March 2023

EUROPEAN SOCIAL CHARTER (REVISED)

European Committee of Social Rights

Conclusions 2022

MONTENEGRO

This text may be subject to editorial revision.

The function of the European Committee of Social Rights is to rule on the conformity of the situation in States with the European Social Charter. In respect of national reports, it adopts conclusions; in respect of collective complaints, it adopts decisions.

Information on the Charter, statements of interpretation, and general questions from the Committee, are contained in the General Introduction to all Conclusions.

The following chapter concerns Montenegro, which ratified the Revised European Social Charter on 3 March 2010. The deadline for submitting the 11th report was 31 December 2021 and Montenegro submitted it on 27 May 2022.

The Committee recalls that Montenegro was asked to reply to the specific targeted questions posed under various provisions (questions included in the appendix to the letter, whereby the Committee requested a report on the implementation of the Charter). The Committee therefore focused specifically on these aspects. It also assessed the replies to the previous conclusions of non-conformity, deferral and conformity pending receipt of information (Conclusions 2018).

In addition, the Committee recalls that no targeted questions were asked under certain provisions. If the previous conclusion (Conclusions 2018) found the situation to be in conformity, there was no examination of the situation in 2022.

In accordance with the reporting system adopted by the Committee of Ministers at the 1196th meeting of the Ministers' Deputies on 2-3 April 2014, the report concerned the following provisions of the thematic group III "Labour Rights":

- the right to just conditions of work (Article 2,
- the right to a fair remuneration (Article 4),
- the right to organise (Article 5),
- the right to bargain collectively (Article 6),
- the right to information and consultation (Article 21),
- the right to take part in the determination and improvement of the working conditions and working environment (Article 22),
- the right to dignity at work (Article 26),
- the right of workers' representatives to protection in the undertaking and facilities to be accorded to them (Article 28),
- the right to information and consultation in collective redundancy procedures (Article 29).

Montenegro has accepted all provisions from the above-mentioned group except Articles 2§3, 2§4, 2§5, 2§7, 4§1, 4§4, 21, 22 and 26§2.

The reference period was from 1 January 2017 to 31 December 2020.

The conclusions relating to Montenegro concern 14 situations and are as follows:

- 6 conclusions of conformity: Articles 2§2, 2§6, 4§2, 6§2, 6§3 and 29;
- 5 conclusions of non-conformity: Articles 4§3, 4§5, 6§4, 26§1 and 28.

In respect of the other 3 situations related to Articles 2§1, 5 and 6§1, the Committee needs further information in order to examine the situation.

The Committee considers that the absence of the information requested amounts to a breach of the reporting obligation entered into by Montenegro under the Revised Charter.

The next report from Montenegro will deal with the following provisions of the thematic group IV "Children, families, migrants" :

- the right of children and young persons to protection (Article 7),
- the right of employed women to protection of maternity (Article 8),
- the right of the family to social, legal and economic protection (Article 16),
- the right of children and young persons to social, legal and economic protection (Article 17),

- the right of migrant workers and their families to protection and assistance (Article 19),
- the right of workers with family responsibilities to equal opportunities and equal treatment (Article 27),
- the right to housing (Article 31).

The deadline for submitting that report was 31 December 2022.

Conclusions and reports are available at www.coe.int/socialcharter.

Article 2 - Right to just conditions of work

Paragraph 1 - Reasonable working time

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to targeted questions for Article 2§1 of the Charter, as well as, where applicable, previous conclusions of non-conformity, deferrals, or conformity pending receipt of information (see the appendix to the letter, whereby the Committee requested a report on the implementation of the Charter in respect of the provisions falling within the thematic group "Labour rights").

The Committee deferred its previous conclusion pending receipt of the information requested (Conclusions 2018). The assessment of the Committee will therefore concern the information provided in the report in response to the conclusion of deferral and to the targeted questions.

Measures to ensure reasonable working hours

In its previous conclusion, the Committee asked for information concerning possible violations of working time regulations identified by the labour inspectorate (Conclusions 2018).

In its targeted question, the Committee asked for updated information on the legal framework to ensure reasonable working hours (weekly, daily, rest periods, …) and exceptions (including legal basis and justification). It also asked for 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.).

The Committee recalls that teleworking or remote working may lead to excessive working hours. It also reiterates that it is necessary to enable fully the right of workers to refuse to perform work outside their normal working hours or while on holiday or on other forms of leave (sometimes referred to as the 'right to disconnect'). States Parties must ensure that employers have a duty to put in place arrangements to limit or discourage unaccounted for out-of-hours work, especially for categories of workers who may feel pressed to overperform. In some cases, arrangements may be necessary to ensure the digital disconnect in order to guarantee the enjoyment of rest periods (Statement on digital disconnect and electronic monitoring of workers).

The report states that as a result of an amendment of the Labour Law in 2020, the total uninterrupted weekly rest time now amounts to 36 hours. Derogations from the rules on daily and weekly rest periods are described in Article 78 of the Labour Law and they relate to the necessity to ensure uninterrupted production, if the activities require permanent presence, for example, in railway traffic, in shift work.

The report states that in 2019, the Labour Inspectorate carried out 532 inspections bearing on weekly rest and issued fines in the amount of €114,700; in 2020, there were 163 inspections and fines issued amounted to €3,300.

Law and practice regarding on-call periods

Previously, the Committee asked whether inactive periods of on-call duty were considered or not as rest periods (Conclusions 2018).

In the targeted question, the Committee asked for information on law and practice as regards on-call time and service (including as regards zero-hour contracts), and how are inactive on-call periods treated in terms of work and rest time as well as remuneration.

In reply, the report states that inactive on-call time not at the workplace is not considered as working time. The report also states that the amount of salary increase for on-call time is

determined by collective agreement. For example, the Branch Collective Agreement on Health states that the worker's salary must be increased by 10% for every hour spent on-call at home.

The Committee reiterates that the equivalisation of an on-call period to a rest period, in its entirety, constitutes a violation of the right to reasonable working hours, both for stand-by duty at the employer's premises as well as for on-call time spent at home (*Confédération générale du travail (CGT) and Confédération française de l'encadrement-CGC (CFE-CGC)* v. France, Complaint No. 149/2017, decision on the merits of 19 May 2021, §61). The Committee asks whether inactive on-call time outside the workplace in Montenegro is assimilated to a rest period. The Committee notes that, if this information is not provided in the next report, there will be nothing to establish that the situation is conformity with Article 2§1 of the Charter.

The report states that zero-hour contracts are not recognised in Montenegro.

Covid-19

In the context of the Covid-19 crisis, the Committee asked the States Parties to 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. More specifically, the Committee asked for information on the enjoyment of the right to reasonable working time in the following sectors: healthcare and social work; law enforcement, defence and other essential public services; education, transport.

The Committee refers to its statement on Covid-19 and social rights of 24 March 2021.

The report states that during the Covid-19 pandemic, it was possible to work from home or work part-time and the salary of the worker remained the same. Paid leave could be used for parents of children under the age of 11.

Conclusion

Pending receipt of the information requested, the Committee defers its conclusion.

See dissenting opinion by Carmen Salcedo Beltrán on Article 2§1 of the 1961 European Social Charter and the Revised European Social Charter.

