HANDBOOK FOR LAWYERS:

European Social Charter (Revised) and the case law of the European Committee of Social Rights

Karin Lukas
Vitaliy Razik

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Karin Lukas
Vitaliy Razik

Additional contributions from:
Monika Smusz-Kulesza
Anahit Manasyan
Alla Fedorova

Council of Europe

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Contents

PART I

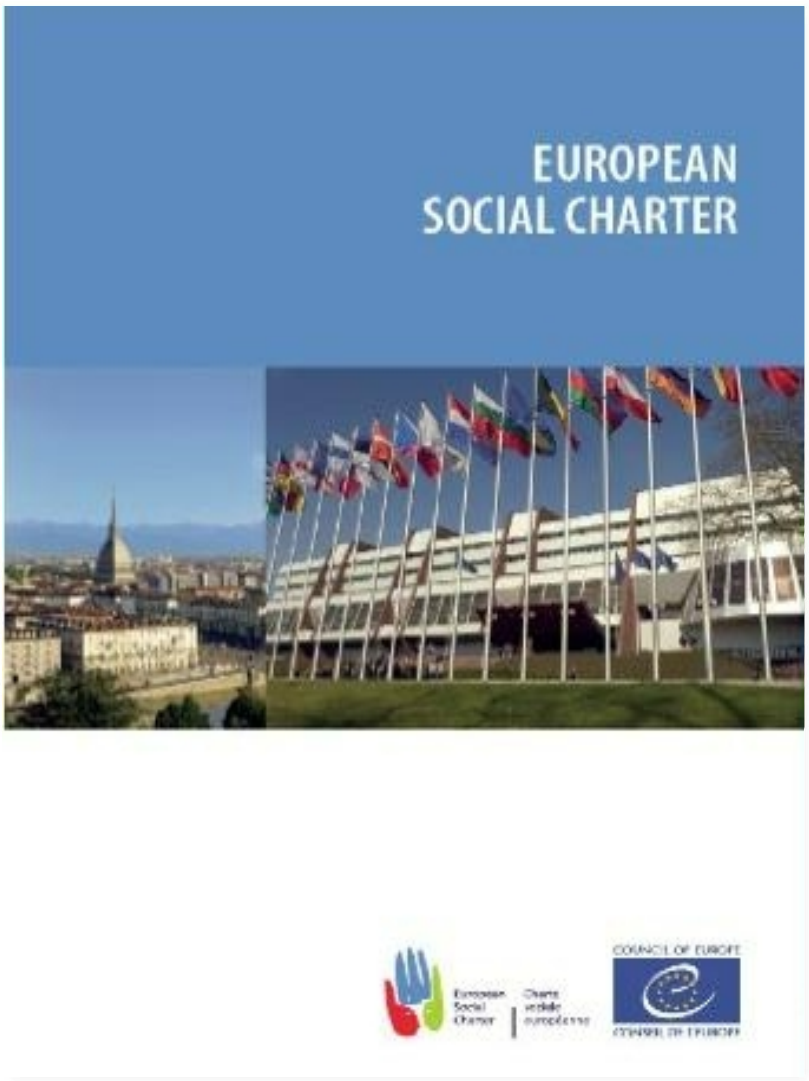
General Information on the European Social Charter

The European Social Charter and its revision

The European Social Charter (ESC) is the counterpart of the European Convention on Human Rights in the field of economic, social and cultural rights. No other legal instrument at pan-European level provides such an extensive protection of these rights. The ESC is also a reference point for European Union law, in particular the EU Charter of Fundamental Rights which based a number of its rights on those of the ESC. Currently, 43 of the 47 State Parties of the Council of Europe have ratified the ESC.

The history of the European Social Charter knows three major milestones. The initial European Social Charter has been adopted in 1961.[1] This document is the result of nearly 10 years of preparatory work in the Council of Europe and with the Member States. In this process, one central document, Opinion no. 5 of 1953, formulated that the European Social Charter should guide the Member States in the field of social policy, and is to be seen as the counterpart of the European Convention on Human Rights in this area.[2] In the late 1980s and (early) 1990s a political and legal process to modernise the Charter and to increase its impact began. In 1988, a first Additional Protocol added new rights[3] and the improvement of the supervisory mechanism[4] in 1991. This reform process culminated in 1996 with the adoption of the Revised Charter,[5] which added a set of new rights while at the same time incorporating the basic content of the 1961 Charter and its protocols.[6] And finally, in 1995, another Additional Protocol[7] providing for a system of collective complaints was adopted which significantly strengthened the monitoring system of the Charter. Today, 43 out of the Council of Europe's 47 member states[8] have ratified either the 1961 Charter (eight states) or the Revised Charter.[9] As this process continues, nearly all states will be bound by the Revised Charter at some point in the future.[10]

1. For the 1961 Charter text see https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b642.
2. Parliamentary Assembly, Opinion No. 5 (1953), adopted by the Assembly at its twenty-first Sitting, on 23rd September, 1953, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13744&lang=en (accessed 8 November 2018).
3. Council of Europe, European Social Charter, Collected texts (2015), 25-30.
4. Ibid, 31-34.
5. For the 1996 Charter text see https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93.
6. The 1961 Charter and the Revised Charter will continue to co-exist until all State Parties have adopted the Revised Charter.
7. Ibid, 35-37.
8. The following states have signed but not ratified the Charter: Liechtenstein, Monaco, San Marino and Switzerland.
9. A detailed chart of signatures and ratifications can be found at the European Social Charter website, https://rm.coe.int/16806f399d (accessed 17 May 2018).
10. The countries which still have neither ratified the 1961 Charter nor the Revised Charter are Liechtenstein, Monaco, San Marino and Switzerland.



1996 Charter text at https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93

Characteristics of the European Social Charter

A. Personal Scope of the Charter

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

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

Consequently, the Charter does not grant foreign nationals in general a right of entry or freedom of movement in the territory of other states parties. However, according to the wording of the Charter and the Committee's interpretation, states parties are required to implement a flexible immigration

policy towards nationals of other states parties by liberalising the regulations governing the employment of foreign workers (see Article 18§§1-3 of the Charter) and facilitating family reunion (see Article 19§6 of the Charter). The Appendix explicitly mentions refugees and stateless persons who if they lawfully reside in the territory of a state party, shall be granted 'treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable' to these groups of persons.

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

In CC 69/2011, DCI v. Netherlands, the complainant organisation alleged that foreign children living accompanied or not, either as illegal residents or asylum seekers in Belgium, are currently excluded from social assistance in breach of Articles 7§10 (Special protection against physical and moral dangers), 11 (right to health), 13 (right to social and medical assistance), 16 (right to appropriate social, legal and economic protection for the family), 17 (right of children and young persons to appropriate social, legal and economic protection) and 30 (right to protection against poverty and social exclusion) alone or read in conjunction with Article E (non-discrimination) of the European Social Charter (revised). The Committee concluded that there was a violation of Article 17, of Article 7§10, and of Article 11 §§1 and 3 of the Revised Charter.

B. À la Carte Ratification of the Charter

Unlike other human rights treaties, the Charter foresees a so-called à la carte ratification. According to Article A of the 1961 Charter, each state party must accept so-called 'core articles' which are articles 1, 5, 6, 12, 13, 16 and 19. In the corresponding provision of the European Social Charter (revised) the core Articles are 1, 5, 6, 7, 12, 13, 16, 19 and 20. In addition, the state must accept enough additional provisions to be bound by not to be less than 10 Articles or 45 numbered paragraphs of the 1961 Charter, and not less than 16 Articles or 63 numbered paragraphs in total of the European Social Charter (revised). This leads to a certain hierarchisation of rights and consequently, to a prioritisation in implementation. The system of à la carte ratification leads to a 'protection patchwork' with certain rights left out depending on the selection by the state in question. For example, France and Portugal have accepted all provisions of the European Social Charter (revised), while Albania and Armenia have committed themselves to 64 paragraphs. Moldova accepted the minimum of 63 paragraphs.[11]

The Charter foresees the procedure of meetings on non-accepted provisions where regular meetings and written exchange between states and the Committee aim at the ratification of further Charter provisions. This has led to the ratification of additional provisions in almost all states, most recently in Austria, Latvia, Moldova, North Macedonia, and Ukraine. Overall, the vast majority of states has ratified a majority of provisions. However, the problem of uneven implementation throughout Europe because of the à la carte system remains even though it gradually decreases.

11. Council of Europe, Country Factsheets European Social Charter, https://www.coe.int/it/web/turin-european-social-charter/implementing-the-european-social-charter#Factsheets (9 November 2018).

C. Overlapping provisions

This 'protection patchwork' is somewhat offset by a number of provisions which overlap with each other. For example, Article 2§4 on the elimination of risks in dangerous occupations significantly overlaps with Article 3 on right to safe and healthy working conditions; Article 16 on the right of the family to social, legal and economic protection provides in the Committee's interpretation a right to shelter and housing for families which is also included in the right to housing (Article 31); Article 4(3) on fair remuneration for women and men and Article 20 on gender equality in employment protect equal pay; similarly, Article 23 overlaps with other provisions of the Charter which protect older persons as members of the general population, such as Article 11 (right to protection of health), Article 12 (right to social security), Article 13 (right to social and medical assistance) and Article 30 (right to protection against poverty and social exclusion). Thus, some degree of protection is provided by articles that capture elements of other rights even though the state has not ratified these provisions of the Charter.

D. Restriction of Rights

The Charter in Article G contains a rights restrictions clause also found in other human rights instruments. It sets out the limitations for rights realisation in much the same way as in the European Convention on Human Rights. The wording of Article G and its interpretation by the Committee requires a restrictive reading of the possible limitation of rights in the Charter. Any restriction to a right is only in conformity with the Charter if it satisfies the conditions stipulated in article G. The Committee has developed extensive case law on art. G regarding freedom to organise (Article 5) and the right to bargain collectively (Article 6).

Given the severity of the consequences of a restriction on Charter rights, Article G lays down specific preconditions for applying such restrictions. Thus, any restriction has to: be prescribed by law; pursue a legitimate purpose; and be necessary in a democratic society for the pursuance of these purposes.

Legitimate purpose can be the protection of the rights and freedoms of others, public interest, national security, public health or morals. According to the Committee's interpretation, States Parties have a margin of appreciation in defining the public interest. However, obligations undertaken under the Charter cannot be abandoned without an appropriate level of protection adequate to meet basic social needs.[12] Such restrictive measures must ensure proportionality between the goals pursued and their negative consequences for the enjoyment of social rights. Consequently, even under extreme circumstances the restrictive measures put in place must be appropriate for reaching the goal pursued. They may not go beyond what is necessary to reach such goal, they may only be applied for the purpose for which they were intended, and they must maintain a level of protection which is adequate.[13] In addition, a balancing analysis of the effects of the legislative measures should be conducted by the authorities, notably of their possible impact on the most vulnerable groups as well as a genuine consultation with those most affected by the measures.[14]

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

Interpretation and Monitoring of the European Social Charter

The legally mandated body to interpret the rights of the Charter is the European Committee of Social Rights (ECSR). It develops its interpretation based on international legal principles: by looking at the object and purpose of ESC, and its dynamic interpretation as a living instrument which is able to address current problems. The ESC is monitored by the ECSR, through the reporting procedure and the collective complaints procedure.

The ECSR's fifteen independent, impartial members come from various fields of law such as labour and social security law, constitutional law, international law and human rights law. They are elected for 6 years and may stand for re-election once. The ECSR is vitally supported by the Secretariat of the European Social Charter.

European Committee of Social Rights, Agora Building, Council of Europe

Monitoring is done through the state reporting procedure and the collective complaints procedure. The Committee is vitally supported by the Secretariat of the European Social Charter in issuing conclusions on state reports and decisions on collective complaints.

E. The Reporting Procedure

Under the reporting system, states submit written reports every year on how they implement the Charter in law and in practice. They are obliged to communicate the reports not only to the Committee but also to representative national trade unions and employers' organisations.[15] Thus, these organisations have the possibility to submit comments on the report of their government. The reports are examined by the Committee which decides whether the situation is in conformity for each provision accepted by each state. In reaching these decisions, the Committee may also take into account information from other sources than the national report, for example information provided by non-governmental organisations and other human rights treaty bodies.

15. See Articles 21 and 23 of Part IV of the 1961 Charter, as well as Article 1 of the Amending Protocol of 1991 which amends Article 23; Article C of Part IV of the Revised Charter refers to the same supervision procedure as under the 1961 Charter.

The Committee reviews progress of the State Parties in a cyclic manner which is shown below:

Group 1 **Employment, training and equal opportunities**	Group 2 **Health, social security and social protection**	Group 3 **Labour rights**	Group 4 **Children, families, migrants**
► Article 1 ► Article 9 ► Article 10 ► Article 15 ► Article 18 ► Article 20 ► Article 24 ► Article 25	► Article 3 ► Article 11 ► Article 12 ► Article 13 ► Article 14 ► Article 23 ► Article 30	► Article 2 ► Article 4 ► Article 5 ► Article 6 ► Article 21 ► Article 22 ► Article 26 ► Article 28 ► Article 29	► Article 7 ► Article 8 ► Article 16 ► Article 17 ► Article 19 ► Article 27 ► Article 31

Table 1: European Social Charter, State Reporting Procedure

Consequently, each provision is examined every four years, with the exception of equal pay for women and men which is examined both under Article 4§3 and Article 20.

Since 2014, State Parties which have accepted the collective complaints procedure are subject to a reporting procedure 'light' and have to submit a national report only every two years.[16] Every other year, State Parties draw up a simplified report which includes the follow-up action taken in response to the decisions of the Committee on collective complaints. The new system entered into force for all states parties which have already accepted the procedure since October 2014 and, for other states parties, it will enter into force one year after acceptance of the collective complaints procedure.

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

All conclusions and follow-up to conclusions can be found in the HUDOC database of the Council of Europe: https://hudoc.esc.coe.int/eng#{%22sort%22:[%22ESCPublicationDate%2Descending%22],%22ESCDcType%22:[%22CON%22]}

F. The Collective Complaints Procedure

This procedure is a unique form of collective redress in the human rights system, reflecting a systemic approach in addressing social problems which affect specific groups of persons. The collective complaints mechanism is a process which does not solely focus on past violations but aims at preventing their reoccurrence in the future. Certain organisations may file complaints of a collective nature alleging that a state is in breach of the Charter. Four categories of organisations

16. Governmental Committee of the European Social Charter and the European Code of Social Security, Ways of streamlining and improving the reporting and the monitoring system of the European Social Charter, Decision 4.7 during the 1196th meeting, 2-3 April 2014, (CM(2014)26)).

are eligible to submit such complaints:[17] the international organisations of trade unions and employers' organisations; the trade unions and employers' organisations in the country concerned; non-governmental organisations which have consultative status and have been put on a list[18] drawn up by the Governmental Committee; and national non-governmental organisations. This last category is only entitled to submit complaints if the state explicitly agrees to it.[19]

A review of the complaints received so far shows that quite a number of national trade unions, and to some extent European trade union organisations such as the European Trade Union Confederation (ETUC), have utilised the collective complaints system. On the part of employers, efforts have been much less extensive. To a considerable extent, international NGOs also avail themselves of the system, notably the European Roma Rights Centre, Defence for Children International, the World Organisation against Torture, the Centre on Housing Rights and Evictions, the International Commission of Jurists, and the International Federation of Human Rights Leagues. To date, 15 State Parties to the Charter have accepted the 1995 Collective Complaints Protocol: Belgium, Bulgaria, Croatia, the Czech Republic, Cyprus, France, Finland, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden, and the Committee has received over 190 complaints.

All collective complaints and decisions on admissibility and the merits regarding those complaints can be found in the HUDOC database of the Council of Europe: http://hudoc.esc.coe.int/eng#{%22ESCDcType%22:[%22DEC%22]}

The Collective Complaints Procedure incorporates various features of a judicial process. The arguments of both parties are considered, the applicable norms are applied to the facts of the case, and the reasoning of the decision follows a judicious fashion. Thus, the collective complaints system of the Charter can be regarded as a quasi-judicial process, the first such complaint mechanism in international law specifically for social rights. In terms of enforcement, there are however some limitations. For example, the powers of the Committee to impose monetary sanctions are marginal. The Committee has stayed within the limits of its powers under the Protocol, and has in several cases rejected claims for more extensive compensation, such as in the case of Collective complaint no. 9/2000.[20] The strengths of the complaint mechanism lie in its substantial development of the standards of the Charter and the monitoring of the implementation of the Charter for specific groups in practice.

Regarding the actual procedure, the complaint must be submitted in writing, relate to a provision accepted by the state party and indicate why the state party has not ensured the 'satisfactory application' of the provision.[21] Standing practice of the Committee further requires that the complaint must be signed by a person authorised to represent the complainant organisation.[22] Requirements that apply to individual complaints such as the exhaustion of domestic remedies

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17. See Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No.158, http://conventions.coe.int/Treaty/en/Treaties/Html/158.htm (accessed 28 May 2018). Other civil society organisations, although not eligible to file complaints, may intervene in the process by separate submissions which the Committee may decide to include in its findings. This has for example been the case in collective complaint No. 87/2012 on the right to women in Italy to access abortion services.
18. In order to be eligible for this list, the organisation has to demonstrate 'access to authoritative sources of information and is able to carry out the necessary verifications, to obtain appropriate legal opinions etc. in order to draw up complaint files that meet the basic requirements of reliability'. Committee of Ministers Decision of 22 June 1995, as summarised by the Explanatory Report to the Revised European Social Charta, para. 20.
19. The only country that has accepted collective complaints by national NGOs is Finland.
20. Confédération Francaise de l'Encadrement v.France, collective complaint no. 9/2000. The fact that the Committee does not award larger sums of compensation has been criticised in the literature. See D Harris and J Darcy, The European Social Charter, 365-367 (2nd edition 2001).
21. Art. 4 of the 1995 Additional Protocol.
22. European Committee of Social Rights, Rules adopted during the 201st session, March 29, 2004, revised during the 207th session, May 12, 2005, Rule 23.

and the requirement to be an individual alleging that his/her rights have been infringed upon are not applicable to this (collective) procedure. Complaints are examined by the Committee first in view of their admissibility and if the complaint satisfies the above-mentioned formal requirements, it is declared admissible. The Committee will then decide on the merits of the case. The decision is taken on the basis of an exchange of arguments in writing between the parties. If necessary, the Committee may also decide to hold a public hearing.

Finally, the Committee transmits its decision to the Committee of Ministers – the highest decision-making body of the Council of Europe – which adopts a resolution for the state concerned to take the necessary measures to bring the situation into conformity with the Charter. After the Committee of Minister's resolution which is generally the case, or if no resolution is passed, after four months, the decision is officially published and transmitted to the Parliamentary Assembly of the Council of Europe. In case the state party does not comply with the decision, the Committee of Ministers has the obligation to adopt, by a two-thirds majority vote, a recommendation to the state. This recommendation means that the state must inform the Committee of Ministers on the measures it has taken to comply with the Committee's findings. Such a recommendation has only occurred once.[23] However, as part of the reform of 2014, the Committee assesses in a follow-up procedure progress made on collective complaints by country in every monitoring cycle.

Collective Complaints Procedure

Judicial assessment

Complaints lodged by trade unions, employers' organisations and NGOs alleging violations of the Charter
European Committee of Social Rights (ECSR) decides whether the complaints are admissible and well-founded

Follow-up

Committee of Ministers Ensures that states bring situations into conformity with the Carter. If not, it addresses a Recommendation to the State in question.

Table 2: European Social Charter, Collective Complaints Procedure

The implementation of the European Social Charter in Ukraine

The European Social Charter Revised was ratified by Ukraine[24] on 21 December, 2006 and the ESC has become binding for Ukraine since the 1st February, 2007.[25] Since that date the ratified provisions of the European Social Charter (revised) have become the part of Ukrainian national legislation accordingly to the Article 9 of the Constitution of Ukraine. This represents all ratified provisions have been automatically incorporated into domestic law of Ukraine and could be

23. In collective complaint No. 6/1999, the Committee of Ministers noted the findings of violation by the Committee regarding access to work and vocational training for guide-interpreters and national lecturers, and requested the French government to end this practice, Recommendation RecChs (2001), https://wcd.coe.int/ViewDoc.jsp?id=182943&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.
24. Law of Ukraine, On ratification of the European Social Charter revised, N 137-V, 14.09.2006. https://zakon.rada.gov.ua/laws/show/137-16/ed20060914#Text
25. Treaty office of the Council of Europe, Chart of signatures and ratifications of Treaty 163. European Social Charter (revised). https://www.coe.int/en/web/conventions/full-list//conventions/treaty/163/signatures?p_auth=dsRWYCH7

treated as a source of law.

The European Social Charter (revised) is one of the pivotal international legal acts which belong to the system of economic and social rights sources. The Law of Ukraine "On International Treaties of Ukraine" establishes that an international treaty of Ukraine is any treaty concluded in writing with a foreign state or other entity under international law and governed by the international law, regardless of whether the treaty is made in one or more related documents, and regardless of its particular name (treaty, agreement, convention, pact, protocol, etc.).[26]

Thus, accordingly the paragraph 2 of Article 19 of the Law of Ukraine "On International Treaties of Ukraine" stipulates that if an international treaty of Ukraine establishes the rules other than those provided for in the relevant act of legislation of Ukraine, the rules of the international treaty shall be applied.

Proceeding from the provisions of the Vienna Convention on the Law of Treaties,[27] to which Ukraine is a party, [28] the conclusions and recommendations of the European Committee of Social Rights are the part of the international treaty. The list of all conclusions made by Committee to Ukraine is available on HUDOC database.[29]

Ukraine considered itself bound by 6 Articles of 9 mandatory articles of the Charter, fulfilled the minimum requirements:

- ***Article 1*** – The right to work
- ***Article 5*** – The right to organise
- ***Article 6*** – The right to bargain collectively
- ***Article 7*** – The right of children and young persons to protection
- ***Article 16*** – The right of the family to social, legal and economic protection
- ***Article 20*** – The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

In addition, the Law of Ukraine "On ratification of the European Social Charter revised" was amended in 2017 and Ukraine agreed to accept last 2 paragraphs of the article 12 - The right to social security (paragraph 3 and paragraph 4)[30] and has bounded itself by them since 1 September, 2017.

Although, under the article 46 of the Constitution of Ukraine, citizens have the right to social protection including the right to financial security in cases of complete, partial, or temporary disability, loss of the principal wage-earner, unemployment due to circumstances beyond their control, old age, and in other cases determined by law… Pensions and other types of social payments and assistance that are the principal sources of subsistence shall ensure a standard of living not lower than the minimum living standard established by law.[31] Other provisions of the

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26. Law of Ukraine, On International Agreements of Ukraine, N 1906-IV, 29.06.2004. https://zakon.rada.gov.ua/laws/show/1906-15#Text
27. Vienna Convention on the law of treaties. https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf
28. Decree of Presidencies of the Verkhovna Rada of Ukrainian RSR, On the accession of the Ukrainian Soviet of the Socialist Republic to the Vienna Convention on the law of international treaties, N 2077-XI, 14.04.1986. https://zakon.rada.gov.ua/laws/show/2077-11#Text
29. https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],%22ESCDcType%22:[%22FOND%22,%22Conclusion%22,%22Ob%22],%22ESCStateParty%22:[%22UKR%22]}
30. Law of Ukraine, On the Amendment to paragraph 2 of the "Law of Ukraine on the Ratification of the European Social Charter (Revised)", N 2034-VIII, 17 May, 2017. https://zakon.rada.gov.ua/laws/show/2034-19#Text
31. The Verkhovna Rada of Ukraine, the Constitution of Ukraine, June 28, 1996. https://rm.coe.int/constitution-of-ukraine/168071f58b

Constitution enshrined the range of rights fixed in the non-accepted provisions of the ESC, such as right to housing (Article 47), right to a standard of living sufficient for themselves and their families including adequate nutrition, clothing, and housing (Article 48), right to health protection, medical care and medical insurance (Article 49) etc.

Except the mentioned provisions, Ukraine has not ratified the following article and provisions of the European Social Charter revised:

Article 2 - The right to just conditions of work, par. 3 about the minimum duration of annual holiday with pay,

Article 4 - The right to a fair remuneration, par. 1 about the right of workers to remuneration such as giving them and their families a decent standard of living,

Article 25 - The right of workers to the protection of their claims in the event of the insolvency of their employer,

Article 31 - The right to housing, par. 3 about taking measures designed the price of housing accessible to those without adequate resources.

All articles and paragraphs that have not been accepted did not constitute elements of Ukrainian national legislation and have not been incorporated into domestic law.

In addition, Ukraine has not accepted the collective complaints procedure.

Table of accepted provisions

1.1	1.2	1.3	1.4	2.1	2.2	2.3	2.4	2.5	2.6	2.7	3.1
3.2	3.3	3.4	4.1	4.2	4.3	4.4	4.5	5	6.1	6.2	6.3
6.4	7.1	7.2	7.3	7.4	7.5	7.6	7.7	7.8	7.9	7.10	8.1
8.2	8.3	8.4	8.5	9	10.1	10.2	10.3	10.4	10.5	11.1	11.2
11.3	12.1	12.2	12.3	12.4	13.1	13.2	13.3	13.4	14.1	14.2	15.1
15.2	15.3	16	17.1	17.2	18.1	18.2	18.3	18.4	19.1	19.2	19.3
19.4	19.5	19.6	19.7	19.8	19.9	19.10	19.11	19.12	20	21	22
23	24	25	26.1	26.2	27.1	27.2	27.3	28	29	30	31.1
31.2	31.3										

Tab. 3[32]

The last full cycle of ECSR's recommendations according to four thematic groups has reflected the lack of achievements made by Ukraine. So, the statistics are following[33]:

Thematic group 1 "Employment, training and equal opportunities". European Committee of Social Rights in its Recommendations 2016 for Ukraine found out that from total 24 situations:

32. See more information about accepted, non-accepted provisions, ratification of the ESC (r) by Ukraine https://rm.coe.int/16805ac112#:~:text=Ukraine%20ratified%20the%20Revised%20European,the%20system%20of%20collective%20complaints.&text=Automatic%20incorporation%20into%20domestic%20law
33. Ukraine and the European Social Charter. Signatures, ratifications and accepted provisions. https://rm.coe.int/16805ac112

- 2 – in conformity
- 20 – non-conformity
- 2 - needs more information

Thematic group 2 "Health, social security and social protection". European Committee of Social Rights in its Recommendations 2017 for Ukraine found out that from total 11 situations:

- 1 – in conformity
- 8 – non-conformity
- 2 - needs more information

Thematic group 3 "Labour rights". European Committee of Social Rights in its Recommendations 2018 for Ukraine found out that from total 21 situations:

- 9 – in conformity
- 10 – non-conformity
- 2 - needs more information

Thematic group 4 "Children, families, migrants". European Committee of Social Rights in its Recommendations 2019 for Ukraine found out that from total 23 situations:

- 7 – in conformity
- 11 – non-conformity
- 5 - needs more information

Problematic situations are stated in the Conclusions on many other articles and paragraphs of the ESC. The ECSR returns to the issues and recommendations that were provided earlier. Unfortunately, in many cases there is a lack of significant changes, which entails a repetition of the negative assessment of Ukraine's implementation of its commitments under the articles and paragraphs independently selected for ratification.

As the process of fulfilling the obligations under the Charter continues, it is the national courts that can be the driving force of its implementation in Ukraine. In recent years, Ukrainian judges have applied the Charter with increasing frequency in an increasing category of cases. The judges referred to the Charter in broad range of pension issues, awarding and paying social benefits, allowance, in a labour case etc. A particularly marked increase could be found in the practice of the Administrative Cassation Court of the Supreme Court. Thus, the Supreme Court mentioned the Charter in the following judgments:

- Judgment of the Supreme Court on August 6, 2019 (case №433 / 172/16-a) to declare unlawful omission of the defendant regarding non-payment of pension to a person because of anti-terrorist operation and due to the age and poor health cannot travel outside of Luhansk.

Judgment of the Supreme Court on 30 January, 2020 (case №489 / 5194/16-a) on the recalculation and renewal of pension payments.

Judgment of the Supreme Court of March 31, 2020 (case №826 / 14837/16) on the appointment and payment of pensions to persons residing abroad.

In all these decisions the Court apply to the paragraph 23 of Part I and stated that:

…The European Social Charter (revised), 03 May 1996, ratified by Ukraine…, stipulates that every older person has the right to social protection (paragraph 23 of Part I)... By ratifying the Charter, Ukraine has undertaken an international commitment to implement by all appropriate means the achievement of conditions under which the rights and principles enshrined in Part I of the Charter can be effectively exercised. Therefore, a person's right to receive a pension as an integral part of the right to social protection is his/her constitutional right, which is guaranteed by international obligations of Ukraine.

Another example of reference to the Charter that could be provided is the judgment of the Supreme Court in case 752/18396/16-a (March 25, 2020) on the appointment of a pension. The Court underlined:

… Subparagraphs 4, 23 of the Part One of the European Social Charter…, ratified by the Law of Ukraine "On Ratification of the European Social Charter (revised)" stipulates that all employees are entitled to fair remuneration that will ensure sufficient living standards for themselves and their families and every older person has the right to social protection.

The special attention must be paid to the provision that was applied by different judges. Principle 23 reflects the Article 23 the right of older persons to social protection, which was ratified by Ukraine and could be implemented as a source of law, principle 4, on the contrary, reflects the non-accepted part of the article 4 which enshrined the right to a fair remuneration.

In some cases, judges applied to the non-ratified articles of the Charter. For example, the judgment of city district court of Bolehiv, case № 2a-516/2010, 7 Dec.2010, was proclaimed: …guided by the provisions of Article 12 of the European Social Charter (revised) 1996…[34]

Dobropil City District Court in its judgment, adopted on 7 May, 2008 on the reduction of social benefits prescribed by national law mentioned the Charter in general and referred to article 12:

…The principles of the welfare state are also embodied in international acts ratified by Ukraine: the International Covenant on Economic, Social and Cultural Rights 1966, the European Social Charter (revised) 1996, the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and the European Court of Human Rights. In particular, according to Article 12 of the European Social Charter (revised), the state is obliged to maintain a system of the social security, its satisfactory level, to make efforts to raise progressively to a higher level, etc.[35]

Moreover, there were examples when the Highest Courts clearly specified that the exact provision of the Charter could not be applied due to its non ratification by Ukraine. So, the Supreme Administrative Court of Ukraine in its judgment in case №2a-7265/09/1570 took 3.08.2010 stated:

…With regard to the cassator's references in support of his position on the provisions of Article 12

34. District court of Bolehiv, judg., case № 2a-516/2010, 7 Dec.2010. https://reyestr.court.gov.ua/Review/13383280
35. Case 2-1079/2008

of the European Social Charter (revised), adopted on 3 May 1996 and ratified by the Law of Ukraine on 14 September 2006 № 137-V, the panel of judges notes that the European Social Charter has been ratified, but Article 12 has not been included in the list of ratified clauses and articles of the Charter, in connection with this, Ukraine has no international obligations under this article and this article is not applicable in this case…[36]

Nowadays, data of the Unified state register of court decisions shows that more than 1 000 judgments of different national courts contain the reference to the ESC. However, there is not much diversity in the court practice.

Due to the manner of reference to the Charter the vast majority of the judgments could be divided into five main groups:

- 1) the ESC is mentioned among other international human rights documents, such as UDHR, ICESCR etc.,

- 2) judges refer to specific items and articles that Ukraine has not ratified (mostly in 2008-2010),

- 3) judges apply to the specific paragraphs of Part 1 of the ESC, which contains the principles, even in cases when appropriate paragraph of the article has been ratified,

- 4) judges refer to specific article of the ESC as to additional legal source, no reference to the ECSR's practice, interpretations of the Charter was found.

36.The Supreme Administrative Court of Ukraine, judg., case №2a-7265/09/1570, 3.08.2010, https://reyestr.court.gov.ua/Review/10584688

Part II

Employment, labour rights and equal opportunities

Analysis of the provisions of of the European Social Charter (revised) on the right to work (Article 1)

The European Social Charter guarantees everyone the opportunity to earn his or her living in an occupation freely entered upon. It encompasses four standards: attaining high employment rates; respect of free choice of one's occupation; free employment services; and the provision of appropriate vocational guidance, training and rehabilitation.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

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

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

- and must take adequate measures to assist those who become unemployed in finding and/or qualifying for a job[37].

> Article 1§1 is an obligation of conduct rather than of result, which means that failure to achieve full employment not even the existence of high rate of unemployment will not as such be regarded as being a breach of the Charter.[38] However, the efforts made by States Parties to reach the goal of full employment must be adequate in the light of the economic situation and the level of unemployment.[39]

> The decline of unemployment alone is not a sufficient indication of efforts towards the achievement of full employment. On the other hand, an increase in the rate of unemployment would not prevent the Committee from concluding that the Charter was

37. Digest 2018, p. 56.
38. Conclusions I (1969), Statement of Interpretation on Article 1§1.
39. Digest 2018, p. 56.

being satisfied, so long as a substantial effort is made to improve the labour market situation.[40]

> The assessment of conformity rests on a number of economic and social indicators and takes into account the results achieved by States Parties in transforming economic growth into employment and providing assistance to unemployed persons.[41]

Article 1§2 covers three different issues:

- 1) the prohibition of all forms of discrimination in employment,
- 2) the prohibition of forced or compulsory labour,
- 3) the prohibition of any practice that might interfere with workers' right to earn their living in an occupation freely entered upon[42].

Prohibition of all forms of discrimination in employment

> Article 1§2 requires the States having accepted it to effectively protect the right of workers to earn their living in an occupation freely entered upon. This obligation requires, inter alia, the elimination of all forms of discrimination in employment regardless of the legal nature of the professional relationship.[43]

Discrimination is defined as a difference in treatment between persons in comparable situations, where the treatment does not pursue a legitimate aim, is not based on objective and reasonable grounds or is not proportionate to the aim pursued.[44] **Indirect discrimination** may arise by failing to take due and positive account of all relevant differences between persons in a comparable situation or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.[45] Discrimination may also result from **failing to take positive account** of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.[46]

Discriminatory acts prohibited by Article 1§2 are those that may occur in connection with recruitment[47] or with employment conditions in general, in particular with regard to remuneration, training, promotion, transfer and dismissal or other detrimental action.[48]

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40. Conclusions III (1973), Statement of Interpretation on Article 1§1.
41. Digest 2018, p. 56.
42. Digest 2018, p. 57.
43. Decision on admissibility and the merits: Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 91/2013, § 235; Syndicat national des Professions du Tourisme v. France, Complaint No. 6/1999, decision on the merits of 10 October 2000, §24; Quaker Council for European Affairs (QCEA) v. Greece, Complaint No. 8/2000, decision on the merits of 25 April 2001, §20; FFFS v. Norway, cited above, §104
44. Syndicat national des Professions du Tourisme v. France, Complaint No. 6/1999, decision on the merits of 10 October 2000, §§24-25; Conclusions XVI-1 (2002), Greece
45. Autism-Europe v. France, Complaint No. 12/2002, decision on the merits of 4 November 2003, §52
46. International Association Autism-Europe (IAAE) v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003, §52; Centre on Housing Rights and Evictions (COHRE) v. Italy, Complaint No. 58/2009, decision on the merits of 25 June 2010, § 35; International Federation of Human Rights (FIDH) v. Belgium, Complaint No. 62/2010 decision on the merits of 21 March 2012 §49; Médicins du Monde v. France, Complaint No. 67/2011 decision on the merits of 11 September 2012 §§ 107,132,144,153 and 163.
47. Conclusions XVI-1 (2002), Austria.
48. Conclusions XVI-1, 2002, Austria.

Under Article 1§2, legislation should prohibit any discrimination in employment inter alia on grounds of sex, race, ethnic origin, religion, disability, age[49], sexual orientation, political opinion, or beliefs including on grounds of conscientious objection or non-objection[50]. Both direct and indirect discrimination shall be prohibited[51].

There must be adequate legal safeguards against discrimination in respect of part-time work. In particular, there must be rules to prevent non-declared work through overtime, and equal pay, in all its aspects, between part-time and fulltime employees.[52] „In order to comply with Article 1§2 states should take legal measures to safeguard the effectiveness of the prohibition of discrimination. These measures must at least provide:

- that any provision contrary to the principle of equal treatment which appears in collective labour agreements, in employment contracts or in firms' own regulations may be declared null or be rescinded, abrogated or amended;

- appropriate and effective remedies in the event of an allegation of discrimination;

- protection against dismissal or other retaliatory action by the employer against an employee who has lodged a complaint or taken legal action;

- in the event of a violation of the prohibition of discrimination, sanctions that are a sufficient deterrent to employers as well as adequate compensation proportionate to the damage suffered by the victim."[53]

In order to make the prohibition of discrimination effective, domestic law must at least provide for the power to set aside, rescind, abrogate or amend any provision contrary to the principle of equal treatment which appears in collective labour agreements, in employment contracts or in firms' own regulations.[54]

Domestic law must provide **appropriate and effective remedies** in the event of an allegation of discrimination[55].

Firstly, there must be a **right to appeal to a court** in case of alleged discrimination. Recognising the right of trade unions to take action in cases of employment discrimination, including action on behalf of individuals; granting groups with an interest in obtaining a ruling that the prohibition of discrimination has been violated, the right to take collective action and the setting up of a special, independent body to promote equal treatment, particularly by providing discrimination victims with the support they need to take proceedings also contributes to combating discrimination in accordance with Article 1§2 of the Charter[56].

Secondly, there must be a protection against **dismissal or other retaliatory action** by the employer against an employee who has lodged a complaint or taken legal action.[57]

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49. Fellesforbundet for Sjøfolk (FFFS) v. Norway, Complaint No. 74/2011, Decision on the merits of 2 July 2013, §115-117.
50. Conclusions 2006, Albania, Conclusions 2012 Iceland, Moldova and Turkey; Confederazione Generale italiana del Lavoro (CGIL) v. Italy, Complaint No 91/2013, Decision on the merits of 12 October 2015, § 240.
51. Conclusions XVIII-I (2006), Austria.
52. Conclusions XVI-1 (2002), Austria.
53. Conclusions XVI-1 - Iceland - Article 1-2
54. Conclusions XVI-1 (2002), Iceland.
55. Digest 2018, p. 59.
56. Conclusions XVI-1 (2002), Iceland.
57. Conclusions XVI-1 (2002), Iceland; Syndicat de Défense des fonctionnaires v. France Complaint No. 73/2011, decision on the merits 13 September 2012, § 59.

Thirdly, domestic law should provide for a shift in the burden of proof in favour of the plaintiff in discrimination cases.[58] In respect of complaints alleging discrimination, the burden of proof should not rest entirely on the complainant organisation, but should be shifted appropriately.[59]

Fourthly, remedies available to victims of discrimination must be adequate, proportionate and dissuasive[60]. Therefore, compensation for all acts of discrimination including discriminatory dismissal, must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers. A ceiling on compensation that may preclude damages from making good the loss suffered and from being sufficiently dissuasive is proscribed.[61]

As to the specific issue of **access of foreigners to certain jobs**, State Parties may make foreign nationals' access to employment on their territory subject to possession of a work permit but they cannot ban nationals of State Parties, in general, from occupying jobs for reasons other than those set out in Article G of the Charter. The only jobs from which foreigners may be banned therefore are those that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority.[62]

Exclusion of individuals from functions, either in the form of refusal to recruit or dismissal, on grounds of previous political activities, is prohibited when it is not necessary within the meaning of Article G in that it does not apply solely to services which have responsibilities in the field of law and order and national security or to functions involving such responsibilities.[63]

Prohibition of forced or compulsory labour

Forced or compulsory labour in all its forms must be prohibited. The definition of forced or compulsory labour is based on Article 4 of the European Convention on Human Rights and on ILO Convention 29 on forced labour:

> "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily (Article 2§1).

Under Article 1§2, the coercion of any worker to carry out work against his or her wishes and without freely expressed consent is contrary to the Charter. The same applies to the coercion of any worker to carry out work he or she previously freely agreed to do, but which subsequently no longer wants to carry out[64].

The prohibition of forced labour implies that disobedience to orders or the interruption or abandonment of service by certain categories of staff (as in the merchant navy or aviation) cannot be subjected to penal measures unless the act giving rise to the charge endangered or was capable of endangering, the safety of the ship or aircraft or the life or health of those on board[65]. The peculiar status of the military may justify penal sanctions for breach of a voluntary engagement

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

without constituting a breach of the prohibition of forced labour[66].

The non-application of national legislation containing elements which were in conflict with this principle of the Charter would not be considered sufficient for the purpose of ensuring the application of this provision on this point and that consequently such legislation would have to be amended[67].

The prohibition of forced or compulsory labour may be infringed when e.g.:[68]

- provisions authorise criminal sanctions in the event of disciplinary offences on the part of seamen or sanctions for seamen who abandon their post, even when the safety of a ship or the lives or health of the people on board are not at stake[69];

- career army officers who have received several periods of training are required to complete a term of compulsory service that may last up to twenty-five years[70] or the decision to grant early retirement is left to the discretion of the Minister of Defence, which could lead to a period of service which would be too long to be regarded as compatible with the freedom to choose and leave an occupation[71].

- powers of requisition in exceptional circumstances are too broadly defined[72]. Any such powers must be defined with sufficient clarity and fall within the scope of Article G of the Charter[73].

Domestic work and work in family enterprises may give rise to forced labour and exploitation, State Parties should adopt legal provisions to combat forced labour in domestic environment and protect domestic workers as well as take measures to implement them.[74]

Prisoners' working conditions must be properly regulated, particularly if they are working, directly or indirectly, for employers other than the prison service. In accordance with the principle of non-discrimination, this regulation, which may be carried out by means of laws, regulations or agreements (particularly where companies act as subcontractors in prison workshops), must concern pay, hours and other working conditions and social protection (in the sphere of employment injury, unemployment, health care and old age pensions)[75].

> In general, the conditions to which the payment of unemployment benefits is subjected, including any obligations to take up offered employment, should be assessed under Article 12§1 of the Charter (or Article 12§3 in the case of new developments). However, in certain cases and under certain circumstances **the loss of unemployment benefits on grounds of refusal to accept offered employment** could amount, indirectly, to a restriction on the freedom to work and as such the situation would be assessed under Article 1§2.[76]

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

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

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

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

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

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

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

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

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

- which requires persons with family responsibilities to change their place of residence, unless it can be proved that these responsibilities can be properly assumed in the new place of residence, that suitable housing is available and that, if the situation of the person so requires, a contribution to the costs of removal is available, either from the employment services or from the new employer, so respecting the worker's right to family life and housing".[77]

> "In all cases in which the relevant authorities decide on the permanent withdrawal or temporary suspension of unemployment benefit because the recipient has rejected a job offer, this decision must be open to review by the courts in accordance with the rules and procedures established under the legislation of the State which took the decision[78].

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

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

77. Conclusions 2012 - Statement of interpretation - Article 1-2.
78. Conclusions 2012 - Statement of interpretation - Article 1-2.

stated that alternative service which is not more than 1.5 times the length of military service is in principle in conformity with the Charter. The general rule is that the longer the period of military service is, the stricter the Committee evaluates the reasonableness of any additional length of the alternative service[79].

Under Article 1§2 any **minimum period of service** in state agencies e.g. in the professional armed forces must be of a reasonable duration and in cases of longer minimum periods due to education or training that an individual has benefitted from, the length must be proportionate to the duration of the education and training. Likewise, any fees/costs to be repaid on early termination of service must be proportionate.[80]

The right to undertake work freely includes the right to be protected against interferences with **the right to privacy**. The Committee noted that

> the emergence of the new technologies which have revolutionised communications have permitted employers to organise a continuous supervision of employees and in practice enable employees to work for their companies at any time and in any place, including their homes with the result that the frontier between professional and private life has been weakened. The result is an increased risk of work encroaching upon all reaches of private life, even outside working hours and outside the place of work. (…) Therefore, it is essential that the fundamental right of workers to privacy should be asserted within the employment relationship so as to ensure that this right is properly protected[81].

To fulfil the obligations under Article 1§2, individuals must be protected from interference in their **private or personal lives** associated with or arising from their employment situation. Modern electronic communication and data collection techniques have increased the chances of such interference. Since the term "private life" may be defined with varying degrees of strictness it may be preferable to speak of "infringements of private or personal life"[82].

> In the first place, employers may place unnecessary restrictions on their employees' freedom of action. These include interference in their personal, or non-working, lives, even though the activities included in this autonomous sphere may be viewed as "public" because they occur in public. Examples include dismissing employees for attending a political rally or for buying a make of car in competition with that sold by their employer. The Charter's insistence that anyone is entitled to earn his living in an occupation freely entered upon (…) means that employees must remain free persons, in the sense that their employment obligations, and hence the powers of management, are limited in scope[83].

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

The principle is indisputable, even though it is sometimes difficult to determine the precise boundary between the occupational and non-occupational spheres, bearing in mind the nature of the work and the purpose of the business. Admittedly, Article 1§2 only refers explicitly to the time when workers enter into employment. Logically, though, the fundamental principle of freedom which the Charter refers to with respect to this particular occasion must continue to apply thereafter in the non-work sphere[84].

Article 1§3 provides for the right to **free employment services**. All workers enjoy this right and therefore services must operate effectively throughout the national territory and with respect to all sectors of the economy. The main function of such services is to place unemployed job–seekers in employment as well as employed workers looking for another job. Basic placement services such as registration of job-seekers and notification of vacancies must be provided free of charge for both employees and employers[85] and must be effective[86].

Fees imposed on employers for the notification of vacancies are contrary to Article 1§3, even where the fees are small and aimed only at covering administrative costs[87]. The existence of fee-charging by private employment agencies is not contrary to Article 1§3 provided that fully-fledged free employment services exist in all occupational sectors and geographical areas[88]. Trade union and employers' organisations must have the possibility of participating in the organisation and running of the employment services[89].

Article 1§4 guarantees the **right to vocational guidance, continuing vocational training** for employed and unemployed persons and **specialised guidance and training for persons with disabilities**[90]. In order to satisfy the requirements of Article 1 § 4, a State Parties must not only have institutions providing vocational guidance, training and rehabilitation, but must also ensure access to the institutions for all those interested, including foreigners, nationals of the States parties to the Charter, and persons with disabilities[91].

The indicators allowing an assessment of the effectiveness of vocational guidance services are: their funding, their staffing and the number of beneficiaries.[92]

No length of residence requirement may be imposed on students or trainees who reside in whatever capacity or are authorised to reside, because of their links with persons legally residing in the country, in the territory of the party concerned, before they can begin their training. If such a length of residence requirement exists for foreigners wishing to receive vocational guidance, training or rehabilitation this situation constitutes an unequal treatment contrary to the Charter.[93]

IMPLICATIONS FOR UKRAINE

Despite the enshrinement of the right to work in the Constitution of Ukraine, national legislation, the Committee found in its Conclusions 2016 that the situation in Ukraine was not in conformity with the requirements under all paragraphs of Article 1 of the Charter.[94]

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

Article 1, Paragraph 1

The Committee in 2016 recalled requirements to demonstrate targeted, effective and regularly monitored labour market measures. However, the lack of information on the abovementioned criteria did not provide the opportunity to evaluate the effectiveness of employment policies in Ukraine and led to the conclusion of non-conformity of the situation in Ukraine with Article 1§1 on the ground that employment policy efforts had not been adequate in combating unemployment and promoting job creation.[95] Such a conclusion was also a consequence of non-providing the information requested in previous report.[96]

Article 1, Paragraph 2

Within the examination of prohibition of discrimination in employment the Committee adopt negative conclusions on effectively implemented the prohibition of discrimination in employment in practice.[97] The situation in Ukraine was also found not in conformity with Article 1§2 due to the obligation of the plaintiff to prove discrimination and not establishing in national legislation a shift in the burden of proof in discrimination cases.

