EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON THE MERITS

Adoption: 8 September 2021

Notification: 15 October 2021

Publicity: 16 February 2022

European Youth Forum (YFJ) v. Belgium

Complaint No. 150/2017

The European Committee of Social Rights, a committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 322nd session, in the following composition:

Karin LUKAS, President
Eliane CHEMLA, Vice-President
Aoife NOLAN, Vice-President
Giuseppe PALMISANO, General Rapporteur
József HAJDU
Barbara KRESAL
Kristine DUPATE
Karin Møhl LARSEN
Yusuf BALCI
Ekaterina TORKUNOVA
Tatiana PUIU
George THEODOSIS
Mario VINKOVIC
Miriam KULLMANN

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 30 June 2021 and 8 September 2021,

On the basis of the report presented by József HAJDU,

Delivers the following decision adopted on this latter date:

PROCEDURE

1. The complaint presented by the European Youth Forum ("YFJ") was registered on 11 May 2017.

2. YFJ alleges that the Volunteer Rights Act of 3 July 2005, permitting the practice of unpaid internships, and the lack of enforcement of a number of provisions in the national legislation regulating internships, violate Articles 4§1 (the right of workers to a remuneration such as will give them and their families a decent standard of living) and 7§5 (the right of young workers and apprentices to a fair wage or other appropriate allowances) in conjunction with Article E (non-discrimination) of the Revised European Social Charter ("the Charter").

3. On 5 December 2017, the Committee declared the complaint admissible, in accordance with Article 6 of the Additional Protocol to the European Social Charter providing for a system of collective complaints ("the Protocol").

4. In its decision on admissibility, the Committee invited the Government to make written submissions on the merits of the complaint by 15 February 2018 in application of Article 7§1 of the Protocol and Rule 31§1 of the Committee's Rules ("the Rules").

5. Pursuant to Article 7§§1, 2 of the Protocol and Rule 32§§1, 2 of its Rules, the Committee invited the States Parties to the Protocol, the States having made a declaration in accordance with Article D§2 of the Revised Charter, and the international organisations of employers or trade unions referred to in Article 27§2 of the 1961 Charter, to submit observations, if they so wished, on the merits of the complaint by 15 February 2018.

6. On 13 February 2018, the Government asked for an extension of the deadline for submitting its submissions on the merits. In conformity with Article 7§1 of the Protocol and in application of Rule 28§2 of the Rules, the President of the Committee has decided to extend this deadline to 15 March 2018. The Government's submissions on the merits were registered on 22 March 2018.

7. The President has also accepted the requests of the European Trade Union Confederation ("ETUC") and the International Organisation of Employers ("IOE") to extend the deadline for the presentation of their observations to 28 February 2018. Observations by ETUC and by IOE were registered on 28 February 2018.

8. Pursuant to Rule 31§2 of the Rules, the President invited the YFJ to submit a response to the Government's submissions by 30 May 2018. Pursuant to Article 7 of the Protocol and Rule 28§2 of the Rules, the President decided, at the request made

on 9 May 2018 by the YFJ, to extend the deadline to 13 June 2018. The response of the YFJ was registered on 13 June 2018.

9. Pursuant to Rule 31§3 of the Rules, the President of the Committee invited the Government to submit a further response by 3 August 2018. Pursuant to Article 7 of the Protocol and Rule 28§2 of the Rules, the President decided, at the request made on 18 July and 28 August 2018 by the Government, to extend the deadline to 5 September 2018. The Government's further response was registered on 5 September 2018.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

10. YFJ invites the Committee to find a violation of Articles 4§1 (the right of workers to a remuneration such as will give them and their families a decent standard of living) and 7§5 (the right of young workers and apprentices to a fair wage or other appropriate allowances) of the Charter, on the ground that in practice, the Belgian Volunteer Rights Act of 3 July 2005 results in widespread use of unpaid internships (outside of secondary and post-secondary education). Moreover, it is alleged that a number of legislative provisions aiming to curtail such unpaid internships are not duly enforced. According to the YFJ, the Labour Inspectorate has proven to be inefficient in detecting and preventing abusive replacing of paid jobs with unpaid internships. Under Article E of the Charter (non-discrimination) in conjunction with Articles 4§1 and 7§5, the YFJ alleges that non-payment of interns results in discrimination against those young people who are unable to afford to work for extended periods of time without pay, but also against the unpaid interns themselves by denying them the right to fair wages while guaranteeing this right to other categories of workers.

