Parallel report to the European Committee of Social Rights

By the Federal Institute for the protection and promotion of Human Rights, the Service to Combat Poverty Insecurity and Social Exclusion, the Institute for the Equality of Women and Men, Myria, and the Central Monitoring Council for Prisons

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Service de lutte contre la pauvreté, la précarité et l'exclusion sociale

Combat Poverty, Insecurity and Social Exclusion Service

Institute for the Equality of Women and Men

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to the European Committee of Social Rights

The Federal Institute for the protection and promotion of Human Rights

The Federal Institute for the protection and promotion of Human Rights (FIRM/IFDH) is an independent public institution created by the Act of 12 May 2019 in accordance with the Paris Principles on national institutions for the promotion and protection of human rights.[1] FIRM/IFDH's mandate covers all federal matters relating to the protection of fundamental rights for which no other independent body for the protection and promotion of human rights has been designated.

The Central Monitoring Council for Prisons

The Central Monitoring Council for Prisons (Conseil Central de Surveillance Pénitentiaire – Centrale Toezichtsraad voor het Gevangeniswezen) is the independent monitoring and advisory body competent to watch over the rights and human dignity of prisoners, and was established by the Principles Act of 12 January 2005.[2]

The Institute for the Equality of Women and Men

The Institute for the Equality of Women and Men was established in December 2002 as an independent federal public institution with the mission to guarantee and promote the equality of women and men, to combat any form of discrimination or inequality based on sex, through the establishment and implementation of an appropriate legal framework, and of appropriate structures, strategies, instruments and actions. The Institute aims to embed equality of women and men in society so that it becomes self-evident in mentalities and practices.

[1] The Federal Institute for the Protection and Promotion of Human Right *(Federaal Instituut voor de Bescherming en de Bevordering van de Rechten van de Mens / Institut Fédéral pour la Protection et la Promotion des Droits Humains)* is an associate member of the European Network of National Human Rights Institutions since April 2021.

[2] Art. 22, Principles Act of 12 January 2005, *Moniteur belge,* 1st February 2005. For more information, visit https://ccsp.belgium.be.

Myria

Myria, the Belgian Federal Migration Centre is an independent public institution. It has legal mandates to protect the fundamental rights of foreign nationals; to analyze migratory flows; and to promote the fight against trafficking and smuggling of human beings. It is also the Belgian independent National Rapporteur on trafficking in human beings. Myria promotes public policies based on evidence and human rights.

The Service to Combat Poverty, Insecurity and Social Exclusion

The Service to Combat Poverty, Insecurity and Social Exclusion (hereafter Combat Poverty Service) is an autonomously functioning interfederal public institution, created in 1999 by a Cooperation Agreement between the Federal State, the Regions and the Communities concerning the continuation of the Poverty Reduction Policy.[3] Its mandate for the protection of human rights is based on the observation that poverty "affects the inherent dignity and the equal and inalienable rights of all human beings" and the common goals that the legislators have fixed for themselves, namely "the restoration of the conditions of human dignity and the exercise of the human rights".

[3] Cooperation Agreement between the Federal State, the Communities, and the Regions concerning the continuation of the Poverty Reduction Policy, *Moniteur belge*, 16 December 1998.

Introduction

This report is authored by the Federal Institute for the protection and promotion of human rights (FIRM/IFDH). It is co-signed by the Central Monitoring Council for Prisons (CCSP/CTRG), the Institute for the Equality of Women and Men (IEFH/IGVM), by Myria (Federal Migration Centre) and by the Service to Combat Poverty, Insecurity and Social Exclusion (Combat Poverty Service). FIRM/IFDH and the co-signing institutions carry out their missions within the limits of their respective mandates, including, as with the present report, their mission to collaborate with United Nations bodies and regional human rights organizations, in the framework of which they can present reports on the human rights situation in Belgium.

The co-signing institutions' input has played an important role in the drafting of this report, in particular for the following sections :

- The input by the Combat Poverty Service on the rights of persons in poverty was particularly used for sections 1.3. (on platform work), 2.3 (measures taken during the pandemic related to working hours), 3.4. (on in-work poverty) and 3.5. (on the impact of the pandemic) ;
- the input by Myria was particularly useful for sections 1.5. (on migrant workers) and 7.5. (on the control of labour regulations with respect to domestic workers) ;
- the input by the Institute for the Equality of Women and Men was particularly useful for sections 3.6. (on the gender pay gap) and 6. (on protection against harassment) ;
- and, finally, the input by the Central Monitoring Council for Prisons was particularly useful for sections 2.1.4 (on reasonable working hours in the context of prison labour), 3.3. (on remuneration for prison labour) and 5.4.5. (on collective consultation regarding prison labour).

The purpose of the present report is to complement and, where necessary, comment upon the information contained in the report presented to the European Committee of Social Rights by the Belgian State,[4] and to draw the Committee's attention to particular areas of concern. Its objective is to facilitate the Committee's work in assessing Belgium's conformity with the labour-related rights contained in the European Social Charter, on which the present reporting procedure focuses. The report pays particular attention to the developments which have taken place since the previous report on labour-related rights submitted to the Committee by the Belgian State in 2014.

FIRM/IFDH has consulted a number of stakeholders : public institutions, social partners, NGOs and academics. Certain sections were developed in collaboration with Unia, the Interfederal Centre for Equal Opportunities (Belgium's National Human Rights Institution (type B)), particularly aspects related to disability (3.4), the protected criterion of 'trade union affiliation' (4.1, 4.3), and the role of the social inspectorate (7.3). In addition to Unia, FIRM/IFDH consulted with ABVV/FGBT (the socialist trade union), ACV/CSC (the Christian trade union), VBO/FEB (the union of Belgian employers), the secretariat of the National Labour Council, the Labour Inspectorate (section Supervision of Social Legislation), the NGOs Ligue des droits humains and FAIRWORK Belgium, as well as academic actors (Prof. Filip Dorssemont, Dr. Mathias Wouters, Dr. Eleni De Becker, Sophie Gérard and Amaury Mechelynck).

[4] Belgian State, 16th Report on the implementation of the European Social Charter, RAP/RCha/BEL/16(2022), 15 February 2022, available at https://rm.coe.int/rap-rcha-bel-16-2022/1680a58f66.

The present report is structured as follows:

It begins and ends with two thematic sections on cross-cutting issues:

- Section 1: precarious labour ;
- Section 7: the role of the labour inspectorate .

The sections in between focus on specific aspects concerning:

- Section 2: the right to just conditions of work (Article 2 of the Revised European Social Charter, hereinafter: RESC) ,
- Section 3: the right to a fair remuneration (Article 4 RESC) ,
- Section 4: the right to organise and to protection of trade unionists (Articles 5 and 28 RESC)
- Section 5: Collective bargaining, collective action and rights to information and consultation (Articles 6, 21, 22 and 29 RESC) ; and
- Section 6: the protection against (sexual) harassment and harassment in the workplace (Article 26 RESC) .

The report ends with a general conclusion.

Section 1: Precarious labour

1.1. Introduction

Belgian labour law has been designed on the basis of the ideal type of the employee working full-time on a contract for indefinite duration. These workers are well-protected both in terms of labour rights and in terms of building up social security rights.[5] Eurofound statistics show that most workers still conform to this ideal type. In 86 % of companies, more than 80 % of employees had a contract for indefinite duration, and in 65 % of companies less than 20 % of workers had a part-time contract.[6] In total, 26,5 % of the working population has a part-time contract (of which a 4/5 regime is most common).[7]

The strong protection of ideal-type workers is reflected by the so-called 'insider-outsider' character of the Belgian labour market: those who work under a standard labour contract generally have a relatively stable job and enjoy relatively good labour conditions ('insiders'), which however makes it more difficult for 'outsiders' to gain access to (formal) employment.[8] However, while good labour conditions may be the reality of most workers, it is not the reality of all workers. Those who do not conform to the ideal type ('atypical workers'), often do not equally enjoy employment-related protection.

This is for instance the case for persons employed on temporary agency contracts, who often fail to build up the necessary rights to be entitled to social security benefits.[9] The Covid-19 pandemic has made the gap between those enjoying access to social security and those who do not, particularly evident (see section on Article 4 RESC). In addition, while Belgium has not seen an erosion of labour rights protection during the reporting period, in practice new atypical employment statuses have been created which allow labour to be conducted without resulting in access to labour and social security rights (the so-called collaborative economy scheme) or without any guarantee in terms of the number of hours worked and the income generated therefrom (both the collaborative economy scheme and the so-called flexi job scheme, both discussed below).[10] Finally, many workers do not enjoy the labour rights protection they are legally entitled to. In particular, undocumented migrant workers, single-permit migrant workers, workers in the informal economy, dependent self-employed workers, workers of subcontractors and posted workers are particularly vulnerable to abuses. While to a certain degree better enforcement could be a response to such abuses (see section 7 on the role of the Labour Inspectorate below), some of these vulnerabilities have actually been increased by State intervention and will be discussed in this section (in particular undocumented and single-permit migrant workers). For a discussion of in-work poverty in Belgium, see the section on Article 4 RESC.

This section in turn addresses questions related to temporary agency contracts; platform workers (including those working under the collaborative economy scheme); flexi job contracts; and migrant

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[5] S. Gérard, J. Gilman, A. Mechelynk and D. Dumont, "Le travail précaire – Une cartographie juridique du travail atypique et des protections (non) garanties par le droit social", Rapport pour le compte de l'Observatoire de la santé et du social de Bruxelles, 2021, p. 423, available at https://dipot.ulb.ac.be/dspace/bitstream/2013/329137/3/Rapport_travail_precaire.pdf.

[6] Eurofound, Fourth European Company Survey, 2019, available at https://www.eurofound.europa.eu/surveys/data-visualisation/european-company-survey-data-visualisation.

[7] See the Belgian statistics office : https://statbel.fgov.be/fr/themes/emploi-formation/marche-du-travail/le-travail-temps-partiel.

[8] See e.g. European Social Policy Network, "In-work poverty in Belgium", ESPN Thematic Report, 2019, available at https://www.researchgate.net/publication/333695497_ESPN_Thematic_report_In-work_poverty_in_Belgium

[9] S. Gérard *et al., op. cit.*, p. 423.

[10] *Ibid*. pp. 422-423.

workers (both undocumented and single-permit migrant workers). The precarious character of such labour is an obstacle to the enjoyment of various labour-related rights from the European Social Charter (hereinafter 'the Charter' or RESC). For this reason, in the present section, it was chosen to discuss these issues together in a cross-cutting manner.

1.2. Temporary agency contracts

In Belgium, temporary agency contracts are regulated by the Act of 24 July 1987 on temporary work, agency work and the provision of workers to users ('Temporary Work Act'), complemented by Collective Agreement No. 108 of 16 July 2013 on temporary work and agency work. A temporary agency labour relation requires two contracts: one between the temporary agency worker and the temporary work agency, and another one between the temporary work agency and the company making use of the temporary agency worker (the user).

In 2019, around 3 % of the total volume of employment in Belgium consists of temporary agency work, representing 732.481 workers (including 267,605 student workers).[11] In principle, temporary agency work has been designed as an exception. Article 1 of the Temporary Work Act sets out the limited circumstances under which temporary work is allowed, e.g. to respond to a temporary increase of work, or to temporarily replace a permanent worker whose contract has ended or has been suspended (for instance because of illness).[12]

A temporary agency worker employed contrary to the conditions under which temporary agency work is permitted, will be considered to have entered into a labour contract for an indefinite period of time with the user (Article 20).

The Temporary Work Act (Article 3) explicitly makes an exception from the general labour law principle that, when parties have entered into several successive fixed-term labour contracts, they are presumed to have entered into a contract for an indefinite period of time.[13] Under this Act, successive contracts can indeed be concluded with the same user, with the exception of successive day contracts, which are only permitted when the user can demonstrate the need for such flexibility (sanctioned by compensation equivalent to a two weeks' wage) (Article 8bis).[14]

A frequent complaint concerns the abuse of the permissible grounds for temporary agency work by the systematic use of successive temporary agency contracts over a longer period under the guise of different motives.[15] While such successive contracts are thus not per se prohibited, with regard to any such contract, the limited conditions under which temporary agency work is permitted, should be met. However, these conditions are defined quite broadly, which lend themselves to abuse, and it is reported that control is often absent (also see section 7.2 and 7.3 hereunder).[16] Consequently, workers often work for long periods of time for the same user in a situation of uncertainty, in which the labour relation can end any week, without this necessarily being proportionate to the need for flexibility of

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[11] Federgon, Rapport Annuel 2019, p. 13 and 22, available at https://federgon.be/fileadmin/media/pdf/fr/Federgon_-_Rapport_annuel_2019.pdf.

[12] Also see S. Gérard *et al., op. cit.*, p. 99.

[13] Article 10 of the Act of 3 July 1978 on labour contracts, *Moniteur belge,* 22 August 1978.

[14] A proposition is currently pending in Parliament to create a presumption that a temporary worker working for at least sixty days within a thirteen weeks period for the same user, has entered into a labour contract for indefinite duration with this user (*Doc*. *Parl.*, 55 0273/001). However, for the time being, it seems unlikely that consensus will be found on the adoption of this proposition.

[15] K. Bosmans, D. De Moortel and C. Vanroelen, "Enforceability of rights in the temporary agency sector: The case of Belgium", *Economic and Industrial Democracy*, 2021, pp. 1-12, available at https://journals.sagepub.com/doi/10.1177/0143831X211017227.

[16] *Ibid*., p. 11.

the user.[17] One study shows that of the 47% of temporary agency workers that have been working for the same user for more than half a year, 80 % was still doing so on the basis of day or week contracts.[18] Around 25% of temporary agency workers who have been working for the same user for more than a year are still working on the basis of day contracts.[19] According to the same study, about half of the temporary agency workers consider their temporary agency work to be involuntary, while around 66 % would prefer to be employed on a contract for indefinite duration with the user.[20]

The coalition agreement of the (current) Government De Croo I has announced the government's intention to step up the fight against the abusive and excessive use of day contracts, in concertation with the social partners.[21] However, no concrete measures have yet been taken in this regard.

The precarity of temporary agency work is not only reflected in job insecurity, but also often in a lack of enjoyment of legal rights in practice. In theory, temporary agency workers are entitled to the same wage, benefits and social protection as permanent workers performing the same job in the user company.[22] Despite such strong protection, temporary agency workers do not always enjoy the same rights in practice as permanent workers: they for instance often do not enjoy the same benefits (e.g. premiums, luncheon vouchers) as permanent workers.[23] A recent study highlights that temporary agency workers are vulnerable due to the fear of losing their work should they claim their rights, and that employers sometimes assume ignorance among temporary agency workers about their rights.[24] According to the authors, because of their often vulnerable situation, temporary agency workers hardly seek enforcement themselves. For this reason, they recommend a more proactive role for the Labour Inspectorate in the enforcement of the rights of temporary agency workers.[25]

Recommendation
Evaluate the criteria under which temporary agency work is permitted, with a view to avoiding that temporary agency workers are dependent for a long period on successive contracts with the same user.
Step up the fight against abuses, in particular with regards to the successive use of day contracts.

1.3. Platform workers

In Belgium, the share of the platform economy was initially a lot smaller compared to the EU average. Recent years have seen a steady increase of platform work in Belgium – which is likely to continue

[17] A. Mechelynk, "Misbruik van opeenvolgende arbeidsovereenkomsten voor uitzendarbeid: een mijlpaalarrest van het Hof van Justitie", *Arbeidsrecht Journaal,* 2022, available at https://arbeidsrechtjournaal.be/misbruik-van-opeenvolgende-arbeidsovereenkomsten-voor-uitzendarbeid-een-mijlpaalarrest-van-het-hof-van-justitie/.
[18] M. Hermans and K. Lenaerts, "De arbeidskwaliteit van uitzendwerk: knelpunten en ongelijkheden – Analyse of basis van de HIVA – KU Leuven Uitzendenquête", 2019, p. 33, available at https://hiva.kuleuven.be/nl/nieuws/nieuwsitems/rapport-de-arbeidskwaliteit-van-uitzendwerk-knelpunten-en-ongelijkheden.
[19] *Ibid*., p. 27.
[20] *Ibid*., p. 18 and 30.
[21] See Belgian federal coalition agreement, 2020, p. 41, available at https://www.belgium.be/sites/default/files/Accord_de_gouvernement_2020.pdf.
[22] K. Bosmans *et al*., p. 4.
[23] *Ibid*. p. 5.
[24] *Ibid*., pp. 9-11.
[25] *Ibid*., p. 15.

growing – however reliable data on the exact size of the platform economy are missing.[26] As in other countries, the emergence of platform work in Belgium has triggered debates regarding the question as to whether platform workers should be considered as self-employed workers or as employees. Under Belgian law, while employees are relatively well-protected, both by labour law as by the automatic build-up of social security rights, self-employed workers are not covered by labour law (including remuneration and labour conditions) and must themselves arrange for protection against most social risks (e.g. illness and disability, incapacity to work, cessation of business, family responsibilities and old age),[27] which can be particularly burdensome for self-employed workers earning little income.

On 8 December 2021, the Labour Tribunal of Brussels issued a long-awaited judgment in a case brought by the Labour Auditor against the food delivery platform Deliveroo,[28] seeking requalification of the labour relation of the food delivery drivers from self-employed to employee on the basis of the Labour Relations Act.[29] This Act provides for a complex mechanism, using so-called 'general' and 'specific criteria' – respectively indicating 'legal' and 'economic' subordination – which together allow to determine whether or not a person works under the authority of another person, and should thus be requalified from a self-employed worker into an employee.

Unlike some decisions on the qualification of platform workers in certain other countries (e.g. France and the Netherlands),[30] the Labour Tribunal decided that Deliveroo drivers ought to be considered as self-employed workers. While the 'specific' criteria pointed in the direction of a legal presumption of an employment contract, the Court considered this presumption to be rebutted on the basis of the general criteria. Thereby, the Labour Tribunal essentially prioritized legal over economic subordination. The Labour Auditorate has meanwhile appealed the Labour Tribunal judgment,[31] which will be heard by the Brussels Labour Court in November 2023.[32]

The judgment immediately led to a political response. In February 2022, an agreement was found within the Government on a broader programme to reform labour law (the so-called 'Labour Deal'),[33] defining the concept of the 'digital platform principal' ('digitaal platform opdrachtgever' / 'plateforme numérique donneuse d'ordres'). The Labour Deal includes a new list of specific criteria applicable to platform work, inspired by the draft EU Directive on improving working conditions in platform work.[34] The resulting bill also provides for the compulsory conclusion of an occupational accident insurance

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[26] E. Ponomarev, I. Smits and K. Lenaerts, "Platformwerk tijdens COVID-19: hoe de pandemie de uitdagingen waarmee platformwerkers geconfronteerd worden op scherp zet*", Over.Werk. Tijdschrift van het Steunpunt Werk*, 2021, pp. 115-116, available at https://www.steunpuntwerk.be/files/publications/OW/OW_2021_1/overwerk_2021_1_11.pdf.

[27] See https://www.belgium.be/en/economy/business/creation/becoming_self_employed/social_security_scheme_self_employed_persons.

[28] Labour Tribunal of Brussels (French-speaking section), 25th Chamber, 8 December 2021, R.G. No. 19/5070/A.

[29] Title XIII of the Program Act (I) of 27 December 2006, *Moniteur belge,* 28 December 2006.

[30] E.g. Court of Cassation (France), Social Chamber, 4 Mars 2020, No. 19-13.316, FP-P+B+R+I ; Court of Amsterdam (Netherlands), 16 February 2021, ECLI:NL:GHAMS:2021:392.

[31] See https://www.lalibre.be/belgique/judiciaire/2022/01/12/statut-des-coursiers-deliveroo-lauditorat-du-travail-de-bruxelles-fait-appel-du-jugement-rendu-en-decembre-P6YF2BUKRFFZXA2GJVNTTGYU6Y/.

[32] See https://www.hln.be/brussel/deliveroo-zaak-in-november-2023-voor-rechter~af43f3b2/.

[33] For a summary, see: https://dermagne.belgium.be/fr/un-accord-sur-la-r%C3%A9forme-du-march%C3%A9-du-travail-valid%C3%A9-par-le-gouvernement.

[34] See https://ec.europa.eu/social/BlobServlet?docId=24992&langId=en.

for self-employed platform workers.[35] At the time of writing, the bill has not yet been voted by the Parliament. While one may hope that the bill, if adopted, will result in the requalification of more platform workers as employees, it is too soon to tell whether it will be able to achieve its aim of guaranteeing legal certainty in this regard.

Recommendation
Evaluate the impact of the so-called 'Labour Deal' on the requalification of self-employed platform workers into employees, to ensure that the reality of economic subordination prevails over the legal fiction of formal self-employment.

1.3.1. The collaborative economy scheme

In any event, the draft bill may have only a limited effect, since in reality most platform workers work under the so-called collaborative economy scheme, which is left untouched in the draft bill. This scheme was introduced in 2016 by the so-called 'De Croo Act'[36] (for the similar 'associative work' scheme, see section 2.4.2.). Under this Act, so-called 'peer-to-peer (P2P)-service providers' can use licensed electronic platforms to provide services to other users in the context of the collaborative economy. Currently about 120 electronic platforms have such a licence (including many smaller local platforms, as well as global commercial platforms like Deliveroo and Uber Eats).[37] Up to 6390 euros annual gross income (indexed amount as of 2021), workers under this status are exempted from paying social security contributions on the income generated through this platforms (and only pay taxes at 10,7%).[38] Consequently, platform workers do not build up any social security rights on the basis of the income generated under this scheme, which is particularly problematic for those workers who have not yet built up sufficient social security rights based on another activity.

All types of labour should contribute to the build-up of social security rights. This raises questions from the viewpoint of the European Council Regulation of 8 November 2019 on access to social protection for workers and the self-employed,[39] which aims for extended social protection, including for atypical forms of work. In this regard, the Combat Poverty Service has recommended to work on ensuring qualitative labour conditions to platform workers which allow better access to social security rights,[40] as the government has in fact foreseen in its coalition agreement.[41]

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[35] Bill containing various labour provisions, introduced in Parliament on 7 July 2022, *Doc. Parl.*, 55 2810/001. While the draft bill provided for the extension of the Act of 10 April 1971 on Labour Accidents to all platform workers, in the most recent version, the choice was made to oblige the platform operator to conclude a separate private occupational accident insurance.

[36] Program Act of 1 July 2016, *Moniteur belge,* 4 July 2016, often named 'De Croo Act' after the minister who initiated the bill.

[37] European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies, Thematic Review 2021 on Platform Work, Synthesis report, 2021, p. 47 available at https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8419&furtherPubs=yes. For the list of licensed platforms, see: https://financien.belgium.be/sites/default/files/downloads/127-economie-collaborative-liste-plateformes-agreees-20220503.pdf.

[38] FAIRWORK Belgium, report : "Fairwork Belgium Ratings 2022: Towards Decent Work in the Platform Economy", 2022, p. 13, available at https://fair.work/en/fw/publications/fairwork-belgium-ratings-2022-towards-decent-work-in-the-platform-economy/.

[39] Council Resolution No. 2019/C 387/01, *Official Journal of the European Union C 387*, 15 November 2019, p. 1–8, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.387.01.0001.01.ENG.

[40] Combat Poverty Service, "Solidarité et pauvreté", Biennial report 2020-2021, p. 95, available at https://www.luttepauvrete.be/wp-content/uploads/sites/2/2021/12/211220-Rapport-bisannuel-Solidarite-et-pauvrete-FR.pdf. An English summary of this report is available at https://www.combatpoverty.be/.

[41] See https://www.belgium.be/sites/default/files/Accord_de_gouvernement_2020.pdf at p. 43.

Recommendation
Ensure that platform work, including when performed under the collaborative economy scheme, counts towards building social security entitlements.

Under the collaborative economy scheme, most workers simply stop working when they reach the maximum annual amount, to avoid having to pay taxes and social security contributions as self-employed workers.[42] According to a survey by Comeos (the Belgian employers' federation for the trade and services sector) among food delivery drivers working for Deliveroo and Uber Eats, 9 out of 10 drivers remain within the limits of the collaborative economy scheme.[43] According to the study, for only 4 % of food delivery drivers, this constitutes their main economic activity as a self-employed worker (around 700 out of around 19000 drivers, as well as 200 workers who are self-employed as a secondary activity).[44] The company "Takeaway" is the only one of the three big food delivery platforms in Belgium which works with employed workers (often using temporary agency labour, see above).[45]

According to a recent study among five big platforms (Takeaway, Ring Twice, Deliveroo, Top Help and Yoopies), only Takeaway and Ring Twice could show that they guarantee their workers at least an income equivalent to the sectoral minimum wage after costs.[46] Most platforms pay by transaction rather than by hour, resulting in unpredictable and unstable income.[47] However, the level of income per hour or transaction cannot be seen in isolation of the amount of worked hours, and of possible other sources of income.

The Combat Poverty Service has observed that among platform workers, an important number of persons belong to socio-economic groups having modest financial means. These persons have to engage in platform work to make ends meet, either on a structural basis, i.e. as a principal activity, or complementary to another professional activity.[48] According to the Service, several among them have to work long periods without interruption in difficult circumstances without, however, managing to reach a level of income allowing them to attain a decent standard of living in a sustainable way.[49]

Platform workers are extra vulnerable for abuses due to difficulties in ensuring adequate collective representation. Their efforts to unionize are hampered by the difficulties inherent in reaching members of a highly flexible workforce. In addition, trade unions traditionally represent employees only – self-employed workers in Belgium are excluded from collective bargaining under the Act of 5 December 1968 on collective labour agreements, and wage agreements could even be considered as illegal price agreements under competition law.[50] ACV-CSC (the Christian trade union) has nonetheless launched an innovative initiative 'United Freelancers' which aims at uniting platform workers,

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[42] Eurofound, "Employment and working conditions of selected types of platform work", 2018, p. 20, available at https://www.eurofound.europa.eu/publications/report/2018/employment-and-working-conditions-of-selected-types-of-platform-work.
[43] Comeos, "Delivery 2022", p. 26-27, available at https://static.comeos.be/Belgische_Delivery_Sector_FR_2022.pdf.
[44] *Ibid.*
[45] FAIRWORK, report : "Fairwork Belgium Ratings 2022: Towards Decent Work in the Platform Economy", *op. cit*., p. 16.
[46] *Ibid.* The trade unions however challenge the current pay level, calling for reclassification of couriers under a different sectoral agreement, with higher salary scales.
[47] ECE, Thematic Review 2021 on Platform Work, *op. cit.*, p. 19.
[48] Written input received from the Combat Poverty Service on 14 June 2022.
[49] *Ibid.*
[50] E. Ponomarev *et al*., *op. cit.*, pp. 117-118.

freelancers and self-employed workers without personnel.[51] A number of food delivery drivers have also organized themselves in the bottom-up initiative KoeriersCollectief/Collectif.[52] In recent years, these initiatives have engaged in collective action in order to strive for better working conditions (see below, discussion Article 6, § 4 RESC).

1.4. Flexi jobs

During the reporting period, besides the collaborative economy scheme, the government has introduced another social status via the 2015 Flexi Job Act.[53] The objective was to provide workers the possibility to undertake smaller, additional work to earn extra income, while at the same time providing employers access to a flexible workforce which can be adapted to variable needs.[54]

The scheme was first introduced in the catering sector (bars, restaurants and hotels) – as part of a broader plan to fight against the high prevalence of undeclared work in this sector – and was later extended to a limited list of other sectors which are often in need of flexible work, like the retail and alimentation industry (Article 2).[55] The flexi job scheme is increasingly popular: from 26.312 workers in the fourth quarter of 2017 to 65.286 in the fourth quarter of 2019; after a dip related to the drop in economic activity due to the pandemic, 83.707 workers were employed under the flexi job scheme in the fourth quarter of 2021.[56]

In the context of a flexi job, the parties conclude two different contracts: a framework contract, containing essential information on the employment relationship (Article 6), and a flexi job labour contract, concluded for each job for a particular period of time or for clearly defined work (Article 8), either orally or in writing (Article 10). The signing of a framework contract does not legally oblige an employee to accept any flexi job contract proposed by the employer. To avoid replacement of regular labour by flexi jobs, it cannot be concluded with the same employer of the principal activity of the worker, nor with a former employer during the period covered by severance pay (Article 4, § 1). It was in fact on account of this protection against replacement that the Constitutional Court declared that the introduction of the flexi job scheme (at the time only in the catering sector) did not constitute a significant decline in the protection level as far as labour conditions, adequate remuneration and social security are concerned – rejecting a challenge to the constitutionality of the scheme.[57] However, practice has proven this to be an insufficient guarantee against replacement of regular labour by flexi jobs: according to a study by the Court of Audit from 2019, 35,3 % of flexi jobs have in fact replaced existing regular jobs.[58]

Flexi job workers are exempted from social security contributions and taxes, but the employer has to pay a 25 % special social security contribution (Article 16), which ensures that flexi job workers build up certain social security rights (unemployment insurance, pensions and vacation) for the hours worked (Articles 13 and 17-22). In terms of remuneration, for the hours worked, flexi job workers are entitled to at least a minimum wage (Article 5). However, the adequacy of the income generated

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[51] See https://www.lacsc.be/united-freelancers.
[52] Also see ECE, Thematic Review 2021 on Platform Work, *op. cit.* p. 20.
[53] Act of 16 November 2015 on various provisions concern social affairs, *Moniteur belge,* 26 November 2015.
[54] S. Gérard *et al.*, *op. cit.*, p. 128.
[55] Article 33 of the Program Act of 25 December 2017, *Moniteur belge,* 29 December 2017.
[56] Statistics from the National Social Security Office, available at https://onss.be/stats/types-d-emplois-specifiques-restauration-et-autres-secteurs. Of which about 7/8th has another job, while 1/8th is pensioned.
[57] Constitutional Court, 28 September 2017, No. 107/2017, § B. 15.5.
[58] Court of Audit, "Incidence du plan horeca 2015. Flexi-jobs, travail occassionnel et heures supplémentaires nettes", 27 February 2019, p. 4 available at https://www.ccrek.be/docs/2019_05_IncidencePlanHoreca.pdf.

through a flexi job depends on the volume of hours worked: while on the one hand, there is no maximum amount of hours which can be worked under the flexi job scheme – which may raise problems under Article 2, § 1 RESC – on the other hand the worker does not have any guarantee of a stable income generated through this scheme – which may raise problems under Article 4, § 1 RESC. The legislator aimed to counterbalance the potential low income generated through flexi jobs, by restricting access to the flexi job scheme to employees who have worked at least 4/5 of a full time in the third trimester preceding the flexi job (or who are pensioned) (Article 4, § 1). In other words, the legislator assumed that having such other job is sufficient to ensure that the worker can generate adequate income.

A number of caveats must however be made. Firstly, since employment status is determined by looking at the third trimester preceding the flexi job, rather than in real time, there is no guarantee that the worker is actually earning another income at the time. In theory, the flexi job could thus constitute the sole source of income for a period of 9 months, during which a flexi job worker is exposed to extreme financial insecurity due to the absence of any obligation on behalf of the employer to provide the worker with a minimum amount of working hours.[59] According to the Court of Audit study, 17 % of flexi job workers do not have 4/5th employment at the time of the flexi job, while 5,5 % does not have any other employment.[60] Secondly, a survey conducted by a recruitment company indicates that for about half of the flexi job workers, the most important motivation is to earn extra income to make ends meet.[61] The lack of a stable income from a flexi job is particularly problematic for those workers for whom the extra income is a financial necessity. The financial insecurity related to income earned through flexi jobs has become particularly evident in the context of the Covid-19 pandemic, during which most flexi job workers suddenly lost their job without this loss of income being compensated by government support measures (see below, section 3.5.2.). For these reasons, the above-mentioned replacement of regular labour by flexi jobs is problematic in that it may result in trapping more workers into precarious labour conditions.

