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1961 EUROPEAN SOCIAL CHARTER

Comments by the German Trade Union Confederation
(Deutscher Gewerkschaftsbund – DGB)
on the 34th National Report on the implementation of the European Social Charter

Articles 2, 4, 5 and 6
for the period 01/01/2017 – 31/12/2020

submitted by

THE GOVERNMENT OF GERMANY

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observations

Observations by the German Trade Union Confederation
(Deutscher Gewerkschaftsbund – DGB)
in relation to the

39th Report of the Government of the Federal Republic of Germany for the period 1 January 2017 - 31 December 2020 Labour Rights

30.06.2022

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Overview

General Observations 2
Ratification issues 2
Reporting obligations 3
Further general obligations 4
Dissemination 4
Specific Observations 5
Needs for improved measure concerning COVID-19 5
Article 2 6
Para. 1 6
Para. 2 16
Para. 4 18
Article 4 19
Para. 1 19
Para. 2 24
Para. 3 25
Para. 5 29
Article 5 30
Article 6 32
Para. 2 32
Para. 4 35

The German Trade Union Confederation (Deutscher Gewerkschaftsbund – DGB affiliated to the E-TUC) and its affiliated unions welcome the opportunity to submit its Observations in relation to the 39th Report of the Government of Germany on the implementation of the accepted obligations under the Group named 'Labour Rights' (i.e. Articles 2, 4, 5 and 6 of the European Social Charter (1961, ESC)[1].

Before going into any details on the specific provisions it appears important to provide the European Committee of Social Rights (ECSR) with General Observations concerning the framework within which the ESC, the supervisory machinery and the specific provisions in question operate.

1 General Observations

The following Observations do not deal with the important social achievements in Germany, in particular compared to several other Member States of the Council of Europe. They concentrate on problems in relation to the full implementation of the requirements imposed by the provisions of the ESC which Germany has accepted.

Moreover, in conformity with the Government's report they focus on the period from 1 January 2017 to 31 December 2020. Therefore, important improvements in relation to labour rights[2] planned or already implemented according to the Coalition Agreement for the new Government (24.11.2021)[3] will not form the center of the following Observations.

1.1 Ratification issues

At the ESC's origins, Germany played an important role when ratifying the original as one of the five first States thus allowing the entering into force of the original ESC (1961). Against this background, the DGB welcomes in general the ratification of the RESC (1996) which took place in 2021[4] and for which it had called ever since this latter instrument had been adopted.

However, in the process of ratification the DGB has strongly advised to also

- accept <u>all</u> RESC provisions, in particular those containing collective rights,
- refrain from 'interpretative declarations' and
- ratify additionally
  - the Turin Amending Protocol (1991) and in particular
  - the Collective Complaints Procedure Protocol (CCPP, 1995).[5]

[1] All following references to 'Articles' without further specification refer to the ESC in its original version of 1961.

[2] From a trade union perspective however, these measures are still not sufficient in all areas: Ein Koalitionsvertrag mit Stärken und Schwächen | DGB.

[3] Mehr Fortschritt wagen – Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit. Koalitionsvertrag 2021–2025 zwischen SPD, BÜNDNIS 90/DIE GRÜNEN und FDP (in German), see a short compilation in: Labour law content in the coalition agreement - Overview of the plans of the new federal government, https://www2.deloitte.com/dl/en/pages/legal/articles/koalitionsvertrag-arbeitsrecht.html (in English).

[4] Germany ratifies Revised European Social Charter (9.3.2021), https://www.bmas.de/EN/Services/Press/recent-publications/2021/germany-ratifies-revised-european-social-charter.html.

[5] See for more details: Stellungnahme - Deutscher Gewerkschaftsbund (13.3.2020, in German).

This latter demand is all the more necessary because it offers the possibility for a more detailed, timely and quasi-judicial analysis of situations in respect of ESC obligations (beyond the reporting cycles of four years). By ratifying the CCPP Germany could set an important example to take social rights seriously.

Despite these demands the Government preferred to reject any suggestions going in this direction. Accordingly, they were not taken into account. That is why the DGB reiterates its strong appeal to the Federal Government to provide workers in Germany with all available and necessary international protection which the Council of Europe provides in relation to the system of the ESC.

1.2 Reporting obligations

In order to be effective rights must be coupled with procedures ensuring their proper implementation in law and practice. In the reduced framework of the ESC this is aimed by the CCPP and the reporting procedure. As long as Germany denies to ratify the CCPP the effectiveness depends only on the reporting procedure.

The DGB is aware of the fact that the whole procedure is currently examined by the GT-CHARTE in relation to its efficiency and the possible solutions. It strongly supports the demand of the ETUC as privileged partner (Article 27(2) ESC) to be fully associated in this process.

At a more technical but nevertheless important level, the DGB well understands the problem of workload in respect of the ECSR but also – and in particular – of the Secretariat which continues to be under-staffed already for a long period.

Against this background, the **ESCR** has reacted in several ways to reduce the workload. In line with its 'targeted and strategic approach' (adopted in 2019 and continued in 2020) and for the purpose of the Governments' reports it has not asked that national reports address all accepted provisions in the Group. However, certain provisions could not be excluded from reporting:

- when connected to other provisions which are the subject of specific questions
- when the previous conclusion was one of non-conformity
- When the previous conclusion was one of deferral due to lack of information
- When the previous conclusion was one of conformity pending receipt of specific information.

For the purpose the German Government's report this meant that it had to report specifically in the cases of

- Non-conformity: Articles 2§2, 4§1, 4§3 and 6§4,
- Deferrals: Articles 2§5 and 4§5,
- Conformity pending receipt of specific information: Article 4§3; as well as

However, the **Committee of Ministers (CM)** in its decisions of 19 March and of 2/3 April 2014 required additional information in case of changes which occurred during the reference period:

> Is 2. National reports should focus on ECSR Conclusions of non-conformity from the previous cycle as well as on questions raised. In any case, additional information should be provided on changes occurred since the last report.[6]

[6] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c6489

More generally, the **ESC** in its Article 21 requires reports in the following terms:

> The Contracting Parties shall send to the Secretary General of the Council of Europe a report at two yearly intervals, in a form to be determined by the Committee of Ministers, concerning the application of such provisions of Part II of the Charter as they have accepted.

This means that the current reporting system is not in line with the legal requirements of Article 21 ESC because the current four-years interval is contrary to the requested two-yearly interval for the periodicity of reports on 'such provisions of Part II of the Charter as they have accepted' i.e. all accepted provisions (and the competences of the CM are only related to the form not to the periodicity).

A reference to the 'Turin' Amending Protocol (1991) which allows the CM to define the reporting obligations more generally appears to be excluded because this Protocol has not yet legally entered into force (also because of the German Government's refusal to ratify it). Moreover, it appears also excluded to refer to the CM's decision allowing the application of the Turin Protocol if its wording is respected. However, the words 'at ***two*** yearly intervals' cannot be interpreted as allowing '***four*** yearly intervals'. (Emphases added).

Accordingly, full reports on all accepted provisions should be provided at two-yearly intervals. Nevertheless, based on CM's 2014 decisions the Government's report should at least contain information on all accepted provisions in Group 3 if there are any changes during the reference period (2017 - 2020).

1.3 Further general obligations

In line with the experience of other international Human rights bodies, the ECSR should consider clarifications in relation to further general obligations.

1.3.1 Dissemination

1.3.2 Assessments by other international supervisory bodies

1.3.3 UN

Human Rights Committee (CCPR) – Concluding Observations

52. **The State party should widely disseminate[7] the Covenant, its seventh periodic report and the present concluding observations with a view to raising the awareness of the rights enshrined in the Covenant among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the country, and the general public. The State party should ensure that the report and the present concluding observations are translated into the official language of the State party.[8]**

Committee on Economic, Social and Cultural Rights (CESCR) – Concluding Observations

65. **The Committee requests that the State party disseminate the present concluding observations widely at all levels of society, including at the national, provincial and municipal levels, in particular among parliamentarians, public officials and judicial authorities, and that it inform the Committee in its next**

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[7] All emphases in quotations which are highlighted in grey are added.

[8] CCPR, Concluding observations on the seventh periodic report of Germany (30.11.2021), https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=CCPR/C/DEU/CO/7&Lang=E. (hereinafter: CCPR, Concluding observations (2021))

> **periodic report about the steps taken to implement them. The Committee encourages the State party to engage with the German Institute for Human Rights, non-governmental organizations and other members of civil society in the follow-up to the present concluding observations and in the process of consultation at the national level prior to the submission of its next periodic report.**[9]

1.3.4 Observations

Generally speaking, the ESC and the ECSR's case law is known by the interested public to only a small extent. That is why the ECSR might wish to consider that there should be a general obligation to disseminate widely the ESC (with all accepted) provisions as well as the Committee's case law in general and concerning Germany in particular especially by offering translations into German. This would be particularly important in relation to the judiciary (especially Labour Courts), labour administration and labour inspection. Such an obligation could contribute to make everyone and in particular those dealing with the implementation of the ESC aware of the obligations deriving from this instrument and their responsibilities to conform their practices accordingly.

2 Specific Observations

Against the background of the reporting obligations (as described above) the DGB will now provide its information about the specific provisions having been accepted by Germany under the 'Labour rights' (Group 3). Besides the new elements from the RESC (like Articles 21, 22, 28 and 29), they should at least cover the whole set of the first six provisions. However, it has been decided to deal only with Article 2, 4 – 6 ESC. Accordingly, the DGB will limit its Observations to those provisions. [10]

2.1 Needs for improved measure concerning COVID-19

The ECSR puts specific emphasis on measures taken by Governments in relation to COVID-19. Concerning the numerous laws and regulations introduced to mitigate the consequences of the pandemic the DGB has pointed to specific defaults

> However, the protection mechanisms have largely failed in employment relationships that are only temporary or organised through placement agencies from other European countries or third countries. For the future, the DGB and its affiliates demand that occupational safety and health be strengthened in the long term. This requires additional human resources in the supervision of the Länder and the statutory accident insurance institutions.[11]

Also, in research publications several problems are mentioned:

> In the course of the pandemic, the psychological strain on workers also increased. New forms of work, blurring boundaries between working hours and private time, coping with

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[9] CESCR, Concluding observations on the sixth periodic report of Germany (27.11.2018) https://undocs.org/E/C.12/DEU/CO/6C (hereinafter: CESCR, Concluding observations (2018))

[10] With the exclusion of Article 4§4 which has not been accepted by Germany.

[11] Antrag B001: Arbeit der Zukunft gestalten – Sozialstaat stärken, lines 159-164: https://bundeskongress.dgb.de/antraege/++co++e0f4f6ca-d077-11ec-a4d7-001a4a160123

home office and homeschooling, fear of infection, etc. created psychological pressure for many people.[12]

2.2 Article 2

2.2.1 Para. 1

2.2.2 Assessments by other international supervisory bodies

2.2.3 UN: CESCR - Concluding Observations (2018)[13]

Occupational safety and health

66. The Committee is concerned at the insufficient number of labour inspections conducted in the agricultural sector as well as in small workplaces, and at the high number of fatal occupational accidents in the sector. (art.7)

67. **The Committee recommends that the State party intensify its efforts to prevent occupational accidents and diseases, in particular by strengthening labour inspection in the agricultural sector as well as in small workplaces.**

Domestic workers

42. While noting that approximately 163,000 caregivers, primarily women migrant workers, are employed in private households in Germany, the Committee is concerned that they are required to work excessive hours without regular rest, and are vulnerable to exploitation; that labour inspections are insufficient; and that these workers have access to limited and fragmented complaint mechanisms. (art.7)

43. The **Committee recommends that the State party ensure that domestic workers, mainly employed as caregivers, enjoy the same conditions as other workers as regards remuneration, protection against unfair dismissal, rest and leisure and limitation of working hours and to protect them from exploitation and abuse. It further recommends that the State party improve the complaint mechanisms so as to make them easily accessible to these workers and ensure effective inspection mechanisms to monitor their conditions of work. The Committee draws the attention of the State party to its general comment No. 23 (2016) on the right of everyone to the enjoyment of just and favourable conditions of work, para. 47(f).**

2.2.4 ILO: Committee of Experts on the Application of Convention and Recommendations (CEACR) Direct request (2022)[14]

The CEACR has recently dealt with the situation on labour inspection in particular in relation to migrant workers and workers in agriculture, stating i.a. the following:

> ***… While noting that the primary responsibility for the enforcement of the Residents Act and the Act to Combat Undeclared Work and Unlawful Employment lies with other Government agencies, the Committee requests the Government to continue to provide information on the notifications made by labour inspectors to immigration and/or prosecution authorities in application of section***

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[12] Sicherheit und Gesundheit bei der Arbeit - Berichtsjahr 2020. Unfallverhütungsbericht Arbeit , p. 26. (Own translation); see also Nils Backhaus, 3.8 Arbeitszeit und Arbeitsort in der SARS-CoV-2-Pandemie, ibid, p. 67 – 71.