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

The Committee in the Conclusions 2016 emphasised that Ukraine has to take into account the Statement of Interpretation of Article 1§2 in the General Introduction to Conclusions 2012 on the requirement to accept the offer of a job or training, on the remedies available for the persons concerned to dispute decisions to suspend or withdraw unemployment benefit.[98] It was also reiterated that the right to earn one's living in an occupation freely entered includes the protection of personal data of workers.

Finally, the Committee found in its Conclusions 2016 non-conformity of the situation in Ukraine with the requirements of Article 2§2 on two grounds: the prohibition of discrimination in employment had not had an effective practical implementation, non-providing a shift in the burden of proof in discrimination cases by national legislation.[99]

Article 1, Paragraph 3

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

In the Conclusions 2012 the Committee asked Ukraine about the effectiveness of employment services, including the performance of indicators, such as the number of vacancies notified to employment services, the number of placements made by these services and the average length of time in filling vacancies.[100]

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95. Ibid., p. 5.
96. ECSR, Conclusions – Ukraine. 2012. – Article 1 – 1. http://hudoc.esc.coe.int/eng?i=2012/def/UKR/1/1/EN
97. ECSR, Conclusions – Ukraine. 2016. p. 6.
98. Ibid., p.8.
99. Ibid., p.9.
100. ECSR, Conclusions – Ukraine. 2012. – Article 1 – 3. http://hudoc.esc.coe.int/eng?i=2012/def/UKR/1/3/EN

Article 1, Paragraph 4

Within the examination of situation regarding vocational guidance, training and rehabilitation, the Committee took into account the ratification Articles 9, 10§3, 15§1 of the Charter by Ukraine which are related to this issue. Therefore, the Committee stressed that the fulfilment of obligations under the mentioned articles have to be taken also into account with the examination the situation under Article 2§4. Because of founding the breach of obligations under Article 9 as regard to non-establishing the guaranties the right to vocational guidance within the labour market, the Committee considered that the situation in Ukraine was inconformity with Article 1§4 on the same ground.[101]

Analysis of the provisions of of the European Social Charter (revised) on the right to just conditions of work (Article 2)

The right to just conditions of work under the European Social Charter includes a wide range of aspects: reasonable working hours, an adequate number of paid holidays, health and safety at work, weekly rest periods, and information about the terms and conditions of the employment relationship.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Working time (Article 2§1)

> Article 2§1 guarantees workers the right to reasonable limits on daily and weekly working hours, **including overtime**. The aim is to protect worker's safety and health. Every worker must therefore receive rest periods adequate for recovering from the fatigue of work and of preventive value in reducing risks of health impairment which could result from accumulation of periods of work without the necessary rest.[102]

To this end, a reasonable period of work, including overtime, must be guaranteed through legislation, regulations, collective agreements or any other binding means. In order to ensure that the limits are respected in practice, an appropriate authority must supervise whether the limits are being respected.[103]

The Charter does not expressly define what constitutes **reasonable working hours**. Situations are therefore assessed on a case-by-case basis: extremely long working hours e.g. 16 hours within a period of 24 hours[104] or, under certain conditions, more than 60 hours in one week[105] are contrary to the Charter. These limits should apply to all categories of workers and can only be exceeded in situations that go beyond what can be considered as exceptional circumstances (i.e. natural disasters, situations of force majeure).[106] The Committee has held that

> what is reasonable under the Charter varied from place to place and from time to time. Moreover, the progressive reduction of working

101. ECSR, Conclusions – Ukraine. 2016. p. 11.
102. Conclusions XIV-2 (1998), Statement of interpretation on Article 2§1; Confédération Générale du Travail (CGT) v. France, Complaint No. 22/2003, Decision on the merits of 7 December 2004, §34.
103. Conclusions I (1969), Statement of Interpretation on Article 2§1.
104. Conclusions XIV-2 (1998), Norway; Conclusions (2014), Armenia.
105. Conclusions XIV-2 (1998), Netherlands.
106. Conclusions (2014), Netherlands; Digest 2018, p. 65.

> hours depends on "the increase of productivity and other relevant factors". Such other factors are the nature of the work, including the risks to which the workers' safety and health are exposed. As the Committee has pointed out on many occasions, risks are higher for workers occupied for long hours over a considerable period of time.[107]

Even if a reasonable limit is set to weekly working hours, this cannot compensate the fact that on a given day, hours may be above the authorised maximum[108].

> **Flexibility measures** regarding working time are not as such in breach of the Charter[109] (…). In order to be found in conformity with the revised Social Charter, national laws or regulations must fulfil three criteria:
>
> (i) they must prevent unreasonable daily and weekly working time
>
> (ii) they must operate within a legal framework providing adequate guarantees
>
> (iii) they must provide for reasonable reference periods for the calculation of average working time.[110]

When determining the conformity of flexible working time systems with the revised Social Charter, the Committee takes account of the length of the reference period which is used to calculate average working time[111]. The reference periods must not exceed six months[112]. They may be extended to a maximum of one year in exceptional circumstances, if it is justified by objective or technical reasons or reasons concerning the organisation of work[113]. Workers on flexible working time arrangements with long reference periods (i.e. one year) should not be asked to work unreasonable hours or an excessive number of long working weeks.[114]

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

> The utilisation and/or the length of overtime should be limited in order to avoid exposing the worker to the risks of accidents at the end of a working day.[115]

The **periods of the on-call duty** ("périodes d'astreinte")

> during which the employee has not been required to perform work for the employer, although they do not constitute effective

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107. Conclusions XIV-2 - Statement of interpretation - Article 2-1.
108. Conclusions XIV-2 - Statement of interpretation - Article 2-1.
109. see in particular General Introduction, Conclusions XIV-2, p. 33.
110. Decision on the merits: Confédération Française de l'Encadrement (CGC) v. France, Collective Complaint No. 9/2000, § 29.
111. see in particular General Introduction, Conclusions XIV-2, p. 34.
112. Conclusions XIV-2 (1998), Statement of interpretation on Article 2§1.
113. Conclusions XIX-3 (2010), Spain.
114. Conclusions XX-3 (2014), Germany.
115. Conclusions XIV-2 - Statement of interpretation - Article 2-1; Conclusions XIV-2 (1998), Statement of Interpretation on Article 2§1.

working time, cannot be regarded as a rest period in the meaning of Article 2 of the Charter, except in the framework of certain occupations or particular circumstances and pursuant to appropriate procedures.

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

The absence of effective work, determined a posteriori for a period of time that the employee a priori did not have at his or her disposal, cannot therefore constitute an adequate criterion for regarding such a period as a rest period.[116]

> For the purpose of protecting the private and family life of workers, the Committee attaches importance to the fact that they must be clearly and duly informed about any changes to their working hours.[117]

Public holiday with pay (Article 2§2)

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

The Charter does not stipulate the number of public holidays. The number of public holidays varies, depending on the State Parties. There has been no finding of non-conformity with this provision because of State Parties granting too few public holidays.[118]

As a rule, work should be prohibited during public holidays. However, work can be carried out on public holidays under specific circumstances set by law or collective agreements.[119]

Work performed on a public holiday entails a constraint on the part of the worker, who should be compensated. Considering the different approaches adopted in different countries in relation to the forms and levels of such compensation and the lack of convergence between State Parties in this regard, State Parties enjoy a margin of appreciation on this issue, subject to the requirement that all employees are entitled to an adequate compensation when they work on a public holiday.[120] In assessing whether the compensation for work performed on public holidays is adequate, levels

116. Confédération Française de l'Encadrement CFE-CGC v. France, Complaint No. 16/2003, Decision on the merits of 12 October 2004, §§50-53; see aso Confédération générale du travail (CGT) v. France, Complaint No 55/2009, Decision on the Merits of 23 June 2010, §§ 64-65;; Digest 2018, p. 66.
117. Conclusions XIV-2 - Statement of interpretation - Article 2-1.
118. Digest 2018, p. 66.
119. Conclusions 2014, Netherlands.
120. 2 Conclusions 2014, Andorra.

of compensation provided for in the form of increased salaries and/or compensatory time off under the law or the various collective agreements in force are taken into account, in addition to the regular wage paid on a public holiday, be it calculated on a daily, weekly or monthly basis.[121]

> Work performed on a public holiday requires a constraint on the part of the worker, who should be compensated with a higher remuneration than that usually paid. Accordingly, in addition to the paid public holiday, work carried out on that holiday must be paid at least double the usual wage. The remuneration may also be provided as compensatory time-off, in which case it should be at least double the days worked[122].

A compensation corresponding to the regular wage increased by 75% is not sufficiently high to constitute an adequate level of compensation for work performed on a public holiday.[123]

Annual holiday with pay (Article 2§3)

Article 2§3 guarantees the right to a minimum of four weeks (or 20 working days) annual holiday with pay. The taking of annual holiday may be subject to the requirement that the twelve working months for which it is due have fully elapsed[124].

The obligation arising under Article 2§3 was fulfilled by a Contracting State provided that the great majority of workers in that State enjoyed the advantages stipulated[125].

> An employee must take at least two weeks uninterrupted annual holidays during the year the holidays were due. Annual holidays exceeding two weeks may be postponed in particular circumstances defined by domestic law, the nature of which should justify the postponement[126].

The right to an annual holiday guaranteed by Article 2§3 (…) cannot be waived even with the free consent of the workers concerned and even in consideration of an extra payment by the employer.[127]

> As a result, Article 2 para. 3 requires that a worker who is incapacitated for work by reason of illness or injury during all or part of his/her annual holiday must be entitled to take at some other time the days thereby lost, at least insofar as is necessary to guarantee the worker the two-week annual holiday provided for by the Charter. This requirement applies in all cases, whether the incapacity commences before or during the holiday period, as well as in cases of employment in which there is a fixed holiday period for all workers in an enterprise.[128]

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121. Conclusions 2014, France; Digest 2018, p. 67.
122. Conclusions XIX-3 - Statement of interpretation - Article 2-2.
123. Conclusions XX-3 (2014), Greece; Digest 2018, p. 67.
124. Conclusions I (1969) Statement of interpretation on Article 2§3.
125. Conclusions I - Statement of interpretation - Article 2-3.
126. Conclusions 2007 - Statement of interpretation - Article 2-3.
127. Conclusions I - Statement of interpretation - Article 2-3.
128. Conclusions XII-2 - Statement of interpretation - Article 2-3.

The Committee recognised, however, that this principle does not prevent the payment of a lump sum to an employee at the end of his employment in compensation for the paid holiday to which he was entitled but which he had not taken.[129]

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

The first part of Article 2§4 requires State Parties to eliminate risks in inherently dangerous or unhealthy occupations. This part is closely linked to Article 3 of the Charter (right to safe and healthy working conditions). Whilst the elimination of dangerous and unhealthy occupations was an ideal to strive for, paragraph 4 of Article 2 required that specific measures should be taken so long as these occupations still existed[130].

State Parties enjoy a certain margin of discretion to determine the activities and risks concerned.[131] They must at least consider sectors and occupations that are manifestly dangerous or unhealthy, such as mining, quarrying, steel making and shipbuilding and occupations exposing employees to ionising radiation,[132] extreme temperatures and noise.[133] This choice is however still subject to review[134].

The second part of Article 2§4 requires State Parties to ensure some form of compensation for workers exposed to risks that cannot be or have not yet been eliminated or sufficiently reduced either in spite of the effective application of the preventive measures referred to above or because they have not yet been applied[135].

Measures intended to compensate workers for exposure to residual risks must be regulated at the central level and must not be left to the agreements between the social partners.[136]

Article 2§4 mention two forms of compensation: reduced working hours and additional paid holidays. In view of the emphasis in this provision on health and safety objectives, however, other approaches to reducing exposure to risks may also ensure conformity with the Charter.[137] They need to be assessed on a case-by-case basis.[138]

The aim of the compensation must be to offer those concerned sufficient and regular time[139] to recover from the associated stress and fatigue, and thus maintain their vigilance.[140] Under no circumstances can financial compensation be considered a relevant and appropriate measure to achieve the aims of Article 2§4,[141] nor is early retirement[142] or the provision of food supplements.[143] Compensation measures such as one additional day's holiday and a maximum weekly working time of 40 hours have been considered inadequate in that they do not offer workers exposed to risks regular and sufficient time to recover.[144]

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129. Conclusions I - Statement of interpretation - Article 2-3.
130. Conclusions V - Statement of interpretation - Article 2-4
131. Conclusions II (1971), Statement of Interpretation on Article 2§4; STTK ry and Tehy ry v. Finland, Complaint No. 10/2000, Decision on the merits of 17 October 2001, §20.
132. STTKry and Tehyry v. Finland, Complaint No. 10/2000, Decision on the merits of 17 October 2001, §27; Digest 2018, p. 68.
133. Conclusions XIV-2 (1998), Norway; Digest 2018, p. 68.
134. Conclusions II, p. 9.
135. Conclusions XII-1 (1991), United Kingdom; Conclusions XX-3 (2014), Germany; Digest 2018, p. 68.
136. Conclusions 2014, Netherlands.
137. Conclusions 2005, Statement of Interpretation on Article 2§4.
138. Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §236.
139. Conclusions V (1977), Statement of Interpretation on Article 2§4; Digest 2018, p. 68.
140. Conclusions III (1973), Ireland; Digest 2018, p. 68.
141. Conclusions XIII-3 (1995) Greece.
142. Conclusions 2003, Bulgaria.
143. Conclusions 2007, Romania.
144. Conclusions XX-3 (2014), Greece.

Weekly rest (Article 2§5)

Article 2§5 guarantees a weekly rest period, which as far as possible shall coincide with the day traditionally or normally recognised as a day of rest in the country or region concerned. Although the rest period should be "weekly", it may be deferred to the following week, as long as no worker works more than twelve days consecutively before being granted a two–day rest period[145].

Derogations to this rule might be in conformity with Article 2§5 when the postponement is truly exceptional and surrounded by strict safeguards (such as the authorisation of the labour inspectorate, with the agreement of the trade union or, as the case may be, the representatives of the employees, or the possibility for the safety representative to react if the employer does not respect the relevant rules)[146].

The right to weekly rest periods may not be replaced by compensation and workers may not be permitted to give it up. However, the rest period can be taken on a day other than the traditional day, either when the type of activity requires it, or for reasons of an economic nature. At all events, another day of rest during the week must be provided for.[147] Periods of on-call duty during a weekly rest period and during which an employee has not been required to work, cannot be regarded as a weekly rest period.[148]

Written information on employment contract (Article 2§6)

> Article 2§6 of the Charter guarantees workers the right to written information at the start of their employment relating to the "essential aspects of the contract or employment relationship". This information must cover at least the following essential aspects: the identity of the parties; the workplace; the date on which the employment contract or the employment relationship commenced; if the employment contract or relationship is a temporary one - the foreseeable length of the contract or the relationship; the length of paid leave; the length of the notice to be given in the event of termination of the contract or the employment relationship; remuneration; the standard daily and weekly working hours and; references to any collective agreements governing the employee's conditions of work[149].

Night work (Article 2§7)

Article 2§7 guarantees compensatory measures for persons performing night work. Domestic law or practice must define what is considered to be "night work" within the context of this provision, namely what period is considered to be "night" and who is considered to be a "night worker".[150]

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145. Digest 2018, p. 69.
146. Conclusions 2010, Romania; Conclusions 2014, Sweden; Conclusions XX-3 (2014) Denmark; Digest 2018, p. 69.
147. Conclusions XIV-2 (1998), Statement of Interpretation on Article 2§5; Conclusions I - Statement of interpretation - Article 2-5.
148. Confédération Générale du Travail (CGT) v. France, Complaint No. 22/2003, Decision on the merits of 7 December 2004, §§35-39.
149. Decision on the merits: Syndicat de Défense des Fonctionnaires v. France, Collective Complaint No. 73/2011, § 17; Conclusions 2003, Bulgaria; Conclusions 2010, Andorra and Portugal.
150. Conclusions 2014, Bulgaria.

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

- regular medical examinations, including a free compulsory medical examination prior to taking up employment on night work;
- the provision of possibilities for transfer to daytime work;
- continuous consultation with workers' representatives on the introduction of night work, on night work conditions and on measures taken to reconcile the needs of workers with the special nature of night work.[151]

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

> - possibilities of transfer to daytime work are not sufficiently provided for;
>
> - laws and regulations do not provide for continuous consultation with workers' representatives on night work conditions and on measures taken to reconcile the needs of workers with the special nature of night work;
>
> - there is no provision in the legislation for compulsory medical examinations prior to employment on night work and regularly thereafter.[152]

IMPLICATIONS FOR UKRAINE

Article 2, Paragraph 1

The situation in Ukraine regarding reasonable working time was found in conformity with Article 2§1 in each conclusion since the ratification of the Charter adopted in 2010, 2014, 2018.[153] The Committee stated that the national legislation in the sphere of working time duration had not been changed since the first conclusions in 2010. The Committee also noted that the Ukraine has obligations to bring the legislation into accordance with standards of Directive 2003/88/EC in the context of the implementation of the Association Agreement between Ukraine and the European Union. The special attention was paid to the regulation of standby/ on-call duty in Ukraine.

Article 2, Paragraph 2

The Committee found the situation in Ukraine regarding the payment for work performed on a public holiday in conformity with the §2 of Article 2 of the Charter. All conclusions adopted in different years were positive in this concern. The Committee took into account that increasing remuneration was guaranteed to all categories of workers in both public and private sector.[154]

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151. Digest 2018, p. 71; Conclusions 2003, Romania.
152. Conclusions 2018 - Ukraine - Article 2-7.
153. ECSR, Conclusions 2014 - Ukraine - Article 2-1, http://hudoc.esc.coe.int/eng?i=2014/def/UKR/2/1/EN
Conclusions 2010 - Ukraine - Article 2-1, http://hudoc.esc.coe.int/eng?i=2010/def/UKR/2/1/EN
Conclusions 2018, Ukraine. p.5
154. ECSR, Conclusions 2018, Ukraine. p.6.

Article 2, Paragraph 3

Ukraine has not accepted §3 of Article 2. However, the Committee underlined the absence of significant obstacles in Ukrainian law and in practice to ratify this provision of the Charter.[155] Article 2.3 guarantees the right to minimum of 4 weeks (or 20 working days) of annual paid holiday. The same standards are required by the Directive 2003/88/EC that was necessary to be taken into account by Ukraine in the light of its obligations' fulfilment under the Association Agreement between Ukraine and EU.

Article 2, Paragraph 4

Within the examination of the situation regarding elimination of risks in dangerous or unhealthy occupations, the Committee recalled the general obligation of States Parties of the Charter to "eliminate risks in inherently dangerous or unhealthy occupations and to apply compensatory measures to workers exposed to risks which cannot be or have not yet been eliminated or sufficiently reduced"[156] and stressed its negative Conclusions 2017 on the situation in Ukraine concerning sufficiency of the coverage of occupational hazards by specific occupational health and safety legislation and regulations according to Article 3 of the Charter.

In 2018, the Committee also examined information about the forms of compensation offered to the workers concerning sufficient and regular time to recover from the stress and fatigue associated to their work, and thus maintain their vigilance and emphasised that early retirement or financial compensation could not be considered an appropriate response in the light of paragraph 4. [157] The situation in Ukraine was found in conformity with the standards in this sphere.

Article 2, Paragraph 5

There were different Conclusions of the Committee on the situation in Ukraine regarding weekly rest period. In 2010 the Committee found that Ukrainian legislation and practice on the issue was in conformity with the requirements of this paragraph. However, the Committee requested the information on exceptions to the rules on weekly rest periods.[158]

The provision of national legislation on the possibility to grant compensation without providing another day of rest contradicted to the requirement of Article 2§5 to guarantee that workers cannot waive their right to a weekly rest period or accept it to be replaced by compensation. Consequently, in 2018 when this information has been received, the Committee drew the negative conclusions on the ground that workers may give up their right to compensatory time off in exchange for financial compensation.[159]

Article 2, Paragraph 6

Within all conclusions the Committee expressed its deep concern that mandatory form for the employment contract in Ukraine does not always take place. In case when an employment contract is not concluded in writing, it has to be formalised anyway by an order or instruction and workers are entitled to written information covering at least the main elements interpreted by the Committee. These elements were underlined several times in the conclusions for Ukraine. In 2018 the lack of this information led to a postponement of conclusions.[160]

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155. Danuta Wisniewska-Cazals Procedure on non-accepted provisions of the European Social Charter. September 2020. p.13.
156. ECSR, Conclusions 2018, Ukraine. p.7.
157. ECSR, Conclusions 2014 - Ukraine - Article 2-4, http://hudoc.esc.coe.int/eng?i=2014/def/UKR/2/4/EN
158. ECSR, Conclusions 2010 - Ukraine - Article 2-5, http://hudoc.esc.coe.int/eng?i=2010/def/UKR/2/5/EN
159. ECSR, Conclusions 2018 . Ukraine. p. 9
160. ECSR, Conclusions 2018. Ukraine. p. 10.

Article 2, Paragraph 7

The situation in Ukraine regarding night work has been found inconsistent with the requirements of Article 2§7 on the ground that possibilities of transfer to daytime work were not sufficiently provided for; laws and regulations did not provide for continuous consultation with workers' representatives on night work conditions and on measures taken to reconcile the needs of workers with the special nature of night work; there was no provision in the legislation for compulsory medical examinations prior to employment on night work and regularly thereafter. The Ukraine has the obligation to bring national legislation into conformity with the Directive 2003/88/EC that prescribed the same night work standards.[161]

Analysis of the provisions of the European Social Charter (revised) on the right to a fair remuneration (Article 4)

The right to fair remuneration is a central employment right and a cornerstone of the right to an adequate standard of living. It includes the following standards: decent remuneration for the individual and his or her family; increased remuneration for overtime work; equal pay for equal work of men and women; a reasonable notice period for termination of employment; and limitations on wage deductions.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

> "The right of workers to a fair remuneration is at the heart of the Charter's guarantee of conditions of work that are reasonable and ensure a fair reward for labour performed. Inadequate pay creates poverty traps, which may affect not just individuals and their families, but whole communities. Inadequate pay is also an obstacle to full participation in society and thus a marker for social exclusion. More broadly, pay which lags significantly behind average earnings in the labour market are incompatible with social justice[162].

The right has to be practical and effective, and not merely theoretical or illusory[163].

Fair remuneration (Article 4§1)

Article 4§1 guarantees the right to a fair remuneration such as to ensure a decent standard of living. It applies to all workers, including to civil servants and contractual staff in the state, regional and local public sectors[164], to branches or jobs not covered by collective agreement, to atypical jobs (assisted employment)[165], and to special regimes or statuses (minimum wage for migrant workers)[166].

Article 4 obliges Contracting States to take appropriate measures to ensure a decent standard of living for workers and their families and requires the states „to make a continuous effort to achieve

161. ECSR, Conclusions 2018. Ukraine. p. 11.
162. ECSR, Decision on the merits: University Women of Europe (UWE) v. Belgium, Collective Complaint No. 124/2016, p. 105.
163. International Commission of Jurists (ICJ) against Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32
164. Conclusions XX-3 (2014), Greece, Digest 2018, p. 85.
165. Conclusions 2014, France, Digest 2018, p. 85.
166. Conclusions 2014, Andorra, Digest 2018, p. 85.

the objectives set by this provision of the Charter."[167]

> [A] 'decent standard of living' which is at heart of this provision of the Charter, goes beyond merely material basic necessities such as food, clothing and housing, and includes resources necessary to participate in cultural, educational and social activities. It follows that guaranteeing a decent standard of living means ensuring a minimum wage (and supplemented by any additional benefits where applicable) the level of which should be sufficient to meet these needs.[168]

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

> the net value, ie. after deduction of social security contributions and taxes, of the total wages, in principle both monetary and in kind, paid regularly by an employer to a worker for work carried out. Account shall, where applicable, be taken of bonuses and gratuities not paid regularly with each pay packet. (…) Social transfers or welfare benefits which are not directly linked to the wage [shall] not be taken into consideration as Article 4 para. 1 concerns remuneration for work as such[169].

Pursuant to the recurring formula used by the Committee, in order for the situation to be in conformity with the Charter, **the lowest wage** should not fall too far behind the national average wage in a country. To be considered fair within the meaning of Article 4§1, the minimum wage paid in the labour market must not fall below 60% of the net average national wage. The minimum wage falling below 60 % is considered incompatible with Article 4§1[170]. The assessment is based on net amounts, i.e. after deduction of taxes and social security contributions. Where net figures are difficult to establish, it is for the State Party concerned to provide estimates of this amount[171]. However, a wage does not meet the requirements of the Charter, irrespective of the percentage, if it does not ensure a decent living standard in real terms for a worker, ie. it must be clearly above the poverty line for a given country.[172]

If the lowest wage does not satisfy the 60% threshold, but does not fall very far below (in practice between 50% and 60%), the Government may provide detailed evidence that the lowest wage is sufficient to give the worker a decent living standard even if it is below the established threshold. In particular, consideration must be given to the costs of having health care, education, transport, etc.[173] In extreme cases, for instance where the lowest wage is less than half the average wage the situation is held to be in breach of Charter independently of such evidence.[174]

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167. Conclusions I, p. 26.
168. Conclusions XIX-3 - Statement of interpretation - Article 4-1.
169. Conclusions XIV-2 - Statement of interpretation - Article 4-1
Conclusions 2018 - Andorra - Article 4-1.
170. Conclusions 2018 - Andorra - Article 4-1.
171. Conclusions XVI-2 (2003), Denmark, Digest 2018, p. 85.
172. Conclusions XIV-2 - Statement of interpretation - Article 4-1.
173. Digest 2018, p. 85.
174. Conclusions XIV-2 (1998), Statement of Interpretation on Article 4§1.

It should be noted though, that providing for a lower minimum wage to younger workers who are under 25 years old is not contrary to the Charter if, and only if, it furthers a legitimate aim of employment policy and is proportionate to achieve that aim.[175] The Committee has considered the reduction of the minimum wage below the poverty level in the situation where the wage was applied to all workers under the age of 25 to be disproportionate and not in compliance with the Charter.[176]

Overtime (Article 4§2)

Article 4§2 is inextricably linked to Article 2§1, which guarantees the right to reasonable daily and weekly working hours. Overtime is work performed in addition to normal working hours.[177]

The principle of this provision is that work performed outside normal working hours requires an increased effort on the part of the worker, who therefore should be **paid at a rate higher than the normal wage**.[178] This increase must apply in all cases[179], including flat-rate payments.[180]

Granting leave to compensate for overtime (instead of granting an increased remuneration) is in conformity with Article 4§2, on condition that this leave is longer than the overtime worked.[181] It is not sufficient, therefore, to offer employees leave of equal length to the number of overtime hours worked.[182] Where remuneration for overtime is entirely given in the form of time off, Article 4§2 requires that this time be longer than the additional hours worked.

Mixed systems for compensating overtime, for example where an employee is paid the normal rate for the overtime worked but also receives time in lieu, are not contrary to Article 4§2.[183]

In a number of countries, working time is calculated on the basis of average weekly hours over a period of several months. Over such periods, weekly working hours may vary between specified maximum and minimum figures without any of them counting as overtime, and thus qualifying for a higher rate of pay. Arrangements of this kind do not, as such, constitute a violation of Article 4§2, provided that the conditions laid down in Article 2§1 are respected.[184] Whether flexible working time arrangements ensure effective compliance with Article 4§2 shall be assessed on a case-by-case basis.[185]

The right of workers to an increased rate of remuneration for overtime work can have **exceptions** only in certain specific cases. These exceptions apply to "senior officials" of state employees and management executives[186]. However, the Committee has ruled that certain limits must apply,

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175. General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011, Decision on the merits of 23 May 2012, §60.
176. General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011, Decision on the merits of 23 May 2012, §§68 and 70.
177. Conclusions I (1969), Statement of Interpretation on Article 4§2; Digest 2018, p. 86.
178. Conclusions XIV-2, Statement of Interpretation of Article 4§2; Conclusions I (1969), Statement of Interpretation on Article 4§2.
179. European Council of Police Trade Unions (CESP) v. France, Complaint No. 68/2011, Decision on the merits of 5 November 2012, §76, 77 and 86 to 88.
180. European Council of Police Trade Unions (CESP) v. France, complaint No. 57/2009, Decision on the merits of 1st December 2010, §35.
181. Conclusions XIV-2 (1998), Belgium; Conclusions XIV-2, Statement of Interpretation of Article 4§2.
182. Conclusions XIV-2, Belgium, p. 134.
183. European Council of Police Trade Unions (CESP) v. Portugal Complaint No. 60/2010, decision on the merits of 17 October 2011, § 21; Conclusions XX-3 (2014), Slovenia.
184. Conclusions XIV-2 (1998), Statement of Interpretation on Article 4§2; Conclusions XX-3 (2014), Portugal.
185. Conclusions XIV-2 - Statement of interpretation - Article 2-1, 4-2.
186. Conclusions IX-2 (1986), Ireland; 414 Conclusions X-2 (1990), Ireland.

particularly on the number of hours of overtime not paid at a higher rate.[187]

„Senior officials" include, for example, police commissioners[188] or administrative court judges[189]. Exceptions to a higher rate of overtime pay for all police members irrespective of their rank and their responsibilities[190], or for all state employees or public officials, irrespective of their level of responsibility does not conform with Article 4§2.[191]

As to the group of managers, exceptions may be applied to all senior managers. However, certain limits must apply, particularly on the number of hours of overtime not paid at a higher rate.[192]

Restrictions to an increased remuneration for additional hours of work can exist only if they are provided by law, pursue a legitimate aim and are proportionate to that aim.[193]

Equal pay for equal work (Article 4§3)

Article 4§3 guarantees the right to equal pay without discrimination on grounds of sex.[194] This is one aspect of the right to equal opportunities in matters of employment guaranteed by Article 20. As a result, the case-law under Article 20 applies mutatis mutandis to Article 4§3. Only aspects specifically linked to equal pay are dealt with hereinafter.[195]

> The equal pay principle applies both to equal work and work of equal or comparable value. The concept of remuneration must cover all elements of pay, that is basic pay and all other benefits paid directly or indirectly in cash or kind by the employer to the worker by reason of the latter's employment.[196]

The equal pay principle must also apply between full-time and part-time employees.[197]

> The legislation of a state which has accepted Article 4 § 3 must prescribe that:
>
> - men and women workers must receive equal pay not only for equal work but also for work of equal value;
>
> - any clauses of collective agreements or individual contracts which contravene this principle must be declared null and void by law;

187. Confédération Française de l'Encadrement CFE-CGC v. France, Complaint No. 9/2000, Decision on the merits of 16 November 2001, §45.
188. Conseil Européen des Syndicats de Police (CESP) v. France, Complaint No 57/2009, Decision on the merits of 1 December 2010, §42-44.
189. Union syndicale des magistrats administratifs (USMA) v. France, Complaint No. 84/2012, Decision on the merits of 2 December 2013, §§ 67 and 69.
190. Conseil Européen des Syndicats de Police (CESP) v. France, Complaint No 38/2006, Decision on the merits of 3 December 2007, §22.
191. Conclusions XV-2 (2001), Poland.
192. Confédération Française de l'Encadrement CFE-CGC v. France, Complaint No. 9/2000, Decision on the merits of 16 November 2001, §45.
193. Confédération Générale du Travail (CGT) v. France, complaint No. 55/2009, decision on the merits of 23 June 2010, §§ 87-89; Digest 2018, p. 87.
194. Conclusions XIII-5 (1997), Statement of Interpretation on Article 1 of Additional Protocol.
195. Digest 2018, p. 88.
196. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 125; Conclusions I (1969), Statement of Interpretation on Article 4§3.
197. Conclusions XVI-2 (2003), Portugal.

- the protection of this right must be ensured through adequate remedies;

- workers must enjoy effective protection from measures of retaliation arising from their claim for equal pay (notably protection against dismissal).[198]

The right of women and men to "equal pay for work of equal value" must be **expressly provided for in legislation**[199].

> States Parties are obliged to enact legislation explicitly imposing equal pay. It is not sufficient to merely state the principle in the Constitution. States must ensure that there is no direct or indirect discrimination between men and women with regard to remuneration.[200]

> The principle of equal pay precludes unequal pay irrespective of the mechanism that produces such inequality. The source of discriminatory pay may be the law, collective agreements, individual employment contracts, internal acts of an employer.[201]

> Any legislation, regulation or other administrative measure that fails to comply with the principle of equal pay must be repealed or revoked. The non-application of discriminatory legislation is not sufficient for a situation to be considered in conformity with the Charter. It must be possible to set aside, withdraw, repeal or amend any provision in collective agreements, individual employment contracts or internal company regulations that is incompatible with the principle of equal pay.[202]

> Domestic law must provide for **appropriate and effective remedies** in the event of alleged pay discrimination. Workers who claim that they have suffered discrimination must be able to take their case to court. Effective access to courts must be guaranteed for victims of pay discrimination. Therefore, proceedings should be affordable and timely.[203]

> Anyone who suffers pay discrimination on grounds of sex must be entitled to **adequate compensation**, i.e. compensation that is sufficient to make good the damage suffered by the victim and to

198. Conclusions VIII - Statement of interpretation - Article 4-3.
199. Conclusions XV-2 (2001), Slovak Republic; Conclusions XX-3 (2014), Georgia; Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 125.
200. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 126.
201. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 127.
202. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 128; Conclusions XIII-5, Statement of Interpretation on Article 1 of the1988 Additional Protocol.
203. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 131; Conclusions I (1969), Statement of Interpretation on Article 4§3.

> act as a deterrent. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and from being sufficiently dissuasive is contrary to the Charter.[204]

The burden of proof must be shifted. The shift in the burden of proof consists in ensuring that where a person believes she or he has suffered discrimination on grounds of sex and establishes facts which make it reasonable to suppose that discrimination has occurred, the onus is on the defendant to prove that there has been no infringement of the principle of non-discrimination.[205]

> **Retaliatory dismissal** in cases of pay discrimination must be forbidden. Where a worker is dismissed on grounds of having made a claim for equal pay, the worker should be able to file a complaint for dismissal without valid reason. In this case, the employer must reinstate her/him in the same or a similar post[206]. If reinstatement is not possible, the employer must pay compensation, which must be sufficient to compensate the worker (i.e. cover pecuniary and non-pecuniary damage) and to deter the employer.[207]

The competence to fix the amount of such compensation shall be attributed to courts and not to the legislator.[208] Courts must be free to decide upon the amount aimed at compensating the damage caused by the termination of the working relationship; any ceiling on the compensation payable to employees dismissed as a reprisal must be seen as violating Article 4 § 3.[209]

The European Committee of Social Rights perceives **pay transparency** as instrumental in the effective application of the principle of equal pay for work of equal value. Transparency contributes to identifying gender bias and discrimination and it facilitates the taking of corrective action by workers and employers and their organisations as well as by the relevant authorities.[210]

States should take measures in accordance with national conditions and traditions with a view to ensuring adequate pay transparency in practice, including measures such as those highlighted in the EU Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, notably an obligation for employers to regularly report on wages and produce disaggregated data by gender. The Committee regards such measures as indicators of compliance with the Charter in this respect.[211]

In order to establish whether work performed is **equal or of equal value**, factors such as the nature of tasks, skills, educational and training requirements must be taken into account. The Committee further observes that the notion of equal work or work of equal value has a qualitative dimension and may not always be satisfactorily defined, thus undermining legal certainty. States should therefore seek to clarify this notion in domestic law as necessary, either through legislation or case law. In this respect, job classification and evaluation systems should be promoted and

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204. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 132; Conclusions XIX-3 - Germany - Article 4-3.
205. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 133; Conclusions XIII-5, Statement of interpretation on Article 1 of the 1988 Additional Protocol.
206. Conclusions XIX-3 (2010), Iceland.
207. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 134; Conclusions XIII-2 (1994), Malta.
208. Conclusions XIX-3 (2010), Germany.
209. Conclusions XIX-3 - Germany - Article 4-3.
210. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 141.
211. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 142.

where they are used, they must rely on criteria that are gender-neutral and do not result in indirect discrimination. Moreover, such systems must consider the features of the posts in question rather than the personal characteristics of the workers.[212]

The possibility of making **job comparisons** is essential to ensuring equal pay. Lack of information on comparable jobs and pay levels could render it extremely difficult for a potential victim of pay discrimination to bring a case to court. Workers should be entitled to request and receive information on pay levels broken down by gender, including on complementary and/or variable components of the pay package. However, general statistical data on pay levels may not be sufficient to prove discrimination. Therefore, in the context of judicial proceedings it should be possible to request and obtain information on the pay of a fellow worker while duly respecting applicable rules on personal data protection and commercial and industrial secrecy.[213]

Moreover, national law should not unduly restrict the scope of job comparisons, e.g. by limiting them strictly to the same company. Domestic law must make provision for comparisons of jobs and pay to extend outside the company concerned where this is necessary for an appropriate comparison. The Committee views this as an important means of ensuring that the equal pay principle is effective under certain circumstances, particularly in larger companies or specific sectors where the workforce is predominantly, or even exclusively, of one sex.[214] The Committee considers notably that job comparisons should be possible across companies, where these form part of a group of companies owned by the same person or controlled by a holding or a conglomerate[215] or for employees of several undertakings or establishments covered by the same collective works agreement or regulations.[216]

Reasonable notice of termination (Article 4§4)

Paragraph 4 forms part of Article on remuneration, as the main purpose of giving a reasonable notice is to allow the person concerned a certain time to look for other work before his or her current employment ends, i.e. while he or she is still receiving wages.[217]

The **concept of "reasonable" notice** has not been defined in abstracto nor ruled on the function of the period of notice or the compensation in lieu thereof. Therefore, the courts must assess the situations on a case-by-case basis.[218]

In the monitoring cycle 2018, the Committee changed its approach to the interpretation of Article 4(4). It held that the reasonableness of the notice periods would no longer be examined on the main basis of length of notice periods. In a new statement of interpretation, it determined the following criteria of assessing Article 4(4):[219]

The rules governing the setting of notice periods (or the level of compensation in lieu of notice):

- during any probationary periods, including those in the public service, the Committee wishes to see an explicit minimum period of notice even if the length of the probationary employment

212. Conclusions XV-2, Article 4§3, Poland.
213. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 144.
214. Statement of interpretation on Article 20, Conclusions 2012.
215. Decision on the merits: University Women of Europe (UWE) v. Sweden, Complaint No. 138/2016, p. 145.
216. Conclusions XX-3 (2014), Romania.
217. Digest 2018, p. 90.
218. Conclusions XIII-3 (1995), Portugal.
219. Conclusions 2018, Statement of Interpretation on Article 4§4, <http://hudoc.esc.coe.int/eng?i=2018_163_01/EN>, (15 April 2019).

period is short or has recently been reduced by law;
- with regard to the treatment of employees in insecure job situations;
- in the event of termination of employment for reasons outside the parties' control (including insolvency, death of the employer if he/she is a natural person); in principle, such circumstances may not warrant failure to give notice;
- and any circumstances in which employees can be dismissed without notice or compensation.

Acknowledgment, by law, collective agreement or individual contract, of length of service, whether with the same employer or in circumstances of successive precarious forms of employment relations;

The components of the employee's remuneration during the notice period.

Receipt of wages in lieu of notice is admitted, provided that the sum paid is equivalent to that which the worker would have earned during the corresponding period of notice.[220] Periods of notice and/or compensation in lieu thereof may, however, not be left at the sole disposal of the parties to the employment contract.[221] The Committee found the severance pay, equal to 25 days of salary per year of service (up to 365 days) insufficient for workers with less than ten years of service.[222]

Article 4§4 does not apply solely to dismissals, but to all cases of termination of employment, such as termination due to bankruptcy, invalidity or death of the employer who is a natural person.[223]

> [U]nder Article 4§4 the right to reasonable notice of termination of employment applies to **all categories of workers** independently of their status, including those in non–standard employment, such as fixed-term, temporary, part-time, intermittent, seasonal or complementary employment. It applies to civil servants and contractual staff in the civil service, to manual workers and in all sectors of activity. It also applies during the probationary period[224] and upon early termination of fixed-term contracts. Domestic law must be broad enough to ensure that no workers are left unprotected.[225]

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

220. Conclusions 2010, Turkey.
221. Conclusions 2014, Russian Federation; Digest 2018, p. 90.
222. Conclusions 2018 - Andorra - Article 4-4; Conclusions 2014 - Andorra - Article 4-4.
223. Conclusions XIV-2 (1998), Spain.
224. Conclusions 2018 - Andorra - Article 4-4.
225. Decision on the merits: Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, p. 199.

> the probationary period may be shorter provided that it remains reasonable in relation to the authorised maximum length of the probationary period.[226]

The absence of provision of a notice period or severance pay during the probationary period of one year has been declared a violation of Article 4§4 of the Charter. [227]

According to the appendix to Article 4§4, the only **exception to the principle of reasonable notice** provided for in the European Social Charter (revised) concerns immediate dismissal for **serious offences**, however, pursuant to the recurring formula used by the Committee the accumulation of several less serious breaches with written warnings from the employer may amount to a serious offence.[228]

By way of example, the Committee considered that the following facts amounted to serious offences:[229]

- violation of equal opportunities policy or sexual harassment;[230]
- refusal to provide information as required by law, regulation or work regulations;[231]
- disclosure of state, professional, commercial or technological secrets;[232]
- working under the influence of alcohol, narcotic or toxic substances;[233]
- abandonment of post;[234]
- refusal to undergo mandatory medical checks;[235]
- immoral acts making it impossible for workers to be kept in teaching positions;[236]
- unjustified absences of more than five consecutive days or more than ten days per year;[237]
- abnormal decrease in productivity.[238]

On the other hand, immediate dismissal on the following grounds has been rejected[239]:

- a failure by the worker to perform;[240]

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226. Decision on the merits: Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, p. 200; Conclusions 2014, Estonia.
227. Decision on the merits: Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, p. 201.
228. Conclusions 2010, Albania.
229. Digest 2018, p. 91.
230. Conclusions 2014, Lithuania.
231. Conclusions 2014, Lithuania.
232. Conclusions 2014, Lithuania.
233. Conclusions 2014, Lithuania.
234. Conclusions 2014, Lithuania.
235. Conclusions 2014, Lithuania.
236. Conclusions 2014, Russian Federation.
237. Conclusions 2014, Portugal.
238. Conclusions 2014, Portugal.
239. Digest 2018, p. 92.
240. Conclusions 2010, Armenia.

- a loss of trust in the worker;[241]
- a call up of the worker for military service;[242]
- death of the employer who is a natural person or winding-up of the company;[243]
- withdrawal of administrative licenses required to perform the job;[244]
- request by bodies or officials authorised by the law;[245]
- duly certified unfitness for work;[246]
- economic, technological or organisational circumstances requiring changes in the work-force;[247]
- insufficient qualification for the post;[248]
- transfer of the employment contract to a successor employer;[249]
- force majeure;[250]
- arrest and custody.[251]

Wage deductions (Article 4§5)

Article 4§5 guarantees worker's right to receive his wages in full and establishes the principle that deductions from wages can be authorised only "under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards". Other deductions must be considered as contrary to the Charter.[252]

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

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

241. Conclusions 2010, Armenia.
242. Conclusions 2010, Armenia.
243. Conclusions 2014, Georgia.
244. Conclusions 2014, Lithuania.
245. Conclusions 2014, Lithuania.
246. Conclusions 2014, Lithuania.
247. Conclusions 2014, Malta.
248. Conclusions 2014, Russian Federation.
249. Conclusions 2014, Slovenia.
250. Conclusions 2014, Turkey.
251. Conclusions 2014, Turkey.
252. Conclusions V - Statement of interpretation - Article 4-5

undertaking laid down in the Charter is satisfied.

A State Party is in conformity with this provision when deductions from wages are permitted for the large majority of workers only when they are expressly authorised by laws, regulations, collective agreements or arbitration awards[253].

The Committee pointed out that a State cannot be regarded as meeting its obligation under the terms of Paragraph 5 unless these conditions and limitations are respected[254]. Article 4 § 5 applies also to civil servants and contractual staff in the civil service.[255]

Wage deductions must be subject to reasonable limits and should not per se result in depriving workers and their dependents of their means of subsistence.[256] Article 4 § 4 covers all forms of deduction, including trade union dues, disciplinary fines, maintenance payments, repayment or wage advances, tax debts, compensation for benefits in kind, wage assignments or transfers, etc.[257]

Workers should not be allowed to waive their right to limitation of deductions from their wage and the way in which such deductions are determined should not be left at the disposal of the sole parties to the employment contract.[258]

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

- deductions from wages may deprive employees with the lowest pay and their dependants of their means of subsistence;[259]
- withdrawal of wages in case of flawed products, for which the employee is responsible, deprives employees and their dependants of their means of subsistence;[260]
- guarantees in place to prevent workers from waiving their right to limitation of deduction from wages are insufficient;[261]
- there are no guarantees in place to prevent workers from waiving their right to limitation of deduction from wages;[262]
- deductions from wages may deprive civil servants, state employees, blue collar workers, seafarers and their dependents of their means of subsistence.[263]

IMPLICATIONS FOR UKRAINE

Article 4, Paragraph 1

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

253. Conclusions V - Statement of interpretation - Article 4-5.
254. Conclusions I - Statement of interpretation - Article 4-5.
255. Conclusions 2014, Portugal.
256. Conclusions XI-1 (1991), Greece.
257. Conclusions 2014, Estonia.
258. Conclusions 2005, Norway.
259. Conclusions 2018 - Armenia - Article 4-5; Conclusions 2018 - Armenia - Article 4-5; Conclusions 2018 - Ukraine - Article 4-5.
260. Conclusions 2018 - Armenia - Article 4-5.
261. Conclusions 2018 - Armenia - Article 4-5; Conclusions 2018 - Ukraine - Article 4-5.
262. Conclusions 2018 - Cyprus - Article 4-5.
263. Conclusions 2018 - Cyprus - Article 4-5

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

During the examination of the commitments under provision about the non-discrimination between women and men with respect to remuneration, the Committee stated that national legislation according to which the claimant has to prove that the discrimination that took place has not been changed since conclusions under Article 20 in 2016. Therefore, the situation in Ukraine was considered not in conformity with §3 of Article 4 on the ground that legislation does not provide for a shift in the burden of proof in gender discrimination cases.[264]

Article 4, Paragraph 2

The Committee stated that national legislation met the requirements of §2 of Article 4 and the situation in Ukraine was in conformity with it.[265]

Article 4, Paragraph 3

Within the examination of provision of equal pay for women and men with the same qualification and working conditions in Ukraine, the Committee asked whether the prohibition was guaranteed for both direct and indirect discrimination.[266]

The Committee recalled that under Ukrainian legislation the claimant shall provide reliable facts which confirm that discrimination took place in discrimination cases. The appropriate provisions of national legislation have been analysed and found non-compliant with the requirements of Article 20 of the Charter. Taking into account that the legislation had not been changed since that time, in the Conclusions 2018 the Committee stipulated that obligations was not in conformity with Article 4§3.[267]

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

Concerning the Association Agreement between Ukraine and the EU, Ukraine took the obligation to implement the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation as it was prescribed by the Directive 2006/54/EC.