Recommendations

Take the necessary measures to ensure that regular labour is not replaced by flexi jobs in sectors making use of the flexi job scheme, e.g. by making regular labour sufficiently attractive for employers when compared with flexi jobs.

1.5. Migrant workers

1.5.1. Single permit workers

Migrant workers often find themselves in a vulnerable situation in the labour market. A first category of migrant workers who might be vulnerable to abuses are single-permit workers. The single-permit system is a framework for labour migration, which enables employers to recruit non-European[62] employees for a fixed term of more than 90 days for particular categories of work (which are decided upon by the regional authorities).[63] Some of the professions identified at the regional level are situated

[59] S. Gérard *et al.*, *op. cit.*, p. 128.

[60] Court of Audit, “Incidence du plan horeca 2015. Flexi-jobs, travail occassionnel et heures supplémentaires nettes”, *op. cit.* p. 4.

[61] Study conducted by NOWJOBS and iVox in early 2022, see https://zigzaghr.be/vlaming-wil-bijverdienen/.

[62] I.e. the European Economic Area plus Switzerland.

[63] Regulated by Articles 61/25-3 – 61/25/6 of the Act of 15 December 1980 on the access to the territory, residence, settlement and removal of aliens (‘Aliens Act’); and by the relevant regional legislation.

in economic sectors where the risk of labour exploitation is known to be higher (e.g. construction).[64] The single permit system, introduced in transposition of the EU Single Permit Directive,[65] replaces the previous system under which work and residence permits had to be applied for separately.

The problem with the single-permit system is that it makes employees highly dependent on their employers, making them particularly vulnerable to exploitation.[66] Claiming labour rights, for instance via a complaint to the Labour Inspectorate, may result in retaliatory dismissal by the employer, leaving a worker only 90 days to find a new employer wishing to apply for a new single permit, before losing residence status.[67] This is because the Aliens Act links the residence permit to the labour permit, as a result of which the termination of employment leads to the automatic expiry of residence status after 90 days.[68] Moreover, a failure of the employer to comply with wage and other labour conditions may result in the refusal to renew a single permit,[69] essentially punishing victims of labour exploitation via a loss of their residence status.[70]

For this reason, FAIRWORK Belgium has recommended the adoption of the Canadian model (the 'open permit for vulnerable workers'),[71] under which an employee who comes into conflict with the employer is granted a temporary work and residence permit for one year which provides access to the whole labour market.[72] This allows migrant workers more time to seek a new employer willing to employ them under the labour migration scheme. Making it easier for migrants to find a new job will reduce dependency from a single employer and thereby vulnerability for exploitation.[73]

Recommendation

Examine how the dependency of single-permit workers on their employer can be reduced, for instance through the adoption of a temporary work and residence permit facilitating a change of employer.

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[64] A. Weatherburn, E.H. Kruithof and C. Vanroelen, "Labour Migration in Flanders and the use of the single permit to address labour market shortages", Interface Demography Working Paper No. 2022-01, p. 19, available at https://interfacedemography.be/wp-content/uploads/2022/04/Working-Paper-Labour-Migration-Single-Permit-Final-DICT-5CG10403GC.pdf.

[65] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, *OFFICIAL JOURNAL OF THE EUROPEAN UNION L* 343, 23 December 2011, p. 1–9

[66] *Ibid.*

[67] FAIRWORK Belgium, "Davantage de FAIRWORK en Belgique", 2021, p. 49, available at https://www.fairworkbelgium.be/wp-content/uploads/2021/11/20211115-Davantage-de-FAIRWORK-en-Belgique.pdf.

[68] Article 61/25-2, § 5, Aliens Act, *op. cit*.

[69] On the basis of the relevant regional legislation, e.g. Article 12 of the Decree of the Flemish Government implementing the Act of 20 April 1999 on the employment of foreign workers, *Moniteur belge,* 21 December 2018.

[70] A. Weatherburn *et al., op. cit.*, p. 17.

[71] See https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/vulnerable-workers.html.

[72] FAIRWORK Belgium, "Davantage de FAIRWORK en Belgique''*, op. cit.*, p. 49.

[73] A. Weatherburn *et al*., *op. cit.*, p. 19.

1.5.2. Undocumented migrant workers

A second category of vulnerable migrant workers consists of undocumented migrants. In Belgium, it is illegal to employ undocumented migrants,[74] as a result of which they have to turn to the informal economy, making them particularly vulnerable to exploitation (which, for the purposes of this report, often involves situations which are not conform Articles 2 and 4 RESC). By way of principle, labour law protection (including minimum wages and working conditions, safety at work provisions and protection against occupational accidents) also applies to undocumented migrants workers. However, it is often very difficult for undocumented migrant workers to claim their rights.

They often have little awareness of their rights and how to access the Labour Inspectorate, trade unions or support services, and are often afraid to claim their rights on account of their dependency on their employers for their income.[75] According to FAIRWORK Belgium, the latter dependency increased in the context of the pandemic.[76] Due to the lack of work in many sectors, undocumented migrant workers – who do not enjoy access to the social security or social welfare safety nets – often had no other choice but to accept labour conditions which they would otherwise deem unacceptable, to be able to survive. Various civil society organisation and trade unions had proposed to introduce a temporary residence status to protect undocumented migrants against their increased precariousness during the pandemic, but to no avail.[77]

1.5.2.1. Legal and practical obstacles

Undocumented migrants workers are confronted with a number of legal and practical obstacles: the criminalisation of non-declared labour; the fear of deportation; and obstacles to obtaining compensation.

Firstly, In 2016, non-declared labour was made a criminal offence with regards to the employee, albeit only punishable with an administrative fine.[78] This creates a chilling effect on the willingness of victims of exploitation to claim their rights. Moreover, it amounts to punishment of potential victims, which, with regards to potential victims of trafficking, violates the non-punishment of victims principle (Article 26 of the Council of Europe Trafficking Convention).[79]

Secondly, an important obstacle consists of the fact that undocumented migrant workers often do not claim violations of their essential labour rights out of fear of being exposed to the risk of deportation. When the Labour Inspectorate encounters an undocumented migrant during an inspection , it contacts the police, who in turn informs the Aliens Office.[80] In order to encourage victims to file a complaint, FAIRWORK Belgium has concluded an informal agreement with the Aliens Office. According to this agreement, when undocumented migrant workers themselves request an inspection, they are only served with an order to leave the territory rather than with a deportation decision (which would imply

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[74] Article 175 of the Social Criminal Code.
[75] FAIRWORK Belgium, "Davantage de FAIRWORK en Belgique'', *op. cit.*, p. 11
[76] FAIRWORK Belgium, Rapport Annuel 2020, p. 19, available at https://www.fairworkbelgium.be/wp-content/uploads/2021/06/FAI-jaarverslag-2020-FR.pdf.
[77] See https://www.cire.be/proposition-de-mecanisme-doctroi-dun-titre-de-sejour-aux-personnes-en-sejour-irregulier/.
[78] Article 183/1 Social Criminal Code, introduced by the Act of 26 February 2016 supplementing and amending the Social Criminal Code and containing various provisions of social criminal law, *Moniteur belge,* 21 April 2016.
[79] Myria, Rapport Annuel « Traite et trafic des êtres humains », 2016, p. 78, available at https://www.myria.be/files/MYRIA_Rapport_2016_TRAITE_FR_AS.pdf.
[80] FAIRWORK Belgium, "Davantage de FAIRWORK en Belgique", *op. cit.*, p. 16.

the possibility of being placed in a migration detention centre).[81] This practice is however only based on an informal agreement rather than on a formal rule.[82] Moreover, it does not prevent the fact that, in practice, exploited workers who ask for an inspection, often end up being handcuffed and taken to the police station, which does not create a lot of willingness to request such an inspection.[83]

Undocumented migrant workers should primarily be treated as victims, rather than as violators of migration law – in line with Article 1 § 1 of the EU Victim Rights Directive,[84] which explicitly stipulates the principle of non-discrimination of victims, including on the basis of residence status. In this regard, it is problematic that Article 81 of the Aliens Act explicitly provides that the Labour Inspectorate is competent to detect and establish violations of this Act. Belgium has already been criticized by the ILO Committee of Experts under the Labour Inspection Convention (Convention No. 81). According to the Committee, the primary function of the Labour Inspectorate is to uphold labour rights, which cannot be reconciled with the function of enforcing migration law.[85] More generally, there should always be a firewall between migration control authorities and authorities called upon to protect the rights of undocumented migrants.[86]

Thirdly, a specific problem arises when undocumented migrant workers claim payment of unpaid wages (relevant for the purposes of Article 4 RESC). FAIRWORK Belgium reports that, in cases they support, they often encounter problems in obtaining payment of compensation granted by courts – which may involve large sums, e.g. in case of compensation for an occupational accident – because undocumented migrant workers do not enjoy access to a bank account in Belgium.[87] Since a modification of the Economic Law Code in 2017, only persons having lawful residence in a EU member State have a right to access basic banking services in Belgium.[88] This is particularly problematic because, at the same time, Belgian law since 2015 provides that wages can in principle only be paid on a bank account.[89] To circumvent this problem, the Labour Inspectorate often requests payment in cash of the due wages from the employer on the spot.[90] However, this requires the consent of all those concerned,[91] and is mostly useful in sectors where cash money is readily available (e.g. the catering industry).[92]

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[81] FAIRWORK, Rapport Annuel 2020, *op. cit.*, p. 21.
[82] *Ibid*., p. 23.
[83] FAIRWORK Belgium, "Davantage de FAIRWORK en Belgique", *op. cit.*, p. 16.
[84] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; *Official Journal of the European Union* L 315, 14.11.2012, pp. 57–73.
[85] Committee of Experts on the Application of Conventions and Recommendations (CEACR), Observation under the Labour Inspection Convention, 2011, published on the 101st ILC session 2012, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2698478,102560,Belgique,2011.
[86] See https://www.federaalinstituutmensenrechten.be/fr/garantir-les-droits-humains-des-personnes-sans-papiers.
[87] FAIRWORK Belgium, "Davantage de FAIRWORK en Belgique", *op. cit.*, p. 22.
[88] Article VII.57, § 1, amended by the Act of 22 December 2017 amending and introducing provisions on payment accounts and payment services in various books of the Economic Law Code, *Moniteur belge,* 12 January 2018.
[89] Article 5, § 1 of the Act of 12 April 1965 on the protection of the wage of employees, amended by the Act of 23 August 2015, *Moniteur belge,* 1 October 2015.
[90] FRA, "Protecting migrants in an irregular situation from labour exploitation – role of the EU sanctions directive", Report, 2021, p. 20, available at https://fra.europa.eu/en/publication/2021/employers-sanctions-against-exploitation.
[91] *Ibid.*
[92] Email FAIRWORK Belgium, 7 June 2022.

1.5.2.2. Action to facilitate enjoyment of labour right by undocumented migrants

In order to facilitate the enjoyment of labour rights by undocumented migrant workers, a number of steps should be taken:

Firstly, **the enforcement of labour rights of undocumented migrant workers** must be strengthened. According to FAIRWORK Belgium, a fundamental problem lies in the insufficient number of labour inspectors[93] (also see section 8.2 and 8.5 on the role of the Labour Inspectorate). In addition, there is an official prosecuting policy (the so-called 'COL 12/2012') to give priority to the prosecution of employers who, during an inspection, are found to employ at least three undocumented migrant workers.[94] Consequently, most of the cases against employers employing less than three undocumented migrant workers are terminated without charges being filed.[95] According to FAIRWORK Belgium, this contributes to a climate of impunity among smaller employers resulting in the phenomenon of serial exploitation where a single employer consecutively exploits various undocumented migrant workers while avoiding to ever employ three or more at the same time.[96] This is particularly problematic because, in the absence of a criminal case brought by the labour auditor, it is very burdensome for undocumented migrant workers to access justice and claim their rights (e.g. non-payment of wages). For this reason, FAIRWORK Belgium recommends the revision of COL 12/2012 in order to ensure prosecution of the employer in any case involving undocumented migrant workers.[97]

Secondly, further steps could be taken **to facilitate access to justice for undocumented migrant workers**: For instance, while Article 8 of the Act of 11 February 2013[98] (transposing the EU Sanctions Directive)[99] provides for the possibility to designate NGOs to take legal action on behalf of the victim in order to ensure payment of due wages,[100] the Royal Decree designating these NGOs has still not been adopted. In addition, Belgium could provide a specific temporary residence status to undocumented victims of labour exploitation in order to allow them to cooperate with the prosecution and to claim their rights – complementary to the status which already exists for victims of human trafficking[101] While Article 13, § 4 of the EU Sanctions Directive[102] provides for the possibility to introduce such a specific status in certain conditions – including when they are subjected to particularly exploitative working conditions – Belgium has not taken any steps to do so. Consequently, undocumented migrant workers who are subjected to 'particularly exploitative working conditions' which are however not sufficiently severe to fall within the scope of the criminal offence of human trafficking (Article 433quinquies of the Criminal Code), do not enjoy access to a temporary residence status. FAIRWORK Belgium has recommended to provide for a temporary residence status for

[93] Consultation with FAIRWORK Belgium, 19 May 2022.
[94] College of General Prosecutors, Circular No. 12.2012 of 22 October 2012 (recently revised on 28 December 2021).
[95] FAIRWORK Belgium, "Davantage de FAIRWORK en Belgique", *op. cit.*, p. 18.
[96] *Ibid.*
[97] *Ibid.,* p. 19.
[98] Act of 11 February 2013 establishing sanctions and measures for employers of illegally staying third country nationals, *Moniteur belge,* 22 February 2013.
[99] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *Official Journal of the European Union* L 168, 30.6.2009, p. 24–32.
[100] On the basis of Article 8 directly, representative trade unions and employer organizations and the Federal Migration Centre Myria can already take such action.
[101] Articles 61/2 – 61/5 Aliens Act.
[102] Read in combination of Article 9 of the Directive.

undocumented migrant workers, in particular with regards to persons who have been the victim of an occupational accident.[103]

Recommendations

Ensure that undocumented migrant workers are primarily treated as potential victims rather than as violators of migration law.

Suppress the criminalisation of employees undertaking undeclared work.

Remove the reference to the Labour Inspectorate from Article 81 of the Aliens Act, which lists the authorities competent to detect and establish violations of this Act

Take the necessary measures to ensure that undocumented migrant workers can actually receive the compensation they obtain for unpaid wages (e.g. by providing access to a bank account).

Give adequate priority to the investigation and prosecution of violations of labour rights, including non-payment of wages, of undocumented migrant workers.

Adopt a Royal Decree designating which organisations are competent to act on behalf of undocumented migrant workers to claim unpaid wages.

Consider providing a specific temporary residence status for undocumented workers in situations of labour exploitation.

[103] FAIRWORK Belgium, "Davantage de FAIRWORK en Belgique", *op. cit.*, p. 28.

Section 2. Reasonable working conditions (Article 2)

2.1. Reasonable working hours (Article 2 § 1)

The Labour Act of 16 March 1971 provides for a general maximum working time of eight or nine hours per day and 40 hours per week.[104] It explicitly refers to the European working time standards,[105] which set an average weekly working time limit of 48 hours.[106] The Act of 16 March 1971 contains numerous exceptions to this maximum working time, which may not, in principle, exceed 50 hours per week and 11 hours per day.[107] The European Social Charter does not define what constitutes reasonable working hours.[108] The Committee has, however, considered that working weeks exceeding 60 hours, or 16-hour days, are contrary to the Charter,[109] except in cases of force majeure.

At first sight, therefore, Belgian law appears to be in line with the Charter. However, the many exceptions, which may considerably extend the working week, may raise problems from the viewpoint of Article 2 § 1: voluntary overtime introduced by the law on workable and agile work; working time of medical staff; working time of trusted or leading positions (*personnel de direction ou de confiance/leidende functie of vetrouwenspost)*; and prison labour.

2.1.1. Monitoring of overtime

The Act of 5 March 2017 on workable and agile work introduced the possibility to work up to 100 hours per year of voluntary overtime, which will not be taken into account for the calculation of the maximum working time of 40 hours.[110] This overtime can be increased to 360 hours per year via a collective labour agreement made compulsory by Royal Decree.[111] In addition, an additional 120 hours of overtime per worker were allowed between 1st April and 30 June 2020 in the context of the fight against the Covid-19 pandemic. Furthermore, the Act establishes a quarter-based limit ('the internal limit') to the excess of working hours: the worker may not exceed the average working time allowed in that quarter by more than 143 hours.[112] However, this internal limit contains itself several

[104] Art. 19, Labour Act of 16 March 1971, *Moniteur belge,* 30 March 1971.
[105] Art. 27 § 5, Act of 16 March 1971, *op. cit.*
[106] Article 6, Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *Official Journal of the European Union* L. 299/9, 18 November 2003.
[107] Art. 27, § 1 Labour Act of 16 March 1971, *op. cit.* Exceptions exist, in particular for work that cannot be interrupted because of its nature (Art. 22, 2°, Act of 16 March 1971).
[108] ECSR, Digest, December 2018, p. 65.
[109] *Ibid.*
[110] Art. 4, Act of 5 March 2017 on workable and agile work, *Moniteur belge,* 15 March 2017, which amended Article 26bis § 1 of the 1971 Act. See also the section below on the link between such overtime and the right to annual paid holiday.
[111] *Ibid.* See also the National Labour Council Collective Agreement No. 129, which increased this number to 120 hours (available at http://www.cnt-nar.be/CCT-COORD/cct-129.pdf). As part of the health measures to combat the coronavirus, the government has granted an additional quota of 120 voluntary hours per employee between 1er April and 30 June 2020.
[112] Art. 26 bis, § 1er bis, Act of 16 March 1971, *op. cit.*

exceptions (exemption for certain overtime hours, possibility to voluntarily waive the recovery of overtime,[113] etc.).

The overview shows that Belgian legislation on overtime is relatively complex, a complexity that is set to increase further with the anticipated adoption of a system of alternating weekly working hours[114] and the possibility to work the same amount of hours over a four-day week (instead of five).[115] This complexity is not as such contrary to the Charter, but it makes it difficult for the competent inspection services to monitor these regulations. The social partners have noted that "***the introduction of an additional system of 'voluntary' overtime makes the regulation of working hours even more complex, illegible and difficult to control***".[116] (emphasis added)

This difficulty to monitor is exacerbated by the absence, in Belgian law, of a general obligation to record working time, except for workers who have floating hours.[117] This lack of a recording obligation seems to be contrary to the case law of the European Court of Justice,[118] and is a cause for debates between labour courts regarding the proof of alleged overtime.[119] However, the Federation of Enterprises in Belgium (FEB-VBO) considers that the transposition of the case law of the Court does not require a registration obligation, as the *CCOO* judgment does not have direct horizontal effect.[120]

The monitoring of working time has also been made more difficult by the **widespread use of teleworking since the start of the Covid-19 pandemic**. The European Committee of Social Rights notes that "*new forms of work organisation, such as teleworking and homeworking practices, often lead de*

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[113] Art. 26 bis §2bis*,* Act of 16 March 1971, *op. cit.*

[114] The bill currently before Parliament would allow a new possibility of organising working time over a two-week timeframe: the worker could work up to 9 hours a day and 45 hours a week, and immediately compensate for this longer working time in the following week. See *Doc. Parl.,* House of Representatives, Bill on various provisions relating to labour, DOC 55 2810/001, 7 July 2022, p. 7, available at https://www.lachambre.be/kvvcr/showpage.cfm?section=/none&leftmenu=no&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=F&legislat=55&dossierID=2810.

[115] *Doc. Parl.*, House of Representatives, Bill on various provisions relating to labour, DOC 55 2810/001, *op. cit.* p. 6; BDO Belgium, "Deal for employment": what do we know already?", 22 June 2022, available here : https://www.bdo.be/fr-be/actualites/2022/%C2%AB-deal-pour-l%E2%80%99emploi-%C2%BB-que-sait-on-deja

[116] National Labour Council, Advisory Opinion No. 2.008 of 7 December 2016, available at http://www.cnt-nar.be/AVIS/avis-2008.pdf.

[117] See in particular Secretariat social Securex, legal department, 2 July 2021, available at https://www.securex.eu/lex-go.nsf/vwNewsWGsoc_fr/0D77F95595F28AA7C12587060029BF42?OpenDocument.

[118] E.C.J., Grand Chamber, *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank SAE* of 14 May 2019, C-55/18, § 60: "*Consequently, in order to ensure the effectiveness of the rights provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter, Member States must impose on employers the obligation to put in place an objective, reliable and accessible system for measuring the length of daily working time worked by each worker.*" See also V. Pertry, L. Vandenplas, "Is de registratie van de arbeidstijd verplicht worden", *Eubelius*, 14 June 2021, available at https://www.eubelius.com/nl/nieuws/is-de-registratie-van-arbeidstijd-verplicht-geworden.

[119] See, for example, Brussels Labour Court, 22 May 2020, 2018/AB/424, or Antwerp Labour Tribunal (Turnhout section), 31 October 2014, which hold, contrary to majority case law, that the burden of proof for the absence of overtime rests with the employer who does not have a system for recording working time. These rulings remain in the minority at present.

[120] This point of view is defended, among others, by S. Coenegracht, from the expertise centre of the Federation of Enterprises in Belgium. S. Coenegrachts, "The worker must always prove his claim for overtime pay", 9 June 2021, available at https://www.feb.be/en/business-issues/hr--personnel/organisation-du-travail2/le-travailleur-doit-toujours-prouver-sa-demande-de-paiement-dheures-supplementaires_2021-06-09/.

facto to longer working hours, not least because of a blurring between work and private life.".[121] This additional difficulty also strengthens the case for generalising working time recording. The National Labour Council has recently indicated that it intends to issue an opinion on working time recording in the coming weeks.[122]

In a study of overtime in Europe, Eurofound refers to a 2017 survey of 14,500 Belgian employees conducted by the trade union ABVV/FGTB.[123] Those who reported working overtime indicated doing so for the following reasons:

- A request from their superior(s) due to increased work pressure (42% of respondents, of which 12% said that the extra work was done without pay) ;
- A workload preventing them from carrying out their tasks during normal working hours (40% of respondents, of which another 40% said that no pay was offered).

Recommendation
Improve the readability of and simplify working time legislation. In addition, the government and the social partners should encourage the recording of working time to facilitate its control by the relevant inspection services.

2.1.2. Working hours of medical staff

An exception to the Act of 16 March 1971 is provided by the Act of 12 December 2010. It determines the working hours of doctors, dentists, veterinarians, candidate doctors and dentists in training, as well as student trainees preparing for these professions.[124] This Act provides for an average working time of 48 hours per week with a maximum of 60 hours per week.[125] It also contains the possibility of **signing an individual agreement that allows for an increase in average working time to 60 hours per week, with a maximum of 78 hours per week**,[126] for example to provide on-call services in the workplace. Some of the academic actors consulted by FIRM/IFDH note that this individual agreement is integrated in the vast majority of the internship agreements that doctor, dentist and student trainees have to sign in order to be able to carry out an internship.

This situation is all the more problematic as it concerns, in part, students. For them, these working weeks must also be combined with other obligations related to their studies. Moreover, the control of

[121] ECSR, Appendix, Questions on Group 3 Provisions (Conclusions 2022) - Labour Rights.
[122] National Labour Council, Advisory Opinion No. 2.289 of 17 May 2022, p. 6, available at http://cnt-nar.be/AVIS/avis-2289.pdf.
[123] J. Cabrita, C. Cerf, D. Foden, "Overtime in Europe: Regulation and practice", Eurofound, 10 March 2022, p. 22, available at https://www.eurofound.europa.eu/publications/report/2022/overtime-in-europe-regulation-and-practice. See also the FGTB study: C. Verdoot, Modern Times II Report: Description of the results of the 2017 survey, available at https://www.metallos.be/sites/default/files/fichiers/Annexe%201%20-%20Rapport%20Modern%20Times%202017.pdf
[124] Act of 12 December 2010 fixing the working hours of doctors, dentists, veterinarians, trainee doctors, trainee dentists and trainee students preparing for these professions, *Moniteur belge,* 22 December 2010.
[125] Art. 5, Act of 12 December 2010, *op. cit.*
[126] Art. 7, *Ibid.*

this working time also seems to be deficient: collective actions by doctor candidates have drawn attention, in 2021, to working weeks of more than 100 hours.[127]

Recommendation

Abrogate the exceptional working regime for doctors, dentists, veterinarians, candidate doctors and dentists in training, as well as student trainees and set the maximum working time regime to the standards set by the Labour Act – a maximum of 11 hours per day and 50 hours per week, except in cases of force majeure.

Alternatively, abrogate the exception introduced by the Act of 12 December 2010, allowing for working more than sixty hours per week.

2.1.3. Working hours of trusted or leading positions[128]

The Labour Act provides that its provisions on working time are not applicable to certain categories of workers: domestic workers (*supra*, section 7.5.), commercial representatives and "workers designated by the King as being in a leading position of a position of trust".[129] This term refers to the Royal Decree of 10 February 1965, which lists the categories of personnel considered to be in a "leading or trusted" position.[130] The exclusion of workers in leading or trusted positions means that they have no legally guaranteed working hours, no maximum limits on working hours, and no right to recovery or payment of overtime.[131] The parties may, however, agree on extra pay for overtime.

Two problems arise in the application of this Royal Decree, which has not been modified since its adoption: firstly, a lack of clarity on the functions considered to be leading or trusted; secondly, a difficulty to monitor its application.

The lack of clarity stems from a controversy in the case law concerning the exhaustive character of the list in the Royal Decree of 10 February 1965.[132] As the Act of 16 March 1971 is of public order, it is

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[127] R.T.B.F., "Des médecins assistants dénoncent les conditions de stage : "Pendant 5 ans, on travaille de 60 à 100 heures par semaine", 29 April 2021, available at https://www.rtbf.be/article/des-medecins-assistants-denoncent-les-conditions-des-stages-pendant-5-ans-on-travaille-de-60-a-100-heures-par-semaine-10751418; R.T.B.F., "Grève des médecins assistants : des centaines de manifestants ont affiché leur mécontentement à Bruxelles", 20 May 2021, available at https://www.rtbf.be/article/greve-des-medecins-assistants-des-centaines-de-manifestants-ont-affiche-leur-mecontentement-a-bruxelles-10765846, M. Ghyselings, "Médecins assistants : les raisons de la grève", *Moustique*, 20 May 2021, available at https://www.moustique.be/actu/2021/05/20/medecins-assistants-les-raisons-de-la-greve-190793 An investigation concerning the respect of the working time of doctors in training seems to be currently underway against at least one Brussels hospital, following controls carried out by the Social Legislation Inspectorate. See Q. Noirfalisse, C. Joie, "L'auditorat du travail de Bruxelles enquête contre un hôpital", *Médor*, 2 March 2021, available at https://medor.coop/nos-series/enquete-sante/lenfer-des-assistantes/horaires-des-assistantes-lauditorat-du-travail-de-bruxelles-enquete-contre-un-hopital-maccs-burnout/?full=1#continuer-a-lire.

[128] In French, *personnel de direction ou de confiance,* in Dutch, *leidende functie of vertrouwenspost.*

[129] Art. 3 Act of 16 March 1971, *op. cit.*

[130] Royal Decree of 10 February 1965 determining the persons entrusted with a position of management or trust, in the private sectors of the national economy, for the application of the law on working hours, *Moniteur belge,* 12 February 1965.

[131] J. Clesse, F. Kéfer, *Manuel de droit du travail* (2nd edn), Larcier, Brussels, 2018, p. 345.

[132] Compare e.g. Brussels Labour Court, 2 December 2020, R.G. 2016/AB/334, and Brussels Labour Court, 27 June 2011, R.G. 2009/AB/52.388.

considered that derogations therefrom must be interpreted restrictively. However, the relatively dated nature of many of the functions it contains – blasters, cabin-keepers, stable masters, etc. – and the fact that it has not been updated since then, make it difficult to apply. Some courts therefore rely on certain more general categories contained in the Royal Decree, even if it means interpreting them broadly,[133] for example by examining whether the functions in question exercise effective authority over a division of the company or can legally commit the company to third parties under their own responsibility.[134] In a form of circular reasoning, the obligation to work outside normal working hours may also be an indication that the function is a leading or trusted position.[135] The controversy about the broad or restrictive interpretation of the list in the Royal Decree and its dated nature seriously undermine the readability of the law in this area.

The actors consulted – trade unions and academics – allege the existence of **practices of abusive classification of functions as leading or trusted staff**. These abuses are aimed at avoiding the application of working time legislation. There seems to be a large body of case law in this area,[136] but, to our knowledge, no study has been published on this subject. These abuses must been seen against the backdrop of difficulties in monitoring these measures: since the determination of the "leading or trusted" nature of a position depends on **vague and dated criteria**, it is difficult for the inspection services to assess with certainty whether the concrete function does not in fact correspond to such a position.

Recommendations

Update and restrict the list of trusted personnel contained in the Royal Decree of 10 February 1965.

Base the definition of leading positions on a contradictory procedure inspired by the one used to define leading positions in the context of social elections.

No longer exclude trusted and leading positions both from the rules on working time and night work, and allow them to be applied over a longer period, for example a trimester.

Strengthen controls by the labour inspection services on abuses of classification of leading or trusted positions.

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[133] Compare e.g. Brussels Labour Court, 2 December 2020, R.G. 2016/AB/334, and Brussels Labour Court, 27 June 2011, R.G. 2009/AB/52.388.

[134] Court of Cassation, 11 September 2017, S.15.0065.N; Brussels Labour Court, 23 November 2016, R.G. 2014/AB/755 and commentary on this judgment published by the social law research centre Terra Laboris: "personnes de confiance: l'arrêté royal du 10 février 1965 dresse-t-il la liste exhaustive des catégories de personnel concernées", 15 June 2017, available at http://www.terralaboris.be/spip.php?article2315.

[135] Court of Cassation, 10 November 2014, S.12.0114.N.

[136] The Terra Laboris research centre has identified around 30 such judgments since 2010. See at https://www.terralaboris.be/spip.php?rubrique1161.

2.1.4. Prison working hours

As prison work is not covered by social legislation (see *above*, point 3.3 on remuneration for prison labour), the Labour Act of 16 March 1971 does not apply directly to it,[137] as confirmed by the Constitutional Court.[138] Working time standards are determined by the General Prison Regulations in the form of a ministerial circular.[139] In practice, they are much more dependent on the concrete circumstances of work (or lack thereof). Importantly, the 'Basic Act on Prisons' states that "*the duration of work may in no case exceed that fixed by or under the law for corresponding activities in free society.*".[140] Therefore, working prisoners should not work more than an average of 40 hours per week, and never more than 11 hours per day and 50 hours per week.

