



International Organisation of Employers
Organisation Internationale des Employeurs
Organización Internacional de Empleadores
The Global Voice of Business

INFORMATION PAPER

INTERNATIONAL ORGANISATION OF EMPLOYERS



THE EUROPEAN SOCIAL CHARTER AND ITS SUPERVISION

OPPORTUNITIES, CONCERNS, AND THE ROLE OF THE IOE



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Executive Summary

THIS INFORMATION PAPER PROVIDES AN INSIGHT INTO THE CONTENT OF THE EUROPEAN SOCIAL CHARTER (ESC), THE WAY IN WHICH IT IS SUPERVISED, AND THE WORKING METHODS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS (ECSR), WHICH IS TASKED WITH THE CHARTER SUPERVISION. IT HIGHLIGHTS THE OPPORTUNITIES AND CONCERNS FOR THE IOE AND ITS MEMBERS ARISING FROM THE SUPERVISION OF THE ESC.

The ESC guarantees social and political rights. It is a Treaty of the Council of Europe (CoE). Currently, two versions of the Treaty are applied, according to the ratification by the CoE Member States: the 1961 original Charter (ESC) and the 1996 revised Charter.

The Charter's supervisory system is composed of a two-fold process: **regular reporting**, based on the analysis of the national reports on the application of the Charter provisions, and the **collective complaint procedure**, allowing specified international organisations of employers and workers, and NGOs, to submit complaints alleging unsatisfactory application of the Charter.

In both processes a central role is played by the ECSR, which ascertains whether countries have respected the provisions set out in the Charter.

The Charter provisions have binding force, but not the ECSR determinations. The ECSR decisions and conclusions are not enforceable in domestic legal systems. However, the ECSR has significant influence (for policy makers and the judicial system), which, together with political and diplomatic pressure, are the engine of the Charter supervisory system.

The IOE has **consultative status within the CoE**, which allows it to gain a deeper understanding of the application of the Charter, and also to play an important role in communicating the business perspective both in the regular procedure of supervision and in the collective complaints procedures. Through the IOE, members have a formal opportunity to counter ECSR observations and to prevent diplomatic escalations of Charter violations.

The IOE, while developing its interest and participation in the work of the CoE, is increasingly concerned by the concrete functioning of the supervisory system and the value given to the Employers' comments.

First, the way in which the Charter is supervised is quite complex and difficult for the general public to understand. Added to this, the system, does not always contribute to adequate implementation of the Charter.

Second, the exact role and mandate of the ECSR is unclear, leading to a situation where the ECSR has developed a wide range of rigid and one-sided extensive interpretations of the Charter. This has generated some frustration on the Governments' side and legal uncertainty as to the exact content of the Charter's provisions.

Detailed **examples of ECSR interpretations and negative consequences are contained in Annex I** on:

- [Article 2.1](#) on working time
- [Article 4.1](#) on minimum wage
- [Article 6.4](#) on the right to collective action
- [Article 24](#) on termination of employment and the probation period

Finally, the IOE is concerned by the relative receptiveness by the ECSR to business views within the framework of the regular reporting or the collective complaint procedure and seeks to redress this situation.



Introduction

THE COUNCIL OF EUROPE (COE) IS A POLITICAL ORGANISATION, FOUNDED IN 1949 TO DEFEND AND PROMOTE THE PRINCIPLES OF DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW. THE COE CURRENTLY HAS 47 MEMBER STATES.

The European Social Charter (ESC) is a Treaty of the Council of Europe. It was signed in 1961 in Turin and **revised in 1996**; the revision came into force in 1999. The 1961 Charter is still applied in 10 countries, while the revised Charter has been ratified and it is now applied in 33 countries¹. The European Social Charter **guarantees social and political rights**, such as, *inter alia*, the right to work, the right to safe and healthy working conditions; the right to a fair remuneration, the right to organise and bargain collectively; the right to maternity protection and to social security; the right of children to social, legal and economic protection, the right of migrant workers to protection and assistance; the right to protection in cases of termination of employment, and to housing². Under certain conditions, the ESC allows for a “menu à la carte”, as member States may decide not to accept

certain provisions and have no obligations vis-à-vis the provisions they have not accepted.