[13] CESCR, Concluding observations (2018), see footnote 9.

[14] Direct Request (CEACR) - adopted 2021, published 110th ILC session (2022) Germany, *Labour Inspection Convention, 1947 (No. 81) (Ratification: 1955) Labour Inspection (Agriculture) Convention, 1969 (No. 129) (Ratification: 1973)*.

23(3) of the ArbSchG. The Committee also requests the Government to provide further information on the actions undertaken by labour inspectors in those cases where, in the discharge of their duties, they encounter violations of the legal provisions related to conditions of work and protection of wages for migrant workers. In this regard, the Committee requests the Government to collect and provide information on the outcome of judicial proceedings resulting from investigations initiated following actions taken by labour inspectors. …

The Committee requests the Government to provide information on the progress made by the Länder working group in order to improve the reporting of labour inspection activities in the agricultural sector, in particular concerning the requirements of Articles 27(d) and (e) of Convention No. 129 on statistics of inspection visits conducted and of violations and penalties imposed in agriculture. …

Noting that agriculture is not listed among the sectors included in section 28a (4) of the SGB IV, the Committee requests the Government to clarify how the authorities in charge of inspecting provisions on minimum wage can benefit from a system of registration of workers in agriculture in order to ensure an effective labour inspection strategy which includes the protection of particularly vulnerable workers. The Committee also requests the Government to indicate the measures taken in order to ensure that inspection authorities in the Länder have access to the data concerning the agricultural undertakings that have accident insurance coverage within the SVLFG's agricultural accident insurance scheme. In this respect, it also requests the Government to indicate whether the GDA contains a specific component on cooperation concerning inspection in the agricultural sector. …

In this regard, the Committee requests the Government to provide the statistics concerning agricultural workers that are not subject to mandatory social insurance. It also requests the Government to provide information on the measures undertaken and planned in order to make sure that the number of labour inspectors in agriculture is sufficient to secure the effective discharge of their duties and to ensure that agricultural undertakings are inspected as often and as thoroughly as is necessary to ensure the effective application of the relevant legal provisions. The Committee also requests the Government to provide information on the manner in which inspectors are associated with any inquiry on the spot into the causes of accidents with fatal consequences in accordance with Article 19(2) of the Convention.

2.2.5 ECSR's questions and Observations

2.2.6 On question a)

Question

a) Please provide updated information on the legal framework to ensure reasonable working hours (weekly, daily, rest periods, …) and exceptions (including legal basis and justification). Please provide detailed information on enforcement measures and monitoring arrangements, in particular as regards the activities of labour inspectorates (statistics on inspections and their prevalence by sector of economic activity, sanctions imposed, etc.).

Observations

Legislation

Besides one exception,[15] the report does not deal with monitoring arrangements (here, in legal terms). However, in order to reply fully to the ECSR's questions i.a. on the monitoring arrangement it would have been appropriate to provide more general information. In this respect, the Working Time Act (Arbeitszeitgesetz (ArbZG))[16] provides the following:

Under the heading '**Rules on penalties and fines**' Section 22 contains the Rules on Fines (§ 22 Bußgeldvorschriften) whereas Section 23 regulates the Penal provisions (§ 23 Strafvorschriften).

Moreover, Section 24 on the '**Implementation of intergovernmental agreements** …' offers the possibility to issue regulations in order to (better) comply with international instruments in this respect.[17] However, the Government has made no use of this opportunity for the purpose of better implementation of the ESC in general and Article 2§1 in particular.

Enforcement (in general)

The enforcement is of specific importance for the effectiveness of substantive legislation. The ECSR asks for several aspects which the Government does address.

Labour inspection

Concerning labour inspection, it could in general be considered as the core of enforcement in labour law.

First of all, it should be noticed that the Government did not provide its 38th report in time on Article 3§2 ESC dealing with labour inspection more in general so that it could not (yet)[18] be considered by the ECSR.[19] In its previous Conclusions,[20] the ECSR had had to defer its assessment 'Pending receipt of the information requested, the Committee defers its conclusion':

> The report indicates that, as the statistics only record the size categories of the companies in question, it is not possible to state the exact number of employees covered by inspections.

[15] See the reference to: Gesetz zur Verbesserung des Vollzugs im Arbeitsschutz, the so-called Arbeitsschutzkontrollgesetz, ArbSchKontrG, Federal Law Gazette I 2020, 3334.
[16] https://www.gesetze-im-internet.de/arbzg/ (in German only).
[17] Arbeitszeitgesetz (ArbZG) - § 24 Umsetzung von zwischenstaatlichen Vereinbarungen und Rechtsakten der EG - Die Bundesregierung kann mit Zustimmung des Bundesrates zur Erfüllung von Verpflichtungen aus zwischenstaatlichen Vereinbarungen oder zur Umsetzung von Rechtsakten des Rates oder der Kommission der Europäischen Gemeinschaften, die Sachbereiche dieses Gesetzes betreffen, Rechtsverordnungen nach diesem Gesetz erlassen. (Own translation: Working Hours Act (ArbZG) - Section 24 - Implementation of intergovernmental agreements and EC legal acts - The Federal Government may, with the consent of the Bundesrat, issue regulations under this Act to fulfil obligations arising from intergovernmental agreements or to implement acts of the Council or the Commission of the European Communities which relate to matters covered by this Act.)
[18] At least it would appear that it is not (yet) published on the ECSR website.
[19] Germany (and Iceland) also submitted reports, however they arrived too late to be examined by the Committee 14.3.2022 PRESS BRIEFING ELEMENTS, Conclusions 2021, (footnote 2) https://rm.coe.int/conclusions-2021-press-briefing-final-en/1680a5eed6.
[20] ECSR, 8.12.2017, Conclusions XXI-2: Article 3§2; (01/01/2012 - 31/12/2015).

> The Committee observes that the number of inspection visits is continuing to decrease, in line with the previous trend. It asks that the next report provide data on the measures taken by Labour Inspectorate inspectors (reports ordering remedial measures, fines for minor, serious and very serious breaches, suspension of activity, referral to prosecution service for criminal proceedings).
>
> The Committee notes that under Article 3§2 of the 1961 Charter, States Parties must implement measures to focus labour inspection on small and medium-sized enterprises (Statement of Interpretation on Article 3§2, Conclusions XX-2 (2013)). Since it cannot find an answer to its question (Conclusions XX-2 (2013)) in the report with regard to this point, the Committee requests that the next report contain this information. The Committee underlines that if the requested information is not provided in the next report, there will be nothing to establish that the situation in Germany is in conformity with Article 3§2 of the 1961 Charter.
>
> Conclusion
>
> Pending receipt of the information requested, the Committee defers its conclusion.

Moreover, the lack of effective enforcement via labour inspection (and respective information) has been recently criticised particularly in relation to specifically **vulnerable groups** like *workers in SMEs* and *domestic workers* (CEACR) *migrant workers* and *workers in agriculture* (CEACR).

These problems can be confirmed by academic research publicly available, for example concerning *workers in the neat industry* and the *online mail order business*.[21]

> At the same time, however, the working environment, the activities to be performed and the organisation of work lead to sometimes serious health hazards and promote social isolation. The combination of exhausting work and sometimes extremely long and/or unfavourable working hours (continuous night shifts) makes participation in social life virtually impossible.

Against this background, it is particularly deplorable that the Government's information is very short. In relation to question b) it states i.a.:

> Responsibility for the implementation, supervision and monitoring of the working hours standards lies with the supervisory authorities of the Länder.
>
> Of the data available for the reporting period, it can be said that the number of supervisory staff in the occupational health and safety authorities of the Länder (in terms of numbers of full-time position equivalents) has remained steady at a high level (annual average of supervisory staff: 2,943). …

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[21] *Felix Bluhm, Peter Birke, Thomas Stieber*, Hinter den Kulissen des Erfolgs. Eine qualitative Untersuchung zu Ausbildung und Erwerbsarbeit von Geflüchteten (2017 bis 2021), https://sofi.uni-goettingen.de/fileadmin/Working_paper/SOFI_WP_Bluhm_Birke_Stieber_Hinter_den_Kulissen_des_Erfolgs.pdf , p. 55 (Own translation): Zugleich führen das Arbeitsumfeld, die zu verrichtenden Tätigkeiten sowie die zeitliche Organisation der Arbeit jedoch zu teilweise schwerwiegenden gesundheitlichen Gefährdungen und befördern soziale Isolation. Das Zusammenspiel aus erschöpfender Tätigkeit sowie teilweise extrem ausgedehnten und / oder un-günstigen Arbeitszeiten (Dauernachtschicht) macht die Teilnahme am gesellschaftlichen Leben faktisch unmöglich.

Concerning the number of **labour inspectors**, the report does not specify the resource on which it relied for the 'data available'. Moreover, the numerical information about the 'annual average of supervisory staff: 2,943' appears at least questionable. Looking at the statistical information concerning safety and health at the workplace[22] coming from the 'Länder' and compiled by the competent Federal Agency the official number is only about the half (1,490).[23] Taking into account, additionally, the specific challenges related to the COVID-19 pandemic it is obvious that already the very basis for enforcement is substantially insufficient.[24]

Furthermore, the report lacks any information about 'the statistics on inspections and their prevalence by sector of economic activity, sanctions imposed, etc.'. However, there is official information about **inspection activities** (at least in general terms). First, concerning inspected establishments, it shows a sharp decrease during the last three years (2020: 51,962; 2019: 61,864; 2018: 68,638). Second, this negative trend corresponds with the decreasing number of inspection visits (2020: 127,683; 2019: 151,096; 2018: 167,270).[25] Even assuming that the decrease in 2020 might be at least to a certain extent related to the pandemic, the figures for 2018 and 2019 clearly illustrate the negative trend.