Article 4, Paragraph 4

The Committee repeatedly found in its Conclusions 2014, 2018 that the situation in Ukraine was not in conformity with Article 4§4 of the Charter due to unreasonable notice periods in different circumstances[268], such as:

- dismissal as a result of changes in the organisation of production or labour or a reduction in staff number;

- dismissal for unfitness due to medical reasons, lack of qualifications or the reinstatement of

264. Ibid., p.13.
265. ECSR, Conclusions 2018. Ukraine. p.12.
266. Ibid., p.13.
267. Ibid., p.13.
268. ECSR, Conclusions 2018. Ukraine. p.15, Conclusions 2014. Ukraine. – Article 4-4.

the previous post holder;

- for workers with more than seven years of service;
- termination of employment or dismissal on all other grounds, beyond five years of service.[269]

Article 4, Paragraph 5

In the Conclusions 2010, 2014 and 2018, the Committee reiterated its findings on non-conformity of the situation in Ukraine with requirements under paragraph 5 of Article 4 on ground that following all authorised deductions, the wages of workers with the lowest pay were not sufficient to sustain themselves or their dependents[270].

Moreover, within the Conclusions 2018, it was found that guarantees in place to prevent workers from waiving their right to limited deductions of wages were insufficient[271].

The provisions enshrined in Article 4 have been repeatedly considered by national courts. The national courts considered cases on discrimination in the sphere of employment, including remuneration. For example, in the decision of the Third Administrative Court of Appeal of 17 January 2019, the applicant alleged discrimination against her on the grounds of age, education, etc. in working and dismissal from the civil service on the basis of the Regulation "On the formation of the personnel reserve for civil servants of the National Bank of Ukraine". The Court analysed national legislation on the prohibition of discrimination, the Constitution of Ukraine, the European convention on human rights and case-law of the European Court of Human Rights, applied to Universal declaration on human rights, International covenant on economic, social and cultural rights[272].

National courts considered also the issue of violation of the notice period for dismissal of employees. In the judgment of the Supreme Court made on 11 September 2019, the notice period for dismissal was wrongly calculated and moreover, it was stated that among other requirements, the attention had to be paid to the obligation to offer all vacancies existing on the day of dismissal.[273]

Analysis of the provisions of the European Social Charter (revised) on the right to organise (Article 5)

The European Social Charter guarantees all workers and employers the right to freedom of association in national or international organisations for the protection of their economic and social interests. The right to organise attaches both a positive and a negative state obligation: to enable by legislative and other measures the right to organise; and to refrain from unjustly interfering with this right.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 5 sets out the principle that employers and workers have the right to form national or international associations, for the protection of their economic and social interest. The Committee noted that two obligations are embodied in this provision, having a negative and positive aspect respectively. The implementation of the first obligation requires the absence, in the municipal

269. ECSR, Conclusions 2018. Ukraine. p.15.
270. ECSR, Conclusions2018. Ukraine. p.16, Conclusions 2014 – Article 4-5, Conclusions 2010. Ukraine Article 4-5.
271. ECSR, Conclusions 2018. Ukraine. p.16.
272. Third Administrative Court of Appeal, judgment 17 January 2019.
273. Supreme Court, judgment of Civil Cassation Court, 11 September 2019, case 280/89/18.

law of each Contracting State, of any legislation or regulation or any administrative practice such as to impair the freedom of employers or workers to form or join their respective organisations. By virtue of the second obligation, the Contracting State is obliged to take adequate legislative or other measures to guarantee the exercise of the right to organise and, in particular, to protect workers' organisations from any interference on the part of employers.[274]

The main object of worker's and employers' right to form organisations is to engage in collective bargaining for the defence of their interests, and this cannot be qualified by any requirement to deposit money in order to obtain a negotiating licence. At most, the Committee might concede that the Charter has been respected if everyone wishing to organise for purposes that are not prejudicial to "l'ordre public" are automatically entitled to such a license, or if payment demanded covers only minimal administrative costs"[275].

Requirements as to minimum numbers of members comply with Article 5 if the number is reasonable and presents no obstacle to the founding of organisations.[276] If fees are charged for the registration or establishment of an organisation, they must be reasonable and designed only to cover strictly necessary administrative costs.[277]

Trade unions and employers' organisations must be free to form federations and join similar national and international organisations[278] and so States Parties may not limit the degree to which they are authorised to organise. There must also be provision in domestic law for a right of appeal to the courts to ensure that all these rights are upheld.[279]

Article 5 of the Charter is intended to guarantee the full enjoyment of the freedom to organise to, in principle, **every category of employers and workers, including the entire public sector[280]**. The right to organise under Article 5 covers not only **workers in activity** but also persons who exercise rights resulting from work.[281] **Unemployed and retired workers** may join and remain in trade unions. However, States are not required to allow them to form trade unions, as long as they are entitled to form organisations which can take part in consultation processes that may impact on their rights and interests[282].

Article 5 allows States

> to impose restrictions upon the right to organise of members of the armed forces and grants them a wide margin of appreciation in this regard, subject to the terms set out in Article G of the Charter. However, these restrictions may not go as far as to suppress entirely the right to organise, such as the blanket prohibition of professional associations of a trade union nature and of the affiliation of such associations to national federations/confederations.[283]

With regard to the police,

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274. Conclusions I - Statement of interpretation - Article 5.
275. Conclusions IV - Statement of interpretation - Article 5.
276. Conclusions XIII-5 (1997), Portugal.
277. Conclusions XV-1 (2000), United Kingdom; Conclusions XVI-1 (2002), United Kingdom.
278. Conclusions I (1969), Statement of Interpretation on Article 5.
279. Conclusions 2016, Malta.
280. Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 140/2016, decision on the merits of 22 January 2019, §69.
281. Conclusions XVII-1 (2004), Poland.
282. Conclusions 2010 - Statement of interpretation - article 5.
283. CESP v. France, Complaint No.101/2013, §84.

> although Article 5 authorises, in the case of members of the **police force**, restrictions on freedom of organisation, the complete suppression of that freedom is not compatible with the article. The Charter is not satisfied by statutes or regulations under which such personnel are forbidden to form their organisations or to join organisations of their own choosing, but compelled to become members of an organisation established by or under the statute or regulation itself. The Committee also thinks it right to point out that a distinction exists between the right to establish a union and to join it and the right of negotiation and collective action (provided for in Article 6). The one does not imply the other. Hence, Article 5 is not satisfied merely by the fact that a statutory or other compulsory organisation effectively engages in procedures resembling collective bargaining[284].

Legislation or regulations which forbid policemen to set up their own trade union or to join a trade union of their own choice; or oblige policemen to join a trade union imposed by statute, are contrary to the Charter because they effectively completely suppress the freedom to organise[285].

Workers must be free not only to join but also not to join a trade union.[286] Domestic law must guarantee the right of workers to join a trade union and include effective punishments and remedies where this right is not respected. Trade union members must be protected from any harmful consequence that their trade union membership or activities may have on their employment, particularly any form of reprisal or discrimination in the areas of recruitment, dismissal or promotion because they belong to a trade union or engage in trade union activities.[287] Where such discrimination occurs, domestic law must make provision for compensation that is adequate and proportionate to the harm suffered by the victim.[288]

To secure the freedom, domestic law must clearly prohibit all pre-entry or post-entry closed shop clauses and all union security clauses (including automatic deductions from the wages of all workers, whether union members or not, to finance the trade union acting within the company).[289] Consequently, clauses in collective agreements or legally authorised arrangements whereby jobs are reserved in practice for members of a specific trade union are in breach of the freedom guaranteed by Article 5.[290] The same rules apply to employers' freedom to organise.[291]

Trade unions and employers' organisations must be autonomous in respect of their organisation or functioning. Trade unions are entitled to choose their own members and representatives.[292] The following examples constitute infringements in breach of Article 5: prohibiting the election of or appointment of foreign trade union representatives, substantially limiting the use that a trade union can make of its assets and substantially limiting the reasons for which a trade union is entitled to take disciplinary action against its members.[293]

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284. Conclusions II - Statement of interpretation - Article 5.
285. Conclusions III - Statement of interpretation - Article 5.
286. Conclusions I (1969), Statement of Interpretation on Article 5.
287. Conclusions 2010, Republic of Moldova; Digest 2018, p. 95.
288. Conclusions 2004, Bulgaria; Digest 2018, p. 95.
289. Conclusions VIII (1984), Statement of Interpretation on Article 5, Confederation of Swedish Enterprises v Sweden, Complaint No 12/2002, Decision on the merits of 22 May 2003 §42
290. Conclusions XIX-3 (2010), Iceland.
291. Digest 2018, p. 95.
292. Conclusions XIII-3 (1995)- United Kingdom.
293. Conclusions 2010, Georgia, Conclusions XX-3 (2014) United Kingdom; Digest 2018, p. 95.

Domestic law may restrict participation in various consultation and collective bargaining procedures to representative trade unions alone. For the situation to comply with Article 5, the following conditions must be met:[294]

- a) decisions on representativeness must not present a direct or indirect obstacle to the founding of trade unions;[295]
- b) areas of activity restricted to representative unions should not include key trade union prerogatives;[296]
- c) criteria used to determine representativeness must be reasonable, clear, predetermined, objective, prescribed by law and open to judicial review.[297]

IMPLICATIONS FOR UKRAINE

Within the examination of the right to organise, the Committee several times found breaches of the requirements under Article 5 of the Charter. In 2014 the situation in Ukraine was found in non-conformity with Article 5 on 4 grounds: unreasonable fees charged for the registration of the employers' organisations; non-establishing that domestic law provides effective sanctions and remedies in case of discrimination and reprisals based on trade union membership and activities; failure to establish that domestic law provides for compensation that is adequate and proportionate to the harm suffered by the victim in case of discrimination and reprisals based on trade union membership and activities; failure to prove that criteria used to determine representativeness were open to judicial review.[298]

Regarding to the examination of forming trade unions and employers' organisations, freedom to join or not to join a trade union, discrimination and harassment of trade union activists, representativeness, the Committee asked to be kept informed on the changes, complaints from the International Labour Organisation and the Secretary-General of the International Confederation of Trade Unions, asked about the prohibition of closed shop clauses.

However, the prohibition for nationals of other Contracting Parties to the Charter to form trade unions was indicated as a situation of non-conformity with Article 5 in the Conclusions 2018.[299]

Despite the improvement, the situation with the fulfilment of obligations under Article 5, various issues in the sphere of trade unions' functioning and activities were considered by national courts, including the Supreme Court. For example, Civil Cassation Court of the Supreme Court in its judgment made on 28 October 2020, considered the case on recognition of illegal and cancellation of the decision on refusal in the state registration of changes to the Statute documents of trade union on the basis of the decision of extraordinary trade union conference[300], on 20 January 2020 the Civil Cassation Court considered the case devoted to non-fulfilment of the employer's obligation to provide premises for the work of the trade union body and to hold a meeting of the staff with all the necessary equipment, communication, lighting, etc.[301], the judgment of the Great Chamber of the Supreme Court adopted 26 February 2020 was devoted to the issue of deprivation of the chairman and deputy chairmen of trade union membership.[302] In the last mentioned case judges applied European Convention on Human Rights in conjunction with the case-law of the European Court of Human Rights.

294. Digest 2018, p. 96.
295. Conclusions 2014, Andorra.
296. Conclusions XV-1 (2000), Belgium.
297. Conclusions XV-1 (2000), France.
298. ECSR, Conclusions 2014 – Article 5. http://hudoc.esc.coe.int/eng?i=2014/def/UKR/5/EN
299. ECSR, Conclusions 2018. Ukraine. p.18-19.
300. Supreme Court, judgment of Civil Cassation Court 28 October, 2020, case 160/12689/19.
301. Supreme Court, judgment of Civil Cassation Court 20 January, 2020, case 265/7296/16-ц.
302. Supreme Court, judgment, 26 February 2020, case 210/5659/18.

Analysis of the provisions of the European Social Charter (revised) on the right to bargain collectively (Article 6)

The European Social Charter guarantees all workers and employers the right to bargain collectively. This right includes: the promotion of joint consultations between employers' and employees' organisations; the promotion of mechanisms of voluntary negotiations between the two groups through collective agreements; the promotion of mechanisms of conciliation and voluntary arbitration between them; and the recognition of industrial action, including the right to strike.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Joint consultation (Article 6§1)

Within the meaning of Article 6§1, joint consultation is consultation between employees and employers or the organisations that represent them.[303] Such consultation can take place within tripartite bodies provided that the social partners are represented in these bodies on an equal footing.[304]

Consultation must take place on several levels: national, regional/sectoral and enterprise.[305] It should take place in the private and public sector (including the civil service).[306] Consultation must cover all matters of mutual interest, and particularly: productivity, efficiency, industrial health, safety and welfare, and other occupational issues (working conditions, vocational training, etc.), economic problems and social matters (social insurance, social welfare, etc.)[307]

It is open to State Parties to require trade unions to meet representativeness criteria subject to certain conditions. Such a requirement must not excessively limit the possibility of trade unions to participate effectively in consultation. In order to be in conformity with Article 6§1, representativity criteria should be prescribed by law, should be objective and reasonable and subject to judicial review which offers appropriate protection against arbitrary refusal.[308]

Negotiation procedures (Article 6§2)

On the basis of Article 6§2 of the Charter "Contracting Parties undertake not only to recognise, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreement if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other (…)".[309]

State Parties should not interfere in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned, including the use of collective action. Trade unions must be allowed to strive for the improvement of existing living and working conditions of workers and in this area the rights of trade unions should not be limited by legislation to the attainment of minimum conditions.[310]

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

> Nothing in the wording of Article 6 of the Charter entitles States Parties to enact restrictions on the right to bargain collectively on the part of the **police or armed forces** in particular.[311]

The extent to which collective bargaining applies to public officials, including members of the police and armed forces, may be determined by law. Officials nevertheless always retain the right to participate in any processes that are directly relevant for the determination of procedures applicable to them.[312]

> A mere hearing of a party on a predetermined outcome will not satisfy the requirements of Article 6§2 of the Charter. On the contrary, it is imperative to regularly consult all parties throughout the process of setting terms and conditions of employment and thereby provide for a possibility to influence the outcome. Especially in a situation where trade union rights have been restricted, it must maintain its ability to argue on behalf of its members through at least one effective mechanism.[313]

An outright ban on collective bargaining of all **self-employed workers** must be seen as excessive as it runs counter to the object and purpose of Article 6§2. In establishing the type of collective bargaining that is protected by the Charter, it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining.[314]

It is open to State Parties to require trade unions to meet an obligation of representativeness subject to certain conditions. With respect to Article 6§2 such a requirement must not excessively limit the possibility of trade unions to participate effectively in collective bargaining. In order to be in conformity with Article 6§2, the criteria of representativeness should be prescribed by law, should be objective and reasonable and subject to judicial review which offers appropriate protection against arbitrary refusals.[315] It was considered that the restriction to the collective bargaining to trade unions representing at least 33% of the employees concerned by this bargaining, was in violation of the Article 6§2.[316]

The extension of collective agreements "should take place subject to tripartite analysis of the consequences it would have on the sector to which it is applied".[317]

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

Conciliation and arbitration (Article 6§3)

According to Article 6§3,

> conciliation, mediation and/or arbitration procedures must be instituted to facilitate the resolution of collective conflicts. They may be instituted by law, collective agreement or industrial practice. Article 6§3 applies also to the public sector.[318]

> Article 6§3 applies to conflicts of interest, i.e. generally conflicts which concern the conclusion of a collective agreement or the modification, through collective bargaining, of conditions of work contained in an existing collective agreement. It does not concern conflicts of rights, i.e. conflicts related to the application and interpretation of a collective agreement, or to political disputes.[319]

Conciliation is a process aimed at the peaceful settlement of a labour conflict, while arbitration can resolve the conflict on the basis of a decision taken by one or more individuals selected by the parties. The result of a conciliation proceeding is not binding on the parties. On the contrary, the result of the arbitration proceedings is binding on the parties.[320]

Arbitration systems must be independent, and the outcome of arbitration may not be predetermined by pre-established criteria.[321] Any form of compulsory recourse to arbitration is a violation of this provision, whether domestic law allows one of the parties to defer the dispute to arbitration without the consent of the other party or allows the Government or any other authority to defer the dispute to arbitration without the consent of one party or both. Such a restriction is only allowed within the limits prescribed by Article G.[322]

Collective action (Article 6§4)

Article 6§4 guarantees the right to strike and the right to call a lock-out. The right may result from statutory law or case-law. [323]

Limiting the right to call a strike to the representative or the most representative trade unions constitutes a restriction which is not in conformity with Article 6§4.[324] A general prohibition of lock-out is not in conformity with Article 6§4,[325] although it is not protected to the same degree as the right to strike.[326]

The decision to call a strike can be taken only by a trade union provided that forming a trade union is not subject to excessive formalities.[327] The Committee considered that the reference to "workers" in Article 6§4 relates to those who are entitled to take part in collective action but says nothing

318. Decision on the merits: Matica Hrvatskih Sindikata v. Croatia, Complaint No. 116/2015, § 105.
319. Decision on the merits: Matica Hrvatskih Sindikata v. Croatia, Complaint No. 116/2015, § 106.
320. Conclusions 2014, Republic of Moldova.
321. Conclusions XIV-1 (1998), Iceland.
322. Conclusions 2006, Moldova, Article 6§3; Digest 2018, p. 101.
323. Conclusions I (1969), Statement of Interpretation on Article 6§4.
324. Conclusions XV-1 (2000), France; Decision on the merits: Matica Hrvatskih Sindikata v. Croatia, Complaint No. 116/2015, p. 117.
325. Conclusions I (1969), Statement of Interpretation on Article 6§4; Conclusions VIII (1984), Statement of Interpretation on Article 6§4.
326. Conclusions VIII (1980) Statement of interpretation on Article 6§4.
327. Conclusions 2004, Sweden; Conclusions 2014, Germany; Digest 2018, p. 103.

about those empowered to call a strike. In other words, this provision does not require states to grant any group of workers authority to call a strike but leaves them the option of deciding which groups shall have this right and thus of restricting the right to call strikes to trade unions. On the contrary, limiting the right to call a strike to the representative or the most representative trade unions constitutes a restriction which is not in conformity with Article 6§4.[328] Once a strike has been called, any employee concerned, irrespective of whether he is a member of the trade union having called the strike or not, has the right to participate in the strike.[329]

Article 6§4 applies to conflicts of interests. It does not concern conflicts of rights, i.e. related to the existence, validity or interpretation of a collective agreement and to the violation of a collective agreement.[330] Political strikes are not covered by Article 6, which is designed to protect "the right to bargain collectively", such strikes being obviously quite outside the purview of collective bargaining.[331]

> The right of trade unions to collective action is not an absolute one. Nevertheless, a restriction to this right can be considered in conformity with Article 6§4 of the Charter only if, as set forth by Article G, the restriction: a) is prescribed by law; b) pursues a legitimate purpose - i.e. the protection of rights and freedoms of others, of public interest, national security, public health or morals – and, c) is necessary in a democratic society for the pursuance of these purposes, i.e. the restriction has to be proportionate to the legitimate aim pursued.[332]

Excessive or abusive forms of collective action, such as extended blockades, which would put at risk the maintenance of public order or unduly limit the rights and freedoms of others (such as the right of co-workers to work, or the right of employers to engage in a gainful occupation) may be limited or prohibited by law. In this context, the Committee considers that the prohibition of certain types of collective action, or even the introduction of a general legislative limitation of the right to collective action in order to prevent initiatives aimed at achieving illegitimate or abusive goals (e.g. goals which do not relate to the enjoyment of labour rights, or relate to discriminatory objectives) would not be necessarily contrary to Article 6§4 of the Charter.[333]

However,

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

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

> Charter, the right to collective bargaining and collective action is essential in ensuring the autonomy of trade unions and protecting the employment conditions of workers: if the substance of this right is to be respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and its scope should not be limited by legislation to the attainment of minimum conditions.[334]

Article 6§4 guarantees also the right to participate in secondary action.[335]

Prohibiting strikes in sectors which are essential to the community is deemed to serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health.[336] However, simply banning strikes even in essential sectors – particularly when they are extensively defined, i.e. "energy" or "health" – is not deemed proportionate to the specific requirements of each sector. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6§4.[337]

The prohibition of the right to strike of members of the armed forces does not amount to a violation of Article 6§4 of the Charter.[338] Restrictions on the right to strike for member of **the armed forces** may be in conformity with the Charter. As regards the right of public servants to strike, the Committee recognised that, by virtue of Article G of the European Social Charter (revised), the right to strike of certain categories of public servants may be restricted, including members of the police and armed forces, judges and senior civil servants. On the other hand, the Committee took the view that a denial of the right to strike to public servants as a whole cannot be regarded as compatible with the Charter.[339]

> Under Article G of the Charter, these restrictions should be limited to public officials whose duties and functions, given their nature or level of responsibility, are directly related to national security, general interest, etc.[340]

> As regards police officers the Committee has, in the context of the diversity of the legal systems in this area, also taken note of the evolution towards the expansion of the right to strike to police officers. Their right to collective action may be restricted. Such a restriction may nevertheless only be compatible with the Charter if the requirements of Article G are met, i.e. if the restriction is established by law, pursues a legitimate aim and is objectively necessary in a democratic society, that is to say proportionate to the

334. Decision on admissibility and the merits: Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, p. 120.
335. Conclusions XX-3 (2014), United Kingdom.
336. Conclusions I (1969), Statement of Interpretation on Article 6§4; Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" and European Trade Union Confederation (CES) v. Bulgaria, Complaint No. 32/2005, Decision on the merits of 16 October 2006, §24
337. Conclusions XVII-1 (2004), Czech Republic.
338. Decision on the merits : European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, p. 118.
339. Conclusions I (1969), Statement of Interpretation on Article 6§4.
340. Decision on the merits : European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, § 113; Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" and European Trade Union Confederation (ETUC) v. Bulgaria, Complaint No. 32/2005, decision on the merits of 16 October 2006, §46.

> aim pursued. Concerning police officers, an absolute prohibition on the right to strike can be considered in conformity with Article 6§4 only if there are compelling reasons justifying it. On the other hand, the imposition of restrictions as to the mode and form of such strike action can be in conformity to the Charter.[341]

The use of compulsory arbitration to terminate a strike is contrary to the Charter except in the cases established by Article G.[342]

Subjecting the exercise of the right to strike to prior approval by a certain percentage of workers is in conformity with Article 6§4, provided that the ballot method, the quorum and the majority required are not such that the exercise of the right to strike is excessively limited.[343]

The exhaustion of conciliation/mediation procedures requirement before strike is in conformity with Article 6§4 – given Article 6§3 – as long as such machinery is not so slow that the deterrent effect of a strike is affected.[344] Periods of notice or cooling-off periods prescribed in connection with pre-strike conciliation procedures are in conformity with Article 6§4 as long as they are of a reasonable duration.[345]

A strike should not be considered a violation of the contractual obligations of the striking employees entailing a breach of their employment contract. It should be accompanied by a prohibition of dismissal. If, however, in practice, strikers are fully reinstated when the strike has ended and their previously acquired entitlements (e.g.[346] concerning pensions, holidays and seniority) are not affected, then formal termination of the employment contract does not violate Article 6§4.

Any deduction from strikers' wages should not exceed the proportion of their wage that would be attributable to the duration of their strike participation.[347] Workers participating in a strike, who are not members of the trade union having called the strike, are entitled to the same protection as trade union members.[348]

IMPLICATIONS FOR UKRAINE

Article 6, Paragraph 1

The Committee found that consultations on a bipartite basis took place between the parties to social dialogue at all levels in both the private and public sectors that was confirmed by high number of collective agreements in force and hence, compliance with the requirements of Article 6§1 was confirmed in the Conclusions 2018.[349]

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341. Decision on the merits : European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, p. 114; Decision on admissibility and the merits: European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012, §§203-204.
342. Conclusions 2014, Norway, Article 6§4.
343. Conclusions II (1971), Cyprus; Conclusions XIV-1 (1998), United Kingdom; Digest 2018, p. 106.
344. Conclusions XVII-1 (2004), Czech Republic.
345. Conclusions XIV-1 (1998), Cyprus.
346. Conclusions I (1969), Statement of Interpretation on Article 6§4; Digest 2018, p. 106.
347. Conclusions XIII-1 (1993), France; Confédération française de l'Encadrement –(CFE-CGC) v. France, Complaint No. 16/2003, Decision on the merits of 12 October 2004, §63; Digest 2018, p. 106.
348. Conclusions XVIII-1 (2006), Denmark; Digest 2018, p. 106.
349. ECSR, Conclusions 2018. Ukraine. p.20.

Article 6, Paragraph 2

The Committee repeatedly stated in its Conclusions 2014, 2018 that the situation regarding negotiation procedures was in conformity with Article 6. However, the additional information was asked about all developments in special procedures for the extension of the scope of collective agreements and about proportion of workers covered by collective agreements.[350]

Article 6, Paragraph 3

The situation in Ukraine regarding conciliation and arbitration was found within the requirements of the Charter in Conclusions 2014, 2018. The Committee noted that Ukrainian legislation did not prohibit or provide any special procedures/methods for conciliation and arbitration for civil servants, however, the confirmation of applying them to civil servants need to be proved within additional information.[351]

Article 6, Paragraph 4

Regarding collective action the Committee's conclusions had been changed from positive to negative since 2014. According to the national report 2017 the procedure for decisions to call a strike that require support by a majority of the workers or two-thirds of the delegates at the conference vote in its favour were going to be changed for the majority of workers (delegates) present at the meeting.

The Committee reconfirmed its negative conclusion on the situation in Ukraine in the sphere of restrictions to the right to strike and procedural requirements. Since 2014 there were no changes in prohibition of organising or taking part in strikes for person of the ordinary and commanding staff of the civil protection service, staff of professional rescue services, workers of paramilitary emergency rescue services in the coal and mining industries, of electric power plants, in the nuclear industry.[352]

National legislation on strikes in transport sector has to be amended due to the obligation to implement the ECHR judgment in the case of "Veniamin Tymoshenko and others v. Ukraine", where the violation of Article 11 of the ECHR has been stated because of unlawful ban of a strike as a result of the absence of clear and foreseeable legislation. In this case the ECHR applied also the Committee's practice. This judgment was classified as a complex problem. Regarding general measures taken by Ukraine, updated action plan on 15 March 2017 provided to the Committee of Ministers of the Council of Europe stated that criticised provisions of the Transport Act were no longer applied and that the legal reasoning from the judgment in the Veniamin Tymoshenko's case had been directly applied by the courts in proceedings concerning strikes not related to transportation industry, at the same time Section 18 of the Transport Act prohibiting strikes in the transport sector is still in force, thus information would be useful via examples of case-law from the moment the judgment became final when the strikes on transport companies took place, in spite of this legislative provisions.[353]

The Committee emphasised that the restriction of strikes is possible in some sectors "since strikes in these sectors could pose a threat to public interest, national security and/or public health".[354] However, the simple ban of strikes for certain categories of employees in national legislation of

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

Ukraine is constituted as a breach of the requirements of Article 6 §4 of the Charter. Therefore, the situation in Ukraine was found not to be compliant with the Charter by the Committee in 2018. The same conclusions the Committee made in accordance with the prohibition of strikes for all civil servants in Ukraine.

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

National courts of Ukraine usually consider the cases on strikes under national legislation and could make a reference to the ECHR and case-law of the European Court of Human Rights. For example, the Supreme Court 29 April 2020 considered the case concerning dismissal of the applicant on the ground of absence from work without serious grounds and participation in the strike which was recognised illegal was indicated in the employment record book, applied to the ECHR.[355]

On the judgment adopted on 26 April 2018, the Court of Appeal of Dnipropetrovsk region considered the case on the on declaring illegal the strike of employees of the structural subdivision of the Mine Management Department of Arcelor Mittal company. The applicants argued that the court of first instance had failed to give a proper legal assessment to the decision of the European Court of Human Rights in Veniamin Timoshenko and Others v. Ukraine, such an argument was not accepted by the panel of judges, as the European Court of Human Rights had ruled that the Article 18 of the Law of Ukraine "On Transport", which did not apply to the legal relations of the parties in this case.[356] The examples given show that judges apply the Convention on Human Rights in matters concerning strikes.

Analysis of the provisions of the European Social Charter (revised) on the right of employed women to protection of maternity (Article 8)

Article 8 guarantees the protection of female workers during maternity. It regulates maternity leave and related benefits, prohibits dismissal during pregnancy as well as underground work and other arduous or dangerous work, and lays out the conditions for night work.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Paid maternity leave (Article 8§1)

Article 8§1 involves two obligations:

- to provide for women to take at least 12 weeks' maternity leave; and
- to ensure that women are adequately compensated for their loss of earnings during the period of leave[357].

Maternity leave must be guaranteed by law[358] and shall last at least 14 weeks.[359] The type of employment and the nature of the employment contract must have no effect on the protection

355. Supreme Court, judgment of the Civil Cassation Court 20 April 2020, case № 158/1839/17, https://reyestr.court.gov.ua/Review/89034678
356. Court of Appeal of Dnipropetrovsk region, judgment of 26 April 2018, case № 214/4164/17, https://reyestr.court.gov.ua/Review/73740087
357. Conclusions III - Statement of interpretation - Article 8-1.
358. Conclusions III - Statement of interpretation - Article 8-1.
359. Conclusions III (1973), Statement of Interpretation on Article 8§1.

secured by Article 8§1 and 2.[360] It must be guaranteed for all categories of employees[361] and the leave must be maternity leave and not sick leave.[362]

Domestic law may permit women to opt for a shorter period of maternity leave. However, in all cases there must be a compulsory period of leave of no less than six weeks which may not be waived by the woman concerned.[363]

> Maternity leave must be accompanied by the continued payment of the individual's remuneration or by the payment of social security benefits or benefits from public funds. The modality of compensation is within the margin of appreciation of the States Parties and may be either a paid leave (continued payment of wages by the employer), social security maternity benefit, any alternative benefit from public funds or a combination of such compensations. Regardless of the modality of payment, the level shall be adequate. In case of continued payment of wages or earnings-related benefits, these shall be equal to the previous salary or close to its value, and not be less than 70% of the previous wage.
>
> A ceiling on the amount of compensation for high salary earners is not, in itself, contrary to Article 8§1.[364]

However, the minimum rate of compensation shall not fall below the poverty threshold defined as 50% of median equivalised income, calculated on the basis of the Eurostat at-risk-of-poverty threshold value.[365] Various elements are taken into account in order to assess the reasonable character of the reduction, such as the upper limit for calculating benefit, how this compares to overall wage patterns and the number of women in receipt of a salary above this limit.[366]

> The right to compensation may be subject to entitlement conditions such as a minimum period of employment or contribution. However, such conditions shall not be excessive; in particular, qualifying periods should allow for some interruptions in the employment record.[367]

Illegality of dismissal (Article 8§2)

Under Article 8§2, it must be unlawful to dismiss employees form the time they notify the employer of their pregnancy to the end of their maternity leave.[368] Article 8§2 applies equally to women on fixed-term and open-ended contracts.[369]

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360. Conclusions XV-2 - Statement of interpretation - Article 8-1.
361. Conclusions XV-2 (2001), Addendum, Malta.
362. Digest 2018, p. 116.
363. Digest 2018, p. 116; Conclusions VIII (1984), Statement of Interpretation on Article 8§1; Conclusions XIX-4 (2011), Statement of Interpretation on Article 8§1.
364. Conclusions 2015, Statement of Interpretation on Article 8§1.
365. Conclusions 2015, Statement of Interpretation on Article 8§1.
366. Conclusions XV-2 (2001), Belgium.
367. Conclusions 2015, Statement of Interpretation on Article 8§1.
368. Digest 2018, p. 117.
369. Conclusions XIII-4 (1996), Austria.

> Job security for a worker on maternity leave means that the contract of employment must not be terminated during this period. This is guaranteed by the prohibition on giving notice of dismissal at such a time that the period of notice would expire during the absence on leave. The giving of notice during maternity leave initiates the period of notice and, where appropriate, the interview, consultation or conciliation procedures to be carried out during this period. The Committee felt that, given the purposes of maternity leave and the unlawfulness of dismissal during this period, notice of dismissal as such was not incompatible with the Charter provided that the period of notice and any procedures were suspended until the end of the leave. The same rules governing suspension of the period of notice and procedures during maternity leave must apply in the event of notice of dismissal prior to maternity leave, irrespective of the length of the period of notice.[370]

The notification of the dismissal, by the employer, during the period of protection does not as such amount to a violation of article 8§2 provided that the period of notice and any procedures are suspended until the end of the leave.[371] The same rules governing suspension of the period of notice and procedures must apply in the event of notice of dismissal prior to the period of protection.[372]

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

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

These exceptions are strictly interpreted.

In cases of illegal dismissal, domestic law legislation must provide for adequate and effective remedies, employees who consider that their rights in this respect have been violated must be entitled to take their case before the courts.[373]

In the case of dismissal contrary to this provision, the reinstatement of the women should be the rule.[374] Exceptionally, if this is impossible (e.g. where the enterprise closes down) or the woman concerned does not wish it, adequate compensation must be ensured.

> The compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered

370. Conclusions XIII-4 - Statement of interpretation - 8-2.
371. Conclusions XIII-4 (1996), Statement of Interpretation on Article 8§2.
372. Digest 2018, p. 117.
373. Digest 2018, p. 117.
374. Conclusions 2005, Cyprus.

> and sufficiently dissuasive are proscribed. If there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation), and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time.[375]

Nursing breaks (Article 8§3)

According to Article 8§3, all employed mothers (including domestic employees[376] and women working at home) who breastfeed their babies shall be granted time off for this purpose. Time off for nursing should in principle be granted during working hours and should be treated as normal working time and remunerated as such.[377]

However, provision for part time work may be considered to be sufficient where loss of income is compensated by a parental benefit or other allowance.[378] Time off for nursing must be granted at least until the child reaches the age of nine months.[379]

The practical ways of implementing this Article are appreciated on a case-by-case basis: legislation providing for two daily breaks for a period of one year for breastfeeding, two half–hour breaks where the employer provides a nursery or room for breastfeeding,[380] one–hour daily breaks[381] and entitlement to begin or leave work earlier have all been found to be in conformity with the Charter.[382]

Night work (Article 8§4)

Article 8§4 requires States Parties to regulate night work for pregnant women, women who have recently given birth and women nursing their infants, in order to limit the adverse effects on the health of the woman. It does not apply to all women.[383]

The regulations must:

- only authorise night work where necessary, having due regard to working conditions and the organisation of work in the firm concerned;[384]

- lay down conditions for night work of pregnant women, e.g. prior authorisation by the Labour Inspectorate (when applicable), prescribed working hours, breaks, rest days following periods of night work, the right to be transferred to daytime work in case of health problems linked to night work, etc.[385]

375. Conclusions XIX-4 - Statement of interpretation - Article 8-2; Conclusions 2011 - Statement of interpretation - Article 8-2, 27-3.
376. Conclusions XVII-2 (2005), Spain.
377. Conclusions XIII-4 (1996), Netherlands.
378. Conclusions 2005, Sweden; Digest 2018, p. 118.
379. Conclusions 2005, Cyprus; Digest 2018, p. 118.
380. Conclusions I (1969), Italy; Digest 2018, p. 118.
381. Conclusion I (1969), Germany; Digest 2018, p. 118.
382. Conclusions 2005, France; Digest 2018, p. 118.
383. Digest 2018, p. 119.
384. Conclusions 2003, France.
385. Conclusions X-2 (1990), Statement of Interpretation on Article 8§4; Digest 2018, p. 119.

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

Article 8§5 applies to all pregnant women, women who have recently given birth or who are nursing their infant, in paid employment, including civil servants. Only self-employed women are excluded.[386]

With regard to the undertaking to "prohibit the employment of women workers in underground mining', the Committee clarified its case lay by specifying that the above-mentioned prohibition is concerned only with the employment of women on underground extraction work in mines, to the exclusion of all other occupations, and in particular those of a social or medical nature, management, inspection, etc.[387]

As regards the second part of sub-paragraph, prohibiting employment of women "as appropriate", on all other work which is unsuitable for them by reason of its dangerous, unhealthy or arduous nature", the expression "as appropriate" permits stated bound by this provision of the Charter to limit the prohibition of employment of women in the above-mentioned occupations to the sole cases where this is necessary, in particular to protect motherhood, notably pregnancy, confinement and the post-natal period, as well as future children.[388]

Certain other dangerous activities, such as those involving exposure to lead, benzene, ionising radiation, high temperatures, vibration or viral agents, must be prohibited or strictly regulated for the group of women concerned depending on the risks posed by the work. Domestic law must ensure a high level of protection against all known hazards to the health and safety of women who come within the scope of this provision.[389]

Domestic law must make provision for the re-assignment of women who are pregnant or breastfeeding if their work is unsuitable to their condition, with no loss of pay, if this is not possible such women should be entitled to paid leave. Such women should retain the right to return to their previous employment.[390]

IMPLICATIONS FOR UKRAINE

Article 8, Paragraph 1

The Commission stated in all its conclusions 2015, 2017, 2019 made for Ukraine on Article 8 §1, except for 2011, when the assumption was postponed, that Ukraine had failed to fulfil its obligations regarding maternity leave on the ground of non-establishing adequate safeguards in law and in practice to protect employees from undue pressure inciting them to take less than six week maternity leave.[391] It was also highlighted that the national legal provision on duration of maternity leave before and after the birth did not prescribed a compulsory period of postnatal leave of at least six weeks, which was obligatory requirement for being in conformity with requirements of Article 8§1. At the same time the Committee stressed on the nature of maternity leave as a right not obligation, that included right to continue to work of woman's own free will despite the medical certificate issued to authorise her to take maternity leave, or if she resumes work earlier, the social insurance body only covers the actual days of the leave taken.[392]

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386. Digest 2018, p. 119.
387. Conclusions X-2 - Statement of interpretation - Article 8-4.
388. Conclusions X-2 - Statement of interpretation - Article 8-4.
389. Conclusions 2003, Bulgaria.
390. Conclusions 2005, Lithuania.
391. ECSR, Conclusions. 2019. Ukraine. – Article 8-1. http://hudoc.esc.coe.int/eng?i=2019/def/UKR/8/1/EN
Conclusions. 2017. Ukraine. – Article 8-1. http://hudoc.esc.coe.int/eng?i=2017/def/UKR/8/1/EN
Conclusions. 2015. Ukraine. – Article 8-1. http://hudoc.esc.coe.int/eng?i=2015/def/UKR/8/1/EN
Conclusions. 2011. Ukraine. – Article 8-1. http://hudoc.esc.coe.int/eng?i=2011/def/UKR/8/1/EN
392. ECSR, Conclusions. 2019. Ukraine. p.19.

Article 8, Paragraph 2, 3

Regarding the illegality of dismissal during maternity leave and redress in case of unlawful dismissal and time off for nursing mothers, the Committee repeated in 2019 its previous conclusions about conformity the situation in Ukraine with §2, §3 of Article 8 of the Charter.[393]

Ukrainian courts applied the provisions of Article 8§2 in some cases concerning dismissal of pregnant women. For example, in judgment adopted on 18 March 2019, the Supreme Court considered the case concerning dismissal of a woman due to reduction in the number of employees, she was warned, that she worked less time than others for the company and had the smallest experience, so in fact she did not object to the dismissal. After that she was hospitalised and she went to work with a certificate of incapacity for work, stating the diagnosis "7 weeks of pregnancy", however, on the same day she was fired and returned her employment record book. The Supreme Court underlined that in accordance with the provisions of paragraph 2 of Article 8 of the European Social Charter (revised), it was illegal for an employer to dismiss a woman during her pregnancy or absence from work in connection with leave, or in the period after her return to work established by national law.[394]

Article 8, Paragraph 4

In 2019, the situation in Ukraine under Article 8§4 was examined in conjunction with Committee's conclusions 2018 on non-conformity of the situation in Ukraine with Article 2§7 on a set of grounds, including non-sufficient providing of possibilities of transfer to daytime work.[395] The request about the transferring of employed women to a daytime post until their child was three years old and rules applied if such a transfer was not possible was reiterated.

The Committee drew attention of Ukraine to its Statement of Interpretation of Articles 8§4 and 8§5, given in 2019, and asked confirmation of no loss of pay results from the changes in the working conditions or reassignment to a different post in cases of pregnancy and maternity, and information on the right of women to return to previous employment at the end of the protected period.[396]

Article 8, Paragraph 5

The Committee emphasised that Article 8§4, §5 enshrined specific rights protecting employed women during pregnancy and maternity.[397]

> "Non-provision of specific rights aimed at protecting the health and safety of a mother and a child during pregnancy and maternity or the erosion of their rights due to special protection during such a period are also direct gender discrimination…in the case a woman cannot be employed in her workplace due to health and safety concerns and as a result, she is transferred to another post or, should such transfer not be possible, she is granted leave instead, States must ensure that during the protected period, she is entitled to her average previous pay or provided with a social

393. ECSR, Conclusions. 2019. Ukraine. p.21-22.
394. Supreme Court, judgment of Civil Cassation Court 18 March 2019, case № 505/3097/17-ц.
395. ECSR, Conclusions. 2019. Ukraine. p.23.
396. Ibid.
397. Ibid., p.24.

security benefit corresponding to 100% of her previous average pay. Further, she should have the right to return to her previous post.[398]

Analysis of the provisions of the European Social Charter(revised) on the right to engage in a gainful occupation in the territory of other State Parties (Article 18)

The right to engage in a gainful occupation in the territory of other State Parties covers two aspects: facilitating the situation of migrant workers once they enter the territory of a state party; and allowing employment of their own nationals in other states that are parties to theEuropean Social Charter (revised) and thus support the movement of workers between states parties.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 18 applies to employees and the self-employed who are nationals of State Parties which are party to the Charter. It also covers members of their family allowed into the country for the purposes of family reunion.[399] Article 18 relates not only to workers already on the territory of the State Parties concerned, but also to workers outside the country applying for a permit to work on the territory.[400]

Liberal application of existing regulations (Article 18§1)

Article 18 § 1 requires each State Party to ensure to the nationals of any other Party the effective exercise of the right to engage in a gainful occupation in its territory, by applying existing regulations in a spirit of liberality[401]. The assessment of the degree of liberality used in applying existing regulations is based on figures showing the refusal rates for work permits. To this end, the figures supplied must be broken down by country and must also distinguish between first-time applications and renewal applications.[402]

As the Committee has already observed, economic or social reasons might justify limiting access of foreign workers to the national labour market. This may occur, for example, with a view to addressing the problem of national unemployment by means of favouring employment of national workers[403]. However, the implementation of such policies limiting access of third-country nationals to the national labour market, should neither lead to a complete exclusion of nationals of non-EU (or non-EEA) State Parties to the Charter from the national labour market, nor substantially limit the possibility for them of acceding the national labour market.[404]

> The Committee considers to be also in conformity with Article 18§1 and §3, the fact that a State Party, in view of ensuring free movement of workers within a given economic area of European States, such as the EU or the EEA, gives priority in access to the national labour market not only to national workers, but also to foreign workers from other European States members of the same area. An example

398. ECSR, Conclusions 2019. General Introduction. Statement of Interpretation on Articles 8§4 and 8§5. p.5-6.
399. Conclusions X-2 (1990), Austria.
400. Conclusions XIII-1 (1993), Sweden.
401. Conclusions XX-1 - Statement of interpretation - Article 18-1, 18-3.
402. Conclusions XVII-2 (2005), Spain; Digest 2018, p. 175.
403. Conclusions XX-1 - Statement of interpretation - Article 18-1, 18-3; Conclusions 2012 - Statement of interpretation - Article 18-1, 18-3.
404. Conclusions 2012, Statement of Interpretation of Article 18§1 and 18§3.

of such a situation can be found in the application of the so called "priority workers" rule, provided for by the EU Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment. This Resolution states inter alia that EU Member States will consider requests for admission to their territories for the purpose of employment only where vacancies cannot be filled by national and Community manpower, or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market.[405]

> In this regard the Committee notes, however, that in order not to be in contradiction with Article 18 of the Charter, the implementation of such policies limiting access of third-country nationals to the national labour market, should neither lead to a complete exclusion of nationals of non-EU (or non-EEA) States parties to the Charter from the national labour market, nor substantially limit the possibility for them of acceding the national labour market. Such a situation, deriving from the implementation of "priority rules" of the kind just mentioned, would not be in conformity with Article 18§1, of the Charter, since it would prove an insufficient degree of liberality in applying existing regulations with respect to the access to the national labour market of foreign workers of a number of States Parties to the Charter.[406]

Simplification of formalities (Article 18§2)

According to Article 18§2 of the Charter, with a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, State Parties are under an obligation to reduce or abolish chancery dues and other charges paid either by foreign workers[407] or by their employers. The Committee observed that in order to comply with such an obligation, State Parties must, first of all, not set an excessively high level for the dues and charges in question, that is a level likely to prevent or discourage foreign workers from seeking to engage in a gainful occupation, and employers from seeking to employ foreign workers .

> In addition, States have to make concrete efforts to progressively reduce the level of fees and other charges payable by foreign workers or their employers. States are required to demonstrate that they have taken measures towards achieving such a reduction. Otherwise, they will have failed to demonstrate that they serve the goal of facilitating the effective exercise of the right of foreign workers to engage in a gainful occupation in their territory.[408]

405. Conclusions XX-1 - Statement of interpretation - Article 18-1, 18-3; Conclusions 2012 - Statement of interpretation - Article 18-1, 18-3.
406. Conclusions XX-1 - Statement of interpretation - Article 18-1, 18-3; Conclusions 2012 - Statement of interpretation - Article 18-1, 18-3.
407. Conclusions XX-1 - Statement of interpretation - Article 18-2.
408. Conclusions XX-1 - Statement of interpretation - Article 18-2.

With regard to the formalities to be completed, conformity with Article 18§2 presupposes the possibility of completing such formalities in the country of destination as well as in the country of origin[409] and obtaining the residence and work permits at the same time and through a single application.[410] It also implies that the documents required (residence/work permits) will be delivered within a reasonable time.[411]

Liberalisation of regulations (Article 18§3)

Article 18§3 requires each State Party to liberalise regulations governing the employment of foreign workers, in order to ensure to the workers from other States parties the effective exercise of the right to engage in a gainful occupation. In view of ensuring the effective exercise of this right, the States Parties' engagement in liberalisation shall include regulations governing the recognition of foreign certificates, professional qualifications and diplomas, to the extent that such qualifications and certifications are necessary to engage in a gainful occupation as employees or self-employed workers[412].

The conditions laid down for access by foreign workers to the national labour market must not be excessively restrictive, in particular with regard to the geographical area in which the occupation can be carried out and the requirements be met[413].

> A requirement that foreign worker be in possession of certificates, professional qualifications or diplomas issued only by national authorities, schools, universities, or other training institutions, without opening the possibility of recognising as valid and appropriate substantially equivalent certificates, qualifications or diplomas issued by authorities, schools, universities or other training institutions of other States parties, which have been obtained as a result of training courses or professional careers carried out within other States Parties, would represent a serious obstacle for foreign workers to access the national labour market, and an actual discrimination against non-nationals. For this reason the Committee, taking inspiration also from the example of the legislative and jurisdictional practice of EU institutions aimed at guaranteeing the right to establishment by the harmonisation and mutual recognition of qualifications, considers it necessary that States Parties make efforts to liberalise regulations governing the recognition of foreign certificates, professional qualifications and diplomas, progressively reducing the disadvantages for foreign workers to engage in a gainful occupation due to lack of recognition of foreign diplomas or professional qualifications substantially equivalent to those issued by national authorities, schools, universities or other training institutions.[414]

409. Conclusions XVII-2, Finland.
410. Conclusions XVII-2, Germany.
411. Conclusions XVII-2, Portugal.
412. Conclusions 2012 - Interpretive statement - Article 18-3.
413. Conclusions V, Germany.
414. Conclusions 2012 - Interpretive statement - Article 18-3.