The International Organisation of Employers (IOE) has a **consultative status within the CoE**, which allows it to gain a deeper understanding of the application of the Charter at national level, but also to play an important role in communicating the business perspective within the Charter’s supervisory procedure.

This note aims to provide an insight into the content of the Charter’s supervision, the way in which it is supervised, and the working methods of the European Committee of Social Rights (ECSR), which is tasked with the Charter supervision. It will finally highlight the opportunities and concerns for the IOE and its members arising from the supervision of the ESC.

¹ For a list of countries and ratifications, see [here](#).

² The European Social Charter guarantees social and political rights related to seven topics: housing, health, education, employment, legal and social protection, free movement of persons, non-discrimination.

The Supervision of the Charter

THE 1961 CHARTER ESTABLISHES IN PART IV THE WAY IN WHICH ITS PROVISIONS ARE SUPERVISED.

The procedure originally established has been complemented with the 1991 Protocol (which focuses exclusively on the reform of the supervisory machinery), and with the 1995 Protocol (which

establishes a system of complaints) and with the 1996 Charter. While the 1991 Protocol has not entered into force (but is applied on a provisional basis³), the 1995 Protocol is applicable only by ratifying Member States.

THE CHARTER SUPERVISION: A TWO-FOLD PROCESS



The **REGULAR PROCEDURE**, based on the analysis of the national reports on the application of the Charter provisions



The **COLLECTIVE COMPLAINT PROCEDURE**, allowing international organisations of employers and workers, other international NGOs, and national organisations of employers and trade unions to submit complaints alleging unsatisfactory application of the Charter

In both procedures a central role is played by the **ECSR**, which ascertains whether countries have respected the provisions set out in the Charter. It is composed of fifteen independent, impartial members (elected by the Council of Europe Committee of Ministers for a period of six years, renewable once). It is reminiscent of the ILO Committee of Experts.

A. Regular reporting

As from 2007, a new system of regular reporting has been introduced. The Charter has been divided into four thematic groups:

Group I	Employment, training and equal opportunities
Group II	Health, social security and social protection
Group III	Labour rights
Group IV	Children, families, migrants

Each provision of the Charter is reported on once every four years. The supervision of the provisions is cyclical, there is no differentiation between countries: the legislation and practice of all countries, based on the ECSR decision, is potentially the subject of discussions at a higher level.

THE REGULAR SUPERVISION IS CONSTITUTED OF A 3-STEP PROCEDURE INVOLVING



³ Committee of Ministers conclusions, CM/Del/Dec (91) 467, 2 Dec. 1991

The **ECSR** examines the reports and publishes its **Conclusions** every year on the application of the rights set out in the Charter. The ECSR may identify the “non-conformity” of a Member State with the Charter provisions. Those cases of “non-conformity” are subsequently followed up in a higher political procedure, involving representatives of CoE Member States.

After the publication of the ECSR conclusions, the **Governmental Committee** discusses the reports of “non-conformity” referred to by the ECSR. The Governmental Committee meets twice a year and

is composed of one representative of each of the Contracting Parties plus **two representatives from international organisations of employers and workers, the IOE and the ETUC, with no right to vote, but with the capacity to participate.**

The decisions of the Governmental Committee are then referred to the **Committee of Ministers**, the CoE’s decision-making body, composed of the Foreign Affairs Ministers of all the member States, which might issue **individual recommendations** to the parties concerned asking them to bring their legislation in line with the provision of the Charter.

EXAMPLE:

States submit their reports on **Group 1 of the Charter – Employment Rights** by 31 October 2015. The report will deal with Employment Rights as applied in the period between 1 January 2011 and 31 December 2014.

The ECSR will examine these reports and publish its conclusions in December 2016. In the event of conclusions of “non-conformity”, the procedure will continue at a higher level with the Governmental Committee and may continue with the Committee of Ministers.

The Governmental Committee will then meet twice in 2017 to discuss the outcomes of the “non-conformity” decisions established by the ECSR.