Several actors note, however, that the correspondence of working hours with ordinary labour law is very relative: prisoners who work in workshops generally do so on a reduced schedule, due to a lack of available work.[141] In contrast, those who work in cells or do domestic work in the prison frequently exceed the maximum working hours[142] : the former mainly because they are paid by the piece rather than by the hour, the latter because of weekend and public holiday work, and because of the absence of statutory holidays for prisoners.[143] Finally, prison workers were not entitled to any form of compensation when they are deprived of work due to circumstances beyond their control, such as work interruptions due to the health crisis. The Central Monitoring Council for Prisons recommended that "*reasonable compensation or indemnification be given to prisoners deprived of work*".[144]

Recommendation

Adopt of a specific legal framework for prison working hours, which would determine the maximum duration for each type of work carried out (domestic work, workshop work carried out on behalf of the prison authorities or external clients), a mechanism allowing for days off, control measures, and reasonable compensation for periods of time where detainees are deprived of work independently of their will.[145]

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[137] The Principles Act specifies, however, that "*the prisoner's work in the prison shall take place under conditions which, insofar as the nature of the detention does not prevent it, are as close as possible to those which characterise identical activities in free society*". Art. 83, Principles Act of 12 January 2005 concerning the penitentiary administration and the legal status of prisoners, *Moniteur belge,* 1er February 2005.

[138] The Constitutional Court states that *"prisoners working in prisons are in a situation too far removed from that of salaried workers for the former to be usefully compared with the latter as regards the legal regime governing the work of both*". Constitutional Court, judgment 65/2015 of 21 May 2015, B.7.

[139] Federale Overheidsdienst Justitie, *Huishoudelijk reglement,* ministerial circular no. HR/3 of 9 October 2017.

[140] Art. 83, § 2, Principles Act, *op. cit.*

[141] C. Oumalis, "le droit des détenus au travail et à la sécurité sociale en Belgique", Dissertation, Faculty of Law and Criminology, Catholic University of Louvain, 2015, p. 39, available at https://dial.uclouvain.be/memoire/ucl/object/thesis:3141.

[142] *Ibid.* This observation is also made in the French report on the control of penal institutions, the so-called Loridant report, cited by C. Oumalis. See P. Loridant, *Doc Parl.* Senate (France), ordinary session 2001-2002, No. 330, p. 28.

[143] Information from our discussions with the Central Monitoring Council for Prisons.

[144] Central Monitoring Council for Prisons, "Prisons: Government urged to strengthen health and humanitarian measures", 30 March 2020, available at https://ccsp.belgium.be/wp-content/uploads/2020/04/30.03.20_Communiqu%C3%A9_CCSP_Covid19.pdf.

[145] On the issue of remuneration for prison labour, see section 3.3.

2.2. On-call and standby time (Article 2 § 1)

In its list of questions to the Belgian State, the Committee shows a particular interest in issues relating to standby and on-call time. In line with European law, Belgian law considers working time to be "the *time during which the personnel is at the disposal of the employer*".[146]

2.2.1. On-call time and time effectively worked

The time during which the worker is on call and physically present at the workplace is considered as effective working time.[147] Belgian case law has long held that time spent on call without being present at a place determined by the employer does not fall within the notion of effective working time, and that only the services effectively performed during this period can be considered as working time.[148] However, a recent judgment of the European Court of Justice held that the place where the work is performed is irrelevant for determining the nature of the work.[149] Rather, following the Court, it is important to determine whether the "*the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests.*".[150] The Court of Justice notes, however, that the question of remuneration for such working time does not fall within its jurisdiction.[151] Also under the Charter, on-call time cannot be considered as rest timer.[152] On-call time should therefore be working time, but its remuneration remains uncertain.

Several Belgian norms are more restrictive than the case law of the Court of Justice. For example, the Royal Decree of 6 May 1971 considers that the on-call time of volunteer firefighters only concerns the time spent in the fire station, to the exclusion of the so-called "recall service", which is nevertheless mandatory.[153] However, the Court of Cassation has issued several recent rulings on on-call time in line with the Court of Justice's case law. It considers that the notion of working time must be distinguished from that of a service giving entitlement to 100% remuneration[154] : certain forms of rest periods must now be considered as working time, may lead to a form of remuneration that is however less than 100%, or even to a flat-rate allowance.[155]

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[146] Art. 19, para. 2, Labour Act of 16 March 1971, *op. cit.*
[147] See Court of Cassation, 4 February 1980, *J.T.T*, 1981, p. 100. See also F. Kéfer, J. Clesse, "le temps de garde inactif, entre le temps de travail et le temps de repos", *Rev. Dr. ULg*, 2006, p. 157 ff.
[148] Constitutional Court, judgment no. 35/2016 of 3 March 2016, B.12.1; E.C.J., *Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana* of 3 October 2000, C-303/98, § 50; *Landeshaupstdt Kiel v. Norbert Jaeger* of 9 September 2003, C-151/02, § 51.
[149] ECJ, *D.J. v. Radiotelevizija Slovenija* of 9 March 2021, C-344/19.
[150] *Ibid.,* § 37.
[151] *Ibid.,* § 57.
[152] ECSR, Digest, December 2018, p. 66
[153] Art. 24/1, annex 3 of the Royal Decree of 6 May 1971 fixing the types of communal regulations relating to the organisation of the communal fire services, *Moniteur belge*, 19 June 1971; Art. 7 Act of 12 December 2010 fixing the working hours of doctors, dentists, veterinary surgeons, trainee doctors, trainee dentists and trainee students preparing for these professions, *op. cit.*
[154] Court of Cassation, 21 June 2021, AR S.19.0071.F, available at https://www.stradalex.com/en/sl_src_publ_jur_be/document/ECLI:BE:CASS:2021:ARR.20210621.3F.6-FR; Court of Cassation, 15 November 2021, S.20.0092.F., available at https://www.stradalex.com/fr/sl_src_publ_jur_be/document/ECLI:BE:CASS:2021:ARR.20211115.3F.1-FR.
[155] *Ibid.*

Some of the distinctions introduced between on-call time and rest period by the law now seem too restrictive to remain in line with developments in the European case law. Moreover, the question of working time is distinct from that of remuneration for these periods of work, and there remains considerable uncertainty where there are no collective labour agreements on the remuneration of on-call time. It is therefore up to the legislator to intervene in order to modify legislation that is contrary to the Court of Justice's ruling, and to clarify the remuneration due for periods considered as working time where the rules are still silent on this issue.

Recommendations

Amend legislation contrary to the Court of Justice's ruling *D.J. v. Radiotelevizija Slovenija* on on-call time, such as the Royal Decree of 6 May 1971.

Clarify the remuneration due for of periods considered as working time, where collective labour agreements are silent on this issue.

2.2.2. Working hours of taxi drivers

A special regime applicable to taxi drivers also raises questions about conformity with Article 2 § 1er of the Charter. The Royal Decree of 14 July 1971 on the working hours of drivers employed in taxi and taxi van companies[156] seeks to prevent remuneration being due for periods in which the worker is presumed to be at the employer's disposal without effectively working (for example, the time between two rides). To this end, the Royal Decree creates **a presumption of effective work done, corresponding to 76% of the working hours performed under the employer's control** : "*for the determination of the working time, no account is taken of the time during which the worker is at the employer's disposal without doing any effective work; thus 24 p.c. of the time spent present is not taken into consideration for the calculation of the working time*".

This royal decree is contrary to superior international norms. For example, the European Directive of 4 November 2003 concerning certain aspects of the organisation of working time[157] defines working time as "*any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice".* The European Committee of Social Rights also considers the absence of effective work not to be an adequate criterion for determining working time, if the worker remains at the disposal of his employer.[158]

The Brussels Labour Court recently questioned the compatibility of this royal decree with European Union law, criticising the use of a legal fiction – the presumption of 76% effective working time – to reduce the effective working time on a flat-rate basis.[159] In the light of the Committee's case law, it appears that this subtraction of the working time effectively worked is also contrary to Article 2(1) of the Charter.

[156] Art. 3, Royal Decree of 14 July 1971 on the working hours of the staff employed in taxi and taxi van companies, *Moniteur belge*, 12 October 1971.

[157] Art. 2.1, Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time, *op. cit.*

[158] ECSR, Digest, December 2018, p. 66.

[159] Brussels Labour Court, 17 January 2022, R.G. 2019/AB/829, pp. 20-22.

Recommendation
Abrogate the exception provided for in the Royal Decree of 14 July 1971 on the working hours of drivers employed in taxi and taxi van companies, which deducts 24% of the time worked.

2.3. Reasonable working hours during the pandemic (Article 2 § 1)

As explained by the Belgian government, a number of measures were taken to promote the right to reasonable working hours during the pandemic, in a context where the enjoyment of such right was severely disrupted by the implementation of public health measures (teleworking, closure of schools or nurseries, etc.). These measures again had a disproportionate impact on vulnerable groups. Below we briefly discuss teleworking and "corona parental leave" (in terms of working hours). Our analysis is mainly based on the input received from the Combat Poverty Service on the impact of COVID-19 on vulnerable workers.

2.3.1. Telework

Precarious jobs generally do not lend themselves well to telework.[160] Furthermore, in complex situations of quarantine or lack of childcare, vulnerable people have often found it difficult to travel to work, resulting in income losses that could be significant.[161] The lowest paid jobs were frequently considered to be 'essential' jobs, which were exempted from mandatory teleworking, exposing workers to greater health risks (physical work, occupations with more contact).[162] Essential occupations also had little opportunity to telework or to interrupt their work activity because of health risks. [163]

In situations where teleworking was possible, the shortage of childcare services also had important consequences. **The Covid-19 crisis made access to childcare more difficult for the most vulnerable** for financial and supply-side reasons (structural lack of places). However, for these teleworkers, the need for childcare was particularly high, due to poor housing conditions, increased stress and anxiety, particularly related to precariousness,[164] and the need to ensure child development and training in a difficult context.[165] Many vulnerable families have also had to give up childcare for their children.[166]

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[160] J. Horemans *et al*, *COVIVAT Beleidsnota 4: De kwetsbare werkende. Een profielschets van armoede en financiële bestaanszekerheid bij werkende Belgen*, Leuven/Antwerpen, 2020 ; Combat Poverty Service, report *Solidarité et pauvreté. Contribution au débat et à l'action politiques*, Bruxelles, 2021, disponible sur https://www.luttepauvrete.be/publication/du-service/rapport-bisannuel/solidarite-et-pauvrete-contribution-au-debat-et-a-laction-politiques/.

[161] See Netwerk tegen Armoede, "Signalenbundel 2.0. Mensen in armoede maken samen de balans op na 1 jaar Corona! "March 24, 2021, available at https://netwerktegenarmoede.be/nl/nieuws/2021/signalenbundel.

[162] J. Horemans *et al*, *COVIVAT Beleidsnota 4: De kwetsbare werkende. Een profielschets van armoede en financiële bestaanszekerheid bij werkende Belgen*, *op. cit* ; Service de lutte contre la pauvreté, la précarité et l'exclusion sociale, rapport *Solidarité et pauvreté. Contribution au débat et à l'action politique*, *op. cit.*

[163] See Federal Public Service Social Security, Working Group Social Impact COVID-19, "Monitoring the social impact of the COVID-19 crisis in Belgium", available at https://socialsecurity.belgium.be/fr/elaboration-de-la-politique-sociale/impact-social-covid-19.

[164] J. Horemans *et al*, *COVIVAT Beleidsnota 4: De kwetsbare werkende. Een profielschets van armoede en financiële bestaanszekerheid bij werkende Belgen*, *op. cit* ; Service de lutte contre la pauvreté, la précarité et l'exclusion sociale, rapport *Solidariteit en armoede. Een bijdrage aan politiek debat en politieke actie*, *op. cit.*

[165] BAPN. *Sheet 84: Families: parenthood and work.*

[166] G. Loosveldt en K. Emmery, "Met de nodige afstand? Een staat van het gezinsbeleid in Vlaanderen 2020", 2021, Odissee Hogeschool.

2.3.2. Parental leave "Corona"

The federal government created a new parental leave for parents who had to combine work with childcare during the pandemic.[167] These parents could reduce their working hours to half time or by one fifth with a limited loss of income. As with 'ordinary' parental leave, vulnerable people made less use of corona parental leave. There are two reasons for this. First, studies show that certain vulnerable groups are much less likely to take paid parental leave, for example mothers with lower levels of education and young children compared to mothers with higher levels of education.[168] On the other hand, the use of parental leave is generally positively correlated with wage level (except for the highest wage bracket): this **suggests that people in the lowest wage brackets are financially less able to take parental leave in view of the lower income it brings**. However, it is also possible that people on low incomes made less use of pandemic-related parental leave because of job loss or because they were in temporary unemployment (see, below, section 3.5.1.)[169]

2.4. Right to a minimum annual holiday with pay (Article 2 § 3)

2.4.1. Right to defer annual holiday days in case of work incapacity

The Royal Decree of 30 March 1967[170] provides for the right to a minimum of four weeks paid leave per year. The worker retains his leave days in the event of an interruption of work due to illness or an accident at work, except if the interruption occurs during the holiday period.[171] In this case, the worker is not entitled to recover the paid annual leave days "lost" during the period of incapacity.

The European Committee of Social Rights noted, as early as 2010, that Belgian law was not, on this point, in conformity with the Charter.[172] Indeed, the Charter, as interpreted by the Committee, enshrines the right to postpone leave days when an illness or another form of incapacity occurs during a holiday period.[173] A comparable right also exists in European Union law.[174] The finding of non-conformity was reiterated in 2014, but the relevant legislation was not amended. A draft Royal Decree amending this regime has been drawn up by the government, and the National Labour Council - the federal joint body with broad advisory powers in social matters - has pronounced itself in favour of a

[167] Royal Decree No. 23 of 13 May 2020 taken in execution of Article 5 § 1, 5° of the Act of 27 March 2020 granting powers to the King in order to take measures in the fight against the spread of the Covid-19 coronavirus, *Moniteur belge*, 14 May 2020.

[168] B. Cantillon. "Forumtekst: pleidooi voor een vernieuwd sociaal contract", *Tijdschrift voor sociale zekerheid*, 2020, n° 2, pp. 407-422.

[169] Federal Public Service Social Security, Working Group Social Impact COVID-19, "Monitoring the social impact of the COVID-19 crisis in Belgium", *op. cit.*

[170] Art. 60, Royal Decree of 30 March 1967 determining the general modalities of implementation of the laws on annual holidays for salaried workers, *Moniteur Belge*, 6 April 1967.

[171] Art. 67, *op. cit.*

[172] ECSR, Conclusions 2010 (Belgium), Article 2 § 3, available at https://hudoc.esc.coe.int/fre?i=2010/def/BEL/2/3/FR.

[173] ECSR, Conclusions XII-2 (1992), Statement of Interpretation on Article 2 §3. It should also be noted that the Committee accepts that the employer requires a medical certificate to demonstrate incapacity to work during the holiday period (*Ibid.*).

[174] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *op. cit.*

right to carry over leave days.[175] However, it is important to note that the draft decree has not yet been officially adopted. The non-conformity of Belgian law with the Charter remains.

Recommendation
Enshrine the right to retain and carry over paid leave days in the event of an illness or another form of incapacity during a holiday period.

2.4.2. Limits to annual holiday entitlement for associative work

In April 2020, the Constitutional Court annulled the Act of 18 July 2018, which had introduced a special status for associative work.[176] This work regime allowed non-profit associations or certain public bodies to hire workers on a supplementary basis, without having to pay social security contributions or taxes. However, workers who are not subject to social security contributions do not build up right to annual paid holidays. The National Labour Council had considered that this legal scheme did not sufficiently ensure that it remained complementary to ordinary employment, and was concerned that it would lead to a "*risk of crowding out regular employment*" in the bodies that relied upon it.[177]

Article 17 of the Royal Decree on social security for workers (the so-called ONSS/RSZ Royal Decree), replacing the annulled Act of 18 July 2018, addresses a number of the Constitutional Court's criticisms. However, it maintains an exemption from social security contributions for certain workers whose work does not exceed 300 hours per year, and up to 450 hours per year in the sports sector.[178] The workers' representatives in the National Labour Council indicated that they felt that this new regime did not guarantee the right to paid annual leave. They therefore recommended a right to be exempted from associative work for periods of annual holidays, with salary retention. The employers' representatives did not share this recommendation, noting that such a proposal could hardly be implemented without the payment of social security contributions creating a right to paid annual leave, and that the payment of such contributions would risk jeopardising the financial attractiveness of the new scheme of associative work.[179]

Despite the improvements in Article 17, workers in this scheme still do not enjoy the right to paid annual leave. This situation is contrary to Article 2 § 3 of the Charter.

[175] National Labour Council, Advisory Opinion No. 2.268 of 21 December 2021 - Compliance of annual holiday provisions with Directive 2003/88/EC of 4 November 2003 on certain aspects of working time arrangements, available at http://www.cnt-nar.be/AVIS/avis-2268.pdf.
[176] Constitutional Court, judgment 2020/053 of 23 April 2020, available at https://www.const-court.be/public/f/2020/2020-053f.pdf.
[177] National Labour Council, Advisory Opinion 2.097 of 25 September 2018, available at http://www.cnt-nar.be/AVIS/avis-2097.pdf; National Labour Council, Advisory Opinion 2.202 of 3 March 2021, available at http://www.cnt-nar.be/AVIS/avis-2202.pdf.
[178] Art. 17 § 1/1, Royal Decree of 28 November 1969 in execution of the Act of 27 June 1969 revising the Decree-Act of 28 December 1944 concerning the social security of workers, *Moniteur belge*, 5 December 1969. See also Royal Decree of 23 December 2021 amending several provisions relating to Article 17 of the Royal Decree of 28 November 1969 implementing the Act of 27 June 1969 revising the Decree-Act of 28 December 1944 on the social security of workers*, Moniteur belge*, 30 December 2021, which introduced this system. This system is distinct from the flexi-job system.
[179] National Labour Council, Advisory Opinion No. 2.236 of 13 July 2021, available at http://www.cnt-nar.be/AVIS/avis-2236.pdf.

Recommendation
Ensure that workers who fall under the scheme of Article 17 of the ONSS/RSZ Royal Decree are entitled to paid annual leave for the hours worked under this scheme.

2.4.3. Absence of right to paid annual leave for platform workers

The first part of this report underlined that some workers do not build up social security rights from their professional activity. This situation concerns platform workers under the 'collaborative economy scheme' (see, above, section 1.3.1.) but also other specific statuses, such as prison labour.[180] Exclusion from building up social security rights has important consequences for the right to paid annual leave, since this right is build up in the basis of social security contributions (see section 2.4.2 on associative work). Thus, since platform workers under the 'collaborative economy scheme' do not build up social security rights, they do not benefit from the right to paid annual leave.

Recommendation
Establish social rights for platform workers: work should in principle allow for the building up of social security rights, including the right to paid annual leave.

2.5. Weekly rest period (Article 2 § 5)

2.5.1. Non-conformity 2014: postponement of the weekly rest day

The Committee has noted on several occasions that Belgian legislation on the postponement of the compensatory rest day is in violation of the European Social Charter.[181] The Act of 16 March 1971 provides for a general ban on Sunday work, but allows certain collective labour agreements to derogate from it. In case of Sunday work, a compensatory rest day must be granted.[182] The Charter provides that this rest day must not be carried over beyond the week following the Sunday worked, to avoid the worker being occupied for more than twelve consecutive days without interruption.[183] However, such a maximum period for taking compensatory rest day does not exist in Belgian law, which in principle allows the recovery of the weekly rest day to be postponed beyond twelve days. Some collective agreements explicitly provide for longer periods.[184]

Belgium confirms the lack of conformity of its legislation in its 2021 report, while considering that the problem does not arise much in practice: "(...) *when the ban on Sunday work is derogated from on the basis of the law on new working regimes, no maximum period to take the compensatory rest day is*

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[180] V. Van der Plancke, " Les exclus de la sécurité sociale ", *Health Conjugate,* n°83, June 2018, available at https://www.maisonmedicale.org/-Malade-et-en-prison-double-peine-.html
[181] ECSR, Conclusions 2010 (Belgium), Article 2 § 5, available at https://hudoc.esc.coe.int/fre?i=2010/def/BEL/2/5/FR ; ECSR, Conclusions 2014 (Belgium) on Articles 2,4, 5, 6, 21, 22, 26 §1er, and 29 of the Revised Charter.
[182] This may be only a half-day to recover if the duration of the Sunday working time did not exceed 4 consecutive hours.
[183] ECSR, Digest, December 2018, p. 69.
[184] For example, the collective labour agreement of 13 June 2005 on the introduction of new arrangements for the organisation of working time in the sub-sector of removal firms, furniture storage firms and their related activities provides for a granting period of 8 weeks. See Royal Decree of 2 May 2006 rendering obligatory the collective labour agreement of 13 June 2005, concluded within the Joint Transport Commission on the introduction of new arrangements for the organisation of working time in the sub-sector of removal firms, furniture storage firms and their related activities, *Moniteur belge*, 10 August 2006.

provided for. In view of the working hours to be observed, the worker will in most cases have been able to take at least one day of rest during the week".

Recommendation
Amend the legislation to explicitly prohibit the postponement of the compensatory rest day beyond twelve consecutive working days.

2.5.2. No compensatory rest for voluntary overtime

The Act of 5 March 2017 on workable and agile work allows for 100 hours of voluntary overtime per year, at the request of the employer and with the agreement of the worker (also see also section 2.1.1. on Monitoring of overtime).[185] This overtime can be increased to 360 hours per year via a collective labour agreement made compulsory by royal decree.[186]

This voluntary overtime gives the right to extra pay but not to compensatory rest.[187] It may be performed on Sundays or during paid public holidays. The Committee has however already stressed that "*the right to weekly rest periods may not be replaced by compensation and workers may not be permitted to give it up*".[188] The exception of the Act of 5 March 2017 regarding compensatory rest therefore seems contrary to the interpretation of the European Social Charter by the Committee.

Recommendation
The Committee should rule on the compatibility of this non-recoverable voluntary overtime with Article 2 § 5 of the Charter.

2.6. Information on the employment contract (Article 2 § 6)

The right to information on the employment contract is generally strongly guaranteed in Belgium.[189] However, some legal mechanisms allow the conclusion of verbal employment contracts, which has an impact the right to information.

In principle, a Belgian employment contract can be concluded orally or in writing. However, a number of clauses must always be in writing, such as those concerning the place of work, remuneration, working hours and holidays, etc. They may, for example, be included in the internal working regulations that must be sent to the employees.[190] This requirement for a written document stems directly from the obligation of employers to inform their workers.[191]

[185] Art. 4, Act of 5 March 2017, *op. cit.*
[186] *Ibid.* See also the National Labour Council Collective Agreement No. 129, which increased this number to 120 hours (footnote 107). As part of the health measures to combat the coronavirus, the government has granted an additional quota of 120 voluntary hours per employee between 1er April and 30 June 2020.
[187] J. Clesse, F. Kéfer, *Manuel de droit du travail*, *op. cit.,* fn 1104 at p. 352.
[188] ECSR, Digest, December 2018, p. 70.
[189] See in particular ECSR, Conclusions 2014 (Belgium), *op. cit.,* p. 12.
[190] J. Clesse, F. Kéfer, *Manuel de droit du travail*, *op. cit.,* p. 238
[191] *Ibid.*

Oral contracts are mainly used for specific employment contracts: flexi-jobs, extra's,[192] seasonal workers, etc. For example, the legislation on flexi-jobs explicitly authorises the use of oral contracts as long as the parties have previously concluded a framework contract in writing. However, the latter does not have to contain all the information prescribed by the Charter: information on working hours, paid holidays and notice periods following the end of the contract, are not explicitly covered by the legislation[193]. This practice seems to be contrary to the case law of the European Committee.[194] Of course, it cannot be excluded that this information is actually transmitted to the flexi-job worker by other means, but this is not explicitly provided for by the Flexi-job Act. The oral dimension of the contract makes it difficult to control the respect for working conditions. Likewise, abuses have been observed in the agricultural seasonal work sector,[195] where oral employment contracts are also frequently used.

Belgian legislation should therefore be brought into line with the Charter by making it compulsory to provide all the information prescribed by the Charter in writing.

Recommendation

Render it compulsory to provide all the information prescribed by the Charter in writing in all employment contracts concluded under Belgian law.

2.7. Night work (Article 2 § 7)

In its 2014 conclusions, the Committee found that the Belgian provisions on night work were in line with the Charter. Night work remains relatively rare in Belgium, compared to other European countries.[196] Yet, as the Belgian 2021 report points out, night work has since been permitted for all e-commerce-related activities,[197] in addition to other sectors where it was previously authorized. The e-commerce sector is defined relatively loosely as "*all logistic and support services related to e-commerce*".[198]

The legislator also temporarily relaxed the conditions to introduce night work in a workplace, which were considered too burdensome for the competitiveness of Belgian companies.[199] Following this regime created in 2017, the introduction of night work no longer required a collective agreement signed by all the organisations represented in the trade union delegation: the agreement of one of these organisations was deemed to be sufficient.[200] This experimental regime ended in December 2019. Nevertheless, in a recent bill, the Belgian government has indicated that it wants to permanently

[192] Extra's are occasional workers in the restaurant and hospitality sector. They are allowed to work up to 50 days a year with reduced tax and social security contributions.

[193] See the details of the FPS Employment, Labour and Social Dialogue: https://emploi.belgique.be/fr/themes/contrats-de-travail/conclusion-du-contrat-de-travail/comment-conclure-valablement-un-1, which lists Articles 20bis (contract performed abroad), 22bis (schooling clause), 65, 86, 104 and 107 (non-competition clause).

[194] ECSR, Digest, December 2018, p. 70.

[195] See "Saisonniers agricoles - ces forçats qu'on ne veut pas voir", *TCHAK!,* June-July-August 2021, available at https://tchak.be/index.php/produit/numero-6/.

[196] G. Woelfle, "Belgians are the least flexible workers in Europe", *R.T.B.F.,* 6 August 2019, available at https://www.rtbf.be/article/les-belges-sont-les-travailleurs-les-moins-flexibles-d-europe-10286738.

[197] Art. 36, 22°, Act of 5 March 2017 on workable and agile work, *op. cit.* Art. 57, Program Act of 25 December 2017, *Moniteur belge*, 29 December 2017.

[198] Art. 56, Act of 25 December 2017, *op. cit*.

[199] See *Doc. Parl.,* House of Representatives, Program Bill, 6 November 2017, DOC 54 2746/001, p. 17.

[200] Art. 57, Program Act of 25 December 2017, *op. cit*.

reintroduce this regime for the e-commerce sector.[201] In addition, it also intends to authorize evening work, i.e. from 8 p.m. to midnight,[202] which companies could introduce on a voluntary basis over an experimental period of 18 months. The Work Council or the Committee on Prevention and Protection in the Workplace, according to the draft legislation, be involved in this "experiment", although the bill does not define how.[203]

These schemes could contravene the Committee's jurisprudence, in particular regarding the requirement to consult workers' representatives in the event of the introduction of night work.[204] Indeed, the proposals contained in the draft law of 7 July 2022 either provide for insufficient consultation – the agreement of one of the trade unions instead of consultation of all of them – or could exempt the employer from doing so through voluntary agreements with individual workers. This appeared to be the case according the first reports on the proposal.[205] An examination of the conformity of these provisions therefore seems appropriate.

Recommendation
Provide for consultation of the members of the trade union delegation at company or sectoral level in the event of the introduction or increase of night work.

Section 3. Reasonable remuneration (Article 4)

In this section, first the evolution of the minimum wage will be examined. It is argued that, depending on the worker's family situation, the minimum wage is not necessarily sufficient to ensure a decent standard of living if not adequately supplemented by social support measures. Attention is also drawn to the evolution of the minimum wage for young workers.

Next, the question of the remuneration of atypical workers is addressed. It is argued that the hourly minimum wage is not necessarily sufficient for workings who do not have the certainty that they can work enough hours to enable them to earn an income which is sufficient to enjoy a decent standard of living. Prison workers are a specific category of workers which are denied their right to a fair remuneration. Moreover, in-work poverty is possibly increasing in Belgium, indicating the need to facilitate the creation of qualitative and sustainable jobs for persons having difficulties accessing the labour market.

Further, it is discussed how the government has mitigated the negative impact of the pandemic on the income of workers. The temporary unemployment scheme has been very successful in this regard.

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[201] *Doc. Parl.,* House of Representatives, Draft Act on various labour-related provisions, DOC 55 2810/001, *op. cit.* p. 17: '*In concrete terms, Article 57 of the Program Act of 25 December 2017 is reinstated. This provision stipulates that if a collective labour agreement is concluded to authorise night work, an amendment to the work regulations is not necessary.*" Federation of Enterprises in Belgium, "E-commerce in Belgium: where we are and what the future holds", 30 May 2022, available at https://www.feb.be/events/20220530---e-commerce/Program/

[202] The Labour Act of 16 March 1971 provides that night work is work performed between 8 pm and 6 am. This proposal would therefore probably introduce a distinction between evening work (20-23h59) and night work (0h-6h). Art. 35, Labour Act of 16 March 1971, *op. cit*.

[203] *Doc. Parl.,* House of Representatives, Draft bill on various provisions relating to labour, DOC 55 2810/001, *op. cit.,* p. 84.

[204] ECSR, Digest, *op. cit.,* p. 71.

[205] See, for example, R.T.B.F, "Travail de nuit : ce qui va changer et ce qui ne change pas », 15 février 2022, available at https://www.rtbf.be/article/travail-de-nuit-ce-qui-va-changer-et-ce-qui-ne-change-pas-10935977 ;

Nonetheless the pandemic has had an uneven impact between groups of workers, made the vulnerability of outsiders to the social security system abundantly clear.

Finally, the gender pay gap in Belgium is discussed.

3.1. The minimum wage

In Belgium, **minimum wages are mostly set at the sectoral level**, through collective agreements concluded in the joint committees.[206] The absolute minimum (the so-called guaranteed average minimum monthly income), which applies in sectors which have net set higher minima, is set by the social partners in the **National Labour Council** (via amendment of **Collective Agreement No. 43**). During the reporting period, the guaranteed average minimum monthly income (hereinafter referred to as the gross minimum wage) remained unchanged, except for the automatic indexation which ensures that wages in Belgium automatically rise to compensate for the loss of purchasing power due to inflation – every time the so-called 'smoothed health index'[207] rises by 2 %.

