



March 2023

## **EUROPEAN SOCIAL CHARTER**

European Committee of Social Rights

Conclusions XXII-3 (2022)

## **GERMANY**

*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 Germany, which ratified the 1961 European Social Charter on 27 January 1965. The deadline for submitting the 39<sup>th</sup> report was 31 December 2021 and Germany submitted it on 2 February 2022.

The Committee recalls that Germany 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 XXI-3 (2018)).

In addition, the Committee recalls that no targeted questions were asked under certain provisions. If the previous conclusion (Conclusions XXI-3 (2018)) found the situation to be in conformity, there was no examination of the situation in 2022.

Comments on the 39<sup>th</sup> report by the Confederation of German Employers' Associations (BDA) and the German Confederation of Trade Unions (DGB) were registered on 29 June and 30 June 2022 respectively.

In accordance with the reporting system adopted by the Committee of Ministers at the 1196<sup>th</sup> 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 2 of the Additional Protocol),
- the right to take part in the determination and improvement of the working conditions and working environment (Article 3 of the Additional Protocol).

Germany has accepted all provisions from the above-mentioned group except Article 4§4 and the Additional Protocol.

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

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

- 10 conclusions of conformity: Articles 2§2, 2§3, 2§4, 2§5, 4§2, 4§5, 5, 6§1, 6§2 and 6§3,
- 3 conclusions of non-conformity: Articles 2§1, 4§3 and 6§4.

In respect of Article 4§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 Germany under the 1961 Charter.

The next report from Germany will be on the Revised European Social Charter, which Germany ratified on 29 March 2021, and 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](http://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 Germany and in the comments of the German Trade Union Confederation (DGB).

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 1961 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 1961 Charter in respect of the provisions falling within the thematic group “Labour rights”).

In its previous conclusion, the Committee found that the situation in Germany was in conformity with Article 2§1 of the 1961 Charter (Conclusions XXI-3 (2018)). The assessment of the Committee will therefore concern the information provided by the Government in response to the targeted questions.

### **Measures to ensure reasonable working hours**

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 there have been no changes for workers covered by the Federal Public Service Bargaining Agreement, under which the collectively agreed average work week has been 39 hours since 2005. The Working Time Act was amended in the area dealing with exceptions in extraordinary cases and concerning monitoring and provisions on fines. Moreover, under the Act on Occupational Health and Safety Inspections authorities can demand not only documentation on working hours and collective agreements, but also other documentation directly or indirectly providing information on compliance with the Working Time Act. The Ordinance on Working Hours in Inland Waterway Transport was updated in order to adapt it to the special working and living situation in the said sector and to set down the necessary conditions for protection of transport staff. The Act on the Protection of Working Mothers states that employers are not to employ pregnant or breastfeeding women over 18 in any activity that requires them to work more than eight and a half hours a day or 90 hours over two weeks. If such women are under 18, they are not to be employed in any activity that requires them to work more than 8 hours a day or 80 hours over two weeks. In general, pregnant and breastfeeding women should not work at night and nor on Sundays and holidays.

The report states that responsibility for implementation, supervision and monitoring of the working hours standards lies with the supervisory authorities of the *Länder*. The report provides information on the number of inspections carried out by the occupational health and safety authorities for compliance with the working hours legislation. It notes that the annual

average of those inspections is 16,782 and that on average, there were 631 warnings, fines and criminal charges for violations of the working hours legislation.

The Committee notes that the reference periods that do not exceed four to six months are acceptable, and periods of up to a maximum of one year may also be acceptable in exceptional circumstances. The extension of the reference period to a 12-month period by a collective agreement would also be acceptable, provided there were objective or technical reasons or reasons concerning the organisation of work justifying such an extension and that the maximum working hours would not exceed 60 hours (*Confédération générale du travail (CGT) and Confédération française de l'encadrement-CGC (CFE-CGC) v. France*, Complaint No. 149/2017, §§ 156-157). The Committee notes that the reference period in Germany can exceed 12 months, which, in accordance with its practice, is not acceptable under any circumstances. The Committee thus concludes that the situation in Germany is not in conformity with Article 2§1 of the 1961 Charter on the ground that it has not been established in certain cases that the reference period for the calculation of average working hours cannot be extended beyond 12 months.

In its comments, the DGB provides information about sanctions imposed by the Labour Inspection between 2018 and 2020. It appears that the number of orders, warnings and criminal charges slightly decreased.

### ***Law and practice regarding on-call periods***

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 the German law on working hours distinguishes between several levels of intensity of work. In addition to full-time work, these are: on-call time when workers must be present at the workplace (*Arbeitsbereitschaft*); on-call time when workers are available at a place designated by the employer, on or off the premises of the organisation, in order to be able to take up the full work activity immediately when called upon, if necessary (*Bereitschaftsdienst*); on-call time when workers are available at a place of their choice in order to be able to take up the work from there when called upon, if necessary (*Rufbereitschaft*). In the first two cases, the full duration of the time must be included when determining maximum daily and weekly working hours. In the third case, the time of on-call counts as time off if there is no call to work. The Committee reiterates that the equalisation 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). It is not clear from the information provided in the report, whether in the third case (*Rufbereitschaft*), inactive on-call periods are assimilated to rest periods in their entirety or in part when workers are not required to stay at the workplace. The Committee therefore reiterates its request for information. In the meantime, it reserves its position on this point.

In its comments, the DBG states that on-call work is associated with disproportionately high levels of short part-time work, low pay and risks of poverty.