Representatives of international organisations of Employers (IOE) and Workers (ETUC) participate and influence the discussion during the Governmental Committee meetings.

Subsequently, the Governmental Committee of Ministers intervenes in the last stage of the national reporting procedure, which would be planned for 2018.

Reference Period	Thematic Group	Date of submission of reports from States	Conclusions of the ECSR	Governmental Committee meetings	Committee of Ministers' meeting
01/01/2011-31/12/2014	Group 1 Employment, training and equal opportunities Article 1 Article 9 Article 10 Article 15 Article 18 Article 20 Article 24 Article 25	31/10/2015	December 2016	2017 (May – October)	2018

B. The Collective Complaint procedure

Under the 1995 Protocol to the Charter, which came into force in 1998, national trade unions and employers' organisations, as well as certain European/International trade unions and Employers' Organisations (the IOE, BUSINESSEUROPE, the ITUC) and specific international NGOs are entitled to lodge complaints of violations of the Charter with the Committee. National NGOs may lodge complaints only if the State concerned makes a declaration to this effect.

TO DATE ONLY 15
MEMBER STATES
HAVE ACCEPTED THE
COLLECTIVE COMPLAINT
PROCEDURE.

The ECSR examines the **admissibility of the complaint and takes a decision on its merits**. The complaint is then forwarded to the parties involved and to the Committee of Ministers for decision. It is made public after three months.

The **consultative status of the IOE within the European Social Charter supervisory system**, allows it - together with BUSINESSEUROPE - to submit complaints, to be notified of a complaint lodged before the ECSR and to directly submit IOE observations on the complaint. Here, the IOE plays a very important role in providing the business perspective.

When the ECSR establishes that a violation of the Charter has occurred, the **Committee of Ministers** invites the respondent State to indicate the measures taken to bring the situation into conformity and **adopts a resolution**. If appropriate, it may recommend the State concerned to take specific measures to bring the situation into line with the Charter. The Committee of Ministers cannot reverse the determinations of the Committee of Social Rights.

So far, the IOE has been actively involved in representing and providing the viewpoint of its members in four collective complaint procedures:

- [Case No. 59/2008](#) on the right to strike involving picketing in Belgium
- [Case No. 85/2012](#) on the possibility to start industrial action in Sweden
- [Cases No. 106-107-108/2014](#) on social security coverage in Finland
- [Case No. 111/2014](#) on working conditions and wages in Greece

C. Legal value of the determinations related to the Charter

The Charter is an international treaty, and therefore its provisions have a binding force that should not be underestimated. However, strictly speaking from a legal standpoint, **the decisions of the ECSR are not enforceable in domestic legal systems**. The Committee does not have the authority of a judicial body, unlike the European Court of Human Rights.

Nevertheless, the Members of the Council of Europe are required – by diplomatic pressure – to take measures to give effect under their domestic law to ECSR conclusions and decisions, or to the Committee of Ministers' resolutions.

The persuasive authority of the ECSR decisions/ conclusions and the Committee of Ministers' resolutions/recommendations, together with political pressure, are the engine of the whole Charter supervisory system.

States tend to conform to these decisions, by adapting their legislation and/or practice. In so doing, they avoid the negative exposure of being "condemned" as being in "non-conformity" with the Charter. However, this is not always the case. Some States have "non-conformity" status for many years and clearly express their intention not to change their legislation.

IOE role: Opportunities and concerns

THE IOE'S CONSULTATIVE BODY STATUS WITHIN THE COE GIVES IOE MEMBERS THE FORMAL OPPORTUNITY TO COUNTER ECSR OBSERVATIONS AND CONCLUSIONS AND TO PREVENT THE COMMITTEE OF MINISTERS FROM ARRIVING AT RESOLUTIONS THAT CAN NEGATIVELY IMPACT EMPLOYERS' INTERESTS.

The supervisory system in itself gives the employers' representatives the possibility to comment and to advocate for change at national level on a wide range of issues covered by the Charter. Employers, through the IOE, can comment on the application of a certain provision of the Charter or lodge a collective complaint before the ECSR.