Additionally, information about **enforcement measures** (i.e. sanctions) imposed is also available. According to the official numbers the following measures for enforcement haven been taken by the labour inspection:[26]

Durchsetzungsmaßnahmen der Gewerbeaufsicht[1)]
in den Jahren 2018 bis 2020

[1)] Auf den Gebieten „Unfallverhütung und Gesundheitsschutz“ sowie „Arbeitsschutz in der Seeschifffahrt“]

[22] Überwachungs- und Beratungstätigkeit der Arbeitsschutzbehörden der Länder, LASI-Veröffentlichung (LV) 1 - Überwachungs- und Beratungstätigkeit der Arbeitsschutzbehörden der Länder - Grundsätze und Standards -Länderausschuss für Arbeitsschutz und Sicherheitstechnik (LASI) - Ausgabe Dezember 2016, Ziff. 2.4.4, Gruppe A (Group A: Occupational health and safety tasks include all tasks of the state authorities responsible for occupational health and safety that ensure the proper implementation of the legisation arising from the Occupational Health and Safety Act, the Working Hours Act, the Driving Personnel Act, the Maternity and Youth Occupational Health and Safety Act and the legal ordinances based on them.)
[23] Sicherheit und Gesundheit bei der Arbeit - Berichtsjahr 2020. Unfallverhütungsbericht Arbeit , p. 161. If the number were to include inspectors in Group B (Tasks that are partly related to occupational health and safety and in this respect also contribute to occupational health and safety (OSH)), this would not appear appropriate because they only partly deal with OSH and it is completely unclear to which extent/percentage bearing in mind that this group includes legislation like: Explosives Act and its regulations; Product Safety Act and its regulations (e.g: Machinery Regulation, Explosion Protection Ordinance Regulation); Atomic Energy Act and its regulations:
X-ray Regulation, Radiation Protection Regulation; Hazardous Goods Transport Act, Chemicals Act (CLP, REACH) and its regulations, e.g.: Hazardous Substances Regulation (Section 2), Chemicals Prohibition Regulation, Medical Devices Act and its regulations …
[24] For more details on working time, see below under question b).
[25] Sicherheit und Gesundheit bei der Arbeit - Berichtsjahr 2020. Unfallverhütungsbericht Arbeit , p. 159.
[26] Sicherheit und Gesundheit bei der Arbeit - Berichtsjahr 2020. Unfallverhütungsbericht Arbeit , p. 163.

- Orders: 2020: 9,219; 2019: 10.903; 2018: 9.564
- Warnings: 2020: 640; 2019 602: 2018: 913
- Fines: 2020: 2,045; 2019: 2,062; 2018: 2,052
- Criminal charges: 2020: 217; 2019; 226; 2018: 185

Further elements of enforcement

Obviously, enforcement in labour law matters in general and OSH/working issues in particular is not limited to 'labour inspection'.

Generally speaking, Germany's approach to enforcement can be characterised as being in principle 'individual': It is a general feature that the German system very much relies on the labour court system allowing (individual) workers to address the courts if they want to remedy a situation not in line with the prevailing legislation. However, this system lacks effectiveness mainly because of the (fear of) victimisation: workers are reluctant to address courts during their employment relationship due to the fear of reprisals, mainly (but not at all limited to) dismissals. This can be illustrated by the fact that in the private sector financial claims are introduced by workers often only in the case of the termination of the employment by a dismissal. Only in the public service where 'victimisation' is less feared financial claims are filed with courts also *during* the existing employment relationship.

Accordingly, the following problematic elements[27] should be taken account of in assessing (non-)conformity with Article 2§1 ESC:

- **Insufficient protection against victimization**: In general, the legal protection against victimization[28] does not work in practice: In particular, the jurisprudence defines that the burden of proof lies with the worker.[29] Any doubt in respect full and effective protection will prevent the worker from complaining before the Court because in the dependent situation of a worker the risk of retaliation is much too high. In this respect it is illustrative to look at the 'Whistleblowing Directive'[30] in respect of
  - the reversal of the burden of proof (Article 21(5))

    In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she

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[27] For the elements more specifically related to working time, see under question b) below.

[28] Bürgerliches Gesetzbuch (BGB) - § 612a Maßregelungsverbot - Der Arbeitgeber darf einen Arbeitnehmer bei einer Vereinbarung oder einer Maßnahme nicht benachteiligen, weil der Arbeitnehmer in zulässiger Weise seine Rechte ausübt. (‚Section 612a - Prohibition of victimization - The employer may not discriminate against an employee in an agreement or a measure because that employee exercises his rights in a permissible way.' https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2565)

[29] Latest example of the jurisprudence of the Federal Labour Court (BAG) 18.11.2021, 2 AZR 229/2, ECLI:DE:BAG:2021:181121.U.2AZR229.21.0, para. 29: 'Der klagende Arbeitnehmer trägt dabei die Darlegungs- und Beweislast für die Voraussetzungen des § 612a BGB und damit auch für den Kausalzusammenhang zwischen benachteiligender Maßnahme und zulässiger Rechtsausübung.' Own translation: 'The plaintiff employee bears the burden of presentation and proof for the requirements of section 612a of the German Civil Code (Bürgerliches Gesetzbuch - BGB) and thus also for the causal connection between the disadvantageous measure and the permissible exercise of the right.')

[30] Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (23.10.2019), L 305/17, Article 19, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937.

reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.

- the long list of retaliation measures which are explicitly prohibited (Article 19) in cases

Moreover, a fundamental problem lies in the long-standing practice that most actions against unfair dismissals only lead to compensation (see below, on the problem of Maximum compensation) instead of a continuation of the employment/reinstatement. This is particularly severe in cases of victimisation, i.e. if workers claiming their rights are actually prevented from remaining in their previous employment.[31]

At least these elements should be observed also here.

- **Restrictive admissibility criteria**: The German civil procedural system is based on the settlement of (mainly financial) claims; it does not favour, however, access to court for the definition of (working) conditions; nevertheless, this would be particularly importnt in relation to working time: It should be easy to access to Labour Courts to clearly define the (working time) obligations.
- **No representative action by trade unions**: It would compensate the missing elements (at least to an important extent) if trade unions were given access to courts in order to ensure the effective enforcement of labour law provisions. However, this is recognised only to a very limited extent in anti-discrimination law. On the other hand, for organisations protecting consumer rights this recognised. In this context, it is relevant that the CJEU has recently acknowledged that representative action can be brought by a consumer protection association in the absence of a mandate and independently of the infringement of specific rights of a data subject.[32] Such an approach would offer an effective protection of workers concerned not having to unveil their identity. It does not appear justifiable to deny trade unions such procedural rights. The DGB and its affiliated unions have been demanding the implementation of the legal possibility of representative actions for unions for years in order to take effective action against structural and systematic violations of mandatory law.

Concluding on the general aspect, it would appear that there are important failures in relation to effective enforcement.

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[31] See for the necessity to reintegrate trade union members who have been victimized by a dismissal, see ECtHR 4.4.2017, No. 35009/05, TEK GIDA İŞ SENDİKASI v. Turkey, in particular para. 56.

[32] CJEU 28.4.2022, C-319/20, *Meta Platforms Ireland*, ECLI:EU:C:2022:322, '… (General Data Protection Regulation) must be interpreted as not precluding national legislation which allows a consumer protection association to bring legal proceedings, in the absence of a mandate conferred on it for that purpose and independently of the infringement of specific rights of the data subjects, against the person allegedly responsible for an infringement of the laws protecting personal data, on the basis of the infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions, where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation.')

2.2.7 On question b)

Question

> *b) The Committee would welcome specific information on proactive action taken by the authorities (whether national, regional, local and sectoral, including national human rights institutions and equality bodies, as well as labour inspectorate activity, and on the outcomes of cases brought before the courts) to ensure the respect of reasonable working hours; please provide information on findings (e.g. results of labour inspection activities or determination of complaints by domestic tribunals and courts) and remedial action taken in respect of specific sectors of activity, such as the health sector, the catering industry, the hospitality industry, agriculture, domestic and care work.*

Observations

The ECSR wishes to receive information about mainly two aspects (the replies will be in the reverse order):

Enforcement (specifically concerning working time)

Labour inspection

In the second part of its replies to question b) the Government provides numbers on enforcement measures in relation to working time. However, they **lack more precise information** concerning:

- the concrete source(s),
- the year concerned: 'annual average' numbers are not appropriate because they do not allow to see (possible) trends,
- the difference between the '10,332 complaints or violations' and the very low number of sanctions (631 warnings etc.)
- the specification of the number '631' in relation to 'warnings, fines and criminal charges': it can be assumed that the number of 'warnings' is the highest, whereas the number of 'criminal charges' is probably the lowest.

More generally, information about inspections and following enforcement measures in SMEs and in specific branches are missing also.

Further elements of enforcement

An important element of (judicial) enforcement is the **burden of proof** which usually lies with the complainant. However, in relation to working time an important development has taken place by the CJEU's judgment in the CCOO case stating that the relevant EU provisions 'must be interpreted as precluding a law of a Member State that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured'.[33] In general terms, the Court noted:

> 44. In that regard, it must be recalled that the worker must be regarded as the weaker party in the employment relationship and that it is therefore necessary to prevent the employer from being in a position to impose a restriction of his rights on him ...

[33] 14.5.2019, C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank*.

> 45 Similarly, it must be observed that, on account of that position of weakness, a worker may be dissuaded from explicitly claiming his rights vis-à-vis his employer where, in particular, doing so may expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to that worker …

More specifically on working time held:

> 47 In that regard, it must be observed, as the Advocate General notes in points 57 and 58 of his Opinion, that in the absence of such a system, it is not possible to determine objectively and reliably either the number of hours worked by the worker and when that work was done, or the number of hours worked beyond normal working hours, as overtime.
>
> 48 In those circumstances, it appears to be excessively difficult, if not impossible in practice, for workers to ensure compliance with the rights conferred on them by Article 31(2) of the Charter and by Directive 2003/88, with a view to actually benefiting from the limitation on weekly working time and minimum daily and weekly rest periods provided for by that directive.
>
> 49 The objective and reliable determination of the number of hours worked each day and each week is essential in order to establish, first, whether the maximum weekly working time defined in Article 6 of Directive 2003/88, including, in accordance with that provision, overtime, was complied with during the reference period set out in Article 16(b) or Article 19 of that directive and, second, whether the minimum daily and weekly rest periods, defined in Articles 3 and 5 of that directive respectively, were complied with in the course of each 24-hour period, as regards the daily rest period, or in the course of the reference period referred to in Article 16(a) of the same directive, as regards the weekly rest period.

However, the German legislator has not changed the relevant provision (Section 16(2) ArbZG),[34] thus leaving the workers concerned without the necessary protection.

Proactive approach
In this respect, the Government's report does not contain any specific information.

2.2.8 On question c)

Question

> *c) Please provide information on law and practice as regards on-call time and service (including as regards zero-hours contracts), and how are inactive on-call periods treated in terms of work and rest time as well as remuneration.*

Observations
Having clarified the links between the law of the Charter and the law of the European Union (EU) the Committee stated that the law of the EU 'may play a positive role in the implementation of

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[34] ‚(2) Der Arbeitgeber ist verpflichtet, die über die werktägliche Arbeitszeit des § 3 Satz 1 hinausgehende Arbeitszeit der Arbeitnehmer aufzuzeichnen und ein Verzeichnis der Arbeitnehmer zu führen, die in eine Verlängerung der Arbeitszeit gemäß § 7 Abs. 7 eingewilligt haben. ...' (Own translation: (2) The employer shall be obliged to record the working time of employees exceeding the working day working time of section 3, first sentence, and to keep a record of workers who have consented to an extension of working time in accordance with section 7, subsection 7. ...)

the Charter'.[35] In the context of on-call work, it should be noted that the CJEU formulated the obligation of the member states to ensure legislatively that employers may not introduce on-call times that are so long or so frequent that they pose a risk to the safety or health of workers. Germany has not yet complied with this legislative obligation. **On the contrary, Section 7 para. 2a ArbZG opens up the possibility of excessive opt-out combining all kinds of on-call time with regular working shifts (in practice 24 hours and more), which cannot be reconciled with the requirements formulated by the CJEU.**[36]

Moreover, there are further problems with on-call work:

> 'Differentiated analyses based on survey data show that both formal and informal variants of on-call work are associated with disproportionately high levels of short part-time work, low pay and consequently with considerable risks of poverty. As a consequence, the ongoing debate on the erosion of the status of employee should not be too narrowly restricted to self-employed workers in the gig economy (Deliveroo, Uber) but should be extended to include the 'grey zones' in the area of dependent employment.'[37]

2.2.9 On question d)

Question

> *d) Please provide information on the impact of the COVID-19 crisis on the right to just conditions of work and on general measures taken to mitigate adverse impact. As regards more specifically working time during the pandemic, please provide information on the enjoyment of the right to reasonable working time in the following sectors: health care and social work (nurses, doctors and other health workers, workers in residential care facilities and social workers, as well as support workers, such as laundry and cleaning staff); law enforcement, defence and other essential public services; education; transport (including long-haul, public transport and delivery services).*

Observations

The Working Time Act at has not been additionally amended. Nevertheless, especially at the beginning of the pandemic, several State authorities responsible for working time reacted to the Covid-19 crisis by issuing general decrees on the basis of Section 15 para. 2 ArbZG in the health sector as well as other essential public services. They provided for the extension of working hours and extended the possibility of working on Sundays and public holidays as well as the deadlines granting alternative rest days.[38]

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[35] See ECSR, Digest of the Case Law of the European Committee of Social Rights, December 2018, (hereinafter: Digest 2018), https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80, p.50.