> Both the granting and the cancellation of work and temporary residence permits may well be interlinked, in as much as they refer to the same case in question- whether or not to enable a foreigner to engage in a gainful occupation. However, in case a work permit is revoked before the date of expiry, either because the employment contract is prematurely terminated, or because the worker no longer meets the conditions under which the work permit was granted, it would be contrary to the Charter to automatically deprive such worker of the possibility to continue to reside in the State concerned and to seek another job and a new work permit, unless there are exceptional circumstances which would authorise expulsion of the foreign worker concerned, in the meaning of Article 19§8.[415]

Right of nationals to leave the country (Article 18§4)

According to Article 18§4, State Parties undertake not to restrict the right of their nationals to leave the country to engage in gainful employment in other State Parties to the Charter. The only permitted restrictions are those provided for in Article G of the Charter, i.e. those which are "prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals."[416]

IMPLICATIONS FOR UKRAINE

Article 18, Paragraph 1

The Committee indicated the criteria of assessment of the degree of liberality to comply with the requirements under this paragraph of Article 18, which included granting and refusal rates for work permits for nationals of State Parties, consequently, high rank of successful applications for work permits and for renewal of work permits.[417] Despite no distinguish between the number of first-time applications and renewal of work permit were provided in the national report 2015, the Committee took into account the high percentage of successful applications for work permits for the decision that the situation in applying existing regulations in a spirit of liberality in Ukraine was in conformity with the requirements of the Charter.[418]

Article 18, Paragraph 2

Within the examination administrative formalities and time frames for obtaining the documents needed for engaging in a professional occupation in Ukraine, the Committee paid attention to the absence of possibility to obtain the residence and work permits simultaneously through a single application and the clarification on the sequence of obtaining these permits. In this context, the requirement to provide the possibility of completing such formalities in the country of destination as well as in the country of origin and obtaining the residence and work permits at the same time and through a single application was recalled as well.[419]

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415. Conclusions 2012 - Statement of interpretation - Article 18-3.
416. Conclusions XI-1, Netherlands; Conclusions 2005, Cyprus; Digest 2018, p. 178.
417. ECSR, Conclusions 2016. Ukraine. p. 33.
418. Ibid. p.34.
419. Ibid. p.35.

According to the rule not to establish excessive chancery dues and other charges for residence and work permits, the Committee found out the lack of information and explanations on the amount of fee for a work permit and its regulation. Moreover, the lack of appropriate information led to the conclusion of non-conformity the situation in Ukraine with Article 18§2 due to non-simplifying existing formalities and other charges payable by foreign workers or their employers.[420]

Article 18, Paragraph 3

The Committee examined the fulfilment of commitments under paragraph 3 regarding access to the national labour market in line with §1 of this Article, examined the situation with work permits for foreigners and stateless persons; legal regulation of self-employment of foreigners in Ukraine and required information on the grounds for refusal to a national of other State Parties willing to work as self-employed or employees of obtaining a residence and work permit; measures taken to liberalise recognition of foreign certifications, professional qualifications and diplomas and statistics of such recognitions.[421]

The possibility of withdrawal residence permit in case of losing a job under Ukrainian legislation was examined by Committee and it was underlined the requirements under Article 18 §3 of the Charter that "loss of employment must not lead to the cancellation of the residence permit, thereby obliging the worker to leave the country as soon as possible".[422]

Article 18, Paragraph 4

The Committee reiterated its main requirements under this paragraph, including not to establish restrictions of the right of State Party nationals to leave the country to engage in a gainful employment in other Parties to the Charter, except the restrictions provided for in Article G of the Charter.[423]

Analysis of the provisions of the European Social Charter (revised) on the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20)

The European Social Charter guarantees all workers the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. Article 20 broadly enshrines the principle of gender equality at all stages of working life, including access to employment, remuneration and other working conditions, vocational training, guidance and promotion, and prohibits dismissal and other forms of discrimination on grounds of sex.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 20 affirms the right to equality of opportunity and equal treatment in the field of employment and occupation, without discrimination based on sex. The principle is understood to mean the absence of any discrimination on grounds of sex, whether direct or indirect[424].

Discrimination in breach of the Charter is constituted by a difference in treatment between people in comparable situations which does not pursue a legitimate aim and is not based on

420. Ibid. , p.36.
421. ECSR, Conclusions 2016. Ukraine. p. 38.
422. Ibid.
423. ECSR, Conclusions 2016. Ukraine. p. 39.
424. ECSR, Conclusions XIII-5, Sweden, Article 1 of the Additional Protocol.

objective and reasonable grounds[425]. In determining whether a legitimate aim is being pursued and the measures taken are reasonably proportionate, the Committee applies Article G[426].

The acceptance of Article 20 ESC entails the following **obligations for State Parties**:

- the obligation to promulgate this right in legislation;

- the obligation to take legal measures designed to ensure the effectiveness of this right. In this regard, the (…) measures must provide for the nullity of clauses in collective agreements and individual contracts which are contrary to the principle, for adequate appeal procedures where the right has been violated and for the effective protection of workers against any retaliatory measures (dismissal or other measures) taken as a result of their demand to benefit from the right;

- the obligation to define an active policy and to take practical measures to implement it[427].

The right of women and men to **equality must be guaranteed by law**. The Charter requires

> States not only to provide for equal treatment but also to protect women and men from discrimination in employment and training. This means that they are obliged to enact a sufficiently detailed legislation explicitly imposing equal treatment in all aspects.[428]

It is not sufficient merely to state the principle in the Constitution.

Any legislation, regulation or other administrative measure that fails to comply with the equality principle must be repealed or revoked. The non-application of discriminatory legislation is not sufficient for a situation to be considered in conformity with the Charter.[429]

It must be possible to set aside, withdraw, repeal or amend any provision in collective agreements, employment contracts or firms' internal regulations that is incompatible with the principle of equal treatment.[430]

The right „has to be practical and effective, and not merely theoretical or illusory".[431]

Domestic law must provide for **appropriate and effective remedies** in the event of alleged discrimination. Employees who consider that they have suffered discrimination must be able to take their case to an independent body.[432]

The burden of proof must be shifted.[433] The shift in the burden of proof consists in ensuring that where a person believes he or she has suffered discrimination on grounds of sex and establishes

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425. Syndicat national des Professions du Tourisme v. France, Complaint No. 6/1999, Decision on the merits of 10 October 2000, §25.
426. Conclusions XVI-1, Greece, Article 1§2; Digest p. 191.
427. ECSR, Conclusions XII-5 - Statement of interpretation - Article 1-2, 4-3, 1 Addditional Protocol; Conclusions XIII-3 - Statement of interpretation - Article 1 Additional Protocol.
428. ECSR, Conclusions XIII-3 (1995), Statement of Interpretation on Article 1 of the Additional Protocol; Conclusions XV-2 (2001) Addendum, Slovak Republic, Article 1 of the Additional Protocol; Conclusions XVII-2 (2005), Netherlands (Aruba), Article 1 of the Additional Protocol.
429. Conclusions XIII-3 (1995), Statement of Interpretation on Article 1 of the Additional Protocol.
430. Conclusions XIII-5 (1997), Statement of Interpretation on Article 1 of the Additional Protocol.
431. ECSR, International Commission of Jurists (ICJ) against Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32.
432. Conclusions XIII-3 (1995), Statement of Interpretation on Article 1 of the Additional Protocol.
433. Conclusions 2004, Romania, article 20; Digest p. 192.

facts which make it reasonable to suppose that discrimination has occurred, **the onus is on the defendant** to prove that there has been no infringement of the principle of equal treatment.[434] The purpose of this rule is to enable courts to deal with discrimination in the light of the effects produced by a rule, act, or practice and hence that the shift in the burden of proof is a key factor in the effective application of rules on protection against discrimination.[435]

By analogy with the case-law in relation to Article 1§2, a number of other legal steps should be taken to make the right of appeal fully effective, such as authorising trade unions and other bodies to take action in employment discrimination cases, including action on behalf of individuals[436] or setting up an independent body to promote equal treatment and provide legal assistance to victims.

Anyone who suffers discrimination on grounds of sex must be entitled to adequate compensation, i.e. compensation must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers.[437]

Adequate compensation means:

- reinstatement or retention of employment and compensation for any pecuniary damage suffered in the event of unlawful or unfair dismissal;
- compensation proportionate to the damage suffered, i.e. to cover pecuniary and non-pecuniary damage, where the dismissed employee does not wish to be reinstated or continuation of the employment relationship is impossible;[438]
- in all other cases, bringing the discrimination to an end and awarding compensation proportionate to the pecuniary and non-pecuniary damage suffered.[439]

Any ceiling on compensation that may preclude damages from making good the loss suffered and from being sufficiently dissuasive is proscribed.[440]

Protection against reprisals

Employees who try to enforce their right to equality must be legally protected against any form of reprisals from their employers,[441] including not only dismissal, but also downgrading, changes to working conditions and so on. National legislation must provide for the same consequences where an employee is a victim of reprisal measures as those described above in the sections on appeal procedures and compensation.[442]

Access to certain occupations

Exceptionally and subject to strict interpretation certain jobs and occupational activities may be limited to persons of one sex, if this is due to the nature of such jobs and activities or the context and conditions in which they are carried out. Such a limitation can only be in conformity in respect of jobs/activities where gender constitutes a genuine occupational requirement (Appendix to Article 20, § 4). In determining whether, because of the conditions in which police activities are

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434. Conclusions XIII-5 (1997), Statement of Interpretation on Article 1 of the Additional Protocol; Digest p. 192.
435. Syndicat SUD Travail et Affaires Sociales v. France, Complaint No. 24/2004, Decision on the merits of 8 November 2005, §34; Digest p. 192.
436. Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol.
437. Conclusions 2012 (Article 1§2) Albania.
438. Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol; Digest p. 192-193.
439. Conclusions XVII-2, Finland, Article 1 of the Additional Protocol; Digest p. 192-193.
440. Conclusions 2012 (Article 1§2) Albania; Digest p. 192-193.
441. Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol; Digest p. 192-193.
442. Digest, p. 193.

conducted, sex constitutes a decisive factor in the police force, the army, etc., State Parties may take account of public order or national security-related requirements provided that they are prescribed by law, pursue a legitimate aim and are necessary in a democratic society (Article G). Like any measure that derogates from the rights guaranteed by the Charter, the exception must be interpreted restrictively and not exceed the legitimately pursued aim.[443]

Particular rights of women - Specific protection measures

According to the Appendix to Article 20 (§1), provisions concerning the protection of women are not deemed to be discrimination. Such provisions must be objectively justified by needs that apply exclusively to women, such as those relating to maternity (pregnancy, childbirth and the post-natal period). These particular rights are also guaranteed by Article 8 of the Charter (right of employed women to protection of maternity).[444]

On the other hand, prohibiting women from performing night work or underground mining while authorising men to do so is contrary to the principle of equal treatment for, while night work is harmful, it is just as detrimental to men as to women.[445]

Equal opportunities and positive measures

Since "the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact" and conformity with the Charter cannot be ensured solely by the operation of legislation,[446] State Parties must take practical steps to promote equal opportunities.[447]

Appropriate measures include:

- adopting and implementing national equal opportunities action plans;
- requiring individual undertakings to draw up enterprise or company plans to secure greater equality between women and men;
- encouraging employers and workers to deal with equality issues in collective agreements;
- setting more store by equality between women and men in national action plans for employment.[448]

Action taken must be based on a comprehensive strategy for incorporating the gender perspective into all labour market policies.[449]

The Appendix to Article 20 (§3) makes it clear that specific measures designed to remove de facto inequalities are permitted. As this provision simply upholds the very purpose of Article 20 in that it guarantees the right to equal opportunities, the Committee has interpreted it as placing a positive obligation on the State Parties. Besides the fact that legislation may not prevent the adoption of

443. Conclusions XVI-2, Greece, Article 1 of the Additional Protocol; Digest p. 193.
444. Digest, p. 193.
445. Conclusions XVII-2, Netherlands (Aruba), Article 1 of the Additional Protocol; Conclusions 2012 Bosnia Hereogovinia, Article 20; Digest p. 193.
446. International Commission of Jurists (CIJ) v. Portugal, Complaint No. 1/1998, Decision on the merits of 9 September 1999, §32; Digest p. 193.
447. Conclusions XVII-2, Netherlands (Antilles and Aruba), Article 1 of the Additional Protocol; Digest p. 193.
448. Conclusions XVII-2, Greece, Article 1 of the Additional Protocol; Digest p. 193.
449. Digest, p. 194.

positive measures or positive action[450], the State Parties are required to take specific steps aimed at removing de facto inequalities affecting women's training or employment opportunities.[451]

Article 20 guarantees **the right to equality at all stages of working life** – access to employment, remuneration and other working conditions, vocational training and guidance and promotion, prohibits dismissal and other forms of detriment on grounds of sex. Article 20 is the lex specialis in relation to Article 1§2 of the Charter, which prohibits all discrimination at work[452]. This means that in practice where a state has accepted Article 20 issues concerning gender equality will be dealt with under this provision.[453]

The right comprises of two main parts: equal rights and equal opportunities.

Article 20

> "embodies the same **guarantee of equal pay** as Article 4§3, and further encompasses other aspects of the right to equal opportunities and equal treatment in matters of employment, such as access to employment, vocational guidance and career development. [454]

The guarantee of equal pay has been discussed in detail under Article 4§3 ESC.

The ECSR found violation of Article 20 ESC in the following cases:

- of lack of legislation providing for a shift in the burden of proof in gender discrimination cases;[455]

- where the unadjusted pay gap was manifestly too high (around 35%[456] or 28.3% while the EU 28 average was 16.1% at the same time);[457]

- where there was no explicit statutory guarantee of equal pay for work of equal value;[458]

- where in equal pay litigation cases legislation pay comparisons were not allowed to be made across companies/undertakings;[459]

- where legislation prohibited women from performing certain occupations[460] or where not all professions were open to women,[461] which constitutes discrimination based on sex;

- where the right to equal treatment in employment without discrimination on grounds of sex was not guaranteed in practice[462] – due to the persistent gender wage gap; women's

450. Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol; Digest p. 193.
451. Conclusions 2002, Romania; Digest p. 193.
452. Conclusions 2002 Statement of Interpretation on Article 20.
453. ECSR, Digest p. 191.
454. ECSR, Decision on the merits: University Women of Europe (UWE) v. Belgium, Collective Complaint No. 124/2016, p. 107.
455. ECSR, Conclusions XXI-1 - Netherlands Aruba - Article 20; Conclusions 2016 - Russian Federation - Article 20; Conclusions 2016 - Ukraine - Article 20.
456. Conclusions 2016 - Armenia - Article 20.
457. ECSR, Conclusions 2016 - Estonia - Article 20.
458. ECSR, Conclusions 2016 - Georgia - Article 20.
459. Conclusions 2016 - Malta - Article 20.
460. Conclusions 2016 - Montenegro - Article 20; Conclusions 2016 - Russian Federation - Article 20; Conclusions 2016 - Turkey - Article 20.
461. Conclusions 2016 - Moldova - Article 20.
462. Conclusions 2016 - Ukraine - Article 20; Conclusions 2016 - Serbia - Article 20.

disproportionately high unemployment, especially among Roma women, women with disabilities and rural women; the increasing feminisation of certain professions; the lack of opportunities to reconcile work and family obligations; the sexual harassment of women in the workplace; and the lack of disaggregated data on the situation of women in the labour market; [463]

- where the limits imposed on compensatory awards in gender discrimination cases might prevent such violations from being adequately remedied and effectively prevented[464].

IMPLICATIONS FOR UKRAINE

In 2016, the Committee analysed the national legislation regarding to the burden of proof in sex discrimination cases and recalled that the burden of proof must be shifted in this category of cases.[465] The absence of this provision in national legislation led to the conclusion that situation in Ukraine was not in conformity with the Article 20 of the Charter.[466]

In Ukraine the burden of proof in the discrimination cases usually is regarded exclusively under national legislation. For example, the Civil Cassation Court in the judgment adopted on 5 September, 2019, considered:

...according to the second part of Article 81 of the CPC of Ukraine in cases of discrimination, the plaintiff is obliged to provide factual data confirming that discrimination took place, but no evidence to prove the existence of discrimination under the Article 2-1 of the Code of Labour Laws of Ukraine was provided by the plaintiff, and therefore the conclusions of the courts of previous instances in this part are also true…[467] The international documents, including the European Social Charter were not applied.

The Committee payed special attention to the equal payment for women and men, and reiterated that it had to be possible to make pay comparisons across companies, where the differences in pay could be attributed to a single source.[468]

Various aspects of the prohibition of discrimination on the ground of sex in employment and occupation sphere have been considered by the national courts of Ukraine. Sometimes, national judges applied ILO Conventions, the ECHR, including the case law of the European Court of Human Rights, nevertheless, references to the European Social Charter have not been found. For example, the question about the discrimination on the ground of sex on the possibility of dismissing an employee during childcare leave was raised in the case № 804/16289/15 that was considered by the Administrative Cassation Court on 15 March, 2019.[469] The judges applied, except the Constitution of Ukraine, appropriate provisions of national legislation, including the Code of Labour Laws of Ukraine, Laws of Ukraine "On ensuring equal rights and opportunities for women and men", "On Principles of Prevention and Combating Discrimination in Ukraine", the range of international documents:

… The Universal Declaration of Human Rights of December 10, 1948, states that everyone should have all the rights and freedoms set forth in this declaration, regardless of race, colour, sex,

463. Conclusions 2016 - Serbia - Article 20.
464. Conclusions 2016 - Armenia - Article 20; Conclusions 2016 - Turkey - Article 20.
465. ECSR, Conclusions 2016. Ukraine. Article 20. http://hudoc.esc.coe.int/eng?i=2016/def/UKR/20/EN
466. Ibid.
467. The Civil Cassation Court, the Supreme Court, case № 274/4455/17, judgment, 5 September, 2019. https://reyestr.court.gov.ua/Review/84152837
468. Ibid.
469. The Supreme Administrative Court of Ukraine, the Administrative Cassation Court, judgment, case №804/16289/15, 15 March 2019.

language, religion, political or other opinion, national or social origin, property, status, or other position.

The International Labour Organisation Convention concerning Discrimination in Respect of Employment and Occupation №111 of 1960 defines the concept of discrimination, which includes, in particular, any distinction, exclusion or preference based on race, colour, sex, religion, political opinion, of foreign origin or social origin and leads to the destruction or violation of equality of opportunity or treatment in the field of labour and occupation...

… The case law of the European Court of Human Rights stipulates that discrimination means the treatment of individuals in different ways, without objective and reasonable justification, in relatively similar situations… The issue of substantiation of discriminatory approaches to the provision of rights in the field of labour (service) of parents was assessed by the European Court of Human Rights for compliance with Article 8 and Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms in case "Konstantin Markin v. Russia"…[470]

However, the European Social Charter has not even been mentioned in that judgment.

In general, the national courts considered not many cases of discriminatory matters on the grounds of sex in the sphere of employment and occupation.

Nowadays, the commitments under the Article 20 should be considered in conjunction with the Ukrainian obligations on the prohibition of discrimination in the sphere of employment and occupation under the Association agreement between Ukraine and EU. Ukraine is obliged to bring the national legislation into accordance with all EU anti-discrimination Directives in this sphere. Although, implementation schedule of the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 "On the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation" will be determined additionally by the Council of Association.[471]

Analysis of the provisions of the European Social Charter (revised) on the right to information and consultation (Article 21)

Article 21 guarantees the right of workers or their representatives to information and consultation, so that they are enabled to influence company decisions which substantially affect them and that their views are taken into account when such decisions are effectively taken, such as changes in work organisation and working conditions.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 21 guarantees the right of workers to information and consultation within the undertaking. Pursuant to the Appendix, Part II, to the European Social Charter (revised), the term "undertaking" is understood as referring to "a set of tangible and intangible components, with or without legal personality, formed to produce goods or provide services for financial gain and with power to determine its own market policy". Consequently, even though Article 21 may apply to workers in state-owned enterprises, public employees are as a whole not covered by these provisions[472]. It follows that the right of police staff to information and consultation does not fall within the scope

470. Ibid.
471. The Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, 21/03/2014., https://zakon.rada.gov.ua/laws/show/984_a11#Text
472. Conclusions XIII-5, Norway, p. 284.

of application of Article 21 of the European Social Charter (revised)[473].

This provision applies to all undertakings, whether private or public. State Parties may exclude from the scope of this provision those undertakings employing less than a certain number of workers, to be determined by national legislation or practice. All categories of employee (in other words all employees with an employment contract with an undertaking, whatever their status, length of service or workplace) must be taken into account when calculating the number of employees covered by the right to information and consultation.[474]

State Parties may exclude from the scope of this provision those undertakings employing less than a certain number of workers, to be determined by national legislation or practice. For example, the thresholds established by Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002: undertakings with at least 50 employees or establishments with at least 20 employees in any one EU member state are in conformity with this provision.[475]

Workers and/or their representatives (trade unions, worker's delegates, health and safety representatives, works' councils) must be informed on all matters relevant to their working environment[476] except where the conduct of the business requires that some confidential information not be disclosed. Furthermore, they must be consulted in good time with respect to proposed decisions that could substantially affect the workers' interests, in particular those which may have an impact on their employment status. These rights must be effectively guaranteed. In particular, workers must have legal remedies when these rights are not respected.[477] There must also be sanctions for employers which fail to fulfil their obligations under this Article.[478]

These rights must be accompanied by guarantees ensuring their effective exercise, in particular the possibility for workers or their representatives of lodging a complaint where they have been infringed.[479]

IMPLICATIONS FOR UKRAINE

Since Ukraine ratified the Charter, the Committee acknowledged that the situation in Ukraine regarding the right of workers to be informed and consulted complied with the requirements of Article 21 of the Charter.[480]

The Committee stressed that the right to information and consultation to the employees is guaranteed by Ukrainian legislation for all categories of workers, without exceptions regardless of the number of employees at the enterprise which was demanded by the Charter.

Within the examination of employers' obligations to inform workers, information on supervision, penalties can be imposed on employers who fail to fulfil their obligation on the issue, examination of the administrative and/or judicial procedures available to employees, or their representatives, who consider that their right to information and consultation within the undertaking has not been respected etc., the Committee concluded in 2018 that Ukraine fulfilled its obligations under Article 21.[481]

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473. Decision on the merits: European Council of Police Trade Unions (CESP) v. Portugal, Collective Complaint No. 40/2007, § 42.
474. Conclusions XIX-3 (2010), Croatia; Digest 2018, p. 196.
475. Conclusions XIX-3 (2010), Croatia; Digest 2018, p. 196.
476. Conclusions 2010, Belgium; Digest 2018, p. 196.
477. Conclusions 2003, Romania; Digest 2018, p. 196.
478. Conclusions 2005, Lithuania; Digest 2018, p. 196.
479. Conclusions XIII-3 - Statement of interpretation - Article 2 Additional Protocol, 3 Additional Protocol.
480. ECSR, Conclusions 2018. Ukraine. – Article 21 http://hudoc.esc.coe.int/eng?i=2018/def/UKR/21/EN, Conclusions 2014. Ukraine. – Article 21 http://hudoc.esc.coe.int/eng?i=2014/def/UKR/21/EN, Conclusions 2010. Ukraine. – Article 21 http://hudoc.esc.coe.int/eng?i=2010/def/UKR/21//EN
481. ECSR, Conclusions 2018. Ukraine. p.27.

Analysis of the provisions of the European Social Charter (revised) on the right to take part in the determination and improvement of the working conditions and working environment (Article 22)

The European Social Charter guarantees all workers the right to take part in the determination and improvement of the working conditions and working environment. This includes workers' or their representatives' participation in the determination and improvement of working conditions, work organisation and the working environment; the protection of health and safety within the undertaking; and the organisation of social and socio-cultural services within the company.

IMPLICATIONS FOR UKRAINE

Since Ukraine ratified the Charter, the Committee found that Ukraine fulfilled its obligations under the Article 22 of the Charter regarding to the right of workers to take part in the determination and improvement of working conditions and working environment.[482]

Analysis of the provisions of the European Social Charter (revised) on the right to protection in cases of termination of employment (Article 24)

The European Social Charter (revised) guarantees all workers the right to protection in cases of termination of employment. This article sets out two general principles, the right not to be dismissed unless there are valid grounds and the right to adequate compensation or other relief in cases of unfair dismissal.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 24 relates to termination of employment at the initiative of the employer and obliges states to establish regulations with respect to termination of employment for all workers. To assess whether the regulations applied in cases of termination of employment are in conformity with Article 24, the examination must be

> " based on:
>
> – the validity of the grounds for dismissal under the general rules on termination of employment and increased protection against certain forms of dismissal (Article 24 a and the Appendix to Article 24);
>
> – penalties and compensation in cases of unfair dismissal and the status of the body empowered to rule on such cases (Article 24 b).[483]

Under Article 24 of the Charter

> " all workers who have signed an employment contract are entitled to protection in the event of termination of employment.

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482. ECSR, Conclusions 2018. Ukraine. – Article 22, http://hudoc.esc.coe.int/eng?i=2018/def/UKR/22/EN Conclusions 2014. Ukraine. – Article 22, http://hudoc.esc.coe.int/eng?i=2014/def/UKR/22/EN Conclusions 2010. Ukraine. – Article 22, http://hudoc.esc.coe.int/eng?i=2010/def/UKR/22//EN

483. Conclusions 2003 - Bulgaria - Article 24.

> According to the Appendix to the Charter, certain categories of workers can be excluded, among them workers undergoing a period of probation. However, exclusion of employees from protection against dismissal for six months or 26 weeks in view of probationary period is not reasonable if applied indiscriminately, regardless of the employee's qualification.[484]

Article 24 establishes in an exhaustive manner the valid grounds on which an employer can terminate an employment relationship[485]. Exclusion of any other category of employee is not in conformity with the Charter.[486]

> Two types of grounds are considered valid, namely on the one hand those connected with the capacity or conduct of the employee and on the other hand those based on the operational requirements of the enterprise (economic reasons).[487]

Among reasons connected with the capacity or conduct of the employee, the Committee found a prison sentence delivered in court for employment-related offences a valid reason for dismissal. This is not the case with prison sentences for offences unrelated with the person's employment, which cannot be considered valid reasons unless the length of the custodial sentence prevents the person from carrying out their work.[488]

Economic reasons for dismissal must be the reasons based on the operational requirements of the undertaking, establishment or service. The assessment relies on the domestic courts' interpretation of the law. The courts must have the competence to review a case on the economic facts underlying the reasons of dismissal and not just on issues of law.[489]

Employers must notify employees of their dismissal in writing.[490]

Pursuant to the decisions of the Committee,

> under Article 24 dismissal of the employee at the initiative of the employer on the ground that the former has reached the normal **pensionable age** (age when an individual becomes entitled to a pension) will be contrary to the Charter, unless the termination is properly justified with reference to one of the valid grounds expressly established by this provision of the Charter.[491]

The legislation which enables dismissal directly on grounds of age and does not, therefore, effectively guarantee the right to protection in cases of termination of employment, is contrary to the Charter.[492]

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484. Conclusions 2005, Cyprus.
485. Conclusions 2012 - Turkey - Article 24.
486. Conclusions 2012, Ireland; Digest 2018, p. 204.
487. Conclusions 2012 - Turkey - Article 24.
488. Digest 2018, p. 205.
489. Conclusions 2012, Turkey; Conclusions 2003, France.
490. Digest 2018, p. 205.
491. Conclusions 2012 - Statement of interpretation - Article 24.
492. Fellesforbundet for Sjøfolk (FFFS) v. Norway, Complaint No. 74/2011, Decision on the merits of 2 July 2013, §§ 86, 89, 97, 99.

> Dismissal on grounds of age will not constitute a valid reason for termination of employment except in accordance with a valid retirement age justified by the operational requirements of the undertaking, establishment or service. States should take adequate measures to ensure protection for all workers against dismissal on grounds of age.[493]

In case of **temporary absence from work due to illness or injury**, a time limit can be placed on protection against dismissal in such cases.[494] Absence can constitute a valid reason for dismissal if it severely disrupts the smooth running of the undertaking and a genuine, permanent replacement must be provided for the absent employee.[495]

> As regards dismissal without notice in the event of permanent invalidity, the following factors are taken into consideration for the assessment:
>
> – is dismissal without notice for reasons of permanent invalidity permitted regardless of the origin of the invalidity? In particular, may this occur in cases of employment injuries or occupational diseases?
>
> – are employers required to pay compensation for termination in such cases?
>
> – if, despite the permanent invalidity, the worker can still carry out light work, is the employer required to offer a different placement? If the employer is unable to meet this requirement, what alternatives are available?[496]

Any employee who considers him- or herself to have been dismissed without valid reason must have **the right to appeal to an impartial body**. The burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment between employee and employer.[497]

Employees dismissed without valid reason must be granted **adequate compensation** or other appropriate relief. Compensation systems are considered appropriate if they include the following provisions:

- reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;[498]
- the possibility of reinstatement;[499] and/or
- compensation of a high enough level to dissuade the employer and make good the damage

493. Conclusions 2007 - Statement of interpretation - Article 24.
494. Conclusions 2012, Ukraine.
495. Digest 2018, p. 205.
496. Digest 2018, p. 204.
497. Conclusions 2008, Statement of Interpretation on Article 24.
498. Conclusions 2012, Slovak Republic; Conclusions 2003, Bulgaria.
499. Conclusions 2012, Finland.

suffered by the employee.[500]

Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed. If there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation), and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time.[501]

National legislation or case-law must contain express safeguards against **retaliatory dismissal.** Safeguarding persons who resort to the courts or other competent authorities to enforce their rights against reprisals is essential in any situation in which a worker alleges a violation of the law. In the absence of any explicit statutory ban, State Parties must be able to show how national legislation conforms to the requirement of the Charter.[502]

IMPLICATIONS FOR UKRAINE

In 2016 the Committee decided that the situation in Ukraine was in conformity with requirements of Article 24 of the Charter.[503] Within the examination of the national legislation and practice, the Committee made a set of general comments on it. For example, regarding to obligation to provide valid reasons for termination of employment, the Committee recalled the meaning of the term "termination of employment", formulated in the Appendix to the Charter as termination of employment at the initiative of the employer.[504] It was also underlined that

> "situations where a mandatory retirement age is set by statute, as a consequence of which the employment relationship automatically ceases by operation of law, do not fall within the scope of this provision.[505]

However, the Committee explained that dismissal of the employee at the initiative of the employer on the ground of reaching the normal pensionable age would be considered as a breach of the Charter, unless the termination is properly justified with reference to one of the valid grounds expressly established by this provision of the Charter.[506] Regarding to temporary absence from work due to illness or injury, it was recalled that a time limit protection against dismissal in such cases has to be established.

The Committee recalled also the appropriate adjustment of division of the burden of proof between employee and employer and not to put it entirely on the complainant in cases concerning dismissal at the initiative of the employer.

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500. Conclusions 2012, Turkey.
501. Conclusions 2012, Slovenia; Conclusions 2012, Finland.
502. Conclusions 2003, Statement of Interpretation on Article 24.
503. ECSR, Conclusions. 2016. Ukraine. p. 44.
504. Ibid., p.45.
505. Ibid.
506. Ibid., p.46

Analysis of the provisions of the European Social Charter (revised) on the right to dignity at work (Article 26)

The right to dignity at work guarantees state protection against sexual harassment (para. 1) and other forms of harassment (para. 2) at the workplace and in relation to work, the latter being the first such standard in international law. The form of protection is both preventive and punitive in character.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 26 guarantees the right of workers to dignity by protection against sexual and moral harassment.

Sexual harassment (Article 26§1)

Article 26§2 requires State Parties to take appropriate preventive measures (information, awareness-raising and prevention campaigns in the workplace or in relation to work) in order to combat sexual harassment. In particular, in consultation with social partners,[507] they should inform workers about the nature of the behaviour in question and the available remedies.[508]

The Appendix to Article 26§1 specifies that State Parties have no obligation to enact legislation relating specifically to harassment, provided that the legal framework, as interpreted by the relevant national authorities ensures an effective protection in law and in practice against harassment in the workplace or in relation to work.[509]

Sexual harassment is defined as a breach of equal treatment characterised by the adoption, towards one or more persons, of preferential or retaliatory conduct, or other forms of insistent behaviour, which may undermine their dignity or harm their career.[510] Irrespective of admitted or perceived grounds, harassment creating a hostile working environment shall be prohibited and repressed in the same way as acts of discrimination, independently from the fact that not all harassment behaviours are acts of discrimination, except when this is explicitly presumed by law.[511]

Workers must be afforded an effective protection against harassment[512] by domestic law, irrespective of whether this is a general anti-discrimination act or a specific law against harassment.

This protection must include the right to appeal to an independent body in the event of harassment, the right to obtain adequate compensation and the right not to be retaliated against for upholding these rights.[513]

It must be possible for employers to be held liable when sexual harassment occurs in relation to work, or on premises under their responsibility, but it is suffered or perpetrated by a third person, not employed by them, such as independent contractors, self-employed workers, visitors, clients, etc.[514]

Under civil law, effective protection of employees requires a shift in the burden of proof, making it possible for a court to find in favour of the victim on the basis of sufficient prima facie evidence

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507. Conclusions 2005, Lithuania.
508. Conclusions 2003, Italy.
509. Conclusions 2005, Moldova; Digest 2018, p. 209.
510. Conclusions 2003, Bulgaria; Conclusions 2005, Moldova; Digest 2018, p. 209.
511. Conclusions 2007, Statement of Interpretation on Article 26; Digest 2018, p. 209.
512. Conclusions 2003, Bulgaria; Conclusions 2005, Moldova.
513. Conclusions 2007, Statement of Interpretation on Article 26; Digest 2018, p. 210.
514. Conclusions 2014, Finland; Digest 2018, p. 210.

and the personal conviction of the judge or judges[515].

Victims of sexual harassment must have effective judicial remedies to seek reparation for pecuniary and non-pecuniary damage.[516] These remedies must, in particular, allow for appropriate compensation of a sufficient amount to make good the victim's pecuniary and non-pecuniary damage and act as a deterrent to the employer.[517] In addition, the right to reinstatement should be guaranteed to employees who have been unfairly dismissed or have been pressured to resign for reasons related to sexual harassment.[518]

Moral harassment (Article 26§2)

Article 26§2 of the Charter establishes a right to protection of human dignity against harassment creating a hostile working environment related to a specific characteristic of a person.[519] The Committee considers that

> there is no requirement for a state's legislation to make express reference to harassment where that state's law encompasses measures making it possible to afford employees effective protection against these phenomena[520].

Under Article 26§2

> irrespective of admitted or perceived grounds, harassment creating a hostile working environment characterised by the adoption towards one or more persons of persistent behaviours which may undermine their dignity or harm their career shall be prohibited and repressed in the same way as acts of discrimination. And this independently from the fact that not all harassment behaviours are acts of discrimination, except when this is presumed by law[521].

Article 26§2 requires the State Parties to take adequate preventive measures against moral harassment. In particular, they should inform workers about the nature of the behaviour in question and the available remedies.[522] States parties are required to take all necessary preventive and compensatory measures to protect individual workers against recurrent reprehensible or distinctly negative and offensive actions directed against them at the workplace or in relation to their work.[523]

> This protection must include the right to appeal to an independent body in the event of harassment, the right to obtain adequate compensation and the right not to be retaliated against for upholding these rights. It further considers that, from the procedural

515. Conclusions 2007, Statement of Interpretation on Article 26; Conclusions 2014, Azerbaijan; Digest 2018, p. 210.
516. Conclusions 2005, Moldova; Digest 2018, p. 210.
517. Conclusions 2005, Lithuania; Conclusions 2007, Slovenia; Digest 2018, p. 210.
518. Conclusions 2003, Bulgaria.
519. Digest 2018, p. 210.
520. Conclusions 2007 - Statement of interpretation - Article 26-2.
521. Conclusions 2007 - Statement of interpretation - Article 26-2; Decision on admissibility and the merits: Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 91/2013, p. 290.
522. Conclusions 2010, Albania, Article 26§2; Conclusions 2007, Statement of Interpretation of Article 26§2.
523. Decision on admissibility and the merits: Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 91/2013, p. 291.

> standpoint, effective protection of employees may require a shift in the burden of proof to a certain extent, making it possible for a court to find in favour of the victim on the basis of sufficient prima facie evidence and the conviction of the judge or judges.[524]

Article 26§2 of the Charter imposes positive obligations on states, to take preventative action to ensure moral harassment does not occur in particular in situations where harassment is likely. The Committee has found a violation of Article 26§2 of the Charter for example in the situation of a failure of the Government to take any preventative action, training or awareness raising to ensure the protection of non- objecting medical practitioners.[525]

IMPLICATIONS FOR UKRAINE

Article 26, Paragraph 1

In Conclusions for Ukraine 2014, 2016, 2018, the Committee found non-conformity of the situation in Ukraine with the requirements of Article 26§1.[526]

Regarding the prevention sexual harassment, the Committee recalled its request concerning broader preventive measures which would be directed at actors other than employers and included information, awareness-raising and prevention campaigns in the workplace or in relation to work, the role of social partners in consultation on above-mentioned measures.

According to the unified register of court decisions in Ukraine, last few years the courts have considered cases regarding sexual harassment at work. For example, in 2019, the Odessa Court of Appeal considered the case of non-including the applicant's candidacy for the voting for the position of professor, taking into account his immoral and unethical behaviour with colleagues, humiliation of women working at the university and his previous work as a vice-rector, professor[527], the Civil Cassation Court adopted a judgment 7 October 2020 in a case concerning the issuance of a restraining order due to sexual harassment by the client of the company in which the applicant works,[528] the case regarding recognition of information as unreliable, its refutation, protection of honour, dignity, business reputation of applicant, compensation for moral damage in connection with accusations of sexual harassment of subordinate employees was considered by the Court of Appeal of Luhansk region in 2017,[529] in 2019 the Supreme Court considered this case.[530] All mentioned cases were considered without application international standards.

The Committee stated that the situation was not in conformity with Article 26§1 on the ground of non-establishing the appropriate and effective redress (compensation and reinstatement) in cases of sexual harassment...[531]

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524. Conclusions 2007 - Statement of interpretation - Article 26-2.
525. Decision on admissibility and the merits: Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 91/2013, p. 297.
526. ECSR, Conclusions 2018. Ukraine. – Article 26, http://hudoc.esc.coe.int/eng?i=2018/def/UKR/26/1/EN Conclusions 2016. Ukraine. – Article 26, http://hudoc.esc.coe.int/eng?i=2016/def/UKR/26/1/EN Conclusions 2014. Ukraine. – Article 26, http://hudoc.esc.coe.int/eng?i=2014/def/UKR/26/1/EN
527. Odessa Court of Appeal, judgment 16 April 2019, case № 522/24585/17. https://reyestr.court.gov.ua/Review/81370944
528. Supreme Court, Civil Cassation Court judgment 7 October 2020, case № 642/1286/19. https://reyestr.court.gov.ua/Review/92173336
529. Court of Appeal of Luhansk region, judgment 4 October 2017, case № 423/1405/17. https://reyestr.court.gov.ua/Review/69427574
530. Supreme Court, Civil cassation court, judgment 19 September 2019, case № 423/1405/17, https://reyestr.court.gov.ua/Review/84406411
531. ECSR, Conclusions 2018. Ukraine. p.30.

Article 26, Paragraph 2

In the Conclusions for Ukraine on 2014, 2016, 2018, the Committee found that the situation in Ukraine regarding moral harassment was not in conformity with Article 26§2 of the Charter.[532] The Committee recalled the obligation to establish appropriate preventive measures in order to combat moral (psychological) harassment and asked for information on involving the social partners in the drafting of the Code of Ethics. Analysing the national legislation and the definition of harassment, the Committee underlined the absence of information on the right to appeal to an independent body in the event of harassment and the right not to be retaliated against for upholding these rights, employer's liability towards persons employed or not employed by them (independent contractors, self-employed workers, visitors, etc.) who have suffered harassment from employees under their responsibility or, on premises under their responsibility.[533]

While examining the requirements on the burden of proof, the Committee asked for the clarification of the provisions of national legislation as it was done for paragraph 1 of this article. According to compensation for financial loss and moral damage that victims of moral (psychological) harassment were entitled, it was also asked in all conclusions about kinds and amount of compensation provided in such cases, examples of appropriate case law along with the awards of damages.[534]

Analysis of the provisions of the European Social Charter (revised) on the right of workers with family responsibilities to equal opportunities and equal treatment (Article 27)

Article 27 guarantees the right of workers with family responsibilities to enter and remain in employment through inter alia vocational guidance and training; protect against unfair dismissal; and to establish child care services and provide parental leave. This right acknowledges the importance of support structures for working parents, and the necessity to explicitly prohibit dismissal of employees because of their family responsibilities.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers **Article 27§1 subparagraph a** of the Charter obliges State Parties to take appropriate measures to enable workers with family responsibilities to enter and remain in employment, as well as to re-enter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training.

The aim of Article 27§1a of the Charter is to provide people with family responsibilities with equal opportunities in respect of entering, remaining and re-entering employment. It underlines that persons with family responsibilities may face difficulties on the labour market due to their family responsibilities. Therefore, measures need to be taken by States to ensure that workers with family responsibilities are not discriminated against due to these responsibilities and to assist them to remain, enter and re-enter the labour market, in particular in the field of vocational guidance, training and re-training[535]. Family responsibilities may exclude people not only from an employment relation but, what is most important, from professional life; they often do not have time to monitor labour market developments and take measures in order to stay competitive

532. ECSR, Conclusions 2018. Ukraine . Article 26 – 2 http://hudoc.esc.coe.int/eng?i=2018/def/UKR/26/2/EN Conclusions 2016. Ukraine. Article 26 – 2 http://hudoc.esc.coe.int/eng?i=2016/def/UKR/26/2/EN Conclusions 2014. Ukraine. Article 26 – 2 http://hudoc.esc.coe.int/eng?i=2014/def/UKR/26/2/EN
533. ECSR, Conclusions 2018. Ukraine. p.31.
534. Government of Ukraine, 10th National report on the implementation of the European Social Charter. 26.07.2018. Cycle 2018. P.65.
535. Conclusions 2005, Statement of Interpretation on Article 27§1a, see for instance, Estonia.

on it. To be able to return to professional life, they need special assistance in terms of vocational guidance and training. At the same time, if the standard employment services (those available to everyone) are well developed, then the lack of extra services for people with family responsibilities cannot be regarded as a human rights violation according to the European Committee of Social Rights.[536]

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers **Article 27§1 subparagraph b** obliges State Parties to take account of their needs in terms of conditions of employment and social security.

According to the European Committee of Social Rights measures need to be taken to implement this provision, especially measures concerning the length and organisation of working time. Furthermore, workers with family responsibilities should be allowed to work part-time or to return to full-time employment.[537] Moreover, the Committee notes that part-time work may be agreed to upon agreement of the employee and the employer. If requested by inter alia a pregnant woman, a nursing mother, a woman or single parent raising a child (children) under 14 years of age or a disabled child under 16 years of age, or a person taking care of a sick family member, part-time work schedule must be agreed to. The Committee also notes that there is no obligation to agree to part-time work for a father who is not single. The Committee considers this to constitute discrimination and can therefore, not be considered to be in conformity with Article 27§1 of the Charter combined with Article E.[538]

Periods of unemployment due to family responsibilities should be taken into account in the calculation of pension schemes or in the determination of pension rights.

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers **Article 27§1 subparagraph c** obliges State Parties to develop or promote services, public or private, in particular child day-care services and other childcare arrangements.

In one of the cases the European Committee of Social Rights asked information on whether the corresponding legislation provides for arrangements enabling parents to reduce or cease their professional activity because of serious illness of a child[539]. Hence, under Article 27§1c parents should be allowed to reduce or cease work because of the serious illness of a child.

It should be noted in the mentioned context that if a State Party has accepted Article 16, childcare arrangements are dealt with under that provision.

Article 27, Paragraph 2

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers Article 27§2 obliges State Parties to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice.

According to the European Committee of Social Rights the focus of Article 27§2 are parental leave

536. Conclusions 2003, Sweden.
537. Conclusions 2005, Statement of Interpretation on Article 27§1b, see for instance, Estonia.
538. Conclusions 2005, Lithuania.
539. Conclusions 2005, Italy.

arrangements which are distinct from maternity leave and come into play after the latter. All categories of employees are entitled to parental leave. Article 27§2 requires States to provide the possibility for either parent to obtain parental leave. An important element for the reconciliation of professional, private and family life is parental leave arrangements for taking care of a child. The duration and conditions of parental leave should be determined by State Parties. At the same time, according to the Committee considers national regulations should entitle men and women to an individual right to parental leave on the grounds of the birth or adoption of a child. With a view to promoting equal opportunities and equal treatment between men and women, the leave should, in principle, be provided on a non-transferable basis to each parent.[540]

What about the remuneration of parental leave (be it continuation of pay or via social assistance/ social security benefits) the Committee considers that it plays a vital role in the take up of childcare leave, in particular for fathers or lone parents.[541]

The European Committee of Social Rights also states that under Article 27§2 of the Charter the State Parties are under a positive obligation to encourage the use of parental leave by either parent. State Parties shall ensure that an employed parent is adequately compensated for his/her loss of earnings during the period of parental leave. The modalities of compensation are within the margin of appreciation of the State Parties and may be either paid leave (continued payment of wages by the employer), a social security benefit, any alternative benefit from public funds or a combination of such compensations. Regardless of the modalities of payment, the level shall be adequate.[542]

Article 27, Paragraph 3

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers Article 27§3 obliges State Parties to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.

According to the Appendix to the European Social Charter (revised), the notion of "family responsibilities" is to be understood as obligations in relation to dependent children and also other members of the immediate family who need care and support. The European Committee of Social Rights states that the purpose of Article 27§3 is to prevent these obligations from restricting preparation for and access to working life, exercise of an occupation and career advancement.[543] According to the Committee Article 27§3 of the European Social Charter (revised) requires that courts or other competent bodies are able to order reinstatement of an employee unlawfully dismissed and/or a level of compensation that is sufficient both to deter the employer and proportionate to the damage suffered by the victim.[544] The Committee further stated that compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed. If there is a ceiling on compensation for pecuniary damage, the victim must be able to seek unlimited compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation), and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time.[545]

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540. Conclusions 2011, Armenia.
541. Conclusions 2011, Armenia.
542. Conclusions 2015, Statement of Interpretation on Article27§2.
543. Conclusions 2003, Statement of Interpretation on Article 27§3.
544. Conclusions 2007, Finland.
545. Conclusions 2011; Statement of interpretation on Articles 8§2 and 27§3.

IMPLICATIONS FOR UKRAINE

Article 27, Paragraph 1, 3

The Situation in Ukraine concerning participation in working life (§1) and Illegality of dismissal on the ground of family responsibilities (§3) was repeatedly found in conformity with the requirements of paragraphs 1 and 3 of Article 27 in the Conclusions 2015, 2019.[546]

Article 27, Paragraph 2

Within the examination of national legislation on parental leave benefit and allowance for children under the age of three, the Committee analysed the amount of childcare assistance that was aggregated with childbirth allowance into a single childbirth allowance, and stated that the level of parental leave benefit was too low and inadequate under the requirements of Article 27 §2.