The report further states that, in addition, on-demand work is an instrument that allows for flexible working hours arrangements. A certain amount of time to be worked is agreed. The main characteristic of on demand work is that the parties to the employment contract do not determine the specific placement of the working hours at the outset. Also, in order to protect workers, the free arrangement of flexible working hours is restricted in several aspects: the workers are obliged to do the work only if employers inform on-demand workers of the placement of the working hours at least 4 days in advance; employers must agree with workers on a specified length of weekly and daily working hours, and if the length is not specified, 20

hours per week are considered to have been agreed upon. If the minimum length is specified, the share of additional work may not exceed 25% of the agreed minimum working hours per week. If the maximum length is specified, the amount of reduction can be 20% of the working hours agreed.

The report states that it is not possible to conclude zero-hour contracts for on demand work. In 2019, approximately 5% of workers did on demand work.

### ***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 the Act to Facilitate Easier Access to Social Security and on the Deployment and Protection of Social Service Providers due to the Corona Virus SARS-CoV-2 authorised the Federal Ministry of Labour and Social Affairs to issue limited exceptions to the Working Time Act in exceptional emergencies with nationwide impact for a limited period of time with the agreement of the Federal Ministry of Health. The ordinance on derogations from working hours legislation due to the Covid-19 pandemic was issued on 7 April 2020, entered into force on 8 April 2020 and expired on 31 July 2020. For that limited period and specific jobs, the ordinance allowed derogations from the provisions of the Working Time Act, particularly regarding maximum working hours, minimum rest periods and the general prohibition against working on Sundays and public holidays. This was used relatively more often in the trade sector than in the services sector, health sector, social sector or other sectors. Companies with 50 to 249 workers made more use of these exceptional measures than smaller ones.

### *Conclusion*

The Committee concludes that the situation in Germany is not in conformity with Article 2§1 of the 1961 Charter on the ground that it has not been established in certain cases that the reference period for the calculation of average working hours cannot be extended beyond 12 months.

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 Germany and in the comments of the German Trade Union Confederation (DGB).

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).

In its previous conclusion, the Committee concluded that the situation in Germany was not in conformity with Article 2§2 of the Charter on the ground that it had not been established that the worker’s right to an adequate level of compensation for work performed on a public holiday was guaranteed (Conclusions XXI-3 (2018)).

The report indicates that public holidays are constitutionally protected under Article 140 of Germany’s Basic Law (*Grundgesetz*, GG) in conjunction with Article 139 of the Weimar Constitution (*Weimarer Reichsverfassung*, WRV) as “days of rest and spiritual edification”. A fundamental and effective legal prohibition of work on public holidays (Section 9 of the Working Time Act) follows from this constitutional guarantee, from which exceptions are only permitted in certain exceptional cases and only under specified conditions (Section 10 of the Working Time Act).

The Committee notes from the report that the principle of continued payment of wages on public holidays is enshrined in law. For working hours not worked on a public holiday, employers are obliged under Section 2(1) of the Continuation of Wage Payments Act (*Entgeltfortzahlungsgesetz*, EFZG) to pay employees the remuneration. The report also indicates that employees required to work on public holidays also receive their normal remuneration including all components such as commissions, gratuities and bonuses. Collective agreements, company agreements and individual contractual agreements often provide for entitlement to supplementary remuneration. The report adds that in late 2020, supplements provided for by collective agreements for work on Sundays and public holidays often ranged from 65% to 200% of the collectively agreed pay.

In its comments, the DGB indicates that there is no individual right for additional compensation and that only (collective and other) agreements might provide for such an additional compensation. Moreover, it emphasises that compensation for working on public holidays is not high enough. The Committee notes that the DGB does not take into account the time that is due in addition to the wage supplement in the case of working on a public holiday.

As regards to compensatory time-off for work on public holidays, the report indicates that, under Article 11(3) of the Working Time Act (*Arbeitszeitgesetz*, ArbZG), employees are entitled to an alternative day of rest in addition to regular remuneration and their usual supplementary remuneration on the basis of collective agreements or individual contracts. Employees cannot waive the right to alternative rest days. According to the report, this is a matter of mandatory legal regulation and a public-law obligation that cannot be overridden by the contracting parties. The Committee considers that this situation is in conformity with Article 2§2 of the Charter.

The Committee notes from the report that in order to protect the right to safe and healthy working conditions enshrined in the Charter and not to encourage people to work on days that should, in principle, be non-working days, the German parliament objected to legislating increased wages and time off. The Committee asks for clarification in the next report on how this decision affected the right of workers to public holidays with pay.

The report indicates that there have been no changes in the federal public service collective bargaining agreement (TVöD): employees receive compensation for the actual work done on public holidays at a rate of 100% of the actual work as well as an additional supplement of 35% per hour worked, which is calculated on the basis of the collectively agreed remuneration. If employees are not compensated with time off, they are entitled to a salary supplement of 135% per hour worked, which is calculated on the basis of the collectively agreed remuneration.

The Committee understands that a worker in public service performing work on a public holiday is entitled: (1) to the regular wage corresponding to the public holiday (100%), to an increased salary for the work performed that day (35%) and to a compensatory day off, or (2) to the regular wage corresponding to the public holiday (100%) and to an increased salary for the work performed that day (135%), without a compensatory day off. The Committee asks that the next report confirm this assumption.

### ***Covid-19***

In reply to the question regarding special arrangements related to the pandemic, the report does not provide any information.