[36] See Buschmann, HIS-Report 4/2021, p. 16-7 (commenting on several CJEU judgments), https://www.hugo-sinzheimer-institut.de/fpdf/HBS-008233/p_hsi_report_4_2021.pdf. With regard to opt-out, see Conclusions 2016 – Malta – Article 2§1 (2016/def/MLT/2/1/EN).

[37] *Karen Jaehrling, Thorsten Kalina*, 'Grey zones' within dependent employment: formal and informal forms of on-call work in Germany, First Published July 24, 2020 (Abstract) https://doi.org/10.1177/1024258920937960.

[38] For Example: Hamburg, Schleswig-Holstein, Mecklenburg-Vorpommern, Niedersachsen, Thüringen, Stuttgart, Unterfranken, Mittelfranken, Oberfranken, Niederbayern, Oberbayern, Oberpfalz, Schwaben.

2.2.10 On question e)

Question

e) The Committee would welcome additional general information on measures put in place in response to the COVID-19 pandemic intended to facilitate the enjoyment of the right to reasonable working time (e.g. flexible working hours, teleworking, other measures for working parents when schools and nurseries are closed, etc.). Please include information on the legal instruments used to establish them and the duration of such measures.

Observations

Two examples of the impact of work in home office analysed by the of the DGB's Good Work Index Report 2020 might illustrate the specific problems encountered in relation to working.

The first example addresses the need for constant availability: While only 15 per cent of workers with a fixed workplace also have to be reachable outside normal working hours, the proportion is consistently higher for workers with mobile forms of work - for example, almost 40 per cent for workers in a home office and even more than 50 per cent for workers who work in public places.

The second example relates to excessive working hours: While just 6 per cent of workers with a fixed workplace have working hours of more than 48 hours, up to 20 per cent of workers in mobile work do.[39]

2.2.11 On question f)

Question

f) If the previous conclusion was one of non-conformity, please explain whether and how the problem was remedied. If the previous conclusion was deferred or conformity pending receipt of information, please reply to the questions raised.

Observations

The Government replies to para.2 (case of non-conformity, see below) and para. 5 (case of deferral, see below). However, no information is provided for paras. 3 and 4. According to the CM's decision (see above), changes in the situation should nevertheless be reported (see below).

2.2.12 Conclusion

On the basis of the above, it is suggested that the Committee concludes i.a. that the situation in Germany is not in conformity with Article 2§1 of the 1961 Charter on the grounds that:

- Working time legislation is not sufficiently enforced,
- On-call workers are not sufficiently protected.

2.2.13 Para. 2

2.2.14 Questions

b) However, if the previous conclusion concerning provisions in Article 2, paragraphs 2 through to 5, was one of non-conformity, please explain whether and how the problem was remedied. If the previous conclusion was deferred or conformity pending receipt of information, please reply to the questions raised.

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[39] https://www.dgb.de/themen/++co++aeb6f25e-38ce-11eb-82a4-001a4a160123

2.2.15 Conclusions XXI-3: Negative Conclusion

> The Committee concludes that the situation in Germany is not in conformity with Article 2§2 of the 1961 Charter on the ground that it has not been **established** that the worker's right to an adequate level of compensation for work performed on a public holiday is guaranteed.

2.2.16 Observations

Whereas the information in the Government's report reflects the legal requirement for the continuation of the remuneration in case of a public holiday, the question of 'adequate compensation' is not addressed sufficiently:

> Collective agreements, company agreements and individual contractual agreements **often provide for entitlement to supplementary remuneration**. In late 2020, supplements provided for by collective agreements for work on Sundays and public holidays often ranged from 65 to 200 percent of the collectively agreed pay.

Indeed, according to the ECSR' case law 'adequate compensation' requires the following:

> 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. For example 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.[40]

First, it should have been clearly stated that there is no individual right for additional compensation. Only (collective and other) agreements might provide for such an additional compensation. Moreover, the report should have stated in particular the coverage of collective agreements which provide for additional compensation.[41] Furthermore, even the Government's report states that there are agreements only providing for 65% additional compensation, a threshold which is obviously below the benchmark of 75% which has been declared by the ECSR as being 'not sufficiently high'. Finally, even for the public service the Government's report states that the 'additional supplement of 35% per hour worked' is provided for in the federal public service collective bargaining agreement (TVöD).

2.2.17 Conclusion

On the basis of the above, it is suggested that the Committee concludes i.a. that the situation in Germany is not in conformity with Article 2§2 of the 1961 Charter on the grounds that it has at least not been established that the worker's right to an adequate level of compensation for work performed on a public holiday is guaranteed.

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[40] Digest 2018, see footnote 35 above, and footnote [264] in the text referring to Conclusions XX-3 (2014), Greece.

[41] It should be noted that the Government's report (in its reply to the question(s) under Article 2§5) referred to the 'the currently available technical possibilities of the collective bargaining register of the Federal Ministry of Labour and Social Affairs' which should allow more precise information in this respect.

2.2.18 Para. 4

2.2.19 Observations on changes occurred since the last report

The original version of Article 2§4 requires 'to provide for additional paid holidays or reduced working hours or for workers engaged in dangerous or unhealthy occupations as prescribed'. In its Digest 2018 the ECSR refers to the following requirement which should be fulfilled:

> …, under no circumstances can financial compensation be considered a relevant and appropriate measure to achieve the aims of Article 2§4,[283] nor is early retirement[284] or the provision of food supplements.[285]
> 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.[286]
> 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.[287][42]

But in its previous Conclusions XXI-3 the ECSR did not find a violation of this provision nor did it ask to receive further information. Therefore, the Government's report did not include any additional information. However, according to the CM's decision 'additional information should be provided on changes occurred since the last report'.

From the outset, it should be noted that there is the possibility to require reduction of working time in case of dangerous work. Section 8 of the Working time Act provides the following:

> Section 8 - Dangerous work
>
> The Federal Government may by regulation, with the consent of the Bundesrat, limit working hours beyond section 3, extend rest breaks and rest periods beyond sections 4 and 5, extend the provisions for the protection of night and shift workers in section 6 and limit the possibilities for derogation under section 7, insofar as this is necessary to protect workers' health, for individual areas of employment, for certain types of work or for certain groups of workers where particular dangers to workers' health are to be expected. ...

Although it is true that dangerous work should be prevented[43] the compensation in relation to stricter limits of working time remains a legal obligation deriving from Article 2§4. Nevertheless, until now no such regulation has been adopted.[44] Instead, the common approach to dangerous or unhealthy work is more related to financial compensation. An illustrative example is the Regulation on hardship supplements[45] for dangerous works in the (federal) public service. If there are provisions on dangerous work in collective agreements, they mostly follow this approach.

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[42] Digest 2018, see footnote 35 above, p. 69.

[43] This idea has been expressed in the new version of Article 2§4 (R)ESC but the content of the original version of Article 2§4 ESC remained in case 'where it has not yet been possible to eliminate or reduce sufficiently these risks'.

[44] There is a one exception: In Section 21 'Discharge and waiting times' of the 'Regulation on Work in Compressed Air (Compressed Air Regulation)' (last amendment 29.3.2017) limiting to a certain extent working time.

[45] "Erschwerniszulagenverordnung" (Regulation on hardship supplements) in the version published on 3 December 1998 (BGBl. I p. 3497), as last amended by Article 74 of the Act of 20 August 2021 (BGBl. I p. 3932).

2.2.20 Conclusion

On the basis of the above, it is suggested that the Committee concludes i.a. that the situation in Germany is not in conformity with Article 2§4 of the 1961 Charter on the grounds that there is no clear legal obligation for additional paid holidays or reduced working hours in case of dangerous or unhealthy work.

2.3 Article 4

Together with the working time (in particular Article 2§1) the remuneration is one, if not the relevant issue in the individual (and accordingly also in the collective) employment relation.

Because para. 4 has not been accepted, the present Observations will deal with the remaining provisions only.

2.3.1 Para. 1

2.3.2 Conclusions XXI-3: Negative Conclusion

> According to EUROSTAT figures for 2016 the gross minimum monthly wage amounted for EUR 1440.00 in Germany, while according to *Statistisches Bundesamt (*DESTATIS) in 2016 the average gross monthly earnings in industry and service sector excluding bonuses amounted to EUR 3,703. That puts the gross monthly minimum wage at 38.9% of the gross average monthly wage in industry and service sector. Therefore, the Committee concludes that the situation is not in conformity **with Article 4§1** of the 1961 Charter.
> Concerning the requested information on the remuneration of tenured civil servants and contractual staff in the civil service the report states that for contractual staff the lowest possible hourly wage for staff employed under the applicable collective agreement (TVöD) has been EUR 10.33 since February 1st 2017 (outside the refernce period).
> The report further states that only young people without training and the previously long-term unemployed are excluded from minimum wage in the first six months of new jobs. It is not known how many people fall into that group. The exemption for the long-term unemployed was requested 3 335 times in total from August 2015 to February 2017. It is not known whether wages actually below the minimum wage were paid in these cases. Nor is it known to what extent persons excluded from the Minimum Wage Act are protected by collective agreements.
> For a more accurate assessment of the situation, the Committee wishes to receive updated figures concerning net minimum and net median wages.
> ***Conclusion***
> The Committee concludes that the situation in Germany is not in conformity with Article 4§1 of the 1961 Charter on the ground that the statutory minimum wage is not sufficient to ensure a decent standard of living to all workers.

2.3.3 Assessments by other international supervisory bodies

2.3.4 UN: CESCR - Concluding Observations concerning Germany (2018)[46]

Minimum wage

36. The Committee welcomes the introduction of a national minimum wage, which is currently set at 8.50 euros and adjusted every two years. It is, however, concerned that the State party does not have reliable data on the compliance with the minimum

[46] CESCR, Concluding observations (2018), see footnote 9.

wage and that a significant number of workers are reportedly paid below the minimum wage. (art.7)

37. **The Committee recommends that the State party intensify its efforts to ensure that all workers are paid at least the national minimum wage and that the minimum wage is set at a level sufficient to provide workers and their families with an adequate standard of living; and to strengthen the enforcement of the minimum wage. The Committee draws the attention of the State party to its general comment No. 23 (2016) on the right of everyone to the enjoyment of just and favourable conditions of work, para. 23.**

Prevalence of precarious employment

32. The Committee is concerned at the very large number of people working in various forms of precarious employment such as mini-jobs, temporary agency work, part-time employment, subcontracted employment, short-term service contracts and fixed-term employment, estimated at 14 million. These workers receive low wages, have a low level of social protection, and have weakened bargaining power. The Committee is further concerned at the rising number of workers depending on social benefits, currently at 1.2 million, and that only a small proportion of workers manage to move from precarious employment to regular employment. (arts. 6 and 7)

33. **The Committee recommends that the State party step up its efforts to create decent jobs, and to regularize precarious employment, by providing employers with incentives and workers with up-skill training to improve their qualifications and other forms of support, such as care services for children and dependent adults, to support them to take up full-time jobs, bearing in mind that a majority of these workers are women. It also recommends that the State party ensure that labour and social security rights of these workers are fully guaranteed in law and in practice and that the legislation on minimum wage is enforced.**

Employment of persons with disabilities

34. The Committee is concerned at the inadequate level of compliance with the quota of 5 per cent of employees being persons with severe disabilities and at the high incidence of unemployment among persons with disabilities, particularly women with disabilities. It is also concerned at the increasing number of persons with disabilities working in sheltered workshops, who are provided with limited labour and social protection and do not benefit from legislation on the minimum wage, and at the low rate of transition from sheltered workshops to the open labour market (arts. 2 (2) and 6).