However while actively participating in the supervision of the Charter, albeit not as signatory Parties, nor as constituents of a tripartite organisation like the ILO, employers' organisations are increasingly concerned by the concrete functioning of the supervisory system and the value given to the Employers' comments.

A. The supervision of the Charter

The way in which the Charter is supervised is quite complex and difficult for the general public to understand.

The IOE questions whether the three-fold steps characterizing the Charter's regular supervision, a) the ECSR b) the Governmental Committee and c) the Committee of Ministers, are effective in terms of real implementation of the Charter. The system, as it stands, does not always contribute to an adequate implementation of the Charter.

In addition, the Governmental Committee discusses the "non-conformity" of some countries with some provisions of the Charter on the basis of a list determined by the ECSR. However, it is not clear how this list is established, nor which criteria are followed in selecting the countries. During the May 2015 Governmental Committee all of the Governmental Committee's participants were astonished to be discussing the non-conformity of Luxembourg with Article 4.1 of the Charter, on the grounds that *"it had not been established that a decent standard of living was ensured for single workers earning the minimum wage"*. Many took the view that it was not worth discussing in an international forum whether 1800 € per month would ensure a decent standard of living in Luxembourg, the OECD country with the highest level of minimum wage.

B. The role of the ECSR

The exact role and mandate of the **ECSR** is unclear, both to the general public and to the member States. The 1961 Charter states that *"The reports sent to the Secretary General in accordance with Articles 21 and 22 shall be **examined** by a Committee of Experts [...]"* (Article 24); *"The Committee of Experts shall consist of not more than seven members appointed by the Committee of Ministers from a list of independent experts of the highest integrity and of recognised competence in international social questions, nominated by the Contracting Parties [...]"* (Article 25). Then, the 1991 Protocol, stating that *"the Committee of Independent Experts shall **assess from a legal standpoint** the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned"* applies on a provisional basis but it is not in force. This increases the lack of transparency regarding the ECSR's mandate.

This confusion generates legal uncertainty as to the exact content of the Charter's provisions and this might ultimately affect the credibility of the organisation as a whole.

Employers do not question that the examination of the national reports by the ECSR implies a certain degree of interpretation, but the ECSR has over time provided an extensive interpretation of the Charter. In the last three years, Employers have experienced the extent and rigidity of these one-sided interpretations.

Clarity is not provided by the *"Digest of the Case Law of the European Committee of Social Rights"*, which is a compilation of ECSR views on the application of the Charter's provisions. The reference contained in the title of the Digest – Case Law – is misleading on the legal value of the ECSR determinations: the question arises whether the ECSR conclusions and decisions on the merits are judicial pronouncements.

Furthermore, some of these interpretations are used by other Experts, such as the ILO Committee of Experts, to influence and reinforce their own interpretations of ILO Conventions.

Detailed examples of the ECSR interpretations are to be found in **Annex I**.

C. The added value of the IOE to the entire system

The IOE has increased its interest and involvement in the work of the CoE and the supervision of the Charter. It engages its own members more and more in the application of the Charter and works closely with them in preparing appropriate observations for the ECSR in the event of a collective complaint.

Such business involvement allows the ECSR to be better informed of the real situation and employers' concerns at national level.

However, there is limited receptiveness by the ECSR to business views within the framework of the regular reporting or the collective complaint procedure. This encourages NGOs to easily submit collective complaints, drafted in a very general manner, often in a disparaging tone and even without supporting evidence, in order to discredit companies at national level. An example in point is the collective complaint submitted by the Finnish Society of Social Rights vs Finland (No. 106, 107, 108/2014).

Conclusions

BEARING IN MIND THE LEGAL VALUE OF THE CHARTER AND ITS INFLUENCE ON NATIONAL SOCIAL POLICIES, THE CHARTER'S PROVISIONS, THE ECSR INTERPRETATIONS AND RELATED DECISIONS ARE HIGHLY RELEVANT TO EMPLOYERS.

In considering the implementation and supervision of the ESC, employers are conscious of the non-tripartite nature of the CoE, which therefore demands even more intense participation in the supervisory work of the Charter if employer voices are to be heard.