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

### *Conclusion*

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 2§2 of the 1961 Charter.



## **Article 2 - Right to just conditions of work**

### *Paragraph 3 - Annual holiday with pay*

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

The Committee recalls that no targeted questions were asked for Article 2§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 (Conclusions XXI-3 (2018)) found the situation in Germany to be in conformity with the Charter, 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 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 Germany is in conformity with Article 2§3 of the 1961 Charter.

**Article 2 - Right to just conditions of work**

*Paragraph 4 - Elimination of risks in dangerous or unhealthy occupations*

The Committee recalls that no targeted questions were asked for Article 2§4 of the 1961 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.

As the previous conclusion found the situation in Germany to be in conformity with the 1961 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 Germany is in conformity with Article 2§4 of the 1961 Charter.

## **Article 2 - Right to just conditions of work**

### *Paragraph 5 - Weekly rest period*

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

The Committee recalls that no targeted questions were asked for Article 2§5 of the 1961 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 and asked for clarification on how weekly rest periods were ensured, mainly in case of deviations allowed by some collective agreements. It asked if, for example, authorisation of the labour inspectorate was required in those cases (Conclusions XXI-3 (2018)).

The report states that even if workers are not allowed to work on Sundays or public holidays, there can be exceptions or deviations. However, exceptions and deviations must fulfill all requirements established by Section 12 of the Working Hours Act (*Arbeitszeitgesetz*), which include important safeguards to ensure health of workers. The report further provides statistical data on the percentage of workers affected by deviations from the principle of weekly rest, which is of around 0.5% of all collective agreements currently available.

The Committee therefore considers that the situation is in conformity with the Charter in this respect.

The report also states that no specific measures relating to Covid-19 and concerning weekly rest period were set in place during the reference period.

### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 2§5 of the 1961 Charter.

## **Article 4 - Right to a fair remuneration**

### *Paragraph 1 - Decent remuneration*

The Committee takes note of the information contained in the report submitted by Germany and the comments submitted by the German Trade Union Confederation (DGB).

The Committee recalls that in the context of the present monitoring cycle, States were asked to reply to targeted questions for Article 4§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 (Conclusions XXI-3 (2018)) the Committee found that the situation was not in conformity with the Charter on the ground that the statutory minimum wage is not sufficient to ensure a decent standard of living to all workers.

The assessment of the Committee will therefore concern the information provided by the Government in response to the conclusion of non-conformity and to the targeted questions.

### ***Fair remuneration***

The Committee notes from the report that as regards the evolution of the minimum wage during the reference period, since the introduction of the general statutory gross minimum wage of € 8.50 per hour, the minimum wage was raised to € 8.84 gross on 1 January 2017, to € 9.19 gross on 1 January 2019 and to € 9.35 gross on 1 January 2020. As regards the gross median wage, for all employees (full-time employees, part-time employees and the marginally employed, but excluding apprentices) in economic sectors A-S (classification of economic sectors by the Federal Statistical Office), it amounted to € 16.58 per hour worked in 2018. The gross monthly median wage was € 2,500. According to the report, because a person’s tax burden is determined individually under German tax law, net minimum and net median wages cannot be represented in a statistically useful way.

The Committee also notes from Eurostat that net annual earnings (single person earning 100% of the average earnings) in 2020 stood at € 31,292 per year or € 2,600 per month. As regards gross earnings, they stood at € 51,000 annually or €4,200 monthly. According to Eurostat, in 2020 the gross monthly minimum wage stood at € 1544. The Committee also notes from Eurostat that the gross monthly minimum wage as a proportion of average gross monthly earnings stood at 49.4% in 2020. There is no information concerning the net minimum wage.

According to the report, for setting individual contractual wages, the general statutory minimum wage under the Act Regulating a General Minimum Wage (Mindestlohngesetz, MiLoG) establishes an absolute lower limit, which may not be undercut. This ensures that a single, full-time employee earns a net wage above the exemption threshold. Germany’s social system also provides for additional benefits for family members with unmet needs in line with Book II of the Social Code – basic income support for job seekers- and Book XII of the Social Code – social assistance. Therefore, according to the report, the system of minimum wage and supplementary social benefits ensures a decent standard of living at all times.

The Committee recalls that to be considered fair within the meaning of Article 4§1, the minimum wage paid in the labour market must not fall below 60% of the net average national wage. The assessment is based on net amounts, i.e. after deduction of taxes and social security contributions (Conclusions XIV-2 (1998), Statement of Interpretation on Article 4§1). For this purpose, taxes are all taxes on earned income. Indirect taxes are thus not taken into account (Conclusions XVI-2, Denmark). Where net figures are difficult to establish, it is for the State Party concerned to provide estimates of this amount.

When a statutory national minimum wage exists, its net value for a full-time worker is used as a basis for comparison with the net average full-time wage (if possible calculated across all sectors for the whole economy, but otherwise for a representative sector such as a manufacturing industry or for several sectors). Otherwise regard is had to the lowest wage determined by collective agreement or the lowest wage actually paid. This may be the lowest wage in a representative sector, for example, the manufacturing industry. Where the net minimum wage is between 50% and 60% of the net average wage, it is for the State Party to establish that this wage permits a decent standard of living. Where the minimum wage is low, the Committee may, when assessing compliance with Article 4§1, take into consideration other elements, such as whether workers are exempt from the co-payment in respect of health care or have the right to increased family allowances (Conclusions XVI-2 (2004), Portugal).