35. **The Committee recommends that the State party intensify its efforts to ensure full compliance with the quota for the employment of persons with severe disabilities, particularly women with disabilities, and strengthen the sanctions for non-compliance. It also recommends that the State party ensure that workers in sheltered workshops are fully covered by labour and social protection measures, including the national minimum wage, and that it takes effective measures to facilitate the transition of workers with disabilities from sheltered workshops to the open labour market.**

2.3.5 ECSR's questions and Observations

For assessing compliance with Article 4§1 the different questions a) - d) have to be considered individually as well as in combination.

As an overarching requirement, it should be recalled that Article 4§1 not only requires a decent remuneration for the individual worker but a 'remuneration such as will give them and their families a decent standard of living'.[47]

2.3.6 On Question a)

Question a

a) Please provide information on gross and net minimum wages and their evolution over the reference period, including about exceptions and detailed statistics about the number (or proportion) of workers concerned by minimum or below minimum wage. Please provide specific information about furlough schemes during the pandemic, including as regards rates of pay and duration. Provide statistics both on those covered by these arrangements and also on categories of workers who were not included.

Observations

In its previous Conclusions XXI-3, the ECSR has found a violation of the provision. However, in its report the Governments limits its information on minimum wage just to statistical information without further explanations.

Level of minimum wage

First, the most relevant information is not provided. In updating the information on which the ECSR based its negative assessment in the previous Conclusions the information would now read as follows: According to EUROSTAT figures for 2020 the gross minimum monthly wage amounted for EUR 1,544.00 in Germany,[48] while according to *Statistisches Bundesamt (*DESTATIS) in 2020 the average gross monthly earnings in industry and service sector excluding bonuses amounted to EUR 3,975.[49] That puts the gross monthly minimum wage at 38.9% of the gross average monthly wage in industry and service sector. As the percentage has not changed (38.9%) in the reference period, the Conclusion should once again be negative.

Below minimum wage

The additionally worrying information is about the ,number of employment relationships received less than the general minimum wage' is directly contained in the Government's report referring to about ½ million of workers in an employment relationship during all three years.[50]

2.3.7 On question b)

Question b)

b) The Committee also requests information on measures taken to ensure fair remuneration (above the 60% threshold, or 50% with the proposed explanations or justification) sufficient for a decent standard of living, for workers in atypical jobs, those employed in the gig or platform economy, and workers with zero hours contracts. Please also provide information on fair remuneration requirements and enforcement activities (e.g. by labour

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[47] See for the same approach Article 7 (a)(ii) ICESCR (requiring '(a) Remuneration which provides all workers, as a minimum, with: … (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;' and the CESCR's General Comment No. 23 on Article 7, in particular para. 18, https://www.refworld.org/docid/5550a0b14.html.

[48] https://ec.europa.eu/eurostat/databrowser/view/earn_mw_cur/default/table?lang=en

[49] https://www.destatis.de/EN/Themes/Labour/Earnings/Earnings-Earnings-Differences/Tables/liste-average-gross-monthly-earnings.html.

[50] See also CESCR, Concluding observations (2018), see footnote 9, para. 36.

inspectorates or other relevant bodies) as well as on their outcomes (legal action, sanctions imposed) as regards circumvention of minimum wage requirements (e.g. through schemes such as sub-contracting, service contracts, including cross-border service contracts, platform-managed work arrangements, resorting to false selfemployment, with special reference to areas where workers are at risk of or vulnerable to exploitation, for example agricultural seasonal workers, hospitality industry, domestic work and care work, temporary work, etc.).

Observations

Coverage of collective agreements

The Government's report states that the 'vast majority of employment relationships continue to fall under collective agreements' referring to 53% of all employees in western Germany were employed in accordance with collective bargaining agreements (eastern Germany 43%)' (2020). Already the qualification of a 'majority' (and even of a 'vast majority') does not appear possible looking at numbers for Germany as a whole (not only western Germany). Moreover, the numbers referred to appear at least questionable. Official statistics show lower numbers with a large degree of differentiation:

> For around 44% of workers in Germany, the employment relationship was governed by a collective agreement in 2019. However, there are differences between the old and new federal states. For 46 % of workers in the old Länder, the employment relationship was regulated by a sectoral collective agreement in 2019. Company collective agreements applied to 7% of workers.
>
> In the new Länder, the collective agreement coverage was significantly lower. Here, 34 % of employees were covered by sectoral collective agreements. 11% worked in companies with company agreements. There was no collective agreement for 47 % of employees in the West and 55 % of employees in the East.[51]

Therefore, it was necessary for the state to ensure a statutory minimum wage.

Applicability of statutory minimum wage

The Government's report refers to the definition of a 'worker' which would include all persons employed also in the gig economy or any other sector. However, this is only partly true because there is a large 'grey zone'. For example, the solo-self-employed (comprising about 1 609 000 persons)[52] are often not considered as workers, at least their (formal) legal status is defined just as being outside the normal employment relationship and thus not entitled to minimum wage. In any event, they have to go to courts in order to get their employment relationship recognised.

Moreover, there are persons excluded by definition from minimum wage: like trainees, compulsory trainees, freelancers, long-term unemployed, young people under 18 without completed training. Moreover, persons with disabilities working in sheltered workshops do not benefit from legislation on the minimum wage.[53]

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[51] Statistisches Bundesamt, Qualität der Arbeit - Tarifbindung von Arbeitnehmern, (own translation) https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Qualitaet-Arbeit/Dimension-5/tarifbindung-arbeitnehmer.html.

[52] Statistisches Bundesamt, https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Erwerbstaetigkeit/Tabellen/atyp-kernerwerb-erwerbsform-zr.html.

[53] See also CESCR, Concluding observations (2018), see footnote 9, para. 34.

Enforcement

As the Government's report points out it is not the normal labour inspection dealing with the enforcement of the minimum wage but the customs administration. Concerning the human resources, it points to the increased number of new posts. However, an official study evaluating the enforcement of Minimum Wage Act enforcement refers to the (reasons of) under-staffing and further resources problems:

> The staffing situation is still a limiting factor for the effectiveness of the FSK, as many positions are unfilled. The recruitment of qualified personnel who can cope with the complex job requirements often fails due to less attractive working conditions or - especially in agglomerations with a high cost of living - due to relatively low salaries. With regard to technical equipment, considerable deficiencies were found at some locations and therefore an urgent need for improvement was formulated. In order to be able to carry out more effective audits, the FSK needs improved staffing and technical equipment. Modern technology and adequately qualified staff are an adjustment screw to increase the number of inspections so that the preventive effect of the inspections can be further strengthened.[54]

Accordingly, the enforcement is not ensured sufficiently.

2.3.8 On question c)

Question c)

> *c) Please also provide information on the nature of the measures taken to ensure that this right is effectively upheld as regards the categories of workers referred to in the previous paragraph (b) or in other areas of activity where workers are at risk of or vulnerable to exploitation, making in particular reference to regulatory action and to promotion of unionisation, collective bargaining or other means appropriate to national conditions.*

Observations

The Government's report refers to three specific areas of concern.

Concerning **posted workers**, the problems in relation to enforcement have been addressed above (see Enforcement). As regards **care work**, it should be noted that the minimum wage per hour for nursing assistants (Pflegehilfskräfte) amounts to 11,35 € (western Germany) 10,85 € (eastern Germany) from 01.05.2020 and from 01.07.2020 € 11.60 € (western Germany) 11.20 € (eastern Germany).[55] For the **meat industry** detailed information is available.[56]

Regarding the legislation on the implementation of directive (EU) 2018/957 amending Directive 96/71/EC on the posting of workers (see above in the Government's report) it has to be noted that the directive has not been implemented adequately. For instance, the extension of collective agreements to companies and workers not covered by said collective agreements via regulation (Sections 7 and 7a AEntG) only includes the minimum wages and does not include additional pay compo-

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[54] BMAS Forschungsbericht 563 Allgemeiner gesetzlicher Mindestlohn: seine Kontrolle und Durchsetzung sowie bürokratische Kosten für Arbeitgeber (Dezember 2020), p. 173 (own translation).

[55] https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/5_Publikationen/Pflege/Berichte/2020-12-09_Umsetzungsbericht_KAP_barrierefrei.pdf, p. 77.

[56] Kleine Anfrage der Abgeordneten Jutta Krellmann u. a. und der Fraktion DIE LINKE betreffend „Arbeitsbedingungen in der Fleischindustrie heute", BT-Drs. 19/31790. https://dip21.bundestag.de/dip21/btd/19/322/1932204.pdf.

nents. However, the wording of the directive does not refer to 'minimum wage' but to 'renumeration', which includes additional pay components. Another example would be the fact that the possibility of an extension of collective agreements to companies and employees not covered by said collective agreements only applies to nationwide collective agreements and does not apply to just regional agreements.[57]

Nevertheless, it should be noted that the CESCR was 'concerned at the very large number of people working in various forms of precarious employment such as mini-jobs, temporary agency work, part-time employment, subcontracted employment, short-term service contracts and fixed-term employment, estimated at 14 million. These workers receive low wages.[58]

2.3.9 On Question d)

Question d)

> *d) If the previous conclusion was one of non-conformity, please explain whether and how the problem was remedied. If the previous conclusion was deferred or conformity pending receipt of information, please reply to the questions raised.*

Observations

Concerning the level of the minimum wage, it can be referred to the Observations concerning Question a).

2.3.10 Conclusion

On the basis of the above, it is suggested that the Committee concludes i.a. that the situation in Germany is not in conformity with Article 4§1 of the 1961 Charter on the grounds that

- the statutory minimum wage is not sufficient to ensure a decent standard of living to all workers,
- the statutory minimum wage is not sufficiently enforced.

2.3.11 Para. 2

2.3.12 Observations on changes occurred since the last report

According to the ECSR's Interpretative Statement Article 4§2 requires not only full payment of the overtime but also additional payment compensating the 'increased effort on the part of the worker':

> Not only must the worker receive payment for overtime, therefore, but also the rate of such payment must be higher than the normal wage rate.[59]

Against these requirements the reality is very different. According to official statistics unpaid overtime was more relevant than paid overtime: About 818 million hours of paid overtime and about 893 million hours of unpaid overtime.[60] In certain sectors, the situation is even worse: For example,

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[57] See for more details: Umsetzung der revidierten EU-Entsenderichtlinie in das nationale Recht | DGB, (in German), 12.03.2020.

[58] see above CESCR, Concluding observations (2018), see footnote 9, para. 34.

[59] https://hudoc.esc.coe.int/eng?i=I_Ob_-17/Ob/EN

[60] *René Bocksch*, So viele Überstunden machen die Deutschen (22.04.2021), https://de.statista.com/infografik/17994/so-viele-eeberstunden-machen-die-deutschen/.

there were about 14.8 million hours of overtime in elderly care in Germany in 2019, of which only about 5.8 million were paid.[61]

As such, this represents a clear violation of Article 4§2. Additionally, it should be noted that there is no legal requirement to increase the payment in case of overtime. Only if e.g. collective agreements[62] so provide such a right can be enforced. Moreover, it should be recalled that the enforcement of limiting working hours is not sufficient (see above Enforcement (in general)).

2.3.13 Conclusion

On the basis of the above, it is suggested that the Committee concludes i.a. that the situation in Germany is not in conformity with Article 4§2 of the 1961 Charter on the grounds that

- not all workers concerned receive payment for overtime,
- not all workers concerned receive additionally a higher rate than the normal wage rate.