The annex of the State report shows the evolution of the gross minimum wages contained in Collective Agreement No. 43. At the end of the reporting period, the monthly amounts for someone working full-time were as follows :

- 18 years and older: 1625,72 euros
- 19 years and older + min. 6 months seniority: 1668,86 euros
- 20 years and older + min. 12 months seniority: 1688,03 euros

While falling outside the reporting period, it is important to draw the attention of the Committee to the fact that, in July 2021, the social partners – for the first time since 2008 – obtained an agreement to raise the gross minimum wage on top of indexation. It was decided to raise the lowest minimum wages on 1 April 2022 by 76,28 euro, and to suppress the second and third category in favour of a single amount.[208] Taking into account three indexations which, due to the soaring inflation, have taken place between July 2021 and March 2022, from 1 April 2022 onwards the new gross minimum wage is set at 1806,16 euro.[209]

3.1.1. Evolution of the net minimum wage

The Committee is interested in the net rather than the gross minimum wage. In order to get a picture of the evolution of the net minimum wage, it is important to not only look at the evolution of the gross minimum wage but also of taxes and social security contributions. The following graph sets out the evolution over time of the gross (gray bar) and the corresponding net (black diamond) minimum wage under Collective Agreement No. 43 against the gross average wage for someone working full-time (for a single adult with no children).[210]

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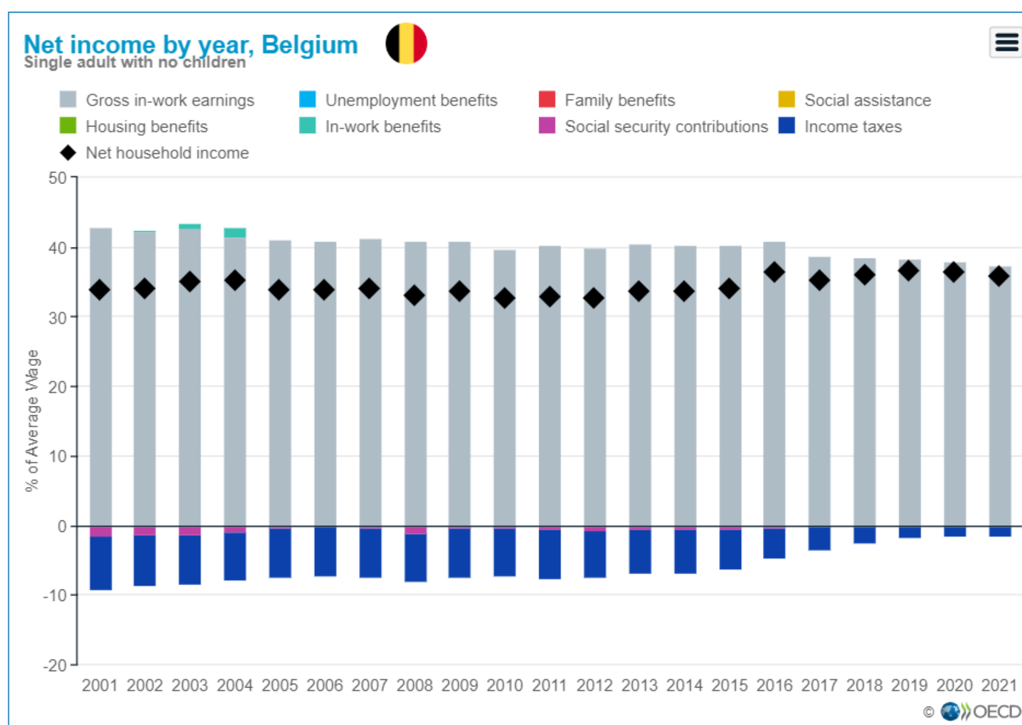
[206] For an overview per sector, see https://salairesminimums.be/jc_overview.html?lang=fr.

[207] I.e. the index used to measure the evolution of consumer prizes for the purposes of the indexation of wages.

[208] National Labour Council, 15 July 2021, Collective Agreement No. 43/15, available at http://www.cnt-nar.be/CCT-ORIG/cct-043-15-(15.07.2021).pdf.

[209] National Labour Council, 9 March 2022, Collective Agreement No. 43/16, available at http://www.cnt-nar.be/CCT-ORIG/cct-043-16-(09.03.2022).pdf.

[210] Based on a comparison between the Eurostat data (EARN_NT_NET and EARN_MW_CUR). Since the Eurostat data on minimum wage concern gross wages, the corresponding net wages have been simulated using



The graph shows that the gross minimum wage has decreased in comparison with the gross average wage during the reporting period, but that this was overcompensated by a decrease of taxes and, to a lesser extent, social security contributions. In other words, despite a lack of increase of the gross minimum wage on top of indexation, the corresponding net minimum wage has increased during the reporting period (both in absolute terms and relative to the average wage).

3.1.2. Ensuring a decent standard of living: reference budgets

During its previous conclusions, the Committee has made a finding of non-conformity on account of the fact that the Belgian State has not demonstrated that the net minimum wage suffices to ensure a decent standard of living.[211] The report of the Belgian State again does not provide such information.

The net minimum wage attaining a certain percentage of the net average wage in a certain country does not in itself say much about what people can actually achieve with such income in terms of a standard of living. For this purpose, it is more reliable to work on the basis of so-called reference budgets. These are priced baskets of goods and services that represent a certain standard of living. When used to identify the resources required for a decent standard of living, reference budgets *inter alia* allow to assess the adequacy of (minimum) wages and benefits.[212]

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https://www.oecd.org/els/soc/benefits-and-wages/tax-benefit-web-calculator/. While the figures used to make these graphs concern single adults with no children, taxes may be lower depending on the family situation of the worker concerned. The percentages concern the ratio of gross average wage to gross minimum wage.

[211] ECSR, Conclusions 2014 (Belgium), p. 12.

[212] E.g. T. Goedemé, T. Penne, T. Hufkens, A. Karakitsios, A. Bernát, B. Simonovits, E. Carillo Alvarez, E. Kanavitsa, I. Cussó Parcerisas, J. Riera Romaní and L. Mäkine, "What Does it Mean to Live on the Poverty Threshold? Lessons From Reference Budgets", Herman Deleeck Centre for Social Policy Working Paper No. 17.07, 2017, available at https://ideas.repec.org/p/hdl/wpaper/1707.html.

In Belgium, the reference budget methodology has been used by the CEBUD research centre to assess the adequacy of social minima.[213] The level of the reference budget set by CEBUD has been determined taking into account the budget required to adequately meet 11 different human needs. Regarding the minimum wage, the study shows that the adequacy of the minimum wage depends on the family situation (taking into account family benefits), on access to social housing and on the dependency on a car for basic mobility – making abstraction of specific financial needs at family minimum level. For instance, without adequate alimony payment, the minimum wage is insufficient for a single person with two children, or for a single person with a child who depends on a car for basic mobility. The same holds true for couples where the wage is the sole source of income, and who have children and/or are dependent on a car.[214] For all of these family types, the minimum wage is only sufficient in case of access to social housing.[215] In sum, the minimum wage in Belgium is in itself insufficient to ensure all family types a decent standard of living, if not adequately complemented by other social benefits, which is not always the case. It must be noted that there is a huge shortage of social housing in Belgium, which is challenged by the collective complaint before the Committee in het pending case of FEANTSA v. Belgium.[216]

Recommendation
Ensure that the minimum wage, in combination with social support measures, suffices for families to enjoy a decent standard of living.

3.1.3. Minimum wages for young workers

Besides Collective Agreement No. 43 (see above, section 3.1.1.), there is also **Collective Agreement No. 50** on minimum wages for workers under 21 years. In its previous conclusions, the Committee was critical about the amounts contained in this Agreement.[217]

It is important to highlight that, during the reporting period, in 2013, this Collective Agreement was **amended as to make it only applicable to student workers** – i.e. persons in full-day school education, who work on the basis of a student labour contract (Title VII of the Act of 3 July 1978 on Labour Contracts) – rather than to all workers under 21 years.[218] However, the legislator intervened in 2019 to provide for the possibility to reduce the gross minimum salary paid to young workers under a so-called 'first-job contract' by 18 % (18 years), 12 % (19 years) and 6 % (20 years).[219] The resulting loss in net income is entirely compensated by a compensatory allowance, which is however exempted from social security contributions, resulting in a decrease in the build-up of social security rights.

[213] M. Frederickx, T. Penne, Heleen Delanghe and B. Storms, "Doeltreffendheid van de minimuminkomens in Vlaanderen", CEBUD Working Paper 21.02, 2021, available at https://www.cebud.be/_files/ugd/4ab716_c208c521e7c9410fb8eb2e70bc4aa954.pdf. The study takes into account certain social support measures which apply in the Flemish Region. The results may be slightly different if applied to the Walloon and Brussels Region, due to differences in social support measures.
[214] *Ibid.*, p. 7.
[215] *Ibid.*, p. 12.
[216] Collective Complaint No. 203/2021, European Federation of National Organizations Working with the Homeless (FEANTSA) v. Belgium, registered on 17 December 2021.
[217] ECSR, Conclusions 2014 (Belgium), p. 12.
[218] National Labour Council, 28 March 2013, Collective Agreement No. 50bis, available at http://www.cnt-nar.be/CCT-ORIG/cct-050-bis-(28-03-2013).pdf.
[219] Act of 7 April 2019 on the social provisions of the job deal, *Moniteur belge,* 19 April 2019.

Collective Agreement No. 50, in turn, provides that student workers are entitled to a gross minimum wage that consists of a percentage of the gross minimum wage under Collective Agreement No. 43: 94 % (20 years), 88 % (19 years), 82 % (18 years), 76 % (17 years), 70 % (16 years).[220] From 1 April 2022 onwards, these percentages have been lowered to 90 % (20 years), 85 % (19 years), 79 % (18 years), 73 % (17 years) and 67 % (16 years). The reason for this is that the social partners agreed that the gross minimum wages under Collective Agreement No. 50 would not follow the increase of the gross minimum wages under Collective Agreement No. 43.[221]

3.2. Atypical jobs

In the questionnaire to the States, the Committee has requested information on the measures taken to ensure fair remuneration for workers in atypical jobs, including workers employed in the platform economy and workers with zero hour contracts (e.g. contracts which do not oblige the employer to provide a minimum number of working hours to the employee).

Regarding the former, the State in its report responded that the sectoral wages apply to platform workers who can be considered as employees. However, the State has failed to mention the specific collaborative economy status under which most platform workers work, according to which the hourly minimum wage is not necessarily guaranteed and which does not allow for the build-up of social security rights (see, above, section 1.3. on platform workers).

With regards to the latter, the State has simply stated that Belgian law does not provide for the possibility to conclude zero hour contracts. This must however be nuanced. It is technically possible to conclude a labour contract which does not provide for any minimum hours which must be offered by the employer.[222] However, any such contract must respect the minimum working time requirements under general labour law, i.e. each working period should consist of minimum three hours, and a part-time labour contract should at least provide for weekly working hours of 1/3 of a full-time schedule.[223] In practice, zero hour contracts are relatively rare, since Belgian labour law already provides employers with other possibilities which offer quite some flexibility, including temporary agency work with daily contracts (see, above, section 1.2. on temporary agency contracts) or part-time work with variable working hours and schedules.[224]

In any event, certain atypical forms of work like temporary agency work (especially day contracts) and platform work (discussed above in sections 1.2. and 1.3., respectively), offer a degree of predictability regarding the minimum amount of hours worked and the corresponding income earned which does not in principle differ from the predictability offered by zero hour contracts. In addition, during the reporting period, the so-called flexi job scheme (see, above, section 1.4.) was created, which

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[220] National Labour Council, 29 October 1991, Collective Agreement No. 50, available at http://www.cnt-nar.be/CCT-ORIG/cct-050-(29.10.1991).pdf.
[221] National Labour Council, 15 July 2021, Collective Agreement No. 50/4, available at http://www.cnt-nar.be/CCT-ORIG/cct-050-04-(15.07.2021).pdf.
[222] Consultation Mathias Wouters, 25 May 2022. While there has been some discussion in the literature on whether a zero hour contract can be considered as a valid contract under general contract law – in terms of the validity condition that contracts must have a 'defined or definable object' – the majority view is that such contract is possible within the limits of what labour law allows.
[223] Article 21 of the Labour Act of 16 March 1971, *Moniteur belge,*30 March 1971; Article 11bis of the Labour Contract Act of 3 July 1978, introduced by Program Act of 22 December 1989, *Moniteur belge,* 30 December 1989.
[224] E. Dermine and A. Mechelynk, "Regulating zero-hour contracts in Belgium – From a defensive to a (too?) supportive approach" (manuscript on file).

introduces a specific zero hour contract regime. While the flexi job scheme operates on the assumption that the lack of predictability regarding minimum working hours is compensated by stable income from another job, this is not always the case in practice (see, above, in section 1.4.).

3.3. Prison labour

Unlike some other countries – for instance France, where a recent legislative change introduced penitentiary labour contracts[225] – prison labour in Belgium is not considered as regular labour. It thus falls outside the scope of regular labour law (including with regards to remuneration) and it does not contribute to the build-up of social security rights.[226] The payment for prison labour is currently regulated by the Royal Decree of 26 June 2019.[227] This Royal Decree only sets minimum and maximum amounts – the exact amounts are set by the autonomous service for prison labour 'Cellmade' within the Prison Administration, differentiated according to prison and type of work. Currently, the payment must be set between 0,75 and 4 euro per hour – alternatively, payment can be set per piece, for as long as the income does not exceed 4 euro per hour on average (Article 2). Most of this income is spent within the prison to buy extra goods or services (e.g., television or computer access).[228] By way of comparison, the hourly gross minimum wage under Collective Agreement No. 43 corresponds with roughly 11 euro per hour. The UN Special Rapporteur on contemporary forms of slavery has already expressed concern regarding the considerable difference between pay received for prison work and the minimum wage.[229] It must be recalled that both the Nelson Mandela Rules and the European Prison rules require 'equitable remuneration of the work of prisoners',[230] and that the European Prison Rules also demand that '[a]s far as possible, prisoners who work shall be included in national social security systems'.[231]

Recommendation
Ensure that prison labour is conducted on the basis of a labour contract and complies with minimum wage and social security regulations.

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[225] See http://www.justice.gouv.fr/prison-et-reinsertion-10036/travail-en-detention-13015/la-reforme-du-travail-penitentiaire-entre-en-vigueur-34399.htm.

[226] Ligue des droits humains, "Prison: travail à la peine", Rapport, 2016, p. 18, available at https://www.liguedh.be/wp-content/uploads/2016/11/151116_ldh_rapport_travail_en_prison.pdf. With regards to certain aspects traditionally regulated by labour law, a specific regime was adopted, e.g. occupational accidents (Royal Decree of 26 June 2019 determining the compensation of detainees who are victim of a penitentiary occupational accident, *Moniteur belge,* 3 July 2019).

[227] Royal Decree of 26 June 2019 determining the amount and the conditions for granting the income from work and of the training allowance and determining the conditions under which the time spent on training activities in prison is equated with working time, *Moniteur belge,* 3 July 2019.

[228] Consultation with the Central Monitoring Council for Prisons, 9 June 2022.

[229] Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Mission to Belgium, 6 July 2015, A/HRC/30/35/Add.2, § 38, available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/30/35/Add.2&Lang=E.

[230] Rule 103, § 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Resolution 70/175, adopted by the UN General Assembly on 17 December 2015, A/RES/70/175; and Rule 26.10 of Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006.

[231] Rule 26.17 of the European Prison Rules.

3.4. In-work poverty

According to EU-SILC statistics, Belgium, compared to the EU average (9 %), has a relatively low in-work poverty rate. This rate has, albeit slightly,[232] increased in recent years: from 4.1 % in 2011 to 5.2 % in 2018.[233] It has been argued that this increase might be explained by the fact that jobs which have been created in recent years have a lower average quality than pre-existing jobs, resulting in a shift from jobless poverty to in-work poverty.[234] For instance, in 2016, 40 % of the new jobs were part-time, 52 % temporary and 47 % were paid at wages in the lowest wage quintile.[235]

Statistics show that temporary workers, the self-employed, the low-educated and households with greater care responsibilities combined with low work intensity (in particular single parents with children), are particularly vulnerable to in-work poverty.[236] Low household work intensity in combination with having children and precarious job status (temporary contracts and self-employment) are the main drivers of in-work poverty in Belgium.[237]

The Combat Poverty Service has observed that economic evolutions like the emergence of the platform economy have stimulated the creation of jobs which are of insufficient quality to lift workers out of poverty (discussed above in section 1 on precarious work).[238] The Service also underlines the fact that interim contracts and flexi jobs (see, above, section 1.2.) do not bring adequate financial security and often do not allow employees to build-up sufficient social security rights.[239] Finally, the Service observes that self-employed workers increasingly encounter difficulties in generating enough income to ensure sufficient financial security.[240] It must be recalled that, for many persons who have difficulties finding a job as employee, self-employment is a way to obtain access to the labour market.[241] This is moreover exacerbated by the fact that, in certain sectors, many companies prefer to work with self-employed workers than with employees.[242] In this respect, the fight against dependent self-employment also gains particular importance. In the course of 2022, judgment is expected in a case of alleged organized social fraud brought against PostNL and GLS – two large companies active in the parcel delivery sector, which is notorious for such abuses.[243]

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[232] An increase which may, however, not be statistically significant.

[233] Federal Public Service Social Security, "The evolution of the social situation and social protection in Belgium 2020", Report, 2021, available at https://socialsecurity.belgium.be/en/publications/analysis-evolution-social-situation-and-social-protection-belgium.

[234] European Social Policy Network, "In-work poverty in Belgium", ESPN Thematic Report, 2019, available at https://www.researchgate.net/publication/333695497_ESPN_Thematic_report_In-work_poverty_in_Belgium.

[235] European Social Policy Network, "Rising employment, sticky poverty in Belgium", ESPN Flash Report 2017/54, 2017, available at https://ec.europa.eu/social/BlobServlet?docId=18131&langId=en&.

[236] *Ibid.*

[237] *Ibid.*

[238] Combat Poverty Service, "Solidarité et pauvreté", Biennial report 2020-2021, p. 44, available at https://www.luttepauvrete.be/publication/du-service/rapport-bisannuel/solidarite-et-pauvrete-contribution-au-debat-et-a-laction-politiques/.

[239] *Ibid.,* p. 47.

[240] *Ibid.*, p. 46.

[241] High Council for the Employment, "État des lieux du marché du travail en Belgique et dans les régions", Annual Report 2018, p. 33, available at https://cse.belgique.be/sites/default/files/content/download/files/cse_rapport_juin_2018.pdf.

[242] *Ibid.*

[243] Combat Poverty Service, "Solidarité et pauvreté", *op. cit.*, p. 49.

Despite an increase in jobs over time (about 10 % in the period 2005 to 2018),[244] the share of households with very low work intensity has only slightly decreased over time[245] (15.1 % in 2005 to 12.6 % in 2018).[246] In the same period, the poverty risk of (quasi-)jobless households increased from 36,5 % to 62,9 %.[247] In other words, newly created jobs have mostly benefited households where somebody already works, and the gap between households with low and high work intensity has only increased.[248] In particular, persons over 50, persons with a non-EU background, persons with a low level of education and singles and families with children are overrepresented in (quasi-)jobless households.[249] According to the Combat Poverty Service, the underlying problem remains a lack of qualitative and sustainable jobs for persons who have difficulties accessing the labour market and which are able to structurally lift these people out of poverty.[250]

Finally, persons with a disability are particularly vulnerable to fall into poverty (25 % of persons with a serious disability are at risk of monetary poverty, compared to 14 % in the overall population).[251] For this reason, the availability of adequate jobs is particularly relevant for this group. Unia has drawn attention to the fact that many workplaces are still inaccessible for persons with a handicap and that reasonable accommodations are not always provided for.[252] For certain persons with a handicap, the pressure of full-time work is too heavy, pushing them into part-time work, despite the negative financial consequences of such a choice.[253] 39 % of the employees with a disability work part-time as opposed to 25 % in the overall population,[254] and the resulting decrease in income is often not compensated for.[255] This has a particular impact on female workers with a disability, of which 55 % works part-time compared to 22 % of male workers with a disability (compared to, respectively, 42 % and 10 % in the overall work population).[256]

Recommendations

Continue the fight against dependent self-employment.

Facilitate the creation of qualitative and sustainable jobs for persons living in poverty having difficulties accessing the labour market.

[244] High Council for the Employment, p. 35, "Allongement et qualité des carrières professionnelles", Annual Report 2017, available at https://cse.belgique.be/sites/default/files/content/download/files/cse_rapport_2017.pdf.
[245] European Social Policy Network, "Rising employment, sticky poverty in Belgium", *op. cit.*
[246] Federal Public Service Social Security, "The evolution of the social situation and social protection in Belgium 2020", *op. cit.*, p. 36.
[247] *Ibid.*, p. 37.
[248] Combat Poverty Service, "Solidarité et pauvreté", *op. cit.*, p. 34.
[249] Federal Public Service Social Security, "The evolution of the social situation and social protection in Belgium 2020", *op. cit.*, p. 38.
[250] Combat Poverty Service, "Solidarité et pauvreté", *op. cit.*, p. 41.
[251] See https://statbel.fgov.be/fr/nouvelles/les-personnes-handicapees-ou-souffrant-de-problemes-de-sante-de-longue-duree-ont-moins.
[252] Unia, "Consultation sur les droits des personnes handicapées", 2020, p. 19, available at https://www.unia.be/fr/publications-et-statistiques/publications/consultation-des-personnes-handicapees-sur-le-respect-de-leurs-droits-2020.
[253] *Ibid.*
[254] See https://statbel.fgov.be/fr/nouvelles/les-personnes-handicapees-ou-souffrant-de-problemes-de-sante-de-longue-duree-ont-moins.
[255] Written input received from Unia on 13 June 2022.
[256] See https://statbel.fgov.be/fr/nouvelles/les-personnes-handicapees-ou-souffrant-de-problemes-de-sante-de-longue-duree-ont-moins.

Facilitate the creation of qualitative and sustainable jobs for persons with a disability, including through the provision of reasonable accommodations.

3.5. The impact of the pandemic

3.5.1. Social security as a socio-economic stabiliser[257]

The Committee requests information on the access to furlough schemes during the pandemic. In Belgium, in response to the pandemic, access to the system of temporary unemployment was expanded. In normal circumstances, this system is restricted to blue-collar workers whose employability has been impacted by an economic downturn or by force majeure (e.g., bad weather or technical defects).[258] In the context of the pandemic, the system was expanded to also include white-collar workers who could be placed in temporary unemployment for force majeure related to the pandemic (e.g. company closure; quarantine of employee or child; closure of nursery, school or centre for persons with a disability of the employee's child).[259] At the same time, the procedure was simplified to facilitate access to the temporary unemployment scheme.[260] This 'temporary unemployment for force majeure corona' scheme was extended various times until it took an end on 30 June 2022, marking a return to the classic system of temporary unemployment.[261]

The impact of the economic shock caused by the pandemic (and the response thereto) on the labour market was largely absorbed by the temporary unemployment scheme.[262] 2020 did not see an increase in the unemployment rate: from 5.4 % at the beginning of the year, over 6.9 % in August and dropping again to 5.2 % in December.[263] In the same period, in March and April 2020, 1,033 and 1,232 million employees, respectively, were placed in temporary unemployment; a number which dropped over the summer to 304.000 in September and slightly increased again during the second wave of the pandemic to a peak of 529.000 in November.[264]

The temporary unemployment scheme has been relatively successful in preventing a negative impact on the income of the persons benefitting therefrom. The net replacement rate of the wage by the temporary unemployment benefits varied in between 45 % for high wages, 65 % for average wages

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[257] K. Vleminckx, "De sociale zekerheid als sociaaleconomische stabilisator tijdens de COVID-19 crisis: algemeen besluit", Belgisch Tijdschrift voor Sociale Zekerheid, 2020, p. 295 at p. 306, available at https://socialsecurity.belgium.be/sites/default/files/content/docs/nl/publicaties/btsz/2020/btsz-2020-1-de-sociale-zekerheid-als-sociaaleconomische-stabilisator-tijdens-de-covid-19-crisis-algemeen-besluit.pdf.
[258] See https://www.eurofound.europa.eu/observatories/emcc/erm/support-instrument/temporary-unemployment-support.
[259] *Ibid.*
[260] Royal Decree of 30 March 2020 amending the procedures in the context of temporary unemployment due to the Covid-19 virus and amending Article 10 of the Royal Decree of 6 May 2019 amending Articles 27, 51, 52bis, 58, 58/3 and 63 of the Royal Decree of 25 November 1991 concerning the unemployment regulations and the insertion of Articles 36sexies, 63bis and 124bis in the same Decree, *Moniteur belge,* 2 April 2020.
[261] See https://news.belgium.be/fr/passage-du-chomage-temporaire-pour-force-majeure-corona-vers-les-regimes-classiques-de-chomage.
[262] Federal Public Service Social Security, "The evolution of the social situation and social protection in Belgium 2020", *op. cit.*, p. 43.
[263] *Ibid.,* p. 46.
[264] *Ibid.,* p. 47.

and 75 % for low and very low wages (for a single person working full-time).[265] From May 2020 onwards, the replacement rate increased by about 10 % for lower and average wages and 5 % for higher wages, due to a decrease in taxes.[266] In many sectors, additional premiums were granted which in certain cases even resulted in replacement rates of over 100 %[267] – the effect of such one-time premiums, however, flattened out over time, as a result of which persons who were in temporary unemployment for a long time were affected by a relatively greater loss of income.[268]

In sum, as also emphasised by the Combat Poverty Service, the social security system has operated as a shock absorber against the economic shock caused by the pandemic.[269]

3.5.2. The uneven impact of temporary unemployment

However, it must also be taken into account that the impact of the income shock has been very uneven.[270] 30.5 % and 24 % of the decrease of disposable income in 2020 was suffered by persons in the, respectively, lowest and second lowest income quintiles.[271] **The worst affected sectors** (catering, arts, entertainment, recreation and retail sectors) – in which jobs often don't lend themselves to teleworking – **employ relatively more people with a vulnerable socio-economic profile** (e.g., young workers, short-skilled workers, singles and single parent families, renters, part-time workers and self-employed workers).[272] The wages are lower, more persons live in families with a high poverty risk and savings are limited.[273] The disparate impact of the pandemic in this regard becomes evident if one looks at the statistics regarding the number of persons living under the poverty line: while this number only slightly increased in April 2020 (12.5 % compared to 13.7 %), at the same time, the number of employees working in the worst-affected sectors living below the poverty line increased from 2.6 % to 6.8 %.[274]

In this regard, it must be emphasized that **for persons with a low income and without sufficient savings** – which are relatively more affected by temporary unemployment – **even a small drop in income may have a serious impact on their ability to achieve a decent standard of living.**[275] A reference budget-based study (see above) has shown that the **minimum temporary unemployment benefits** during the first lockdown **were just enough to cover non-deferrable expenses but insufficient**

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[265] J. Barrez, T. Bevers, A. Coenen, V. Gilbert, G. Mattheussens, R. Van Dam and K. Vleminckx, "De werkgelegenheids- en sociale impact van de Covid-19-crisis", in "Armoede en Sociale Uitsluiting", Annual Report of the University Foundation for the Fight against Poverty of the University of Antwerp, pp. 204-213, available at https://medialibrary.uantwerpen.be/files/99421/6b9a2607-773a-4ce2-bc43-562a7c1b689c.pdf?_ga=2.218016022.1262914964.1656405806-1254739299.1626796787.

[266] *Ibid.*

[267] *Ibid.*

[268] Written input received from the Combat Poverty Service on 14 June 2022.

[269] *Ibid.* Also see Combat Poverty Service, "Solidarité et pauvreté", Biennial report 2020-2021, p. 89, available at https://www.luttepauvrete.be/publication/du-service/rapport-bisannuel/solidarite-et-pauvrete-contribution-au-debat-et-a-laction-politiques/.

[270] Also see Combat Poverty Service, "Note interfédérale sur l'impact de la crise du COVID-19 dans les situations de pauvreté et de précarité", April 2021, available at https://www.luttepauvrete.be/wp-content/uploads/sites/2/2021/04/Note-interfederale-impact-COVID-19-avril-2021-FR.pdf.

[271] B. Capéau, A. Decoster, J. Venderkelen and S. Van Houtven, "De impact van de Covid-19 schok voor loon- en weddetrekkenden in 2020", COVIVAT Policy Note No. 9, April 2021, p. 10, available at https://drive.google.com/file/d/1w6lonhGq9WDkV-_z3ADxL3xROskRp9Hx/view.

[272] J. Barrez *et al.*, *op. cit.* p. 181.

[273] *Ibid.*

[274] *Ibid.,* p. 219.

[275] *Ibid.,* p. 182.

to later catch up on essential expenses which were necessarily deferred due to the lockdown measures.[276] According to a National Bank Study, between April 2020 and April 2021, among those families having been affected by a significant income loss due to temporary unemployment (> 10 %), the number of families indicating that their savings were insufficient to compensate for less than a month of income loss increased from 15 % to 20 % – indicating a **depletion of savings** among the affected families, and a corresponding increase in their financial insecurity.[277]

Besides the impact of temporary unemployment, the pandemic has also resulted in the **decrease of certain additional forms of income** like additional premiums, compensation for night work and overtime, which often allow employees in a vulnerable socio-economic situation to make ends meet.[278] This particularly holds true **for the many employees who are dependent on the extra income generated through a flexi job** (see, above, section 1.4.)**, the sudden loss of which was not compensated** – demonstrating the precarious character of such employment. Especially the catering sector – i.e., the sector by excellence making use of the flexi job scheme – was severely affected by lockdown measures (e.g., total closures of bars and restaurants from 12 March to 7 June 2020 and from 19 October 2020 until well into 2021, and severe capacity restrictions in between). The second quarter of 2020 saw a drop in flexi jobs by 41 % compared to the first quarter (62,909 to 36,835); rising to 56,816 in the third quarter, to drop again to 49,361 in the fourth quarter (during the second wave).[279] A study has shown that, while the average employee affected by temporary unemployment saw a dip of 3.1 % yearly disposable income in 2020, for workers who also lost their flexi job this increased to 6.5 % (and even to 28.8 % for persons having their main occupation in the catering sector).[280]

In addition, it must be taken into account that the unemployment payment institutions were overburdened as a result of which **many people had to wait for long periods before actually receiving the benefits they were entitled to**[281] – which is particularly problematic for persons without sufficient savings.

3.5.3. Impact on the outsiders of the social security system

While the pandemic has demonstrated the ability of the Belgian social security system to serve as a stabiliser of the income of those benefitting from the system, it has at the same time highlighted the system's insider/outsider character. In this regard, as also highlighted by the Combat Poverty Service,

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[276] B. Cantillon, S. Marchal, N. Peeters, T. Penne, B. Storms, "Huishoudbudgetten en sociale minima in lockdown", COVIVAT Policy Note No. 2, May 2020, available at https://drive.google.com/file/d/1xMjBFtTgVAFwkEnrKRrwW_RkufPwUXYZ/view.

[277] National Bank of Belgium, "Impact of the COVID-19 crisis on household incomes and savings: results after one year in the light of the consumer survey" (April 2021), available at https://www.nbb.be/en/articles/impact-covid-19-crisis-household-incomes-and-savings-results-after-one-year-light-consumer. A depletion of savings is also evident from an increase in requests for social assistance to public social welfare centres (OCMW-CPAS) in the context of debt mediation (from around 35,000 in January 2020 to almost 50,000 in June 2021), see J. Barrez *et al.*, *op. cit.*, p. 217-218.

[278] Written input received from the Combat Poverty Service on 14 June 2022.

[279] Statistics from the National Social Security Office, available at https://onss.be/stats/types-d-emplois-specifiques-restauration-et-autres-secteurs.