The Committee considers that the information concerning the net minimum and average wages provided in the report is incomplete. Therefore, it asks the next report to provide information concerning the net amounts of minimum and average wages. In the meantime, it reserves its position on this issue.

As regards the proportion of workers receiving the minimum or below minimum wage, the Committee notes from the report that according to the Federal Statistical Office, the applicable general minimum wage was paid in the following number of employment relationships: 1,371,000 in 2017, 926,000 in 2018 and 1,421,000 in 2019. The following number of employment relationships received less than the general minimum wage: 823,000 in 2017, 483,000 in 2018 and 527,000 in 2019. The Committee asks the next report to provide information concerning the proportion of workers earning minimum wage and below minimum wage as a percentage of total employment.

### ***Workers in atypical employment***

As part of its targeted questions the Committee asks for information on measures taken to ensure fair remuneration 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. It also asks about enforcement activities (e.g. by labour inspectorates or other relevant bodies) as regards circumvention of minimum wage requirements (e.g. through schemes such as subcontracting, service contracts, including cross-border service contracts, platform-managed work arrangements, resorting to false self-employment, 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.).

As regards measures taken to ensure fair remuneration (above the 60% threshold, or 50% with the proposed explanations or justification) for workers in atypical jobs, those employed in the gig or platform economy, and workers with zero hours contracts, the Committee notes from the report that the general statutory minimum wage applies to employees and, with some exceptions, also to interns. The factor that determines whether the minimum wage is applied is therefore the existence of an employment relationship as defined by German law. In this sense, an employee is someone obliged to perform work in the service of someone else while receiving instructions and taking orders in a relationship of personal dependency on the basis of a contract under private law. The German definition of employee makes no distinction between traditional and atypical forms of employment. The minimum wage therefore applies comprehensively to part-time workers, marginally employed workers, workers with limited-time contracts and temporary workers.

The same applies to employees in the gig economy and working via online platforms. If the conditions of an employment relationship are met, then the minimum wage also applies. Zero-hour contracts for on-demand work in line with Section 12 of the Act on Part-Time and Fixed-Term Employment (*Teilzeit- und Befristungsgesetz, TzBfG*) are not permitted. Alongside the statutory minimum wage, there are regionally, and nationally applicable sector-specific minimum wages specified in the respective sectors' collective agreements. These are

extended to all employers not bound by collective agreements at the request of the parties to the collective agreements. All employers not bound by collective agreements must also comply with them. These are higher than the general statutory minimum wage, sometimes significantly so.

As regards enforcement activities (e.g. by labour inspectorates or other relevant bodies) to ensure that minimum wage requirements are not circumvented, the report states that compliance with the statutory minimum wage and nationally applicable sector-specific minimum wages under the Act on Mandatory Working Conditions for Workers Posted Across Borders and for Workers Regularly Employed in Germany (*Arbeitnehmer-Entsendegesetz*, AEntG) and the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, AÜG) is monitored by the authorities of the customs administration, which also issues sanctions. They have been given the necessary authorisation. The Federal Customs Administration unit responsible for enforcing the law on illegal employment and benefit fraud, the Financial Control of Undeclared Work (*Finanzkontrolle Schwarzarbeit*, FKS) is responsible for this. It has been granted 1,600 new positions in the context of the minimum wage legislation, all of which have now already been filled. Under the legislation against illegal employment and social benefits fraud (*Gesetz gegen illegale Beschäftigung und Sozialleistungsmissbrauch*) the FKS was granted around 3,500 additional positions.

In 2020, the FKS carried out numerous focused inspections and special event days, for example in the meat industry and delivery services, auditing a total of 44,702 employers. Intentionally or negligently failing to comply with the legal obligations related to the minimum wage constitutes an administrative offence and can incur a fine of up to € 500,000.

The Committee notes from the Comments by the German Trade Union Confederation (DGB) that 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, according to the DGB, this is only partly true because there is a large 'grey zone'. For example, the solo-self-employed (comprising about 1 609 000 persons) are often not considered as workers, or at least their (formal) legal status is defined as being outside the normal employment relationship and they are thus not entitled to the minimum wage. In any event, they have to go to the courts in order to have their employment relationship recognised.

The Committee considers that the requirement that workers be remunerated fairly to ensure a decent standard of living for themselves and their families applies equally to atypical jobs, such as part-time work, temporary work, fixed-term work, casual and seasonal work. In some cases, prevailing wages or contractual arrangements lead to a significant number of so-called working poor, including persons working two or more jobs or full-time workers living in substandard conditions.

The Committee refers in particular to workers employed in emerging arrangements, such as the gig economy or platform economy, who are incorrectly classified as self-employed and therefore, do not have access to the applicable labour and social protection rights. As a result of the misclassification, such persons cannot enjoy the rights and protection to which they are entitled as workers. These rights include the right to a minimum wage.

### **Covid-19**

As part of its targeted questions, the Committee also asked for specific information about furlough schemes during the pandemic. The Committee notes that the report does not provide this information.

The Committee recalls that in the context of the Covid-19 pandemic, States Parties must devote necessary efforts to reaching and respecting this minimum requirement and to regularly adjust minimum rates of pay. The right to fair remuneration includes the right to an increased pay for workers most exposed to Covid-19-related risks. More generally, income

losses during lockdowns or additional costs incurred by teleworking and work from home practices due to Covid-19 should be adequately compensated.