B – The respondent Government

11. The Government rejects YFJ's allegations and requests the Committee to find that the situation in Belgium is in conformity with Articles 4 and 7 of the Charter and that the complaint is therefore unfounded.

OBSERVATIONS OF THE THIRD PARTIES

A – International Organisation of Employers (IOE)

12. The IOE submits, firstly, that the allegations made by the YFJ are very general and not substantiated by any statistical data or empirical evidence. According to the IOE, the YFJ does not demonstrate, with supporting figures, the extent of the phenomenon of unpaid internship it denounces.

13. Secondly, the IOE underlines that, in Belgium, in recent decades, most of the powers relating to the numerous measures intended to promote the integration of young people into the labour market have been transferred to the federated entities, either to regions or communities. Considering the numerous authorities having the power to legislate in the matter, the measures are the subject of a plethoric regulation. In their observations, the IOE refers to a non- exhaustive list of standard internship and apprenticeship agreements in force in Belgium and highlights the measures contained in those agreements aimed at protecting young people in their transition from education to employment:

- Industrial apprenticeship contract (Act of 19 July 1983), the purpose of which is to train an apprentice in the exercise of a remunerated profession. An apprenticeship allowance is due for both practical and theoretical training, the amount of which is set at the sectorial level by an apprenticeship regulation (established by the executive branch, on the proposal of the relevant joint committee).

- The contract for vocational training in enterprises is generally aimed at encouraging the integration of job seekers with employers who offer vacant jobs through a specific vocational training programme. During this training, the status of jobseeker and the unemployment allowance which the trainee was entitled to before the beginning of his/her training are maintained; a “productivity bonus” or “supplementary incentive” are paid monthly by the employer; at the end of the training, the employer is obliged to hire the jobseeker on the basis of an employment contract for at least the same duration of the training and for a function corresponding to the occupation learned during the training.

- Business transition internship: At the end of their studies, young people under the age of 25 may complete an “insertion course” after which they are entitled to “integration allowances” if they have not found a job during the so-called insertion course. During their insertion course, they have the opportunity to complete a “business transition internship”. The purpose of this internship is to allow the young person to have an experience in the labour market with an internship provider for a minimum of 3 months and a maximum of 6 months. During the transition internship, the young intern is entitled to a daily internship allowance from the National Employment Office and a monthly supplementary allowance paid by the internship provider.

- Professional immersion agreement (Programme Act of 2 August 2002): this agreement provides an opportunity for any person to acquire certain knowledge or ability from an employer in the framework of their training by performing work. The agreement is characterized by a concrete project in which the work services are only a means at the service of the training objective. A minimum compensation, the amount of which is set by royal decree, must be paid by the training provider.

- First employment agreement (“Rosetta Plan”): the Rosetta Plan obliges employers with at least 50 workers to hire a minimum quota (3% of the staff in private sector) of young workers on the basis of a first job agreement (act of 24

December 1999 on job promotion). First employment agreement can be based either on an ordinary employment contract (within the meaning of the act of 3 July 1978 on employment contracts) or on an apprenticeship agreement or a "socio-professional integration" agreement.

14. In addition to the measures provided in those specific agreements, according to Article 42§1 of the Employment Promotion Act of 24 December 1999, employers of private sector are obliged, regardless of the number of workers they occupy individually, to make available each year a number of integration internship positions proportional to one per cent of their total number of staff. Moreover, young job seekers who do not justify a sufficient period of work to qualify for unemployment benefits, may claim a right to "integration allowance", once they have previously completed their "insertion course" (see, point 3 in §13 above). The duration of this allowance is 36 months, possibly extending an additional 6 months.

15. As to the Volunteer Act of 3 July 2005, the IOE explains that this act sets out the normative framework for non-profit associative work and protects the rights of volunteers who intend to provide their free time and work force to those associations which need it. It imposes a condition of non-purpose of lucre that excludes any activity in the commercial sector or operated by a commercial company. The act is therefore limited to the work of volunteers carried out in an associative setting and does not apply in the alternative to young unpaid trainees for the sole reason that they commit without financial consideration. According to the IOE, the Volunteer Act applies only to volunteers considered as "social cohesion schemers" who do not seek to develop skills or connections professionally, nor to optimize their employability in the labour market. Therefore, the Volunteer Act is not the relevant legislation concerning internships in Belgium and the assertion that the Act is the cause of the use of unpaid internships is unsubstantiated.