Article 2 - Right to just conditions of work

Paragraph 2 - Public holidays with pay

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that no targeted questions were asked for Article 2§2 of the Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the “Labour rights” thematic group).

As the previous conclusion found the situation in Montenegro to be in conformity with the Charter (Conclusions 2018), there was no examination of the situation in 2022 on this point. Therefore, the Committee reiterates its previous conclusion.

Covid-19

In reply to the question regarding special arrangements related to the pandemic, the report indicates that no changes have been introduced regarding the right to public holidays with pay.

The Committee refers to its statement on Covid-19 and social rights of 24 March 2021.

Conclusion

The Committee concludes that the situation in Montenegro is in conformity with Article 2§2 of the Charter.

Article 2 - Right to just conditions of work

Paragraph 6 - Information on the employment contract

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that no targeted questions were asked for Article 2§6 of the Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the “Labour rights” thematic group).

The Committee deferred its previous conclusion pending receipt of information as to which written document (contract or some other document) specified the notice period or periods for termination of the contract or the employment relationship (Conclusions 2018). The assessment of the Committee will therefore concern the information provided in the report in response to the conclusion of deferral.

The report notes that a new Labour Code entered into force in 2020, which has provisions on the contents of an employment contract. Pursuant to Article 21§1 of the Labour Code, the employment contract shall specify the length of the notice period in case of termination. Other provisions provide that fines shall be imposed for non-compliance with this obligation and that employers shall provide employees with one copy of the employment contract on their first working day.

Covid-19

In reply to the question regarding the special arrangements related to the pandemic, the report notes that no special arrangements were made.

Conclusion

The Committee concludes that the situation in Montenegro is in conformity with Article 2§6 of the Charter.

Article 4 - Right to a fair remuneration

Paragraph 2 - Increased remuneration for overtime work

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to targeted question for Article 4§2 of the Charter, as well as, where applicable, previous conclusions of non-conformity, deferrals, or conformity pending receipt of information (see the appendix to the letter, whereby the Committee requested a report on the implementation of the Charter in respect of the provisions falling within the thematic group "Labour rights").

In its previous conclusion, the Committee found that the situation in Montenegro was in conformity with Article 4§2 of the Charter (Conclusions 2018). The assessment of the Committee will therefore concern the information provided in the report in response to the targeted question.

Covid-19

In the context of the Covid-19 crisis, the Committee asked the States Parties to explain the impact of the Covid-19 crisis on the right to a fair remuneration as regards overtime and provide information on measures taken to protect and fulfil this right. The Committee asked for specific information on the enjoyment of the right to a fair remuneration/compensation for overtime for medical staff during the pandemic and explain how the matter of overtime and working hours was addressed in respect of teleworking (regulation, monitoring, increased compensation).

The Committee refers to its statement on Covid-19 and social rights of 24 March 2021.

The report states that the Covid-19 pandemic did not affect the legislation governing overtime work. However, a working group was set up to make amendments to the Labour Law on teleworking. The Committee asks to be kept informed about these amendments.

Conclusion

The Committee concludes that the situation in Montenegro is in conformity with Article 4§2 of the Charter.

Article 4 - Right to a fair remuneration

Paragraph 3 - Non-discrimination between women and men with respect to remuneration

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to targeted question for Article 4§3 of the Charter, as well as, where applicable, previous conclusions of non-conformity, deferrals, or conformity pending receipt of information (see the appendix to the letter, whereby the Committee requested a report on the implementation of the Charter in respect of the provisions falling within the thematic group "Labour rights").

With respect to Article 4§3, the States were asked to provide information on the impact of Covid-19 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.

The Committee recalls that it examines the right to equal pay under Article 20 and Article 4§3 of the Charter and does so every two years (under thematic group 1 "Employment, training and equal opportunities", and thematic group 3 "Labour rights").

The Committee deferred its previous conclusion pending receipt of the information requested (Conclusions 2018).

The assessment of the Committee will therefore concern the information provided in the report in response to the conclusion of deferral.

Obligations to guarantee the right to equal pay for equal work or work of equal value

Legal framework

In its previous conclusion (Conclusions 2018), the Committee asked whether the methods used to evaluate work were gender neutral and excluded discriminatory undervaluation of jobs traditionally performed by women.

The report does not contain any information on this point. The Committee reiterates its question. It points out that, should the necessary information not be provided in the next report, nothing will enable the Committee to establish that the situation in Montenegro is in conformity with Article 4§3 of the Charter in this respect.

Effective remedies

In its previous conclusion (Conclusions 2018), the Committee asked whether there were ceilings on the amount of compensation that could be awarded in the event of pay discrimination.

In response, the report indicates that an employee whose rights in this regard have been breached has a right to compensation amounting to the portion of the salary which they were not paid. In this connection, the Committee refers to its previous conclusion on Article 20 (Conclusions 2020) where it noted that according to Article 26 of the law on the prohibition of discrimination, a victim of discrimination may obtain redress in the form of:

(1) the establishment of the fact that the respondent has acted in a discriminatory manner towards the plaintiff;
(2) a prohibition on exercising the activity likely to be treated as discriminatory, i.e., a prohibition on repeating the discriminatory activity;
(2a) removing the consequences of the discrimination;
(3) compensation for the damage in accordance with the law;
(4) the publication in the media, with the respondent bearing the costs, of the judgment establishing discrimination.

Regarding the amount of the compensation, the report does not provide any information. In this context, the Committee also refers to its previous conclusion on Article 20 (Conclusions 2020) where it noted that the law on obligations does not set a limit on the amount of damages that may be awarded to a victim of discrimination, whatever the ground (the amount is decided on a case-by-case basis by the courts).

The report specifies that no complaints regarding equal pay for women and men were brought in the courts during the reference period.

In its previous conclusions (Conclusions 2018 on Article 4§3 and Conclusions 2020 on Article 20), the Committee asked what rules applied to the cases of dismissal following an equal pay claim. The report does not provide any information. Consequently, the Committee finds that the situation is not in conformity with Article 4§3 of the Charter on the ground that it has not been established that adequate remedies are available in the event of dismissal following a claim for equal pay.

Pay transparency and job comparisons

In its previous conclusion (Conclusions 2018), the Committee asked whether pay comparisons across companies were possible.

The report does not contain any information on this point. In this connection, the Committee refers to its previous conclusion on Article 20(c) (Conclusions 2020) on this issue and reiterates all of its questions that were asked there. It points out that, should the necessary information not be provided in the next report, nothing will enable the Committee to establish that the situation in Montenegro is in conformity with Article 4§3 of the Charter in this respect.

Moreover, the Committee asks that the next report provide information on the specific measures provided for in national legislation concerning pay transparency in the labour market, and in particular, the possibility for workers to receive information on the pay levels of other workers and the information available on pay.

Statistics and measures to promote the right to equal pay

The report does not provide any statistical data on equal pay gap during the reference period.

As Montenegro has accepted Article 20.c, the Committee examines policies and other measures to reduce the gender pay gap under Article 20 of the Charter.

The impact of Covid-19 on the right of men and women workers to equal pay for work of equal value

In response to the question on the impact of Covid-19 on the right of men and women workers to equal pay for work of equal value, the report does not provide any information.

