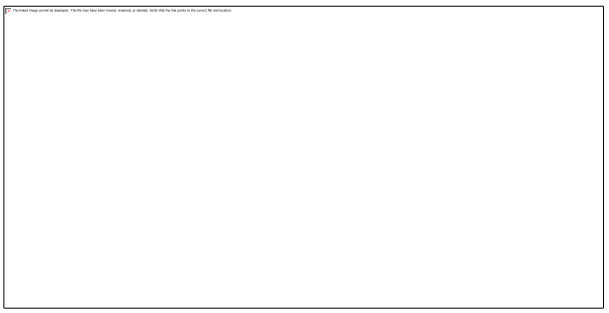

March 2023

EUROPEAN SOCIAL CHARTER

European Committee of Social Rights

Conclusions XXII-3 (2022)

LUXEMBOURG

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 Luxembourg, which ratified the 1961 European Social Charter on 10 October 1991. The deadline for submitting the 25th report was 31 December 2021 and Luxembourg submitted it on 30 December 2021.

The Committee recalls that Luxembourg 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 XX-3 (2014)).

In addition, the Committee recalls that no targeted questions were asked under certain provisions. If the previous conclusion (Conclusions XX-3 (2014)) found the situation to be in conformity, there was no examination of the situation in 2022.

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

- the right to just conditions of work (Article 2),
- the right to a fair remuneration (Article 4),
- the right to organise (Article 5),
- the right to bargain collectively (Article 6),
- the right to information and consultation (Article 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).

Luxembourg has accepted all provisions from the above-mentioned group except Articles 4§4 and 6§4 of the 1961 Charter and the Additional Protocol.

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

The conclusions relating to Luxembourg concern 13 situations and are as follows:

– 9 conclusions of conformity: Articles 2§1, 2§2, 2§3, 2§5, 4§2, 4§5, 5, 6§1, 6§2,

– 3 conclusions of non-conformity: Articles 2§4, 4§1, 4§3.

In respect of Article 6§3, 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 Luxembourg under the 1961 Charter.

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

- the right of children and young persons to protection (Article 7),
- the right of employed women to protection (Article 8),
- the right of the family to social, legal and economic protection (Article 16),
- the right of mothers and children to social and economic protection (Article 17),
- the right of migrant workers and their families to protection and assistance (Article 19).

The deadline for submitting that report was 31 December 2022.

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

Article 2 - Right to just conditions of work

Paragraph 1 - Reasonable working time

The Committee takes note of the information contained in the report submitted by Luxembourg and in the comments by OGBL and LCGB.

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 Luxembourg was in conformity with Article 2§1 of the 1961 Charter, pending receipt of the information requested (Conclusions XXI-3). The assessment of the Committee will therefore concern the information provided in the report in response to the questions raised in its previous conclusion, and to the targeted questions.

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 the normal working hours are 8 hours per day and 40 hours per week. The applicable collective agreements may set lower limits. Moreover, the employer may determine a reference period of up to 4 months during which workers may be employed beyond the above-mentioned limits. In any case, the maximum working time may not exceed 10 hours per day or 48 hours per week. Rest periods should be of at least 11 consecutive hours in each 24-hour period and 44 consecutive hours in each 7-day period. When the working time exceeds 6 hours, every worker is entitled to one or more rest periods, paid or unpaid. The employer may introduce a work organisation plan or flexitime which will apply either to all workers or to part of them.

The report lists exceptions where the working time regulations do not apply, for example, to home-based workers, fairground workers, inland waterway transporters, travellers and sales representatives working outside the establishment, directors and senior managers whose presence at the enterprise is indispensable for its operation and supervision, family businesses. Specific schemes apply to personnel employed in care institutions, rest homes, holiday camps, orphanages and boarding schools; mobile workers employed in road transport companies; employees, apprentices and trainees employed in the hotel and catering sector.

The report provides no information on the activities of labour inspectorates, including statistics on inspections and their prevalence by sector of economic activity, sanctions imposed, therefore, the Committee reiterates this request for information.