16. The IOE also refutes the allegation that a category of young people is discriminated against because of the existence of unpaid internships. Different normative provisions, either at federal or federated level, provide an opportunity for young people wishing to increase their chances of obtaining their first job through industrial apprenticeship contracts, to conclude contracts for vocational training in enterprises, business transition internships and professional immersion agreements. At the end of their studies, young people therefore have many legal tools to carry out an internship with allowance, or failing that, can benefit from integration allowances for a period between 36 and 42 months (see §14 above). In addition, institutions that implement the above-mentioned legislations, such as Actiris (Brussels Regional Office for Employment), Forem (Office for Employment in the Walloon Region), VDAB (Office for Employment in the Flemish Region), provide young people with information about existing opportunities.

17. Considering that the allegations are based on assumptions and opinions, rather than empirical data and evidence and that they contain incorrect references to Belgian

legislation, the IOE takes the view that Articles 4 and 7 of the Revised Charter are not violated in the instant case.

B – European Trade Union Confederation (ETUC)

18. The ETUC underlines firstly that for many years and in particular since the economic crisis in 2008, apprenticeships, trainee and internships, and more recently voluntary work/volunteering, have been heavily promoted to enhance the employability, skills and competences of young persons. This enhanced attention has led to the introduction or a reshaping of a multitude of traineeship/apprenticeship schemes which, in turn, has led to a very confusing picture in relation notably to the rights and obligations of all actors involved in those different schemes.

19. According to ETUC, the lack of clarity concerns in particular the exact link between the Volunteer Rights Act and Belgian labour law and the applicability of the latter in the context of volunteer work. Referring to the notion of "assimilated persons" (*gelijkgestelde personen*), i.e. persons who, without an employment contract, perform work under the authority of another person, the ETUC explains that the tendency in domestic case law and legal doctrine is to expand the application of, or parts of, the labour law to other categories beyond the traditional workers and employers and in particular to persons who provide work under the same conditions as "normal" workers. The ETUC also refers to the *travaux préparatoires* and a number of provisions of the 2005 Volunteer Right Act, and explains that the legislator is aware of the fact that, in some circumstances, volunteer work can exhibit a lot of similarities with work performed by normal workers and the purpose of those provisions, as confirmed by the *travaux préparatoires,* is to avoid that volunteer work would be abused as a cheap alternative for paid (professional) work and amount to a sort of "bogus volunteer work".

20. The ETUC explains that as a result of this risk of abusive job replacement by volunteer work (i.e. permanent or temporary jobs replaced by non-remunerated volunteering), the labour inspection continued to keep its competence to control such cases of abuse in the framework of the implementation of the Volunteer Rights Act, as confirmed also by the debates before the Belgian Parliamentary Commission of Social Affairs on the draft 2005 Volunteer Rights Act. Nevertheless, the ETUC expresses its deep concern about the "pragmatic approach" to this inspection, as evidenced in the statement made by the representative of the Minister of Work before the Commission of Social Affairs that it "*was not the intention to systematically inspect voluntary organisations which did not conduct commercial activities and serve a societal purpose; however, the possibility to prevent abuse in semi-commercial purposes has to be upheld.*" As a result of this "pragmatic approach" where the inspection depends on the individual legal/judicial complaint introduced by the concerned volunteer, according to the ETUC, a search on the websites of the different labour law/social security inspection services in Belgium reveals no information on inspections of volunteer work and certainly no statistics on such eventual inspections. For the same

reasons, there hardly exists any case law on the particular situation of unpaid internships in the framework of volunteer work or more broadly “outside formal education” circumstances despite the high risk of abuse in these circumstances.

21. The ETUC underlines that Belgium, and in particular Brussels, are not only host of the headquarters/regional offices of important international and European political institutions but also of an important number of international non-governmental and lobbying organisations which tend to make use of internships and volunteers for their activities. This is an exacerbating factor with respect to the number of persons who could be doing such internships but at the same time, also as regards the number of interns whose social rights are not respected, including those rights concerning fair pay or compensation. The ETUC refers to a research conducted by “Brussels interns NGO” which launched in 2016 a campaign “Just Pay! Unpaid is illegal!” and which found around 60 worrying cases of adverts for internships, within the framework of a period of one year, which were unpaid or at least left it unclear what would be eventually paid. Un(der)paying employers include, according to the ETUC, media outlets, lobby groups and human rights organisations. The ETUC also refers to the Government’s observations on the admissibility of this complaint and observes that some of the Regions also accept the reality of the practice of unpaid internships.