Given the increased impact of ECSR comments at national level (especially for policy makers and the judicial system), which are becoming stronger, more rigid and more powerful, the IOE has intensified its efforts to involve its Members in the supervision of the Charter. It provides the ECSR with comments and observations on collective complaints.

Such employer participation is beneficial to the functioning of the Charter's supervisory system as it allows the ECSR, the Governmental Committee and the Committee of Ministers to build an overall picture of the application of the Charter in member States.

However, the situation regarding the extensive and unilateral ECSR interpretations, the lack of clarity around the ECSR's mandate and the limited receptiveness of the business position need redressing going forward.

Annex I

ECSR INTERPRETATIONS THAT NEGATIVELY IMPACT THE BUSINESS COMMUNITY⁴

Article 2.1 of the Charter (both the 1961 Charter and the revised Charter) on working time

“With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake to provide for **reasonable daily and weekly working hours**, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit”.

ECSR Interpretation: The ECSR appears to have a very rigid reading of “reasonable”, and considers that the **working time for all workers in all sectors shall not exceed 60 hours per week and 16 hours per day. Exceptions are not permitted.** The “increase of productivity” and the “other relevant factors” mentioned in the Charter do not seem to be taken into consideration by the ECSR when analysing national reports. Diversification per sector is not permitted either. Flexibility measures, even agreed among the social partners at the national level, are not accepted by the ECSR, unless national laws or regulations:

- prevent unreasonable daily and weekly working time, not exceeding 60 hours per year/16 hours per day;
- operate “within a legal framework providing adequate guarantees”, that limits “the discretion left to employers and employees to vary, by means of collective agreement, working time”;
- provide for reasonable reference periods for the calculation of average working time (not exceeding six months or maximum one year in exceptional circumstances).

Consequences:

- A. In the cases of Iceland, Ireland Italy, Estonia, the ECSR in its 2014 conclusions considered that their situation “is not in conformity with article 2.1 of the

Charter on the ground that the working hours in the merchant shipping sector or for seamen may be up to 72 hours”. Thus, exceptions for very particular sectors, such as the merchant shipping or the fishing sector are not taken into account. Indeed, the working time in the fishing sector is not exactly the same as for white collar workers. Fish stocks are not available only in normal working hours (between 8 and 12 am for instance) and a limitation to working hours would ultimately be counterproductive for the workers themselves and the entire sector. In addition, in those sectors where there are EU Directives and ILO Conventions (for instance, the Maritime Labour Convention, 2006) that have been agreed among experts of the sector, including workers’ and employers’ sectoral organisations, these regulations allow for a maximum of 72 working hours in a seven-day period. As a result, member States do not understand why the regime adopted under EU Directives and ILO Conventions with which they are in compliance would not be in conformity with the Charter.

During the May 2015 Governmental Committee, the IOE highlighted the need to adopt a more flexible perspective based on EU regulation and the regulations agreed on a tripartite basis within the ILO.

- B. In the case of Spain, in the [2014 conclusions](#) on the flexibility measures agreed by the social partners at national level (Agreement on Employment and Collective Bargaining in 2012, 2013 and 2014), the ECSR stated that the situation “is not in conformity with Article 2.1 of the Charter on the ground that the maximum weekly working time may exceed 60 hours in flexible working time arrangements and for certain categories of workers.” The ECSR undertakes a strict scrutiny of flexibility measures prior to their validation.

During the May 2015 Governmental Committee, the IOE pointed out the need to take into account the agreements signed among the social partners at national level, which demonstrates the wish of the Parties towards a certain degree of flexibility.

⁴ Those interpretations refer to the “Digest of the Case Law of the European Committee of Social Rights”, to the ESCR conclusions and to Collective complaints decisions

Article 4.1 of the Charter (both the 1961 Charter and the revised Charter) on the minimum wage

“With a view to ensuring the effective exercise of the **right to a fair remuneration**, the Parties undertake to recognize the right of workers to remuneration such as will give them and their families a **decent standard of living**”.