Authorities' actions to ensure the respect of reasonable working hours and remedial action taken in respect of specific sectors of activity

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

In reply, the report states that in 2020, 9,128 requests with regard to overtime were processed by the authorities, which represents a decrease of 3.73% in comparison with 2019.

Law and practice regarding on-call periods

In its previous conclusion, the Committee asked whether inactive periods of on-call duty during which workers were not at the workplace were regarded as rest periods (Conclusions XXI-3).

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, if the worker has to be at the disposal of the employer at the workplace and is obliged to remain constantly attentive, this period is considered working time, even if the worker has no actual work to do. If the worker has to be contactable but may remain at home or another place, a periodic payment for such period may be freely determined between the employer and the worker and indicated in the employment contract or its amendment. If the worker is obliged to be present at a particular place, this time is considered working time. The Committee asks whether there are any rules describing time spent at home in terms of rest time and remuneration.

The report states that zero-hour contracts are not provided for by the domestic legislation.

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 extraordinary family leave has been introduced to respond to closures of schools and childcare facilities.

The report also states that telework was generally encouraged both in the private sector and the public sector.

In their comments, OGBL and LCGB state that the Government did not reply to the targeted question and also state that, having regard to the growth of the new Covid-19 infections, it was possible for employers to authorise some sector workers to work up to 12 hours per day and up to 60 hours per week (healthcare services).

Conclusion

The Committee concludes that the situation in Luxembourg is in conformity with Article 2§1 of the 1961 Charter.

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 Luxembourg.

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

As the previous conclusion found the situation in Luxembourg to be in conformity with the Charter (Conclusions XXI-3 (2018)), there was no examination of the situation in 2022 on this point. Therefore, the Committee reiterates its previous conclusion.

The Committee notes from the report that the Law of 25 April 2019 amending various laws introduced an additional public holiday from 1 January 2019. According to the report, all persons bound by a service or apprenticeship contract, in both the private and public sectors, have the same statutory holidays provided that they do not benefit from other, more favourable statutory or contractual provisions.

As for employees working for seasonal businesses, the report states that a Grand Ducal regulation provides that "(…) workers paid by the hour or the month who work for seasonal businesses and are required to work on statutory holidays can be compensated, for each statutory holiday worked, by giving them two paid rest days within six months, or by giving them two days of paid leave additional to their ordinary leave, or by giving them, for all statutory holidays worked, half of a paid rest day per week throughout the year."

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 Luxembourg 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 Luxembourg.

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).

In its previous conclusions (Conclusions 2018), the Committee found that the situation in Luxembourg was not in conformity with Article 2§3 of the 1961 Charter on the ground that not all employees had the right to take at least two weeks of uninterrupted leave during the year.

The report states that the Law of 8 April 2018 "amending 1) the Labour Code; 2) the amended law of 24 December 1996 introducing income tax deductions when hiring unemployed persons; 3) the amended law of 12 September 2003 relating to persons with disabilities" introduced a new provision in the Labour Code. New Article L. 233-8 provides that "leave may be taken in a single period, unless the needs of the department or the justified wishes of the employee require that it be divided up, in which case one of the fractions of the period of leave taken must be at least two calendar weeks” (previously 12 consecutive days). The report also states that under Article L.233-3 of the Labour Code, the leave year is the calendar year, and that under Article L. 233-4 (as amended) the length of the leave period is at least 26 working days per year (previously 25 days).

However, the Committee notes that Article L.233-10 of the Labour Code according to which "leave which has not yet been taken by the end of the calendar year may exceptionally be carried over until 31 March of the following year" is still in force.

In view of the legislative changes, the Committee asks that the next report state whether, under this provision, workers can still defer their entire period of leave until the following year or whether they must in all cases use a certain amount of their annual leave during the year in which it is due. In the meantime, it concludes that this situation is in conformity with Article 2§3 of the Charter.

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 Luxembourg 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 takes note of the information contained in the Luxembourg report, as well as in the comments submitted by the trade union organisations OGBL and LCGB affiliated to the ETUC (European Trade Union Confederation).

The Committee points out that no targeted questions were asked in relation to 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 (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 (Conclusions XXI-3 (2018)), the Committee considered that the situation in Luxembourg was not in conformity with Article 2§4 of the 1961 Charter on the grounds that, despite the policy of eliminating risks, workers exposed to tasks involving residual health risks are not entitled to appropriate compensation measures.