22. Referring to various international law materials, resolutions and reports, the ETUC underlines that although Belgium belongs to the category of countries that has a well-elaborated legal framework for all trainee/internships schemes and a specific legislation on volunteer work, there are several problems both in law and practice which relate in particular to:

- the uncertainty and the lacking clarity of the legislative framework providing a legal status, clear definitions, identification of the respective rights and obligations of concerned actors and protection of social rights of unpaid internships (under the Volunteer Rights Act);

- The lack of, or at least, insufficient monitoring and enforcement mechanisms (including the lack of data and the resulting uncertainty on the number of unpaid interns involved) due to the “pragmatic” and “restricted” approach taken by the Belgian authorities in relation to inspection in this respect;

- The existing and continuing practice of using/allowing unpaid internships (both inside and outside the framework of formal education).

23. In conclusion, the ETUC supports the complaint introduced by YFJ against Belgium and considers that the practice of unpaid internships and lack of effective monitoring/inspection is in violation of Articles 4§1 and 7§5 of the Charter.

RELEVANT DOMESTIC LAW AND PRACTICE

1. Volunteer Rights Act of 3 July 2005 (as amended by Act of 1 March 2019)

24. The Volunteer Rights Act provides a comprehensive legal framework that regulates volunteering on Belgian territory, as well as volunteering that is exercised outside Belgium, but organised from Belgium, provided that the volunteer has his main residence in Belgium.

25. Chapter II (Article 3) of the Act provides for the definitions of a number of specific terms used in the provisions of the Act:

> "Chapter II. – Definitions:
>
> Article 3. For the purposes of this Act, (…)
>
> (1) volunteering: any activity:
> (a) which is exercised without remuneration or obligation;
> (b) which is carried out for the benefit of one or more persons other than the person who operates, a group or organisation, or the community as a whole;
> (c) which is organised by an organisation other than the family or private setting of the person who carries out the activity;
> (d) and not exercised by the same person and for the same organisation under an employment contract, service contract or designation as a statutory agent;
>
> (2) voluntary: any natural person who engages in an activity referred to in paragraph 1 [including those in charge of a mandate or who are members of a management body in an organisation referred to in paragraph 3];
>
> (3) organisation: any association of fact or legal person under public or private law, not-for-profit, which uses volunteers (association of fact is any association devoid of legal personality and composed of two or more persons who organise, by mutual agreement, an activity with a view to achieving a non-profit objective , excluding any distribution of profits between its members and directors, and who have direct control over the operation of the association.);"

26. Chapter III (Article 4) gives details concerning the information that the not-for-profit organisation as defined under Chapter II, Article 3 (3), is obliged to provide to the volunteer before the latter starts performing his/her volunteer work:

> "Chapter III. – The obligation to inform
>
> Article 4. Before the volunteer starts working in an organisation, the organisation (…) informs him/her of:
>
> (a) not-for-profit purpose and the legal status of the organisation; Whether it is a de facto association, the identity of the association's officials;
> (b) the insurance contract, covered by Article 6 (1), which the organisation contracted for the voluntary work; if it is an organization that has not civil liability, within the meaning of Article 5, for the damage caused by a volunteer, the liability regime that applies for the damage caused by the volunteer and the possible coverage of that liability through an insurance contract;
> (c) possible coverage, through an insurance contract, of other risks associated with volunteering (…);
> (d) of the possible payment of an expense for volunteering and, where applicable, the nature of the expense and the cases in which it is paid;

(e) of the volunteer's duty of discretion and, if necessary, to professional secrecy covered by Article 458 of the Penal Code, taking into account the causes of legal justification with respect to solicitor-client privilege.

The information in paragraph 1 may be provided in any form. The burden of proof rests with the organisation."

27. Chapter VII (Article 10) regulates the payments which can be made by the organisation in case the volunteer incurred costs for the organisation in the framework of the volunteer work:

"Chapter VII. Expenses received in the context of volunteering

Article 10. The unpaid nature of the volunteering does not prevent the volunteer from being paid by the organisation of the costs he has incurred for it. The volunteer is not obliged to prove the reality and the amount of these fees, provided that the total amount of payments collected does not exceed 24.79 euros per day and 991.57 euros per year. These amounts are related to the pivotal index 103.14 (base 1996 = 100) and vary as provided for by the act of 2 August 1971 organizing a system of linkage to the consumer price index of treatments, salaries, pensions, allowances and subsidies paid by the public treasury, certain social benefits, salary limits to be taken into account when calculating certain social security contributions for workers , as well as social obligations imposed on the self-employed.