The Committee refers to its statement on Covid-19 and Social Rights of 24 March 2021.

Conclusion

The Committee concludes that the situation in Montenegro is not in conformity with Article 4§3 of the Charter on the ground that it has not been established that adequate remedies are available in the event of dismissal following a claim for equal pay.

Article 4 - Right to a fair remuneration

Paragraph 5 - Limits to deduction from wages

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that no targeted questions were asked for Article 4§5 of the Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information, were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the "Labour rights" thematic group).

The Committee recalls that the deductions envisaged in Article 4§5 can only be authorised in certain circumstances which must be well-defined in a legal instrument (for instance, a law, regulation, collective agreement or arbitration award (Conclusions V (1977), Statement of Interpretation on Article 4§5). The Committee further recalls that deductions from wages must be subject to reasonable limits and should not *per se* result in depriving workers and their dependents of their means of subsistence (Conclusions 2014, Estonia). With a view to making an in-depth assessment of national situations the Committee has considered it necessary to change its approach. Therefore, the Committee asks States Parties to provide the following information in their next reports:

- a description of the legal framework regarding wage deductions, including the information on the amount of protected (unattachable) wage;
- Information on the national subsistence level, how it is calculated, and how the calculation of that minimum subsistence level ensures that workers can provide for the subsistence needs of themselves and their dependents.
- Information establishing that the disposable income of a worker earning the minimum wage after all deductions (including for child maintenance) is enough to guarantee the means of subsistence (i.e., to ensure that workers can provide for the subsistence needs of themselves and their dependents).
- a description of safeguards that prevent workers from waiving their right to the restriction on deductions from wage.

Deductions from wages and the protected wage

In its previous conclusion (Conclusions 2018) the Committee asked what were the exceptions to the limitation of deductions to one third of the wage provided for by Article 85, paragraph 2 of the Labour Act and what was the level of protected wages.

According to the report, the Labour Act, which entered into force in 2020, provides in its Article 106 that an employer may collect a claim against a worker in accordance with the procedure established by law, final court decisions or with the consent of the employee. According to paragraph 2 of Article 106 if the court refers to mandatory maintenance, in its decision, then up to 50% of the wage can be attached and in all other cases the attachment cannot exceed one third of the wage.

The Committee asks the next report to demonstrate that the protected wage, i.e. the portion of wage left after all authorised deductions, including for child maintenance, in the case of a worker earning the minimum wage, will never fall below the subsistence level established by the Government. The Committee notes that if this information is not provided in the next report, there will be nothing to establish that the situation is in conformity with the Charter.

Waiving the right to the restriction on deductions from wage

In its previous conclusion (Conclusions 2014 and 2018) the Committee asked under which circumstances workers could waive the limitation on deductions from wages provided for by the law. It notes that the report does not provide this information. The Committee therefore

considers that it has not been established that workers cannot waive their right to the limitation on deductions from wages.

Conclusion

The Committee concludes that the situation in Montenegro is not in conformity with Article 4§5 of the Charter on the ground that it has not been established that workers cannot waive their right to the limitation on deductions from wages.

Article 5 - Right to organise

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to the targeted questions for Article 5 of the Charter, as well as, where applicable, previous conclusions of non-conformity, deferrals, or conformity pending receipt of information (see the appendix to the letter, whereby the Committee requested a report on the implementation of the Charter in respect of the provisions falling within the thematic group "Labour rights").

In its previous conclusion, pending receipt of the information requested, the Committee concluded that the situation in Montenegro was in conformity with Article 5 of the Charter (Conclusions 2018).

The Committee also recalls that in the General Introduction of Conclusions 2018, it posed a general question under Article 5 and asked States to provide, in the next report, information on the right of members of the armed forces. to organise.

The assessment of the Committee will therefore concern the information provided in the report in response to the the targeted questions and to the general question.

Prevalence/Trade union density

The Committee asked in its targeted question for data on trade union membership prevalence across the country and across sectors of activity.

In reply to the targeted question, the report states that 1,909 trade unions are registered with the Ministry of Economic Development. The report adds that during 2020 and 2021, 38 new trade union organizations were registered. 559 trade unions were registered in the Register of Representative Trade Unions, and during 2020 and 2021, 24 new representative trade unions were registered. The report further adds that no statistics are kept on the number of trade unions by sectors of activity. The report also states that data on the level of trade union organization are not available because there are no records on the number of trade union members in relation to the number of employees.

Personal scope

In its previous conclusion, the Committee requested that all States to provide information on the right of members of the armed forces to organise (Conclusions 2018 – General question).

The report does not reply to the targeted question. The Committee therefore reiterates its request and considers that if the next report does not provide the information requested, there will be nothing to establish that the situation in Montenegro is in conformity with the Charter on this point.

The Committee recalls that Article 5 of the Charter allows States Parties to impose restrictions upon the right of members of the armed forces to organise and grants them a wide margin of appreciation in this regard, subject to the terms set out in Article G of the Charter. However, these restrictions may not go as far as to suppress entirely the right to organise, such as through the imposition of a blanket prohibition of professional associations of a trade union nature and prohibition of the affiliation of such associations to national federations/confederations (European Council of Trade Unions (CESP) v. France, Complaint No.101/2013, Decision on the merits of 27 January 2016, §§80 and 84).

The Committee recalls that it has previously considered that the complete suppression of the right to organise (which involves freedom to establish organisations/trade unions as well as freedom to join or not to join trade unions) is not a measure which is necessary in a democratic society for the protection of, inter alia, national security (*Confederazione Generale Italiana del*

Lavoro (CGIL) v. Italy, Complaint No. 140/2016, decision on the merits of 22 January 2019, §92).

Restrictions on the right to organize

In its targeted question, the Committee asked for information on public or private sector activities in which workers are denied the right to form organisations for the protection of their economic and social interests or to join such organisations.

In reply to the targeted question, the report states that the right to organise is guaranteed by the Constitution and the Labour Law, and there is no activity or sector in which employees are deprived of this right. Despite this, the report acknowledges that in some activities such as trade, tourism and catering and construction, there is a very low rate of trade union membership.

Forming trade unions and employers' organisations

In its previous conclusion, the Committee asked whether there have been cases where a trade union has in fact been refused registration (Conclusions 2018).

The report does not reply to the question. The Committee therefore reiterates its request and considers that if the next report does not provide the information requested, there will be nothing to establish that the situation in Montenegro is in conformity with the Charter in this point.

In light of an Observation from the ILO (Freedom of Association and Protection of the Right to Organise Convention 148 No. 87) the Committee asks the next report to provide information on the rules governing the deletion of a trade union from the register.

Freedom to join or not to join a trade union

The Committee previously found the situation to be in conformity in this respect (Conclusions 2018).

Trade union activities

The Committee previously found the situation to be in conformity in this respect (Conclusions 2018).

Representativeness

In its previous conclusion, the Committee asked whether minority unions, i.e. those not deemed representative, may still exercise fundamental trade union prerogatives (Conclusions 2018).

The report does not reply to the question. The Committee therefore reiterates its request and considers that if the next report does not provide the information requested, there will be nothing to establish that the situation in Montenegro is in conformity with the Charter on this point

Conclusion

Pending receipt of the information requested, the Committee defers its conclusion.