[280] B. Capéau *et al.*, *op. cit.*

[281] J. Barrez *et al.*, *op. cit.*, p. 182.

the impact of the pandemic has been particularly hard for persons who do not or only insufficiently have access to the social security system.[282]

For instance, 2020 saw a serious drop in **temporary agency work**: a decrease of 25-30% in March, followed by a recovery over summer and a new drop of about 5-10 % at the end of the year (in comparison with the preceding year).[283] Temporary vacancy workers were only entitled to temporary unemployment for the duration of their contract. If such contract was not extended, they were only able to access classic unemployment if they had built up sufficient social security rights. This is, however, often difficult to achieve on account of the unstable character of temporary agency work (see, above, section 1.2. on temporary agency work). Similarly, **student workers** typically have not built up sufficient social security rights. The impact of the severe decrease in availability of student labour (of around 35 % during the first months of the crisis),[284] had a particularly severe impact on students who are dependent on their student job to pay their studies.[285]

Moreover, the impact of the pandemic has been particularly hard on **workers in the informal economy**. An estimated 14.400 workers in the informal sector lost their job during the first lockdown (in particular in the construction, retail and catering sectors).[286] Persons doing part-time informal work have seen their income decrease, but the impact was worse for persons full-time employed in the informal economy.[287] This is especially the case for workers who did not already combine informal work with unemployment benefits, since workers from this group often have built up little to no social security rights.[288] The situation is even worse for undocumented migrant workers, who due to their residence status are not entitled to social assistance from the public social welfare centres (OCMW/CPAS) (with the exception of emergency medical care).[289]

Finally, also **self-employed workers** were particularly vulnerable during the crisis, especially in the sectors which have been most affected, directly or indirectly, by the pandemic. On average, they were confronted with an income loss which was a lot higher than with respect to employees.[290] While self-employed workers do not have access to the temporary unemployment scheme, their income loss was compensated by the emergency replacement income for the self-employed ('overbruggingsrecht' / 'droit passerelle' or 'bridging right') – which however is situated only slightly above the poverty line for a single person – and by deferral of social security payments.[291] In April 2020, in 413,915 files a bridging right was paid; decreasing to 84,735 in September 2020 and increasing to 163,483 in November 2020 (during the second wave).[292] Lack of adequate data however complicates efforts to quantify the loss of disposable income among self-employed workers.[293]

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[282] Written input received from the Combat Poverty Service on 14 June 2022. Also see Combat Poverty Service, "Solidarité et pauvreté", *op. cit.*, p. 90-91.
[283] *Ibid.,* p. 211.
[284] *Ibid.*
[285] J. Barrez and R. Van Dam, "Armoede en kwetsbare groepen tijdens de coronacrisis", Belgisch Tijdschrift voor Sociale Zekerheid, 2020, p. 205, available at https://socialsecurity.belgium.be/sites/default/files/content/docs/nl/publicaties/btsz/2020/btsz-2020-1-armoede-en-kwetsbare-groepen-tijdens-de-coronacrisis.pdf.
[286] J. Barrez *et al.*, *op. cit.*, p. 211.
[287] J. Barrez and R. Van Dam, *op. cit.*, p. 208.
[288] J. Barrez *et al.*, *op. cit.*, p. 211.
[289] K. Vleminckx, *op. cit.*, p. 306.
[290] J. Barrez and R. Van Dam, *op. cit.,* p. 205.
[291] *Ibid.*
[292] J. Barrez *et al.*, *op. cit.*, p. 212.
[293] B. Capéau *et al.*, *op. cit.*, p. 15.

By way of conclusion, the temporary unemployment scheme has been very successful in protecting the income from Belgian workers in the context of the pandemic. However, major difference between groups must be taken into account. Workers in a vulnerable socio-economic situation were overrepresented in temporary unemployment. For such persons, even a small drop of income has had a serious impact on their ability to achieve a decent standard of living. Finally, while the pandemic has demonstrated the resilience of the Belgian social security system, it has also made the pre-existing vulnerability of outsiders to the social security system abundantly clear.

Recommendation
Draw the necessary lessons from of the pandemic with a view to improving social protection of the outsiders to the social security system.

3.6. The right of men and women workers for equal pay for work of equal value (Article 4, § 3)

From a comparative perspective, Belgium is doing relatively well in terms of the gender pay gap. According to Eurostat data – based on companies in the private sector employing – in 2020, Belgium is the 6th out of 28 EU countries with the smallest gender pay gap (5,3 % compared to a 13 % EU average).[294]

The Institute for the Equality of Women and Men publishes a yearly report on the gender pay gap in Belgium. According to the most recent report – based on data from 2018 and using a different methodology than Eurostat – the gender pay gap in Belgium constitutes 9.2 %.[295] Since more women work part-time than men do (i.e., 42,5 % compared to 11.08 % of all workers, respectively), the gender pay gap if not corrected for labour time is significantly higher: 23.1 %[296]. The gender pay gap amounts to 12.7 % and 5.2 % in, respectively, the private and public sector.[297] The gender pay gap has slowly decreased during the reporting period (from 10.7 % in 2014).[298]

The Institute for the Equality of Women and Men will conduct a study regarding the impact of the pandemic on the gender pay gap, the results of which are expected in the course of 2022.[299] Meanwhile it is already clear that women have made more use of the system of 'corona parental leave' – i.e. a new parental leave allowing parents to take care of their children during the Covid crisis (during the period May to September 2020) – than men did (59 % compared to 41 % in 2020),[300] indicating that mothers have reduced their professional activities more than fathers did in order to cater for the increased care responsibilities resulting from the pandemic.

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[294] See https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics.
[295] Institute for the Equality of Women and Men, "L'écart salarial entre les femmes et les hommes en Belgique", Annual Report 2021, available at https://igvm-iefh.belgium.be/sites/default/files/136_-_rapport_ecart_salarial_2021_0.pdf, p. 7.
[296] Written input by the Institute for Equality of Women and Men, received on 13 May 2022.
[297] Institute for the Equality of Women and Men, "L'écart salarial entre les femmes et les hommes en Belgique", *op. cit.,* p. 18.
[298] *Ibid.,* p. 7.
[299] Written input by the Institute for Equality of Women and Men, received on 13 May 2022.
[300] *Ibid.*

In 2019, the Committee made a finding of non-conformity with Article 4, § 3 RESC in the case of University Women of Europe (UWE) v. Belgium, on account of the lack of pay transparency in the private sector, and of certain shortcomings regarding the required gender neutrality of function classification systems.[301] Meanwhile, no further steps have been taken to increase pay transparency in Belgium. While various initiatives are currently pending in parliament with regards to the revision of the Act of 22 April 2012 aimed at combating the pay gap,[302] Belgium seems to await the adoption of the proposed EU Directive[303] on the matter.[304] The Institute for the Equality of Women and Men has drafted various recommendations to Parliament in order to strengthen pay transparency.[305]

[301] ECSR, 6 December 2019, *University Women of Europe (UWE) v. Belgium*, Collective Complaint No. 124/2016.
[302] Act of 22 April 2012 aimed at combating the pay gap*, Moniteur belge,* 28 August 2012.
[303] Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM/2021/93 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0093.
[304] Written input by the Institute for Equality of Women and Men, received on 13 May 2022.
[305] Institute for the Equality of Women and Men, Advisory Opinion No. 2020-1/001 "concernant diverses propositions de loi modifiant la loi du 22 avril 2012 visant à lutter contre l'écart salarial entre hommes et femmes et concernant l'efficacité et l'efficience de la loi", 2020, available here : https://igvm-iefh.belgium.be/fr/avis_et_recommandations/diverses_propositions_de_loi_modifiant_la_loi_du_22_avril_2012_visant_a.

Section 4. Right to organise and protection of trade unionists (Articles 5 and 28)

In Belgium, trade union membership is high: around 50% of employees are unionised, compared to an EU average of 23%, which makes Belgium the EU country with the 5th highest unionization rate.[306] **Strong trade unions in combination with a tradition of social dialogue and collective bargaining have resulted in strong labour law arrangements**.[307] 96 % of employees in the private sector are covered by a collective agreement.[308] Collective bargaining takes place at the intersectoral (in the National Labour Council), the sectoral (in the joint committees) and the company level. The Act of 5 December 1968 on collective labour agreements grants the monopoly on collective bargaining to the so-called representative trade unions and employers organisations (with the exception for collective agreements at the company level, which can also be signed by individual employers), i.e., the interprofessional organisations established for the whole country which are represented in the National Labour Council (Article 3). Currently, three trade unions are considered as representative ones: ABVV-FGTB (socialist), ACV-CSC (Christian) and ACLVB-CGSLB (liberal).

This section addresses the protection of the right to organise (Article 5 RESC) through the prohibition of discrimination on the grounds of trade union convictions; on the right of trade unions under Article 5 RESC, including the question of legal personality, access to the workplace and the rights of non-representative organisations; and on the representation of workers at company level and the protection of workers' representatives (Articles 22 and 28).

4.1. Protection against discrimination on the grounds of trade union convictions (Article 5)

While there are some legal norms which protect freedom of association in general (Article 27 of the Constitution and the Act of 24 May 1921 safeguarding freedom of association), the only specific provision in domestic law protecting the freedom to form and join trade unions can be found in the Act of 10 May 2007 combatting various forms of discrimination ('Antidiscrimination Act').[309] While originally, 'trade union conviction' was not part of the list of discrimination grounds, in 2009 it was added by the legislator[310] following a judgment by the Constitutional Court.[311] This notion includes not only "conviction" as such, but also trade union activity, membership or non-membership.[312]

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[306] See https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2.

[307] See European Social Policy Network, "In-work poverty in Belgium", ESPN Thematic Report, 2019, available at https://www.researchgate.net/publication/333695497_ESPN_Thematic_report_In-work_poverty_in_Belgium.

[308] See https://www.eurofound.europa.eu/country/belgium#collective-bargaining.

[309] Written input from Prof. Dr. Filip Dorssemont, 30 May 2022.

[310] Act of 30 December 2009 containing various provisions, *Moniteur belge,* 31 December 2009.

[311] Constitutional Court, 2 April 2009, No. 64/2009.

[312] See, for example, Gent Labour Court, 12 February 2020, available at https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/cour-du-travail-de-gand-12-fevrier-2020, on sanctions against a candidate in a social election disciplined for his participation in a spontaneous strike ; Gent Labour Tribunal, 11 July 2019, available at https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-du-travail-de-gand-11-juillet-2019, on a work stoppage not approved by the trade union; Liège Labour Tribunal, 23 June 2020, available at https://www.unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-du-travail-de-liege-23-juin-2020, on the assimilation of individuals identified as future candidates to the status of trade union delegate or candidate.

The protection against non-discrimination on the grounds of trade union conviction is the most important legal tool to protect trade union freedom under Belgian law.[313] It complies with the requirement that follows from the Committee's jurisprudence that '[t]rade 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.'[314]

Workers affected by harmful consequences on account of their trade union activities, are entitled to compensation equivalent to six months of gross wages (Article 18, § 2 Antidiscrimination Act). Protection against discrimination on the grounds of trade union conviction is complementary to the (generally more protective) specific protections against dismissal of workers' representatives having a seat in Work Councils and in health and safety committees[315] (see below, with regards to Article 28 RESC). In neither case, a right to reinstatement is provided for[316] – under Belgian labour law, reinstatement cannot be ordered since the parties are considered to have a right to unilaterally terminate a labour contract.[317] In principle, it suffices for the employee to put forward 'facts which *may suggest* the existence of discrimination', shifting the burden of proof to the employer to demonstrate that there has not been a discrimination (Article 28 Antidiscrimination Act). Recently, however, the Court of Cassation in a judgment of 9 September 2019, interpreted this provision as requiring the plaintiff to put forward 'facts which *suggest* the existence of discrimination'.[318] This judgment has been criticized in the literature for placing the burden of proof on the plaintiff, rather than shifting it.[319] This is problematic from the viewpoint of the Committee's practice to require that domestic law 'provide[s] for a **shift of the burden of proof** in favour of the plaintiff in discrimination cases.'[320]

The Interfederal Centre for Equal Opportunities, Unia, is competent to receive complaints regarding discrimination on the grounds of trade union conviction. According to information procured from Unia,[321] they have received 313 complaints leading to the opening of 211 files since 2007, of which 168 complaints and 120 files concern the period 2017-2020.[322] However, this increase does not necessarily mean that there has been a surge in discrimination based on trade union conviction but may simply reflect increased appeal to Unia by victims of trade union discrimination.

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[313] Written input from Prof. Dr. Filip Dorssemont, 30 May 2022.
[314] ECSR, Digest (December 2018), p. 95.
[315] F. Dorssemont, "Facilities for trade union officials and members to exercise their rights – a comparative review", ILO Publications, 2020, p. 22, available at https://www.ilo.org/global/docs/WCMS_760829/lang--en/index.htm.
[316] *Ibid.*
[317] J. Clesse, F. Kéfer, *Manuel de droit du travail*, *op. cit.*, pp. 426-429.
[318] Court of Cassation, 9 September 2019, S 18.00085 N.
[319] F. Dorssemont, "Hof van Cassatie heeft moeite met juiste lezing antidiscriminatiewet", *Juristenkrant,* 2020, No. 401, pp. 12-13.
[320] ECSR, Digest (December 2018), p. 88. In its previous conclusions, the Committee found the situation in Belgium to be in conformity with Article 5 on account of the protection offered by the Antidiscrimination Act, see ECSR, Conclusions 2014 (Belgium), p. 21.
[321] Written input by Unia from 25 May and 13 June 2022.
[322] All-in all this is a relatively small proportion of the overall number of complaints Unia receives. By way of comparison, in 2020 alone 956 files were opened concerning complaints of racial discrimination, and 519 concerning complaints of discrimination based on handicap. See Unia, "Rapport chiffres 2020", p. 25, available at https://www.unia.be/fr/publications-et-statistiques/publications/rapport-chiffres-2020.

Common complaints concern a failure to comply with the so-called 'occult period'[323]; the combination of compensation for discriminatory dismissal and protection for trade union representatives[324] ; or a refusal to grant a promotion to a trade union representative as long as he continues to exercise his mandate.

During the pandemic, Unia has received **complaints about abuses of the temporary unemployment scheme** (discussed above in section 3.5.1.) to keep trade union representatives away from the workplace. Unia has transmitted these complaints to the Labour Inspectorate but has not yet been informed about any results from the investigations.

4.2. Rights of organisations (Article 5)

In Belgium, **trade unions do not possess legal personality.**[325] While sometimes criticized by employers for resulting in a lack of accountability for trade unions, the lack of legal personality is considered by trade unions themselves as a safeguard against liability claims in the context of collective action – thereby indirectly contributing to the protection of the right to collective action. A legislative proposal, introduced by an opposition party, which aims to oblige trade unions to acquire legal personality, is currently pending in Parliament.[326] The Council of State has, however, issued a negative advisory opinion regarding this proposal, considering that it constitutes an unjustified restriction of the freedom of trade unions to remain de facto associations, and that the envisaged sanction (suspension of all legal trade-union prerogatives, including the possibility to undertake collective bargaining) would affect the most essential aspect of trade union freedom.[327] In light of this advisory opinion, it is highly unlikely that this legislative proposition will pass.

While workers attempting to organize are protected under the prohibition of non-discrimination on the grounds of trade union conviction (see above), there is **no formal right for trade unions to gain access to the workplace to engage in recruitment practices** – which is of particular importance in companies which have few or no unionized members.[328] For the difficulties, resulting from data protection legislation, for trade unions to contact employees in such companies, see hereunder section 5.3.

Recommendation

Provide access for trade unions to the workplace to undertake recruitment practices.

In its previous conclusions on Belgium, the Committee requested information on the **rights of non-representative trade unions** (on this notion, see the introduction of section 4).[329] The report of the Belgian State refers to the Constitutional Court judgment of 26 June 2017[330] on restrictions imposed

[323] The 'occult' period is the period of time during which workers can stand as candidates in social elections without having yet been designated as official candidates by the publication of the lists. They are therefore protected against dismissal, even if the employer ignores which worker might be a candidate.

[324] Hainaut Labour Tribunal, (Charleroi section), Chamber II, 14 October 2019, , R.G. 17/1884/A, available at www.unia.be.

[325] Certain Acts, however, do confer trade unions so-called 'functional' legal personality, which allows them to take legal action regarding certain conflicts which fall within the scope of these Acts, see J. Clesse, F. Kéfer, *Manuel de droit du travail*, *op. cit.*, pp. 50-51.

[326] *Doc. Parl.*, House of Representatives, 2020-2021, No. 55-1997/001.

[327] Council of State, 3 December 2021, Advisory Opinion No. 70.264/VR, available at http://www.raadvst-consetat.be/dbx/adviezen/70264.pdf.

[328] F. Dorssemont, "Facilities for trade union officials and members to exercise their rights", *op. cit.*, p. 43 and 63.

[329] ECSR, Conclusions 2014 (Belgium), p. 21.

[330] Constitutional Court, 26 July 2017, No. 101/2017.

on the rights of non-representative trade unions at the National Railway Company of Belgium (NMBS-SNCB). The Court considered that the inability for non-representative trade unions to participate in the procedure to notify the intention to strike and to engage in dialogue in the context of a collective conflict, struck at the essence of trade union freedom. In addition, the Court considered that the inability for non-representative trade unions to propose lists of candidates for social elections was discriminatory vis-à-vis representative trade unions. The report of the Belgian State must, however, be nuanced. It is important to take into account the fact that these findings are very specific to the labour law arrangements at NMBS-SNCB, and not necessarily apply by way of analogy to the whole private sector. For instance, the Constitutional Court expressly referred to the fact that the non-representative trade unions affected had beforehand enjoyed the possibility to participate in social elections, distinguishing it from the private sector in which this has never been the case.[331] The Constitutional Court judgment thereby does not change anything about the exclusion of non-representative organisations in the private sector from participating in the social elections or from engaging in collective bargaining.

4.3. Workers' representatives: protection of trade union representatives (Article 28)

Article 28 of the Charter states that workers' representatives must enjoy effective protection against prejudicial acts taken against them on account of their trade union activities or status as workers' representatives in the undertaking, and that they must be given appropriate facilities necessary to enable them to perform their duties promptly and efficiently. In Belgium, **this right must be recognised for both elected workers' representatives** (to the Work Councils and the Committees on Prevention and Protection) **and trade union delegates**, because of the **dual nature of the Belgian system of social consultation**, which combines (often elected) trade union representation with workers' representation in social advisory and consultative bodies. Conformity with Article 28 of the Charter was not examined in the 2014 review of Belgium, nor in any of the previous reporting cycles on Group 3 "rights related to work" of the Revised Social Charter.[332]

The Belgian state rightly notes the existence of protection against dismissal for workers' representatives in the private sector, as well as for candidates in social elections. However, there are several omissions from this system: representatives in the public sector have only minimal protection (1.); and there has been complaints of abuses of COVID19 schemes against workers' representatives during the pandemic (2.).

4.3.1. Lack of protection for contractual workers' representatives in the public sector

In Belgium, workers' representatives to the (mainly consultative) work council and the protection and prevention committee - as well as candidates for these positions - are protected by the Act of 19 March 1991.[333] Members of the trade union delegation, who represent the members of the trade union and deal with collective disputes in the workplace, also enjoy some protection against dismissal, but insofar as it concerns measures taken against them because of the exercise of their mandate, following the

[331] *Ibid*., B. 26.2 and B.26.7.

[332] The article was thus not examined in 2014, 2010 and 2006, when analysing other "Group 3" rights, nor was it analysed in any other reporting cycle.

[333] Act of 19 March 1991 on a special dismissal regime for staff delegates to works councils and to committees for safety, hygiene and the improvement of the workplace, as well as for candidate staff delegates, *Moniteur belge*, 29 March 1991.

collective agreement no. 5 of 24 May 1971 on the status of trade union representatives[334]. However, neither the Act of 19 March 1991 nor collective agreement No. 5 applies to contractual employees in the public sector.

The Belgian civil service is mainly composed of statutory public servants, in accordance with the constant case law of the Court of cassation and the legal doctrine.[335] These statutory agents have effective protection against dismissal and specific means of appeal. However, in recent years, exceptions to this principle have multiplied, leading to increasing use of contractual staff,[336] to the extent that, as soon as 2003, they made up the majority of public servants in Belgian local authorities[337] and one third of all staff in the Regions and Communities.[338]

This development raises a number of issues, including the protection of contractual workers' representatives. Indeed, "*the system of collective bargaining in the public sector is completely alien to that of the Act of 5 December 1968*".[339] In terms of protection against dismissal, the Royal Decree of 28 Septembre 1984 states that workers' representatives may not be sanctioned for their actions as representatives,[340] and their dismissal must be preceded by a prior hearing and consultation with the High Consultation Committee.[341] However, non-conformity with the procedure is not subject to any specific sanctions,[342] and a negative opinion of the High Consultation Committee is only subject to a specific obligation to state reasons for the dismissal.[343] Finally, this Royal Decree does not provide for any form of lump-sum compensation: a workers' representative dismissed by a public authority may at most claim compensation for discrimination based on trade union conviction,[344] or for unfair or manifestly unreasonable dismissal. Another problem is that the contractual workers' representative does not benefit from any form of adjustment to the burden of proof, and must alone demonstrate

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[334] Collective Agreement No. 5 of 24 May 1971 concerning the status of trade union delegations of company personnel, available at http://www.cnt-nar.be/CCT-COORD/cct-005.pdf.

[335] I. DE WILDE, "*Flexicurity in de publieke sector. Een analyse van de (eenzijdige) wijzigbaarheid van de individueel en collectief bepaalde arbeidsvoorwaarden van de overheidscontactant",* PhD thesis of the University of Antwerp, defended on 6 July 2016, available at https://doc.anet.be/docman/docman.phtml?file=.irua.2c2a15.134278.pdf.

[336] See art. 543 *juncto* art. 450 § 1, program-Act of 24 December 2002, *Moniteur belge*, 31 December 2002; art. 3 § 1er, al. 1er, 1°-4°, Act of 22 July 1993 on certain measures relating to the public service, *Moniteur belge*, 14 August 1993.

[337] A. L. Durviaux, *Droit de la fonction publique*, Larcier, Brussels, 2012.

[338] Vlaamse Overheid, "Historische evolutie van het personeelsaantal volgens statuut", available at https://overheid.vlaanderen.be/bedrijfsinformatie/cijfers-demografische-gegevens-statuut

[339] J. Jacqmain, *Droit social de la fonction publique*, vol. 1, 30ème edition, Presses universitaires de Bruxelles, Brussels, 2019-2020, p. 136.

[340] Art. 87, Royal Decree of 28 September 1984 implementing the Act of 19 December 1974 organising relations between the public authorities and the trade unions of the agents under these authorities, *Moniteur belge,* 20 December 1984.

[341] In particular Article 89, Royal Decree of 28 September 1984, *op. cit.* The negative opinion of the Higher Consultative Committee only entails an obligation on the part of the employer to give specific reasons. In French, *Comité supérieur de concertation.* In Dutch, *hoog Overlegcomité.*

[342] See for example, Mons Labour Court, Chamber II, 20 April 2015, R.G. n°2013/AM/70, in which the labour court considers that there is no "*effective need to respect the procedure provided for by Article 89* (...) *since* [the dismissal decision] *is based on perfectly impartial considerations*"; see also Council of State, judgment n°62.522 of 11 October 1996, concerning the abolition of a service. The Council of State generally declares itself incompetent and refers to the competence of the labour courts.

[343] Art. 89 § 9, Royal Decree of 28 September 1984, *op. cit.*

[344] Law of 10 May 2007 to combat certain forms of discrimination, *Moniteur belge*, 30 May 2007. See *below*.

the existence of a link between his or her dismissal and his or her activity as a workers' representative.[345]

Case law has dealt with this issue on several occasions,[346] noting that "***the Belgian State's failure to legislate to create a protective status in the public sector constitutes a fault***" (emphasis added). However, the recognition of this shortcoming does not allow the courts to create a new right more favourable to civil service workers' representatives: at most, they can give a judgment against the State because of this fault.[347] This reasoning is shared by the doctrine, which questions the conformity of Belgian law with Belgium's international commitments regarding the protection of workers' representatives, in particular International Labour Organisation Convention No. 151 concerning Labour Relations in the Public Service.[348] **The lack of effective protection, a mechanism for sharing the burden of proof or specific sanctions is incompatible with Article 28 of the European Social Charter**.

Recommendation
Provide protection against dismissal for trade union delegates in the public sector, by adopting a provision in the Royal Decree of 28 September 1984 granting them a similar protection to that enjoyed by trade union delegates in the private sector.

4.3.2. Protection of workers' representatives and COVID-19

In its 2020 annual report, Unia, the Interfederal Centre for Equal Opportunities, reports that it has received several reports of workers' representatives regarding temporary unemployment for "force majeure due to the corona pandemic or the war in Ukraine" (see above, 3.5.2. "temporary unemployment").

A particular feature of this measure is that it allows the employer to specifically select which worker or category of workers he or she wishes to temporarily place in the unemployment scheme. The reports received by Unia therefore concern **abuses of this system - where temporary unemployment is diverted from its purpose to allow the removal of workers with a trade union mandate**.[349] If these facts are proven, they may constitute a form of trade union discrimination, but proof of such discriminatory treatment may be difficult to provide, as the employer has considerable leeway in deciding which workers to choose. Unia says that these reports have been forwarded to the inspection of the Supervision of Social Legislation[350].

[345] J. de Wilde d'Estmael, "Réflexions sur la "protection" des délégués syndicaux contractuels de la fonction publique (Commentaire de l'arrêt de la Cour du travail de Mons (2è ch.) du 20 avril 2015, RG n°2013/AM/70)", *Terra Laboris,* p. 8.
[346] Liège Labour Court, Chamber VIII, 28 February 2002, *Chr. D.S.,* 2003, p. 74; Hainaut Labour Tribunal (Charleroi section), Chamber II, 14 October 2019, R.G. 17/1884/A, available at www.unia.be.
[347] Court of Cassation, 3 November 2008, *Pas.* 2008, p. 2440, cited in Hainaut Labour Tribunal (Charleroi section), 14 October 2019, *op. cit*, pp. 26-27.
[348] J. Jacqmain, "... Et toujours pas de protection", *obs. under* Liège Labour Court, Chamber VIII, 28 February 2002, *Chr. D.S.* 2003, p. 74; J. de Wilde d'Estmael, *op. cit.* pp. 10-12; R. Janvier, *Le droit social de la fonction publique*, La Charte, 2015, p. 308.
[349] Unia, Annual Report 2020 - Vulnerability of Human Rights in Times of Crisis, 2021, p. 46, available at https://www.unia.be/fr/publications-et-statistiques/publications/rapport-annuel-2020.
[350] In French, *contrôle des lois sociales.* In Dutch, *toezicht op sociale wetten.* Hereafter called "Social Legislation Inspectorate".

Section 5. Collective bargaining, collective action and the rights to information and consultation (Articles 6, 21, and 22)

Several rights in the Charter are explicitly concerned with collective labour relations, such as the right to bargain collectively (art. 6 of the Charter), the right to information and consultation (art. 21), and the right to take part in the determination and the improvement of the working conditions and working environment (art. 22).

Social dialogue in Belgium is relatively strong: the competences of social consultation bodies are numerous and relatively well organised, and both trade unions and employers' federations can claim a significant degree of representativeness of their respective interest groups. The protection of the right to strike is generally well guaranteed (5.2), with some reservations related to the possibility of requisitioning certain workers (5.2.3) and to recent case law on the direct effect of the Charter (5.2.2). The competences of the Work Council and the Committee on Prevention and Protection in the Workplace are numerous and generally correctly applied (5.4.1). Finally, the Covid-19 crisis has not had a particularly negative impact on the quality of collective bargaining (5.4.6)

However, there are other elements that cloud this picture: **industrial relations are more conflictual** compared to most other European states, and there is a **lack of mutual trust between social partners**[351] (5.4.). For example, in some companies, information necessary for the enjoyment of the right to information and consultation is denied to trade unions in the name of personal data protection (5.3). In addition, certain categories of workers are excluded from social dialogue (5.4.4, 5.4.5), and the rights to strike and demonstrate have been severely restricted by the measures to combat the coronavirus pandemic (5.2.4). The social partners criticise the increased use of legislation or decrees to regulate areas traditionally regulated by social dialogue (5.1). Finally, the Belgian State did not provide certain information that is important for determining conformity with the Charter regarding the roles and powers of the Committee on Prevention and Protection in the Workplace and the Work Council (5.4.3, 5.4.4).

5.1. Collective bargaining and promotion of social dialogue (Articles 5 and 6 § 2)

As demonstrated in the State report, **social dialogue and collective bargaining have shown to be very effective in the context of the pandemic.** Many of the most important measures in the area of labour relations have been taken by the social partners at the level of the National Labour Council, including the introduction of regulations on mandatory teleworking and the relaxation of conditions to access the temporary unemployment scheme.[352]

In general, however, in recent years there is a growing frustration among social partners about the **increasing intervention of the government in areas which are traditionally governed by social dialogue and collective bargaining.** Recently, for instance, in an advisory opinion on a draft bill to modernize various aspects of labour law (the so-called 'Labour Deal'), the National Labour Council unanimously deplored the absence of prior involvement of the social partners by the government – considering that this is crucial to create a support base among social partners which is necessary for

[351] Eurofound, *Third European Company Survey*, *op. cit.* ; Eurofound, *Fourth European Company Survey*, *op. cit.*
[352] See more elaborately at http://www.cnt-nar.be/Dossier-FR-covid-19.htm.

the effectiveness of any measures, and emphasizing that the government proposal concerns matters which traditionally pertain to the competence of the social partners through social dialogue.[353]

State intervention restricting the margin for collective bargaining is also evident at the level of **wage-setting**. The Act of 26 July 1996 sets an upper limit (determined with reference to the forecasted wage evolutions in the neighbouring countries, the so-called 'wage norm') for wage negotiations at all levels (i.e., intersectoral, sectoral and company – regardless of the actual changes in productivity of the sector or company concerned). [354] This system was made stricter in 2017, now involving a prior and systematic intervention by the State, for an indefinite period of time, in collective negotiations on wage-setting.[355] At the same time, sectoral collective agreements provide for a system of automatic wage indexation, setting a lower limit to wage negotiations. While trade unions, on the one hand, consider the wage norm to be an unacceptable limitation of the freedom of collective bargaining, the employer organisations on the other hand consider that the upper limit set by the wage norm must be considered as the necessary counterweight for the lower limit set by the automatic indexation of wages.

Recommendation
Respect that the primary responsibility to regulate social affairs through collective bargaining rests upon of the collective partners.