Elimination or reduction of risks

As regards the progressive elimination of the risks inherent in dangerous or unhealthy occupations, the Committee considered the situation to be in conformity with Article 2§4 of the 1961 Charter and therefore reiterates its conclusion of conformity on this point.

Measures in response to residual risks

When the risks have not been eliminated or sufficiently reduced despite the application of the measures described above, or if such measures have not been applied, the second part of Article 2§4 requires States to grant workers exposed to such risks one form or another of compensation. The aim of these compensatory measures should be to afford the persons concerned sufficient regular rest time to recover from the stress and fatigue caused by their occupation and thus maintain their vigilance or limit their exposure to the risk.

The Committee has considered for many years that it has not been established that workers exposed to residual health risks at work in Luxembourg are entitled to appropriate compensation measures and has therefore concluded that the situation is not in conformity with Article 2§4 of the 1961 Charter on this point (Conclusions XIV-2 (1999), XVI-2 (2003), XVIII-2 (2007), XX-3 (2014), XXI-1 (2016), XX1-3 (2018)).

The report refers to the Grand Ducal regulation of 18 December 2019, under the collective labour agreement for the building industry, which provides for, among other things, allowances for arduous work, as well as supplements for arduous work and transport. However, this is limited to a few categories of workers, and the law still does not provide for compensation measures for residual risks for all hazardous occupations. The trade unions OGBL and LGCB in their comments to the report regret that the law has not been supplemented in this sense. In view of the above, the Committee considers that Luxembourg does not meet the obligations of the 1961 Charter on this point, despite the policy of eliminating risks followed.

Measures related to Covid-19

The report does not contain information on specific measures adopted under this article in relation to the Covid-19 pandemic.

Conclusion

The Committee concludes that the situation in Luxembourg is not in conformity with Article 2§4 of the 1961 Charter on the ground that on workers exposed to tasks involving residual health risks are not entitled to appropriate compensation measures.

Article 2 - Right to just conditions of work

Paragraph 5 - Weekly rest period

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.

As the previous conclusion found the situation in Luxembourg 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 Luxembourg 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 Luxembourg.

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, the Committee found that the situation in Luxembourg was in conformity with the Charter.

The Committee's assessment will relate to the information provided by the Government in response to the questions raised in the previous conclusion as well as the targeted questions with regard to Article 4§1 of the Charter.

Fair remuneration

As part of its targeted questions the Committee asks for information on gross and net minimum and average wages and their evolution over the reference period. It also asks what proportion of workers is concerned by minimum or below minimum wage.

In its previous conclusion (Conclusions 2018) the Committee found that the situation was in conformity with the Charter as the minimum wage paid to workers ensured a decent standard of living. The Committee notes from the report that under the terms of paragraph 1 of Article L.222-2 of the Labour Code, the level of the Minimum Social Wage (SSM) is set by law. According to the report in 2018 and 2019 the SSM was raised on three occasions. In 2020 14.6% of workers were remunerated at around the minimum wage.

The Committee notes from the report and from Eurostat that the gross minimum wage in 2020 stood at € 2.142. The annual gross average earnings made € 64.424. As regards the net values, according to Eurostat the annual net average earnings stood at € 44.374 (€ 3.698 per month). The Committee recalls that in its Conclusions 2014 it received information about the net minimum wage, which made up around 85% of the gross minimum wage. Using the same calculations, the Committee estimates that the net minimum wage in 2020 stood at € 1.820 and therefore, it amounted to 49.2% of the net average earnings.

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. 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 (Conclusions XIV-2 (1998), Statement of Interpretation on Article 4§1). However, where the minimum net wage falls below 50% of the net average wage, the Committee considers that it does not ensure a decent standard of living. Since the net minimum wage fell below 50% of the net average wage in Luxembourg, the Committee considers that it does not ensure a decent standard of living.