Moreover, the Committee paid its attention to non-providing in national legislation the individual and non-transferable part of parental leave and emphasised that

> "in order to promote equal opportunities and equal treatment between men and women, the leave should, in principle, be provided to each parent and at least some part of it should be non-transferable.[547]

In case of granting both parents the right to parental leave without an individual, non-transferable part, the requirements under Article 27 would be found unsatisfied. Thereby, the situation in Ukraine was found not to be in conformity with the mentioned Article due to not guaranteeing of an individual, non-transferable right to parental leave.[548]

Analysis of the provisions of the European Social Charter (revised) on the right of workers' representatives to protection in the undertaking (Article 28)

The European Social Charter guarantees workers' representatives the right to protection against acts prejudicial to them and the entitlement to be afforded appropriate facilities to carry out their functions. Article 28 commits states parties to make sure that workers' representatives can in fact exercise their representative functions in the company, and are protected against reprisals, most notably through protection against dismissal. It also, in very general terms, obliges states parties to ensure that workers' representatives have the support they need to exercise these functions in the company.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 28 guarantees the right of workers' representatives to protection in the undertaking and to certain facilities. It complements Article 5, which recognises a similar right in respect of trade union representatives.[549]

Pursuant to the Appendix of Article 28, the term "workers' representatives" means persons who are recognised as such under national legislation or practice. States Parties may therefore

546. ECSR, Conclusions 2019. Ukraine. p.35,37.
547. Ibid., p.36
548. Ibid.
549. Conclusions 2003, Bulgaria.

establish different kinds of workers' representatives either trade union representatives or other types of representatives or both. Representation may be exercised, for example, through workers' commissioners, workers' council or workers' representatives on the enterprise's supervisory board.[550]

Workers' representatives must be protected both from dismissal and prejudicial acts other than dismissal. Protection afforded to workers shall be extended for a reasonable period after the effective end of period of their office[551]. The extension of the protection granted to workers' representatives to at least six months after the end of their mandate is considered reasonable[552]. Granting protection from dismissal solely during the exercise of the representative's mandate was found to be in non-conformity with the Charter.[553]

Remedies must be available to worker representatives to allow them to contest their dismissal.[554] Where a dismissal based on trade union membership has occurred, there must be adequate compensation proportionate to the damage suffered by the victim. The compensation must at least correspond to the wage that would have been payable between the date of the dismissal and the date of the court decision or reinstatement.[555]

As regards the facilities, protected workers must be granted at least:

> paid time off to represent employees, financial contributions to work councils, the use of premises and materials for works councils, as well as other facilities mentioned by the R143 Recommendation concerning protection and facilities to be afforded to workers representatives within the undertaking adopted by the ILO General Conference of 23 June 1971 (support in terms of benefits and other welfare benefits because of the time off to perform their functions, access for workers representatives or other elected representatives to all premises, where necessary, the access without any delay to the undertaking's management board if necessary, the authorisation to regularly collect subscriptions in the undertaking, the authorisation to post bills or notices in one or several places to be determined with the management board, the authorisation to distribute information sheets, factsheets and other documents on general trade unions' activities).[556]

> The Committee also considers that participation in training courses on economic, social and union issues should not result on a loss of pay. Training costs should not be borne by the workers' representatives.[557]

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550. Conclusions 2003, Bulgaria.
551. Conclusions 2018 - Azerbaijan - Article 28.
552. Conclusions 2010, Bulgaria.
553. Conclusions 2018 - Azerbaijan - Article 28.
554. Conclusions 2010, Norway; Digest 2018, p. 217.
555. Conclusions 2007, Bulgaria; Digest 2018, p. 217.
556. Conclusions 2010 - Statement of interpretation - article 28.
557. Conclusions 2010 - Statement of interpretation - article 28.

IMPLICATIONS FOR UKRAINE

Within the examination of conformity the situation in Ukraine concerning Article 28, the Committee found the breach of obligations in its Conclusions 2018, 2016, 2014 (the Conclusions 2010 was deferred) due to non-granting adequate protection to workers' representatives, other than trade union representatives.[558] The Committee repeatedly stated that protection against dismissal has to be guaranteed to all types of workers' representatives, not just trade union representatives. [559]The Committee underlined that protection for workers' representatives had to cover not only dismissal, but also any prejudicial acts other than dismissal. In this regard the Committee found that the situation in Ukraine was also not in conformity with Article 28.[560]

Analysis of the provisions of the European Social Charter (revised) on the right to information and consultation in collective redundancy procedures (Article 29)

The European Social Charter guarantees all workers the right to information and consultation in collective redundancy procedures. This entails the right to be informed and consulted in 'good time' by employers planning to implement collective redundancies. This consultation should be a process of dialogue between the employer and the workers' representatives on ways of avoiding redundancies or limiting their number and mitigating their effects.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 29 guarantees the right of workers to information and consultation in collective redundancy procedures. It

> requires that state parties establish an information and consultation procedure which should precede the process of collective redundancies. Its provisions are directed – on the one hand – towards ensuring that workers are made aware of reasons and scale of planned redundancies, and – on the other hand – towards ensuring that the position of workers is taken into account when their employer is planning collective redundancies, in particular as regards the scope, mode and manner of such redundancies and the extent to which their consequences can be avoided, limited and/or mitigated.[561]

Under Article 29 the **collective redundancies** are redundancies affecting several workers within a period of time set by law and decided for reasons which have nothing to do with individual workers, but correspond to a reduction or change in the firm's activity.[562] The definition of redundancies in domestic law, however, must not be too restrictive.[563]

In order to give effect to the requirements of Article 29, national law must thus provide for the following guarantees:

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558. ECSR, Conclusions. Ukraine. 2018. Article 28 http://hudoc.esc.coe.int/eng?i=2018/def/UKR/28/EN, Conclusions. Ukraine. 2016. Article 28. http://hudoc.esc.coe.int/eng?i=2016/def/UKR/28/EN,
Conclusions. Ukraine. 2014. Article 28. http://hudoc.esc.coe.int/eng?i=2014/def/UKR/28/EN,
Conclusions. Ukraine. 2010. Article 28. http://hudoc.esc.coe.int/eng?i=2010/def/UKR/28//EN
559. ECSR, Conclusions. Ukraine. 2018. Article 28. http://hudoc.esc.coe.int/eng?i=2018/def/UKR/28/EN
560. Ibid.
561. Conclusions 2014 - Statement of interpretation - Article 29.
562. Conclusions 2003, Statement of Interpretation on Article 29.
563. Conclusions 2014, Azerbaijan.

> When employers implement information and consultation procedures preceding collective redundancies, **employees should be represented** by persons acting on behalf of all workers employed in the workplace. Such representatives may be either bodies operating in the employer's enterprise (for example, trade unions or workers' councils) or ad hoc representatives appointed to take part in these processes. National law should ensure that employees may appoint representatives even when they are not otherwise represented in the context of a particular workplace by a trade union or other representative body. Such representatives should represent all employees who may be potentially subject to collective redundancies and should not suffer any negative consequences as a consequence of their activities in this regard.
>
> The appendix to the Charter defines **workers' representatives** as persons who are recognised as such under national legislation or practice, in accordance with ILO Convention No. 135 on workers' representatives. In other words, trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions, or elected representatives, namely, representatives who are freely elected by the workers of the undertaking and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned. This wording means that States Parties are free to decide how the workers' representatives who have to be informed and consulted are to be appointed (general or ad hoc system).[564]
>
> Employers should be required to provide employees' representatives with all the **relevant information** necessary to ensure the integrity and effectiveness of the information and consultation process. This information should in particular include the reasons for the proposed redundancies, the criteria for determining which employees are to be made redundant, the proposed order and scheduling of such redundancies, the amount of any cash benefits or other forms of compensation and the scope and content of any planned social measures which are designed to mitigate the consequences of this process.[565]

In principle, all relevant information should be provided to employees' representatives **prior to the commencement** of the consultation process, but national law should also guarantee the right of employees' representatives to be provided with all relevant information throughout the entire duration of the consultation process.[566] Article 29 provides for the employer's duty to consult with workers' representatives and the purpose of such consultation. Simple notification of

564. Conclusions 2003 Sweden; Digest 2018, p. 218.
565. Conclusions 2014 - Statement of interpretation - Article 29.
566. Conclusions 2014 - Statement of interpretation - Article 29.

redundancies to workers or their representatives is not sufficient.[567]

> The information and consultation process should be conducted 'in good time prior to collective redundancies' as required by the text of Article 29. National law should thus ensure that employers are obliged to provide employees with information about planned collective redundancies sufficiently far in advance of the process, so as to enable employees and their representatives to become familiar with the key aspects of the planned redundancies. Consultation should also be conducted within a time period that is sufficient to ensure that employees' representatives have an opportunity to present suitable proposals with a view to avoiding, limiting or mitigating the effect of the proposed redundancies.[568]

All relevant documents must be supplied before consultation starts, including the reasons for the redundancies, planned social measures, the criteria for being made redundant and information on the order of the redundancies.[569]

> The information and consultation **process should be directed towards** not only the possible avoidance or minimisation of the scope of collective redundancies, but also at mitigating their consequences. It should therefore cover the possibility of undertaking actions aimed at retraining and redeployment of the workers concerned. As part of this process, employers should be required to cooperate with administrative authorities or public agencies which are responsible for the policy counteracting unemployment, by for example notifying them about planned collective redundancies and/or cooperating with them in relation to retraining employees who are made redundant or providing them with other forms of assistance with a view to obtaining a new job.[570]

Consultation rights must be accompanied by guarantees that they can be exercised in practice. Where employers fail to fulfil their obligations, there must be at least some possibility of recourse to administrative or judicial proceedings before the redundancies are made to ensure that they are not put into effect before the consultation requirement is met.[571]

IMPLICATIONS FOR UKRAINE

In 2018, the Committee made the first conclusions on the compliance of the situation in Ukraine with the requirements of Article 29 of the Charter since its ratification.[572] The Committee examined in its conclusions 2018 the provisions of national legislation on the employer's notion of collective

567. Conclusions 2014, Georgia.
568. Conclusions 2014 - Statement of interpretation - Article 29.
569. Conclusions 2005, Lithuania.
570. Conclusions 2014 - Statement of interpretation - Article 29.
571. Conclusions 2007, Sweden; Digest 2018, p. 220.
572. ECSR, Conclusions 2018. Ukraine - Article 29. http://hudoc.esc.coe.int/eng?i=2018/def/UKR/29/EN, Conclusions 2014. Ukraine. – Article 29. http://hudoc.esc.coe.int/eng?i=2014/def/UKR/29/EN, Conclusions 2010. Ukraine. – Article 29. http://hudoc.esc.coe.int/eng?i=2010/def/UKR/29//EN

redundancy and asked about any exceptions for certain categories of workers or enterprises. Regarding the information provided by national report about employer's obligation to submit information, to consult the trade unions and to take measures to prevent collective redundancy or minimise the dismissals, to submit information to the competent territorial bodies, the Committee presumed that effective dissemination included provision of all relevant documents necessary to hold joint consultations.[573]

According to possibility of creating special commissions to develop the appropriate set of measures for the enterprise and proposals for territorial and local employment programmes, examples in this regard were required.[574]

573. ECSR, Conclusions 2018. Ukraine - Article 29. p.34.
574. Ibid.

Part III
Health care

Analysis of the provisions of the European Social Charter (revised) on the right protection of health (Article 11)

The right to protection of health guaranteed in Article 11 of the Charter is fundamental to the enjoyment of all other social rights. It is closely linked to Articles 2 (right to life) and 3 (right to be free from torture, inhuman or degrading treatment) of the European Convention on Human Rights as interpreted by the ECtHR.[575] The principle of human dignity is the fundamental principle underpinning the right to health, and adequate health care is a prerequisite for the preservation of human dignity.[576]

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

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 11, Paragraph 1

The Committee interprets health as physical and mental well-being, in line with the definition of health in the Constitution of the World Health Organisation (WHO).[577] It analyses the following specific criteria: the right to the highest possible standard of health, and the right of access to health care.

State Parties undertake to ensure the best possible state of health for the population according to existing knowledge. This includes both positive obligations to realise the best possible state of health through, inter alia, adequate health services, and negative obligations to refrain from interfering directly or indirectly with this right.[578] For example, any treatment, which is not necessary from a health perspective, is in breach of Article 11 if such treatment is a precondition to obtain another right.[579] Similarly, medical treatment without free and informed consent is not

575. Conclusions 2005, Statement of Interpretation on Article 11, <http://hudoc.esc.coe.int/eng?i=2005_Ob_1-1/Ob/EN>, (2 January 2017).
576. International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, Decision on the merits of 3 November 2004, §31, <http://hudoc.esc.coe.int/eng?i=cc-14-2003-dmerits-en>, (2 January 2017).
577. Conclusions 2005, Statement of Interpretation on Article 11, <http://hudoc.esc.coe.int/eng?i=2005_Ob_1-1/Ob/EN>.
578. CoE (2018), Digest, 127; on negative obligations see Transgender Europe and ILGA Europe v. Czech Republic, complaint no. 117/2015, decision on the merits of 15 May 2018, §74, <http://hudoc.esc.coe.int/eng?i=cc-117-2015-dmerits-en>.
579. Transgender Europe and ILGA Europe v. Czech Republic, supra, § 79.

in conformity with article 11.[580]

The main indicators which are assessed by the Committee are life expectancy and principal causes of death. These indicators must show an improvement and should not be lagging far behind the European average.[581] According to the Committee, infant and maternal mortality are additional decisive indicators of the operation of a state party's overall health system.[582] Infant and maternal mortality are avoidable risks and every step should be taken to eliminate these risks.[583] A recurring problem of non-conformity under Article 11(1) is the high infant and maternal mortality rate in some countries, which reveal severe shortcomings in the health system when examined together with other basic health indicators.[584]

Regarding access to healthcare services, the main principle is that the health care system must be accessible to everyone. Restrictions on the application of Article 11 may not result in impeding, in particular, disadvantaged groups' exercise of their right to health. This approach requires a human rights conducive interpretation of the way the personal scope of the Charter is applied in conjunction with Article 11(1),[585] meaning that the restriction through the personal scope should not be read in such a way as to deprive persons not falling within this scope, for example migrants in an irregular situation, of the protection of their most basic rights, such as the right to life or to physical integrity.[586]

The Committee has developed detailed criteria regarding access to health:

- the cost of health care should be borne, at least partly, by the "collective bodies" in the health care system;[587] it may not lead to an excessively heavy burden for the individual. Out-of-pocket payments should not be the main source of funding of the health system.[588] Steps must also be taken to reduce the financial burden on patients from disadvantaged communities;[589]

- arrangements for access to health care must not lead to unnecessary delays. The management of waiting lists and waiting times must be based on transparent criteria, agreed at national level, taking into account the risk of deterioration in either clinical condition or quality of life of the patient;[590]

- the number of health care professionals and equipment must be adequate given the national situation. In the case of hospitals, the objective laid down by the WHO of 3 beds per thousand population is one key indicator.[591] A low density of hospital beds in combination with waiting

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580. Here, the Committee refers to definition of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: „informed consent is (…) a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers." UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, report A./64/272 of 1 August 2009, cited in Transgender Europe and ILGA Europe v. Czech Republic, §81.
581. Conclusions 2005, Lithuania, <http://hudoc.esc.coe.int/eng?i=2005/def/LTU/11/1/EN>.
582. Conclusions 2003, Romania, <http://hudoc.esc.coe.int/eng?i=2003/def/ROU/11/1/EN>.
583. Conclusions 2003, France, <http://hudoc.esc.coe.int/eng?i=2003/def/FRA/11/1/EN>.
584. CoE (2018), Digest, (fn. 96), 129. Conclusions 2013, Ukraine, <http://hudoc.esc.coe.int/eng?i=2013/def/UKR/11/1/EN>.
585. Conclusions 2005, Statement of Interpretation on Article 11, <http://hudoc.esc.coe.int/eng?i=2005_Ob_1-1/Ob/EN>.
586. Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012, §28), <http://hudoc.esc.coe.int/eng?i=cc-69-2011-dmerits-en>; International Federation of Human Rights Leagues (FIDH) v. France, Complaint No.14/2003, Decision on the Merits of 8 December 2004, §§ 30-31.
587. Conclusions I (1969), Statement of Interpretation on Article 11, <http://hudoc.esc.coe.int/eng?i=I_Ob_-43/Ob/EN>; Conclusions XV-2 (2001), Cyprus, <http://hudoc.esc.coe.int/eng?i=XV-2/def/CYP/11/1/EN>.
588. Conclusions 2013, Georgia, <http://hudoc.esc.coe.int/eng?i=2013/def/GEO/11/1/EN>.
589. Conclusions XVII-2 (2005), Portugal, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/PRT/11/1/EN>.
590. The Committee refers to CoE Committee of Ministers Recommendation (99)21 on „criteria for the management of waiting lists and waiting times in health care". See Conclusions XV-2 (2001), United Kingdom, <http://hudoc.esc.coe.int/eng?i=XV-2/def/GBR/11/1/EN>; Conclusions XX-2 (2013), Poland, <http://hudoc.esc.coe.int/eng?i=XX-2/def/POL/11/1/EN>.
591. Conclusions XV-2 (2001), Turkey, <http://hudoc.esc.coe.int/eng?i=XV-2/def/TUR/11/1/EN>.

lists, could be an obstacle to access to health care and therefore a ground for non-conformity with Article 11(1).[592] Conditions in hospitals, including psychiatric hospitals, must be satisfactory and generally compatible with the principle of human dignity.[593]

As part of the positive obligations arising from Article 11(1), the Committee requires State Parties to provide appropriate and timely care on a non-discriminatory basis, including services relating to sexual and reproductive health. As a result, a health care system which does not provide for the specific health needs of women, for example in view of pregnancy, will not be in conformity with Article 11, or with article E RESC (non-discrimination) in conjunction with Article 11.[594]

Article 11, Paragraph 2

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

In view of education and awareness-raising, the Committee requires that public health policy pursues the promotion of public health in conformity with the objectives set by the WHO. National rules must provide for information of the public, education and participation regarding health policies. State Parties have to demonstrate through concrete measures that they implement a public health education policy in favour of the general population and population groups affected by specific health issues.[595] Informing the public, particularly through awareness-raising campaigns, must be a public health priority. The precise extent of these activities will vary according to the nature of the national public health concerns.[596] Measures should be introduced to prevent activities that are damaging to public health, such as smoking, alcohol and drugs, and to develop a sense of individual responsibility, including issues such as a healthy diet, sexual and reproductive health, and protection of the environment.[597]

[Health education must be carried out throughout school life and be part of the school's curriculum.[598] Health education in schools must be provided throughout the entire period of schooling and should cover the following subjects: prevention of smoking and alcohol abuse, sexual and reproductive health education,[599] in particular with regard to prevention of sexually transmitted diseases and AIDS, road safety and promotion of a healthy diet.[600]]

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

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

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592. Conclusions XV-2 (2001), Denmark, <http://hudoc.esc.coe.int/eng?i=XV-2/def/DNK/11/1/EN>.
593. Conclusions 2005, Statement of Interpretation on Article 11, <http://hudoc.esc.coe.int/eng?i=2005_Ob_1-1/Ob/EN>, (2 January 2017); Conclusions 2005, Romania, <http://hudoc.esc.coe.int/eng?i=2005/def/ROU/11/1/EN>.
594. International Planned Parenthood Federation – European Network (IPPF EN) v. Italy, complaint No. 87/2012, decision on the merits of 10 September 2013, § 66, <http://hudoc.esc.coe.int/eng?i=cc-87-2012-dmerits-en>.
595. Marangopoulos Foundation for Human Rights (MFHR) v. Greece, complaint No. 30/2005, decision on the merits of 6 December 2006, §§ 216 and 219, <http://hudoc.esc.coe.int/eng?i=cc-30-2005-dmerits-en>.
596. Conclusions 2007, Albania, <http://hudoc.esc.coe.int/eng?i=2007/def/ALB/11/2/EN>.
597. International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, complaint No. 45/2007, decision on the merits of 30 March 2009, §43, <http://hudoc.esc.coe.int/eng?i=cc-45-2007-dmerits-en>. CoE (2018), Digest, 131.
598. In this respect, the Committee of Ministers' Recommendation No R(88)7 on school health education and the role and training of teachers is taken into account by the Committee as a relevant standard. CoE (2018), Digest, 131.
599. International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, complaint No. 45/2007, decision on the merits of 30 March 2009, §46, <http://hudoc.esc.coe.int/eng?i=cc-45-2007-dmerits-en>.
600. Conclusions 2013, Montenegro, <http://hudoc.esc.coe.int/eng?i=2013/def/MNE/11/2/EN>.

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

<http://hudoc.esc.coe.int/eng?i=cc-45-2007-dmerits-en>

With regard to medical counselling and screening, there must be free and regular consultation and screening services for pregnant women and children throughout the country.[601] Free medical checks must be carried out throughout the period of schooling. The assessment of compliance takes into account the frequency of school medical examinations, their objectives, the proportion of school children concerned and the number of staff.[602] There should be screening for all diseases that are major causes of death.[603] Where it has proved to be an effective means of prevention, screening must be used to its full extent.[604]

Article 11, Paragraph 3

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

Regarding accidents, State Parties must take concrete steps of prevention, in particular through awareness-raising and training programmes. The Committee interprets the scope of accidents quite widely (accidents at work, at home, at school, and during leisure activities.)[605] However, trends in accidents at work are mainly considered under Article 3 (health and safety at work).[606]

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

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

Collective Complaint No. 72/2011, decision on the merits of 23 January 2013, § 150, <http://hudoc.esc.coe.int/eng?i=cc-72-2011-dmerits-en>

Regarding a healthy environment, the Committee examines a wide range of issues. Besides pollution, State Parties have to report on the situation regarding water management, nuclear waste, asbestos, and food security.[607]

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601. Conclusions 2005, Moldova, <http://hudoc.esc.coe.int/eng?i=2005/def/MDA/11/2/EN>.
602. Conclusions XV-2 (2001), France, <http://hudoc.esc.coe.int/eng?i=XV-2/def/FRA/11/2/EN>.
603. Conclusions XV-2 (2005), Moldova, <http://hudoc.esc.coe.int/eng?i=2005/def/MDA/11/2/EN>.
604. Conclusions XV-2 (2001), Belgium, <http://hudoc.esc.coe.int/eng?i=XV-2/def/BEL/11/2/EN>.
605. Conclusions 2005, Moldova, <http://hudoc.esc.coe.int/eng?i=2005/def/MDA/11/3/EN>.
606. For details see art. 3 RESC.
607. CoE (2018), Digest, 133-134.

Overcoming pollution is an objective that can only be achieved gradually and is therefore subject to progressive realisation. State Parties must strive to attain this objective within a reasonable time, by showing measurable progress and making the best possible use of the resources at their disposal.[608] The measures taken are assessed with reference to national legislation and regulations and legal commitments vis-à-vis the European Union and the United Nations,[609] and how the relevant legal framework is applied in practice.

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

- develop and regularly update sufficiently comprehensive environmental legislation and regulations;[610]

- take specific steps, such as modifying equipment, introducing threshold values for emissions and measuring air quality, to prevent air pollution at local level[611] and to help to reduce it globally. In the case of global pollution, emission control is assessed with reference to the objectives set for implementation of the UN Framework Convention on Climate Change (UNFCC) of 9 May 1992, and of the Kyoto Protocol to the UNFCC of 11 December 1997;[612]

- ensure that environmental standards and rules are properly applied, through appropriate supervisory machinery, including measures such as sanctions which are sufficiently dissuasive and have a direct effect on polluting emission levels;[613]

- assess health risks through epidemiological monitoring of the groups concerned.[614]

Moreover, State Parties have to take preventive and protective measures concerning clean water. A situation where availability of drinking water is still a problem for a significant proportion of the population is in breach of the Charter.[615]

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

As regards drug abuse, anti-smoking measures are particularly relevant for the compliance with Article 11 since smoking is a major cause of avoidable death in Europe. The WHO has set a target for European countries of raising the proportion of non-smokers in the population to at least 80% and protecting non-smokers against involuntary exposure to tobacco smoke.[616] WHO indicators and the Framework Convention on Tobacco Control are taken into consideration for the Committee's assessment of compliance with Article 11(3).[617] In order to be effective, any prevention policy must restrict the supply of tobacco products through controls on production, distribution, advertising and pricing.[618] In particular, the sale of tobacco products to young persons must be banned,[619] as must smoking in public places,[620] including public transport, and advertising it with posters and

608. Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §§ 203 and 205, <http://hudoc.esc.coe.int/eng?i=cc-30-2005-dmerits-en>.
609. Conclusions XV-2 (2001), Italy, <http://hudoc.esc.coe.int/eng?i=XV-2/def/ITA/11/3/EN>.
610. Conclusions XV-2 (2001), Slovak Republic, <http://hudoc.esc.coe.int/eng?i=XV-2/def/SVK/11/3/EN>.
611. Supra, fn. 854.
612. Supra, fn. 854.
613. Supra, fn. 853, §§ 203, 209, 210 and 215.
614. Id, fn. §§ 203 and 220.
615. Conclusions 2013, Georgia, <http://hudoc.esc.coe.int/eng?i=2013/def/GEO/11/3/EN>.
616. Conclusions XV-2 (2001), Greece, <http://hudoc.esc.coe.int/eng?i=XV-2/def/GRC/11/3/EN>.
617. Conclusions 2013, Malta, <http://hudoc.esc.coe.int/eng?i=2013/def/MLT/11/3/EN>.
618. Conclusions XVII-2 (2005), Malta, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/MLT/11/3/EN>.
619. Conclusions XV-2 (2001), Portugal, <http://hudoc.esc.coe.int/eng?i=XV-2/def/PRT/11/3/EN>.
620. Conclusions 2013, Andorra, <http://hudoc.esc.coe.int/eng?i=2013/def/AND/11/3/EN>.

in the press.[621] The effectiveness of such policies is assessed on the basis of statistics on tobacco consumption. This assessment also applies *mutatis mutandis* to alcohol and drug addiction measures.

Regarding immunisation and epidemiological monitoring, the Committee requires the implementation of widely accessible immunisation programmes. State Parties have to maintain high coverage rates as large-scale vaccination is recognised as the most efficient and most economical means of combating infectious and epidemic diseases.[622] State parties must demonstrate their ability to cope with infectious diseases, through arrangements such as reporting and notifying about diseases, special treatment for AIDS patients and emergency measures in the case of epidemics.[623]

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

https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640

IMPLICATIONS FOR UKRAINE

Article 11, Paragraph 1

Measures to ensure the highest possible standard of health

The Committee has analysed the information provided by the Government of Ukraine, WHO and the World Bank data related to the life expectancy and death rate and considers that the prevailing high infant and maternal mortality rates, examined together with the low life expectancy rate, show that the situation in Ukraine is below the average in other European countries which confirms the weaknesses in the health system. The low progress toward mentioned indicators has caused the previous conclusion of non-conformity to be kept.[624]

Access to health care

Arrangements for access to care must not lead to excessive delays in its provision.

While analysing the data the Committee pointed out the cost of health care that must not represent an excessively heavy burden for the individual and the out-of-pocket payments should not be the main source of funding of the health system.[625] Summing up the above mentioned the Committee concludes that the situation is not in conformity with Article 11§1 of the Charter based on unsatisfactory measures that have been taken to effectively guarantee the right of access to health care.

Article 11, Paragraph 2

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

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621. Conclusions XV-2 (2001), Greece, <http://hudoc.esc.coe.int/eng?i=XV-2/def/GRC/11/3/EN>.
622. Conclusions XV-2 (2001), Belgium, <http://hudoc.esc.coe.int/eng?i=XV-2/def/BEL/11/3/EN>.
623. Conclusions XVII-2 (2005), Latvia, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/LVA/11/3/EN>.
624. Conclusions 2017, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2017/def/UKR/11/1/EN>, (8 December 2017)
625. Ibid.

The Committee previously examined the situation in Ukraine and found that it was not in conformity with Article 11§2 of the Charter (Conclusions 2013,[626] 2015)[627] on the ground that it has not been recognised that public information and awareness raising is the main concern of public health.

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

> State Parties must ensure that sexual and reproductive health education forms part of the ordinary school curriculum; that the education provided is adequate in quantitative terms; that the form and substance of the education, including curricula and teaching methods, are relevant, culturally appropriate and of sufficient quality, in particular that it is objective, based on contemporary scientific evidence and does not involve censoring, withholding or intentionally misrepresenting information, for example as regards contraception and different means of maintaining sexual and reproductive health; and that a procedure is in place for monitoring and evaluating the education with a view to effectively meeting the above requirements.[628]

The Committee emphasised the same as in the conclusion for Moldova[629] that should provide screening for the diseases which cause the major cause of death. The Committee has stated that "where it has proved to be an effective means of prevention, screening must be used to the full" as in the conclusion made for Belgium.[630]

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

Article 11, Paragraph 3

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

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

Taking into account the WHO Report on the global tobacco epidemic, the Committee wonders whether the indoor offices and workplaces are not smoke-free locations in Ukraine and requested the information on action are taken to resolve this issue.

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626. Conclusions 2013, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2013/def/UKR/11/2/EN>, (6 December 2013)
627. Conclusions 2015, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/11/2/EN>, (4 December 2015)
628. International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia, Complaint No. 45/2007, Decision on the merits of 30 March 2009, §47, <http://hudoc.esc.coe.int/eng/?i=cc-45-2007-dmerits-en>
629. Conclusions 2005, Moldova, <http://hudoc.esc.coe.int/eng/?i=2005/def/MDA/11/2/EN>, (30 June 2005)
630. Conclusions 2001, Belgium, < http://hudoc.esc.coe.int/eng/?i=XV-2/def/BEL/11/2/EN>, (31 December 2001)

At the beginning of monitoring the situation in Ukraine the Committee pointed the low vaccination coverage rate of infants.[631]

The Committee recalls the conclusions to Belgium stating that State Parties must operate widely accessible immunisation programmes.

> "They must maintain high coverage rates not only to reduce the incidence of these diseases, but also to neutralise the reservoir of the virus and thus achieve the goals set by WHO to eradicate several infectious diseases.[632]

As well as in the conclusions to Latvia it is repeated that countries must demonstrate their ability to cope with infectious diseases, including arrangements for reporting and notifying diseases, special treatment for AIDS patients, emergency measures in case of epidemics.[633]

Based on above, the Committee has found that the situation in Ukraine does not meet the stipulations of the Article 11§3 of the Charter regarding efficient immunisation and epidemiological monitoring programmes that do not meet the general requirements.

Analysis of the provisions of the European Social Charter (revised) on the right to safe and healthy working conditions (Article 3)

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 3, Paragraph 1

Under this provision, State Parties undertake to formulate, implement and periodically review a coherent policy on occupational health and safety in consultation with social partners.[634] The main policy objective is the maintenance and promotion of a culture of prevention in the areas of health and safety at national level.[635] Occupational risk prevention should hence be a priority and be incorporated into the public authorities' activities at all levels and form part of other public policies.[636]

The following standards are decisive indicators of an adequate implementation of article 3(1): ILO Occupational Health and Safety Convention no. 155 (1981),[637] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work,[638] and European Union strategies on safety and health at work[639] for State Parties from the EU. The policy and strategies adopted are to be regularly assessed and reviewed by states parties, particularly in the light of changing risks such as work-related stress, violence, and psycho-social risks.[640]

According to the Committee, effective prevention implies that all relevant actors – state authorities,

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631. Conclusions 2017, Ukraine, <http://hudoc.esc.coe.int/eng/?i=2017/def/UKR/11/3/EN>, (8 December 2017)
632. Conclusions 2001, Belgium.
633. Conclusions 2005, Latvia.
634. Conclusions 2003, Statement of Interpretation on Article 3, section regarding Article 3(1).
635. Conclusions 2009, Armenia.
636. Conclusions 2005, Lithuania, <http://hudoc.esc.coe.int/eng?i=2005/def/LTU/3/1/EN>. See also Digest (2018), p. 73.
637. ECSR, Conclusions 2013, Albania.
638. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§1 of the 1961 Charter, <http://hudoc.esc.coe.int/eng?i=XIV-2_Ob_V1-4/Ob/EN>, (7 November 2019)
639. Conclusions 2013, Austria, <http://hudoc.esc.coe.int/eng?i=2013/def/AUT/3/1/EN>, (29 December 2016).
640. Conclusions 2013, Statement of Interpretation on Article 3.

employers and workers – are actively involved in occupational risk prevention within a defined framework of rights and duties.[641] The Committee has identified two levels of engagement in this regard:

- the governmental level: this entails the development of an appropriate system of public prevention and supervision of the implementation of health and safety standards.[642] The responsibility of the labour inspectorate to share the knowledge about risks and risk prevention they have acquired during their inspections conducted as part of their preventive activities is assessed under this provision;[643] their duty to ensure compliance with the rules falls under the scope of Article 3§3 of the European Social Charter (revised);

- the company level: besides compliance with protective rules, the Committee assesses work-related risks and the adoption of preventive measures as well as information and training for workers.[644] This includes risks specific to the workplace, which is the only aspect covered by Article 3(1), whereas follow-up measures are assessed under Article 3(2). Employers are also required to provide appropriate information, training and medical supervision for temporary workers and employees on fixed-term contracts.[645]

- In order to implement this provision, states parties have to take measures to increase general awareness, knowledge and understanding of dangers and risks at the workplace, and of ways of preventing and managing them; these include:[646]

- training by qualified staff;

- information and dissemination;

- quality assurance (professional qualifications, certification systems for facilities and equipment);

- research on these risks.

Article 3§1 of the European Social Charter (revised) requires broader consultation than already required under Article 3(3) of the 1961 Charter because it not only includes tripartite cooperation between authorities, employers and workers to improve working conditions and the working environment, but also the coordination of their activities and cooperation on relevant occupational safety and prevention issues.[647]

According to the Committee's case law, the implementation of Article 3(1) means that adequate consultation mechanisms and procedures must be set up by the state party concerned. At national and sectoral level, this requirement is satisfied where there are specialised bodies of government, employers' and workers' representatives which are consulted by the public authorities.[648] These bodies may be permanent or ad hoc consultation forums, but they must in any case be 'effective' with regard to competences, procedures, and participants to promote social dialogue in occupational safety and health matters.[649]

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641. Digest (2018), p. 74.
642. Conclusions 2007, Cyprus.
643. Conclusions 2009, Malta.
644. Conclusions 2009, Armenia.
645. Conclusions XX-2 (2013), Luxembourg; Conclusions XIX-2 (2009), Greece.
646. See in particular Conclusions 2003, Bulgaria.
647. Digest, (2018), p. 75.
648. Id.
649. Conclusions 2009, Lithuania.

Article 3, Paragraph 2

Through this provision, State Parties commit to issue health and safety regulations. According to the Committee, such regulations are to provide measures of prevention and protection against workplace risks. The Committee interprets the term 'worker' to include both employed and self-employed persons.[650]

The European Social Charter (revised) does not define the risks to be regulated, therefore, in the assessment of the national situation, the Committee refers to international technical occupational health and safety standards such as the ILO Conventions and EU standards on health and safety at work.[651] Here, the Committee refers inter alia to ILO Convention No. 148 on Working Environment (Air Pollution, Noise and Vibration)[652] and EU Council Directive 2003/18/EC on the ban of asbestos.[653]

According to the Committee, in order to make Article 3 operational, national law must provide a legislative framework setting out employers' responsibilities and workers' rights and duties as well as specific regulations. In view of the particularly complex nature of the subject matter in the light of technological, ergonomic and medical changes, existing regulations must be adapted to new circumstances where the rules prove to be inadequate. Such new risks include workplace alterations, hazardous substances,[654] and sectoral risks (such as agriculture, mining, transport, and work in docks and on ships).[655] A State Party is considered to have satisfied the requirement of an adequate legislative framework if it has transposed most of the EU *acquis communautaire* on occupational health and safety into its domestic legislation.[656] In sectors of activity where the acquis is incomplete, e.g. in shipping or fishing, the main international reference framework is provided by the respective ILO conventions.[657]

State Parties are required to pay particular attention to asbestos and ionising radiation. They have to provide evidence that workers are protected up to a level at least equivalent to that set by international reference standards.[658]

Workers on fixed-term contracts as well as temporary and seasonal workers may also be exposed to dangerous agents and substances. In order to address those risks and avoid discrimination in comparison with permanently contracted workers, adequate protection mechanisms have to be in place.[659]

The Committee also takes into account rules on medical checks, information and training in occupational safety and health matters for temporary workers upon recruitment, transfer, as well as the introduction of new technologies.[660] Moreover, the Committee examines the representation of this category of workers in occupational safety and health matters and measures adopted to reduce the high numbers of occupational accidents of this group.[661]

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650. Conclusions 2005, Article 3§2, Estonia.
651. Conclusions XIV-2 (1998), Statement of Interpretation of Article 3.
652. Conclusions XIV-2 (1998), Italy.
653. Conclusions 2009, Estonia.
654. Id.
655. Id. For further details see Digest (2018), pp. 77-78.
656. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§2.
657. Conclusions 2013, Malta.
658. For asbestos, the Committee refers to Recommendation 1369 (1998) of the Parliamentary Assembly of the Council of Europe on the dangers of asbestos for workers and the environment; ILO Asbestos Convention No. 162 (1986) and Directive 2009/148/EC of the Parliament and the Council of 30 November 2009 on the protection of workers from the risks related to exposure to asbestos at work. Regarding ionising radiation, national standards must take account of the recommendations made by the International Commission on Radiological Protection 1990. See ECSR, Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§2.
659. Conclusions 2009, Andorra, <http://hudoc.esc.coe.int/eng?i=2009/def/AND/3/2/EN>, (30 December 2016).
660. Conclusions 2009, Lithuania, <http://hudoc.esc.coe.int/eng?i=2009/def/LTU/3/2/EN>, (30 December 2016).
661. Conclusions 2009, Belgium, <http://hudoc.esc.coe.int/eng?i=2009/def/BEL/3/2/EN>, (7 November 2019).

According to the Committee, all sectors of the economy must be covered by the legislative framework.[662] It is not necessary for a specific regulation to be adopted for each activity or sector, but the wording of the regulation should be sufficiently precise to allow effective application in all sectors, taking particular account of the degree of danger in each sector. Sectors must be covered in their entirety and all companies must be covered regardless of the number of employees.[663] No workplace can be exempted from the application of health and safety rules. Workers employed on residential premises, i.e. domestic workers and home workers, must be covered[664] by health and safety rules; these may however be adapted to the type of activity and be formulated in general terms.[665] Regulations are to be developed in consultation with employers' and workers' organisations.[666] Consultations between the relevant authorities and employers' and workers' organisations on measures to improve occupational health and safety was already required under Article 3(3) of the 1961 Charter. The requirement in Article 3§2 of the European Social Charter (revised) is the same *mutatis mutandis* as Article 3(3) of the 1961 Charter.[667]

Article 3, Paragraph 3

This provision requires State Parties to effectively implement the right to health and safety at work by "measures of supervision". According to the Committee, this includes monitoring the number of injuries and occupational diseases at work and supervising the application of the respective regulations as well as consulting employers' and workers' organisations in this field.[668]

In assessing compliance with this provision, the Committee reviews the frequency and trends in occupational diseases and injuries.[669] This includes the number of all occupational accidents as well as the number of such accidents in relation to the workforce (incidence rate per 100 000 workers as defined by Eurostat).[670] The figures provided should capture the total number of accidents in all sectors, as well as some particularly risk-prone sectors,[671] and specific categories of workers.[672] This assessment can be made on the basis of absolute figures[673] or in relation to the average in the states parties.[674] The same approach is being applied to the number of fatal occupational accidents and to their number in relation to the workforce. The Committee also takes into account European Commission Recommendation 2003/670/CE concerning the European list of occupational diseases and ILO Recommendation no. 194 (2002) concerning the List of Occupational Diseases and the Recording and Notification of Occupational Accidents and Diseases.[675] The situation is considered by the Committee to be in breach of the Charter where, for several years, the frequency of fatal accidents is clearly too high. A fatal accident rate of more than double the European Union average indicates that measures taken to reduce fatal accidents are inadequate.[676] According to the Committee, the collection and presentation of data on occupational accidents and diseases must be reliable, exhaustive and in accordance with accepted statistical methods.[677] State Parties

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662. Conclusions I (1969), Statement of Interpretation of Article 3§2 (i.e. on Article 3§1 of the 1961 Charter).
663. Conclusions XIII-1 (1993), Greece, <http://hudoc.esc.coe.int/eng?i=XIII-3/def/GRC/3/1/EN>, (30 December 2016).
664. CoE (2018), Digest, (fn. 96), 75.
665. Conclusions XIV-2 (1998), Belgium, <http://hudoc.esc.coe.int/eng?i=XIV-2/def/BEL/3/1/EN>, (30 December 2016). See also CoE (2018), Digest (fn. 96), 79.
666. On the scope of this consultation, see above under Article 3(1).
667. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3, <http://hudoc.esc.coe.int/eng?i=XIV-2_Ob_V1-4/Ob/EN>, (19 November 2019).
668. Marangopoulos Foundation for Human Rights (MFHR) v. Greece, complaint no. 30/2005, decision on the merits of 6 December 2006, §231, <http://hudoc.esc.coe.int/eng?i=cc-30-2005-dmerits-en>, (30 December 2016).
669. Conclusions 2013, Bulgaria, <http://hudoc.esc.coe.int/eng?i=2013/def/BGR/3/3/EN> (30 December 2016).
670. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§3.
671. Conclusions XIV-2 (1998), Portugal.
672. Conclusions 2009, Italy.
673. Conclusions 2003, Slovenia.
674. Conclusions XIV-2 (1998), Portugal.
675. Digest (2018), p. 80.
676. Conclusions 2013, Lithuania.
677. Digest (2018), p. 80f.

have to take measures to combat possible non-reporting or concealment of accidents and diseases.[678] An ineffective or failing system of reporting of accidents and diseases is likely to lead the Committee to a finding of non-conformity.[679]

Article 3(3) does not prescribe any standard model for the organisation of the labour inspectorate; however, Article A(4) of Part III of the European Social Charter (revised) refers to a system "appropriate to national conditions". According to the Committee, labour inspection services may be divided between several bodies having specialised jurisdiction.[680] The division of services between several monitoring bodies that work under a lack of resources and imperfect co-operation may, however, deprive the labour inspection of its efficiency and would thus be contrary to Charter standards.[681]

State Parties must allocate enough resources to enable labour inspectorates to conduct regular inspections. In assessing the adequacy of the allocated resources, the Committee takes into account the following:[682]

- the number and frequency of inspection visits on occupational safety and health conducted by labour inspection services;

- the number of companies subject to inspection visits by sector of activity;

- the number and percentage of workers covered by inspection visits in each sector of activity, this information being broken down as much as possible by age and sex of the workers;

- the number of staff employed in labour inspectorates on occupational safety and health for each sector of activity; states parties are in breach of Article 3(3) when the staffing of the inspection services and the number of visits carried out is manifestly inadequate for the number of employees concerned.

- measures on capacity-building of the Labour Inspectorate, taking account of technological and legal developments.

Labour Inspectorates should have the mandate to inspect all workplaces, including residential premises, in all economic sectors,[683] private and public.[684] They should have sufficient and appropriate means of information and powers of investigation and enforcement, in particular powers to take emergency measures in case of immediate danger to the health or safety of workers.[685] Monitoring of compliance with occupational health and safety regulations including penalties is key in this regard.[686] In assessing the system of penalties, the Committee takes into account the following:[687]

- the number of offences recorded in relation to the number of penalties imposed;
- the frequency of offences in relation to the severity of penalties;
- the types of penalty imposed and their administrative or criminal nature;
- the gross amount of fines and the way in which they are set, in particular whether they are

678. Conclusions 2013, Albania.
679. Id.
680. Conclusions 2013, Austria.
681. Conclusions 2013, Ukraine.
682. Conclusions XIII-1 (1993), Statement of Interpretation on Article 3§3.
683. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§3.
684. Conclusions 2013, Statement of interpretation on Article 3§3.
685. Conclusions XIV-2 (1998), Statement of Interpretation on Article 3§3.
686. Marangopoulos Foundation for Human Rights (MFHR) v. Greece, complaint no. 30/2005, decision on the merits of 6 December 2006, §228.
687. Conclusions 2013, Romania.

> proportionate to the number of workers concerned.[688]

A level of sanctions which is excessively low deprives the labour inspectorate of its efficiency and is therefore not in conformity with the Charter. The enforcement of these regulations is to be done in consultation with employers' and workers' organisations with regard to labour inspectorate activities other than participation in company inspections; the latter is assessed under Article 22 of the Charter.

Article 3, Paragraph 3

In view of this provision, all workers in all branches of economic activity and all companies should have access to occupational health services with preventive and advisory functions. These services may be run jointly by several companies. Article 3§4 is one of the Charter provisions which entail progressive and resource-intensive obligations. States parties are called upon to promote the progressive development of such services. According to the Committee, this means that

> "a State Party must take measures that allow it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources.[689]

According to the Appendix to the Charter, State Parties have a wider margin of appreciation regarding the concrete implementation of Article 3(4):

> "the functions, organisation and conditions of operation of these services shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions.[690]

In order to review compliance with this provision, the Committee assesses the number of occupational physicians in the total workforce,[691] the number of enterprises (co-)providing occupational health services, as well as any increase in the number of workers supervised by those services in comparison to the previous reference period. [692] In terms of legal standards, the Committee takes into consideration the ratification of ILO Occupational Health Services Convention No. 161 (1985), or the transposition of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.[693]

According to the Committee, and given the wording of this provision, occupational health services essentially have preventive and advisory functions[694] which go beyond mere safety at work. They contribute to conducting workplace-related risk assessments and prevention, worker health supervision, training in matters of occupational safety and health, as well as assessing working conditions' impact on workers' health.[695] Staff of health services should be trained, endowed and equipped to identify, measure and prevent work-related stress and violence.[696]

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688. Id.
689. International Association Autism-Europe (IAAE) v. France, complaint no. 13/2002, decision on the merits of 4 November 2003, § 53.
690. Appendix to the Charter, Art. 3§4.
691. Conclusions 2009, Slovenia.
692. Conclusions 2009, Albania.
693. Conclusions 2009, France.
694. Conclusions 2009, Ukraine.
695. Conclusions 2003, Bulgaria.
696. Conclusions 2013, Statement of Interpretation on Article 3, section on Article 3§4.

IMPLICATIONS FOR UKRAINE

According to the Committee's Conclusions 2017, the situation in Ukraine was not in conformity with all paragraphs of Article 3, except the §1 on which the conclusion was deferred.

Article 3, Paragraph 1

Due to the lack of information about regularly revision of occupational health and safety policy in the light of changing risks, the Committee took into account Recommendations for Ukraine presented by the ILO Committee of Experts on the Application of Conventions under Occupational Safety and Health Convention No. 155. Duty to carry out activities in terms of research, knowledge and communication relating to psychosocial risks was underlined by the Committee.[697]

The range of other questions were also reiterated by the Committee on the results of previously listed initiatives for developing an occupational health and safety policy and which have helped to create a culture of prevention in respect of occupational health and safety in practice in different sectors (except coal mining sector); about the implementation measures aimed at organising occupational risk prevention in sectors other than mining, questions concerning improvement of occupational safety and health, about information on consultation with the competent occupational health and safety bodies within enterprises, in particular enterprises where there are no workers' representatives and truly tripartite system for consulting social partners. Moreover, the Committee stated that consultation was required not only for tripartite cooperation between authorities, employers and workers to seek ways of improving their working conditions and working environment, but also for the co-ordination of their activities and co-operation on key safety and prevention issues.[698] Necessity to create specialised bodies made up of representatives of the government and of employers' and workers' organisations, which are consulted by the public authorities, was recalled as obligatory criteria for commitments obligation in the light of the right to consultation.[699]

Article 3, Paragraph 2

The coverage of occupational hazards by specific occupational health and safety legislation and regulations was repeatedly declared insufficient. The national report 2016 referred to the obligations of Ukraine under the Association Agreement the European Union (EU) and Ukraine (Annex XL to Chapter 21) in the sphere of occupational safety and health.[700] However, the Committee stated that the fact that national provisions were in conformity with the EU Directive did not automatically render them in conformity with the Charter. The Committee also required as general obligations under Article 3§2 to cover in accordance with international standards most of the risks listed in the general introduction to Conclusions XIV-2.