If the total amount of payments that the volunteer received from one or more organisations exceeds the amounts covered in paragraph 1, these payments can only be considered a reimbursement of the costs incurred by the volunteer for the organisation or for the organisations if the reality and the amount of these fees can be justified by evidence. The amount of the fees cannot be higher than the amounts set in accordance with the Royal Order of July 13, 2017 setting out allowances and allowances for federal public service staff.

Concerning the volunteer, it is forbidden to combine the lump sum payment with that of the actual costs.

However, it is possible to combine the lump sum payment and the reimbursement of actual travel costs for up to 2,000 kilometres per year per volunteer. The maximum amount that can be allocated annually per volunteer for the use of public transport, personal vehicle or bicycle, may not exceed 2,000 times the mileage allowance set out in section 74 of the Royal Order of 13 July 2017 setting out the allowances and allowances of federal public service personnel.

This 2,000-kilometre limit does not apply to regular passenger transportation activities. When several activities are carried out, the limit of 2,000 kilometres can only be exceeded for kilometres travelled as part of the regular transport of people.

With regard to the use of the personal vehicle, these actual travel expenses are set in accordance with the provisions of Article 74 of the same royal decree of 13 July 2017. Actual travel costs related to the use of a bicycle are set in accordance with the provisions of Article 76 of the same royal decree of 13 July 2017.

Gifts, as defined in Articles 19§2, 14°, of the Royal Order of 28 November 1969, (…) are not taken into account in determining lump sum and actual payments for volunteers."

28. Chapter VIII of the Act regulates the situation of volunteers who already benefit from unemployment allowance, work disability compensation or family allowance, etc.

"Article 13. Unemployed An unemployed person who is compensated may volunteer while retaining his allowance, provided that he makes a prior and written declaration to the unemployment office of the National Employment Office.

The director of the unemployment office may prohibit the exercise of the activity with the retention of allowances or accept it only with certain restrictions, if s/he can prove that:

(1) the activity does not have the characteristics of volunteering within the meaning of this Act;
(2) the activity, by its nature, duration and frequency or because of the framework in which it fits, does not or more present the characteristics of an activity usually carried out by volunteers in associative life;
(3) that the availability of the unemployed for the labour market would be reduced.
(…)

Section III – work disability

Article 15. In Article 100 (1) of the Mandatory Health Care insurance and Allowances Act, coordinated on 14 July 1994, the following paragraph is inserted between paragraphs 1 and 2:
"Voluntary work within the meaning of the law of 3 July 2005 on the rights of volunteers is not considered an activity, provided that the medical consultant finds that this activity is compatible with the general state of health of the person concerned."

Article 19

In Article 62 of the Laws on Family Allowances for Salaried Workers coordinated by the Royal Order of 19 December 1939, replaced by the Act of 29 April 1996, it is inserted a new paragraph 6, written as follows:
"6. For the purposes of these laws, volunteering under the Voluntary Rights Act of 3 July 2005 is not considered a lucrative activity. Compensation under section 10 of the aforementioned Act is not considered income, profit, gross remuneration or social benefit, provided that volunteering does not lose its unpaid character under the same section of the same law."

2. Programme Act of 2 August 2002 (professional immersion agreement)

29. Articles 104-112 of this Act regulate the professional immersion agreements in the context of which any person (trainee) as part of his/her training, acquires certain knowledge or skills with an employer by performing work services.

30. The explanatory note to this Act explains that currently, different systems and immersion formulas in the labour sector exist: apprenticeship, work-study training, professional training in companies, internships organised at the end of studies, etc. While a number of practical training sessions are organised or framed by virtue of decrees and ordinances, in recent years, emerges new internship formulas in companies that are organised in a "spontaneous" way without being part of an existing regulation or without being supervised by a competent body dependent on or approved by the community or the region concerned. According to the explanatory note, it is therefore necessary to guarantee a legal framework for work services that take place during these internships, respecting the powers of the federal state, communities and regions. The act consequently sets out minimum conditions to be met when entering into a professional immersion agreement: written agreement and the recognition of the right to compensation. The note also indicates that in doing so, the different community or regional regulations which organise this kind of practical training with an employer

are respected and it is ensured that all those training conventions offer at least minimum equivalent protection.