In its previous conclusion the Committee took note of the information concerning additional benefits that the workers on minimum wage were entitled to, such as cost-of-living allowance (AVC) and rent allowance. In this respect, the Committee notes from the comments provided by the trade union organisations OGBL and LCGB on the national report that the minimum statutory wage as established by the Government is lower than the monetary threshold foreseen to meet everyday expenses. The Committee asks the next report to provide updated information about additional benefits, available for workers earning the minimum wage.

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 sub-contracting, 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.).

The Committee notes that the report does not provide this information.

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.

The Committee asks what measures are being taken to ensure fair remuneration of workers in atypical jobs as well as misclassified self-employed persons in the platform economy.

Covid-19

As part of its targeted questions, the Committee also asked for specific information about furlough schemes during the pandemic.

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.

The Committee notes that the report does not provide this information.

The Committee asks whether the financial support provided for workers through furlough schemes was ensured throughout the period of partial or full suspension of activities due to the pandemic. It also asks what proportion of workers concerned were covered under such schemes.

Conclusion

The Committee concludes that the situation in Luxembourg is not in conformity with Article 4§1 of the 1961 Charter on the ground that the minimum wage does not ensure a decent standard of living.

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 Luxembourg.

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 considered that the situation in Luxembourg was not in conformity with Article 4§2 of the 1961 Charter on the ground that it had not been established that the right to increased remuneration for overtime work was sufficiently guaranteed (Conclusions XXI-3). 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 targeted question.

Rules on increased remuneration for overtime work

Previously, the Committee found that the situation in Luxembourg was not in conformity with the Article 4§2 of the 1961 Charter because it had not been established that the right to increased remuneration for overtime work was sufficiently guaranteed (Conclusions XXI-3).

The report states that overtime is understood as time worked beyond the daily and weekly limits of the normal working day (8 hours per day and 40 hours per week). Except in cases of force majeure, the duration of overtime is strictly limited to 2 hours per day. Thus, the total working time cannot exceed 10 hours per day and 48 hours per week. Each overtime hour is paid at a rate of 1.4 or compensated for 1.5 in paid rest periods.

The report further states that in the civil service, any work carried out before 6:30 a.m. or after 7:30 p.m. during the working week, work carried out on Sundays and often on Saturdays is considered as overtime. Changes were made to the Code of the Civil Service on 1 August 2018. According to paragraph 1ter of Article 19 of the Code of the Civil Service, if the monthly total overtime does not exceed 8 hours, those hours are compensated by compensatory leave. If monthly overtime exceeds 8 hours, the first 8 hours are compensated by compensatory leave.

According to Grand-Ducal Regulation of 25 October 1990 on overtime by civil servants as well as their on-call time at home, overtime is paid on the basis of hourly rate, which equals 1/173 of the gross monthly salary. For overtime worked on Sundays, an additional 40% is added. For overtime worked on a public holiday, 70% is added. If overtime is worked between 10 p.m. and 6 a.m., a supplement of 20% is added to the above rates.

The report states that concerning the police, in accordance with the Law of 18 July 2018 of the Grand-Ducal Police (which entered into force on 1 August 2018), overtime in emergency or exceptional situations their working time. The maximum weekly working time is calculated on the basis of a reference period of 4 months. The average weekly working time during this period shall not exceed 48 hours, including overtime. The maximum daily working time is 10 hours, including overtime. However, this time may be up to 12 hours in certain exceptional circumstances and the maximum daily working time may be exceeded only up to 4 times during the reference period. In certain cases, daily working time may exceed 12 hours, but this is compensated by 2 hours per hour worked. If missions such as repatriation, extradition, international cooperation exceed 24 hours, the staff shall be compensated for 6 hours per working day, and 10 hours per non-working day as well as an allowance of 5.10 points per day.

The Committee asks how this allowance of 5.10 points per day translates into monetary compensation.

With regard to teaching staff, the report states that in principle no member of the teaching staff shall be charged with additional lessons unless there is a well-established need. With regard to primary education, only the surplus of work carried out in the course of teaching and related activities shall give rise to special remuneration. The remuneration for additional direct teaching shall be based on the number of additional lessons actualy taught: €6.52 per lesson during the first 12 years of service and €8.92 per lesson after 12 years of service. Each hour worked as other activities shall be paid at the rate of €4.75.