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

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697. ECSR, Conclusions 2017. Ukraine. – p.1203.
698. Ibid., p.1204
699. Ibid.
700. Annex XL to the Chapter 21, Association Agreement between the European Union and Ukraine. p. 43-47. URL: https://www.kmu.gov.ua/storage/app/media/uploaded-files/ANNEXES%20OF%20TITLE%20V.pdf

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

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

In general, the Committee repeated the previous conclusions 2013 that the situation in Ukraine did not conform with the requirements of Article 3§2 on the ground that the coverage of occupational hazards by specific occupational health and safety legislation and regulations is insufficient.[701]

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

Article 3, Paragraph 3

Concerning the issue of accidents at work and occupational diseases, the report of Ukraine satisfactory explained difference in statistic between the number of fatal accidents indicated in the report and published by ILOSTAT, the procedure for investigation and records of accidents at work. Moreover, the information on steps taken to reduce the high level of fatal accidents and diseases was not performed as well as the statistics on the number of occupational diseases. [702]

Despite the creation in 2014 the State Labour Service by reorganising and merging former authorities in the labour Inspectorate sphere, the situation in Ukraine remained unsatisfactory due to not sufficiently developed labour inspection structures in practice, small amount and the number of fines imposed to have a dissuasive effect. The Committee also recalled that the largest possible number of workers should be covered by inspection visits to satisfy the requirements under Article 3§3.[703]

Generally, all Committee's conclusions made for Ukraine under Article 3§3 have been negative

Article 3, Paragraph 4

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

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701. Ibid.
702. Ibid., p.1210.
703. Ibid., p.1211.

Part IV

Social security and social protection

Analysis of the provisions of the European Social Charter (revised) on the right to social security (Article 12)

Article 12 of the European Social Charter (revised) states the obligations State Parties to undertake with a view to ensuring the effective exercise of the right to social security. It is considerable that according to the European Committee of Social Rights this right concerns also the self-employed workers.[704]

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 12§1 requires State Parties to ensure this right through establishing and maintaining a system of social security, which should be established by law and function in practice.

According to the case law of the European Committee of Social Rights the principle of collective funding is a fundamental feature of a social security system as foreseen by Article 12 as it ensures that the burden of risks are spread among the members of the community in an equitable and economically appropriate manner and contributes to avoiding discrimination of vulnerable categories of workers.[705] According to the European Committee of Social Rights the mere existence of a social security system is not satisfactory: the system in question should cover a significant percentage of the population and at least offer effective benefits in several areas.[706] Within the meaning of Article 12§1 social security system should also cover the traditional risks and therefore provide the following benefits: medical care, sickness benefit, unemployment benefit[707] old age benefit, employment injury benefit, family benefit, and maternity benefit. The system should cover a significant percentage of the active population as regards income-replacement benefits, such as sickness, maternity and unemployment benefits, pensions, and work accidents or occupational diseases benefits.

It is also important to note that according to the European Committee of Social Rights social security benefits and other benefits, notably social assistance benefits, should be distinguished.

> "In making the distinction between social security benefits and social assistance benefits under Article 12 and Article 13

704. Conclusions XIV-1 (1998), Ireland.
705. Conclusions 2006, the Netherlands.
706. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12.
707. Conclusions 2006, Bulgaria; Conclusions 2013, Georgia.

> respectively it pays attention to the purpose of and the conditions attached to the benefit in question. As far as social security benefits are concerned, these are benefits granted in the event of risks which arise but they are not intended to compensate for a potential state of need which could result from the risk itself (Statement of interpretation on Articles 12 and 13, Conclusions XIII-4).[708]

> Social security, which includes universal schemes as well as professional ones, is seen by the Committee in its application of Article 12 of the Charter as including contributory, non-contributory and combined allowances related to certain risks (sickness, disablement, maternity, family, unemployment, old age, death, widowhood, vocational accidents and illnesses). These are benefits granted in the event of risks which arise but they are not intended to compensate for a potential state of need which could result from the risk itself.[709]

Article 12§2 obliges State Parties to establish and maintain a social security system at a satisfactory level which is at least equal to that required for ratification of the European Code of Social Security. The European Code of Social Security aims at encouraging the development of social security in all member States of the Council of Europe in order that they may gradually reach the highest level possible. The Code fixes a series of standards which State Parties undertake to include in their social security systems. The Code defines norms for social security coverage and establishes minimum levels of protection which State Parties must provide in such areas as medical care, sickness benefits, unemployment benefit, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits, survivors' benefits, etc.

According to the case law of the European Committee of Social Rights in order to comply with Article 12§2 of the Charter the social security system of State Party shall satisfy, at least, six risks (old-age counting per three under the European Code of Social Security)[710]. When the State Party concerned has not ratified the European Code of Social Security, the social security system is assessed in order to decide on the conformity with Article 12§2[711]. In order to examine whether the social security system is at a level at least equal to that necessary for the ratification of the Code thorough information should be provided regarding the branches covered, the personal scope and the level of benefits offered. Findings under Article 12§1 are also taken into account.

Article 12§3 obliges State Parties to endeavour to raise progressively the system of social security to a higher level.

Clarifying the content of the discussed obligation, the European Committee of Social Rights stated that Article 12§3 requires State Parties to improve their social security system. In particular, expansion of schemes, protection against new risks or increase of benefits is examples of such improvement. In order to ascertain whether the changes introduced do not infringe the principle and spirit of social security, the Committee makes a reasoned assessment of changes

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708. Finnish Society of Social Rights v. Finland, Complaint No. 108/2014, §27, Decision on the merits of 4 December 2016.
709. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12.
710. Conclusions 2006, Italy.
711. Conclusions XIV-1 (1998), Finland.

to the situation.[712] Moreover, the Committee considers that Article 12§3 does not presuppose the existence of a social security system of a higher level than that required under Article 12§1 or Article 12§2. A situation of progress may consequently be in conformity with Article 12§3 even though the social security system has not attained the levels required under the two first paragraphs of Article 12. A partly restrictive evolution in the social security system is not automatically in breach of Article 12§3.[713] The following information and criteria are used for the assessment of the situation in each concrete case:

- The nature of the changes (field of application, conditions for granting allowances, amounts of allowance, lengths etc...);

- The reasons given for the changes (the aims pursued) and the framework of social and economic policy in which they arise;

- The extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);

- The existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made (this information can be submitted under Article 13);

- The results obtained by such changes (their adequacy).[714]

Hence, even if specific restrictive measures are in conformity with the Charter, their cumulative effect could amount to a violation of Article 12§3. In view of the close relationship between the economy and social rights, the pursuit of economic goals is not incompatible with Article 12. At the same time, any modifications should not undermine the effective social protection of all members of society against social and economic risks and should not transform the social security system into a basic social assistance system or a system of minimum assistance. In any event any changes to a social security system must nonetheless ensure the maintenance of a basic compulsory social security system which is sufficiently extensive and did not prevent members of society from continuing to enjoy effective protection against social and economic risks.[715]

According to the Committee, the effective social protection of all the members of society, which should be the aim of all the states having accepted Article 12§3, involves maintaining in the Contracting Parties social security systems functioning through solidarity, as this represents a basic safeguard against differentiation in this field. Financing by the community as a whole in the form of contributions and/or taxes is a vital factor of this safeguard, as it guarantees the sharing of risks between the various members of the community.[716]

The position of the European Committee of Social Rights is also worth mentioning, according to which

> "the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to

712. Conclusions 2013, Georgia.
713. Conclusions 2009, Statement of Interpretation on Article 12§3.
714. Conclusions XVI-1 (2002), Statement of Interpretation on Article 12§3.
715. Federation of employed pensioners of Greece (IKA-ETAM) v. Greece, Complaint No. 76/2012, decision on the merits of 7 December 2012, §71; Conclusions XIV-1 (1998), Statement of Interpretation on Article 12; Finnish Society of Social Rights v. Finland, Complaint No.88/2013, decision on the merits of 9 September 2014, §85-86.
716. Conclusions XIV-1 (1998); Statement of Interpretation on Article 12.

> ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most.[717]

Article 12§4 subparagraph a) obliges State Parties to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure equal treatment with their own nationals of the nationals of other State Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the State Parties.

The personal scope of Article 12§4 extends to refugees and stateless persons. Self-employed workers are also covered by the discussed provision.[718]

According to the European Committee of Social Rights

> ... the appendix to Article 12§4 allow Contracting Parties to require the recipients of non-contributory benefits who are nationals of other Contracting Parties to complete a prescribed period of residence. However, ... the Committee reserves the right to assess the proportionality of length of residence required.[719]

Moreover, the wording "and subject to the conditions laid down in such agreements" in the introduction to Article 12§4 may imply inter alia that a State Party may require the completion of a prescribed period of residence before granting such benefits to nationals of other State Parties.

In one of the cases the Committee concluded:

> The report confirms that in order to become entitled to benefits which are based on permanent residence status, a foreign national must have been living in Lithuania without interruptions for the past five years. The Committee considers that this amounts to a length of residence requirement which is not in conformity with the Charter where contributory social security benefits are concerned. Moreover, although the Appendix to Article 12§4 permits states to require the completion of a prescribed period of residence before granting non-contributory benefits to non-nationals, the Committee considers a period of five years to be too long.[720]

At the same time, the position of the European Committee of Social Rights should be taken into account that

> [Article 12§4] does not require reciprocity: it directly empowers the Contracting Parties to implement its principles by means

717. Conclusions 2013, Lithuania.
718. Conclusions XIV-1 (1998), Turkey.
719. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12§4
720. Conclusions 2004, Lithuania.

other than concluding bilateral or multilateral agreements.[721]

Hence, Article 12§4 did not require that bilateral agreements exist, nor was it based on principles of reciprocity. Any state having accepted it could comply either through bilateral agreement or through unilateral action.[722]

The right to equal treatment is concerned in the frames of the discussed provisions of the Charter. According to the European Committee of Social Rights it, in particular, presupposes:

> "... equal treatment between the nationals of all the Contracting Parties to the Charter presupposes ... not to grant entitlement to social security benefits solely to their own nationals or those of specific Contracting Parties, [nor] to impose additional conditions on nationals of other Contracting Parties. This rule has its limits because the appendix to Article 12§4 allow Contracting Parties to require the recipients of non-contributory benefits who are nationals of other Contracting Parties to complete a prescribed period of residence. However, ... the Committee reserves the right to assess the proportionality of length of residence required.[723]

The right to equal treatment presupposes exception of any form of discrimination, namely, both direct and indirect discrimination. In one of its conclusions the European Committee of Social Rights stated that

> "the Contracting Parties should avoid indirect discrimination, for instance conditions which are imposed on both their own nationals and those of other Contracting Parties but are more difficult for the latter to meet and which therefore represent a greater obstacle for them.[724]

What about the child benefits the European Committee of Social Rights concluded that a residence requirement in respect of children is in conformity with Article 12§4[725]. At the same time, the Committee stated that

> "As regards the payment of family benefits, the Committee considers that according to Article 12§4, any child resident in a state party is entitled to the payment of family benefits on an equal footing with nationals of the state concerned. Therefore, whoever is the beneficiary under the social security system, i.e. whether it is the worker or the child, state party are under the obligation to secure through unilateral measures the actual payment of family benefits to all children residing on their territory. In other words, imposing an obligation of residence of the child concerned on

721. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12§4.
722. Conclusions XIII-2 (1994), Norway.
723. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12§4.
724. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12§4.
725. Conclusions 2006, Statement of Interpretation on Article 12§4.

> the territory of the state is compatible with Article 12§4 and its Appendix. However, since not all countries apply such a system, states applying the 'child residence requirement' are under the obligation, in order to secure equal treatment within the meaning of Article 12§4, to conclude within a reasonable period of time bilateral or multilateral agreements with those states which apply a different entitlement principle.[726]

In this context it should also be noted that equality of treatment does not necessarily mean that family allowances should be paid at the same amount when the children for whom it is granted are not residents of the same country as the recipient. The European Committee of Social Rights considers that the level of benefit may in this case be reduced where the cost of living in the child's country of residence is significantly lower. Hence, family allowance can in principle be paid at a reduced rate when the children do not reside within the territory of the institution paying the benefit, provided that the cost of living in the children's country of residence is considerably lower and the reduction is proportional to the difference in the cost of living between the countries in question.[727]

The invalidity benefit, old age benefit, survivor's benefit and occupational accident or disease benefit acquired under the legislation of one state according to the eligibility criteria laid down under national legislation are maintained irrespective of whether the beneficiary moves between the territories.[728] Due to the particular nature of unemployment benefit, which is a short-term benefit closely linked to trends in the labour market, Article 12§4 does not require it to be exported.[729]

Article 12§4 subparagraph b) obliges State Parties to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the State Parties.

The maintenance of accruing rights may be implemented either via conclusion of appropriate bilateral and multilateral agreements or unilaterally – by various legislative or administrative measures.

According to the European Committee of Social Rights states that have ratified the European Convention on Social Security are presumed to have made sufficient efforts to guarantee the retention of accruing rights and to secure equal treatment as regards aggregation of insurance or employment periods towards non-nationals.[730]

IMPLICATIONS FOR UKRAINE

Initially, when Ukraine ratified the European Social Charter in 2006, none of the paragraphs of the Article 12 of the Charter had been accepted.

Upon examination of Ukrainian report on non-accepted provisions 2017, the Committee stated

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726. Conclusions 2006, Cyprus.
727. Conclusions XIII-4 (1996), Statement of Interpretation on Article 12§4; Conclusions XIV-1 (1998), Germany.
728. Conclusions XIV-1 (1998), Finland; Conclusions XIV-1(1998) Norway.
729. Conclusions XVI-1 (2002), Belgium.
730. Conclusions 2006, Italy.

that there were no significant obstacles, in law and practice, for the acceptance of paragraphs 12§2 and 12§3 of the Charter by Ukraine. However, the necessity of additional clarification led to defer the final conclusion about the 12§2.

By contrast, the Committee reached the opposite conclusions on paragraphs 1 and 4 of Article 12 of the Charter. In the Committee's view, the situation in Ukraine was not fully in compliance with mentioned parts of the Article 12[731].

Later that year, when the result of the Committee's examination was presented, Ukraine decided to be bound by paragraphs 3 and 4 of the Article 12 of the Charter.

Article 12, Paragraph 1

Ukraine has not accepted paragraphs 1 and 2 of the Article 12 of the ESC.

In Conclusions 2017, the European Social Charter (revised) agreed that the social security system of Ukraine has covered the traditional risks demanded by Article 12§1, but the Committee underlined that a social security system had to guarantee the adequacy of the benefits served and reiterated its opinion according to which, some types of benefits was found insufficient to meet the criteria of adequacy within the first examination. From that time, no information indicating that the level of benefits had been significantly improved was provided.[732]

The Ukrainian social security system is based on several dozens of comprehensive laws and hundreds of regulatory acts. Many of them a lack harmonisation with budget expenditures; some acts are outdated, do not correspond to present-day realities in social security and are discordant inter se. The system of social benefits, subsidies and types of aid is rather extensive and confusing; there is no precise official data on the number of existing types of different payments, benefits, allowances and supplements.[733] The amount of some social payments is unexplained. The victims of the Chornobyl disaster have a right to annual rehabilitation benefit under the Cabinet of Ministers Order No 562, 12 July 2005 with amendments "On annual rehabilitation benefits to citizens suffered following the Chornobyl disaster". According to this Act the sums of payments still are between 75 and 120 UAH which equalled approximately two and three and a half Euros respectively.

In accordance with the Verkhovna Rada Resolution "On the recommendations of the parliamentary hearing "Problems of calculation of the subsistence level in Ukraine" No 620-IX, 19 May 2020, the global verification of all social benefits calculated on the basis of subsistence minimum level, to identify the levels of budgetary expenditures to fund them, separately under each type of social benefits and each category of their beneficiaries had to be presented to the Verkhovna Rada in August 2020. By the end of November 2020, the results of such verification have not been presented to the public yet.

Article 12, Paragraph 2

As it was mentioned before, the Committee has not found significant obstacles for the ratification

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731. Wisniewska-Cazals Danuta Procedure on non-accepted provisions of the European Social Charter. Council of Europe, September, 2020. - 20p.
732. European Committee of Social Rights, Second report on the non-accepted provisions of the European Social Charter, Ukraine. April 2017. – P.7.
733. Fedorova A. Analysis of the national legislation of Ukraine providing for social benefits in the context of the execution of the European Court of Human Rights judgements in the Burmych and Others v. Ukraine group of cases, other ECtHR judgements on the non-enforcement of decisions of the Ukrainian national courts on social issues// Council of Europe Project "Promoting social human rights as a key factor of sustainable democracy in Ukraine", September, 2020, P. 7.

the Article 12§2 by Ukraine.[734] In 2016, Ukraine signed the European Code of Social Security, afterwards, ratified ILO Convention No 102 on social security (Minimum standards). Therefore, the first steps towards to the ratification of the Article 12§2 have been made. However, the general situation with the social protection system of Ukraine, which needs reform, remains difficult.

Article 12, Paragraphs 3, 4

The amendments to the Law of Ukraine "On the Ratification of the European Social Charter (revised)" which added paragraphs 3 and 4 of the Article 12 to the list of ratified provisions of the Charter by Ukraine, was adopted on 17 May 2017.[735] Consequently, the Ukrainian report on the thematic group "Health, social security and social protection" that State Parties had to prepared by 31 October 2016, could not include the analysis of Article 12 and even more so, the Committee indicated in its conclusions adopted on January 2018 that Ukraine has accepted all provisions from the Group except Articles 12 and 13 of the Charter.

The application of the Article 12 by the national courts

Despite the partial ratification of the Article 12 in 2017 (ten years after the Charter entered into force for Ukraine), national courts, including the Supreme Court applied the Article 12, especially in pension matters, with increasing frequency.

In case № 640/14865/16-a regarding the refusal of the plaintiff to reinstate the payment of previously granted pension for retirement and oblige the defendant to renew the payment of the previously assigned pension for years of service, the Supreme Court in its judgment taken 20 October 2020 underlined:

According to Article 12 of the Charter, in order to ensure the effective realisation of the right to social security, the State Parties undertake, in particular, to establish a social security system or to maintain its functioning; to maintain the social security system at a satisfactory level, at least at a level equal to the level required for the ratification of the European Social Security Code; take measures, by concluding relevant bilateral and multilateral agreements or otherwise, and in accordance with the conditions set out in such agreements, to ensure, inter alia, equality between their own nationals and nationals of other State Parties with regard to social security rights, including the preservation of benefits provided by the legislation on social security, regardless of the movement of protected persons in the territories of the State Parties.[736]

In another judgment adopted 19 December 2019 in case № 442/8041/15-a, the Administrative Cassation Court quoted the Article 12 entirely.[737]

Considering the case of the termination of pension benefits of internally displaced person according to the grounds not provided by the laws of Ukraine, the Supreme Court, listing the international acts ratified by Ukraine, in which the principles of the welfare state are embodied, also indicated the European Social Charter, and then, the Court referred separately to Article 12 of the Charter:

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734. Ukraine has not provided the Committee with the specific information on the paragraph 12.2 within the second report on non-accepted provisions of the ESC, therefore, the Committee made references to the previous report. See more: European Committee of Social Rights, Second report on the non-accepted provisions of the European Social Charter, Ukraine. April 2017.

735. Law of Ukraine, On the Amendments to paragraph 2 of the "Law of Ukraine on the Ratification of the European Social Charter (Revised)", N 2034-VIII, 17 May, 2017. https://zakon.rada.gov.ua/laws/show/2034-19#Text

736. The Supreme Court, Judgment of 20 October 2020, case 640/14865/16-a, https://reyestr.court.gov.ua/Review/92334240

737. The Supreme Court, Judgment of 19 December 2019, case № 442/8041/15-a, https://reyestr.court.gov.ua/Review/86460178

…In particular, according to Article 12 of the European Social Charter (revised) of 3 May 1996, the state is obliged to maintain the functioning of the social security system, its satisfactory level, to make efforts to gradually strengthen it, and so on…[738]

In 2010, the former Supreme Administrative Court of Ukraine in the case on granting the status of a participant of military activities and issuing a certificate of a participant in military activities, considered the applicant's reference to Article 12 of the Charter and defined that:

> …the European Social Charter has been ratified, but Article 12 has not been included in the list of ratified provisions of the Charter, in connection with this, Ukraine has no international obligations under this exact article and it is not applicable in this case…[739]

The presented examples demonstrate various approaches of national judges to the application Article 12 of the Charter.

Analysis of the provisions of the European Social Charter (revised) on the right to social and medical assistance (Article 13)

Ukraine has not ratified Article 13 of the Charter. The Committee analysed Ukrainian legislation and practice within the second report on non-accepted provisions of the Charter by Ukraine in 2017. Taking into account the inadequate level of social assistance, the national subsistence minimum in the light of interpretation of appropriateness of assistance by the Committee, it was considered that situation in Ukraine was not in conformity with §1 Article 13. On some paragraphs of Article 13, the Committee found no particular obstacles to the immediate acceptance, and needed more information and clarification for the conclusion on 13§3.

Analysis of the provisions of the European Social Charter (revised) on the right to benefit from social welfare services (Article 14)

Article 14 of the European Social Charter (revised) concerns the right to benefit from social welfare services.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

With a view to ensuring the effective exercise of the right to benefit from social welfare services, **Article 14§1** obliges State Parties to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment.

The right to social welfare services potentially applies to all individuals and groups in the community. However, several groups were specified in the case-law of the European Committee of Social Rights. For instance, children, older persons, people with disabilities, young people in difficulty and young offenders, minorities (migrants, Roma, refugees, etc.), the homeless, alcoholics and drug addicts, battered women and former detainees. As mentioned above, the list is not exhaustive as the right to social welfare services must be open to all individuals and groups in the community. It does, however, give an idea of the groups in which the Committee systematically

738. The Supreme Court, Judgment of 31 October 2018, Case № 263/4121/17 https://reyestr.court.gov.ua/Review/77587024
739. The Supreme Administrative Court of Ukraine, judgment, case №2a-7265/09/1570, 3.08.2010, https://reyestr.court.gov.ua/Review/10584688

takes an interest because of their more vulnerable situation in society.[740]

It should be noted that Article 14 provides a general right to benefit from social welfare services. At the same time, the other provisions of the Charter deal with social services for specific target groups and define services "with a narrowly specialised objective", for instance, Article 13§3. Hence, in cases when these various provisions have not been accepted by a State Party the situation with regard to social services for the specific target groups concerned is examined under Article 14. The European Committee of Social Rights stated with this regard that issues such as childcare, child-minding, domestic violence, family mediation, adoption, foster and residential childcare, services relating to child abuse, and services for the older are primarily covered by Articles 7§10, 16, 17, 23 and 27. Co-ordination measures to fight poverty and social exclusion are dealt with under Article 30 of the European Social Charter (revised), while social housing services and measures to combat homelessness are dealt with under Article 31 of the European Social Charter (revised).[741]

According to the European Committee of Social Rights social services include in particular counselling, advice, rehabilitation and other forms of support from social workers, home help services (assistance in the running of the home, personal hygiene, social support, delivery of meals), residential care, and social emergency care (shelters).[742]

With regard to the quality of social welfare services the European Committee of Social Rights defines: The right to social services must be guaranteed in law and in practice. Effective and equal access to social services implies that:

- The general eligibility criterion regulating access to social services is the lack of personal capabilities and means to cope. The goal of welfare services is the well-being, the capability to become self-sufficient and the adjustment to the social environment of the individual;

- An individual right of access to counselling and advice from social services shall be guaranteed to everyone likely to need it. Access to other kind of services can be organised according to eligibility criteria, which shall be not too restricted and at any event ensure care in case of urgent need;

- The rights of the client shall be protected: any decision should be made in consultation with and not against the will of the client; remedies shall be available in terms of complaints and a right to appeal to an independent body in urgent cases of discrimination and violation against human dignity;

- Social services may be provided subject to fees, fixed or variable, but they must not be so high as to prevent the effective access of these services. For persons lacking adequate financial resources in the terms of Article 13§1 such services should be provided free of charge;

- The geographical distribution of these services shall be sufficiently wide;

- Recourse to these services must not interfere with people's right to privacy, including protection of personal data. Social services must have resources matching their responsibilities and the changing needs of users.

This implies that:

740. Conclusions 2009, Statement of Interpretation on Article 14§1.
741. Conclusions 2005, Bulgaria.
742. Conclusions 2005, Bulgaria.

- staff shall be qualified and in sufficient numbers;
- decision–making shall be as close to users as possible;
- there must be mechanisms for supervision the adequacy of services, public as well as private".[743]

With a view to ensuring the effective exercise of the right to benefit from social welfare services, **Article 14§2** of the European Social Charter (revised) obliges the State Parties to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

The European Committee of Social Rights states with this regard:

> Article 14§2 requires States to provide support for voluntary associations seeking to establish social welfare services. This does not imply a uniform model, and States may achieve this goal in different ways: they may promote the establishment of social services jointly run by public bodies, private concerns and voluntary associations, or may leave the provision of certain services entirely to the voluntary sector. The "individuals and voluntary or other organisations" referred to in paragraph 2 include the voluntary sector, private individuals, and private firms. The Committee examines all forms of support and care mentioned under Article 14§1 as well as financial assistance or tax incentives for the same purpose. It also verifies that the Parties continue to ensure that services are accessible on an equal footing to all and are effective, in keeping with the criteria mentioned in Article 14§1. Specifically, Parties must ensure that public and private services are properly coordinated, and that efficiency does not suffer because of the number of providers involved. In order to control the quality of services and ensure the rights of the clients as well as the respect of human dignity and basic freedoms, effective preventive and reparative supervisory system is required. Article 14§2 also requires States to encourage individuals and organisations to play a part in maintaining services. The Committee looks at action taken to strengthen dialogue with civil society in areas of welfare policy which affect the social welfare services. This includes action to promote representation of specific user–groups in bodies where the public authorities are also represented, and action to promote consultation of users on questions concerning organisation of the various social services and the aid they provide.[744]

Moreover, according to the European Committee of Social Rights Article 14§2 also requires State Parties to encourage individuals and organisations to play a part in maintaining services. The Committee looks at action taken to strengthen dialogue with civil society in areas of welfare policy which affect the social welfare services. This includes action to promote representation of specific user–groups in bodies where the public authorities are also represented, and action to promote

743. Conclusions 2005, Bulgaria.
744. Conclusions 2005, Bulgaria, Statement of Interpretation on Article 14§2.

consultation of users on questions concerning organisation of the various social services and the aid they provide.[745]

IMPLICATIONS FOR UKRAINE

According to the previous questions of the Committee, Ukraine underlined in its report 2017 that everyone and separate groups of persons being in difficult life circumstances are entitled to social services irrespective of the fact whether they have relatives or not. Moreover, social services are available for foreigners and stateless persons who live in Ukraine.

However, the main concern of the Committee was about quality of social services, including the amount of public spending and implementation the Methodical Recommendations for Monitoring and Assessment of Quality of Social Services adopted in 2012.

Within the provided information the Committee was not able to make an exact conclusion on the §1 of the Article 14. The absence of a conclusion cannot be considered as a positive tendency due to the negative Committee's previous conclusions, acknowledging that Ukraine did not fulfil its obligations under Article 14§1. Nevertheless, during the reporting period that was finished in 2020, new acts of the social services entered into force, including the Law of Ukraine "On social services"[746] in 2019, the Law of Ukraine "On the organisation of social services" [747]in 2020, etc.

The Committee also analysed the national legislation and practice on the issue relating to the voluntary activities in providing social services and made the same positive conclusion as it had taken in the previous reporting period.

Analysis of the provisions of the European Social Charter (revised) on the right of the family to social, legal and economic protection (Article 16)

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Firstly, it is important to note how the term "family" should be understood under the discussed provision. The notion of the "family" is variable according to the different definitions in domestic law. Hence, the Charter refers to the definitions used in domestic law of each State Party and considers every constellation defined as "family" by domestic law as being covered by Article 16. However, domestic law must not provide for an unduly restrictive definition and the scope of Article 16 is not restricted to family based on marriage.[748] The European Committee of Social Rights examines the means used by states to ensure the social, legal and economic protection of the various types of families in the population, especially single parent families, with a particular emphasis on vulnerable families, including Roma ones.[749] Moreover, Appendix to the European Social Charter considers that the protection afforded in this provision covers also single-parent families.

It should be emphasised that the requirement of equal treatment is applicable also in the context of Article 16 of the European Social Charter. In particular, State Parties must ensure equal treatment of foreign nationals of other States Parties who are lawfully resident or regularly working in their territory with respect to family benefits. As was stated by the European Committee of Social Rights

745. Conclusions 2005, Bulgaria.
746. The Verhovna Rada, Law of Ukraine On social services, No 2671-VIII, 17.01.2019, https://zakon.rada.gov.ua/laws/show/2671-19#Text
747. The Cabinet of Ministers of Ukraine, Resolution of the Cabinet of Ministers "On the organisation of social services", No 01.06.2020, https://zakon.rada.gov.ua/laws/show/587-2020-%D0%BF#Text
748. Conclusions 2011, Azerbaijan.
749. Conclusions 2006, Statement of Interpretation on Article 16.

> Since family allowances are non-contributory social security benefits, the Committee accepts, by analogy with Article 12§4, that the Contracting Parties, in order to prevent abuses, require beneficiaries to be resident in the country for a certain period before they qualify for benefits. It reserves the right, however, to determine whether the required period of residence is in proportion with the desired result. In this case the Committee considers it reasonable to require one of the parents to have been resident in the country for six months.[750]

At the same time, as was analysed in the frames of the study of Article 12, the proportionality of such length of residence requirements is examined on a case-by-case basis, noting also the nature and purpose of the benefit. For instance, in one of the cases a period of 6 months was considered as reasonable and therefore in conformity with Article 16.[751] In another case periods of 1 year and 3 years were considered as excessive and therefore in violation of Article 16.[752]

As it derives from the wording of Article 16, social protection of family life is implemented by various means, such as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

Though the right to housing is stipulated under Article 31 of the Charter, according to the European Committee of Social Rights this does not preclude a consideration of relevant housing issues arising under Article 16 which addresses housing in the context of securing the right of families to social, legal and economic protection.

> In this context and with respect to families, Article 16 focuses on the right of families to an adequate supply of housing, on the need to take into account their needs in framing and implementing housing policies and ensuring that existing housing be of an adequate standard and include essential services.[753]

Moreover, the right to housing permits the exercise of many other rights – both civil and political as well as economic, social and cultural. It is also of central importance to the family. The Committee has also stated that adequate housing refers not only to a dwelling which must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence. Furthermore, the obligation to promote and provide housing extends to security from unlawful eviction[754].

With regard to the evictions the European Committee of Social Rights stated:

> The Committee notes with regard to Article 31§2 that States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned,

750. Conclusions XIV-1 (1998), Sweden.
751. Conclusions XIV-1 (1998), Sweden.
752. Conclusions XVIII-1 (2006), Denmark.
753. European Roma Rights Center (ERRC) v. Bulgaria, Complaint No. 31/2005, Decision on admissibility of 10 October 2005, §9.
754. European Roma Rights Centre (ERRC) v. Greece, Complaint No. 15/2003, Decision on the merits of 8 December 2004, §24.

> and that alternative accommodation is available (see Conclusions 2003, Article 31§2, France, p. 225, Italy, p. 345, Slovenia, p. 557, and Sweden, p. 653). The law must also establish eviction procedures, specifying when they may not be carried out (for example, at night or during winter), provide legal remedies and offer legal aid to those who need it to seek redress from the courts. Compensation for illegal evictions must also be provided.[755]

What about childcare facilities, it should be noted that where a State Party has accepted Article 27 of the Charter child care facilities and arrangements are examined under the discussed provision.[756] Childcare structures can be public or private. According to the European Committee of Social Rights State Parties are required to ensure that childcare facilities are available, affordable and of good quality (coverage with respect to the number of children aged 0-6, ratio of staff to children, staff training, suitable premises and cost of childcare to parents, etc.)[757]

Moreover, in order to ensure that the views of families are taken into account in the formulation of family policy, all civil organisations representing families should be consulted by the relevant authorities.[758]

Under Article 16 State Parties are also required to ensure the economic protection of the family by appropriate means. The primary means should be family or child benefits provided as part of social security, available either universally or subject to a means-test.

As to the family benefits, they must constitute an adequate income supplement for a significant number of families. Adequacy is assessed with respect to the median equivalised income (Median equivalised income (Eurostat): the income of a household is established by summing all monetary income received from any source by each member of the household. In order to reflect differences in household size and composition, this total is divided by the number of "equivalent adults" using a standard scale (the so-called modified OECD equivalence scale). The resulting figure is attributed to each member of the household).

The level of benefit should be adjusted as necessary to keep pace with inflation. Other forms of economic protection, such as birth grants, additional payments to large families or tax relief in respect of children, are also relevant to the implementation of this provision.[759]

IMPLICATIONS FOR UKRAINE

Legal protection of families

According to the legal protection of the family, the Committee drew attention to 2 aspects: the rights and obligations of spouses, settlement of disputes including in respect of children and mediation services. In its conclusions of 2011, 2015 and 2019, the European Committee of Social Rights constantly recognised that Ukrainian legislation and practice was in conformity with the requirements of Article 16 in this issue.

On the other side, the Committee issued opposite conclusions on the seconds issue, on domestic

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755. European Roma Rights Centre (ERRC) v. Italy, Complaint No. 27/2004, Decision on the merits of 7 December 2005, §41.
756. Conclusions 2011, Azerbaijan.
757. Conclusions XVII-1 (2004), Turkey.
758. Conclusions 2006, Statement of Interpretation on Article 16.
759. Conclusions 2006, Estonia, Statement of Interpretation on Article 16.

violence against women. The ECSR reiterated that States Parties are required to ensure an adequate protection with respect to women, both in law and in practice. Adequate protection of women should be dealt with in the context of the Recommendation Rec (2002)5 of the Committee of Ministers of the Council of Europe to member States on the protection of violence against women and Parliamentary Assembly Recommendation 1681 (2004) on a campaign to combat domestic violence against women in Europe.[760]

In general, the Committee not only analyses the national law and practice of the state described in the report, but also has the opportunity to include, if necessary, the materials and conclusions of other international institutions. Thus, the the European Social Charter (revised) drew attention of Ukraine to the Opinion of the UN Committee on the Elimination of Discrimination against Women in 2017 and asked Ukraine for additional information.

To bring the national legislation into accordance of the Council of Europe standards, the Criminal Code and Code of Criminal Procedure was amended in order to increase the effectiveness of the mechanism of the prevention and counteraction to domestic violence and ratify finally the Istanbul Convention (2017), also the special Law of Ukraine "On preventing and combating domestic violence" (2018) was adopted. New legislation has already been examined by the Committee due to the period of examination, but the Istanbul Convention has not been ratified up to the end of 2020.

Despite the non-ratification of the Istanbul Convention, Ukrainian courts have already applied it. For instance, the Criminal Cassation Court in its judgment in case № 647/1931/19 adopted on 7 April 2020, stipulated:

The Court considers that Law № 2227, which amended Article 284 § 1 (7) of the Code of Criminal Procedure… at issue in the present case, seeks to implement the provisions of the Council of Europe Convention on the Prevention of Violence against Women and Domestic Violence.

Although the Istanbul Convention has not been ratified yet by Ukraine, the Court's direct reference to it in the Law, obliges the Court to take into account not only national law but also the understanding of the "domestic violence" and "domestic violence crime" in the light of the provisions of this Convention, as well as other international treaties and the relevant practice of international bodies, in so far as they are relevant to the understanding of its provisions.[761]

Social and economic protection of families

Within the examination of childcare facilities, the Committee payed attention to alternative family-oriented care systems that according to UNICEF information, were underdeveloped and thousands of children were separated from their families and living in various child-care institutions.

In the context of equal access to family benefits for foreign nationals, the the European Social Charter (revised) recalled Ukraine that State Parties may apply a length of residence requirement as regards non-contributory benefits on condition that the length is not excessive. 6-month period is reasonable within the requirements of Article 16, and on the contrary, a period of a year and more would not be in conformity with requirements for length of residence.[762]

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760. European Committee of Social Rights, Conclusions 2019. Ukraine. 20 March, 2020. – P.26.
761. The Supreme Court, Judgment of 7 April 2020, case № 647/1931/19 https://zakononline.com.ua/court-decisions/show/89035028
762. European Committee of Social Rights, Conclusions 2019. Ukraine. 20 March, 2020. – P.27.

Level of family benefits

Analysing the information provided by Ukraine and the correlation between the amount of payments and the subsistence level, the Committee emphasised on the necessity of

> "child allowances to constitute an adequate income supplement, which is the case when they represent a significant percentage of the median equivalised income.[763]

However, the lack of requested information in the report, including information about the median income, led to the negative conclusions of the Committee.

During the entire period of the monitoring Ukraine's commitments of its obligations under Article 16, the Committee pointed to 2 situations: women were not ensured adequate protection against domestic violence, in law and in practice; it has not been established that the level of family benefits was adequate.[764]

Analysis of the provisions of the European Social Charter (revised) on the right to protection against poverty and social exclusion (Article 30)

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

According to the European Committee of Social Rights living in a situation of poverty and social exclusion violates the dignity of human beings. With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion Article 30 requires States parties to adopt an overall and coordinated approach, which shall consist of an analytical framework, a set of priorities and corresponding measures to prevent and remove obstacles to access to social rights as well as monitoring mechanisms involving all relevant actors, including civil society and persons affected by poverty and exclusion. It must link and integrate policies in a consistent way moving beyond a purely sectoral or target group approach. The measures taken in pursuance of the approach must promote access to social rights, in particular employment, housing, training, education, culture and social and medical assistance. The Committee also emphasised that this list does not exhaust the areas in which measures must be taken to address the multidimensional poverty and exclusion phenomena. The measures should strengthen entitlement to social rights, their monitoring and enforcement, improve the procedures and management of benefits and services, improve information about social rights and related benefits and services, combat psychological and socio-cultural obstacles to accessing rights and where necessary specifically target the most vulnerable groups and regions. As long as poverty and social exclusion persist, they should also represent an increase in the resources deployed to realise social rights. Finally, the measures should be adequate in their quality and quantity to the nature and extent of poverty and social exclusion in the country concerned.[765]

The Committee takes into account a set of indicators in order to assess in a more precise way the effectiveness of policies, measures and actions undertaken by State Parties within the framework of this overall and co-ordinated approach. One of the key indicators in this respect is the level of resources (including any increase in this level) that have been allocated to attain the objectives of the strategy,[766] in so far as "adequate resources are an essential element to enable people to become self-sufficient".[767]

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763. Ibid., P.28.
764. Ibid.
765. Statement of interpretation of Article 30, Conclusions 2003, France.
766. Statement of Interpretation of Article 30, Conclusions 2005.
767. Statement of Interpretation of Article 30, Conclusions 2003, France.

Concerning the repercussions of the economic crisis on social rights, the Committee held that, by acceding to the Charter, the State Parties have accepted to pursue by all appropriate means, the attainment of conditions in which inter alia the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised. Accordingly, it has concluded that "the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most.[768]

The Committee also considers that what applies to the right to health and social protection should apply equally to labour law and that while it may be reasonable for the crisis to prompt changes in current legislation and practices in one or other of these areas to restrict certain items of public spending or relieve constraints on businesses, these changes should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter.[769]

One of the most important points in this context is the fact that the two dimensions of Article 30, poverty and social exclusion, constitute an expression of the principle of indivisibility which is also contained in other provisions of the Charter. The European Committee of Social Rights considers that the reference to the social rights enshrined in Article 30 should not be understood too narrowly. In fact, the fight against social exclusion is one area where the notion of the indivisibility of fundamental rights takes a special importance. In this regard, the right to vote, as with other rights relating to civic and citizen participation, constitutes a necessary dimension in social integration and inclusion and is thus covered by Article 30.[770]

It should also be noted that close links exist between the effectiveness of the right recognised by Article 30 of the Charter and the enjoyment of the rights recognised by other provisions, such as the right to work (Article 1), access to health care (Article 11), social security allowances (Article 12), social and medical assistance (Article 13), the benefit from social welfare services (Article 14), the rights of persons with disabilities (Article 15), the social, legal and economic protection of the family (Article 16) as well as of children and young persons (Article 17), right to equal opportunities and equal treatment in employment and occupation without sex discrimination (Article 20), the rights of the elderly (Article 23) or the right to housing (Article 31), without forgetting the important impact of the non-discrimination clause (Article E), which obviously includes non-discrimination on grounds of poverty.

Hence, together with the indicators mentioned above, when assessing the respect of Article 30, the Committee also takes into consideration the national measures or practices which fall within the scope of other substantive provisions of the Charter in the framework of both monitoring systems (the reporting procedure and the collective complaint procedure). This approach does not mean that a conclusion of non-conformity or a decision of violation of one or several of these provisions automatically or necessarily lead to a violation of Article 30, but such a conclusion or decision may, depending on the circumstances, be relevant in assessing conformity with Article 30.

For instance, in one of its decisions the European Committee of Social Rights stated:

> "Admittedly, as is stated in the complaint, family allowances can form a substantial share of the income of persons living below the poverty threshold. In this respect, the possibility of being placed

768. General Introduction to Conclusions XIX-2 (2009).
769. GENOP-DEI and ADEDY v. Grèce, Complaint No. 65/2011, Decision on the merits of 23 May 2012, §17.
770. ERRC v. France, Complaint No. 51/2008, Decision on the merits of 19 October 2009, §99.

> in uncertain economic and social circumstances through the partial withdrawal of family allowances may result in a reduction of the economic and social protection of families under Article 16 (see above). However, as such, this measure cannot be seen to undermine the coordinated approach of the protection against poverty and social exclusion that should be afforded under Article 30 of the revised Charter.[771]

IMPLICATIONS FOR UKRAINE

The situation in Ukraine has never been found in conformity with the Article 30 since the ratification of the Charter. In the conclusions 2017, the Committee analysed the statistics on poverty (extreme, relative) in Ukraine and concerned about increasing rates.

The Committee asked Ukraine to elaborate and adopted the adequate overall and coordinated approaches to combat poverty and social exclusion which should consist of an analytical framework, a set of priorities and measures to prevent and remove obstacles to access fundamental social rights. In addition, the Committee reiterated its conclusions made for France in 2003 that

> "the measures taken to combat poverty and social exclusion must promote and remove obstacles to access to fundamental social rights, in particular employment, housing, training, education, culture and social and medical assistance.[772]

Consequently, the non-availability of such an approach led to the general negative conclusion that Ukraine breached the commitments under the mentioned Article.

Special attention was payed to omission of any specific expenditure for the implementation of measure for overcoming poverty in the country according to the National Programme for Overcoming and Preventing Poverty. One of the Committee's questions was also about the budgetary resources allocated to combating poverty and social exclusion and sufficiency of their amount. This issue is being vigorously discussed, in particular, in the context of the finding ways to enforce the judgment of the European Court of Human Rights in case "Burmych and Others v. Ukraine" and other judgments of the European Court on non-enforcement of decisions of the Ukrainian courts on social matters. The situation is getting worse every year due to financial failure of Ukraine to fulfil its social obligations prescribed by nation law in force.[773] The social obligations that Ukraine has undertaken and enshrined in its national legislation often do not correspond to its financial capabilities and the Law of Ukraine on the State budget.

Within the respect of this Article, the Committee highlighted the complementary and interrelated nature of the provisions of the Charter, that, except the negative conclusion on the Article 30, caused to conclusions on non-conformity under other articles of the Charter, which are linked to the Article 30 (in particular, Article 23, Article 31.2 etc.)

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771. EUROCEF v. France, Complaint No. 82/2012, Decision on the merits of 19 March 2013, §59.
772. European Committee of Social Rights, Conclusions 2017. Ukraine. January, 2018, P.1232.
773. Analysis of the national legislation of Ukraine providing for social benefits in the context of the execution of the European Court of Human Rights judgment in the Burmych and Others v. Ukraine case, others ECHR judgments on non-enforcement of decisions of the Ukrainian national courts on social issues. Analysis was prepared by A. Fedorova within the Council of Europe Project "Promoting social human rights as a key factor of sustainable democracy in Ukraine", September, 2020. – 23 p.

Analysis of the provisions of the European Social Charter (revised) on the right to housing (Article 31)

Article 31 concerns the right to housing.

Pursuant to the Explanatory Report to the European Social Charter

> "in order to ensure a right to housing, this provision obliges Parties to take measures in so far as possible aiming to progressively eliminate homelessness, to promote access to housing of an adequate standard and to make the price of housing accessible to those without adequate resources.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

For the State Parties it imposes a positive obligation to take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question. States enjoy a margin of discretion in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources. Nonetheless, according to the case law of the European Committee of Social Rights

> "when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources[774].

Moreover, implementation of the Charter requires state parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein.[775]

The actual wording of Article 31 of the Charter cannot be interpreted as imposing on states an obligation of "results". However, the European Committee of Social Rights considers that the rights recognised in the the European Social Charter (revised) must take a practical and effective, rather than purely theoretical, form. This means that, for the situation to be in conformity with the treaty, State Party must:

- a) adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;
- b) maintain meaningful statistics on needs, resources and results;
- c) undertake regular reviews of the impact of the strategies adopted;
- d) establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;

774. European Roma Rights Center (ERRC) v. Bulgaria, Complaint n°31/2005, Decision on the merits of 18 October 2006, §35.
775. International Movement ATD Fourth World v. France, complaint n° 33/2006, Decision on the merits of 5 December 2007, §61.

e) pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.

According to Article 31§1 of the Charter with a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed to promote access to housing of an adequate standard.

The European Committee of Social Rights considers that parties shall guarantee equal treatment with respect to housing on the grounds of Article E of the Charter. Equal treatment must be assured to the different groups of vulnerable persons, particularly low-income persons, unemployed, single parent households, young persons, persons with disabilities including mental health problems, persons internally displaced due to wars or natural disasters etc. The principle of equality of treatment and non-discrimination covers not only paragraph one but the rest of Article 31 as well[776].

In this context it is important to reveal what the wording "adequate housing" means. According to the European Committee of Social Rights "adequate housing" means a dwelling which is structurally secure, safe from a sanitary and health point of view and not overcrowded, with secure tenure supported by the law if it possesses all basic amenities, such as water, heating, waste disposal; sanitation facilities; electricity; etc and if specific dangers such as, for example, the presence of lead or asbestos are under control.[777] With this regard the Committee also noted that over-crowding means that the size of the dwelling is not suitable in light of the number of persons and the composition of the household in residence. Security of tenure, in turn, means protection from forced eviction and other threats, and it will be analysed in the context of Article 31§2.

It is important to note that according to the Committee, the standards of adequate housing shall be applied not only to new constructions, but also gradually, in the case of renovation to the existing housing stock. They shall also be applied to housing available for rent as well as to housing occupied by their owners.[778]

The European Committee of Social Rights considers that it is incumbent on the public authorities to ensure that housing is adequate through different measures such as, in particular, an inventory of the housing stock, injunctions against owners who disregard urban development rules and maintenance obligations for landlords. Public authorities must also guard against the interruption of essential services such as water, electricity and telephone.[779]

Even if under domestic law, local or regional authorities, trade unions or professional organisations are responsible for exercising a particular function, State Parties to the Charter are responsible, under their international obligations to ensure that such responsibilities are properly exercised. Thus, ultimate responsibility for policy implementation, involving at a minimum supervision and regulation of local action, lies with the Government which must be able to show that both local authorities and itself have taken practical steps to ensure that local action is effective.[780]

It is also important to note that according to the European Committee of Social Rights effectiveness of the right to adequate housing implies its legal protection. This means that tenants or occupiers

776. Conclusions 2003, Italy.
777. Conclusions 2003, France.
778. Conclusions 2003, France.
779. Conclusions 2003, France.
780. European Roma Rights Center (ERRC) v. Italy, Complaint No. 27/2004, Decision on the merits of 7 December 2005, § 26; European Federation of National Organisations Working with the Homeless (FEANTSA) c. France, Complaint No 39/2006, Decision on the merits of 5 December 2007, §79.

must have access to affordable and impartial judicial or other remedies.[781] Moreover, any appeal procedure must be effective.[782]

According to **Article 31§2** of the Charter with a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed to prevent and reduce homelessness with a view to its gradual elimination.