2.3.14 Para. 3

2.3.15 Conclusions XXI-3:

2.3.16 Negative Conclusion

Conclusion

The Committee concludes that the situation in Germany is not in conformity with Article 4§3 of the 1961 Charter on the ground that the maximum compensation of 12 months wages established by law in cases of litigation concerning reprisals is not sufficient to make good the damage suffered by the victim and to act as a deterrent to the offender.

2.3.17 Requestion for information

Methods of comparison

As regards the job comparisons, the Committee reiterates its request for information (Conclusions 2010) concerning any developments of jurisprudence regarding non-discrimination cases with respect to remuneration and problems encountered in practice by employees who wish to make wage comparisons and who do not work for the same employer. In particular, the Committee asks whether the law prohibits discriminatory pay in statutory regulations or collective agreements, as well as whether the pay comparison is possible outside one company, for example, where such company is a part of a holding and the remuneration is set centrally.

Statistics

…

The Committee notes that there has not been any significant decrease in the gender pay gap since the previous reference period when it stood at 22%. The Committee asks the next report to provide information concerning the measures taken to address the main causes of the gender pay gap as outlined above.

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[61] https://de.statista.com/infografik/17994/so-viele-eeberstunden-machen-die-deutschen/; this information contains also data for the previous years.

[62] Even assuming that each collective agreement would provide for overtime supplements (which is not the case) the coverage of collective agreements is less than 50% (see above Coverage of collective agreements).

…

2.3.18 Assessments by other international supervisory bodies

2.3.19 UN

CESCR – Concluding Observations

Gender pay gap

38. The Committee is concerned that the gender pay gap remains high at 21 percent in 2018, mostly due to the persistent vertical and horizontal de facto segregation as well as the predominant proportion of women in precarious employment. It is also concerned that this leads to a wide gender pension gap (which currently stands at 53%) as well as to a disproportionately high incidence of poverty among older women. (arts.3, 7, 9 and 11)

39. **The Committee recommends that the State party intensify its efforts to close the gender pay gap, including by (a) addressing the vertical and horizontal de facto segregation; and by (b) reviewing its social and tax policies, with a view to addressing the factors that discourage women to continue their career or to take up full-time employment. Moreover, the Committee urges the State party to take targeted measures to address the high incidence of poverty among older women.**

UN: CEDAW

Legislative framework

13. The Committee welcomes the constitutional provisions, laws, administrative norms and policies promoting gender equality and defining sex as a prohibited ground for discrimination that have been adopted since the previous periodic review. Nevertheless, the Committee is concerned that the General Act on Equal Treatment (2006) remains limited in scope and fails to comprehensively protect women from gender-based discrimination in the domestic and private spheres. While the Committee notes the shift in the burden of proof in civil and administrative proceedings concerning discrimination, it points out that the period during which discrimination claims can be made remains extremely limited. The Committee is also concerned that group action enabling women's organizations and trade unions to bring cases of discrimination before the courts is currently not provided for through the Act. In addition, it is concerned that article 9 of the Act provides for questionable differential treatment on the grounds of religion or beliefs.

14. **The Committee recommends that the State party amend the General Act on Equal Treatment in line with the proposals outlined in the evaluation conducted by the Federal Anti-Discrimination Agency and ensure that its range of application is expanded. It therefore recommends that the State party introduce the right of group action on the part of women's organizations and trade unions to bring discrimination cases before the courts and extend the deadline for submitting discrimination complaints to at least six months. It also recommends that dismissals be added to the Act and that article 9 of that Act be abolished.**[63]

Employment

35. The Committee commends the State party on the wide-ranging measures taken to reconcile family and work life and to address the gender

[63] Concluding observations (2017) CEDAW/C/DEU/CO/7-8, 9.3.2017.

pay gap, and notes as positive the bill on equal pay. Nevertheless, it notes with concern:

(a) The fact that the prevailing gender pay gap (currently 21 per cent) in both the public and the private sector continues to have a negative impact on women's career development and pension benefits owing to insufficient effective implementation of legislation on the principle of equal pay for work of equal value; …

36. **Reiterating its previous recommendations (see CEDAW/C/DEU/CO/6, para. 40) the Committee recommends that the State party:**

(a) **Strengthen its efforts to eliminate the gender wage gap and ensure equal opportunities for women and men in the labour market, including through the continued use of temporary special measures, with time-bound targets, in line with article 4 (1) of the Convention and the Committee's general recommendation No. 25; and adopt the bill on equal pay as a matter of priority;**

2.3.20 ECSR's questions and Observations

2.3.21 On Question a)

Question a)

a) Please provide information on the impact of COVID-19 and the pandemic on the right of men and women workers to equal pay for work of equal value, with particular reference and data related to the extent and modalities of application of furlough schemes to women workers.

Observations

For the impact of the pandemic, the official statistics see a link to the gender pay gap:

> It has to be noted that special effects due to short-time work in the coronavirus crisis may have had an impact on the change of the unadjusted gender pay gap.[64]

It should also be taken into account that specific groups like female refugees[65] might be affected to a higher degree.

2.3.22 On Question b)

Question b)

b) If the previous conclusion was one of non-conformity, please explain whether and how the problem was remedied. If the previous conclusion was deferred or conformity pending receipt of information, please reply to the questions raised.

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[64] See footnote 66. For more detailed information, see https://www.boeckler.de/de/pressemitteilungen-2675-corona-und-gleichstellung-31078.htm (in German).

[65] Report: Migration and Gender Pay Gap - Women * with refugee and migration histories in the corona pandemic (4.6.2021), https://www.damigra.de/en/meldungen/bericht-migration-und-gender-pay-gap-frauen-mit-flucht-und-migrationsgeschichte-in-der-corona-pandemie/

Observations

Equal pay

The general situation is characterised by an ongoing gender pay gap which in its 'unadjusted' form still amounts to 18%.[66] But even in its 'adjusted' form (measuring the difference in earnings between men and women with comparable qualifications, occupations and employment biographies) the numbers show an important wage difference of 6% between men and women:

> The remaining … 1.28 euros of the earnings difference corresponds to the adjusted gender pay gap. According to this, female workers earned on average 6% less per hour than men in 2018, even in comparable jobs and with equivalent qualifications.[67]

Moreover, this result might be questioned because the definition of 'comparable' occupations is not easily to be defined.

Enforcement

In addition, the lack of effective enforcement is of particular relevance.

First, there is a structural problem in relation to inspection. Labour inspection in Germany is mainly focused on safety and health at the workplace. And even assuming that it is dealing with equal pay the insufficient staffing has been described above (Labour inspection). On the other side, the additional enforcement by customs authorities in relation to minimum wage and posting of workers is not targeted to equal pay either.

Second, effective enforcement is not guaranteed because trade unions and women's organizations are not provided with access to court for group actions (see above also CEDAW: Legislative framework).

Third, in respect of victimisation, burden of proof might be even more severe (see above: Further elements of enforcement: Insufficient protection against victimization) in effectively preventing victimisation.

Maximum compensation

Concerning the '**maximum compensation**' all information provided in the Government's report does not change the legal situation of the limitation of severance payments in Section 10 of the Act on the Protection against Dismissal (Kündigungsschutzgesetz, KSchG).

Moreover, the 'principle of safeguarding existing employment relationships (Bestandsschutzprinzip)' is correct (only) in theory, however in practice most cases in which the dismissal is challenged before a Labour Court end with a friendly settlement ending the employment relationship, in return with a severance payment.[68]

Furthermore, in the case of victimization (i.e. if a female worker has claimed equal pay and is subsequently dismissed) even if the Labour Court would declare the dismissal unlawful it will often be the

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[66] https://www.destatis.de/EN/Press/2021/03/PE21_106_621.html;jsessionid=129F0ED8414C75C16F5CAD574D40B3AC.live722

[67] https://www.destatis.de/DE/Presse/Pressemitteilungen/2020/12/PD20_484_621.html

[68] Section 10 Amount of the Severance Payment

(1) A severance payment in the amount of up to twelve months pay shall be set. (Unofficial translation: https://www.mayr-arbeitsrecht.de/wp-content/uploads/2016/05/Protection-Against-Unfair-Dismissal-Act.pdf); para. 2 extends this limitation under certain circumstances (age combinded with length of employment relationship).

employer who seeks to get a termination of the employment by way of Sections 9 and 10 of the KSchG.

Accordingly, the situation continues to be in non-conformity with Article 4§3.

2.3.23 Conclusion

On the basis of the above, it is suggested that the Committee concludes that the situation in Germany is not in conformity with Article 4§3 of the 1961 Charter on the grounds that

- equal pay for work of equal value is not sufficiently guaranteed,
- right to equal pay is not sufficiently enforced,
- the maximum compensation of 12 months wages established by law in cases of litigation concerning reprisals is not sufficient to make good the damage suffered by the victim and to act as a deterrent to the offender.

2.3.24 Para. 5

2.3.25 Conclusions XXI-3: Deferral

> The Committee renews its request for further information and asks that the next report to provide details on: the conditions under which it is permitted for workers to consent to their wages being forfeited, assigned or pledged for the benefit of their employer or third parties; the unattachable portion of wages in the event of attachment of wages or simultaneous deductions on concurrent grounds; any other grounds for deductions from wages (execution of court decisions or administrative orders; fines for criminal or disciplinary offences; maintenance payments or compensatory claims; failure to reach objectives; reimbursements of advances on wage or expenses, etc.). It also asks whether workers are authorized to waive their right to limited deductions from wages.
>
> *Conclusion*
>
> Pending receipt of the information requested, the Committee defers its conclusion.

2.3.26 Observations

First, it should be noted that Germany has not ratified ILO Protection of Wages Convention, 1949 (No. 95) which should be considered as minimum protection.

Concerning attachments, it should be noted that i.a. the following elements are not protected against attachment (not being exempted according to Section 850(1) Civil Procedure Code - ZPO[69] and the following provisions):

- Severance pay,
- continued payment of wages in case of illness,
- Travel allowances,
- Allowance for shift work, Saturday or pre-holiday work (Section 850a No.3 ZPO),
- Overtime hours at 50%.

Because of their specific relevance for the workers, these elements of remuneration should be fully precluded from attachment.

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[69] Section 850 - Exemption from attachment of earned income
(1) Earned income that is payable in money may be attached only subject to the stipulations set out in sections 850a through 850i.

Moreover, it should be ensured that this protection is not circumvented. For example, refugees might be in an extremely difficult situation when asked to sign so-called declarations of assignment:

> From various parts of Lower Saxony we have become aware that residents of refugee accommodation are being asked by the municipalities to sign so-called declarations of assignment. With these declarations of assignment, the municipalities have "all existing and future income claims" of the residents transferred to them - e.g. against their employer, the employment agency or the job centre, the health insurance or the pension insurance - in order to be able to claim - alleged - debts for accommodation fees "excluding the seizure exemption limit" directly from the designated bodies, even "if this means that the seizure exemption limits are not met.[70]

This means that also the practice has to be examined more deeply and any circumvention of this fundamental protection be prevented.

2.3.27 Conclusion

On the basis of the above, it is suggested that the Committee concludes that the situation in Germany is not in conformity with Article 4§5 of the 1961 Charter on the grounds that the protection of workers in case of attachment of their wages is not sufficient.

2.4 Article 5

2.4.1 Conclusions XXI-3: Questions

> **Article 5 Right to organise**
>
> The Committee takes note of the information contained in the report submitted by Germany.
>
> It already examined the situation with regard to the right to organise (forming trade unions and employer associations, freedom to join or not to join a trade union, trade union activities, representativeness, and personal scope) in its previous conclusions. It will therefore only consider recent developments and additional information. …
>
> **Personal Scope**
>
> The Committee notes that the right to organize for civil servants guaranteed under Article 9§3 of the Constitution is expressly confirmed in Section 116 of the Federal Civil Service Act (*Bundesbeamtengesetz BBG*) and Section 52 of the Act on the Status of Civil Servants (*Beamtenstatusgesetz BeamtStG*) thus binding the Federation and the individual federal states.
>
> The Committee refers to its general question on the right to organise for members of the armed forces.