Article 6 - Right to bargain collectively

Paragraph 1 - Joint consultation

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that no targeted questions were asked for Article 6§1 of the Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the “Labour rights” thematic group).

In its previous conclusion, the Committee found that the situation in Montenegro was in conformity with Article 6§1 of the Charter, pending receipt of information on consultation rights and obligations at the enterprise level (Conclusions 2018).

The Committee notes that the information requested is not provided. The Committee further recalls that consultation at the enterprise level is dealt with under Article 6§1 and Article 21 of the Charter. According to the wording of Article 21 of the Charter, workers or workers’ representatives must be informed on all matters relevant to their working environment and consulted in good time with respect to proposed decisions that could substantially affect workers’ interests. As Montenegro has not yet accepted Article 21 of the Charter, this matter falls to be examined under Article 6§1 of the Charter. The Committee has previously asked questions regarding consultation at the enterprise level in Conclusions 2014 and 2018, without receiving satisfactory replies. It, therefore, reiterates its question regarding consultation rights and obligations at the enterprise level. Should the next report not provide the requested information, there will be nothing to establish that the situation in Montenegro is in conformity with Article 6§1 of the Charter.

Conclusion

Pending receipt of the information requested, the Committee defers its conclusion.

Article 6 - Right to bargain collectively

Paragraph 2 - Negotiation procedures

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that no targeted questions were asked for Article 6§2 of the Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the “Labour rights” thematic group).

The Committee also recalls that in the General Introduction to Conclusions 2018, it posed a general question under Article 6§2 of the Charter and asked States to provide, in the next report, information on the measures taken or planned to guarantee the right to collective bargaining for self-employed workers and other workers falling outside the usual definition of dependent employee.

In its previous conclusion, the Committee found that the situation in Montenegro was in conformity with Article 6§2 of the Charter (Conclusions 2018). The assessment of the Committee will therefore concern the information provided in the report in response to the general question.

As the report does not provide any relevant information in relation to the above-mentioned general question, the Committee reiterates its request for information on the measures taken or planned to guarantee the right to collective bargaining for self-employed workers and other workers falling outside the usual definition of dependent employee.

Covid-19

In reply to the question regarding the special arrangements related to the pandemic, the report notes that the validity of the national collective agreement was extended twice, in 2020 and 2021 respectively. Furthermore, the collective agreement applying in healthcare was extended and amended, including by increasing wages for certain medical professionals.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Montenegro is in conformity with Article 6§2 of the Charter.

Article 6 - Right to bargain collectively

Paragraph 3 - Conciliation and arbitration

The Committee recalls that no questions were asked for Article 6§3 of the Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the “Labour rights” thematic group).

As the previous conclusion found the situation in Montenegro to be in conformity with the Charter, there was no examination of the situation in 2022.

Therefore, the Committee reiterates its previous conclusion.

Conclusion

The Committee concludes that the situation in Montenegro is in conformity with Article 6§3 of the Charter.

Article 6 - Right to bargain collectively

Paragraph 4 - Collective action

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that no targeted questions were asked for Article 6§4 of the Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the "Labour rights" thematic group).

The Committee also recalls that in the General Introduction to Conclusions 2018, it posed a general question under Article 6§4 and asked States to provide, in the next report, information on the right of members of the police to strike and any restrictions.

In its previous conclusion (Conclusions 2018), the Committee considered that the situation in Montenegro was not in conformity with Article 6§4 of the Charter on the grounds that the sectors in which the right to strike could be restricted were overly extensive and that it had not been established that the restrictions fell within the limits set by Article G of the Charter. It also requested that the next report provide various information. The assessment of the Committee will therefore concern the information provided in the report in response to the conclusion of non-conformity, to the requests for information and to the general question.

Right to collective action

Definition and permitted objectives

In its previous conclusion, the Committee asked whether strikes could only be called within the framework of collective bargaining.

In reply, the Government states that the Law on Strike of 2015 defines strikes as an interruption of work by employees with a view to protect their professional, economic and social interests. A strike may be held to protect employees' interests whether or not a collective agreement is being amended or a new one is being negotiated, or regardless of the type of collective bargaining involved.

The Committee considers the situation to be in conformity with Article 6§4 of the Charter on this point.

Entitlement to call a collective action

In its previous conclusion, the Committee sought clarification as to whether a decision to call a strike at branch or industry level may only be made by a representative trade union.

In reply, the Government states that under Article 13 of the Law on Strike, the decision to call a branch or general strike lies with the competent body of the representative trade union at branch level, i.e. at state level.

The Committee points out that limiting the right to call a strike to the representative or most representative trade unions is a restriction which is not in conformity with Article 6§4 of the Charter. It follows that the situation is not in conformity with the Charter on this point.

Restrictions to the right to strike, procedural requirements

In its previous conclusion, the Committee asked what the notice period was for branch, industry-wide and general strikes. It also asked whether there were cooling-off periods during which conciliation was mandatory.

In reply, the Government states that the notice period for branch and general strikes is ten days. The Committee asks for clarification in the next report on whether there are cooling-off periods during which conciliation is mandatory.

In its previous conclusion, the Committee considered that the sectors in which the right to strike could be restricted were overly extensive and that it had not been established that the restrictions fell within the limits set by Article G of the Charter. It also asked for clarification on the minimum service to be provided during strikes.

In its report, the Government states that the Constitution and the Law on Strike clearly and unequivocally provide that the staff of the armed forces, the police, state bodies and public services have the right to strike, but this right may be restricted in order to protect the public interest. In other words, such employees may hold a strike but only in a way which will not endanger national security, the security of persons or property, the general interest of citizens or the functioning of government bodies. The decision on whether a strike compromises the public interest is taken by the authority in charge of national security (Article 18 of the Law on Strike).

A minimum service must be provided in the event of a strike in the armed forces, the police, state bodies or public services, and in other sectors, namely: (i) public interest activities; (ii) secondary and higher education, and; (iii) the chemical and ferrous and non-ferrous metal-working industries (Article 22 of the Law on Strike). Under Article 23 of the Law on Strike, minimum service rules must be determined by a tripartite agreement (between the relevant authority, employer and trade union) within 90 days of the entry into force of the law in question (or where there is no such agreement, at a later date, by an arbitration council made up of representatives of the parties and an expert in the area concerned). The Government emphasises that worker representatives are therefore involved in the process.

The Committee notes that there has been no change in the situation since its last conclusion: there are still very many sectors in which the right to strike may be restricted. The Committee would also point out that although the right to strike of certain categories of public officials may be restricted, under Article G these restrictions should be limited to public officials whose duties and functions, given their nature or level of responsibility, are directly related to national security, general interest, etc. and this does not seem to be the case in Montenegro. Lastly, the Committee notes that the Government has failed to provide any detailed information on the minimum service requirement (particularly the main ways in which minimum service is organised). For these reasons, the Committee considers, as in its previous conclusion, that the sectors in which the right to strike may be restricted are overly extensive, and that it has not been established that the restrictions fall within the limits set by Article G of the Charter.