The European Committee of Social Rights considers as homeless those individuals not legally having at their disposal a dwelling or other forms of adequate shelter.[783] The Committee considers that the parties must prevent categories of vulnerable people from becoming homeless. This requires states to introduce a housing policy for all disadvantaged groups of people to ensure access to social housing.[784] Reducing homelessness requires the introduction of emergency measures, such as the provision of immediate shelter. It likewise requires measures to help the homeless to overcome their difficulties and to prevent them from returning to a situation of homelessness.[785]

Though State authorities enjoy a wide margin of discretion in measures to be taken concerning town planning, according to the European Committee of Social Rights they must strike a balance between the general interest and the fundamental rights of the individuals, in particular the right to housing and its corollary of ensuring individuals do not become homeless.[786]

In this context the issues with regard to eviction should also be analysed. At first it should be noted that according to the European Committee of Social Rights Articles 16 and 31, though different in personal and material scope, partially overlap with respect to several aspects of the right to housing. In this respect, the notions of adequate housing and forced eviction are identical under Articles 16 and 31.[787]

The European Committee for Social Rights states with regard to forced eviction:

> "Forced eviction can be defined as the deprivation of housing which a person occupied due to insolvency or wrongful occupation. Legal protection for persons threatened by eviction must include, in particular an obligation to consult with the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction. The law must also prohibit evictions carried out at night or during winter and provide legal remedies and offer legal aid to those who are in need to seek redress from the courts. Compensation for illegal evictions must also be provided. When an eviction is justified by the public interest, authorities must adopt measures to re-house or financially assist the persons concerned.[788]

781. Conclusions 2003, France.
782. European Federation of National Organisations Working with the Homeless (FEANTSA) c. France, Complaint No 39/2006, decision on the merits of 5 December 2007, §§ 80-81.
783. Conclusions 2003, Italy.
784. Conclusions 2005, Lithuania.
785. Conclusions 2003, Italy.
786. European Roma Rights Center (ERRC) v. Bulgaria, Complaint No. 31/2005, Decision on the merits of 18 October 2006, §54.
787. Centre on Housing Rights and Evictions (COHRE) v. Italy, Complaint No. 58/2009, Decision on the merits of 25 June 2010, §115.
788. Conclusions 2003, Sweden.

It is important to note that according to the Committee illegal occupation of a site or dwelling may justify the eviction of the illegal occupants. However, the criteria of illegal occupation must not be unduly wide, the eviction should take place in accordance with the applicable rules of procedure and these should be sufficiently protective of the rights of the persons concerned.[789] State Parties must also make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and that alternative accommodation is available. The law must also establish eviction procedures, specifying when they may not be carried out (for example, at night or during winter), provide legal remedies and offer legal aid to those who need it to seek redress from the courts. Compensation for illegal evictions must also be provided.[790]

According to Article 31§2, homeless persons must be offered shelter as an emergency solution. Moreover, to ensure that the dignity of the persons sheltered is respected, shelters must meet health, safety and hygiene standards and, in particular, be equipped with basic amenities such as access to water and heating and sufficient lighting. One of the basic requirements is also the security of the immediate surroundings.[791]

The European Committee of Social Rights considers that Article 31§2 obliges State Parties to gradually reduce homelessness with a view to its elimination. Reducing homelessness implies the introduction of measures, such as provision of immediate shelter and care for the homeless and measures to help such people overcome their difficulties and prevent a return to homelessness.[792] With regard to persons accommodated in emergency shelters, who are regularly resident or regularly working within the territory of the State Party concerned, the Committee recalls that the provision of shelter, however adequate, cannot be considered a lasting solution. They thus must be offered either long-term accommodation suited to their circumstances or housing of an adequate standard as provided by Article 31§1 within a reasonable time.[793]

Moreover, the Committee considers that eviction from shelter of persons present within the territory of a State Party in an irregular manner should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness, which is contrary to the respect for their human dignity. State Parties are not obliged to provide alternative accommodation in the form of permanent housing within the meaning of Article 31§1 for migrants in an irregular situation. The Committee mentioned in its Conclusion with regard to the situation in Ukraine that a national situation is not in conformity with Article 31§2 of the Charter, where the right to shelter is not guaranteed to persons irregularly present, including children, for as long as they are within the jurisdiction of the state.[794]

Article 31§3 with a view to ensuring the effective exercise of the right to housing, obliges State Parties to take measures designed to make the price of housing accessible to those without adequate resources. However, this provision is not accepted by Ukraine.

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789. European Roma Rights Center (ERRC) v. Greece, Complaint n°15/2003, decision on the merits of 8 December 2004, §51.
790. European Roma Rights Center (ERRC) v. Bulgaria, Complaint n°31/2005, decision on the merits of 18 October 2006, §52.
791. Conference of European Churches (CEC) v. the Netherlands Complaint No. 90/2013, decision on the mertis of 1 July 2014, §§138; Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, decision on the merits of 20 October 2009, §62.
792. Conclusions 2003, Italy.
793. Conference of European Churches (CEC) v. the Netherlands Complaint No. 90/2013, decision on the merits of 1 July 2014, §140.
794. Conference of European Churches (CEC) v. the Netherlands Complaint No. 90/2013, decision on the merits of 1 July 2014, §§128-129; Conclusions 2011, Ukraine.

IMPLICATIONS FOR UKRAINE

Ukraine has been ratified paragraphs 1 and 2 of the Article 31, except the paragraph 3.

Criteria for adequate housing

In the submitted report, Ukraine pointed out to the national legislation enshrined criteria for adequate housing that entered into force in 2006. However, the possibility of its application to the housing stock existed before was not indicated. Thereby, the Committee reiterated for Ukraine that criteria for adequate housing must be applied "not only to new constructions, but also gradually to the existing housing stock".[795]

Furthermore, emphasising the importance of establishing proper supervision of housing standards, responsibilities for adequate housing, the Committee took into account its previous conclusions of non-conformity of supervision mechanism of housing standards to the Committee's requirements. The Committee also examined the measures taking by Ukraine in favour of ensuring the right to adequate housing for vulnerable groups, especially internally displaced persons, Roma nationals etc.

Finally, the European Social Charter (revised) stated that Ukraine didn't fulfil the commitments because of lack of sufficient measures taken to improve the substandard housing conditions of Roma.

The Article 47 of the Constitution of Ukraine declares a ban on forced deprivation of housing other than on the basis of the law under the court decision. In addition, citizens in need of social protection are provided with housing by the state and local governments free of charge or for a fee available to them in accordance with the law. However, identifying the lack of information provided on the prevention of homelessness the Committee reserved the situation until receiving further information and reiterated its previous unsatisfactory findings about non-conformity. The Committee assumed that the legal protection of persons threatened by forced eviction is insufficient and the fact that the right to shelter is adequately guaranteed in Ukraine cannot be recognised.

Ukraine has not ratified paragraph 3 of Article 31 of the European Social Charter (revised). In 2017, the Committee analysis stated that among other issues the situation in Ukraine had not been fully in compliance with requirements of para.3 of Article 31 of the Charter. The Committee came to this conclusion based on the information provided by the state on the suspension of funding for many housing and affordable credit programs in 2014.

795. Ibid., P.38.

Part V

Rights of persons with disabilities and older persons

Analysis of the provisions of the European Social Charter (revised) on the right of persons with disabilities to independence, social integration and participation in the life of the community (Article 15)

The European Social Charter guarantees persons with disabilities the right to independence, social integration and participation in the life of the community. All of these must be exercised without discrimination based on disability. The most important and detailed regulation of protection of persons with disabilities is included in Article 15 European Social Charter.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

The words "effective exercise of the right to independence" contained in the introductory sentence to the provision imply, inter alia, that persons with disabilities should have the right to an independent life.[796] The underlying vision of Article 15 ESC is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of "independence, social integration and participation in the life of the community.[797] In the light of this, the non-discrimination norm has a very important role in the disability context and forms an integral part of Article 15 of the Charter.[798] An equality of treatment should exist, not only by law but also in practice, between persons with and without disabilities - nationals of the Contracting Party and foreigners - "in so far as they are nationals of other State Parties" and "are lawfully resident or regularly working within the territory of the Party concerned"[799]. The rights apply to all persons with disabilities regardless of the nature and origin of their disability and irrespective of their age.[800]

In the regulations of the Council of Europe there is no legal definition of disability, person/people with disability or discrimination on the basis of disability. In its decisions and conclusions[801] the European Committee of Social Rights turns directly to the definition of "disability" and "person/people with a disability" endorsed by the WHO in its International Classification of Functioning,

796. Explanatory Report to the European Social Charter (Revised) Strasbourg, 3.V.1996, p. 63.
797. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 48; Conclusions 2003 - Interpretative Statement - Article 15; Digest 2018, p. 157.
798. Conclusions 2003, Statement of Interpretation on article 15; Digest 2018, p. 157.
799. ESC/RevESC Appendix, item 1; Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 48; Conclusions XIV-2 (1998), Statement of Interpretation on article 15; Digest 2018, p. 157.
800. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 48.
801. The ECSR, Conclusions 2016 - Hungary - Article 15 § 1.

Disability and Health (known as the ICF)[802] and to the definition of "discrimination on the basis of disability" used in the United Nations Convention on the Rights of Persons with Disabilities ("CRPD") based on the ICF's model. The ICF is a classification of health and health-related domains and the WHO framework for measuring health and disability at both individual and population levels. The ICF was officially endorsed by all 191 WHO Member States in the Fifty-fourth World Health Assembly on 22 May 2001[803] as the international standard to describe and measure health and disability.

The idea of the ICF is that disability is a complex phenomenon that is both a problem at the level of a person's body and a complex and primarily social phenomena. Disability is always an interaction between features of the person and features of the overall context in which the person lives. Some aspects of disability are almost entirely internal to the person, while other are almost entirely external.[804] ICF defines disability as an umbrella term for impairments, activity limitations and participation restrictions. Disability is the interaction between individuals with a health condition (e.g. cerebral palsy, Down syndrome and depression) and personal and environmental factors (e.g. negative attitudes, inaccessible transportation and public buildings, and limited social supports).

While assessing state legislations under Article 15 ESC, the European Committee of Social Rights finds incompatibility of definitions of disability with the ESC where the definitions of disability and persons with disabilities focus on impairments of an individual rather than on the barriers that he/she faces as such definitions fail to encompass all persons with disabilities, including e.g. those with psychosocial disabilities.[805]

Article 15§1 ESC establishes the right of persons with disabilities to guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private. Securing a right to education for children and others with disabilities plays an important role in advancing their citizenship rights and guaranteeing their fundamental rights.[806]

The rights to vocational guidance and training are laid down in Article 1§4 and Articles 9 and 10 ESC, and Article 15§1 ESC refers specifically to persons with disabilities. Article 15 ESC, by establishing a separate right to guidance, education and vocational training for people with disabilities, aims to offer increased protection to these persons in an area, namely education and employment, in which they are more vulnerable than the rest of the listeners and workforce. Under the approach adopted in Article 15 ESC, the State Party is responsible for adopting measures to help persons with disabilities participate fully and actively in the community. In other words, the effective exercise of the right of persons with disabilities to vocational training and rehabilitation requires specific measures to be taken, which may, if need be, take the form of positive action designed to improve the "employability" of persons with disabilities and their access to and ability to remain in employment. In addition, particular emphasis must be put on the protection of persons who are disabled as a result of an occupational accident or illness.[807]

Under Article 15§1 ESC, the existence of non-discrimination legislation is considered necessary as an important tool for the advancement of the inclusion of children with disabilities into general

802. The World Health Organisation, International Classification of Functioning, Disability and Health (ICF), available at: https://www.who.int/classifications/icf/en/
803. Resolution WHA 54.21.
804. WHO, Towards a Common Language for Functioning, Disability and Health ICF, World Health Organisation, Geneva 2002, p.8-9, available at https://www.who.int/classifications/icf/icfbeginnersguide.pdf?ua=1
805. The ECSR, Conclusions 2016 - Hungary - Article 15§1.
806. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 48; Digest 2018, p. 157.
807. Conclusions XIV-2 - Statement of interpretation - Article 15.

or mainstream educational schemes. Such legislation should, as a minimum, require a compelling justification for special or segregated educational systems and confer an effective remedy on those who are found to have been unlawfully excluded or segregated or otherwise denied an effective right to education. Legislation may consist of general anti-discrimination legislation, specific legislation concerning education, or a combination of the two.[808]

According to Article 15§1 ESC, all persons with disabilities (children, adolescents and adults who face particular disadvantages in education, such as persons with intellectual disabilities) have the right to education and training: primary education, general and vocational secondary education as well as other forms of vocational training. As under Article 10 of the Charter, vocational training under Article 15 encompasses all types of higher education.[809]

Article 15§1 ESC makes it an obligation for State Parties to provide education for persons with disabilities, together with vocational guidance and training, in one or other of the pillars of the education system, in other words mainstream or special schools. The priority to be given to education in mainstream establishments, which is referred to explicitly in the Article, is subject to a conditionality clause, which if interpreted as it ordinarily would be and with due regard for the context and purpose of the provision, indicates to the public authorities that in order to secure the independence, social integration and participation in the life of the community of persons with disabilities through their education, they must take account of the type of disability concerned, how serious it is and a variety of individual circumstances to be examined on a case-by-case basis. Consequently, Article 15§1 of the Charter does not leave State Parties a wide margin of appreciation when it comes to choosing the type of school in which they will promote the independence, integration and participation of persons with disabilities, as this must clearly be a mainstream school.[810]

Lessons provided in mainstream schools and, if need be, in special schools must be adequate.[811] This means that in order to guarantee an equal and non-discriminatory treatment of persons with disabilities, mainstream and special schools must ensure adapted teaching.[812]

State Parties to ESC are required to provide the human assistance needed for the school career of the persons concerned. Such assistance is a particularly important mean of being able to keep, especially children and adolescents with autism, in mainstream schools.[813] The margin of appreciation in that matter applies only to the means that State Parties deem most appropriate to ensure that this assistance is provided, bearing in mind the cultural, political or financial circumstances in which their education system operates. However, this is subject to the provision that, at all events, the choices made and the means adopted are not of a nature or are not applied in a way that deprives the established right of its effectiveness and turns it into a purely theoretical right.[814]

State Party must take measures (such as the support of teachers and the accessibility of premises) in order to enable integration and must demonstrate that tangible progress is being made in setting up education systems which exclude nobody.[815]

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808. Conclusions 2007 - Statement of interpretation - Article 15 § 1.
809. Conclusions 2012, Ireland; Digest 2018, p. 157.
810. European Action of the Disabled (AEH) v. France, complaint No. 81/2012, Decision on the merits of 11 September 2013, §78; Digest 2018, p. 158.
811. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 48.
812. European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, Decision on the merits of 11 September 2013, § 85.
813. European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, Decision on the merits of 11 September 2013, § 85.
814. European Action of the Disabled (AEH) v. France, complaint No. 81/2012, Decision on the merits of 11 September 2013, §§ 80-81; Digest 2018, p. 158.
815. Conclusions 2005, Cyprus.

'Integration' and 'inclusion' are two different notions and one does not necessarily lead to the other. The right to an inclusive education is about the child's right to participate in mainstream school and the school's obligation to accept the child taking account the best interests of the child as well as its abilities and educational needs as a primary consideration.[816]

Education and training are the essential foundation to obtain a position in the open labour market and to be able to lead a self-determined life. Young persons with disabilities with an education below the upper secondary level are per se subject to various disadvantages on the employment market. States must take measures in order to enable integration and guarantee that both mainstream and special schools ensure adequate teaching. Furthermore, State Parties must demonstrate that tangible progress is being made in setting up inclusive and adapted education systems.[817]

Specialised institutions shall ensure, through their internal organisation and/or their working methods, the predominance of guidance, education and vocational training over the other functions and duties that they may be required to perform under domestic law[818].

Article 15 § 1 ESC establishes one of the rights protected by the Charter which are exceptionally complex and particularly expensive to resolve. Therefore, the measures taken by a State Party to achieve the Charter's objectives must meet the following three criteria: "(i) a reasonable timeframe, (ii) measurable progress and (iii) financing consistent with the maximum use of available resources".[819]

The European Committee of Social Rights in the process of assessing whether the situation in the State Party stays in conformity with Article 15§1 ESC concentrates on four areas: definition of disability, anti-discrimination regulations, education and vocational training.

The European Committee of Social Rights in the process of assessing whether the situation in the State Party is in conformity with Article 15§1 ESC and so if children and adults with disabilities have effective equal access to education and vocational training, takes into consideration:[820]

- the total number of persons with disabilities, including the number of children;
- the number of students with disabilities attending mainstream education and vocational training courses;
- the number of students with disabilities attending special education and training courses;
- the number of children with disabilities who are not in education and the measures taken to remedy this;[821]
- the number of persons with disabilities who leave the education system with no qualifications;[822]
- the percentage of students with disabilities entering the labour market following mainstream or special education and/or training;[823]
- data on the success rate of children with disabilities by comparison with other children and the success rate in terms of access to vocational training, continuation of studies or entry into the open labour market;[824]
- data on the number of people receiving vocational training in a mainstream or a special

816. MDAC v. Belgium, Complaint No. 109/2014, Decision on the merits of 16 October 2014, § 66; Digest 2018, p. 158.
817. Conclusions XX-1 (2012), Austria; Digest 2018, p. 158.
818. European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, Decision on the merits of 11 September 2013, §111; Digest 2018, p. 158.
819. Autism-Europe v. France, cited above, § 53.
820. Conclusions 2016 - Serbia - Article 15 § 1.
821. Conclusions 2016 - Hungary - Article 15 § 1.
822. Conclusions 2016 - Hungary - Article 15 § 1.
823. Conclusions 2016 - Serbia - Article 15 § 1.
824. Conclusions 2016 - Hungary - Article 15 § 1.

establishment compared to the number of requests for admission;
- data on the percentage of students with disabilities entering the labour market following mainstream or special education and/or training[825]

The European Committee of Social Rights found violation of Article 15§1 ESC in cases of:

- lack of effective integration of children and youths with disabilities into the mainstream education and into mainstream vocational training facilities - where youths with disabilities are little integrated into mainstream institutions and into mainstream vocational training facilities, and so special and separate facilities remain the norm[826] or where minority[827] or almost half of pupils with special educational needs attend special schools;[828]

- lack of equal access of children with disabilities to education – in situation where many children with disabilities are placed in institutions, particularly those with mental disabilities (who account for about 80% of all children living in institutions), and do not therefore have equal access to education.[829]

Article 15§2 ESC establishes the right of persons with disabilities to promote their access to employment and to adjust the working conditions to the needs of the persons with disabilities or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services. It is understood that the term "sheltered employment" also covers working co-operatives.[830]

Art. 15§2 ESC requires State Parties to promote access to employment on the open labour market for persons with disabilities. It applies to both persons with physical and intellectual disabilities[831].

To this aim, legislation must prohibit discrimination on the basis of disability in employment as well as the dismissal on the basis of disability, to create genuine equality of opportunities on the open labour market.[832] In addition, regarding work conditions, there must be obligations on the employer to take steps in accordance with the requirement of reasonable accommodation to ensure effective access to employment and to keep in employment persons with disabilities, in particular persons who have become disabled while in their employment as a result of an industrial accident or occupational disease[833]. Apart from that, regulations must confer an effective remedy on those who are found to have been unlawfully discriminated.[834]

State Parties to ESC enjoy a margin of discretion concerning the other measures they take in order to promote access to employment of persons with disabilities. Article 15§2 ESC does not require the introduction of quotas.[835]

Sheltered employment facilities must be reserved for those persons with disabilities who, due to their disability, cannot be integrated into the open labour market. They should aim to assist

825. Conclusions 2016 - France - Article 15 § 1.
826. Conclusions XVI-2 - Malta - Article 15 § 1.
827. Conclusions 2016 - Ukraine - Article 15 § 1.
828. Conclusions 2016 - Austria - Article 15 § 1, Conclusions 2016 - Romania - Article 15 § 1.
829. Conclusions 2016 - Serbia - Article 15 § 1.
830. Explanatory Report to the European Social Charter (Revised) Strasbourg, 3.V.1996, p. 65.
831. Conclusions XX-1 (2012), Czech Republic; Conclusions I (1969), Statement of Interpretation on article 15 § 2.
832. Conclusions 2003, Slovenia; Conclusions 2012, Russian Federation.
833. Conclusions 2007, Statement of Interpretation on Article 15 § 2.
834. Conclusions XIX-1 (2008), Czech Republic.
835. Conclusions XIV-2 (1998), Belgium.

their beneficiaries to enter the open labour market.[836] Persons working in sheltered employment facilities where production is the main activity are entitled to the basic provisions of labour law and in particular the right to fair remuneration and trade union rights.[837]

The European Committee of Social Rights in the process of assessing whether the situation in the state is in conformity with Article 15§2 ESC concentrates on three areas: employment of persons with disability, anti-discrimination regulations and measures to encourage the employment of persons with disabilities.

The European Committee of Social Rights in the process of assessing whether the situation in the state stays in conformity with Article 15§2 ESC and so if persons with disabilities have effective equal access to employment, takes into consideration not only proper legislation, including the judicial and non-judicial remedies provided for in the event of discrimination on the ground of disability, but also its justifiability and practical aspects such as e.g. the figures on the total number of persons with disabilities, the number of people with disabilities of working age, the number in employment (in the open market or in sheltered employment), the number benefiting from employment promotion measures, the number seeking employment and the number who are unemployed.[838]

The European Committee of Social Rights found violation of Article 15§2 ESC in cases of:

- lack of legislation prohibiting discrimination on grounds of disability in the field of employment;[839]
- lack of adequate protection against discrimination on the grounds of disability – lack of measures protecting employees with disabilities from dismissal and lack of obligation for the employers to continue to employ a person who becomes disabled following an occupational injury or disease;[840]
- excessively low wage levels in sheltered employment facilities (persons employed performing production orientated work in sheltered workshops were not subject to the usual terms and conditions of employment and that their pay was much lower than that in the open working environment (varying between 5 % and 30 %);[841]
- lack of guaranteed effective access to the open labour market;[842]
- not respected legal obligation to provide reasonable accommodation.[843]

Article 15§3 ESC establishes the right of persons with disabilities to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

The right of persons with disabilities to social integration provided for by Article 15§3 ESC implies that barriers to communication and mobility be removed in order to enable access to transport

836. Digest 2018, p. 158.
837. Conclusions XVII-2 (2005), Czech Republic.
838. Conclusions 2016 - Armenia - Article 15 § 2.
839. Conclusions XVI-2 - Belgium - Article 15 § 2; Conclusions XVI-2 - Spain - Article 15 § 2.
840. Conclusions XVI-2 - Denmark - Article 15 § 2.
841. Conclusions XVI-2 - Denmark - Article 15 § 2.
842. Conclusions 2016 - Serbia - Article 15 § 2.
843. Conclusions 2016 - Serbia - Article 15 § 2.

(land, rail, sea and air), housing (public, social and private), cultural activities and leisure (social and sporting activities).[844] To this end Article 15§3 ESC requires the existence of comprehensive non-discrimination legislation covering both the public and private sphere in fields such as housing, transport, telecommunications and cultural and leisure activities and effective remedies for those who have been unlawfully treated.[845] Such legislation may consist of general anti-discrimination legislation, specific legislation or a combination of the two.[846]

Article 15§3 ESC also requires the adoption of a coherent policy in the disability context: positive action measures to achieve the goals of social integration and full participation of persons with disabilities. Such measures should have a clear legal basis and be coordinated[847]. People with disabilities should have a voice in the design, implementation and review of policies concerning them.[848]

To give meaningful effect to this, undertaking mechanisms must be established to assess the barriers to communication and mobility faced by persons with disabilities and identifies the support measures that are required to assist them in overcoming these barriers. Furthermore, technical aids must be available either for free or subject to a contribution towards their cost and taking into account the beneficiary's means. Such aids may for example take the form of prostheses, walkers, wheelchairs, guide dogs and appropriate housing support arrangements. Support services, such as personal assistance and auxiliary aids, must be available, either for free or subject to an appropriate contribution towards their cost and taking into account the beneficiary's means.[849]

Telecommunications and new information technology must be accessible and sign language must have an official status[850]. Public transports (land, rail, sea and air), all newly constructed or renovated public buildings, facilities and buildings open to the public, and cultural and leisure activities should be physically accessible.[851]

The needs of persons with disabilities must be taken into account in housing policies, including the construction of an adequate supply of suitable, public, social or private, housing. Further, financial assistance should be provided for the adaptation of existing housing.[852]

The European Committee of Social Rights in the process of assessing whether the situation in the state is in conformity with Article 15§3 ESC concentrates on nine areas: anti-discrimination legislation and integrated approach, consultation, forms of financial aid to increase the autonomy of persons with disabilities, measures to overcome obstacles, technical aids, communication, mobility and transport, housing, culture and leisure.

The European Committee of Social Rights in the process of assessing whether the situation in the state is in conformity with Article 15§3 ESC and so if persons with disabilities fully participate in the life of community, takes into consideration not only proper legislation, including the judicial and non-judicial remedies provided for in the event of discrimination on the ground of disability, but also its justifiability and practical aspects such as e.g.: the availability of different grants to adjust the environment to the needs of a person with disability - convert housing, car, remove architectural

844. Conclusions 2005, Norway.
845. Conclusions 2007, Slovenia.
846. Conclusions 2012, Estonia.
847. Digest 2018, p. 161.
848. Conclusions 2003, Italy.
849. Conclusions 2008, Statement of interpretation on Article 15 § 3; Digest 2018, p. 161 – 162.
850. Conclusions 2005, Estonia; Conclusions 2003, Slovenia.
851. Conclusions 2003, Italy.
852. Conclusions 2003, Italy.

and communication barriers, purchase assistance products; the eligibility for supporting goods and services free of charge or with reduced price - technical aids, public transport; actions being taken to encourage access to new communication technologies.

The European Committee of Social Rights found violation of Article 15§3 ESC in cases of:

- lack of anti-discrimination legislation for persons with disabilities which specifically covers the areas of housing, transport, communications, culture and leisure;[853]
- lack of effective remedies available to people with disabilities alleging discriminatory treatment;[854]
- lack of effective access to housing; [855]
- lack of effective accessibility for people with disabilities to different means of transport;[856]
- lack of effective access to technical aids.[857]

IMPLICATIONS FOR UKRAINE

Article 15, Paragraph 1

Regarding the anti-discrimination legislation in the sphere of vocational training for persons with disabilities, the Committee asked the information on the measures taken to ensure effective remedies against alleged discrimination in education and training on grounds of disability.[858]

In general, analysing the Ukrainian legislation, the Committee concluded that the situation in Ukraine failed to meet the requirements under Article 15§1 of the Charter on the ground that the right of persons with disabilities to mainstream education is not effectively guaranteed.[859]

Article 15, Paragraph 2

The Committee special attention was paid to the obligation to ensure reasonable accommodation and its fulfilment in practice, as well as impact from fulfilment to increasing is of employment of persons with disabilities in the open labour market. Taking into account all information presented and conclusions deferred in previous cycle 2012, the Committee decided that the situation in Ukraine was not in conformity with the requirement of Article 15§2 due to non- effective guarantees for the reasonable accommodation obligation.[860]

As a result of examination, the national report in 2016, breach of obligations under Article 15 §2 on two grounds were found: non-effective respect of reasonable accommodation obligation and non-effective guarantees of mainstreaming in employment in respect of persons with disabilities.[861]

Article 15, Paragraph 3

The Committee decided that Ukraine did not fulfil its obligations Article 15§3 due to non-establishing effective protection persons with disabilities against discrimination in the fields of housing, transport, communications and culture and leisure activities.[862] The attention was also

853. Conclusions 2016 - Estonia - Article 15 § 3.
854. Conclusions 2016 - Andorra - Article 15 § 3, Conclusions 2016 - Hungary - Article 15 § 3.
855. Conclusions 2012 - Andorra - Article 15 § 3, Conclusions 2016 - Hungary - Article 15 § 3.
856. Conclusions 2016 - Armenia - Article 15§3.
857. Conclusions 2012 - Andorra - Article 15§3.
858. ECSR, Conclusions 2016. Ukraine. p. 25.
859. Ibid., p. 27.
860. Ibid., p. 28-29.
861. Ibid.
862. ECSR, Conclusions 2016. Ukraine. p. 30

paid to the adoption of the Action Plan for the implementation of the United Nations Convention on the Rights of Persons with Disabilities.

The Committee analysed and took notes of the method for calculating disability pension, financial assistance available to persons with disabilities; however, additional questions were not raised.[863]

Regarding to technical aids for persons with disabilities prescribed in national legislation, the question on mechanisms established to assess the barriers to communication and mobility faced by individual persons with disabilities and to identify the technical aids and support measures that may be required to assist them in overcoming these barriers was raised. In the Conclusions 2012 the Committee pointed out that technical aid has to be available either for free or subject to a contribution towards their cost.[864]

Furthermore, the Committee examined the information on mobility and transport, access to public sites for persons with disabilities, equipment buildings and other sites open to the public with signs used internationally to indicate their accessible for persons with disabilities.[865]

Therefore, the Committee found in its Conclusions 2016 that Ukraine did not commit its obligations under Article 15§3 of the Charter due to non-establishing the anti-discrimination legislation covering the fields of housing, transport and communications.[866]

Analysis of the provisions of the European Social Charter (revised) on the right of older persons to social protection (article 23)

Article 23 of the Charter is the first human rights treaty provision to specifically protect the rights of the elderly,[867] aimed to enable older persons to remain full members of society. The scope of Article 23 extends to social protection of older persons outside the employment field and include protecting them against discrimination on grounds of age in certain domain,[868] namely in access to goods, facilities and services, healthcare, education, services such as insurance and banking products, participation in policy making/civil dialogue, allocation of resources and facilities[869] and provide for a procedure of assisted decision making.[870] The right to take part in society's various fields of activity should be granted to everyone active or retired, living in an institution or not.[871]

Article 23 overlaps with other provisions of the Charter which protect older persons as members of the general population, such as Article 11 (Right to protection of health), Article 12 (Right to social security), Article 13 (Right to social and medical assistance) and Article 30 (Right to protection against poverty and social exclusion). Article 23 requires State Parties to make focused and planned provision in accordance with the specific needs of older persons.[872]

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

The Committee stated that a fundamental measure to combat age discrimination outside the employment is an adequate legal framework.[873] The framework should be

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863. Ibid., 31.
864. ECSR, Conclusions 2012. Ukraine. Article – 15-3. URL: http://hudoc.esc.coe.int/eng?i=2012/def/UKR/15/3/EN
865. ECSR, Conclusions 2016. Ukraine. p. 32.
866. Ibid.
867. Conclusions XIII-3, Statement of Interpretation of Article 4 of the Additional Protocol (Article 23).
868. ESCR, Digest 2018, p. 199.
869. Conclusions 2009, Andorra, Digest of the case law of the ECSR, Appendix, 2018, p. 270 (1199).
870. Conclusions 2013, Statement of Interpretation Article 23, ESCR, Digest 2018, p. 200.
871. ESCR, Digest 2018, p. 199.
872. Ibid.
873. Conclusions 2009, Andorra, Digest of the case law of the ECSR, Appendix, 2018, p. 270 (1199).

> related to assisted decision making for older persons guaranteeing their right to make decisions for themselves unless it is shown that they are unable to make them. (…) The incapacity to make their own decision should be established in relation to the nature of the decision, its purpose and the state of health of the older person at the time of making it, and not only being associated with a particular medical condition or disability, or lack of legal capacity.[874]

The Committee provided with in-depth interpretation of capability of older persons to make their own decision. It was stated that:

> all possible ways of communicating, including words, pictures and signs, should be used before concluding that they cannot make the particular decision on their own. In this connection, the national legal framework must provide appropriate safeguards to prevent the arbitrary deprivation of autonomous decision making by older persons, also in case of reduced decision making capacity. It must be ensured that the person acting on behalf of older persons interferes to the least possible degree with their wishes and rights.[875]

State Parties are required to take appropriate measures against elder abuse and neglect, including raising awareness, evaluation the extent of the problem, adoption of legislation. The Committee has not formulated the definition of elder abuse, but proposed to apply the interpretation given in the Toronto Declaration on the Global Prevention of Elder Abuse.[876]

According to Article 23 State Parties are obliged to guarantee the possibility for older persons to remain full members of society for as long as possible by means of adequate resources. Adequate resources which mean, above all, pensions and all social protection measures, "must be sufficient in order to allow older persons to lead a "decent life" and play an active part in public, social and cultural life". All social benefits, such as pensions, contributory or non-contributory, and other complementary cash benefits available to older persons must be comparable with the median equivalised income.[877]

In addition to adequate resources State Parties are required to inform older persons about services and facilities available for them. Despite the absence of direct requirements to ensure the existence of services and facilities and that older persons have the right to certain services and facilities, the Committee examines existence, extent and cost of services and facilities themselves.[878]

Monitoring the quality of services and independent inspection body, licensing of institutions where older persons are living, are also examined by the Committee.[879]

The situation can be recognised as a breach of the requirements of Article 23 due to insufficient

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874. Conclusions 2013, Statement of Interpretation, Article 23.
875. Ibid.
876. In the Conclusions 2009 for Andorra, the Committee recalled that elder abuse is defined in the Toronto Declaration on the Global Prevention of Elder Abuse (2002) as "a single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person".
877. Conclusions 2013, Statement of Interpretation Article 23.
878. Conclusions 2003, France (Article 23), Digest, 2018. p.201.
879. Conclusions 2009 Andorra (Article 23), Conclusions XX-2 (2013) Czech Republic Digest, 2018, p. 201-202.

regulation of fees for services that led to legal uncertainties to older persons in need of care due to diverse and complex fee policies. While municipalities may adjust the fees, there are no effective safeguards to assure that appropriate access to services is guaranteed to every older person in need of services required by their condition."[880]

Clarifying States are obliged to ensure the right of older persons to choose their lifestyle freely and to lead independent lives in their familiar surroundings for as long as they wish and are able to, the Committee requires states' policies to include support of older persons to remain in their own homes for as long as possible through the provision of sheltered/supported housing and assistance for the adaptation of homes.[881]

In the context of Article 23 special medical programmes for older persons must be provided, including domiciliary nursing/health care services, help for any psychological problems, adequate palliative care services.[882]

Accordingly, to the case law of the Committee, the set of rights of older persons living in institutions was enshrined:

- to appropriate care and adequate services and to affordable cost for care in institutions,
- to privacy,
- to personal dignity,
- to participate in decisions concerning the living conditions in the institution, the protection of property,
- to maintain personal contact with persons, close to the older person
- to complain about treatment and care in institutions.[883]

The Committee repeatedly reiterates that any inspection system should be independent of the entity that establishes or manages the residential facility and asks whether steps are envisaged to create an independent inspection mechanism (…) to examine in particular, the quality of care, or whether such a system exists.[884]

The Council of Europe elaborates and adopts a range of other documents relevant for human rights of the older persons:

Recommendation CM/Rec(2014)2 to member States on the promotion of human rights of older persons

Recommendation CM/Rec(2009)6 on ageing and disability in the 21st century: sustainable frameworks to enable greater quality of life in an inclusive society

Recommendation PACE 1796 (2007) on "The situation of elderly persons in Europe"; Recommendation PACE 1749 (2006), Resolution PACE 1502 (2006) on "Demographic challenges for social cohesion"

Recommendation PACE 1591 (2003) on "Challenges of social policy in Europe's ageing societies"

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880. Central Association of Carers in Finland v. Finland complaint no 71/2011 decision on the merits of 4 December 2012, §53.
881. Conclusions 2005, Slovenia, Conclusions 2013, Andorra (Article 23), Digest of the case law of the ECSR, 2018. p. p.201.
882. Conclusions 2003, France, Article 23.
883. Digest of the case law of the ECSR, 2018. p.202.
884. Conclusions 2003, France, Slovenia, Digest of the case law of the ECSR, Appendix, 2018. p. 272 - 273.

- Recommendation CM/Rec(94)9 concerning elderly people.

IMPLICATIONS FOR UKRAINE

In 2017, the Committee repeated that the situation in Ukraine was not in conformity with Article 23. The conclusion based on the level of the minimum pension which was found manifestly inadequate.[885]

Examining the adequacy of resources, the Committee pointed out that its task was to assess not only the law, but also the compliance of practice with the obligations arising from the Charter. For this purpose, the Committee compares resources with median equivalised income and also takes into consideration relevant indicators relating to at-risk-of-poverty rates for persons aged 65 and over.

The enhancement minimum amount of social assistance, pension and other efforts, minimum pension was "still lower than the poverty threshold and even slightly lower than the extreme poverty threshold". Moreover, the relative-criterion-based poverty rate and the extreme poverty level were taken into account for recognition the violation of Article 23 by Ukraine.

The Committee reiterated the main aim of Article 23 of the Charter is to enable older persons to remain full members of society and the obligation to have appropriate legislation to combat age discrimination outside the employment and provide for a procedure of assisted decision making.

According to the legal framework about age discrimination, the absence of response to the question about remedies which are available to victims of discrimination was noted by the Committee, which asked also about the national case law or statistics dealt with in relation to age discrimination outside employment.

Analysing health care for older persons, capacity and geographical location were taking into account to decision that "older persons' healthcare needs were generally only partly met".[886]

The Committee also stressed that number of older people in Ukraine grew every year, it needed to

> strengthen legal protection of older persons, provide them with a decent standard of living, increase the role of families in caring for them, organise effective care and psychological support and ensure that they have access to information.[887]

Despite non-compliance the requirements of Article 23 by Ukraine, national judges refer to it in cases on social, pension and other matters.

The Administrative Cassation Court, considering termination of pension payments due to moving the plaintiff abroad to another county for permanent residence, applied to Article 23 of the Charter alongside other international treaties:

[…] Article 22 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Economic, Social and Cultural Rights, Article 23 of the European Social Charter (revised) enshrine the right to social protection, including the situation of full, partial or temporary disability, loss

885. ECSR, Conclusions 2017, Ukraine. P. 1230.
886. ECSR, Conclusions 2017, Ukraine, p. 1229.
887. Ibid., p. 1230.

of family breadwinner (survivors' benefits), unemployment due to circumstances beyond their control, as well as in old age and in other cases provided by law.[888]

In a range of cases the point 23 of the Part 1 of the Charter was applied instead of Article 23. For example, the Administrative Cassation Court in the judgment of 9 October 2020 regarding the refusal to include a certain period of work in the total length of service and provide recalculation of the pension, considered:

[…] The European Social Charter (revised) of 3 May 1996, ratified by the Law of Ukraine of 14 September 2006 № 137-V, which entered into force on 1 February 2007, stipulates that every older person has the right to social protection. (23, Part I). By ratifying the mentioned Charter, Ukraine has undertaken an international obligation to implement by all appropriate means the achievement of conditions under which the rights and principles enshrined in Part I of the Charter can be effectively realised.

Thus, a person's right to receive a pension as an integral part of the right to social protection is his/her constitutional right, which is guaranteed by Ukraine's international obligations.[889]

The same reference to the point 23 of Part 1 of the Charter was found in other judgments, as the following: Judgment of the Administrative Cassation Court of 30 April 2020, case №805/153/18-a (pension payment for person living abroad), Judgment of the Administrative Cassation Court of 24 December 2019, case №826/11829/16 (pension payments exclusively within the account in Oschadbank (State Savings Bank of Ukraine) for IDPs, verification procedure, issuance of bank cards, which are also a pension certificate), Judgment of the Administrative Cassation Court of 6 August 2019, case № 433/172/16-a (on recognition of illegal inaction of the defendant on non-payment of pension to the person during anti-terrorist operation, and also impossibility to leave Luhansk because of age and bad state of health) etc. The mentioned point of Part 1 of the Charter in conjunction with the point 4 was applied regarding the appointment of the pension in the Judgment of the Administrative Cassation Court of 25 March 2020 (case № 252/18396/16-a).

While the above examples demonstrate the increasing amount of references to the right of older persons to the social protection enshrined in the Charter, the application provisions of Article 23 remain low.

Analysis of the provisions of the European Social Charter (revised) on non-discrimination (Article E)

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

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

The wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in interpreting Article 14 and most recently in the Thlimmenos case [Thlimmenos c. Grèce [GC], no 34369/97, CEDH 2000-IV, § 44)], the principle of equality that is reflected therein means treating equals

888. Supreme Court, judgment of the Administration Cassation Court, 14 March 2019, case №761/6781/14-a. https://reyestr.court.gov.ua/Review/80457859

889. Supreme Court, judgment of the Administration Cassation Court, 9 October 2020, case № 341/460/17 https://reyestr.court.gov.ua/Review/92172952

equally and unequals unequally. In particular it is said in the above-mentioned case:

> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[890]

The European Committee of Social Rights considered that the insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein. It further considered that its function is to help secure the equal effective enjoyment of all the rights concerned regardless of difference. Therefore, it does not constitute an autonomous right which could in itself provide independent grounds for a complaint.[891] Hence, the situation can be considered as allegedly violating other Articles of the Charter also in cases when read in combination with Article E.

It should be noted that Article E concerns all forms of discrimination. According to the European Committee of Social Rights Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.[892]

The wording of Article E shows that prohibited grounds of discrimination are presented in it as a non-exhaustive list. This was noted in a number of positions of the European Committee of Social Rights. For instance, in one of the cases the latter stated that although disability is not explicitly listed as a prohibited ground of discrimination under Article E, the Committee considers that it is adequately covered by the reference to "other status". Such an interpretative approach, which is justified in its own rights, is fully consistent with both the letter and the spirit of the Political Declaration adopted by the 2nd European conference of ministers responsible for integration policies for people with disabilities (Malaga, April, 2003), which reaffirmed the anti-discriminatory and human rights framework as the appropriate one for development of European policy in this field.[893] The same applies to the health status, the socio-economic status or the territorial location.[894]

It is important to note that both in theory and in the case-law of various international bodies the principle of equality presupposes that all people in the same situation must be treated equally. At the same time, it also implies that people in different situations must be treated differently. Hence, the State Parties will be considered to violating the Charter when, without an objective, reasonable, proportionate and legitimate justification, they fail to treat differently persons whose situations are different. In this regard, the European Committee of Social Rights considered that such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.[895]

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890. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, decision on the merits of 4 November 2003, §52.
891. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, decision on the merits of 4 November 2003, §51.
892. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, decision on the merits of 4 November 2003, §52.
893. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, decision on the merits of 4 November 2003, §51.
894. IPFEN v. Italy, Complaint No, 87/2012, decision on the merits of 10 September 2013, §190-194.
895. Association internationale Autisme-Europe (AIAE) v. France, Complaint No. 13/2000, decision on the merits of 4 November 2003, §52.

It should be noted that a difference of treatment is not discriminatory only in cases when it is legitimate, based on an objective and reasonable justification, and is proportionate to the legitimate objective pursued.[896]

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

The case law of the European Court of Human Rights is also worth mentioning with this regard, according to which not all the differences in treatment – or failure to treat differently persons in relevantly different situations – constitute discrimination, but only those devoid of "an objective and reasonable justification" (Molla Sali v. Greece [GC], 2018, § 135; Fabris v. France [GC], 2013, § 56; D.H. and Others v. the Czech Republic[GC], 2007, § 175; Hoogendijk v. the Netherlands (dec.), 2005).

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

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

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

- a. Does it pursue a legitimate aim?
- b. Are the means employed reasonably proportionate to the aim pursued?[897]

What about the burden of proof, according to the European Committee of Social Rights in disputes about discrimination in matters covered by the European Social Charter (revised), adopted in the framework of reporting procedure, the burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment. It also applies to the collective complaints procedure.[898]

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896. See, for instance, European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §41; Associazione Nazionale Giudici di Pace v. Italie, Complaint No 102/2013, decision on the merits of 5 July 2016, § 82; Associazione sindacale « La Voce dei Giusti » v. Italie, Complaint No 105/2014, decision on the merits of 18 October 2016, §74

897. Guide on Article 14 of the European Conventionon Human Rightsand onArticle 1 of Protocol No. 12 to the Convention, https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf

898. Mental Disability Advocacy Center (MDAC) v. Bulgaria, Complaint No. 41/2007, decision on the merits of 3 June 2008, §52

Part VI

Education and children rights

Education Rights

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

Analysis of the provisions of the European Social Charter (revised) on the right to vocational guidance (Article 9)

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Article 9 of the European Social Charter (revised) concerns the right to vocational guidance. It defines that with a view to ensuring the effective exercise of the right to vocational guidance, the State Parties undertake to provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity: this assistance should be available free of charge, both to young persons, including schoolchildren, and to adults.

According to the European Committee of Social Rights the purpose of this article is to make it compulsory for those states having accepted it to operate a service that helps all persons, free of charge, to solve their problems relating to vocational guidance.[899]

On examining the reports submitted as part of the fourth cycle of supervision, the European Committee of Social Rights stressed the importance of vocational guidance in a modern economy especially at time of economic recession and defined it as the service which assists all persons to solve problems related to occupational choice and with due regard to the individual's characteristics and their relation to occupational opportunity.[900]

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

> "General social and employment trends during the latest reference period have revealed a growing need for and increasing

899. Conclusions I (1969), Statement of Interpretation on Article 9.
900. Conclusions IV (1975), Statement of Interpretation on Article 9.

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

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

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

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

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

v. the number of people benefiting from guidance, their age, social origin and educational level.[901]

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

It should be noted that though the European Committee of Social Rights considers that the Contracting Parties are undertaking continuous efforts to adapt and develop the structure of guidance services in order to respond to the contemporary changes, however, the dissemination of information and effective equality of chances still remain areas where implementation should be improved and to which the national authorities need to devote their activities.[902]

IMPLICATIONS FOR UKRAINE

In the Conclusions 2012, 2016, the Committee reiterated to Ukraine the main requirements of States Parties under Article 9: that equal treatment with respect to vocational guidance has to be guaranteed to everyone; it has to be provided free of charge, including non-nationals from other Parties of the Charter; by qualified and sufficient staff; with an adequate budget; to a significant number of persons and by aiming at reaching as many people as possible; and without any requirements for length of residence, even for students and trainees, or employment requirements and/or the application of the reciprocity clause.[903]

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

The Committee in the Conclusion 2016 stated that the situation in Ukraine was not in compliance with obligations under Article 9 regarding the lack of guarantees of the right to vocational guidance within the labour market.[904]

Analysis of the provisions of the European Social Charter (revised) on the right to vocational training (Article 10)

Article 10 of the European Social Charter (revised) concerns the right to vocational training.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

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

The right to vocational training is a universal right and implies an obligation to promote technical and vocational training for all persons.[905] Hence, the principle of **equal treatment** should be applicable in the mentioned context. According to the European Committee of Social Rights under Article 10 it should also verify that equal treatment in access to training institutions and programmes is ensured for all those interested, including **nationals of other Contracting Parties** legally residing or regularly working in the territory[906]. According to the Appendix to the Charter, equality of treatment shall be provided to nationals of other Parties lawfully resident or regularly working on the territory of the Party concerned. This implies that no length of residence is required from students and trainees residing in any capacity, or having authority to reside in reason of their ties with persons lawfully residing, on the territory of the Party concerned before starting training. This does not apply to students and trainees who, without having the above-mentioned ties, entered the territory with the sole purpose of attending training.[907]

Vocational training for disabled persons remains an important concern to the European Committee of Social Rights. At the same time, for the sake of clarity in the presentation of its conclusions, the Committee refers to this issue under Article 15 for those Contracting Parties which have accepted both provisions.[908] Hence, vocational training for disabled persons is dealt with Article 15 for State Parties which accepted both provisions.