5.2. Right to strike (Article 6 § 4)

In Belgium, the right to strike is not explicitly enshrined in the Constitution or in a law. Legal doctrine and jurisprudence generally consider that, in addition to a judgment by the Court of Cassation of 21 December 1981,[356] the right to strike was established by the adoption of the Act of 11 July 1990 approving the European Social Charter,[357] and that it has direct effect in Belgian law (see section 5.2.2). Several collective labour agreements specify modalities for a strike, a *lock-out*, the preservation of social peace, with eventual obligations of prior notice or conciliation, etc.[358] The right to strike is recognised both in the private and the public sector, although there are some particularities for the latter sector.[359] Currently, the right to strike is only prohibited for the military[360] and for the personnel

[353] National Labour Council, 17 May 2022, Advisory Opinion No. 2.289, available at http://www.cnt-nar.be/AVIS/avis-2289.pdf. See similarly, the criticism regarding the bill resulting in the Act of 5 March 2017 on workable and agile work (*Moniteur belge,* 15 March 2017), in National Labour Council, 7 December 2016, Advisory Opinion No. 2.008, available at http://www.cnt-nar.be/AVIS/avis-2008.pdf.
[354] Act of 26 July 1996 on the promotion of employment and the preventive safeguarding of competitiveness, *Moniteur belge,* 1 August 1996. Also see https://www.eurofound.europa.eu/country/belgium#collective-bargaining.
[355] Act of 19 March 2017 amending the Act of 26 July 1996 on the promotion of employment and the preventive safeguarding of competitiveness, *Moniteur belge,* 19 March 2017.
[356] Court of Cassation "De Bruyne" judgment of 21 December 1981, no. 3288, available at https://www.terralaboris.be/IMG/pdf_Cass_21dec_1981_greve_non_reconnue.pdf.
[357] Act of 11 July 1990 approving the European Social Charter*, Moniteur belge,* 28 December 1990. See also the Act of 15 March 2002 approving the revised European Social Charter and the Annex, done in Strasbourg on 3 May 1996, *Moniteur belge*, 10 May 2004.
[358] J. JACQMAIN, Droit social de la fonction publique, *op. cit.,* p. 133
[359] *Ibid*, p. 142
[360] Act of 14 January 1975 on the disciplinary regulations of the armed forces, *Moniteur belge,* 1 February 1975, erratum of 7 February 1975.

of the intelligence and security services (State Security).[361] Police officers have the right to strike with the exercise of which must however be preceded by consultation, and can be requisitioned if the authorities deem it necessary.[362] These restrictions appear to be in line with the Charter and the case law of the Committee.[363]

Belgium therefore tends to be a good performer in terms of the protection of the right to strike, as the Committee recalled in its 2014 conclusions.[364] The right to strike is generally well protected, including with regards to collective actions not approved by a trade union.[365] The following section examines five important points, which are discussed in detail below:

1. A finding of non-conformity regarding the use of unilateral applications to stop picketing;
2. A recent court case led the Court of cassation to question the direct effect of Article 6 § 4 of the European Social Charter, weakening the protection of the right to strike;
3. The period under review also saw the adoption of two pieces of legislation introducing forms of minimum service in the prison and railway sectors, including the requisitioning of prison staff where necessary;
4. The protection of the right of collective action for platform workers is also an important concern;
5. The COVID-19 pandemic has also had some impact on this right.

5.2.1. Finding of non-conformity: unilateral emergency applications before a tribunal

On 13 September 2011, the European Committee of Social Rights issued its decision in the complaint ***ETUC, CGSLB, CSC and FGTB v. Belgium***.[366] The Committee found that the unilateral application procedure – in which some employers would use an emergency relief procedure to bring a case before a single judge to order an end to a picket, usually without the possibility to exercise defence rights – was contrary to Article G of the Charter and Article 6 § 4 of the Charter. As the Committee noted: "(…) *the exclusion of unions from the emergency relief procedure may lead to a situation where the intervention by the courts runs the risk of producing unfair or arbitrary results. For this reason, such restrictions to the right to strike cannot be considered as being prescribed by law. (…)Therefore, the Committee considers that Belgian law does not provide guarantees for employees participating in a lawful strike within the meaning of Article 6§4 of the Revised Charter.*"[367]

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[361] Act of 17 March 2004 organising relations between the public authorities and the trade unions of the personnel of the external services of State Security, *Moniteur belge*, 2 April 2004.
[362] Art. 126 Act of 7 December 1998 organising an integrated police service, structured at two levels*, Moniteur belge,* 5 January 1999; Ministry of the Interior, Circular POL 1999/1 of 12 January 1999: Right to strike - Minimum tasks to be performed, *Moniteur belge,* 20 January 1999.
[363] Art. 5, European Social Charter. ECSR, Digest, *op. cit.* pp. 96-97.
[364] ECSR, Conclusions 2014 (Belgium), *op. cit*, p. 25.
[365] Court of Cassation, "De Bruyne" judgment of 21 December 1981, *op. cit.*
[366] ECSR, *European Trade Union Confederation (ETUC), Centrale Générale des Syndicats Libéraux de Belgique (CGSLB), Confédération des Syndicats chrétiens de Belgique (CSC) and Fédération Générale du Travail de Belgique (FGTB) v. Belgium,* 13 September 2011, Claim No. 59/2009, available at https://hudoc.esc.coe.int/fre/?i=cc-59-2009-dmerits-fr.
[367] *Ibid,* §§ 44-46.

The Belgian courts have taken note of this decision and have gradually developed a stable and coherent case law, which imposes a high threshold of requirement to satisfy a unilateral emergency application to end a picket.[368] The Brussels court of appeal has, for example, made a spectacular turnaround in its case law, in less than a year, to affirm the inadmissibility of requests made by way of unilateral application.[369] On a third-party proceedings application – a procedure in which a third party who had not been called to a proceeding can ask the same judge for a new ruling on the facts – the tribunal of first instance of Leuven considered that the documents filed by the company did not make it possible to establish that the planned collective actions would cause such trouble that there was an "absolute necessity" to take measures via a unilateral application.[370] Furthermore, it considered that the company had not established that a summary procedure (*action en référé*) would not have achieved the desired result. The original application was therefore dismissed, the third-party application being admissible and well-founded.[371]

The monitoring of the implementation of the decision of the European Committee of Social Rights confirms this observation: in 2018, the Committee considered that the problem was now sufficiently remedied through the establishment of new case law: "[t]*he Committee considers that the examples of case law given by the authorities show, on the one hand, that the Belgian case law on strikes is stable, consistent and predictable and, on the other hand, that the proceedings for unilateral applications guarantee procedural fairness*".[372]

The consultations carried out by FIRM/IFDH slightly nuance this observation: some social partners mention an upsurge in unilateral applications, but confirm the existence of consistent case law rejecting the abusive use of this practice. However, **other actors**, notably human rights associations and academics, **note the persistence of judicial remedies in favour of the plaintiff on the basis of unilateral emergency applications against collective action**. These actors note that third-party proceedings can be brought by trade union actors to reform the challenged jugdment, and that the outcome of third-party proceedings will generally be favourable to the trade unions. However, these civil society associations and academic actors also argue that the possibility of appealing against an emergency order granted against a collective action is not sufficient to bring the situation into conformity with the European Social Charter.

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[368] Brussels Court of Appeal, 15 September 2017, R.G. no. 2016/KR/102; Antwerp Court of Appeal, 17 September 2018, R.G. no. 2017/KR/31; Leuven Court of First Instance, 19 December 2019, R.G. no. 19/21/28/A, unpublished, to name but a few decisions

[369] See Brussels Court of Appeal, 15 September 2017, *op. cit.* which makes this change in jurisprudence. The change in case law is striking: barely a year earlier, in a judgment of 9 June 2016 (R.G. no. 2015/AR/2115), the Court of Appeal still considered in a comparable case that "[the employer] *was consequently admissible to introduce his request by way of a unilateral application*". See J.-F. Neven, "Requêtes en matière de grève: priorité au contradictoire. Commentaire de l'arrêt de la Cour d'appel de Bruxelles du 15 septembre 2017", 31 October 2017, available at http://www.terralaboris.be/spip.php?article2391.

[370] Leuven Court of First Instance, 19 December 2019, R.G. 19/2128/A, available at https://www.terralaboris.be/spip.php?rubrique1105.

[371] *Ibid.*

[372] ECSR, *European Trade Union Confederation (ETUC), Centrale Générale des Syndicats Libéraux de Belgique (CGSLB), Confédération des Syndicats chrétiens de Belgique (CSC) and Fédération Générale du Travail de Belgique (FGTB) v Belgium,* 2nd Assessment of follow-up, 6 December 2018*.*, § 7, available at https://hudoc.esc.coe.int/eng/?i=cc-59-2009-Assessment2-en.

The absence of reliable statistics or studies on this issue makes it difficult to confirm or deny these findings. An effort to collect data could be undertaken by the Belgian State to confirm the consistency and stability of this case law.

Recommendation

Collect data on unilateral emergency applications against picketing, in order to confirm the stability of the case law. This process should take care to consult the social partners, and to transmit the data collected to the National Labour Council. This data could be collected, for example, by assigning a code to the courts and tribunals that would make it possible to determine, from a certain date, the number of decisions handed down on this matter and their outcome

5.2.2. The direct effect of the revised European Social Charter

As mentioned above, the European Social Charter is the main instrument explicitly enshrining the right to strike in the Belgian legal order. Article 6 §4 therefore acquired the value of a fundamental right in 1990, when Belgium ratified the European Social Charter, and became a pillar for the right to strike.[373]

Despite this importance, the direct influence of Article 6 § 4 and of the decisions of the European Committee of Social Rights on case law remain relatively limited. Decisions by the European Committee are often considered to belong to the *soft law*, and thus are seen as non-binding for courts and tribunals that are seized with an application concerning the right to strike.[374]

More problematically, **the criminal chamber of the Court of cassation recently held that Article 6 §4 did not have direct effect in Belgian law**. The case concerned the prosecution of some trade union leaders following the blocking of a motorway by demonstrators. The trade union leaders had been sentenced to prison, which they challenged before the high court on the grounds that a criminal conviction in such a case would run contrary to the right of collective action enshrined in the Charter. The Court, following its Advocate General,[375] replied that :

> *"Articles 6.4 and N of the Charter establish that States Parties recognise the right to strike and may regulate it.* ***Lacking the sufficiently clear and precise character that would allow them to be recognised as having direct effect, these provisions do not attribute to the plaintiffs, who are defendants, a subjective right that they could assert against the criminal sanctions requested against them.*** *In this respect, the plea lacks a basis in law."*[376] (emphasis added)

[373] I. Gracos, "Strikes and social conflictuality in 2020. Vol. I. Concertation et mobilisation aux niveaux interprofessionnel et sectoriel", *Courrier hebdomadaire du CRISP*, 2021/26, n° 2511-2512, pp. 41-43. ; F. Dorssemont, "Handhaving van en door het collectief arbeidsrecht", *Revue de Droit social/Tijdschrift voor Sociale Rechten,* 2021/1-2, p. 126.

[374] J.-F. Neven, "Requêtes en matière de grève: priorité au contradictoire. Commentaire de l'arrêt de la Cour d'appel de Bruxelles du 15 septembre 2017", 31 October 2017, available at http://www.terralaboris.be/spip.php?article2391, p. 7.

[375] Conclusions of the Public Prosecutor's Office of 23 March 2022, available at https://juportal.be/content/ECLI:BE:CASS:2022:CONC.20220323.2F.4/FR?HiLi=eNpLtDKwqq4FAAZPAf4=.

[376] Court of Cassation, 23 March 2022, P.21.1500.F, available at https://juportal.be/content/ECLI:BE:CASS:2022:ARR.20220323.2F.4/FR?HiLi=eNpLtDKwqq4FAAZPAf4=.

The very general nature of the terms used in this judgment weakens the protection of the right to strike in Belgium. The right to participate in picketing is recognized as part of the right to strike, subject to certain conditions, notably what may be necessary to protect public order.[377] The direct effect of the provisions of the Charter is well established in Belgium,[378] and many jurisdictions have recognized and used it.[379] This decision by the Court of cassation is therefore quite exceptional in Belgian case law, and its impact outside criminal law is uncertain at this point. However, it remains worrying for the protection of the right to strike in Belgium. It is therefore important to pay attention to the follow-up that Belgian case law will give to this ruling.

5.2.3. Requisitioning of workers on strike

In the period studied by the Committee, two Acts were adopted to provide for a "minimum service" in certain sectors: the Act of 29 November 2017 on the continuity of the rail transport service in the event of a strike,[380] and the Act of 23 March 2019 on the minimum guaranteed service in prison.[381] In addition to these two instruments, it is possible to requisition workers in the event of a strike during an epidemic emergency (*infra*).[382]

The Act of 29 November 2017 was presented by the government as introducing a "guaranteed service" for railways. However, this statement may be misleading, as this provision does not create a minimum service in the sense in which this expression is generally understood. The Act contains no obligation to provide a service and no power of commandeering individuals on the part of the authorities. Strikers cannot therefore be forced to interrupt their collective action. Indeed, the mechanism merely obliges railway personnel to indicate, before the collective action, whether or not they intend to take part in it in order for the employers to organise the service as well as possible. Its conformity with the Belgian constitution and the treaties ratified by Belgium has been confirmed by the Constitutional Court.[383] A Flemish decree makes similar provisions for the staff of the Flemish transport company De Lijn.[384]

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[377] ECSR, *European Trade Union Confederation (ETUC), Centrale Générale des Syndicats Libéraux de Belgique (CGSLB), Confédération des Syndicats chrétiens de Belgique (CSC) and Fédération Générale du Travail de Belgique (FGTB) v Belgium, op. cit.,* §29.

[378]The Constitutional Court recognised the direct effect of Article 6 § 4 of the Charter in 2000.

[379] Both the judicial and administrative courts have recognised a direct effect. See Brussels Labour Court, 5 November 2009, *J.L.M.B.,* 2010, p. 646; Brussels Court of first instance (in summary proceedings), 26 September 2001, *Chr. D.S.* 2002, p. 218; Antwerp Labour Tribunal, 18 May 2001, unpublished; Council of State, judgment no. 52.424 of 22 March 1995*, A.P.T.* 1995, pp. 228-238; EC, judgment no. 113.168 of 3 December 2002; Council of State, judgment no. 185.075 of 2 June 2008. Judgments cited in P.-O. de Broux, "L'applicabilité directe et ses succédanés. 2° La Charte sociale européenne (révisée)"*, in* S. Van Drooghenbroeck, *le droit international et européen des droits de l'homme devant le juge national*, Larcier, Brussels, 2014, pp. 187-195, fn 10 and 23.

[380] Act of 29 November 2017 on the continuity of the rail passenger transport service in the event of a strike, *Moniteur belge*, 17 January 2018.

[381] Act of 23 March 2019 on the organisation of prison services and the status of prison staff, *Moniteur belge*, 11 April 2019.

[382] Other regimes for requisitioning personnel can also be cited - without being examined -: a decree of the Government of the French Community of 26 January 1999 determining the rules relating to the minimum programming and the equipment which must be maintained in permanent working order at the R.T.B.F.; police officers can also be requisitioned in the event of collective action: Art. 126, Act of 7 December 1998 organising an integrated police service, *op. cit*.

[383] Constitutional Court, judgment no. 67/2020 of 14 May 2020, available at https://www.const-court.be/fr/judgments?year=2020.

[384] Decree of 31 July 1990 concerning the privatised external public agency Vlaamse Vervoersmaatschappij, available at https://codex.vlaanderen.be/Portals/Codex/documenten/1001627.html.

However, some politicians are calling for a reform of this law, with a view to introducing the possibility of requisitioning staff.[385] The European Committee of Social Rights considers that the introduction of a minimum service is only possible if a strike in this sector threatens public health, national security or the public interest in the strict sense.[386] It is therefore doubtful that public transport can be described as an essential service within the meaning of the Committee's case law, except in these very specific circumstances.

In contrast to the railway legislation, the Act of 23 March 2019 does contain a real mechanism for requisitioning striking prison workers. Before the Act, due to the absence of a guaranteed minimum service in Belgian prisons, several strikes by prison staff had led to the suspension of the ordinary detention regime. It had caused considerable suffering for prisoners whose basic needs – washing and minimum hygiene, physical exercise, going out to the yard, family visits, etc. – were no longer guaranteed. This situation led to a significant level of distress, constituting inhuman and degrading treatment within the meaning of the European Convention on Human Rights.

This unacceptable situation has led to Belgium being condemned by the European Court of Human Rights on two occasions[387] in 2019 and 2020 for violations of article 3 of the ECHR.[388] In the meantime, following a public statement by the European Committee against Torture (CPT),[389] **the Parliament adopted the Act of 23 March 2019, which permits the requisition of the required part of the striking prison personnel in case of a strike lasting more than two days**. The Constitutional Court confirmed the validity of this provision in 2021,[390] holding that the requisition did not excessively interfere in the exercise of the right to strike, taking into account the impact of the strike on prison living conditions.

The Central Monitoring Council for Prisons (CTRG/CCSP) and FIRM/IFDH have sent a joint "Rule 9" communication to the Committee of Ministers of the Council of Europe in the context of the follow-up to the execution of the *Clasens* and *Detry and others v. Belgium* judgments.[391] FIRM/IFDH and the CTRG/CCSP note that **the adoption of the law of 23 March 2019 is not sufficient to solve the problem of minimum guaranteed service in prisons in the event of a strike by prison wardens and other personnel.** The State's efforts to restore confidence with the social partners in the prison system and to support strong social consultation must be strengthened.[392] In addition, the State must implement sustainable solutions to prison overcrowding and avoid structural understaffing of prison staff. The implementation of these two judgments is still ongoing, and the recommendations made by FIRM/IFDH and the CTRG/CCSP remain valid.

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[385] See, for example, the position of the Mouvement Réformateur, one of the main French-speaking political parties: "Le MR veut un véritable service garanti à la SNCB", available at https://www.mr.be/le-mr-veut-un-veritable-service-garanti-a-la-sncb/.
[386] ECSR, Digest, 2018, p. 105.
[387] ECtHR, *Clasens v. Belgium* of 28 May 2019, application no. 26564/16; *Detry and others v. Belgium* of 4 June 2020, applications no. 26565/16 and 6 others.
[388] It should be noted that the European Court of Human Rights had received more than 60 applications relating to the conditions of detention during the strikes. The problem was therefore clearly structural.
[389] Public statement made under Article 10, paragraph 2, of the European Convention for the Prevention of torture and Inhuman or Degrading Treatment or Punishment, Strasbourg, 13 July 2017, available at https://rm.coe.int/pdf%20/1680731786.
[390] Constitutional Court, No. 107/2021 of 15 July 2021.
[391] Available at https://www.institutfederaldroitshumains.be/publications/pour-un-traitement-humain-des-prisonniers-y-compris-pendant-les-greves-des-prisons
[392] *Ibid.,* p. 8.

Recommendation
Implement sustainable solutions to prison overcrowding and avoid structural understaffing of prison staff. It is also important to restore a relationship of trust between social partners among prison staff, and support a strong social consultation.

5.2.4. Protection of the right to collective action during COVID-19.

The COVID-19 pandemic inevitably had an impact on the exercise of the right to collective action. Indeed, the government took several measures to limit the number of people who could participate in a gathering, whether in a private or public context, thereby prohibiting certain forms of collective action. Yet, in a similar context, the European Court of Human Rights found that a general ban on gatherings during the epidemic period – with criminal sanctions and no judicial remedy – violated the European Convention on Human Rights.[393]

In March 2020, all gatherings in Belgium were banned.[394] This situation lasted until 8 June, when the ban was slightly relaxed: public gatherings were allowed up to a maximum of 10 people.[395] From 1 July 2020, events were again allowed, provided certain conditions were met[396] : the event was limited to 200 (this amount was to be be increased to 400 people a few weeks later), must be static, respect safety distances and be authorised by the competent municipal authorities. This limit fluctuated and was finally reduced starting from 1er November 2020 to 100 people.[397]

Some of the actors consulted, mainly academics and the social partners, noted a decrease in the number of collective actions in 2020, although it is difficult to say whether this decrease should be attributed to measures taken by the public authorities, a policy of caution on the part of the social actors, other factors, or a combination of the above. **Several of the collective actions undertaken have led to administrative sanctions by the police**.[398] Some authors conclude that the limitations imposed on the freedom of demonstration in the context of public health measures constituted a threat to trade union freedoms.[399]

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[393] ECtHR, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* of 15 March 2022, application no. 21881/20, https://hudoc.echr.coe.int/fre?i=002-13596.
[394] Ministerial Decree of 23 March 2020 on emergency measures to limit the spread of the COVID-19 coronavirus, *Moniteur belge,* 23 March 2020.
[395] Ministerial Decree of 5 June 2020 amending the Ministerial Decree of 23 March 2020 on emergency measures to limit the spread of the COVID-19 coronavirus, *Moniteur belge,* 5 June 2020.
[396] Ministerial Decree of 24 July 2020 amending the Ministerial Decree of 30 June 2020 on emergency measures to limit the spread of the Covid-19 coronavirus, *Moniteur belge,* 24 July 2020.
[397] Ministerial Decree of 28 November 2020 amending the Ministerial Decree of 28 October 2020 on emergency measures to limit the spread of the COVID-19 coronavirus, *Moniteur belge,* 29 November 2020.
[398] Some of the actors consulted by FIRM/IFDH shared this observation. At least one of these actions, punished by fines of €350 per participant, was reported in the press. See Het Laatste Nieuws, *Vakbonden voeren actie tegen GAS-boetes voor protestactie: "Recht om onze stem te laten horen wordt ons ontnomen",* 3 May 2021. The action in question took place in September 2020. A judgment in June 2022 found in favour of the unions (see https://www.vrt.be/vrtnws/nl/2022/06/16/vakbondssecretarissen-moeten-boete-van-stad-gent-voor-spontane-p/). A rally in front of the Liège courthouse also saw the prosecution of the trade union officials involved: see I. Gracos, "Grèves et conflictualité sociale en 2020 - vol. 1 Concertation et mobilisation aux niveaux professionnels et sectoriel", *op. cit.,* p. 28.
[399] *Ibid.*

The Act on administrative police measures during an epidemic emergency,[400] adopted on 14 August 2021 after lengthy debates, is considered problematic to the right to collective action and freedom of association by the actors consulted. Article 5 of the Act contains several measures that can be activated by the Belgian government in the event of an epidemic emergency. These include severe restrictions on gatherings – including their prohibition – and the imposition of strict conditions on the organisation of work for broad swathes of the population. The Act also provides for the possibility of requisitioning certain workers (workers on strike, on leave, etc.) deemed necessary by the authorities. The requisition may be ordered by many public authorities : the King (meaning the Government), an individual minister, a provincial governor, or even local municipal authorities.[401] Non-compliance with Article 5 carries criminal penalties, including imprisonment for one day to three months and community service sentences.[402] When this provision was announced, the trade union CSC-ACV expressed concern about a "*brutal restriction on freedom of association and the right to collective action*".[403]

This possibility of requisitioning striking workers was previously rare in Belgian law, apart from the situations examined in section 5.2.3 (*supra*), to which a few exceptions can be added.[404] Only the Act of 19 August 1948 on public services in peacetime[405] allowed for requisition in the private sector. This Act provides for a mechanism of social consultation to determine the modalities of its application, an approach that is absent in the Act of 14 August 2021.

Finally, some requisitions of health personnel were announced before the adoption of the Act of 14 August 2021, when the public authorities still lacked a solid legal basis to order them.[406] Health care institutions and services, nursing homes were required to provide a minimum service.[407] The low number of strikes during this period has made the challenge of such measures mostly theoretical, but the lack of social consultation can be criticized.[408]

The health crisis has seen the public authorities multiply measures, even if it meant limiting freedom of association and the right to collective action in the name of the higher interest of society. As a result, Belgian law now enshrines a number of provisions allowing the prohibition of

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[400] Act of 14 August 2021 on administrative police measures during an epidemic emergency, *Moniteur belge,* 20 August 2021.
[401] Art. 5 § 3, *ibid.*
[402] Art. 6, *ibid.*
[403] *Doc. Parl.*, House of Representatives, Draft bill on administrative police measures during an epidemic emergency - Report on behalf of the Committee on the Interior, Security, Migration and Administrative Matters, 30 March 2021, DOC 55 1897/001, p. 621.
[404] See, for example, the Royal Decree of 25 April 2014 laying down the modalities of the requisition power referred to in Article 181 of the Act of 15 May 2007 on civil security, *Moniteur belge,* 27 November 2014.
[405] Act of 19 August 1948 on the provisions of services in the public interest in peacetime, *Moniteur belge*, 21 August 1948.
[406] Requisitions were carried out in application of the Act of 19 August 1948. See A. Mayence, "La continuité des services essentiels à l'épreuve du COVID-19 - Les réquisitions en temps de crise", *Carnet de crise du Centre de droit public de l'Université libre de Bruxelles #12*, 14 April 2020, p. 7, available at https://droit-public.ulb.ac.be/carnet-de-crise-12-du-14-avril-2020-la-continuite-des-services-essentiels-a-lepreuve-du-covid-19-les-requisitions-en-temps-de-crise/.
[407] *Ibid.,* p. 3.
[408] E. Dermine, A. Mayence, "Associating the social interlocutors to the identification of essential enterprises: a technical contribution but also a democratic challenge", *Carnet de crise of the Centre de droit public de l'Université libre de Bruxelles #7*, 5 April 2020, available at https://droit-public-et-social.ulb.be/carnet-de-crise-7-associer-les-interlocuteurs-sociaux-a-lidentification-des-entreprises-essentielles-un-apport-technique-mais-egalement-un-enjeu-democratique/.

demonstrations, strikes, gatherings and the requisition of workers. A parliamentary assessment of the impact of public health measures on human rights, including on labour rights should be realized. This assessment will determine what changes to the legislative framework applicable to epidemic emergencies are needed to better guarantee human rights.

Recommendation

Conduct a parliamentary assessment of the impact of public health measures on human rights, including labour rights.

5.3. Right to information and consultation of the workers (Article 21)

In Belgium, the right to information and consultation of workers is mainly exercised through the social consultation bodies - Work Council and Committee on Prevention and Protection in the Workplace in the private sector, Basic Consultation Committee – and other bodies – in the public sector. According to the actors FIRM/IFDH consulted, the COVID-19 pandemic had only a limited impact on the exercise of the right to information and consultation. Social elections were postponed from May to November 2020, without major incidents, despite the increasing use of postal and electronic voting. This limited impact appears confirmed by the large number of sectoral collective labour agreements adopted in 2019-2020.[409] The Federal Public Service Employment, Labour and Social Dialogue has authorised that meetings of company elected bodies be held remotely, conditioned upon the agreement of employers' and workers' representatives.[410]

In addition to the pandemic, one issue related to the right to information and consultation was often highlighted by the consulted actors: **the refusal to grant trade unions access to certain data pertaining to the identity of a company's workers, in the name of compliance with the General Data Protection Regulation**.[411] The Regulation prohibits the processing of personal data except for several explicitly legal grounds, such as acting with the consent of the data owner or carrying out a task in the public interest.[412] Trade unions may claim that they are carrying out a public interest task, but this exception does not lend itself easily to the context of social elections, and such an argument may place the provisions' interpretation on the employer, giving him or her considerable leeway to allow or to refuse the request. Without this information, Trade unions would face considerable difficulty to inform and consult with the workers they intend to represent.

The European Trade Union Confederation (ETUC) has repeatedly denounced this trend, and notes that, in the specific case of Belgium "[a] *lot of companies use the GDPR to claim that they aren't allowed to*

[409] Federal Public Service Employment, Labour and Social Dialogue, Report on the results of the sectoral consultation in 2019-2020, p. 6, available at https://emploi.belgique.be/fr/publications/rapport-sur-la-concertation-sociale-sectorielle-2019-2020. This report mentions more than 2,500 sectoral collective labour agreements adopted over the period studied (2019-2020).

[410] *Ibid.*

[411] EU Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, *Official Journal of the European Union*, 4 May 2016.

[412] Art. 6, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, *Official Journal of the European Union,* 4 May 2016.

let trade union representatives communicate with all of the workers in their companies, that they can't provide information on newly hired workers, on subcontracting, etc.".[413] Furthermore, several Belgian social secretariats[414] advise employers to withhold certain data on workers in the company (e.g., contact details) from trade unions, especially in the context of social elections, in order to comply with data protection regulations.[415]

The right to protect personal data must be balanced against other fundamental rights, such as the right to information and consultation. Several recent cases tend to show that these rights can perfectly be balanced with each other.[416] However, the current lack of clarity on the regulations' application can lead to important restrictions to the workers' right to information and consultation. The Act of 20 September 1948 on the organisation of the economy should be amended to provide a legal basis for the transfer of certain personal data – in particular professional details – of workers to the company's trade unions, with a view to facilitating the realisation of the right to information and consultation. Such an amendment will have to be drafted in consultation with the social partners and will require an advisory opinion from the Belgian Data Protection Authority (GBA/APD).

Recommendation

Amend the Act of 20 September 1948 on the organisation of the economy so as to provide a legal basis for the transmission of certain personal data – in particular professional details – of workers to the company's trade unions, with a view to facilitating the realisation of the right to information and consultation. Such an amendment will require both consultation with the social partners and an advisory opinion from the Data Protection Authority (GBA/APD).

5.4. The right to take part in the determination and improvement of the working conditions and working environment (Article 22)

In the private sector, at company level, workers' representatives are elected to **Work Councils[417] and the Committees on Prevention and Protection in the Workplace[418]**. Despite the relatively high thresholds in terms of company size for the establishment of Work Councils (min. 100 employees)[419] and Committees on Prevention and Protection in the Workplace (min. 50 employees),[420] Eurofound

[413] European Trade Union Confederation, "GDPR being misused by employers to hinder trade unions", 19 March 2020, available at https://www.etuc.org/en/pressrelease/gdpr-being-misused-employers-hinder-trade-unions.

[414] A private company that gives social security services to companies, such as calculating the amount due for social security contributions for each worker. Called in Dutch, sociaal secretariaat, and in French, secrétariat social.

[415] See for example here at https://www.securex.eu/lex-go.nsf/vwNews_fr/20FC9A0322412413C125849B0025B2B5?OpenDocument ; also at https://ondernemingsdatabank.indicator.be/sociale_verkiezingen/geen_personeelsgegevens_voor_de_vakbond_door_de_gdpr_/VLTAPSAR_EU26050401/topArt ; or at https://legalpme.be/elections-sociales-rgpd/

[416] See F. Hendrickx, S. Taes, "Data Protection Law and the Exercise of Collective Labour Rights by Trade Unions vis-à-vis Employers or Groups of Employers in a Transnational Context", executive summary, *Institute for Labour - KU Leuven & European Cockpit Association*, 2021.

[417] In Dutch, *ondernemingsraad*, in French, conseil d'entreprise.

[418] In Dutch, *Comité voor preventive en bescherming op het werk*. In French, Comité pour la prévention et la protection au travail.

[419] Art. 14 of the Act of 20 September 1948 on the organization of the economy, *Moniteur belge,* 27 September 1948.

[420] Art. 49 of the Act of 4 August 1996 on well-being of workers in the performance of their work, *Moniteur belge*, 18 September 1996.

statistics show that Belgium scores relatively well with regard to the number of employees working in an organisation with a Committee on Prevention and Protection in the Workplace (67% compared to a 58% EU average) or in an organisation with a trade union, Work Council or similar committee representing employees (66 % compared to a 50% EU average).[421]

The Belgian system of social consultation is generally characterised by well-trained workers' representatives with extensive rights to information but limited decision-making powers.[422] It is also characterised by social relations that are often conflictual, with comparatively little mutual trust[423] : Belgium ranks second highest in the European Union when it comes to levels of mutual distrust between social partners.[424] These characteristics are in line with the so-called '*extensive and conflictual*' model of social dialogue organisation[425], as understood by Eurofound (2015).[426]

In 2014, the European Committee of Social Rights noted that certain information had not been provided by the Belgian state: information related to the functioning and role of the Work Councils, to the challenge of decisions made by the Committee on Prevention and Protection in the Workplace, and to the situation of socio-cultural services and facilities within the company.[427] The Belgian report 2021 mentions that the provisions of the Well-Being Act of 4 August 1996 apply to both the public and the private sector, but unfortunately remains silent on the other points of interest raised by the Committee.

This section therefore analyses the various issues raised by the Committee in 2014: the role of the Work Council (1.), the organisation of socio-cultural services and facilities in the company (2.), and the question of challenging certain decisions taken by the employer in the area of welfare (3.). The exclusion of certain categories of workers from social elections is then examined (4.), before focusing on the right to take part in the determination and improvement of the working conditions and working environment during the pandemic (5.).