ECSR Interpretation: Given that the Charter does not contain a clear definition of “*decent standard of living*”, the ECSR has considered that the “net minimum wage has to be more than 60% of the net average wage. When the net minimum wage lies between 50% and 60% of the net average wage, it is for the state to establish whether this wage is sufficient to ensure a decent standard of living”. This rigid mathematical formula takes into account neither the specificities of a given country, nor the business needs. According to the ECSR, the minimum wage is a purely social tool driven by the government, and its establishment has no link whatsoever with economic factors such as productivity or business ability to pay. Also ignored is the capacity of the minimum wage to give rise to job creation rather than unemployment.

Consequences:

In its 2014 conclusions the ECSR highlighted the situation of non-conformity with Article 4.1 of the Charter in Austria, Belgium, Ireland, the Netherlands, Germany, Luxembourg and the UK - the countries with the highest minimum wage in Europe. The poor implementation of this Article in European countries is mainly due to such a rigid mathematical formula.

During the May 2015 Governmental Committee, the IOE underlined the negative impact of such strict interpretation and requested an improved analysis when establishing the “decency of standards of living” in a specific country, such as consideration for the disparities in the cost of living between the cities and the countryside, or the high number of cross-border commuters working in a country but living in the neighbouring country. The need to include economic factors in minimum wage fixing was adequately underlined.

Article 6.4 of the Charter (both the 1961 Charter and the revised Charter) on the right to collective action

“With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties [...] **recognize the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike**, subject to obligations that might arise out of collective agreements previously entered into”.

This provision needs to be read together with the Appendix:

“It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike **by law**, provided that any further restriction that this might place on the right can be justified under the terms of Article G (or article 31 of the 1961 Charter)”.

Article G of the revised Charter (or Article 31 of the 1961 Charter), allow for restrictions to this Article:

“The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any **restrictions or limitations** not specified in those parts, except such as 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 moral**”.

ECSR Interpretation: The provision refers to a right to collective action by workers and employers, thus including the employers' right to lock-out. However, the (workers') right to strike has, in the ECSR view, a wide application. For instance: there should be no limits on the trade union membership calling the strike (the trade union should not necessarily be the most representative), any employee has the right to participate in the strike, irrespective of whether he is a member of the trade union calling the strike. The right to strike can be restricted in cases of conflict

of rights, i.e. related to the existence, validity or interpretation of a collective agreement⁵, and in the event that it is not respecting obligations arising from collective agreements previously entered into. If there is a collective agreement in force, which may represent a social peace treaty depending on the national collective bargaining system, prohibition of strikes is in conformity with Article 6.4 of the Charter. A deduction from strikers' wages is also in conformity with the Charter. Last, restrictions to the right to strike according to Article G are possible only in few cases: the denial to the right to strike for the police and armed forces, judges and senior civil servants for instance, is permissible.

Consequences:

With regard to restrictions on the right to strike, in its decision on the merits of *Collective Complaint v. Belgium* No. 59/2009, the ECSR examined the so-called "unilateral application procedure" in Belgium. Through this procedure, employers may ask the courts to order the end of picketing and the courts, depending on the urgency of the matter, may justify the restriction of the right to strike with the aim of protecting the rights and freedom of others. The ECSR held that "in practice this procedure constituted a restriction on the exercise of the right to strike, since the prohibition of picketing did not apply only to cases where the picketing activities were undertaken in such a way as to infringe the rights of non-strikers, for example through the use of intimidation or violence. [...] The Committee also felt that in its practical operation the so-called "unilateral application procedure" went beyond what was necessary to protect the right of co-workers and/or of undertakings by reason of the potential lack of procedural fairness. The Committee therefore concluded that the restrictions on the right to strike constituted a violation of Article 6§4 of the Charter because they do not comply with the conditions established by Article G of the Charter given that they are neither prescribed by law nor proportionate to the aims set out in Article G of the Charter".

In its observations on the case, the IOE tried to explain the Belgian Government's position as aimed at protecting the "right and freedom of others". Despite this attempt, the final resolution issued by the Committee of Ministers followed the ECSR position.

Article 24 of the Charter (both the 1961 Charter and the revised Charter) on termination of employment and the probation period

"With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognize: the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service; **the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief; [...]**".