As regards specific information about furlough schemes during the pandemic, according to the report *Kurzarbeitergeld*, the reduced working hours allowance scheme, was introduced in response to the Covid-19 pandemic. According to the report, until 30 September 2021, social security contributions would be reimbursed in full to employers while they are in the reduced working hours scheme. Half of the social security contributions would then be reimbursed by the Federal Employment Agency for companies that had reduced working hours by that point until December 2021. If workers on reduced hours had lost at least 50% of their earnings, the *Kurzarbeitergeld* allowance would be increased to 70% (77% for households with children) from their fourth month in the scheme onwards, calculated from March 2020. These arrangements also apply until 31 December 2021 for all employees whose entitlement to the reduced working hours allowance had come into force by 31 March 2021.

#### *Conclusion*

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

## **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 Germany and in the comments of the German Trade Union Confederation (DGB).

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 1961 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 1961 Charter in respect of the provisions falling within the thematic group “Labour rights”).

In its previous conclusion, the Committee found that the situation in Germany was in conformity with Article 4§2 of the 1961 of the Charter (Conclusions XXI-3 (2018)). The assessment of the Committee will therefore concern the information provided in the report in response to the targeted question.

In its comments the DGB states that there is no legal requirement to increase the payment in case of overtime. The Committee asks the next report to contain information on the increase in salary in case of overtime.

### **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.

### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 4§2 of the 1961 Charter.



## **Article 4 - Right to a fair remuneration**

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

The Committee takes note of the information contained in the report submitted by Germany and in the comments of the German Trade Union Confederation (DGB).

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 (Article 1 of the 1988 Additional Protocol) and Article 4§3 of the Charter and does so therefore every two years (under thematic group 1 “Employment, training and equal opportunities”, and thematic group 3 “Labour rights”). As Germany has not accepted Article 1 of the 1988 Additional Protocol, the Committee examines policies and other measures to reduce the gender pay gap under Article 4§3 of the Charter. The Committee also points out that Germany ratified the Revised European Social Charter on 29 March 2021 (outside the reference period), accepting, among others, Article 20.

In its previous conclusion, the Committee found that the situation in Germany was not in conformity with Article 4§3 of the Charter, on the ground that the maximum compensation of 12 months wages established by law in cases of litigation concerning reprisals was not sufficient to make good the damage suffered by the victim and to act as a deterrent to the offender (Conclusions XXI-3 (2018)).

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

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

#### ***Legal framework***

The report indicates that the German antidiscrimination laws (General Equal Treatment Act and Transparency in Wage Structures Act) prohibit the discrimination against persons on the grounds of sex. According to Section 3 of the Transparency in Wage Structures Act, the prohibition of discrimination includes pay discrimination between women and men with regard to all elements of remuneration and conditions of remuneration. Discriminatory provisions are also prohibited in statutory law as well as in individual and collective agreements. A discriminatory clause can be declared invalid by the courts and generally an upwards adjustment in favour of the discriminated group takes place.

Pursuant to Section 6 of the Transparency in Wage Structures Act, the parties to the collective wage agreement and the employee or workers representatives, within the framework of their responsibilities and opportunities for action, are called to collaborate in achieving the goal of equal pay among women and men.

#### ***Effective remedies***

In its previous conclusions (Conclusions XXI-3 (2018), XX-3 (2014), XIX-3 (2010), XVIII-2 (2007), XVI-2 (2003)), the Committee found that the situation in Germany was not in conformity with Article 4§3 of the Charter, on the ground that the maximum compensation of

12 months wages established by law in cases of litigation concerning reprisals was not sufficient to make good the damage suffered by the victim and to act as a deterrent to the offender.

The report repeats the information provided previously.

In this regard, the DGB indicates in its comments concerning the maximum compensation that 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, it states that in practice, most cases in which the dismissal is challenged before a Labour Court result in a friendly settlement ending the employment relationship, in return with a severance payment. Furthermore, the DGB indicates that in the case of victimisation (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 employer who seeks to get a termination of the employment relationship by way of Sections 9 and 10 of the *KSchG*.

In view of the above, the Committee reiterates its previous conclusion of nonconformity 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.

In addition, in view of the adoption of the Transparency in Wage Structures Act entered into force on 6 July 2017, the Committee asks how the principle of shifting of the burden of proof is applied in practice. It also asks for clarification in the next report whether this Act provides for further consequences/sanctions in the event of a violation of the prohibition of pay discrimination on the grounds of gender.

### ***Pay transparency and job comparisons***

As regards job comparisons, the Committee asked in its previous conclusions (Conclusions XXI-3 (2018) and XIX-3 (2010)) for information concerning the 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. It also asked whether the pay comparisons were possible across companies. The Committee also asked for information on the implementation of the Transparency in Wage Structures Act (*Entgelttransparenzgesetz, EntgTranspG*).

As regards the implementation of the Transparency in Wage Structures Act, the report indicates that it entered into force on 6 July 2017 with the aim of supporting women (and men) in better asserting their entitlement to equal pay for equal work or work of equal value. The Act creates a clear legal basis for the principle of equal pay and clearly and transparently sets out the entitlement of women and men to equal pay for equal work or work of equal value. The Act also addresses the lack of transparency regarding company remuneration structures, which is another cause of pay inequality between women and men.

The report indicates that the Transparency in Wage Structures Act entails an individual entitlement to disclosure. Section 12 of the Act introduces an individual entitlement for employees in establishments with more than 200 employees to obtain information on the median monthly gross salary of at least six employees of the other gender who perform the same work or work of equal value, as well as on the criteria and procedure used for determining the remuneration.