Covid-19

In the context of the Covid-19 health crisis, the Committee asked all States to provide information on:

- specific measures taken during the pandemic to ensure the right to strike;
- as regards minimum or essential services, 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.

The Committee points out that in its Statement on Covid-19 and social rights adopted on 24 March 2021, it specified that Article 6§4 of the Charter entails a right of workers to take collective action (e.g. work stoppage) for occupational health and safety reasons. This means, for example, that strikes in response to a lack of adequate personal protective equipment or inadequate distancing, disinfection and cleaning protocols at the workplace would fall within the scope of the protection afforded by the Charter.

In its report, the Government states that during the pandemic, there was no change in the legislation to limit or reduce the rights to take collective action or to strike. Nor did the state

introduce any direct or indirect measure to reduce labour rights during the Covid-19 crisis. According to the Labour Inspectorate, there were no strikes during the pandemic. The Government also points out that the Labour Inspectorate did not receive any reports from workers' representatives or trade union activists about employers or entrepreneurs taking advantage of the situation to suppress or prevent the exercise of the right to trade union activity.

Conclusion

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

- only representative trade unions have the right to initiate branch-level or general strikes;
- the range of sectors in which the right to strike may be restricted is too extensive and it has not been established that the restrictions on the right to strike fall within the limits set by Article G of the Charter.

Article 26 - Right to dignity in the workplace

Paragraph 1 - Sexual harassment

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to targeted questions for Article 26§1 of the Charter, as well as, where applicable, previous conclusions of non-conformity, deferrals, or conformity pending receipt of information (see the appendix to the letter, whereby the Committee requested a report on the implementation of the Charter in respect of the provisions falling within the thematic group "Labour rights").

In its previous conclusion, the Committee deferred its conclusion, pending receipt of the information requested (Conclusions 2018).

The assessment of the Committee will therefore concern the information provided in the report in response to the questions raised in its previous conclusion, and to the targeted questions.

Prevention

For this monitoring cycle, the Committee welcomed information on awareness-raising and prevention campaigns as well as on action taken to ensure that the right to dignity at work is fully respected in practice.

In its previous conclusions, the Committee asked whether and to what extent employers' and workers' organisations are consulted on initiatives to promote awareness, information and prevention of sexual harassment in the workplace (Conclusions 2014, Conclusions 2018).

The report indicates that, in 2021 (outside the reference period), tripartite consultations took place within the Social Council on considering the ratification of ILO Convention No. 190 on the elimination of violence and harassment in the world of work. The results of an analysis prepared by the ILO on the compliance of the national legal framework with the requirements of the ILO Convention No. 190 were presented at a round table discussion that brought together government representatives, representatives of trade unions and employers' organisations, and representatives of the business sector.

The report adds that the Government adopted a new National Strategy for Gender Equality 2021-2025, with an Action Plan for 2021-2022. The National Strategy for Gender Equality, through Operational Objective 3, Measure 3.3, aims to prevent sex and gender discrimination and sexual harassment in the workplace. One of the planned activities, to be implemented by the end of 2022, is a Recommendation to private companies to adopt protocols for protection against gender-based discrimination and sexual harassment in the workplace.

Liability of employers and remedies

In a targeted question, the Committee asked for information on the regulatory framework and any recent changes introduced to combat sexual harassment and abuse in the framework of work or employment relations.

The report indicates that, under the new Labour Law (*Official Gazette of Montenegro*, No. 74/19, which entered into force on 6 January 2020), the prohibition of harassment and sexual harassment at work and in relation to work applies also in relation to access to vocational guidance, vocational training and advanced vocational training, promotion at work and termination of employment, as well as to other aspects of employment (Article 10(1) of the Labour Law) (before the entry into force of the new Labour Code, the ban concerned only harassment and sexual harassment at work and in relation to work).

Harassment is defined as any unwanted behaviour based on any of the grounds referred to in Articles 7 and 8 of the Labour Law, as well as harassment through audio and video surveillance, mobile devices, social networks and Internet, with the purpose or effect of

undermining the dignity of a person seeking employment or of an employed person, which causes or intends to cause fear, humiliation or dishonour, or of creating or intending to create a hostile, degrading or offensive environment (Article 10(2) of the Labour Law). Under the Labour Law, sexual harassment is defined as any unwanted verbal, non-verbal or physical conduct which has the aim or effect of violating the dignity of a job seeker or an employee, in particular when such conduct creates an intimidating, hostile, degrading, unpleasant, aggressive or offensive environment (Article 10(3) of the Labour Law).

The report adds that under Article 10(4) of the Labour Law, the employee must not suffer adverse consequences for having reported or witnessed harassment and sexual harassment at work or in connection with work.

In its previous conclusion, the Committee noted that under the Law on the Prohibition of Harassment at Work, perpetrators of harassment can include an employer who is a natural person, a manager engaged by the employer in the capacity of legal entity, an employee/group of employees working for the employer, and/or a third party who interacts with the employer or the employee in the workplace (Conclusions 2018). The Committee also noted that under Article 10 of the Law on the Prohibition of Harassment at Work, an employer can be held liable for damages that a responsible person, an employee or group of employees causes to another employee (Conclusions 2018). The Committee asked that the next report provides information on the liability of the employer in the event that the perpetrator of sexual harassment is a person not employed by them, such as an independent contractor, a self-employed worker, a visitor, a client, etc. It pointed out that in the absence of such information in the next report there would be nothing to establish that the situation is in conformity with the Charter in this respect (Conclusions 2018).

The report, like the previous report, states that under the Law on the Prohibition of Harassment at Work, the perpetrator of harassment is considered to be an employer with the status of a natural person, a responsible person with an employer with the status of a legal entity, an employee or group of employees with the employer or a third party with whom the employee or the employer have contact during the performance of tasks at the workplace. In addition, this law applies to employers and employees, in accordance with the labour regulations as well as to persons engaged outside the employment relationship such as: persons in vocational training and development; pupils and students undergoing practical training; volunteers; persons who perform certain tasks while serving a prison sentence or educational measures; persons in voluntary and public works, works organised in the general interest, labour activities and competitions, and any other person who on any basis participates in the work with the employer (Article 3 of the Law on the Prohibition of Harassment at Work).

Damages

In a targeted question, the Committee asked whether any limits apply to the compensation that might be awarded to the victim of sexual harassment for moral and material damages.

In its previous conclusion, the Committee noted that there were no cases pending before the Court of First Instance and that no judicial decisions concerning sexual harassment in the workplace had been issued since 1 January 2017 (Conclusions 2018). The Committee reiterated its question and asked for the next report to provide any relevant case law or other evidence of the effectiveness of remedies, whether judicial, administrative or otherwise, in particular as regards the range of damages awarded in sexual harassment cases. The Committee pointed out that in the absence of such information in the next report, there will be nothing to establish that the situation is in conformity with the Charter in this respect (Conclusions 2018).

