conclusions, which have been repeated for almost 15 years for many provisions. The ECSR has stated the lack of appropriate positive developments and a lack of comprehensive understanding of necessary changes in national legislation and practice to implement ESC standards.[1151]

In the meantime, ESC (r), being the source of law concerning economic and social rights, is the basis for its implementation in the domestic legislation of Ukraine and legal practice while ESC (r) reflects and consolidates European practice and experience in the field of economic and social rights; it belongs to the system of international legal agreements in the field of economic and social rights; it is an integral part of national law as an international treaty; it includes norms that contain fundamental economic and social guarantees; it is the international legal basis for the development of domestic legislation on economic and social rights; it acts of domestic law concerning economic and social rights must comply with ESC (r); it subjects to supervision and control.

The lack of significant progress in the implementation of Committee's recommendations in Ukraine is associated with many factors, among which the following: total lack of Ukrainian translation of the decisions, recommendations of the Committee, the lack of information and understanding of the Committee's interpretation of the Charter's rights by legal professionals, the lack of an integrated complex understanding of the necessary changes in national legislation and practice for the adequate implementation of the Charter standards.

1148. The survey on awareness of target groups about the European Social Charter. URL: https://www.coe.int/en/web/kyiv/-/the-survey-on-awareness-of-target-groups-with-the-european-social-charter
1149. The results of a survey of certain categories of people on awareness of the provisions of the European Social Charter. URL: http://pravokator.club/news/prezentovano-rezultaty-opytuvannya-okremyh-kategorij-osib-shhodo-obiznanosti-pro-polozhennya-yevropejskoyi-sotsialnoyi-hartiyi/
1150. A. Fedorova, O. Lysenko The European Social Charter standards of right to housing: Ukraine's compliance with commitments// Actual problems of international relations. Release 143. 2020. – P.34-44.
1151. Ibid, P.43-44.

The European Social Charter, adopted in 1961 and revised in 1996, is the counterpart of the European Convention on Human Rights in the field of economic and social rights. It guarantees a broad range of human rights related to employment, housing, health, education, social protection and welfare.

No other legal instrument at pan-European level provides such an extensive and complete protection of social rights as that provided by the Charter.

The Charter is therefore seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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