5.4.1. Advisory and decision-making role of the Work Council

In 2010, the Committee highlighted that, following information provided by Belgium, the role of the Work Council could go beyond a merely advisory capacity and become more "active" in a number of areas.[428] However, the information provided by the Belgian State was not sufficiently precise: the more

[421] Eurofound, Sixth European Working Conditions Survey, 2017, available at https://www.eurofound.europa.eu/data/european-working-conditions-survey.
[422] Eurofound, *Third European Company Survey*, 2013, pp. 109-110, available at https://www.eurofound.europa.eu/surveys/european-company-surveys/european-company-survey-2013.
[423] *Ibid.,* p. 108. The index of mutual trust between employers and employee representatives in Belgium is one of the lowest in the European Union.
[424] Eurofound, *Fourth European Company Survey*, *op. cit.*, available at https://www.eurofound.europa.eu/publications/flagship-report/2020/european-company-survey-2019-workplace-practices-unlocking-employee-potential.
[425] *Ibid.* p. 111. *Extensive* refers to a system of social consultation with important competences in the field of labour law (e.g. many matters where the norm can be decided by a collective labour agreement), and *conflictual* refers to difficult relations between social partners.
[426] In 2019, the *Fourth European Company Survey* has slightly modified its typology of social dialogue models. Belgium is now cited as an example in the '*bad relationship, little influence*' category, although the '*moderate trust, moderate influence*' model remains dominant in the country. See Eurofound, *Fourth European Company Survey*, *op. cit.* FIRM/IFDH has retained the 2015 typology as it considers it clearer for the explanations that follow this point.
[427] ECSR, Conclusions 2014 (Belgium), *op. cit.*
[428] *Ibid.,* p. 30.

"active" role of the Work Council was not defined and no additional information was provided. The Committee therefore concluded: "*as the report does not reply to this request, the Committee reiterates its question*".[429] However, the Belgian 2021 report provides no response.

The Work Council's role is primarily consultative[430] : it has a broad competence to give advice but cannot compel the employer to follow its decision. The Work Council does have decision-making powers in three separate areas: **it can draw up or amend the company's internal working regulations**; it can set the dates for the collective annual holidays and, if necessary, establish a staff rotation; and, in the area of well-being, the council manages the company's "social services".[431] The decision-making powers of the Work Council are therefore relatively limited. However, some of the actors consulted by FIRM/IFDH add some nuance to this statement: although the competences of the council are generally consultative, it can nevertheless form a space for discussion and negotiation to facilitate the adoption and subsequent implementation of decisions made within the company. Moreover, the mainly consultative nature of the Work Council is partly compensated for by the Belgian hybrid system of social dialogue (see section 4.3), which combines elected workers' representation bodies (Work Councils, Committees on Prevention and Protection in the Workplace) and trade union delegations.

The role of the Work Council in drawing up and amending internal working regulations is particularly important. In contrast to France,[432] for example, the Belgian social legislation inspectorate does not exercise preventive control over the legality of working regulations.[433] The Work Council must therefore check the legality of the provisions of the internal working regulations on its own initiative and ensure that the provisions adopted comply with the rights of the employees.[434] This function constitutes an important part of the monitoring and reporting role of the Work Council.[435]

Apart from the internal working regulations, the decision-making powers of the Work Council are limited. However, **the current situation does not seem to be in violation of the right to take part in the determination and improvement of the working conditions and work environment**. Consequently, strengthening the powers of the Work Council could be opportune, but is not an obligation for the Belgian State under the Charter.

Recommendation

The Belgian government should strengthen its efforts to provide comprehensive information to the European Committee of Social Rights about its conformity with Article 22 of the Charter.

[429] *Ibid*.

[430] Art. 15, Act of 20 September 1948 on the organisation of the economy, *op. cit*.

[431] *Ibid.* specifically art. 15, d), g) and h).

[432] Art. L1321-4, Labour Code (France).

[433] Art. 15, Act of 8 April 1965 instituting labour regulations, *Moniteur belge*, 5 May 1965. The Act provides for an obligation to register the regulation with the Federal Public Service for Employment, Labour and Social Dialogue, but this is a formality, with no legal control attached.

[434] F. Dorssemont, "Handhaving van en door het collectief arbeidsrecht", *op. cit.,* p. 128. It can be noted, however, that the works council is both judge and jury on this competence: it is responsible for drawing up and amending the internal working regulations, and for monitoring them.

[435] Art. 15, Act of 20 September 1948 on the organisation of the economy, *op. cit.* especially art. 15 l) and 15 m).

5.4.2. Organisation of socio-cultural services and facilities

The Committee requested an update on the situation of the organisation of socio-cultural services and facilities within the company in 2010 and again in 2014, stating that it wished to receive "*full and up-to-date information on the situation*".[436] However, the Belgian State did not provide an answer.[437]

The term "socio-cultural services and facilities" refers to all the cultural and social facilities made available to the worker by the employer. They may include access to a library, subsidies for sports classes or cultural outings, childcare options for workers with young children, etc.[438] **The presence – or absence – of such facilities can have a significant impact on other Charter rights, including in terms of gender equality**.[439]

The varied nature of these benefits and the lack of systematic or statistical studies make it difficult for the authors of this report to provide comprehensive information on the organisation of these services and facilities. Recognising, however, the importance of these services to the right to participate in the determination and improvement of the working conditions and work environment – as well as to a number of other human rights –, the State should be strengthen its efforts to provide accurate and detailed information on this issue.

Recommendation

The Belgian government should strengthen its efforts to provide comprehensive information to the European Committee of Social Rights about its conformity with Article 22 of the Charter.

5.4.3. Challenging the company's decisions in health and safety

In its conclusions of 2014, the Committee indicated that it would like to obtain further information on the **remedies available against an employer who refuses to take into consideration several consecutive recommendations of the Committee on Prevention and Protection in the Workplace (CPW**). The Committee noted that there appeared to be no specific procedure in this respect, but that, according to the 2014 State report, "*in the view to maintaining good relations with employees",*[440] the employer had to give convincing reasons. The Belgian State further elaborated by recalling that any worker and any representative organisation could lodge an appeal with the labour courts based on the Act of 4 August 1996 on well-being of workers in the performance of their work.

The CPW has broad powers to issue opinions on protection and prevention at work. Some of these opinions are binding on the employer.[441] In the event of a dispute, the Well-Being Act provides for a

[436] ECSR, Conclusions 2014 (Belgium), *op. cit*., p. 30.

[437] ECSR, Belgium's Report on the Revised Social Charter (Group 3: labour rights), Period 2017-2020, 2022.

[438] ECSR, Digest, *op. cit.,* p. 198

[439] See Institute for the Equality of Women and Men, " Travail et Paternité, comment promouvoir l'équilibre ", 2014, p. 27, available at https://igvm-iefh.belgium.be/sites/default/files/downloads/76%20-%20Travail%20et%20paternit%C3%A9_FR.pdf

[440] ECSR, Conclusions 2014 (Belgium), *op. cit*., p. 29

[441] See in particular Art. 4, Royal Decree of 28 May 2003 on health surveillance of workers, *Moniteur belge,* 16 June 2003.

specific appeal to the labour courts.[442] The aim of this particular mechanism is to "*provide a flexible solution to disputes relating to the CPW in general and to social elections in particular*".[443]

Yet, the purpose of this procedure is mainly to resolve quickly disputes relating to the *composition of* the CPW – in particular those pertaining to social elections and the dismissal of a workers' representative. **There is no specific provision in the law for challenging decisions taken by the employer despite contrary advice from the CPW**. A refusal to follow consecutive recommendations of the CPW would be difficult to challenge in the labour courts on the basis of the Well-Being Act, particularly if these advisory opinions are not legally binding on the employer.[444]

Therefore, as the Committee noted in 2014, there is no specific legal mechanism to compel an employer who adopts a regulation or wrongfully refrains from a policy without the favourable advice of the CPW. This absence's impact on the conformity of Belgian law to the Charter is difficult to ascertain, in the absence of much indication from the Digest. Consequently, the Committee may want to examine this point and rule on this issue.

5.4.4. Exclusion of executives from trade union delegation elections

The Act of 20 September 1948 and its implementation decrees provide that Work Councils must be composed of all persons working in the company : employers and senior management, and representatives of all categories of workers – blue-collars, white-collars and executives.

In the context of social elections, the term "executives"[445] refers to '*employees who, excluding those who are members of the senior management* (...)*, exercise a senior function in the company*'.[446] Executives, if they are sufficiently numerous in the company, may have their own representation in the social consultation bodies.[447] Other terms are sometimes used in some collective agreements to refer to executives, such as 'unscaled', 'unscalable' or 'unclassified' employees.[448] Executives do not belong to leading positions of the company within the meaning of the legislation on social elections.[449] They should therefore be entitled to the same rights as other employees in matters of representation. The Act of 20 September 1948 provides for a procedure to decide on the delimitation of the group of executives in the event of disagreement between management and the unions.[450]

However, the status of the trade union delegation in private sector companies is not laid down by law but by collective agreement. Collective labour agreement no. 5 lays down the minimum requirements

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[442] Art. 79, Act of 4 August 1996 on well-being of workers during the performance of their work*, Moniteur belge*, 18 September 1996.
[443] *Doc. Parl.,* House of Representatives, Ordinary Session 2006-2007, DOC 51 2687/001, p. 51.
[444] F. Dorssemont, "Handhaving van en door het collectief arbeidsrecht", *op. cit.*
[445] In French, les cadres, in Dutch, kaderpersoneel.
[446] Art. 14 § 1er, 3°, Act of 20 September 1948 on the organisation of the economy, *op. cit*. It should be noted that the notion of executive in matters of social elections and collective consultation is distinct from the term 'leading position' often used in labour matters, and also distinct from trusted personnel for the application of regulations on working time (see section 2.1.3, and the Royal Decree of 1965). A worker can be an "executive" for social elections, and be considered a leading position in the meaning of working hours regulations.
[447] Art. 20, *Ibid.*
[448] See Mons Labour Court, 15 March 2019, R.G. 2018/AM/184.
[449] See Article 4, 4° of the Act of 4 December 2007 on the 2008 social elections, *Moniteur belge,* 7 December 2007.
[450] Art. 24, Act of 20 September 1948, *op. cit.*

(see also 4.3.1. above),[451] and sectoral collective labour agreements specify the thresholds for the establishment of a trade union delegation and the arrangements for each sector of activity.

A number of sectoral collective agreements explicitly exclude executive staff from their scope of application. This exclusion is clearly illegal: it is contrary to collective agreement No. 5, and consequently to the Act of 5 December 1968 on collective labour agreements.[452] Such clauses in a collective agreement must therefore be considered null and void, as consistently confirmed in case law. For instance, the Mons Labour Court partially annulled a company collective labour agreement that prohibited the election of executives to the trade union delegation[453] and considered it discriminatory. The Antwerp Labour Court also ruled against a sectoral collective agreement that had been made compulsory by Royal Decree, because it similarly excluded executives from its application with respect to social elections.[454] The presence of executives' representatives in these trade union delegations has an impact on the facilities granted to them, and on the effective representation of these categories of staff in social consultation bodies.[455]

The existence of such sectoral collective labour agreements stresses the need for better monitoring of these provisions. This control could ideally be carried out by the Inspectorate for the Supervision of Social Legislation of the Federal Public Service Employment, Labour and Social Dialogue, with which sectoral collective agreements must be registered. It should therefore be requested that the Federal Public Service systematically check the existence of such clauses in the collective agreements it receives.

Recommendation
Ask the Federal Public Service for Employment, Labour and Social Dialogue to systematically check the existence of clauses excluding executives from elections to trade union delegations in the collective agreements it receives. Enforce the prohibition of exclusion of executives from the election to trade union delegation.

5.4.5. Social dialogue and prison labour

Prison workers – whether domestic workers or workers for third-party companies – should also be entitled to fundamental labour rights. The Prison Administration Principles Act emphasises the importance of consultation between prisoners and public authorities.[456] Each prison should have a 'consultation body' that enables prisoners' representatives to discuss issues of community interest with staff and management.[457] Prison work can be – but is not necessarily – one of the issues discussed.

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[451] Collective Agreement No. 5 of 24 May 1971 concerning the status of trade union delegations of company personnel, *op. cit.*
[452] Art. 10, Act of 5 December 1968 on collective labour agreements and joint committees, *op. cit.*
[453] *Ibid.*
[454] Labour Court of Antwerp, Chamber II, 13 January 2021, R.G. 2019/AA/412 : available at https://www.law.kuleuven.be/arbeidsrecht/nieuwsbrieven/nieuwsbrief2021/Nieuwsbrief-2021-2#4_lagere_rs
[455] D. Van Herreweghe, G. Van Gyes, K. Lenaerts, *et al*, "Participation and representation of professional and managerial staff in the metal and technology industry. Study on company practices and regulations", *KU Leuven - Onderzoeksinstituut voor arbeid en samenleving*, Leuven, 2019, available at https://hiva.kuleuven.be/nl/nieuws/docs/synthese-pc209-fr.pdf.
[456] Art. 7, Principles Act of 12 January 2005, *op. cit.*
[457] C. Oumalis, "le droit des détenus au travail et à la sécurité sociale", *op. cit.,* p. 41

It is not, therefore, a social consultation body as such – insofar as it has a wider scope than just prison labour[458] – and discussion of working conditions seems to be infrequent.[459]

A Royal Decree of 22 June 2018 sets out the composition and operating procedures of this body.[460] In addition to the director of the prison, the body is composed of a secretary, a representative of the prison staff appointed by the director, and four inmates chosen by lot from among a set of candidates. The consultative body has only advisory powers, but can help to create a culture of communication in prisons, which appears somewhat lacking nowadays.[461] The reports of the prison supervisory boards, which are in principle authorised to attend the meetings of the consultation bodies, note the creation of these consultation bodies in most Belgian prisons.[462]

The consultation body can play a critical role in guaranteeing respect for the right of detained workers to information and to participate in the determination and improvement of their working conditions and work environment. This body should therefore be strengthened and given specific tasks in the field of social dialogue. **Some of the tasks assigned to the CPW in the private sector would be particularly suitable for this purpose**, such as the possibility of giving an advisory opinion on any project, measure or means concerning the well-being of (prison) workers ; suggesting workplace accommodations ; the development of measures related to the reception of new (prison) workers, their information and training in safety at work ; or monitoring the global prevention plan and its annual action plans. Strengthening the tasks of the consultation body will require strengthening the legitimacy of the prisoners' representatives, and ensuring that they are sufficiently trained to represent detained workers.

Recommendations

Strengthen the penitentiary 'consultation body' by entrusting it with certain tasks entrusted to the Committee on Prevention and Protection in the Workplace in the ordinary professional sector, such as: giving advisory opinion on any project, measure or means concerning the well-being of (prison) workers ; suggesting workplace accommodations ; developing measures related to the reception of new (prison) workers, their information and training in safety at work ; or monitoring the global prevention plan and its annual action plans.

Strengthen the legitimacy of prisoners' representatives to the consultation body and provide them with sufficient training.

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[458] *Doc. Parl.,* Senate, session 2012-2013, Parliamentary question n°5-9491 of 5 July 2013, available at https://www.senate.be/www/?MIval=/Vragen/SVPrintNLFR&LEG=5&NR=9491&LANG=nl.

[459] According to our consultations with some actors active in prison work, and several reports of prison supervisory boards consulted.

[460] Royal Decree of 22 June 2018 regulating the composition and operating procedures of the consultation body provided for in Article 7 of the Principles Act of 12 January 2005 concerning the prison administration and the legal status of prisoners, *Moniteur belge*, 4 September 2018. Note that the Royal Decree was published more than thirteen years after the adoption of the Principles Act.

[461] M.-A. Beernaert, "Concertation bodies and halfway houses: towards another model of detention?", *Cahiers du Crid&p,* October 2018, available at https://uclouvain.be/fr/instituts-recherche/juri/cridep/actualites/organes-de-concertation-et-maisons-de-transition-vers-un-autre-modele-de-detention-marie-aude-beernaert.html.

[462] Information received through the Central Prison Monitoring Council.

5.4.6. Determining and improving working conditions during the pandemic

The Covid-19 pandemic has had a major impact on social dialogue. A study conducted by researchers at the *Université libre de Bruxelles* – which results have not yet been published but were shared with FIRM/IFDH – examined the quality of social dialogue in an attempt to assess the impact of the pandemic. The authors – Professor Vanessa De Greef and researchers Jacques Wels and Natasia Hamarat – surveyed a representative sample of 467 workers' representatives about their experience of social consultation during the COVID-19 crisis.[463] Half of the respondents felt that the quality of social dialogue within the company had not been affected by the crisis during the pandemic. Only a third of them stated that social dialogue had deteriorated. These results are relatively positive: they show that the initiatives taken by the authorities and the social partners to enable social consultation to go on seem to have been successful in maintaining the quality of social dialogue.

One of the initiatives undertaken by the social partners was to draw up a "Generic guide to combating the spread of COVID-19 at work",[464] a document containing instructions on how to set up specific prevention measures in the context of COVID-19.[465] This generic guide was complemented by the development of specific guides within some particular sectoral joint committees.[466] Between 40 and 45% of the participants in the study considered that the adoption of these generic and sectoral guides had strengthened the protection of workers in the company, and only 17% criticised their usefulness. The impact of the guides on social consultation is less striking: a majority of respondents felt that the guides had had no effect, and only 15% felt that they had facilitated it. Just under 10% also said that they had made consultation more difficult.

The study also looked at the consistency of anti-covid health measures with the employer's global prevention plan and its annual action plans.[467] It found that slightly more than a third of the respondents did not know whether the prevention measures were integrated into the plans. In 35-40% of cases, they simply were not included. The study also found that risk analysis for COVID-19 was "not at all" systematic in the prevention of coronavirus, contrary to the requirements prescribed by the Code of Well-Being at Work.[468] A quarter of the respondents did not know whether it had been carried out, and only 40% of them said that it had been carried out.

One of the conclusions of this study is that **the system of social consultation has remained effective at intersectoral and sectoral level** – in particular with the adoption of generic and sectoral guides – **but it has been much less effective at company level.** Within the company, a number of measures were not taken or were not taken through the social consultation bodies – even if they were legally competent for these matters. The proliferation of decisions taken without respecting the established

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[463] The results are still provisional and unpublished. They were shared with FIRM/IFDH by the authors, as part of our consultations. The authors state that "*the sample provides a good representation of sectors apart from the public sector. It was somewhat less filled by blue-collar workers*".

[464] Higher Council for Prevention and Protection at Work, *Generic guide to combating the spread of COVID-19 at work,* 23 April 2020, available at https://emploi.belgique.be/fr/actualites/guide-generique-pour-lutter-contre-la-propagation-du-covid-19-au-travail

[465] *Ibid.,* p. 5.

[466] For example, the Joint Committee on Health Care Institutions and Services adopted such a guide in October 2020, which is available at https://www.groups.be/fr/legislation-sociale/documentation-sectorielle/commissions-paritaires/33004000000/64/coronavirus.

[467] See the Well-being at work Code, concordance of Article 29 of the Royal Decree of 27 March 1998. The overall plan and the annual plans must by law be drawn up by the employer in consultation with the prevention services, and the annual action plan must be presented once a year to the Committee for Prevention and Protection at Work.

[468] Art. I.2.5 - 1.2.7, Well-Being at Work Code. See also Art. I.2.3. of the Well-Being at Work Code for the obligation of continuous adaptation.

procedures may be understandable in times of crisis and urgency. However, continuing to proceed in this manner could lead to weaken social dialogue and to introduce policies that are haphazardly integrated into global prevention plans, with little knowledge of them by workers and their representatives.

Further efforts are required to improve social consultation at company level in the event of an epidemic emergency. Legislative amendments – for example to the Welfare Code – would be an appropriate manner to better integrate general prevention and health protection measures with the exceptional health measures, such as the ones introduced in the context of the fight against the COVID-19 pandemic. The government and social partners could also devote further efforts to better disseminate and enshrine the good practices that have been developed at the (inter-)sectoral level.

Recommendation

Consider an amendment to the Code of Well-being at Work to better integrate general prevention and health protection measures with exceptional health measures.

Disseminate and enshrine good practices of consultation and social dialogue that have been developed at sectoral and intersectoral level.

Section 6. Protection against harassment (Article 26)

As indicated in the report of the Belgian State, Section Vbis of the Act of 4 August 1996 on well-being of workers in the performance of their work ('Well-Being Act') provides protection against a wide range of so-called 'psychosocial risks' at work, which include behaviour envisaged by Article 26 of the Charter, such as violence, bullying and sexual harassment in the workplace. The Act requires employers to take preventive measures to prevent or mitigate such harm and to provide for (informal and formal) internal procedures. It also allows victims to access, in a subsidiary manner, the external complaints procedure before the labour inspectorate or the labour courts. In addition, there is the possibility to complain to the public prosecutor (labour auditor) or to file a complaint with civil party status before the investigating judge with a view to opening a criminal proceeding against the suspect for violence, bullying or sexual harassment, or against the employer for failure to comply with its obligations under the Well-Being Act (Articles 119-122 of the Social Criminal Code).

While the Belgian legal framework seems to meet the requirements of Article 26, a number of caveats can be made:

1) **Domestic workers:** Domestic workers are excluded from the scope of the Well-Being Act (Article 2, § 4). With a view to bringing the legislation in conformity with ILO Convention No. 189 ('Domestic Workers Convention'), which Belgium ratified in 2015, a change in the law was made[469] in order to remove this restriction on the scope of application of the Act.[470] However, the entry into force of this modification was made dependent upon the adoption of a Royal Decree which has hitherto not yet been adopted.
2) **Reinstatement:** In its 2012 Conclusions, the Committee requested the Belgian State to provide information on whether reinstatement is possible when employees have been forced to resign because of sexual harassment.[471] In this regard, it must be recalled that the Committee has held that 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.'[472] The Well-Being Act does prohibit dismissal or any other adverse measure against employees who have had recourse to any procedure (request for formal psychosocial intervention, complaint, lawsuit or witness statement) to challenge violence, bullying or sexual harassment at the workplace, except for reasons which are unrelated to such recourse (Article 32tredecies, § 1) – the burden of proof in this regard resting upon the employer (§ 2). However, under Belgian labour law, reinstatement cannot be ordered since the parties are considered to have a right to unilaterally terminate a labour contract.[473] While the Well-Being Act provides for the possibility for the dismissed employee to request reinstatement (§ 3), the sanction for a refusal by the employer to do so consists in compensation equivalent to six months of gross wages or compensation for the actual damage suffered by the employee – who, in the latter, case must prove the extent of the damage (§ 4).

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[469] The Act of 15 May 2014 modifying the Act of 4 August 1996 on well-being of workers in the performance of their work, *Moniteur belge,* 18 June 2014.
[470] V. De Greef, "Droit et féminisme – Le Harcèlement sexuel au travail en droit belge », *e-legal – Revue de droit et de criminologie de l'ULB*, 2019, Volume n° 3, p. 10, available at https://e-legal.ulb.be/volume-n03/hommage-a-eliane-vogel-polsky/axe-1-droit-et-feminisme-le-harcelement-sexuel-au-travail-en-droit-belge.
[471] ECSR, Conclusions 2014 (Belgium), p. 32.
[472] ECSR, Digest, (December 2018), p. 210
[473] J. Clesse, F. Kéfer, *Manuel de droit du travail*, *op. cit*., pp. 426-429.

3) **Scope of the Gender Act:** Sexual harassment and harassment in the workplace, when covered by the Well-Being Act, are excluded from the scope of application of the Act of 10 May 2007 to combat discrimination between women and men ('Gender Act') (Article 7) – as the legislator wished to exclude the simultaneous applicability of two bodies of legislation to the same set of facts.[474] The Institute for the Equality of Women and Men has repeatedly stated that, in doing so, sexual harassment and harassment on the grounds of gender are treated as a mere question of welfare at work, thereby ignoring the discriminatory nature of such treatment which is often rooted in power inequalities between women and men.[475] In March 2022, the Government has announced its intention to remove the reference to the Well-Being Act from the scope of application of antidiscrimination legislation in the near future,[476] but no concrete steps in this regard seem to have been taken yet.

Despite a relatively strong legal framework, **harassment at the workplace remains widespread** in Belgium. Survey results indicate that between 14.2 and 18.6 % of workers have been confronted with (non-sexual) harassment at the workplace in the preceding year.[477] With regards to sexual harassment, a survey by the Institute for the Equality of Women and Men indicates that 9 % of female workers and 4 % of male workers indicate having ever been confronted with sexual harassment at the workplace – especially (female and male) workers younger than 25 years are more likely to having been confronted with sexual harassment in the workplace in the preceding year.[478] Sexual harassment at the workplace is particularly prevalent in sectors where workers come into contact with customers, and in which women are often overrepresented (e.g. care sector and education).[479]

Based upon a consultation on the rights of persons with a disability, the Interfederal Centre for Equal Opportunities, Unia, has drawn attention to the specific vulnerability of **persons with a disability** to become victim of harassment at the workplace, often as a result of incomprehension by colleagues regarding reasonable accommodations.[480] Unia is also concerned about the particularly vulnerable situation of women with disabilities in the labour market, especially in the sheltered workshops ("maatwerkbedrijven / entreprises de travail adapté") where they are underrepresented. It often

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[474] V. De Greef, *op. cit.*, p. 37.

[475] Institute for the Equality of Women and Men, Recommendation No. 2018/R/05, available at https://igvm-iefh.belgium.be/sites/default/files/adivsories/2018-07-04_-_recom2018-05_-_intimidation_sexuelle_def_fr.pdf; and Recommendation No. . 2021-R/001, available at https://igvm-iefh.belgium.be/sites/default/files/adivsories/2021r001_-_recommandation_harcelement_-_fr.pdf.

[476] See https://news.belgium.be/fr/modifications-des-lois-anti-discrimination-et-de-la-loi-bien-etre-en-ce-qui-concerne-la-protection.

[477] See https://www.serv.be/stichting/publicatie/grensoverschrijdend-gedrag-werk-2 (figures by the Social and Economic Council of Flanders regarding the Flemish Region): and https://www.liantis.be/nl/nieuws/1-op-7-werknemers-kreeg-2021-te-maken-met-pesterijen-op-het-werk (figures by Liantis, an external service for the prevention and protection in the workplace).

[478] See https://igvm-iefh.belgium.be/sites/default/files/downloads/les_jeunes_travailleur-se-s_vulnerables_au_harcelement_sexuel.pdf. According to figures from IDEWE (an external service for prevention and protection in the workplace) from 2021, 7,4% of the respondents indicated that they have been confronted with sexual harassment in the six preceding months, see X., "7 procent van werknemers is slachtoffer", De Morgen 8 February 2022.

[479] SERV – Sociaal-Economische Raad van Vlaanderen. Stichting Innovatie en Arbeid, « Grensoverschrijdend gedrag op het werk. Analyse bij werknemers op basis van de Vlaamse werkbaarheidsmonitor 2004-2016", 2018, p. 10, available at https://publicaties.vlaanderen.be/view-file/27933 (figures concerning the Flemish Region).

[480] Unia, "Consultation sur les droits des personnes handicapées", 2020, p. 33, available at https://www.unia.be/fr/publications-et-statistiques/publications/consultation-des-personnes-handicapees-sur-le-respect-de-leurs-droits-2020.

receives complaints from such workers about sexual harassment. A working group consisting of various regional government agencies, trade unions and the employer organisations from the sheltered workshop sector has been established in 2020 at the request of Unia to reflect on the creation of preventative tools against such abuses.[481]

Finally, as the Institute for the Equality of Women and Men has already recommended, Belgium should take the necessary steps to **ratify as soon as possible ILO Convention No. 190** ('Violence and Harassment Convention').[482] This is a so-called 'mixed' treaty which requires the approval at both the federal level and at the level of the federated entities (regions and communities). So far, at the level of the federated entities, only Flanders has adopted the necessary approval legislation.[483] On 6 May 2022, the Federal Government submitted a draft approval act for an advisory opinion to the Council of State, after which a bill can be submitted to Parliament.[484]

Recommendations

Adopt the Royal Decree which is necessary for the entry into force of the provisions extending the scope of applicability of the Well-Being Act to domestic workers.

Ensure protection against (sexual) harassment for workers with a disability, including for workers in sheltered workplaces.

Provide more training for labour inspectors, occupational physicians and prevention counsellors on the specificity of sexual violence committed against women with disabilities as well as on reasonable accommodations.

Take the necessary steps to ratify ILO Convention No. 190 as soon as possible.

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[481] Written input received from Unia on 25 May 2022.

[482] Institute for the Equality of Women and Men, Recommendation No. 2021-R/001, available at https://igvm-iefh.belgium.be/sites/default/files/adivsories/2021r001_-_recommandation_harcelement_-_fr.pdf. Also the National Labour Council has issued a positive advisory opinion in this regard, see National Labour Council, 30 June 2020, Advisory Opinion No. 2.168, available at http://www.cnt-nar.be/AVIS/avis-2168.pdf.

[483] Decree of 30 April 2021 on the approval of Convention No. 190 on Violence and Harassment in the World of Work, adopted by the International Labour Organisation during its 180th session on 21 June 2019, *Moniteur belge,* 12 May 2021.

[484] See https://news.belgium.be/fr/assentiment-la-convention-de-lutte-contre-la-violence-et-le-harcelement-au-travail.

Section 7. The role of the labour inspectorate

The monitoring of work-related fundamental rights is a transversal issue that arises in almost all of this report's sections : migrant work, working hours, remuneration, right to strike, prison labour, harassment, etc. The actors consulted systematically referred to the role played by the inspection services, mainly the **inspectorate for the Supervision of Social Legislation** (hereafter: Social Legislation Inspectorate), for the realisation of these rights, its functioning and its shortcomings.

These points will not be repeated in the following section. Indeed, in addition to the issues developed above, a number of questions related to the inspection services has yet to be addressed: the understaffing of social inspectorates (7.2) ; the priorities of the inspection services (7.3) ; the condemnation of Belgium in the *European Youth Forum* case (7.4) ; and the inspection controls on domestic work (7.5).

7.1. Control of work-related rights

Belgium has several dozen social inspection services whose competences and sizes vary according to the regulations they are tasked to monitor or to enforce.[485] Combatting labour law violations falls mainly within the purview of three federal social inspectorates:

- The **inspectorate of the National Social Security Office** (ONSS/RSZ), which merged in 2017 with the former social inspectorate of the Federal Public Service (FPS) Social Security. It monitors the social security liability of self-employed persons, as well as conformity with social security legislation in the workplace, with the exception of accidents at work;
- The **Inspectorate for Supervision of Well-being at Work**, of the FPS Employment, Labour and Social Dialogue, is responsible for well-being in the workplace, including safety at work, health protection and prevention of moral and sexual harassment;
- Finally, the **Social Legislation Inspectorate,** of the FPS Employment, Labour and Social Dialogue. It ensures that individual and collective workers' rights are respected, particularly with regard to working conditions, pay, social dialogue and illegal work. Its competences are relatively broad and are the most relevant for this report.[486]

These inspection services (and several others) are coordinated **through the Social Information and Research Service** (SIOD/SIRS).[487] In addition, the inspection services operate **under the authority of the Labour Auditorate**, to whom the certified reports on social law violations are addressed. Belgium is divided into 17 judicial district cells presided over by an auditor, who is responsible for organising and coordinating the inspection services.[488]

[485] C.-E. Clesse, "Les services de l'Inspection sociale: présentation générale", *Justice-en-ligne*, 12 January 2018, available at https://www.justice-en-ligne.be/Les-services-de-l-Inspection
[486] *Ibid.*
[487] Art. 3, program Act of 27 December 2006, *op. cit.*
[488] Social Information and Research Service (SIRS/SIOD), report from 01/01/2022 to 31/03/2022 on the work of the judicial district cells, available at https://www.siod.belgie.be/fr/publications/statistiques.