The report indicates that under the Law on the Prohibition of Harassment at Work, the employer is obliged to provide work for employees at the workplace and in a working environment under conditions that ensure respect for their dignity, integrity and health, and to take the necessary measures to protect them from harassment. A fine ranging from €500 to

€10 000 will be imposed on a legal entity where it does not take the aforementioned preventive measures for employees. In addition, the Law on the Prohibition of Discrimination provides that a fine of between €1 000 to €20 000 shall be imposed on a legal person in the event that: (i) it engages in any unwanted conduct, including harassment by means of audio and video surveillance, mobile devices, social networks and the internet, with the purpose or effect of violating personal dignity, generating fear, feelings of humiliation or insult or creating a hostile, degrading or offensive environment (Article 7 paragraph 1); or (ii) it engages in any unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person or group of persons, in particular when such conduct creates fear or a hostile, degrading, intimidating or offensive environment (Article 7, paragraph 2).

The report provides information on the cases of harassment reported to the Labour Inspectorates during the reference period: 21 reported cases of which six were by women in 2017, 14 reported cases of which five were by women in 2018, 13 reported cases of which six were by women in 2019, and 8 reported cases of which four were by women in 2020. No information is provided on the outcome of these cases and the compensation awarded to victims.

The Committee notes that the report provides information on the sanctions that can be imposed on employers in cases of sexual harassment according to the law. It does not provide any examples of relevant case law or other evidence of the effectiveness of remedies, whether judicial, administrative or otherwise, in particular as regards the range of damages awarded in sexual harassment cases. The report also fails to respond to the targeted question regarding the limits to compensation that might be awarded to a victim of sexual harassment.

The Committee also notes from the *Country report on gender equality 2021* of the European network of legal experts in gender equality and non-discrimination that harassment and sexual harassment, although regulated by the 2008 Labour Law, are difficult to prove in practice. The same report indicates that there has not been a single Supreme Court ruling on this issue.

In the absence of the requested information, the Committee concludes that the situation in Montenegro is not in conformity with Article 26§1 of the Charter on the ground that it has not been established that appropriate and effective redress (compensation and reinstatement) is guaranteed in cases of sexual harassment.

Covid-19

In a targeted question, the Committee asked for information on specific measures taken during the pandemic to protect the right to dignity in the workplace and notably as regards sexual harassment. The Committee welcomed specific information about categories of workers in a situation of enhanced risk, such as night workers, home and domestic workers, store workers, medical staff, and other frontline workers.

The report indicates that no concrete measures to protect against sexual and psychological harassment have been adopted. It states that, during the pandemic, all legislative and judicial measures in this area were in force in order to protect employees. The report also states that the number of cases of harassment at work reported to the Labour Inspection did not exceed the number of cases reported before the pandemic (e.g. 13 reported cases of which 6 were reported by women in 2019; 8 reported cases of which 4 were reported by women in 2020 and 17 reported cases of which 14 were reported by women in 2021).

Conclusion

The Committee concludes that the situation in Montenegro is not in conformity with Article 26§1 of the Charter on the ground that it has not been established that appropriate and effective redress (compensation and reinstatement) is guaranteed in cases of sexual harassment.

Article 28 - Right of workers' representatives to protection in the undertaking and facilities to be accorded to them

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee points out that no targeted questions were asked in relation to Article 28 of the Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the "Labour rights" thematic group).

In previous conclusions (Conclusions 2018), the Committee deferred its conclusion. In the present conclusion, the assessment of the Committee will therefore concern the information provided by the Government in response to its previous questions.

Types of workers' representatives

In Conclusions 2018, the Committee took note that employees are represented in Montenegro by trade unions or other workers' representatives. It asked for more details on the additional forms of employee representation.

In reply, the report indicates that the new Labour Law in Montenegro which entered into force in January 2020 stipulates that employees and employers have the right to freely establish, without prior approval, their organisations and to join them. Article 194 of the Labour Law stipulates that the trade union independently decides on the manner of its representation with the employer. The union may appoint or elect one authorized union representative to represent it. The trade union is obliged to inform the employer about the appointment of the authorised trade union representative within 15 days from the day of entry in the register kept by the Ministry, in accordance with the law.

The report also indicates that in case no trade union is established, one employee shall be elected to represent the employees. The workers' representative has the right to participate in the discussions with the employer, when issues including development plans and their impact on the position of employees and planned changes in the wage policy; overtime work; and measures taken to improve working conditions are considered.

Protection granted to workers' representatives

In Conclusions 2018, the Committee asked that the next report provide information on the protection of workers' representatives against prejudicial acts short of dismissal, which may entail for instance, denial of certain benefits, training opportunities, promotions or transfers, discrimination when issuing lay-offs or assigning retirement options, being subjects to shifts cut-down or any other taunts or abuse. The Committee reserved its position on this point.

In reply, the report indicates that the Labour Law provides for the following guarantees only to the authorised trade union representative, during the trade union activities and six months after the cessation of trade union activities: they cannot be called to account, cannot be assigned to another job or to another work-place with the same or another employer, or otherwise disadvantaged, if they act in accordance with the law, the collective agreement and the employment contract.

The report also explains that the provisions of the previous Labour Law equated the employee representative and the authorised trade union representative. This was changed in the new Labour Law due to the ambiguity and inadequate application. The Committee asks whether the rules on the protection granted to workers representatives against dismissals, which the Committee found to be in conformity with the Charter in previous conclusions (Conclusions 2014 and 2018) were modified in the new Labour Code.

As to the protection against prejudicial acts short of dismissal granted to workers' representatives other than trade union representatives, the report indicates that in case no trade union is established, the workers' representatives are provided with certain rights, including, being informed about any change of the employer; reasons for changing the employer; legal, economic and social consequences of the change of employer; measures concerning employees whose employment contract are transferred. According to the report, the employer has also the obligation to inform the workers' representatives at least once a year about development plans and planned changes in the wage policy; business results; the list of employees and their working status; realised overtime work, recorded injuries at work and measures taken to improve working conditions.

The Committee understands from the information provided in the report, that the protection against prejudicial acts short of dismissal is granted only to trade union representatives and not to other workers' representatives. Apart from the employers' obligation to inform the workers' representative concerning the working conditions, the report does not provide for any information concerning the protection granted to workers' representatives other than trade union representatives, against prejudicial acts short of dismissal. The Committee therefore reiterates its previous questions in this regard and concludes that it has not been established that that workers' representatives other than trade union representatives are effectively protected against prejudicial acts short of dismissal.

Facilities granted to workers' representatives

In Conclusions 2018, the Committee took note that the General Collective Agreement provides for detailed normative conditions for trade unions' work and that the employer is obliged to provide the unions with all necessary means for the effective performance of their activities, including premises, technical and administrative support, access to media, paid time off, right to participate in seminars, courses and conferences. The Committee asked that the next report confirm that there is also a legal basis upon which the listed facilities could likewise be accorded to workers' representatives other than trade union representatives.

The report does not provide any information on facilities afforded to workers representatives and does not provide any answer to the previous question of the Committee as to the legal basis upon which the facilities could also be accorded to workers' representatives other than trade union representatives. The Committee reiterates its request for information on facilities mentioned in the R143 Recommendation concerning protection and facilities to be afforded to workers representatives within the undertaking adopted by the ILO General Conference of 23 June 1971, including access to premises, use of materials, distribution of information, support in terms of benefits, training costs (Statement of Interpretation, Conclusions 2016).

The Committee concludes that it has not been established that facilities granted to workers' representatives are adequate.