The Committee asks whether it is possible for teaching staff to receive time off, and, if so, whether it is longer than the overtime worked. With regard to monetary compensation, the Committee asks whether the remuneration for overtime is increased compared to that for the normal workload.

Covid-19

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

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

The report states that at the time of its submission no relevant data on overtime related to Covid-19 existed.

Conclusion

The Committee concludes that the situation in Luxembourg 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 Luxembourg.

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

With respect to Article 4§3, the States were asked to provide information on the impact of Covid-19 pandemic on the right of men and women workers to equal pay for work of equal value, with particular reference and data related to the extent and modalities of application of furlough schemes to women workers.

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

In its previous conclusion (Conclusions XXI-3 (2018)), the Committee concluded that the situation in Luxembourg was not in conformity with Article 4§3 of the 1961 Charter on the ground that it had not been established that the principle of equal pay was ensured in practice and in particular that:

- it had not been established that the principle of equal pay was protected in practice,
- it had not been established that there was case law on compensation and discrimination based on gender;
- it had not been established that data were collected (concerning job comparison systems).

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

In its previous conclusions (Conclusions XXI-3 (2018) and XX-3 (2014)), the Committee requested information about the case law on sex discrimination, including the notion of indirect discrimination.

In response, the report provides a few examples of relevant case law, showing how the notions of discrimination have been interpreted by the courts. Article L. 241-1(2) of the Equal Pay Act defines indirect discrimination as follows: "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary".

The Committee notes that the situation is in conformity with Article 4§3 of the Charter in this regard.

Effective remedies

In its previous conclusion (Conclusions XXI-3 (2018)), the Committee found that the situation was not in conformity with Article 4§3 of the Charter on the ground that it had not been

established that the principle of equal pay was ensured in practice, nor whether case law existed on compensation and on sex discrimination.

The Committee notes from the report that Article L. 244-3 of the Labour Code allows a shift in the burden of proof in proceedings before the labour courts if there are circumstances which make it reasonable to suppose that direct or indirect discrimination has occurred ("when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment").

Pay inequality is now a criminal offence punishable by a fine. That means that if a difference in pay cannot be justified on objective grounds and is based on gender considerations, the employer will be liable to a fine ranging from €251 to €25,000.

In addition, under Article L. 225-4 of the Labour Code, any clause in an employment contract, collective agreement or internal company rules which provides for lower pay for one or more employees of one sex than for employees of the other sex for the same work or for work of equal value is automatically null and void. The highest remuneration paid to the latter employees is automatically substituted for that provided for in the invalidated provision. Consequently, according to the report, the court hearing a dispute simply has to substitute the highest remuneration for the one earned by the employee concerned.

The report states that very few employees, male or female, take administrative action via the Inspectorate of Labour and Mines or go to court over gender wage inequality. The Committee considers that the absence or low number of gender wage discrimination cases brought before the courts is likely an indication of a lack of appropriate legal framework, lack of awareness of rights, lack of confidence in the legal remedies available or the absence of such remedies, lack of practical access to procedures or fear of retaliation. The Committee requests that the next report provide information explaining this trend. It also asks that the next report state what rules apply in the event of dismissal in retaliation for a complaint about equal pay.

The Committee notes that the report does not provide any information about the compensation awarded by the courts in cases of gender pay discrimination. It therefore considers that the situation is not in conformity with Article 4§3 of the 1961 Charter on the ground that it has not been established that the right to adequate compensation is provided for in gender pay discrimination cases. The Committee requests more information in the next report about the compensation awarded by the courts in gender pay discrimination cases. In particular, it asks whether the obligation to compensate the difference of pay is limited in time or is awarded for the entire period of unequal pay, and whether there is a right to compensation for pecuniary and non-pecuniary damage.

Pay transparency and job comparisons

In its previous conclusions (Conclusions XX-3 (2014) and XXI-3(2018)), the Committee had requested information on job comparisons systems and the practice for correcting possible differences in wages. In the absence of a reply, the Committee considered that the situation was not in conformity with Article 4§3 of the Charter on the ground that it had not been established that data were collected regarding job comparisons systems.