It also introduces regular reporting about the measures taken to promote gender equality and create equal pay for women and men for private sector employers with more than 500 employees, which are also encouraged to use internal company evaluation procedures to assess their remuneration system.

According to the report, the Federal Government is obliged in principle to evaluate the Transparency in Wage Structures Act two years after its entry into force and then every four years thereafter. As a result of the first assessment carried out in 2019, it appears that: (1) only 4% of employees in enterprises with over 200 employees have made an information request; (2) 45% of companies surveyed (with over 500 employees) have voluntarily reviewed their in-house pay structures; and (3) 44% of companies with reporting obligations indicated they were complying with the reporting obligation. The Committee asks that the next report to provide information on the number of companies of more than 200 employees and of more than 500 employees in the country, as well as the proportion of the workforce covered by these undertakings. It also requests that the next report provide information on the consequences/sanctions for non-compliance with the obligations set out in this Act.

Regarding the methods of comparison, the report indicates that there are no rulings of courts which can be reported on.

The Committee notes that the report does not contain any information on pay comparisons across companies. In order to clarify this issue, the Committee considers that provision should be made for the right to challenge unequal remuneration resulting from legal regulation and collective agreements. In addition, there should be the possibility to challenge unequal remuneration resulting from the internal pay system within a company or a holding company, if remuneration is set centrally for several companies belonging to such holding company. The Committee 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 Germany is in conformity with Article 4§3 of the Charter in this respect.

### ***Statistics and measures to promote the right to equal pay***

The Committee notes, from the statistical information provided in the report, that the unadjusted wage differentials between men and women slightly decreased from 20% in 2018 to 18% in 2020. According to the report, the gender pay gap has fallen by one percentage point annually since 2015.

The report indicates that in-depth statistical analyses of the pay gap are possible every four years on the basis of the survey on the structure of earnings. As a result of an analysis carried out in 2018, it appears that three quarters of the unadjusted gender pay gap are attributable to structural differences: the main reasons for the disparities in average gross hourly earnings were the differences in the sectors and occupations in which women and men are employed, and the unequal distribution of job requirements in terms of management and skills. In addition, women are also more likely than men to work part-time or in mini-jobs. The remaining quarter of the pay gap cannot be explained with job characteristics. This so-called adjusted gender pay gap was 6% nationwide in 2018. According to the report, this means that women with comparable qualifications and tasks earned on average 6% less than men per hour.

The report indicates that the reasons for the pay gap are many-faceted: the different choice of occupation (women frequently work in social or personal services that are less well paid, for example, than technical professions), a longer family-related interruption to gainful employment followed by a return to part-time employment and mini-jobs (49% of women in employment subject to mandatory social security contributions in 2020 worked part-time). In June 2020, 4.3 million people in Germany were employed exclusively in mini-jobs, of which 60.5% are women.

Furthermore, the report explains that women still have worse career opportunities and are under-represented in management positions. In addition, role stereotypes and gender-specific attributions also continue to have an effect on job evaluation, performance assessment and job placement.

The Committee takes note of the detailed statistical series on the pay gap between men and women not employed by the same employer, broken down by sector, skill level or other relevant factors for 2018.

For information, the Committee takes note of the Eurostat data on the gender pay gap during the reference period in Germany: 20.4% in 2017, 20.1% in 2018, 19.2% (provisional figure) in 2019 and 18.3% (provisional figure) in 2020 (compared with 9.4% in 2011). It notes that this gap is higher than the average in the 27 countries of the European Union, namely 13% (provisional figure) in 2020 (data as of 4 March 2022).

In its previous conclusion, the Committee asked for information concerning the measures taken to address the main causes of the gender pay gap (Conclusions XXI-3 (2018)).

In reply, the report indicates that the Federal Government focuses on a cause-related strategy for overcoming pay inequality and has adopted a wide range of primary and secondary legislative measures in the reporting period.

The Committee notes that after the adoption in 2015, of the Act on Equal Participation of Women and Men in Leadership Positions in the Public and Private Sectors, introducing a mandatory 30% gender quota, to be realized by 2016, the share of women of supervisory boards amounted to 21.6% in 2018, the share of women on the managing boards of all companies covered by the Act amounted to 8.6%, and the share of women of executive positions in the supreme federal authorities of federal public service amounted to 37%.

The Committee also notes that the second Act on the Equal Participation of Women and Men in Executive Positions in the Private Sector and Public Service entered into force on 12 August 2021 (outside the reference period) to introduce further provisions to increase the number of women in executive positions in the private and public sectors. However, as these changes are outside the reference period, the Committee will examine them in the next monitoring cycle.

The Committee takes note of other measures taken by the Government to enhance better conciliation between work and family responsibilities and counteract the preconception that family responsibilities are primarily a matter for women: projects on full-time childcare for primary-school-children, improved tax deductibility of childcare costs, parental allowance with partner months, parental allowance plus and the partnership bonus as income replacement benefits, fostering a family-oriented culture in companies, programme that supports a return to work after a family-related interruption.

The report also indicates that several policies and programmes are still implemented to fight gender stereotypes and occupational segregation: the Girls' and Boys' Days to promote careers that go beyond traditional notions of roles at an early stage; an online platform to increase interest in programming among girls and young women; valorisation of social professions through material improvements (the fees for new trainees were abolished and decent training pay was secured with the entry into force of the Nursing Professions Act and the start of the new training programmes in nursing on 1 January 2020); seminars and information on economic independence for women; initiatives to promote a fair distribution of paid employment and unpaid care work between women and men, and other measures aimed at respecting the principle of equal pay, as well as individual Länder projects to promote equal pay in public service.