The Social Legislation Inspectorate has four general tasks: information, supervision, regularisation and repression of infringements.[489] The Act of 16 November 1972 on social inspection details its powers and competences. In addition to the directorates associated with each district unit, the labour inspection contains several specialised teams : one for posted workers, another for transport companies and a third for the control of Work Councils.[490] The Social Legislation Inspectorate has 244.5 full-time equivalents positions (2022), and 55 full-time equivalents for administrative support.[491] In the last four years, the Social Legislation Inspectorate has dealt with between 25 and 30,000 cases each year.

7.2. Understaffing of labour inspectors

Belgium does not meet the International Labour Organisation's (ILO) standards on its labour inspectorates. According to the ILO, each type of economy must have a minimum amount of labour inspectors required according to. Indeed, in a developed market economy, the social inspectorate should count no less than one inspector per 10,000 workers.[492] **However, Belgium has only 0.7 inspectors (all services) per 10,000 workers in 2019**.[493]

This situation is problematic: understaffed, the Social Legislation Inspectorate can hardly carry out its tasks. **The lack of monitoring is an element that came up repeatedly in the consultations FIRM/IFDH carried out** in the context of this report. In particular, Brussels and Antwerp, that represent the two largest areas of economic activity in Belgium, face a particularly significant lack of inspectors .[494] However, the federal government's coalition agreement has committed itself to gradually adapting the number of inspectors to ILO standards.[495]

The International Labour Organisation (ILO) has repeatedly stressed out the importance of social inspection services for the monitoring and administration of labour law. As the ILO Committee of Experts on the Application of Conventions and Recommendations recalls: "[social inspection] *is at the core of promoting and enforcing decent working conditions and respect for fundamental principles and rights at work.*".[496] **The ILO is particularly concerned about a number of recent trends that tend to significantly impair the operation of social inspectorates** : the establishment of a moratorium on the recruitment of labour inspectors or insufficient recruiting ; the allocation of new responsibilities that

[489] Act of 16 November 1972 on labour inspection, *Moniteur belge*, 8 December 1972.
[490] See the presentation of the Social Legislation Inspectorate by the Social Information and Research Service (SIRS/SIOD), available at https://www.sirs.belgique.be/fr/sirs/services-dinspection/controle-des-lois-sociales-cls
[491] Figures from a discussion with the statistics department of the Social Legislation Inspectorate.
[492] *Ibid.* See also the summary of this report published by the International Labour Organization, "ILO calls for strenghtening labour inspection worldwide", 16 November 2006, available at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_077633/lang--en/index.htm#1
[493] See the "ILO Stat" tool available at https://www.ilo.org/shinyapps/bulkexplorer47/?lang=en&segment=indicator&id=LAI_INDE_NOC_RT_A. 2019 is the last year for which the ILO is publishing statistics for Belgium at the time of writing this report.
[494] Information from our exchanges with the Confédération des Syndicats Chrétiens.
[495] Coalition Agreement of the Federal Government of 30 September 2020, *op. cit.,* p. 21.
[496] Committee of Experts on the Application of Conventions and Recommendations (CEACR), General Observation on Labour Inspection Convention, 1947 (No. 81) and Labour Inspection (Agriculture) Convention, 1969 (No. 129), 2020, available at https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/labour-inspection/WCMS_752439/lang--en/index.htm, p. 1.

falls outside the scope of labour and social security law[497] ; or requiring labour inspectors to inform employers of their upcoming visit.[498]

The ILO stresses the importance of having enough labour inspectors to carry out the tasks assigned to them. Elements such as the number of workplaces and of workers to be inspected, the complexity and quantity of social legislation to monitor, etc.[499] must be taken into account to determine the precise number of inspectors required in each specialized service. Some transparency on these criteria can be expected of the State.[500]

Recommendation
Strengthen the labour inspection services, particularly the Social Legislation Inspectorate, and reach the standard of one inspector (all services) per 10,000 workers set by the International Labour Organisation.

7.3. Priorities of the Labour Auditorate

Circular No. 12/2012 of the College of General Prosecutors on criminal policy in the field of social criminal law establishes a set of priorities for the offences that fall within the jurisdiction of the Labour Auditorate. The offences are classified in descending order of severity :

- **First**, and most serious, **the offences related to serious and organised social fraud, economic exploitation, and serious offences against the well-being**;
- **Second, social contribution and benefit fraud**, including the employment of foreign workers without a residence permit or a work permit;
- and, **last, all other offences**.[501]

Many actors consulted by FIRM/IFDH criticise these priorities, arguing that while prioritising the fight against serious social fraud may be justified, the prosecution of those offences should not be made at the expense of other key objectives in matters of violations of social legislation, such as the protection of people with a precarious status, measures taken against discrimination in the labour market, etc.

These priorities do not give sufficient importance to combatting discrimination in employment relations, even though discrimination-related offences are to a large extent criminally punishable and/or a matter of public order.[502] As the National Labour Council points out, the persistence of

[497] For example, the competence to investigate and establish violations of the Act of 15 December 1980 on the access to the territory, residence, settlement and removal of aliens (Art. 81, see point 1.3.2 above).
[498] *Ibid.*
[499] International Labour Conference, *Report III: part 1B. General Survey on the reports concerning the Labour Inspection Convention, 1947 (No. 81), and the Protocol of 1995 to the Labour Inspection Convention, 1947, and the Labour Inspection Recommendation, 1947* (No. 81)*, the Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82), the Labour Inspection (Agriculture) Convention, 1968 (No. 129), and the Labour Inspection (Agriculture) Recommendation, 1969 (No. 133)*, p. 59.
[500] *Ibid.*
[501] Circular No. 12/2012 of the College of General Prosecutors on criminal policy in the field of social criminal law, 22 October 2012, available at https://www.om-mp.be/sites/default/files/u1/col_12_2012_1.zip.
[502] The Anti-Racism Act of 30 July 1981 (Art. 25) and the Gender Act of 10 May 2007 (Art. 28/2) sanction any form of discrimination in employment. The Anti-discrimination Act of 10 May 2007 does not contain general criminal sanctions, but is of public order. It therefore also falls within the competence of the Labour Auditorate. See Act of 30 July 1981 to suppress certain acts inspired by racism or xenophobia (*Moniteur belge*, 8 August

discrimination in the labour market is unacceptable and should receive particular attention. Yet, some of the monitoring means used by the Social Legislation Inspectorate seem too complex to be effective.[503] Unia, the Interfederal Centre for Equal Opportunities, has published a number of reports recommending the reinforcement of the competences of the labour inspectorate, and recommending the development of specific tools to combat discrimination more effectively.[504] In particular, Unia has argued for the introduction and subsequent strengthening[505] of 'discrimination testing' by labour inspectorates to try to confirm the existence of a specific form of discrimination within an employer, usually based on a previously received complaint.[506]

As Unia recommends, **the fight against discrimination in employment, and the protection of people with precarious status, should be a higher priority for the Labour Auditorate and the Social Legislation Inspectorate**. Circular 12/2012 should be amended to include those issues in the most prioritized category of offences.

Recommendation
Amend Circular 12/2012 to include the prosecution of discrimination and the protection of people with precarious status in the highest priority category.

7.4. European Youth Forum v. Belgium

A recent decision of the European Committee of Social Rights – ***European Youth Forum vs. Belgium*** – examined the effectiveness of the labour inspectorate when monitoring unpaid internships in Belgium. The Committee concluded that " *the Labour Inspectorate is not sufficiently effective in detecting and preventing "bogus internships"*."[507]

The European Youth Forum's collective complaint argues that the Belgian legislation[508] *de facto* allows unpaid internships to exist outside the framework of secondary and post-secondary education – the only area covered by this complaint. The Social Legislation Inspectorate is specifically criticised for its ineffectiveness in detecting and curbing the abusive replacement of paid jobs by voluntary internships.

1981); Act of 10 May 2007 to combat discrimination between women and men (*Moniteur belge*, 30 May 2007); Act of 10 May 2007 to combat certain forms of discrimination (*Moniteur belge*, 30 May 2007).

[503] National Labour Council, Advisory Opinion No. 2.248 of 26 October 2021 on the specific power of inspectors to make findings on discrimination, available at http://cnt-nar.be/AVIS/avis-2248.pdf.

[504] Unia, Recommendation No. 165 of 31 March 2017: *recherche et surveillance en matière de discrimination dans les relations de travail par l'inspection fédérale du travail,* available at https://www.unia.be/files/Documenten/Aanbevelingen-advies/FED_FR_-_165_-_Recherche_et_contr%C3%B4le_par_les_services_dinspection_du_travail.pdf ; Unia, Recommendation of 22 October 2020: *concrétiser l'utilisation du datamining pour lutter contre la discrimination sur le marché du travail,* available at https://www.unia.be/fr/legislation-et-recommandations/recommandations-dunia/tests-de-situation-20-quelques-nouvelles-propositions-dunia ; Unia, Recommendation No. 307 of 1er July 2022: *avis concernant les tests de discrimination dans l'avant-projet d'ordonnance portant modification de diverses dispositions visant à lutter contre les discriminations en matière d'emploi*, pending publication.

[505] Act of 1st April 2022 amending section 2/1 of the Social Penal Code concerning the specific powers of social inspectors with regard to findings on discrimination, *Moniteur belge*, 28 April 2022.

[506] Unia, Recommendation No. 165 of 31 March 2017, *op. cit.* The implementation of these tests has, however, been criticised by both opponents and supporters of these measures.

[507] ECSR, *European Youth Forum v. Belgium*, 8 September 2021, Complaint no. 150/2017, available at https://hudoc.esc.coe.int/fre/?i=cc-150-2017-dmerits-fr, § 151.

[508] The collective complaint is aimed in particular at the Volunteers' Rights Act of 3 July 2005 (see *above*).

The Forum more specifically argues that two separate rights are being violated by Belgium: on the one hand, the right of workers to fair remuneration[509] ; on the other hand, the right of young workers and apprentices to a fair wage or an equitable allowance.[510] The Forum also claims that the situation also constitutes to discrimination within the meaning of the Charter.[511]

The Committee largely followed the reasoning of the European Youth Forum, especially regarding the right to fair remuneration and discrimination between unpaid trainees and other workers. Above all, it shared its criticism of the effectiveness of controls. In particular, the Committee notes that **unpaid work appears frequent, in the Belgian labour market**, using concrete examples found, among others, within public bodies.[512] **The Committee also finds that the Labour Inspectorate's complaint and monitoring mechanisms are not adapted to the unfavourable situation of disadvantaged trainees, and more broadly of vulnerable people:** "*The Committee is of the view that the inspection system should be adapted to the features of the target population, such as disadvantaged young interns*".[513] The Inspectorate must thus take concrete steps to maintain the effectiveness of its controls, i.e. not rely solely on complaints but also, in such circumstances, adopt a proactive attitude to prosecute offences, taking into account the vulnerability of the target groups (unpaid trainees, domestic workers, seasonal agricultural workers, etc.)[514]

This decision marks an **important** – and unusual – **criticism of the working methods of the Labour Inspectorate**. Particular attention should be paid to the follow-up of this decision, by inter alia, calling for a reform of the working methods of the Labour Inspectorate and the Labour Auditorate, including a more proactive approach in sectors with large numbers of vulnerable workers.

Recommendation

Adapt the working methods of the Social Legislation Inspectorate and the Labour Auditorate, with a view to create new, specific, modes of operation, including a more proactive approach to monitoring, when dealing with sectors containing large numbers of vulnerable workers.

7.5. Monitoring the rules regarding domestic workers

Belgium's ratification of ILO Convention No. 189 on domestic workers has led the government to introduce legislative changes in order to reinforce the protection of domestic workers (see Section 6 on protection against harassment). The Convention also provides for the adoption of specific measures for the inspection of domestic work, mainly stressing out the need to take its characteristics into account in order to fulfill the inspection's monitoring duties.[515] Complementarily to the Convention, ILO Recommendation No. 201 calls for the establishment of a "*sufficient and appropriate*" inspection system for domestic workers.[516]

[509] Art. 4, European Social Charter.
[510] Art. 7 § 5, European Social Charter.
[511] Art. E, European Social Charter.
[512] ECSR, *European Youth Forum v. Belgium, op. cit.,* § 147.
[513] ECSR, *European Youth Forum v. Belgium, op. cit.,* § 145.
[514] ECSR, *European Youth Forum v. Belgium, op. cit.,* § 150.
[515] Art. 17 § 2, International Labour Organisation Convention No. 189: "*Each member shall develop and implement measures for labour inspection, enforcement and penalties with due regard for the special characteristics of domestic work, in accordance with national laws and regulations*".
[516] International Labour Organization, Recommendation No. 201 on Domestic Workers, 2011, available at https://www.ilo.org/dyn/normlex/fr/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R201.

Domestic workers have some specific features which complicate the tasks of labour inspectors : **since their place of work is often the employer's home, there are important privacy considerations to take into account when monitoring the workplace**. The Social Penal Code states that social inspectors can only gain access to an inhabited space in cases of *flagrante delicto*, or at the request of the person who enjoys the actual use of the space, or with the authorisation of an investigating judge to conduct a home visit.[517] This home visit, even authorized by an investigating judge, is different from a home search conducted based on a warrant, as social inspectors have far less extensive powers than judicial police officers. For example, they cannot use coercion if they are refused access to the inhabited premises or if the occupant is absent.[518]

Additional difficulties are caused by the **residency status of some domestic workers**, some of whom work in Belgium without a residence permit or work permit. Access to the inspection for these domestic workers is thus hindered,[519] given the duties of the Labour inspection regarding the enforcement of measures against illegal immigration (see section 1.3.2 above).

Myria rightly concludes that domestic work "*escapes the spontaneous control of the labour inspectorate*".[520] Some studies have highlighted the fear that irregular workers – including domestic workers – have of controls by the labour inspectorate, and the relative impunity that this confers on the employer.[521] Finally, control is also made more difficult by **the lack of a general obligation to declare all types of domestic workers to the National Social Security Office** (ONSS/RSZ). Individuals providing services of an intellectual nature in the home (i.e. house or hotel governess, tutor, etc.) for up to eight hours a week do not have to be declared[522] : the Inspectorate is therefore generally unaware that these persons are assigned to domestic staff.

Solutions are being put in place to improve domestic workers' access to labour inspection. The project *Fairwork for domestic workers*, developed by the non-profit organisation FAIRWORK Belgium, provides access to a secure information desk where domestic workers may seek help and lodge complaints with the labour inspectorate without fear repercussions.[523]

In accordance with ILO Convention 189, specific measures must be taken to ensure effective monitoring of the rights of domestic workers in a way that does not adversely affect their stay in Belgium. Several solutions have been suggested to address this:

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[517] Art. 24, Social Penal Code.

[518] Constitutional Court, judgment no. 102/2019 of 27 June 2019, B.7.1, available at https://www.const-court.be/fr/judgments?year=2019. This judgment finds that there is no discrimination or violation of the right to the home in the difference between the conditions of the search and the visit of an inhabited space by a social inspector.

[519] Myria, Annual Report Trafficking in Human Beings 2020: "Behind Closed Doors", 15 December 2020, p. 19, available at https://www.myria.be/fr/publications/rapport-annuel-traite-et-trafic-des-etres-humains-2020-derriere-des-portes-closes.

[520] Myria, Annual Report Trafficking in Human Beings 2020: 'Behind Closed Doors', *op. cit.,* p. 8.

[521] H. Vandermeerschen, L. Vanduynslager, J. Van Caeneghem, N. Meurens, "Protecting migrant workers from exploitation in the EU: workers' perspectives", *Country report Belgium*, Fundamental Rights Agency, September 2017, p. 43, available at https://fra.europa.eu/sites/default/files/fra_uploads/belgium-selex-ii-report_en.pdf.

[522] Royal Decree of 13 July 2014 repealing Articles 5 and 18 and amending Article 16 of the Royal Decree of 28 November 1969 in execution of the Act of 27 June 1969 revising the Decree-Act of 28 December 1944 concerning the social security of workers, *Moniteur belge*, 28 July 2014.

[523] Myria, Annual Report on Trafficking in Human Beings 2020: 'Behind Closed Doors', *op. cit.,* p. 22.

- the possibility of **exercising prior control** by the Labour Inspectorate **over the inhabited spac**e before domestic work begins[524] ;
- **Strengthen the access of social inspectors to the inhabited space**. For example, standard clauses allowing the inspectorate to visit the workplace could be included in domestic workers' contracts, as is already the case with au pair work[525] ;
- the **creation of a specialised section within the Social Legislation Inspectorate**, on the model of other States such as Uruguay, cited as an example by the ILO[526] ;
- **the introduction of a third-party system**, as suggested by FAIRWORK Belgium and the International Labour Organisation, whereby the domestic worker works for an organisation and is assigned to the inhabited space of a client of the organisation (along the lines of the service vouchers system, which is very popular in Belgium)[527] ;

These recommendations, if put in place, could significantly improve the monitoring and the respect for the labour rights of domestic workers.

Recommendation
Establish a set of measures in order to ensure effective monitoring of the rights of domestic workers, including systematic inspection of the workplace prior to the employment contract's beginning, the reinforcement of the social inspectors' access to inhabited spaces, and the creation of a specialised unit within the Social Legislation Inspectorate.

[524] International Labour Office, *Report IV (1) - Decent work for domestic workers*, International Labour Conference, 99rd session, 2010, § 252, available at https://www.ilo.org/ilc/ILCSessions/previous-sessions/99thSession/reports/WCMS_104701/lang--fr/index.htm.
[525] Art. 26, 9°, Royal Decree of 9 June 1999 implementing the Act of 30 April 1999 on the employment of foreign workers, *Moniteur belge,* 26 June 1999. See also the Fairwork Belgium report, "Davantage de FAIRWORK en Belgique", *op. cit.*
[526] International Labour Office, *Report IV (1) - Decent Work for Domestic Workers, op. cit.,* § 251.
[527] Myria, Annual Report Trafficking in Human Beings 2020: "Behind Closed Doors", *op. cit.* This proposal is supported by the International Labour Organisation and FAIRWORK Belgium, among others.

General conclusion

The legal framework protecting labour-related rights in Belgium is traditionally strong, both in terms of individual labour rights (remuneration, reasonable working hours, protection against harassment at work, …) as with regards to the rights of trade unions and trade union representatives (collective bargaining, information and consultation rights, the right to strike, …). This is especially the case for the ideal type employee (i.e. working full-time on the basis of a labour contract of indefinite duration), since general labour law protection has been designed with such workers in mind.

During the reporting period, no significant decline of the overall protection of labour-related rights has taken place. The regular labour law framework remains protective, even though these rights are not always enjoyed in practice, highlighting the importance of adequate enforcement. Throughout the report, many specific areas have been identified in which there is room for improvement. By way of conclusion, FIRM/IFDH and the co-signing institutions draws the attention of the members of the Committee to a number of general evolutions which have taken place since the last reporting cycle (2014) and which raise concern:

1) New employment statuses have been created which deviate from regular labour law, institutionalizing atypical work and sometimes replacing regular labour. The collaborative economy scheme, which is often used for platform work, does not fall within the scope of labour law nor does it allow for the build-up of social security rights. The flexi job scheme is comparable to zero hour contracts in the sense that it does not provide any guarantee on the numbers of hours worked and the income generated therefrom. While this is partly compensated by the fact that access to the flexi job scheme is restricted to workers who are assumed to enjoy financial security on account of another main economic activity, this assumption is not always met in practice. Other statuses (domestic workers, extra's, unpaid interns, associative work, etc.) also contain numerous weaknesses in terms of the realisation of labour-related rights. The multiplication of these statuses poses problems in terms of the precarisation of the working conditions of the individuals concerned (the *working poor)* and of intelligibility of labour law, thereby also affecting the possibilities for control and enforcement.
2) Furthermore, the pandemic has made the pre-existing precariousness of some forms of work abundantly clear. The vast majority of the working population was well-protected against a loss of income by the extension of the temporary unemployment scheme, even though a small loss of income can already be problematic for families with low incomes. Workers in a precarious labour situation however did not always benefit from access to the social security safety net. For instance, temporary agency workers have not always built up sufficient rights to benefit access to social security, and often their contracts were not extended hampering their access to the temporary employment scheme. Flexi job workers did not see the loss of income from their flexi job compensated, while for many of them such jobs are necessary to make ends meet. Undocumented migrant workers fell entirely out of the scope of the safety net, and consequently became even more dependent on their employer, increasing their vulnerability for exploitation.
3) Labour legislation has become increasingly complex, especially in the area of working time regulations. This makes it increasingly difficult for the Labour Inspectorate to control conformity with such legislation. The Labour Inspectorate is understaffed when measured by ILO standards, which makes it challenging for the Inspectorate to be sufficiently proactive in controlling whether labour rights are protected. This is particularly problematic with regards to workers in a vulnerable situation, who often are afraid to claim their labour rights out of

fear of losing their precarious employment (e.g. temporary agency workers, single-permit migrant workers, undocumented migrant workers) or out of fear for the impact on their stay in Belgium (both single-permit and undocumented migrant workers).

4) Social dialogue in Belgium is marked by its robustness but also by the lack of trust between employers and workers' representatives. It has adapted surprisingly well to the pandemic and has seen relatively few changes since 2014. A number of structural problems however remain, for example the lack of possibility for social consultation and collective bargaining for certain categories of workers (platform workers, prison labour, etc.) or the protection of contractual union representatives in the public sector.

These general concerns, as well as more isolated issues which have been discussed in the preceding chapters, have led to the formulation of several recommendations throughout this report. This is a list of all of these recommendations:

<u>On precarious Labour :</u>

a. Temporary agency workers

1. Evaluate the criteria under which temporary agency work is permitted, with a view to avoiding that temporary agency workers are dependent for a long period on successive contracts with the same user ;
2. Step up the fight against abuses, in particular with regards to the successive use of day contracts.

b. Platform work

3. Evaluate the impact of the so-called 'Labour Deal' on the requalification of self-employed platform workers into employees, to ensure that the reality of economic subordination prevails over the legal fiction of formal self-employment ;
4. Ensure that platform work, including when performed under the collaborative economy scheme, counts towards building social security entitlements.

c. Flexi-job

5. Take the necessary measures to ensure that regular labour is not replaced by flexi jobs in sectors making use of the flexi job scheme, e.g. by making regular labour sufficiently attractive for employers when compared with flexi jobs.

d. Migrant workers

6. Examine how the dependency of single-permit workers on their employer can be reduced, for instance through the adoption of a temporary work and residence permit facilitating a change of employer ;
7. Ensure that undocumented migrant workers are primarily treated as potential victims rather than as violators of migration law ;
8. Suppress the criminalisation of employees undertaking undeclared work ;
9. Remove the reference to the Labour Inspectorate from Article 81 of the Aliens Act, which lists the authorities competent to detect and establish violations of this Act ;
10. Take the necessary measures to ensure that undocumented migrant workers can actually receive the compensation they obtain for unpaid wages (e.g. by providing access to a bank account) ;
11. Give adequate priority to the investigation and prosecution of violations of labour rights, including non-payment of wages, of undocumented migrant workers ;

12. Adopt a Royal Decree designating which organisations are competent to act on behalf of undocumented migrant workers to claim unpaid wages.

On reasonable working conditions (article 2) :

a. **Reasonable working hours**

13. Improve the readability of and simplify working time legislation. In addition, the government and the social partners should encourage the recording of working time to facilitate its control by the relevant inspection services ;

14. Abrogate the exceptional working regime for doctors, dentists, veterinarians, candidate doctors and dentists in training, as well as student trainees and set the maximum working time regime to the standards set by the Labour Act – a maximum of 11 hours per day and 50 hours per week, except in cases of force majeure.
    Alternatively, abrogate the exception introduced by the Act of 12 December 2010, allowing for working more than sixty hours per week ;
15. Update and restrict the list of trusted personnel contained in the Royal Decree of 10 February 1965 ;
16. Base the definition of leading positions on a contradictory procedure inspired by the one used to define leading positions in the context of social elections ;
17. Strengthen controls by the labour inspection services on abuses of classification of leading or trusted positions
18. Adopt of a specific legal framework for prison working hours, which would determine the maximum duration for each type of work carried out (domestic work, workshop work carried out on behalf of the prison authorities or external clients), a mechanism allowing for days off, control measures, and reasonable compensation for periods of time where detainees are deprived of work independently of their will.

b. **On on-call and standby time**

19. Amend legislation contrary to the Court of Justice's ruling *D.J. v. Radiotelevizija Slovenija* on on-call time, such as the Royal Decree of 6 May 1971 ;
20. Clarify the remuneration due for of periods considered as working time, where collective labour agreements are silent on this issue ;
21. Abrogate the exception provided for in the Royal Decree of 14 July 1971 on the working hours of drivers employed in taxi and taxi van companies, which deducts 24% of the time worked.

c. **On the right to a minimum paid annual leave**

22. Enshrine the right to retain and carry over paid leave days in the event of an illness or another form of incapacity during a holiday period ;
23. Ensure that workers who fall under the scheme of Article 17 of the ONSS/RSZ Royal Decree are entitled to paid annual leave for the hours worked under this scheme ;
24. Establish social rights for platform workers: work should in principle allow for the building up of social security rights, including the right to paid annual leave.

d. **On weekly rest periods**

25. Amend the legislation to explicitly prohibit the postponement of the compensatory rest day beyond twelve consecutive working days ;
26. The Committee should rule on the compatibility of this non-recoverable voluntary overtime with Article 2 § 5 of the Charter.

e. On information on the employment contract

27. Render it compulsory to provide all the information prescribed by the Charter in writing in all employment contracts concluded under Belgian law.

f. On night work

28. Provide for consultation of the members of the trade union delegation at company or sectoral level in the event of the introduction or increase of night work.

<u>On reasonable remuneration (article 4):</u>

a. On a minimum wage

29. Ensure that the minimum wage, in combination with social support measures, suffices for families to enjoy a decent standard of living.

b. On prison Labour

30. Ensure that prison labour is conducted on the basis of a labour contract and complies with minimum wage and social security regulations.

c. On In-work poverty

31. Continue the fight against dependent self-employment **;**
32. Facilitate the creation of qualitative and sustainable jobs for persons living in poverty having difficulties accessing the labour market ;
33. Facilitate the creation of qualitative and sustainable jobs for persons with a disability, including through the provision of reasonable accommodation.

d. On the impact of the pandemic

34. Draw the necessary lessons from of the pandemic with a view to improving social protection of the outsiders to the social security system.

<u>On the right to organize and the protection of trade unionist (articles 5 and 28)</u>

a. On the right of organisation

35. Provide access for trade unions to the workplace to undertake recruitment practices.

b. On the protection of trade union representatives

36. Provide protection against dismissal for trade union delegates in the public sector, by adopting a provision in the Royal Decree of 28 September 1984 granting them a similar protection to that enjoyed by trade union delegates in the private sector.

<u>On collective bargaining, collective action and the rights to information and consultation (articles 5, 6, and 22)</u>

a. On collective bargaining

37. The government must respect the primary responsibility of social partners to regulate social affairs through collective bargaining.

b. On the right to strike

38. Respect that the primary responsibility to regulate social affairs through collective bargaining rests upon of the collective partners ;
39. Collect data on unilateral emergency applications against picketing, in order to confirm the stability of the case law. This process should take care to consult the social partners, and to transmit the data collected to the National Labour Council. This data could be collected, for example, by assigning a code to the courts and tribunals that would make it possible to determine, from a certain date, the number of decisions handed down on this matter and their outcome ;
40. Implement sustainable solutions to prison overcrowding and avoid structural understaffing of prison staff. It is also important to restore a relationship of trust between social partners among prison staff, and support a strong social consultation ;
41. Conduct a parliamentary assessment of the impact of public health measures on human rights, including labour rights.

c. On the right to information and consultation

42. Amend the Act of 20 September 1948 on the organisation of the economy so as to provide a legal basis for the transmission of certain personal data – in particular professional details – of workers to the company's trade unions, with a view to facilitating the realisation of the right to information and consultation. Such an amendment will require both consultation with the social partners and an advisory opinion from the Data Protection Authority (GBA/APD).

d. On the right to take part in determining and improving the working conditions

43. The Belgian government should strengthen its efforts to provide comprehensive information to the European Committee of Social Rights about its conformity with Article 22 of the Charter ;
44. Ask the Federal Public Service for Employment, Labour and Social Dialogue to systematically check the existence of clauses excluding executives from elections to trade union delegations in the collective agreements it receives. Enforce the ban on the exclusion of executives from the election of trade union delegation ;
45. Examine an amendment to the Code of Well-being at Work to better integrate to better integrate general prevention and health protection measures with exceptional health measures ;
46. Disseminate and enshrine the good practices of consultation and social dialogue that have been developed at sectoral and intersectoral level.
47. Strengthen the penitentiary 'consultation body' by entrusting it with certain tasks entrusted to the Committee on Prevention and Protection in the Workplace in the ordinary professional sector, with such competence as giving advisory opinion on any project, measure or means concerning the well-being of (prison) workers ; suggesting workplace accommodations ; the development of measures related to the reception of new (prison) workers, their information and training in safety at work ; or monitoring the global prevention plan and its annual action plans ;
48. Strengthen the legitimacy of prisoners' representatives on the consultation body and provide them with sufficient training ;

49. Examine an amendment to the Code of Well-being at Work to better integrate to better integrate general prevention and health protection measures with exceptional health measures ;
50. Disseminate and enshrine the good practices of consultation and social dialogue that have been developed at sectoral and intersectoral level during the pandemic ;

On the protection against harassment (article 26)

51. Adopt the Royal Decree which is necessary for the entry into force of the provisions extending the scope of applicability of the Well-Being Act to domestic workers ;
52. Ensure protection against (sexual) harassment for workers with a disability, including for workers in sheltered workplaces ;
53. Provide more training for labour inspectors, occupational physicians and prevention counsellors on the specificity of sexual violence committed against women with disabilities as well as on reasonable accommodations ;
54. Take the necessary steps to ratify ILO Convention No. 190 as soon as possible.

On the role of labour inspectorates

55. Strengthen the labour inspection services, particularly the Social Legislation Inspectorate, and reach the standard of one inspector (all services) per 10,000 workers set by the International Labour Organisation ;
56. Amend Circular 12/2012 to include the prosecution of discrimination and the protection of people with precarious status in the highest priority category ;
57. Adapt the working methods of the Social Legislation Inspectorate and the Labour Auditorate, with a view to create new, specific, modes of operation, including a more proactive approach to monitoring, when dealing with sectors containing large numbers of vulnerable workers ;
58. Establish a set of measures in order to ensure effective monitoring of the rights of domestic workers, including systematic inspection of the workplace prior to the employment contract’s beginning, the reinforcement of the social inspectors’ access to inhabited spaces, and the creation of a specialised unit within the Social Legislation Inspectorate.