In response, the report states that work is considered to be of equal value where, on the whole, it requires comparable occupational qualifications (as expressed by a title, a diploma or vocational experience), abilities deriving from experience, responsibilities and physical or mental strain.

In addition, the report states that, according to national case law, "the key comparator is the work actually performed by the employee" and that "in examining the question of comparable situation it is irrelevant in what capacity the employee was hired. What matters most is the nature of the work performed" (Court of Appeal ruling of 14 July 2016, No. 41026).

The report states that the LOGIB-LUX software allows enterprises with more than 50 employees to detect any gender pay inequalities and determine the causes of the pay gap. The tool is available on the digital portal of the Ministry of Equality between Women and Men (MEGA). Since the end of 2016, enterprises participating in MEGA's Affirmative Action Programme have been required to conduct a self-assessment of their salaries. They are not obliged to disclose the results of the assessment and must merely show that they have used the software. The Committee requests that the next report provide information on the number of enterprises concerned by this measure, and on the proportion of the workforce covered by these enterprises. It also asks that the next report provide information about how equal pay is ensured in practice, including about the monitoring activities conducted in this respect by the Labour Inspectorate and other competent bodies.

The Committee notes that the report does not contain any information on the 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 also should be the possibility to challenge unequal remuneration resulting from 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 Luxembourg is in conformity with Article4§3 of the Charter in this respect.

Statistics and measures to promote the right to equal pay

In its previous conclusion (Conclusions XXI-3 (2018)), the Committee asked for detailed information regarding the adjusted gender pay gap in all occupations.

In response, the report refers to the Eurostat data on the gender pay gap. The Committee takes note of these data during the reference period: 2.6% in 2017, 1.4% in 2018, 1.3% (provisional figure) in 2019 and 0.7% (provisional figure) in 2020 (compared with 7.9% in 2011). It notes that the gender pay gap was significantly below the average of the 27 European Union countries, which was 13%(provisional figure) in 2020 (data as of 4 March 2022).

The report does not provide any data on the pay gap by occupation but states that, although the gender pay gap has tended to narrow in recent years, significant differences persist in certain sectors of activity. The Committee notes from the Direct Request concerning the Equal Remuneration Convention (No. 100) in Luxembourg, published by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) in 2021 (109th Session of the International Labour Conference) that the gender pay gap remained substantial in several sectors, and was estimated in 2017 at about 22% in financial and insurance activities and in wholesale and retail trade, which employ an equal share of women and men, and up to 30.7% in other service activities, where a majority of women are employed. The Committee asks the next report to provide information and updated figures on this situation. In the meantime, it reserves its position on this issue.

In its previous conclusions (Conclusions XX-3 (2014) and XXI-3(2018)), the Committee also asked for information on measures implemented with a view to promoting gender equality and reducing the gender pay gap in all entities.

In response, the report states that the national action plan on "Equality" 2015-2018 contains various equal pay measures.

In particular, the report describes the MEGA Observatory project set up in December 2019. The Observatory operates in seven areas (education, work-life balance, decision-making, income, health, employment and domestic violence) and consists of two parts: a database relating to the seven above-mentioned areas and providing yearly calculations of the various indicators identified in consultation with the organisations and institutions concerned, and a website for members of the general public wishing to know about the situation as regards

gender equality. In addition, the Observatory pools data from various administrations and organisations. According to the report, the Observatory is intended to supplement existing tools and to encourage new projects in order to make equality a reality in everyday life.

The report also states that several public and local administrations and private enterprises have participated in the Affirmative Action Programme since 2011. In the private sector, the scheme allows enterprises to create *de facto* equality within their organisation and to sign up to incorporating gender equality in three key areas, namely: (1) equal treatment of women and men, (2) gender equality in decision-making and (3) gender equality in reconciling work and private life. The Committee notes from the report that the Affirmative Action Programme has been extended by increasing the number of participating enterprises and by setting up a network for sharing good practice.

The Committee takes note of other measures under this scheme described in the report (consultations conducted by the Labour Inspectorate, various outreach measures, specific training, etc.).

The report further states that the Government joined the Equal Pay International Coalition (EPIC) led by the International Labour Organization, UN Women and the OECD in April 2021 (outside the reporting period), with the aim of assisting UN member states in achieving equal pay for women and men for work of equal value by 2030.