Covid-19

The report indicates that during the pandemic, workers 'or union representatives did not submit any complaints to the Labour Inspectorate concerning cases of abuse by employers-entrepreneurs to reduce workers' rights during such a situation or prevent union representatives from performing their union activities. The only complaints submitted to the labour inspection were individual in nature and related to the rights of the employee (who is also a trade union representative) whose employment was terminated based on the expiration of the fixed-term employment contract.

Conclusion

The Committee concludes that the situation in Montenegro is not in conformity with Article 28 of the Charter on the grounds that it has not been established that:

- workers' representatives other than trade union representatives are effectively protected against prejudicial acts short of dismissal and,
- facilities granted to workers' representatives are adequate.

Article 29 - Right to information and consultation in procedures of collective redundancy

The Committee takes note of the information contained in the report submitted by Montenegro.

The Committee points out that no targeted questions were asked in relation to Article 29 of the Charter. For this reason, only States in relation to which the previous conclusion had been a conclusion of non-conformity, deferral or conformity pending receipt of information were required to provide information for this provision in the current reporting cycle (see the appendix to the letter in which the Committee requested a report on the implementation of the Charter in respect of the provisions relating to the "Labour rights" thematic group).

In the previous conclusions (Conclusions 2018), pending receipt of the information requested, the Committee deferred its conclusions.

In the present conclusion, the assessment of the Committee will therefore concern the information provided by the Government in response to the questions asked in the previous conclusion (Conclusions 2018).

Sanctions and preventative measures

In Conclusions 2018, the Committee asked what sanctions were available if employers failed to notify workers' representatives about planned redundancies and what preventative measures existed to ensure that redundancies did not take effect before employers had met their obligation to inform and consult employees' representatives.

In reply, the report indicates that during the information and consultation process in procedures of collective redundancy, the trade union or employees' representatives may submit their remarks and proposals to the Employment Bureau and the employer regarding the information provided by the employer before the consultation procedure and the information about the results of the consultation provided by the employer to the Employment Bureau. According to the report, informing the Employment Bureau about the results of the consultation process must precede the decision on collective redundancies. Article 168§1 of the Labour Law stipulates that the employer may not make a decision on termination of employment before the expiration of 30 days from the date of submission of the notification to the Employment Bureau on the results of the consultation. Paragraph 2 of the same article stipulates that the Employment bureau may order the employer in writing to postpone the procedure of terminating the employment contract of all or individual employees whose work is no longer needed, for a maximum of 30 days.

The report also indicates that Article 209 of the Labour Law stipulates that a fine in the amount of €1,000 to €10,000 shall be imposed on a legal entity for a misdemeanour if it fails to conduct information and consultations in accordance with the Labour Law. The responsible person in the legal entity will also be fined in the amount of €100 to €1,000 and the entrepreneur in the amount of €500 to €5,000.

Conclusion

The Committee concludes that the situation in Montenegro is in conformity with Article 29 of the Charter.

Dissenting opinion by Carmen Salcedo Beltrán on Article 2§1 of the 1961 European Social Charter and the Revised European Social Charter

Article 2§1 of the 1961 European Social Charter, and the Revised European Social Charter provides that the Contracting Parties, with a view to ensuring the effective exercise of the right to just conditions of work, undertake "to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit".

The European Committee of Social Rights has ruled in the past on this provision and in particular on the guarantees provided for on-call duty, those periods during which the employee, without being at his place of work and without being at the permanent and immediate disposal of the employer, must be contactable and able to intervene in order to carry out work for the company.

The Committee examined their legal regime through the two systems for monitoring the compliance with the European Social Charter. On the one hand, four decisions on the merits, under the collective complaints procedure have been adopted: decision on the merits of 12 October 2004, *Confédération française de l'Encadrement CFE-CGC* v. France, Collective Complaint No. 16/2003; decision on the merits of 8 December 2004, *Confédération Générale du Travail (CGT)* v. France, Collective Complaint No. 22/2003; decision on the merits of 23 June 2020, *Confédération Générale du Travail (CGT)* v. France, Collective Complaint No 55/2009; decision on the merits of 19 May 2021, *Confédération générale du travail (CGT) and Confédération française de l'encadrement-CGC (CFE-CGC)* v. France, Collective Complaint No 149/2017.

On the other hand, directly or indirectly, 68 conclusions on the reporting system, of which 35 were of non-conformity, have been adopted (Conclusions 2018, Conclusions XXI-3, Conclusions 2014, Conclusions XX-3, Conclusions 2013, Conclusions 2011, Conclusions 2010, Conclusions XVIII-2, Conclusions 2007, Conclusions XVII-1, Conclusions XVI-2, Conclusions XVI-1).

As a result of this consolidated case law, the Committee has focused its attention on on-call periods, in order to decide whether or not article 2§1 of the European Social Charter has been complied with, or violated, on two specific points that it has clearly identified in this respect:

1º. On one hand, on the payment to the on-call employee of a compensation, either in financial form (bonus) or in the form of rest, in order to compensate for the impact on his/her ability to organise his private life and manage his personal time in the same way as if he/she was not on call.

2º. On the other hand, on the minimum duration of the compulsory daily and/or weekly rest period which all States must respect and which all workers must enjoy. It is common for employees to start their on-call period, totally or partially, at the end of their working day and end it at the beginning of the next working day. Even if the employee is not required to carry out actual work, the consequence is that he/she will not have had his/her rest time at his/her disposal in full freedom or without any difficulty, i.e. the conditions and purpose of the minimum rest period are difficult to achieve *stricto sensu*.

In this perspective, I would like to emphasise the two effects mentioned which impact on two different elements of the employment relationship (salary and minimum rest period). States often integrate them together into one, so that the payment of a bonus is the most usual (only) remedy (compensation for the first effect) and the legal assimilation of the on-call period without carrying out actual work to rest time (i.e. it has no consideration for the second effect).

The case law that the ECSR has adopted in recent years has considered both effects separately. Both must be valued and respected at the same time. On one hand, the availability of the employee to intervene must be compensated. On the other hand, the consequences for the minimum period of compulsory rest must be considered. For this reason, in the four

decisions on the merits mentioned above, France was condemned for the violation of article 2§1 of the revised European Social Charter. As far as France is concerned, even though Article L3121-9 of the Labour Code provides that "the period of on-call duty shall be compensated for, either financially or in the form of rest", it should be noted that considering on-call duty without intervention for the calculation of the minimum daily rest period undermines the second condition. Indeed, it is necessary to point out that the ECSR specified in the last decision on the merits that this considering will involve a violation of the provision if it is "in its entirety" (decision on the merits of 19 May 2021, *Confédération générale du travail (CGT)* and *Confédération française de l'encadrement-CGC (CFE-CGC)* v. France, Collective Complaint No. 149/2017.

In the 2022 conclusions, on-call duty was specifically examined. The Committee requested information on the legislation and practice regarding working time, on-call duty and how inactive periods of on-call duty were treated in terms of working time and rest and their remuneration.

It should be noted that most responses did not answer in the affirmative. In other words, the State reports did not inform the Committee simply that "on-call time is working time or rest time". However, the answers had a negative meaning, i.e., the responses stated verbatim that on-call duty "is not considered as working time".