2.4.2 ECSR's questions and Observations

2.4.3 On Question a)

Question a)

> *a) Please provide data on trade union membership prevalence across the country and across sectors of activity, as well as information on public or private sector activities in*

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[70] https://www.nds-fluerat.org/48199/aktuelles/gefluechtete-werden-durch-abtretungserklaerungen-betrogen/

> *which workers are excluded from forming organisations for the protection of their economic and social interests or from joining such organisations. Also provide information on recent legal developments in these respects and measures taken to promote unionisation and membership (with specific reference to areas of activity with low level of unionisation, such as knowledge workers, agricultural and seasonal workers, domestic workers, catering industry and workers employed through service outsourcing, including cross border service contracts).*

Observations

The information in the Government's report on the coverage of collective agreements will be dealt with under Article 6§2.

Trade union membership

The German Confederation of Trade Unions (DGB) consists of eight federation with a total membership in 2021 of 5,729,371 (3,774,675 male members (65.9%) and 1,954,696 female members (34,1%). The two biggest federations are the Metal Workers Union (IG Metall: 2,169,183 members) and the United Services Union (ver.di: 1,893,920 members). [71] The DGB's level of organisation in 2017 was 15.0%.[72]

Trade unions face severe problems in unionizing worker in specifically individualised or vulnerable activities or branches. However, they develop specific programs for unionizing workers in those areas like crowd workers,[73] migrant workers (in the construction and agricultural sector)[74] or self-employed (in the services sector).[75]

Discrimination because of trade union membership or activity

Although Article 9 (3) of the Basic Law (Grundgesetz, GG) protects trade union membership against discrimination, this is not sufficient because it requires that the (discriminatory) measure has to be 'directed to this end'.[76] The ECSR has required a broader approach by protecting trade union members against 'any harmful consequence':

> 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.[490] Where such discrimination occurs, domestic law must make provision for compensation that is adequate and proportionate to the harm suffered by the victim.[491][77]

Moreover, the burden of proof remains a practical obstacle in securing effective protection against discrimination.

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[71] https://www.dgb.de/uber-uns/dgb-heute/mitgliederzahlen/2020-2029

[72] https://www.boeckler.de/pdf/p_wsi_report_44_2018.pdf.

[73] http://faircrowd.work/de/ (IG Metall together with further trade unions).

[74] https://igbau.de/en.html.

[75] https://selbststaendige.verdi.de/ (in German).

[76] (3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. … https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0054.

[77] Digest 2018, see footnote 35 above, p. 95.

Union busting

In Germany parts of the business community are increasingly using American methods to combat workplace representation (mainly works councils). They systematically try to hinder or prevent the establishment or the work of works councils in their companies, often working with specialised lawyers, media agencies and detective agencies. Their repertoire includes

- preventing works council elections
- intimidation and surveillance of works councils and candidates for works council elections
- granting benefits to pro-business works councils
- the prevention of critical press reports.[78]

Access to workplaces

In general terms, the ECSR has required:

> Trade union officials must have access to the workplace and union members must be able to hold meetings at work in so far as employers' interests and company requirements permit.[499]]

This right should be further developed in relation to a digital access to the workplace. In particular, the pandemic has clearly shown the need for trade unions to have an explicit right to access home office workers virtually in an equivalent way as it exists already in relation to personal contact at the workplace. For trade unions, those workers were not accessible during the pandemic.

2.4.4 On Question c)

Question c)

> *If the previous conclusion was one of non-conformity, please explain whether and how the problem was remedied. If the previous conclusion was deferred or conformity pending receipt of information, please reply to the questions raised.*

Observations

In its previous Conclusions XXI-3 the ECSR referred to the general question on the right to organise for members of the armed forces. This question was not replied in the Government's report.

2.5 Article 6

2.5.1 Para. 2

2.5.2 Assessments by other international supervisory bodies

2.5.3 ILO: CEACR – Observation (2022) on the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

> The Committee takes due note of the 2018 ruling of the Federal Constitutional Court. The Committee observes that it results in a ban on the involvement of all civil servants in collective bargaining. The Committee ***regrets*** that public servants not engaged in the administration of the State are thus deprived of the right to bargain collectively granted to them by the Convention. The Committee recalls in this regard that it has been highlighting for many years that, pursuant to *Articles 4* and *6* of the Convention, all public service workers, other than those engaged in the administration of the State, should enjoy collective bargaining rights. It also

[78] https://www.dgb.de/themen/++co++d00bf11e-6543-11e7-9563-525400e5a74a (10.07.2017). As recent example, the delivery service employer 'Gorillas' has tried to stop its workers from forming a works council (https://detektor.fm/wirtschaft/zurueck-zum-thema-union-busting).

> emphasizes that while the determination of wages is an important element of the scope of collective bargaining, other terms and conditions of work and employment also fall within its scope. ***In view of the above, the Committee encourages the Government to continue engaging in a comprehensive national dialogue with representative organizations in the public service with a view to exploring innovative solutions and possible ways in which the current system could be developed so as to effectively recognize the right to collective bargaining of public servants who are not engaged in the administration of the State, including for instance, as previously indicated by the BDA, by differentiating between areas of genuinely sovereign domains and areas where the unilateral regulatory power of the employer could be restricted to extend the participation of representative organizations in the public service. Further noting that proceedings are currently ongoing before the European Court of Human Rights in relation to the ban on the right to strike of civil servants and observing that it may also have repercussions on the right of civil servants to bargain collectively, the Committee requests the Government to provide information on the resulting decision and on any impact it may have at the national level.***

2.5.4 Observations on changes occurred since the last report

Article 6§2 does not only provide for the right to bargain collectively but, more specifically, it contains also the obligation to 'promote' it.

2.5.5 Coverage of collective agreements

In its previous Conclusions the ECSR had held that the situation in Germany was in conformity with Article 6§2:

> The Committee notes, from the information provided in Germany's report and all the information at its disposal, that the situation which it previously considered to be in conformity with Article 6§2 of the Charter (Conclusions XX-3 (2014)) has not changed. The report notes that in the period from January 1st 2013 to December 31st 2016 a total of about 21,300 new collective agreements were entered in the register of collective agreements of which about 14,000 were company agreements.

However, besides the number of newly concluded collective agreements, the obvious decline of collective agreements coverage is a problem of specific concern. According to official statistical information:

> The development of collective agreements shows a decline in collective agreement coverage in both the old and the new Länder. In the former federal territory, 76 % of employees were covered by a collective agreement in 1998. The coverage of collective agreements has thus fallen by 23 percentage points in the west between 1998 and 2019 (53 %). In eastern Germany, 63 % of employees were covered by sectoral or company collective agreements in 1998. By 2019 (45 %), this proportion had fallen by 18%.[79]

Obviously, this situation does not correspond with the obligation to 'promote' collective bargaining. In the words of the ECSR:

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[79] Statistisches Bundesamt, Tarifbindung von Arbeitnehmern, https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Qualitaet-Arbeit/Dimension-5/tarifbindung-arbeitnehmer.html (own translation). For more information on the current situation, see above: Coverage of collective agreements.

> The Committee observes that states' obligation under this provision of the Charter goes further than the enactment of legislation permitting free collective bargaining. They are also required to take necessary and appropriate steps to promote collective bargaining.[80]

Accordingly, concrete measures should be taken in order to reverse this development. In this context, it might be helpful to take note of the developments in the EU concerning promotion of coverage of collective agreements. Indeed, in its proposal for a Directive on Minimum Wage[81] which is still under consideration the Commission foresees the need for an 'action plan to promote collective bargaining' in case the 'collective bargaining coverage is less than 80% of the workers'.

Bearing in mind that this provision might still be amended the need for a general approach to counter the decline in collective bargaining coverage is obvious.

At domestic level, one of the important obstacles to more collective bargaining coverage is the so-called 'OT'-membership (i.e. membership without collective bargaining commitment) in employers organisations. In combination with other measures this should be changed.

2.5.6 Personal scope

Moreover, there are limitations concerning the personal scope of collective agreements.

Civil servants

In its Conclusions XXI-3 the ECSR had found Germany in conformity with the requirements of Article 6§2 in relation to the exclusion of civils servants from collective bargaining in the following terms:

> The report highlights that the basic employment conditions of public service employees with the status of civil servants, including pay-related issues, are not based on collective agreements but are established directly by law. It is nevertheless stipulated that, in accordance with section 118 of the Act on Federal Civil Servants (*Bundesbeamtengesetz*) and section 53 of the Act on the Status of Civil Servants (*Beamtenstatusgesetz*), when civil service regulations are being prepared, the central organisations of the relevant trade unions are systematically involved.[82]

However, there is no definition about the 'involvement'. Moreover, looking more in detail to its case law the ECSR states that

> 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.[54283]

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[80] Conclusions XVII-2 Volume 2 – Latvia, referring to Conclusions XVI-2, Hungary, Article 6§2, pp. 409-411.

[81] Proposal for a Directive on adequate minimum wages in the European Union (COM/2020/682 final), 28.10.2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0682.

[82] https://hudoc.esc.coe.int/eng?i=XX-3/def/DEU/6/2/EN

[83] Digest 2018, see footnote 35 above, and footnote [542] in the text referring to 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.

Taking also into account the ILO CEACR's Observations (see above) it appears at least questionable whether the 'involvement' is sufficient to fulfill the requirements of Article 6§2.

Self-employed / Platform workers

Another area of concern relates to self-employed workers and their protection by collective agreements. While it is true that Section 12a of the Collective Agreements Act (Tarifvertragsgesetz, TVG) opens up the possibility of collective bargaining for 'Employee-like persons'[84] under certain conditions the reality for platform workers this protection is not sufficient. For example, the DGB has required i.a. the following:

> Given the work reality of many platform workers, who often earn their living on several platforms, this threshold is too high and should be lowered. Section 12a TVG should be expanded to the effect that economic dependence on a platform is assumed if the platform represents a third of the remuneration earned, instead of the previously stipulated half.[85]

Against the background of the ECSR's case law_

> The rapidly changing world of work and proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law, has resulted in an increasing number of workers falling outside the definition of a dependent employee, including low-paid workers or service providers who are de facto "dependent" on one or more labour engagers. These developments must be taken into account when determining the scope of Article 6§2 in respect of self-employed workers.
>
> 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.[86]

it would appear that the limitations in Section 12a TVG should be reviewed.

2.5.7 Para. 4

2.5.8 Conclusions XXI-3: Negative Conclusions

Specific restrictions to the right to strike and procedural requirements

The Committee previously found the situation in Germany not to be in conformity on the grounds that prohibiting civil servants from striking constituted an excessive restriction on

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[84] See translation: https://www.gesetze-im-internet.de/englisch_tvg/englisch_tvg.html.

[85] The German Trade Union Confederation's Position on the Platform Economy (22..3.2021), https://www.dgb.de/downloadcenter/++co++6a573b02-a1ea-11eb-bae1-001a4a160123, p. 4. See also Stellungnahme des Deutschen Gewerkschaftsbundes im Rahmen der Konsultation zum Entwurf der „Leitlinien zur Anwendung des EU-Wettbewerbsrechts auf Tarifverträge über die Arbeitsbedingungen von Solo-Selbstständigen" C(2021) 8838 final, https://www.dgb.de/++co++f375fc30-93e2-11ec-bcf2-001a4a160123/DGB-Stellungnahme-Leitlinien-Tarifvertraege-von-Solo-Selbststaendigen.pdf.

[86] Digest 2018, see footnote 35 above, p. 100.

the right to strike. There have been no changes to this situation. Therefore the Committee reiterates its previous conclusions.