In addition, the report indicates that the MINT (mathematics, IT, science, technology) action plan aims, among others, to encourage more children and young people to get involved in scientific experiments and to increase the opportunities open to girls and women in MINT professions.

The report also states that the three-year programme "Promoting Equal Pay – Advising, Supporting, Strengthening Businesses" started at the end of 2020 to support companies in implementing the Transparency in Wage Structures Act and the principle of equal pay.

According to the report, the programme also promotes an awareness of the advantages of a gender-equitable HR and remuneration policy and supports employers in making internal remuneration structures transparent and implementing equal pay for women and men within the company.

In view of the foregoing, the Committee considers that, despite all the measures taken during the reference period, the gender pay gap remains very high. Consequently, it finds that the situation is not in conformity with Article 4§3 of the Charter on the ground that the obligation to make measurable progress in order to reduce the gender pay gap is not respected.

***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, the report states that there have been no changes to the legal framework concerning the principle of equal pay for men and women due to the pandemic. It presents various forms of relief for the reconciliation of work and care implemented during the pandemic.

In addition, the report indicates that more women than men have been affected by short-time work during the pandemic.

In this context, in its comments the DGB states that special effects due to short-time work during the pandemic may have had an impact on the change of the unadjusted gender pay gap.

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

*Conclusion*

The Committee concludes that the situation in Germany is not in conformity with Article 4§3 of the 1961 Charter on the grounds that:

- there is an upper limit on compensation for employees who are dismissed as a result of making a claim of gender discrimination which may preclude damages from making good the loss suffered and from being sufficiently deterrent;
- the obligation to make measurable progress in order to reduce the gender pay gap is not complied with.

## **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 Germany.

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***

The Committee notes from the report that various forms of primary legislation aim to ensure that employees are able to dispose of at least the part of remuneration considered to constitute the minimum subsistence level and that is necessary to meet their statutory maintenance obligations.

According to Sections 850 to 850 i of the Code of Civil Procedure (*Zivilprozessordnung, ZPO*), earned income is only attachable to a limited extent. Certain sums pursuant to Section 850 c of the Code of Civil Procedure are immune from wage attachment (attachment-exempt thresholds). The attachment-exempt thresholds depend on the employee’s net income and maintenance obligations. The Committee takes note of an example provided by the Government, according to which the basic attachment-exempt amount has amounted to € 1,252.64 per month since 1 July 2021 and increases for each person for whom the employee is legally obliged to provide maintenance. Furthermore, certain parts of earned income are unattachable (Section 850 a of the Code of Civil Procedure). These include, for example, risk and hardship allowances, allowances for work away from home, parts of the Christmas bonus and overtime remuneration. This exemption from attachment of wages applies towards both employers and third parties (especially credit institutions). Lower unattachable amounts apply to attachment due to statutory maintenance obligations (Section 850 d of the Code of Civil Procedure).

### ***Waiving the right to the restriction on deductions from wage***

According to the report, Sections 850et seq. of the Code of Civil Procedure are not negotiable either in advance or retrospectively. Debtors are unable to forego their protection because they can neither assign nor pledge unattachable receivables, that is, make them the basis of liability for their debts by way of a legal transaction.

This exemption from attachment of wages is supplemented by a statutory non-assignment clause and prohibition of offsetting. According to Section 400 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), a receivable cannot be assigned as long as it is not subject to attachment. Furthermore, offsetting against wage entitlements is ruled out as long as the latter are not subject to attachment (Section 394 of the German Civil Code). The employer must always pay out the unattachable portion of earned income to the employee, even if it is entitled to counterclaims that it could offset against the wage claim.

#### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 4§5 of the 1961 Charter.

## **Article 5 - Right to organise**

The Committee takes note of the information contained in the report submitted by Germany as well as the information provided by the German Trade Union Confederation (DGB).

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, the Committee concluded that the situation in Germany was in conformity with Article 5 of the 1961 Charter (Conclusion XXI-3 (2018)).

The Committee also recalls that, in the General Introduction of Conclusions XXI-3 (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 by the Government in response to the targeted questions and general question.

### ***Prevalence/Trade union density***

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

In reply to this question, the report states that the Federal Government has no official data about the unionisation of employees. The report also states that most employment relationships continue to be shaped by collective agreements. In 2020, 53% of all employees in Western Germany were employed by companies bound by collective agreements (43% in Eastern Germany). Furthermore, 19% of employees in Western Germany worked for companies guided by a collective agreement (20% in Eastern Germany).

The DGB consists of eight federations 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 DGB's level of organisation in 2017 was 15.0%.

### ***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 address the question directly but simply states there are no sectors in which employees may not organise. The Committee notes from other sources (EUROMIL) that members of the armed forces have the right to organise. The Committee asks that the next report to provide information on the prerogatives of trade unions representing the military.

The Committee recalls that Article 5 of the Charter allows States Parties to impose restrictions on the right to organise of members of the armed forces and grants them a wide margin of appreciation in this regard, subject to the terms set out in Article G of the Charter. However, these restrictions may not go as far as to suppress entirely the right to organise, such as 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).



### ***Restrictions on the right to organise***

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 these questions, the report states that the right to unionise is guaranteed in Germany in all areas of the public and private sectors, so there are no areas in which employees may not set up or join associations for the protection of their economic and social interests.