The majority of the Committee felt that this information did not answer the question asked and decided to defer most of the conclusions.

I regret that I am unable to agree with these conclusions. I will explain my reasons below. Firstly, I consider that the negative responses from the Member States provide sufficient information on the legislative frameworks in place regarding the inclusion of on-call duty in daily or weekly rest periods. In my opinion, it is meaningless not to examine or value the replies, because the sentence "on-call duty is rest time" is not transcribed positively, but "on-call duty is not working time" is transcribed negatively. I believe that the Committee has sufficient information to assess conformity or non-conformity.

In my view, the consequences of not assessing this information are remarkable. Firstly, it encourages States not to provide the information within the time limits set by the Committee and to take advantage of an attitude that, in addition, does not comply with an obligation that they know perfectly well and that they have become accustomed to not fulfilling.

Secondly, it should be remembered that the legal interpretation of the European Social Charter goes beyond a textual interpretation. It is a legal instrument for the protection of human rights which has binding force. A treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Art. 31 Vienna Convention on the Law of Treaties). In the light of the Charter, it means protecting rights that are not theoretical but effective (European Federation of National Organisations Working with the Homeless (FEANTSA) v. Slovenia, Collective Complaint No. 53/2008, decision on the merits of 8 September 2009, §28). As such, the Committee has long interpreted the rights and freedoms set out in the Charter in the light of current reality, international instruments and new issues and situations, since the Charter is a living instrument (Marangopoulos Foundation for Human Rights v. Greece, Collective Complaint No. 30/2005, decision on the merits of 6 December 2006, §194; European Federation of National Organisations Working with the Homeless (FEANTSA) v. France, Collective Complaint No. 39/2006, decision on the merits of 5 December 2007, §64 and ILGA v. Czech Republic, Collective Complaint No. 117/2015, decision on the merits of 15 May 2018, §75).

Finally, in the event that the Committee does not have all the relevant information, in my view it should take the most favourable meaning for the social rights of the Charter. In other words, States must provide all the information, which becomes a more qualified obligation when this information has been repeatedly requested. Furthermore, I would like to point out that this

information was requested in previous Conclusions (Conclusions 2018, Conclusions XXI-3, Conclusions 2014, Conclusions XX-3). Therefore, the States were obliged to provide all the information that the Committee has repeatedly requested.

In view of the above arguments, my separate dissenting opinion concerns, firstly, those deferred conclusions by the majority of the Committee members regarding the States which, on one hand, replied that on-call duty "is not working time", and then that they take it into account in the minimum rest period which every employee must enjoy. These include Belgium, Bosnia and Herzegovina, Finland, Germany, Italy, Lithuania, North Macedonia, Malta, Montenegro, Slovak Republic and Spain. Similarly, on the other hand, it concerns States that did not respond or did so in a confused or incomplete manner. These are Albania, Estonia, Georgia, Hungary, Ireland, Latvia and the Republic of Moldova. It follows from all the above considerations that the conclusions in relation to all these States should be of non-conformity.

Secondly, my separate dissenting opinion also concerns the "general" findings of conformity with Article 2§1 of the Charter reached by the majority of the Committee in respect of four States. More specifically, with regard to Andorra, the report informs about the on-call time. It "is not considered as actual working time for the purposes of calculating the number of hours of the legal working day, since it does not generate overtime. Nevertheless, it is not considered as rest time either, it being understood that in order to comply with the obligation to benefit from at least one full day of weekly rest, the worker must be released from work at least one day in the week - of course from actual work, but also from the situation of being available outside of his working day-". The document expressly states that one day of weekly rest is respected in relation to on-call duty, but it does not communicate anything about the respect of daily rest (except for a mention of the general minimum duration of 12 hours). In relation to Greece, the report informs that the provisions of labour law do not apply to on-call duty without intervention since, even if the worker has to remain in a given place for a certain period of time, he/she does not have to be physically and mentally ready to work. As regards Luxembourg, the document informs that on-call duty is not working time. Finally, as regards Romania, the report informs, first of all, that Article 111 of the Labour Code, considers the period of availability of the worker as working time. However, immediately, on the organisation and on-call services in the public units of the health sector, informs that on-call duty is carried out on the basis of an individual part-time work contract. On-call hours as well as calls received from home "must be recorded on an on-call attendance sheet, and 'only' the hours actually worked in the health facility where the call is received from home will be considered as on-call hours". Consequently, on the basis of this information, if there are no hours worked or calls, this time is not work. It follows from all the above considerations that the conclusions in relation to these four states should also be of non-conformity.

Thirdly, in coherence, my separate dissenting opinion also concerns the finding of non-conformity with regard to Armenia. This State has informed that the time at home without intervention should be considered as at least half of the working time (Art. 149 of the Labour Code). This legal regulation is in line with the latest case law of the Committee (decision on the merits of 19 May 2021, *Confédération générale du travail (CGT)* and *Confédération française de l'encadrement-CGC (CFE-CGC)* v. France, Collective Complaint No. 149/2017). In my view, a positive finding on this point should be adopted expressly, independently of the finding of non-conformity on the daily working time of certain categories of workers.

Finally, I would like to raise two important questions following some of the answers contained in the reports. The first question relates to the governmental reports that have justified the national legal regime of on-call duty or non-compliance with previous findings of non-conformity on the basis of the judgments of the Court of Justice of the European Union, including some responses that challenge the Committee's ruling on "misinterpretation" of the Charter. These are Bosnia and Herzegovina, Spain, Italy, Ireland and Luxembourg. It is necessary to recall that the European Committee of Social Rights has affirmed that "the fact that a provision complies with a Community Directive does not remove it from the ambit of the Charter and from the supervision of the Committee" (*Confédération française de*

l'Encadrement (CFE-CGC) v. France, Collective Complaint No. 16/2003, decision on the merits of 12 October 2004, §30). Furthermore, it stressed that, even if the European Court of Human Rights considered that "there could be, in certain cases, a presumption of conformity of European Union law with the Convention, such a presumption - even if it could be rebutted - is not intended to apply in relation to the European Social Charter". On the relationship between the Charter and European Union law, it pointed out that "(...) they are two different legal systems, and the principles, rules and obligations which form the latter do not necessarily coincide with the system of values, principles and rights enshrined in the former; (...) whenever it is confronted with the latter, the European Union will have to take account of the latter.) whenever it is confronted with the situation where States take account of or are constrained by European Union law, the Committee will examine on a case-by-case basis the implementation by States Parties of the rights guaranteed by the Charter in domestic law (General Confederation of Labour of Sweden (LO) and General Confederation of Executives, Civil Servants and Clerks (TCO) v. Sweden, Collective Complaint No. 85/2013, decision on admissibility and merits of 3 July 2013, §§72-74).

The second issue is that the Charter sets out obligations under international law which are legally binding on the States Parties and that the Committee, as a treaty body, has "exclusive" responsibility for legally assessing whether the provisions of the Charter have been satisfactorily implemented (*Syndicat CFDT de la métallurgie de la Meuse* v. France, Collective Complaint No. 175/2019, decision on the merits of 5 July 2022, §91).

These are the reasons for my different approach to the conclusions of Article 2§1 of the European Social Charter in relation to on-call duty.