The Committee recalls that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. In the light of Article 31 of the Charter, "the right to strike of certain categories of public servants may be restricted, in particular members of the police and armed forces, judges and senior civil servants. However, the denial of the right to strike to public servants as a whole cannot be regarded as compatible with the Charter" (cf. Conclusions I (1969)). The Committee also notes that in the case of civil servants who are not exercising public authority, only a restriction can be justified, not an absolute ban (Conclusions XVII-1 (2005) Germany). According to these principles, all public servants who do not exercise authority in the name of the State should have recourse to strike action in defence of their interests.

The Committee refers to its general question regarding the right of members of the police to strike.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with Article 6§4 of the 1961 Charter on the grounds that:

- the prohibition on all strikes not aimed at achieving a collective agreement constitutes an excessive restriction on the right to strike and
- the requirements to be met by a group of workers in order to form a union satisfying the conditions for calling a strike constitute an excessive restriction to the right to strike and
- the denial of the right to strike to civil servants as a whole, regardless of whether they exercise public authority, constitutes an excessive restriction to the right to strike.

2.5.9 Assessments by other international supervisory bodies

2.5.10 Denial of the right to strike to civil servants as a whole

UN

CCPR – Concluding Observations concerning Germany (2021)

Freedom of association

50. The Committee is concerned about the blanket ban on public sector workers striking within the State party, based upon the assessment that all such workers, including schoolteachers, are essential (art. 22).

51. **The Committee reiterates the recommendation of the Committee on Economic, Social and Cultural Rights13 that the State party should take measures to revise the scope of the category of essential services with a view to ensuring that all those civil servants whose services cannot reasonably be deemed as essential are entitled to their right to strike, also in accordance with article 22 of the International Covenant on Civil and Political Rights.**[87]

[87] CCPR, Concluding observations (2021), see footnote 8.

CESCR – Concluding Observations concerning Germany (2018)

The right to strike of civil servants

44. The Committee remains concerned about the prohibition by the State party of strikes by all public servants with civil servant status, including schoolteachers with this status. This goes beyond the restrictions allowed under article 8 (2) of the Covenant, since not all civil servants can reasonably be deemed to be providers of an essential service. (art. 8)

45. **The Committee reiterates its previous recommendation that the State party take measures to revise the scope of the category of essential services with a view to ensuring that all those civil servants whose services cannot reasonably be deemed as essential, are entitled to their right to strike in accordance with article 8 of the Covenant and ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise (1948).**

ILO

CEACR – Observations concerning Germany (2022)

Moreover, the Committee wishes to make clear that its task is not to judge the validity of the Court decision of 12 June 2018 (Case No. 2 BvR 1738/12), which is based upon issues of German national law and precedents. The Committee's task is to examine the outcome of this decision on the recognition and exercise of the workers' fundamental right to freedom of association. In this regard, the Committee observes with ***regret*** that the result of the Court's decision is not in keeping with the Convention, inasmuch as it amounts to a general ban on the right to strike of civil servants based on their status, irrespective of their duties and responsibilities, and in particular a ban on the right of civil servants who are not exercising authority in the name of the State (such as teachers, postal workers and railway employees) to have recourse to strike action.[88]

2.5.11 Prohibition on all strikes not aimed at achieving a collective agreement

UN

CCPR and CESCR: Joint Statement (2019)

Freedom of association, along with the right of peaceful assembly, also informs the right of individuals to participate in decision-making within their workplaces and communities in order to achieve the protection of their interests. The Committees recall that the right to strike is the corollary to the effective exercise of the freedom to form and join trade unions. Both Committees have sought to protect the right to strike in their review of the implementation by States parties of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[89]

CESCR – Concluding Observation concerning Belgium

The Committee also recommends that the State party guarantee the exercise of the right to strike in law and in practice, in full compliance with the Covenant. The Committee draws the State party ' s attention to its general comment No. 18 (2005) on the right to work and refers it to its joint statement with the Human

[88] ILO CEACR RCE 2022, p. 158

[89] Joint statement by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee: Freedom of association, including the right to form and join trade unions - (23.10.2019), https://www.ohchr.org/Documents/HRBodies/CESCR_CCPR_Joint_STM.pdf, para. 4.

> Rights Committee on freedom of association, including the right to form and join trade unions (E/C.12/66/5-CCPR/C/127/4), adopted in 2019.[90]

ILO

Commmittee on Freedom Association (CFA) – Compilation (2018)

> 784: Regarding various types of strike action denied to workers (wild-cat strikes, tools-down, go-slow, working to rule and sit-down strikes), the Committee considers that these restrictions may be justified only if the strike ceases to be peaceful.[91]

2.5.12 ECSR's questions and Observations

2.5.13 On Question a)

Question a)

> *a) Please provide information on specific measures taken during the pandemic to ensure the right to strike (Article 6§4). As regards minimum or essential services, please provide information on any measures introduced in connection with the COVID-19 crisis or during the pandemic to restrict the right of workers and employers to take industrial action.*

Observations

It can be confirmed that as far as strikes are concerned no specific limitations have been introduced during the pandemic. As an example, a strike in a health care enterprise was declared lawful during the Corona crisis by the Gießen Labour Court by way of an interim injunction. It was necessary to ensure an minimum service, but not necessarily to agree on an minimum service agreement.[92]

2.5.14 On Question b)

Question b)

> *b) If the previous conclusion concerning the provision was one of non-conformity, please explain whether and how the problem was remedied. If the previous conclusion was deferred or conformity pending receipt of information, please reply to the questions raised.*

The ECSR's Conclusions

Collective action: definition and permitted objectives

> German law on collective action, based on Article 9§3 of the Constitution as interpreted by the courts, still prohibits strikes which are not concerned with the conclusion of collective agreements. Since its first conclusion (Conclusion I (1969)), the Committee has found this prohibition not to be in conformity with Article 6§4 of the Charter. It previously (Conclusions XX-3 (2014)) reserved its position in case specific situations might indicate conflicts of interest other than those aiming at concluding collective agreements which cannot be solved by a competent court. However it now reiterates the finding of non-conformity as permitting the right to strike only when aimed at the conclusion of a collective agreement unduly restricts the right to strike.

Specific restrictions to the right to strike and procedural requirements

> The Committee previously found the situation in Germany not to be in conformity on the grounds that prohibiting civil servants from striking constituted an excessive restriction on

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[90] CESCR, Concluding Observations concerning Belgium, E/C.12/BEL/CO/5 (2020).

[91] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945527,2

[92] ArbG Gießen, 6.3.2020, no. 9 Ga 1/20.

the right to strike. There have been no changes to this situation. Therefore the Committee reiterates its previous conclusions.

The Committee recalls that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. In the light of Article 31 of the Charter, "the right to strike of certain categories of public servants may be restricted, in particular members of the police and armed forces, judges and senior civil servants. However, the denial of the right to strike to public servants as a whole cannot be regarded as compatible with the Charter" (cf. Conclusions I (1969)). The Committee also notes that in the case of civil servants who are not exercising public authority, only a restriction can be justified, not an absolute ban (Conclusions XVII-1 (2005) Germany). According to these principles, all public servants who do not exercise authority in the name of the State should have recourse to strike action in defence of their interests. …

The Committee refers to its general question regarding the right of members of the police to strike.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with Article 6§4 of the 1961 Charter on the grounds that:

- the prohibition on all strikes not aimed at achieving a collective agreement constitutes an excessive restriction on the right to strike and
- the requirements to be met by a group of workers in order to form a union satisfying the conditions for calling a strike constitute an excessive restriction to the right to strike and
- the denial of the right to strike to civil servants as a whole, regardless of whether they exercise public authority, constitutes an excessive restriction to the right to strike.

Observations

Three situations have been considered by the ECSR not to be in conformity with Article 6§4 amongst which the probably longest-standing criticisms (in principle, since Conclusions I (1969)) concerns the denial of the right to strike to all civil servants.

Denial of the right to strike to civil servants as a whole

In relation to the ECSR's negative conclusions in the previous cycle there have been no changes in substance on the denial of the right to strike to civil servants as a whole.

In this respect, the Government's report refers mainly to the judgment of the Federal Constitutional Court (FCC) of 12.06.2018.[93] The DGB and its affiliates, in particular the Education union (GEW)[94] and the United Services Union (ver.di)[95] have criticised this complete ban as well as the judgment of the FCC. The report fails to provide a legal justification for compliance with the ESC. This is all the more deplorable as the FCC's judgment did not respond in to the applicants' arguments of non-compliance with international standards (besides the ECtHR). They had referred to UN, ILO, Council

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[93] Official press release in English: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-046.html.

[94] https://www.gew.de/tarif/streik/beamtenstreik.

[95] Kein Streikrecht für Beamte – ver.di.

of Europe and EU standards and related case law of the competent bodies. Amongst these references they drew particular attention to the ECSR's case law. In the meantime, those criticisms from international supervisory bodies have been renewed (see above: Prohibition on all strikes not aimed at achieving a collective agreement), partly criticising directly the FCC's judgment.[96]

Number of civil servants affected

The ban affects a significant number of persons. According to official statistics, in the public service, about 1,700,000 (1,716,625) are employed in status of civil servants.[97] Among those persons, about 730,000 (732 040) civil servants work in the education sector[98] amongst which the most relevant example are teachers[99] who can be separated from civil servants exercising authority in the name of the state or being employed in essential services. Moreover, 41,300 civil servants work in the (private) successor companies of the former German Federal Postal Service (Deutsche Bundespost).[100] Moreover, the former Postbank has meanwhile been integrated into its new mother company, the Deutsche Bank, thus requiring that civil servants are directly working for this bank, an even more private profit orientated company.

Consequences of the prohibition to go on strike

Any civil servant going on strike would be liable to disciplinary sanctions which have not only an immediate negative impact in relation to the procedure as such and its most likely financial sanctions but are – in the medium and long term – likely to i.a. hinder promotions. In case of repetition(s) the sanctions might even be much harder (possibly going up the termination of employment).

The negative consequences of the strike ban are also serious for the respective trade unions. They would not be able to rely on their members to go on strike in case the trade union concerned would call a strike. In the ECtHR's words:

> "The Court considered that these sanctions were such as to discourage trade union members … from acting upon a legitimate wish to take part in such a day of strike action or other forms of action aimed at defending their affiliates' interests".[101]

This enormously weakens the impact of the trade unions concerned when striving for the interests of their members. Moreover, in such a case the trade unions concerned would be held liable in damages. In the public service even more severe (administrative) prohibitions and sanctions would not be excluded. That is why there are not more examples of calls for strikes by civil servants.

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[96] CEACR – Observations concerning Germany (2022)

[97] Staff by type of employment contract (30.6.2020), Personal des öffentlichen Dienstes - Fachserie 14 Reihe 6 - 2020 (Korrigierte Fassung vom 05.11.2021)), (hereinafter: Public service - Staff statistics (2020)), p. 25. These numbers include 21,370 civil servants working in the 'Railways and public transport' sector mostly in private companies, ibid, p. 50.

[98] In the sector 'Education, science, research, cultural affairs', see Public service - Staff statistics (2020), footnote 97, p. 46.

[99] In the subsector 'General education and vocational schools' 651,000 persons work as civil servants, ibid.

[100] Public service - Staff statistics (2020), footnote 97, p. 10.

[101] *Enerji Yapi-Yol Sen v. Turkey*, no. 68959/01, 21 April 2009, para. 32 (translated from French).

Intermediate Conclusions

By denying all civil servants independently of their function and by not guaranteeing them the right to strike to civil servants not exercising the authority of the state like teachers, postal and railway, Germany continues to fail to comply with the requirements of article 6§4 ESC.

2.5.15 Conclusion

On the basis of the above, it is suggested that the Committee concludes that the situation in Germany continues not to be in conformity with Article 6§4 of the 1961 Charter on the ground that the denial of the right to strike to civil servants as a whole, regardless of whether they exercise public authority, constitutes an excessive restriction to the right to strike.