### ***Trade union activities***

According to the comments received from the DGB attempts by employers to prevent workplace representation (mainly works councils) are increasing. The Committee asks if the Government has taken any measures in order to prevent such practices.

Further the DGB states that during the pandemic they had no access to workers who were working remotely. The Committee asks whether any measures have been taken to ensure that trade unions have (virtual) access to workers working remotely.

### ***Conclusion***

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 5 of the 1961 Charter.

## **Article 6 - Right to bargain collectively**

### *Paragraph 1 - Joint consultation*

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

The Committee recalls that no targeted questions were asked for Article 6§1 of the 1961 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 1961 Charter in respect of the provisions relating to the “Labour rights” thematic group).

As the previous conclusion found the situation in Germany to be in conformity with the 1961 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 Germany is in conformity with Article 6§1 of the 1961 Charter.

## **Article 6 - Right to bargain collectively**

### *Paragraph 2 - Negotiation procedures*

The Committee takes note of the information contained in the report submitted by Germany, and the comments submitted by the German Trade Union Confederation (DGB).

The Committee recalls that no targeted questions were asked for Article 6§2 of the 1961 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 1961 Charter in respect of the provisions relating to the “Labour rights” thematic group).

The Committee also recalls that in the General Introduction to Conclusions XXI-3 (2018), it posed a general question under Article 6§2 of the 1961 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 Germany was in conformity with Article 6§2 of the 1961 Charter (Conclusions XXI-3 (2018)). The assessment of the Committee will therefore concern the information provided in the report in response to the general question.

The report does not provide any relevant information in relation to the above-mentioned general question. The comments submitted by DGB note, among others, that Section 12a of the Collective Agreements Act (*Tarifvertragsgesetz, TVG*) provides self-employed workers with access to collective bargaining, subject to conditions that are overly restrictive. The comments refer in particular to the requirement that economic dependence on a platform, and implicitly coverage under the law, is assumed if the platform represents half of the remuneration earned by the worker in 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, including in the light of the comments received from DGB.

### **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*

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 6§2 of the 1961 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 1961 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 Germany 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 Germany is in conformity with Article 6§3 of the 1961 Charter.

## **Article 6 - Right to bargain collectively**

### *Paragraph 4 - Collective action*

The Committee takes note of the information contained in the report submitted by Germany and of the comments from the German Trade Union Confederation (DGB).

The Committee recalls that no targeted questions were asked for Article 6§4 of the 1961 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 XXI-3 (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 XXI-3 (2018)), the Committee considered that the situation in Germany was 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 constituted an excessive restriction on the right to strike;
- the requirements to be met by a group of workers in order to form a union satisfying the conditions for calling a strike constituted an excessive restriction on the right to strike;
- denying all civil servants the right to strike, regardless of whether they exercised public authority, constituted an excessive restriction on the right to strike.

The assessment of the Committee will therefore concern the information provided in the report in response to the conclusion of non-conformity and to the general question.

### ***Right to collective action***

#### ***Definition and permitted objectives***

With regard to the first ground of non-conformity (authorising strikes only when they are aimed at negotiating a collective agreement constitutes an excessive restriction on the right to strike), the Government states that it does not agree with the Committee. It points out that there has been no change to the legislative framework and refers to its previous reports.

Since the situation has not changed, the Committee reiterates its conclusion of non-conformity on this point.

#### ***Entitlement to call a collective action***

With regard to the second ground of non-conformity (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 on the right to strike), the Government states that it does not agree with the Committee. It points out that there has been no change to the legislative framework and refers to its previous reports. In particular, it reiterates that the requirement for a group of workers to be able to bargain collectively (their “assertive ability”) is necessary to ensure that the opposite side cannot reject offers of negotiations.

Since the situation has not changed, the Committee reiterates its conclusion of non-conformity on this point.

### ***Restrictions to the right to strike, procedural requirements***

As to the third ground of non-conformity (civil servants are not entitled to strike), the Government states that in a ruling of 12 June 2018 (No. 2 BvR 1738/12), the Federal Constitutional Court found that, regardless of the type of activity exercised, the ban on strike action for civil servants was an independent and traditional principle of the career civil service system within the meaning of Article 33§5 of the Basic Law (*Grundgesetz*), which justified a restriction on the right to organise. The ban was closely linked, in particular, to the civil service principle of alimentation (*Alimentationsprinzip*), the duty of loyalty and the principle of lifetime employment.

The Federal Constitutional Court added that the provisions of the Basic Law had to be interpreted in keeping with international law. In this context, it ruled that the ban on strike action by civil servants in Germany was compatible with the guarantees of the European Convention on Human Rights and that it had not been established that German law conflicted with the case law of the European Court of Human Rights under Article 11 of the Convention (freedom of assembly and association).

The Committee recalls that public officials enjoy the right to strike under Article 6§4 of the 1961 Charter. Prohibiting all public officials from exercising the right to strike is not in conformity with this provision. Consequently, the Committee reiterates its conclusion of non-conformity on this point.

### ***Covid-19***

In the context of the Covid-19 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 the pandemic and the related restrictions did not lead to any structural restrictions regarding the right to strike. Consequently no individual measure was considered necessary to guarantee this right.

### ***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;
- 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 on the right to strike;
- all civil servants, regardless of whether they exercise public authority, are denied the right to strike.

## ***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:

1°. 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.

2°. 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.