In view of the above, the Committee asks that the next report contain information on the pay gap by occupation. In the meantime, it reserves its position on this point.

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

In reply to the question regarding the impact of Covid-19, the report states that no relevant data is available at this time.

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

Conclusion

The Committee concludes that the situation in Luxembourg is not in conformity with Article 4§3 of the 1961 Charter on the ground that it has not been established that adequate compensation is provided for in gender pay discrimination cases.

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 Luxembourg.

The Committee recalls that no 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).

As the previous conclusion found the situation in Luxembourg 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 Luxembourg 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 Luxembourg.

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 Luxembourg was in conformity with Article 5 of the 1961 Charter (Conclusion 2018).

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

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

Prevalence/Trade union density

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

In reply to the targeted question, the report states that there are no developments to be reported since the last studies on prevalence carried out in 2011.

Personal scope

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

In reply to the Committee´s question, the report states that members of the armed forces in Luxembourg are considered civil servants and therefore benefit from the right to organise to the same extent as civil servants.

Restrictions on the right to organize

The Committee asked in its targeted question for information on public or private sector activities in which workers are excluded from forming organisations for the protection of their economic and social interests or from joining such organisations.

The report provides no information in this respect. The Committee recalls that it has previously found the situation in conformity with Article 5 of the Charter (most recently Conclusions 2018, 2014). Therefore, it considers that the situation remains in conformity in this respect, however it requests the next report to confirm that there are no public or private sector activities in which workers are excluded from forming organisations for the protection of their economic and social interests or from joining such organisations.

Forming trade unions and employers' organisations

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

Freedom to join or not to join a trade union

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

Trade union activities

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

Representativeness

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

Conclusion

Pending receipt of the information requested the Committee concludes that the situation in Luxembourg 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 Luxembourg, as well as of the information contained in the previous report, which it had not examined due to its late submission.

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).

In its previous conclusion, the Committee found that the situation in Luxembourg was in conformity with Article 6§1 of the 1961 Charter, pending receipt of the information requested (Conclusions XX-3 (2014)). Namely, the Committee asked whether joint consultation between employees and employers at all levels covered all matters of mutual interest.

The report refers to Articles 414.1-13 of the Labour Code which, among others, enumerate a broad range of matters of mutual interest that are subject to joint consultation procedures at the enterprise level. The Committee asks for information about the scope of joint consultation at the national level.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Luxembourg 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 Luxembourg, as well as of the information contained in the previous report, which it had not examined due to its late submission.

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 Luxembourg was in conformity with Article 6§2 of the 1961 Charter, pending receipt of the information requested (Conclusions XX-3 (2014)). The assessment of the Committee will therefore concern the information provided in the report in response to the questions raised in its previous conclusion and to the general question.

The Committee asked for updated information on the number of collective agreements concluded in the public and private sectors and the number of employees covered by these agreements (Conclusions XX-3 (2014)). According to the report, the latest national data on collective bargaining coverage were published in 2013. Nevertheless, the national statistics body (STATEC) estimates that nearly 50% of employees were covered by a collective labour agreement in 2019. The report further provides a list of the industry-level collective agreements currently in force. It notes that 243 enterprise-level collective agreements were in force when the report was submitted, covering 101594 employees.

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

Covid-19

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

Conclusion

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

Article 6 - Right to bargain collectively

Paragraph 3 - Conciliation and arbitration

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

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).

In its previous conclusion, the Committee found that the situation in Luxembourg was in conformity with Article 6§3 of the 1961 Charter pending receipt of the information requested. It asked for up-to-date information on the rules governing the arbitration procedure for public sector employees (Conclusions XX-3 (2014)).

In its report, the Government states that the conciliation and mediation procedures for the public sector were set out in a Grand Ducal regulation of 2015 and provides the text of this regulation.

The Committee notes that the Government did not provide information on the rules governing the arbitration procedure for public sector employees. It therefore repeats its request for information on this point. The Committee points out that should the next report not provide the information requested, there will be nothing to show that the situation is in conformity with Article 6§3 of the 1961 Charter.

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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