According to the European Committee of Social Rights Article 10§1 covers all kind of higher education. In view of the current evolution of national systems, which consists in the blurring of the boundaries between education and training at all levels within the dimension of lifelong learning, the Committee considers that, today, the notion of vocational training of Article 10§1 covers initial training, i.e. general and vocational secondary education, university and non-university higher education, and continuing training. University and non-university higher education are considered to be vocational training as far as they provide students with the knowledge and skills necessary to exercise a profession.[909]

According to the European Committee of Social Rights the importance of vocational training

904. ECSR, Conclusions. Ukraine 2016. p. 15.
905. Conclusions I (1969), Statement of Interpretation on Article 10§1.
906. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§1.
907. Conclusions 2003, Slovenia.
908. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§1.
909. Conclusions 2003, France.

should be emphasised at a time of economic recession and underlined that priority should be given to young persons, who are particularly hit by unemployment.[910]

Providing vocational training, State Parties must:

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

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

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

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

- outline the mechanisms for the recognition of qualifications awarded by continuing vocational education and training.[911]

It is important to note that access to higher technical or university education based solely on individual aptitude cannot be achieved only by setting up educational structures which facilitate the recognition of knowledge and experience as well as the transfer from one type or level of education to another; this also implies that registration fees or other educational costs do not create financial obstacles for some candidates.[912] Moreover, the European Committee of Social Rights stressed on the situation in Ukraine with this regard that facilities other than financial assistance to students should be granted to ease access to technical or university higher education based solely on individual aptitude. This obligation can be achieved namely by:

- avoiding that registration fees or other educational costs create financial obstacles for some candidates;
- setting up educational structures which facilitate the recognition of knowledge and experience, as well as the possibility of transferring from one type or level of education to another[913].

The main indicators reflecting state commitment to "provide and promote" vocational training are the following: total expenditure (e.g. as a share of GDP), the total capacity of the system, in particular the availability of training places for all applicants, the proportion of young people completing a vocational education and geographical coverage.[914]

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

Under Article 10§2 the European Committee of Social Rights considers apprenticeship arrangements

910. Conclusions IV (1975), Statement of Interpretation on Article 10.
911. Conclusions 2003, France.
912. Conclusions 2003, France.
913. Conclusions 2012, Ukraine.
914. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§1, Conclusions, 2003.

taking place within the framework of an employment relationship between the employer and the apprentice and leading to vocational education.[915] The Committee has consistently underlined the importance of combining theoretical and practical training and of maintaining a close contact between training institutions and the world of work.[916]

Apprenticeship and its compliance to Article 10§2 are assessed on the basis of the following criteria: length of the apprenticeship and division of time between practical and theoretical learning; selection of apprentices; selection and training of trainers; remuneration of apprentices; termination of the apprenticeship contract.[917] The adequacy of apprenticeship arrangements, e.g. in terms of the number of participants, the availability of apprenticeship places for applicants, the proportion of trainees completing an apprenticeship and geographical coverage, are also important in assessing the compliance of the situation to Article 10§2.[918]

Equal treatment is a significant indicator also in the aspect of this provision. Under all of the first three paragraphs of Article 10 a major preoccupation of the European Committee of Social Rights is to verify that equal treatment in access to training institutions and programmes is ensured for all those interested, including nationals of other Contracting Parties legally residing or regularly working in the territory[919]. Moreover, according to the Appendix to the Charter, equality of treatment shall be provided to nationals of other Parties lawfully resident or regularly working on the territory of the Party concerned. This implies that no length of residence is required from students and trainees residing in any capacity, or having authority to reside in reason of their ties with persons lawfully residing, on the territory of the Party concerned before starting training. This does not apply to students and trainees who, without having the above-mentioned ties, entered the territory with the sole purpose of attending training.[920]

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

Under paragraph 3 the Committee examines all forms of labour market training and education for adult workers.[921]

Indicators of particular interest for assessing the compliance to Article 10§3 are the number of participants, the development in national expenditure, the results of the effort, i.e. the employment effect.[922]

The following aspects are also taken into consideration while assessing the compliance to the discussed provision: existence of legislation on the possibility of individual leave for training and, in particular, subject to what conditions, on whose initiative, of what length and whether it is paid or not; sharing of the burden of the cost of vocational training among public bodies (state or other collective bodies), unemployment insurance systems, enterprises, and households as regards continuing training.[923]

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915. Conclusions XIX-1 (2008), Slovak Republic; Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§2.
916. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§2.
917. Conclusions XVI-2 (2003), Malta.
918. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§2.
919. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§5 (i.e. Article 10§4 of the 1961 Charter).
920. Conclusions 2003, Slovenia.
921. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§3.
922. Conclusions XIV-2 (1998), Statement of Interpretation on Article 10§3.
923. Conclusions 2003, Slovenia.

Moreover, according to the European Committee of Social Rights the purpose of Article 10§3 of the Charter is, among others, to oblige states to provide facilities for training and retraining of adult workers, in particular the arrangements for retraining redundant workers and workers affected by economic and technological change. The aim is to prevent the deskilling of still active workers at risk of becoming unemployed as a consequence of technological and/or economic progress.[924]

The right under Article 10§3 must be guaranteed also to unemployed people. The European Committee of Social Rights stressed with this regard that each national report on this provision should provide information on vocational training courses available for the unemployed, the activation rate i.e. the ratio between the annual average number of previously unemployed participants in active measures divided by the number of registered unemployed persons and participants in active measures.[925] Moreover, according to the Committee special effort should be made on their behalf, so that unemployed migrant workers may benefit from the same help in the matter of vocational training and retraining as nationals.[926] Here the **principle of equal treatment** becomes essential. In one of the cases the Committee concluded that the situation is not in conformity with Article 10§3 of the Charter because of indirect discrimination against nationals of the other Contracting Parties to the 1961 European Social Charter and nationals of the States Parties to the Revised European Social Charter, lawfully residing or regularly working in the state, who are potentially more affected by the length of residence requirement in order to access continuing vocational training.[927]

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

The European Committee of Social Rights considers a person who has been without work for twelve months or more to be long-term unemployed.[928]

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

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

Article 10§5 of the European Social Charter (revised) defines additional measures, which are important for making the right to vocational training effective. It, in particular, obliges State Parties to encourage the full utilisation of the facilities provided by appropriate measures such as: a. reducing or abolishing any fees or charges; b. granting financial assistance in appropriate cases; c. including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment; d. ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally with a view to ensuring the effective exercise of the right to vocational training.

The principle of equal treatment should be taken into consideration under the mentioned provision. According to the Appendix to the Charter, equality of treatment shall be provided to nationals of other Parties lawfully resident or regularly working on the territory of the State

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924. Conclusions XIX-1 (2008), Spain.
925. Conclusions XIX-1 (2008), Hungary.
926. Conclusions IV (1975), Statement of Interpretation on Article 10§3.
927. Conclusions XVI-2 (2003), Addendum, Ireland.
928. Conclusions 2003, Italy.

Party concerned. This implies that no length of residence is required from students and trainees admitted to reside in any capacity other than being a student or a trainee, or having authority to reside by reason of their ties with persons lawfully residing, on the territory of the State Party concerned before starting training. This does not apply to students and trainees who, without having the above-mentioned ties, entered the territory with the sole purpose of attending training. To this purpose, the Committee recalls that it has held that length of residence or employment requirements for vocational training financial assistance are contrary to the provisions of the Charter.[929]

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

Subparagraph b) of Article 10§5 obliges State Parties to grant financial assistance in appropriate cases. According to the European Committee of Social Rights the importance of financial assistance in the framework of vocational training is, in fact, so great that the very existence of the right protected by Article 10 of the Charter may depend on it[930]. With regard to the granting of financial assistance in appropriate cases, the Committee considers that this meant providing financial assistance to persons who would not otherwise be in a position to undergo apprenticeship or training.[931] Moreover, the level of social scholarship should be adequate in relation to the cost of living.[932] The following criteria for assessing the compliance to the noted provision are also important: a full description of all the allowances and grants available for different training programmes: criteria for awarding allowances, size of allowances, number of allowances granted in relation to number of applicants.[933]

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

Subparagraph d) of Article 10§5 obliges State Parties to ensure, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally. It should be noted that the European Committee of Social Rights considers participation of workers' organisations in supervising the effectiveness of training schemes as an important element for ensuring the mentioned provision.[934]

IMPLICATIONS FOR UKRAINE

Article 10, Paragraph 1

Regarding to general obligations of State Parties under §1 of Article 10 in the light of secondary and higher education, including insurance of general and vocational secondary education, university and non-university higher education and other forms of vocational training, creation mechanisms for the recognition/validation of knowledge and experience acquired in the context of training/working activity etc., the Committee emphasised non-compliancy of the situation in Ukraine with the requirements of Article 10§1 on the ground of non-establishing the efficient operation of the system of secondary and higher vocational education.[935]

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929. Conclusions XVI-2 (2003), United Kingdom.
930. Conclusions VIII (1984), Statement of Interpretation on Article 10§5.
931. Conclusions XIII-1 (1993), Turkey.
932. Conclusion XVI-2 (2004), Slovak Republic.
933. Conclusions XIV-2 (1998), Ireland.
934. Conclusions XIV-2 (1998), United Kingdom.
935. ECSR, Conclusions 2016. Ukraine – Article 10-1. http://hudoc.esc.coe.int/eng?i=2016/def/UKR/10/1/EN

The Committee also pointed out that granting facilities other than financial assistance to students in order to simplify access to technical or university higher education have to be based solely on individual aptitude.[936]

Article 10, Paragraph 2

Within the examination of Ukrainian legislation concerning apprenticeship, in the Conclusion 2016 Committee reiterated its definition as training based on a contract of employment between the employer and the apprentice that leads to vocational education, which has to combine theoretical and practical training, and recalled the basic criteria for apprenticeship.[937]

Generally, it was found that the situation in Ukraine was unconformity with the requirements of Article 10 §2 on the ground of non-establishing an effective system of apprenticeship.[938]

Article 10, Paragraph 3

In the light of State Parties obligations regarding vocational training and retraining of employed persons under Article 10§3, the Committee asked Ukraine to provide the information on percentage of employees have undertaken training and about legal regulation of individual leave for training and its characteristics, including length, remuneration, and the initiative to take it.[939]

The presented information was not enough as it had already been in the previous cycle. Therefore, the Committee was forced to defer its conclusion.[940]

Article 10, Paragraph 4

Taking into account that Ukraine did not provide any information requested, including information on the types of vocational training provided for long-term unemployed persons, reasons for the significant decrease of long-term unemployed individuals that attended vocational training and information on any special measures for the retraining and reintegration of the long-term unemployed, the Committee stated that Ukraine failed to fulfil its obligations under Article 10§4 on the ground of non-establishing effectively provided or promoted special measures for the retraining and reintegration of the long-term unemployed.[941]

Article 10, Paragraph 5

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

Based on the provided information the Committee declare the inconformity of the situation in Ukraine to the requirements of Article 10§5 regarding to non-establishing the system of financial assistance for vocational education and training.[942]

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936. Ibid.
937. ECSR, Conclusions 2016. Ukraine. Article 10 – 2. P.20.
938. Ibid.
939. ECSR, Conclusions 2016. Ukraine. Article 10 – 3. p.21.
940. Ibid., p.22, ECSR, Conclusions 2012. Ukraine. Article 10 – 3. http://hudoc.esc.coe.int/eng?i=2012/def/UKR/10/3/EN
941. ECSR, Conclusions 2016. Ukraine. Article 10 – 4. p.22.
942. ECSR, Conclusions 2016. Ukraine. Article 10 – 5. p.24.

The Rights of Children and Young Persons

Analysis of the provisions of the European Social Charter (revised) on the right of children and young persons to protection (Article 7)

Children and young persons under the Charter are persons below the age of 18. The Charter contains two main articles regarding this group: Article 7 on children and young persons in employment and Article 17 on the right of children and young persons to social, legal and economic protection. Article 7 focuses on the regulation of employment – with due regard to the right to education – and the protection in specific employment-related situations (night work, unhealthy occupations), as well as against 'moral dangers' directly or indirectly linked to employment, such as child trafficking. Under Article 17, the Committee assesses the following issues: the legal status of the child; rights of children in public care; protection of children from violence, ill–treatment and abuse; young offenders; the right to assistance for children and the situation of children in poverty; and the right to education. Moreover, Article E prohibits discrimination based on age.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

According to **Article 7§1**, State Parties shall set the minimum age of admission to employment at 15 years. The Committee views this standard to apply to all economic sectors, including agriculture, and all places of work, including work within family enterprises and in private households.[943] It also extends to all forms of economic activity (employed, self-employed, work in the family enterprise, etc.). The minimum age standard it must be effectively applied in practice and supervised, also in view of work at home.[944] Here, the role of the Labour Inspectorate is decisive.[945]

The only exception to the prohibition of child employment is so-called "light work". Light work has been defined by the Charter as work that does not entail any risk to the "health, morals, or education" of children. State Parties are required to define the types of work which may be considered light, or at least to establish a list of types of work that are not considered light. Work considered to be light stops to be so if it is performed for an excessive duration of time.[946] The following activities have been considered as light work: participation in cultural events or performances, sports events, or short promotional activities.[947] Children under the age of 15 who are subject to compulsory education should not perform light work during school holidays for more than 6 hours per day and 30 hours per week in order to avoid any risks that the performance of such work might have for their health, development or education.[948]

Article 7§2 stipulates that State Parties shall set 18 as the minimum age for occupations regarded as "dangerous or unhealthy." There must be an adequate statutory framework to identify potentially hazardous work, which either lists such forms of work or defines the types of risk which such work may cause.[949] According to the Appendix to the Charter, states parties may legislate that young persons under that minimum age perform work under the following conditions: the work performed is absolutely necessary for their vocational training; it is carried out in accordance with

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

conditions prescribed by the competent authority; and measures are taken to protect the youth's health and safety at work. According to the Committee's interpretation, this kind of work must be done under strict expert supervision and only for the time necessary; the labour inspectorate must monitor these arrangements.[950]

Article 7§3 prohibits the employment of children "that would deprive them of the full benefit of their education." The Committee applies the same standard of permissible light work as under art. 7§1.[951] During school term, the time during which children may work must be limited in order not to interfere with their school attendance and school homework. The Committee therefore assesses the national conditions for light work and the maximum permitted duration of such work, similar to the requirements under Article 7§1. The Committee takes account of the length and distribution of holidays, the uninterrupted period of rest, the nature and the length of the light work and the control efficiency of the labour inspectorate.[952]

Under **Article 7§4**, national law must limit the working hours of persons under 18 who are no longer subject to compulsory schooling "in accordance with the needs of their development, and particularly with their need for vocational training." This limitation may be implemented by legislation, regulations, contracts or practice.[953] According to the Committee, for young persons under 16, a limit of eight hours a day or forty hours a week is in breach of the Charter. [954] For persons over 16 years, these limits are in conformity with the Charter.[955]

Under **Article 7§5**, State Parties have to recognise a fair wage for young workers and appropriate allowances as regards apprentices. According to the Committee, this right may be implemented by legislation, collective agreements or equivalents in the national legal system.[956] Under this provision, the Committee assesses the fairness of the wage and the appropriateness of the allowance in comparison with the starting wage or minimum net wage paid to a single adult.[957]

Regarding young workers, their wage may be less than the adult starting or minimum wage, but any difference must be reasonable and the gap must close fairly quickly.[958] Here, the Committee has developed detailed standards: for 15 to 16 year-olds, a wage which is 30% lower than the adult starting wage is acceptable; for 16 to 18 year-olds, the difference may not exceed 20%.[959] The adult reference wage must in all cases be sufficient to comply with the fairness criteria of Article 4§1 of the Charter (right to adequate remuneration). For example, if young workers between 16 and 18 were paid 80% of a minimum wage in line with the Article 4§1 fairness threshold (60% of the net average wage), the situation would be in conformity.[960] If the reference wage is too low, a young worker's wage is a fortiori not considered fair.[961]

Regarding apprentices, they may be paid lower wages, since the value of the on-the-job training they receive is taken into account. However, the apprenticeship system must not be used to

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950. ECSR, Conclusions 2006, Norway, <http://hudoc.esc.coe.int/eng?i=2006/def/NOR/7/2/EN>, (2 January 2017).
951. ECSR, Conclusions I (1969), Statement of Interpretation on Article 7§3, <http://hudoc.esc.coe.int/eng?i=I_Ob_-29/Ob/EN>, (2 January 2017).
952. ECSR, Conclusions 2011, Statement of Interpretation on Article 7§3, <http://hudoc.esc.coe.int/eng?i=2011_163_01/Ob/EN>.
953. ECSR, Conclusions 2006, Albania, <http://hudoc.esc.coe.int/eng?i=2006/def/ALB/7/4/EN>. CoE (2018), Digest of the Case Law of the European Committee of Social Rights, p. 109.
954. ECSR, Conclusions XI-1 (1991), Netherlands, <http://hudoc.esc.coe.int/eng?i=XI-1/def/NLD/7/4/EN>, (2 January 2017).
955. ECSR, Conclusions 2002, Italy, <http://hudoc.esc.coe.int/eng?i=2002/def/ITA/7/4/EN>, (2 January 2017).
956. ECSR, Conclusions 2015, Serbia, <http://hudoc.esc.coe.int/eng?i=2015/def/SRB/7/5/EN>, (2 January 2017); Conclusions 2011, Ukraine, <http://hudoc.esc.coe.int/eng?i=2011/def/UKR/7/5/EN>, (2 January 2017).
957. Conclusions XI-1 (1991), United-Kingdom, <http://hudoc.esc.coe.int/eng?i=XI-1/def/GBR/7/5/EN>, (2 January 2017).
958. Conclusions II (1971), Statement of Interpretation on Article 7§5, <http://hudoc.esc.coe.int/eng?i=II_Ob_-9/Ob/EN>, (2 January 2016).
959. Conclusions 2006, Albania, <http://hudoc.esc.coe.int/eng?i=2006/def/ALB/7/5/EN>, (2 January 2017).
960. Conclusions 2015, Slovenia, <http://hudoc.esc.coe.int/eng?i=2015/def/SVN/7/5/EN>, (19 November 2019).
961. Conclusions XII-2 (1992), Malta, <http://hudoc.esc.coe.int/eng?i=XII-2/def/MLT/7/5/EN>, (2 January 2017).

circumvent the payment of fair wages to young workers. Accordingly, the terms of apprenticeship should not last too long and, as skills are gained, the allowance should be gradually increased throughout the contract period,[962] starting from at least one-third of the adult starting wage or minimum wage at the commencement of the apprenticeship, to at least at two-thirds at the end of it.[963]

According to **Article 7§6**, time spent on vocational training by young people during normal working hours is part of the working day. Such training should, in principle, be done with the employer's consent and be related to the young person's work.[964] This right also applies if it is not financed by the employer.[965] Therefore, training time is to be remunerated as normal working time, and there can be no obligation to make up for the time spent in training, which would de facto increase the total number of hours worked.[966]

Article 7§7[967] stipulates that young persons under eighteen must be given at least four weeks' annual holiday with pay.[968] According to the Committee's interpretation, young employees who cannot work because of illness or accident during the whole or part of their annual leave must have the right to take the leave lost at some other point in time at least to the extent needed to give them the four weeks' paid annual leave stipulated in the Charter. This applies in all circumstances, regardless of whether incapacity begins before or during leave, and also in cases where a company requires its workers to take leave at a specific time.[969]

According to **Article 7§8**, national law must prohibit night work of young persons under eighteen. This prohibition concerns all economic sectors and must be rigorously supervised by the Labour Inspectorate.[970] Exceptions are narrowly defined by the Committee and can only be made in view of occupations explicitly mentioned in national law, necessary for the functioning of the economic sector and if the number of young workers concerned is low.[971] According to the Appendix to the Charter, State Parties fulfil this requirement if the law provides that the great majority of persons under eighteen years of age are not employed in night work.[972] In the definition of night work, states parties have a wider margin of discretion. It is up to national laws or regulations to define the period of night time.[973]

Article 7§9 provides for compulsory regular medical check-ups[974] for under eighteen-years-old employed in occupations as specified by national laws or regulations. These check-ups must be adapted to the specific situation of young workers and the particular risks that they face.[975] They may, however, also be carried out by the occupational health services, if these services have the specific training to do so.[976] The right stipulated in Article 7§9 includes a full medical examination on recruitment and regular check-ups thereafter.[977] The intervals between check-ups must not be

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962. ECSR, Conclusions II (1971), Statement of Interpretation on Article 7§5, <http://hudoc.esc.coe.int/eng?i=II_Ob_-9/Ob/EN>.
963. ECSR, Conclusions 2006, Portugal, <http://hudoc.esc.coe.int/eng?i=2006/def/PRT/7/5/EN>, (2 January 2017).
964. Conclusions XV-2 (2001), Netherlands, <http://hudoc.esc.coe.int/eng?i=XV-2/def/NLD/7/6/EN>, (2 January 2017).
965. Id.
966. Conclusions V (1977), Statement of Interpretation on Article 7§6, <http://hudoc.esc.coe.int/eng?i=V_Ob_-12/Ob/EN>, (2 January 2017).
967. Under the 1961 Charter, the requirement is three weeks.
968. General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011, Decision on the merits of 23 May 2012, §§ 30-32, <http://hudoc.esc.coe.int/eng?i=cc-66-2011-dmerits-en>. The standards are the same as for adults under Art. 2(3) of the Charter.
969. Conclusions 2006, France, <http://hudoc.esc.coe.int/eng?i=2006/def/FRA/7/7/EN>. CoE (2018), Digest, p. 111.
970. Conclusions XIX-4 (2011), Czech Republic, <http://hudoc.esc.coe.int/eng?i=XIX-4/def/CZE/7/8/EN>.
971. Conclusions XVII-2 (2005), Malta, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/MLT/7/8/EN>.
972. ESC Appendix, Article 7, paragraph 8; ECSR Conclusions 2011, Belgium, <http://hudoc.esc.coe.int/eng?i=2011/def/BEL/7/8/EN>.
973. Conclusions I (1969), Statement of Interpretation on Article 7§8, <http://hudoc.esc.coe.int/eng?i=I_Ob_-31/Ob/EN>.
974. Conclusions IV (1975), Statement of Interpretation on Article 7§9, <http://hudoc.esc.coe.int/eng?i=IV_Ob_-8/Ob/EN>.
975. Conclusions 2006, Albania, <http://hudoc.esc.coe.int/eng?i=2006/def/ALB/7/9/EN>.
976. Conclusions VIII (1984), Statement of Interpretation on Article 7§9, <http://hudoc.esc.coe.int/eng?i=VIII_Ob_-4/Ob/EN>; Conclusions XIII-2 (1994), Italy.
977. Conclusions XIII-1 (1993), Sweden, <http://hudoc.esc.coe.int/eng?i=XIII-1/def/SWE/7/9/EN>.

too long. In this regard, an interval of two years has been considered by the Committee to be too long.[978]

Article 7§10 is a very broad provision and guarantees the right of children to be protected against physical and moral risks in and outside employment. This includes in particular the protection of children against all forms of exploitation. This paragraph – as interpreted by the Committee – also covers trafficking of human beings as a severe form of exploitation. Given its wide scope and relevance for the physical and mental integrity of minors, the Committee has developed quite an elaborate case law on this provision.[979] Given its relevance, it applies to all minors[980] on the territory of the state party.[981]

This provision is closely linked with and overlaps with Article 17. In case State Parties have accepted both provisions (which is the case for Ukraine), the Committee focuses on the following aspects regarding Article 7§10: the protection of children against moral dangers at work and outside work and the involvement of children in the sex industry and in begging. The situations dealt with under Article 17 are in particular the protection of children from ill-treatment, including corporal punishment.[982]

In order to combat sexual exploitation of children through the use of internet technologies, State Parties must adopt effective measures in law and in practice. This includes legislation that Internet service providers be responsible for controlling the material they host, encouraging the development and use of a monitoring system for activities on the net and logging procedures (for example filtering and rating systems).[983] Internet service providers should be under an obligation to remove or prevent accessibility to illegal material on which they have knowledge and internet safety hotlines should be set up through which illegal material can be reported.[984]

State Parties must also prohibit the use of children by other forms of exploitation such as, domestic/labour exploitation, including trafficking for the purposes of labour exploitation, begging, etc. through legislation and its effective implementation.[985] They must take preventive measures regarding street children and assist them in regaining a dignified and protected living situation.[986]

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

Complaint No. 114/2015, decision on the merits of 24 January 2018, http://hudoc.esc.coe.int/fre/?i=cc-114-2015-dmerits-en.

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978. Conclusions 2011, Estonia, <http://hudoc.esc.coe.int/eng?i=2011/def/EST/7/9/EN>.
979. Conclusions 2004, Bulgaria, <http://hudoc.esc.coe.int/eng?i=2004/def/BGR/7/10/EN>.
980. This is one of the few interpretative exceptions to the personal scope of the Charter which only protects persons of other states parties who are either legally residing or regularly working in the territory of the state party in question.
981. Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012, §§ 85-86, <http://hudoc.esc.coe.int/eng?i=cc-69-2011-dmerits-en>.
982. Conclusions XV-2 (2001), Statement of Interpretation of Article 7§10, <http://hudoc.esc.coe.int/eng?i=XV-2_Ob_V1-1/Ob/EN>; Association for the protection of All Children (APPROACH) Ltd. v. Cyprus, Complaint No. 97/2013, decision on admissibility of July 2013, §10, <http://hudoc.esc.coe.int/eng?i=cc-97-2013-dadmiss-en>,; Mental Disability Advocacy Center (MDAC) v. Bulgaria, Complaint No. 41/2007, decision on admissibility of 26 June 2007, §8, <http://hudoc.esc.coe.int/eng?i=cc-41-2007-dadmiss-en>.
983. Conclusions 2004, Romania, <http://hudoc.esc.coe.int/eng?i=2004/def/ROU/7/10/EN>.
984. Conclusions XIX-4 (2011), Croatia, <http://hudoc.esc.coe.int/eng?i=XIX-4/def/HRV/7/10/EN>.
985. Conclusions 2015, Estonia, <http://hudoc.esc.coe.int/eng?i=2015/def/EST/7/10/EN>.
986. Conclusions 2004, Romania, <http://hudoc.esc.coe.int/eng?i=2004/def/ROU/7/10/EN>.

IMPLICATIONS FOR UKRAINE

Article 7, Paragraph 1

From the moment of the ESC ratification in 2006, Ukraine has three times provided the reports on Article 7 of the Charter. In each of these reports Committee found that situation in Ukraine is not in conformity with Article 7§1 of the Charter on the grounds that the definition of light work is not sufficiently defined and the prohibition of employment under the age of 15 is not guaranteed in practice.[987]

The Committee pointed that the prohibition of the employment of children under the age of 15 applies to all economic sectors, and all places of work, including work within family enterprises and in private households. It further recalls that the prohibition also extends to all forms of economic activity, irrespective of the status of the worker (employee, self-employed, unpaid family helper or other).[988]

The last time Ukraine referred to the draft of Labour Code of Ukraine which resolved this situation and thus it prohibits the use of minors in the work where they may be at risk of physical, psychological or sexual violence, or whose performance may harm their health or lead to negative consequences in moral development.[989] By the end of November 2020 it has not been adopted by Verkhovna Rada.

Article 7, Paragraph 2

The Committee Conclusion of 2015 found that the situation in Ukraine is in conformity with Article 7§2 of the Charter. Based on the provided information the Committee recalls that in the application of Article 7§2 there must be a sufficient statutory framework in order to identify potentially hazardous work, which either provides such forms of work or defines the types of risk (physical, chemical, biological) which may occur in the course of work. As the result of the reviewing of all the information provided, the Committee concludes that the situation in Ukraine is not in conformity with Article 7§2 of the Charter reasoning that the prohibition of employment under the age of 18 for dangerous or unhealthy activities is not effectively guaranteed.[990]

Article 7, Paragraph 3

Upon examination of Ukrainian report, the Committee refers to its findings regarding light work in its conclusion on Article 7§1 and considers that the situation in Ukraine is not in conformity with Article 7§3 of the Charter on the ground that the definition of light work is not sufficiently precise.[991]

In Conclusions 2015,[992] the Committee examined the legislation concerning working time for children who are still subject to compulsory education. It is noted that young employees aged from 16 to 18 years old may work up to 36 hours per week. It also takes into consideration the total duration of the general secondary education which is 11 years. It is therefore referred to its statement of interpretation on Article 7§1 and 7§2 and concluded that the situation was not in conformity with the Charter on the ground that the duration of working time for children aged 16-18 who are still

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

subject to compulsory education is excessive and cannot be qualified as light work.[993]

Article 7, Paragraph 4

Having analysed the information provided by the Government of Ukraine on the Seventh National Report[994] related the requirements to the working time of the children the Committee concludes that the situation in Ukraine is in conformity with the Charter. However, the Committee recalls that the situation in practice should be regularly monitored and therefore asks to provide information on the number and nature of violations detected as well as on sanctions imposed on employers for the breach of the regulations regarding the working time for young workers under the age of 18.[995]

Article 7, Paragraph 5

In Conclusion 2015,[996] the Committee stated that the minimum wage corresponded to only 34.44% of the net average wage, which is too low to secure a decent standard of living for young workers. Accordingly, the situation in Ukraine was not in conformity with Article 7§5 of the Charter.

Article 7, Paragraph 6

The Committee previously examined the situation in Ukraine and found it to be in conformity with Article 7§6 of the Charter (Conclusions 2011[997], 2015[998]).

Despite that the Committee emphasises that provisions cannot be guaranteed exclusively by the operation of legislation if this is not effectively implemented into practice and strictly controlled.

Article 7, Paragraph 7

The Government of Ukraine pointed out to the national legislation preserved that young workers under 18 were granted an annual leave of 31 calendar days. The Committee examined the situation in Ukraine and found it to be in conformity with Article 7§6 of the Charter (Conclusions 2011,[999] 2015,[1000] 2019[1001]).

Article 7, Paragraph 8

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

Article 7, Paragraph 9

The Government of Ukraine pointed that according to the Labour Code all individuals under the age of eighteen are hired only after a preliminary medical examination and thereafter, until the age

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993. Conclusions 2019, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/3/EN >, (5 December 2019).
994. Seventh National Report of the Government of Ukraine on the implementation of the provisions of the European Social Charter (revised) concerning Articles 7, 8, 16, 17, 27, 31. URL: https://www.msp.gov.ua/content/spivrobitnictvo-z-radoyu-evropi.html
995. Conclusions 2015, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/4/EN >, (4 December 2015).
996. Conclusions 2015, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/5/EN >, (4 December 2015).
997. Conclusions 2011, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2011/def/UKR/7/6/EN >, (9 December 2011).
998. Conclusions 2015, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/6/EN >, (4 December 2015).
999. Conclusions 2011, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2011/def/UKR/7/7/EN >, (9 December 2011).
1000. Conclusions 2015, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/7/EN >, (4 December 2015).
1001. Conclusions 2019, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/7/EN >, (5 December 2019).

of 21, are subject to a mandatory annual medical examination.[1002] This provision was not changed during next reports periods. The Committee examined the situation in Ukraine and found it to be in conformity with Article 7§9 of the Charter (Conclusions 2011,[1003] 2015,[1004] 2019[1005]).

Article 7, Paragraph 10

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

The overall result of the Committee's examination is that the situation in Ukraine is not in conformity with Article 7§10 of the Charter on the grounds that not all children under the age of 18 are protected against sexual exploitation.[1006]

In the Conclusions 2015, the Committee considered that the situation in Ukraine was not in conformity with the Charter on the grounds that legislation did not protect children under the age of 18 from child prostitution; the use of children in the production of pornographic materials was not criminalised if it was proved that the child had been paid for their services or consented to being involved and the simple possession of child pornography was not a criminal offence.[1007]

Ukraine takes several steps to prevent trafficking in human beings, increase the effectiveness of the detection of the individuals who commit or facilitate such offences, ensure the protection of the rights of victims of trafficking, in particular children, and to provide them with assistance.[1008]

Nevertheless, from the GRETA report the Committee concludes that statistical data on human trafficking in Ukraine remains largely unconsolidated: law enforcement agencies collect data on the number of victims of trafficking registered in the course of criminal investigations, the Ministry of Social Policy keeps records of people who have formally applied for the status of victim, and the IOM Office, NGOs and social service providers keep their own statistics on victims and presumed victims of trafficking assisted by them.[1009] In relation to children in street situations, the Committee refers to the General Comment No. 21 of the UN Committee on the Rights of the Child which gives authoritative guidance to States on developing comprehensive, long-term national strategies on children in street situations using an integral, child rights approach and addressing both prevention and response in line with the Convention on the Rights of the Child, which has been ratified by Ukraine.[1010]

Analysis of the provisions of the European Social Charter (revised) on the right of children and young persons to social, legal and economic protection (Article 17)

Under Article 17§1, State Parties need to ensure that children and young persons "have the care, the assistance, the education and the training they need" (1.a); protect them against "negligence, violence and exploitation" (1.b.); and provide protection and aid for children and young persons

1002. The third national report of the Government of Ukraine on the implementation of the provisions of the European Social Charter (revised) URL: https://www.msp.gov.ua/content/spivrobitnictvo-z-radoyu-evropi.html
1003. Conclusions 2011, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2011/def/UKR/7/9/EN >, (9 December 2011).
1004. Conclusions 2015, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/9/EN >, (4 December 2015).
1005. Conclusions 2019, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/9/EN >, (5 December 2019).
1006. Conclusions 2019, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/10/EN >, (5 December 2019).
1007. Conclusions 2015, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/7/10/EN >, (4 December 2015).
1008. Eleventh National Report of the Government of Ukraine on the implementation of the provisions of the European Social Charter (revised) concerning Articles 7, 8, 16, 17, 27, 31. https://www.msp.gov.ua/content/spivrobitnictvo-z-radoyu-evropi.html
1009. Conclusions 2019, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/7/10/EN >, (5 December 2019).
1010. Ibid.

"deprived of their family's support" (1.c.). Thus, the Committee assesses a wide range of situations.

DECISIONS AND CONCLUSIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

According to the Committee's interpretation, children have the right to know their origins. The Committee examines the procedures available for the establishment of maternity and paternity and the situations where the establishment of maternity or paternity is not possible and/or this right is restricted.[1011] The Committee also interprets Article 17§1 to prohibit discrimination of children born outside and within marriage, particularly in respect of care obligations and inheritance rights.[1012] Regarding the minimum age for marriage, the Committee raised questions with State Parties when there is a difference in the minimum age for marriage for males and females, on the ground that this may be discriminatory.[1013]

The Committee has developed very detailed standards for children in public care.[1014] The main criterion is that placement must be an exceptional measure, and is only justified when it is based on the needs of the child, namely if remaining in the family represents a danger for the child. The financial conditions or material circumstances of the family should not be the sole reason for placement. Appropriate alternatives to placement should be explored first, taking into account the views expressed by the child, his or her parents and other members of the family.[1015] The long-term care of children outside their home should take place primarily in suitable foster families and only if necessary in institutions.[1016]

According to the Committee's interpretation, Article 17§1 entails a prohibition and penalisation of all forms of violence against children, including all forms of corporal punishment,[1017] in the home, as well as in all education settings, public and private, and in alternative care. These are acts likely to affect the physical integrity, dignity, development or psychological well-being of children. The relevant legislation must be sufficiently clear, binding and precise.[1018] Moreover, states parties must act diligently to ensure that such violence is effectively eliminated in practice.[1019]

In the cases Association for the Protection of All Children (APPROACH) v. France, Ireland, Italy, Slovenia, Czech Republic, Cyprus, and Belgium, the complainant organisation alleged that because of the lack of explicit and effective prohibition of all corporal punishment of children in the family, schools and other settings, and because the states in question had failed to act with due diligence to eliminate such punishment in practice, they were in breach of Article 17§1. Regarding the majority of countries, the Committee held that they were in violation of Article 17§1 because the respective legislations did not set out an express and comprehensive prohibition on all forms of corporal punishment of children and there was no case law by superior courts showing that the legislations have been interpreted as prohibiting all forms of violence against children.[1020]

Regarding young offenders, the age of criminal responsibility must not be too low.[1021] The criminal

1011. Conclusions 2003, France, <http://hudoc.esc.coe.int/eng?i=2003/def/FRA/17/1/EN>.
1012. Conclusions XVII-2 (2005), Malta, <http://hudoc.esc.coe.int/eng?i=XVII-2/def/MLT/17//EN>.
1013. Ibid; Conclusions 2011, Ukraine, <http://hudoc.esc.coe.int/eng?i=2011/def/UKR/17/1/EN>.
1014. For details see CoE (2018), Digest of the Case Law of the European Committee of Social Rights, p. 170f.
1015. Conclusions 2011 (XIX-4), Statement of Interpretation on Articles 16 and 17, <http://hudoc.esc.coe.int/eng?i=XIX-4_035_04/Ob/EN>.
1016. Ibid.
1017. Conclusions XIX-4 (2011) United Kingdom, <http://hudoc.esc.coe.int/eng?i=XIX-4/def/GBR/17//EN>.
1018. World Organisation against Torture (OMCT) v. Portugal, Complaint no. 34/2006, Decision on the merits of 5 December 2006, §19-21, <http://hudoc.esc.coe.int/eng?i=cc-34-2006-dmerits-en>.
1019. Conclusions 2011, France, <http://hudoc.esc.coe.int/eng?i=2011/def/FRA/17/1/EN>.
1020. APPROACH v. Belgium, collective complaint no. 98/2013, decision on the merits of 20 January 2015, <http://hudoc.esc.coe.int/eng/?i=cc-98-2013-dmerits-en>.
1021. Conclusions 2011, Ireland, <http://hudoc.esc.coe.int/eng?i=2011/def/IRL/17/1/EN>; Conclusions XIX-4 (2011) United Kingdom, <http://hudoc.esc.coe.int/eng?i=XIX-4/def/GBR/17//EN>.

procedure relating to children and young persons must be adapted to their age and proceedings involving minors must be conducted rapidly. Minors should only exceptionally be detained pending trial for serious offences, for short periods of time[1022] and should in such cases be separated from adults.[1023] Prison sentences should only exceptionally be imposed on young offenders. They should only be for a short duration[1024] and the length of sentence must be laid down by a court. Young offenders should not serve their sentence together with adult prisoners.[1025]

According to the Committee's interpretation, Article 17§1 guarantees the right of children and young persons to care and assistance, including medical and social assistance when the parents are unable to provide such assistance or if they are non-accompanied minors.[1026] State Parties must take appropriate measures to guarantee the care and assistance needed and to protect them from negligence, violence or exploitation.[1027] Immediate assistance includes the satisfaction of the material needs, as well as medical or psychological care in the structured form of a child support plan.[1028] Regarding unaccompanied foreign minors, the system of reception must respect the dignity of the child. The detention of minors in waiting areas, together with adults, and/or accommodated in hotels, deprived by the assistance of a guardian cannot be in the best interest of the child and is thus contrary to the Charter.[1029]

The Committee also assesses more generally the situation of children in poverty, and bases its assessment on the Guiding Principles on extreme poverty and human rights.[1030]

Finally, the Committee assesses the right to education as a fundamental right for the achievement and maintenance of other critical rights of children. Here, the Committee particularly focuses on equal access to education as Article 17 under both its paragraphs guarantees the right of all children to education.[1031] Here, the Committee pays particular attention to state protection for children in vulnerable situations from minorities, children seeking asylum, refugee children, children in hospitals, children in care, pregnant teenagers, teenage mothers, and children deprived of their liberty. Children belonging to these groups must be integrated into mainstream educational facilities and schemes. Where necessary, special measures should be taken to ensure equal access to education.[1032] However, special measures for Roma children should not involve the establishment of separate schools or classes only for this group which may lead to segregation.[1033] As regards children with disabilities, their right to education is guaranteed both by paragraphs 1

1022. Conclusions 2005, France, <http://hudoc.esc.coe.int/eng?i=2005/def/FRA/17/1/EN>; Conclusions XIX-4 (2011), Denmark, <http://hudoc.esc.coe.int/eng?i=XIX-4/def/DNK/17//EN>.
1023. European Committee for Home Based Priority Action for the Child and the Family (EUROCEF) v. France, Complaint No. 114/2015, decision on the merits of 24 January 2018, § 99, <http://hudoc.esc.coe.int/eng?i=cc-114-2015-dmerits-en>.
1024. Conclusions 2011, Norway, <http://hudoc.esc.coe.int/eng?i=2011/def/NOR/17/1/EN>.
1025. Conclusions 2011, Belgium, <http://hudoc.esc.coe.int/eng?i=2011/def/BEL/17/1/EN>; Conclusions XV-2 (2001), Statement of Interpretation on Article 17, <http://hudoc.esc.coe.int/eng?i=XV-2_Ob_V1-2/Ob/EN>; CoE (2018), Digest, p. 169.
1026. International Federation of Human Rights Leagues (FIDH) v. France, Complaint No 14/2003, decision on the merits of September 2004, §36, <http://hudoc.esc.coe.int/eng?i=cc-14-2003-dmerits-en>; Defence for Children International (DCI) v. Netherlands, Complaint 47/2008, Decision on the merits of 20 October 2009, §§70-71, <http://hudoc.esc.coe.int/eng?i=cc-47-2008-dmerits-en>; European Federation of National Organisations working with the Homeless (FEANTSA) v, Netherlands, Complaint No. 86/2012, decision on the merits of 2 July 2014, §50, <http://hudoc.esc.coe.int/eng?i=cc-86-2012-dmerits-en>.
1027. Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012, §82, <http://hudoc.esc.coe.int/eng?i=cc-69-2011-dmerits-en>.
1028. CoE (2018), Digest, p. 172.
1029. European Committee for Home Based Priority Action for the Child and the Family (EUROCEF) v. France, Complaint No. 114/2015, decision on the merits of 24 January 2018, § 100, 136, <http://hudoc.esc.coe.int/eng?i=cc-114-2015-dmerits-en>.
1030. Magdalena Sepúlveda Carmona, Guiding principles on extreme poverty and human rights, adopted by the United Nations Human Rights Council on 27 September 2012.
1031. Mental Disability Advocacy Centre (MDAC) v. Bulgaria, Collective Complaint No. 41/2007, decision on the merits of 3 June 2008, §34, <http://hudoc.esc.coe.int/eng?i=cc-41-2007-dmerits-en>. Autism-Europe v. France, Complaint No.13/2002, decision on the merits of 4 November 2003, §49, <http://hudoc.esc.coe.int/eng?i=cc-13-2002-dmerits-en>.
1032. Mental Disability Advocacy Centre (MDAC) v. Bulgaria, supra, §34.
1033. Conclusions 2011, Slovakia, <http://hudoc.esc.coe.int/eng?i=2011/def/SVK/17/1/EN>.

and 2 of Article 17 as well as by Article 15§1[1034] and Article 10. Article 15 is the lex specialis to be applied for children with disabilities.[1035]

Article 17, Paragraph 2

This provision guarantees the right of children to primary and secondary education, including the right to inclusive education. According to the Appendix, it covers all persons below the age of 18 years, unless under the applicable law the threshold is attained earlier, without prejudice to the other specific provisions of the Charter, particularly Article 7. According to the Appendix, his does not imply an obligation to provide compulsory education up to the age of 18.

Regarding the criterion of quality, states parties have to establish and maintain a well-functioning education system. Here, the Committee requires, inter alia, a functioning system of primary and secondary education, which includes an adequate number of schools fairly distributed over the geographical area, in particular between rural and urban areas. Class sizes and the teacher-pupil ratio must be reasonable. There must also be a mechanism to control the quality of teaching and the methods used in public as well as private educational institutions. These are the same criteria as applied under Article 17§1.

According to the wording of Article 17§2, primary and secondary education, which comprises the basic education system must be free of charge. Other costs such as books or uniforms must be reasonable and assistance must be available to limit their costs for the most disadvantaged children. The Committee examines state measures to encourage school attendance and to actively reduce the number of children dropping out or not completing compulsory education and the rate of absenteeism. State Parties have a margin of discretion in developing and implementing concrete measures to combat absenteeism depending on causes and national situations.

IMPLICATIONS FOR UKRAINE

Article 17, Paragraph 1

The Committee examined the situation in Ukraine on its conformity with Article 17§1 of the Charter on aspects the legal status of the child, protection from ill-treatment and abuse, rights of children in public care, right to education, children in conflict with the law, right to assistance and child poverty.

The overall result of the Committee's examination the situation in Ukraine is not in conformity with Article 17§1 of the Charter on the ground that the ratio of children in institutional care to the number of children in foster-care or other forms of family-based care is too high.[1036]

The main interest of the Committee related to the legal status of a child was devoted to the measures which have been taken by the Government of Ukraine to reduce statelessness including relevant procedures for obtaining nationality and taking measures to identify children unregistered at birth.

The Committee repeats that the situation related protection from ill-treatment is in conformity with the Charter; all forms of corporal punishment are prohibited in all settings.[1037]

1034. Conclusions 2003, Bulgaria, <http://hudoc.esc.coe.int/eng?i=2003/def/BGR/17/2/EN>.
1035. European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, decision on the merits of 11 September 2013, §§24-30, <http://hudoc.esc.coe.int/eng?i=cc-81-2012-dmerits-en>.
1036. Conclusions 2019, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/17/1/EN >, (5 December 2019).
1037. Conclusions 2015, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2015/def/UKR/17/1/EN >, (4 December 2015).

On the aspects of education, the Committee refers to its conclusion under Article 17§2.

Evaluating the situation with respect of rights of children in public care the Committee was very concerned on the procedure for removing children from their families, following the judgment of the European Court of Human Rights in the case Saviny v. Ukraine.[1038]

The Committee finds the situation not to be in conformity with the Charter on the grounds that the ratio of children in institutional care to the number of children in foster-care or other forms of family-based care is too high.[1039]

The Committee emphasised that prison sentences should only exceptionally be imposed on young offenders as a measure of last resort and be of short duration and be regularly reviewed. That also includes provisions of the law that allows children to be detained for 12 months pending trial.

The right to assistance was linked to the situation in Ukraine that the detention of children on the basis of their or their parents' immigration status. Such practice in the view of the Committee is contrary to the best interests of the child.

Article 17, Paragraph 2

The Committee evaluated the situation in Ukraine on conformity with Article 17§2 of the Charter on enrolment rates, absenteeism and drop-out rates, costs associated with education, vulnerable groups, anti-bullying measures and the voice of the child in education. The overall conclusion was deferred on pending receipt of the information.

The Committee on the aspects of vulnerable groups pointed out the access to general secondary education of children in an irregular migration situation and wishes to receive updated information in this respect.

The conclusion of the Committee emphasises needs of child participation across a broad range of decision-making and activities related to education.

1038. European Court of Human Rights, Saviny v. Ukraine, < http://hudoc.echr.coe.int/eng/?i=001-90360 >, (18 December 2008)
1039. Conclusions 2019, Ukraine, < http://hudoc.esc.coe.int/eng/?i=2019/def/UKR/17/1/EN >, (5 December 2019).

The European Social Charter, adopted in 1961 and revised in 1996, is the counterpart of the European Convention on Human Rights in the field of economic and social rights. It guarantees a broad range of human rights related to employment, housing, health, education, social protection and welfare.

No other legal instrument at pan-European level provides such an extensive and complete protection of social rights as that provided by the Charter.

The Charter is therefore seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture.

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