This provision needs to be read together with the Appendix, which states: "[...] 2. It is understood that this article covers all workers but that a Party may exclude from some or all of its protection the following categories of employed persons: a) workers engaged under a contract of employment for a specified period of time or a specified task; b) **workers undergoing a period of probation** or a qualifying period of employment, provided that this is determined in advance and is of a reasonable duration; c) workers engaged on a casual basis for a short period. [...]";

"4. It is understood that compensation or other appropriate relief in case of termination of employment without valid reasons shall be **determined by national laws or regulations, collective agreements or other means appropriate to national conditions**".

⁵ Article 6.4 applies to conflicts of interest, which may arise in all cases where a bargaining process is occurring between workers and the employer aimed at solving a problem of common interest, whatever its nature (for instance, where there is no collective agreement in force, the application of safety rules, or consultation prior to redundancy procedure).

ECSR Interpretation: This provision has been interpreted in the sense that a “valid reason” could be related to the “reasons connected with the capacity or conduct of the employee” and to “economic reasons” (that is based on the operational requirements of the undertaking, establishment or service”). In order to assess whether the reasons regarded as justifying dismissal constitute valid reason under Article 24, the ECSR examines “the national courts’ interpretation of the law and their leading decisions and judgements”. However, the ECSR does not operate the same assessment of national practices when considering whether the compensation has been adequate. Despite the text contained in point 4 of the Appendix, the ECSR analysis focuses on the fact that: “Compensation systems are considered appropriate if they include: a) the reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body; b) the possibility of reinstatement c) and/or compensation of a high enough level to dissuade the employer and make good the damage suffered by the employee”. In practice, this translates to the ECSR considering not in conformity with Article 24 of the Charter all regulation/jurisprudence that fixes **upper limits to compensation in the event of termination of employment without valid reason**. This is simply clashing with the reality in a significant number of CoE member States.

With reference to workers in probation period, who could in theory be deprived of protection in the event of termination of employment, **the ECSR does not consider it reasonable to exclude from application of Article 24 workers under probation for six months or 26 weeks**. This unilateral and unjustified interpretation clashes with the reality in the majority of CoE member States, where the probation period is six months.

Consequences:

A. All countries bound by the terms of this provision are requested to eliminate the upper limits to compensation in the event of termination of employment with no valid reason.

In its observations on collective complaint No. 107/2014 vs Finland, the IOE draws the ECSR's attention to the fact that its interpretation clashes with the reality in a significant number of CoE member States, as well as the need for legal certainty on workplace matters. More specifically, the IOE pointed out that the principle of uncapped compensation should be replaced by an assessment of the “compensation of high enough level to dissuade the employer and make good damage suffered by the employee”. This focus is preferable for the following reasons: a) In many European Union countries “adequate compensation or other relief” can be obtained through a financial reimbursement, aimed at dissuading the employer and making good the damage suffered by the employee. Upper limits are not in themselves meant to be in violation of Article 24 of the Charter; b) Legal certainty is fundamental for companies when making a decision on establishing or restructuring a business. It allows for adequate risk management and for more accurate financial management. This is especially the case in judicial systems with a very slow response. Legal uncertainty in systems without upper limits to compensation for unfair dismissals could be highly prejudicial and particularly damaging for SMEs; c) If law and practice allow compensation to be set inadequately high, it can become a significant financial risk for enterprises. Enterprises may be discouraged from implementing the lay-offs necessary to staying competitive and viable, or may refrain from creating new jobs and hiring workers. Therefore, in determining adequate compensation in law and practice, the needs of sustainable enterprises, in particular SMEs, should be fully taken into consideration. A useful instrument is the provision of reasonable maximum amounts for compensation. A decision on the merits of this collective complaint procedure is expected in the coming months.

B. The ECSR also requests all countries that are bound by the terms of this provision to reduce the maximum probation period when it is fixed at six months.

The IOE is the largest network of the private sector in the world.
With more than 150 members, it is the global voice of business for
labour and social policy matters at the international level.



International Organisation of Employers
Organisation Internationale des Employeurs
Organización Internacional de Empleadores

The Global Voice of Business