31. Under Article 104 which determines the scope of application of Chapter X (Professional immersion agreements), the following is excluded from the scope of application of this Act:

> 1. Training activities which take place within the framework of an employment contract within the meaning of the Act of 3 July 1978 relating to employment contracts;
>
> 2. The work performed by a pupil or a student with an employer as part of the trainings s/he follows in an educational institution or a training organisation created, subsidized or approved by the competent community or the region, provided that the total duration of these work does not exceed sixty days with the same employer or internship supervisor during a school or academic year for educational establishments or during a calendar year for training organisations;
>
> 3. Traineeships, the duration of which is explicitly fixed by the competent authority as part of a course leading to the issuing of a diploma, certificate or attestation of professional competence;
>
> 4. (…) Measures implemented by or by virtue of decrees, orders or collective labour agreements concluded within a joint body in accordance with the act of 5 December 1968 relating to collective labour agreements and joint committees;
>
> 5. Interns who are preparing for the exercise of a liberal profession or provider of intellectual services and who are, during their internship, subject to the ethics of an order or institute created by legal or regulatory provisions.

32. According to Article 105 (as amended by Act of 3 June 2007), the professional immersion agreement must be documented in writing, individually for each trainee, at the latest at the time where the trainee begins the fulfilment of this agreement. Under Article 106, In the event that training in the framework of the professional immersion agreement is not organised following an initiative or under the responsibility of an educational institution or a training organisation depending or approved by the community or the competent region, the written agreement referred to in Article 105, should include at least the following items:

> 1. with regard to the trainee: the surname, first names and the main residence;
> 2. with regard to the employer: last name, first name and the main residence or the company name and headquarters;
> 3. the place of execution of the agreement;
> 4. the object and duration of the professional immersion agreement;
> 5. the daily and weekly presence in the company;
> 6. the agreed compensation or the method and basis of calculation of compensation;
> 7. the way in which the professional immersion agreement is terminated;
> 8. the training plan agreed between the parties and approved by the competent authorities.

33. According to Article 107, the minimum compensation applicable to any professional immersion agreement is determined by the King by decree deliberated in the Council of Ministers, without prejudice to the competence of the joint committees to set higher minimum amounts. It may not be less than the amount of the compensation referred to in Act of 19 July 1983 on apprenticeship performed by salaried workers (see below). According to paragraph 2 of the same provision, Article 18 of the Act of 3 July 1978 relating to employment contracts (see below) is applicable

in the context of professional immersion agreements, including contracts excluded by virtue of Article 104(2) and (4).

3. Social Criminal Code of 6 June 2010 (as amended by Act of 17 March 2019)

34. According to Article 186, the employer or his agent who, in contravention of Royal Decree No. 5 of 23 October 1978 relating to keeping of social documents, is punished with a level 2 sanction, if:

> 3. S/he does not keep the contract relating to (…) a professional immersion agreement;
> 4. S/he fails to issue the contract relating to (…) a professional immersion agreement;
> 5. S/he issues the contract relating to a (…) professional immersion agreement in an incomplete and accurate way;
> 6. S/he does not take the necessary measures so that the contract relating to (…) a professional immersion agreement (…) is made available at all times to the officials and agents responsible for monitoring.

4. Act of 19 July 1983 concerning apprenticeship performed by salaried workers (as amended by Decree of 20 July 2016)

35. According to Article 2(2) of the Act of 19 July 1983, in enterprises employing 20 or more, but less than 50 workers, apprenticeship contracts can be concluded for professions exercised by salaried workers with the exception of domestic workers, following the request of the joint apprenticeship committee with the joint apprenticeship committee of the National Labour Council. This is a fixed-term contract by which the employer undertakes to provide to the apprentice, training for the exercise of the chosen profession, and by which the apprentice is obliged to learn the practice of the profession under the authority of the employer and to follow, under his/her supervision, the courses necessary for this training (Article 3).

36. The apprenticeship contract can only be concluded by a young person who has satisfied full-time compulsory education and this contract must be concluded, as far as the apprentice is concerned, before the age of 18 (Article 4). However, the young person who has successfully completed a full cycle of training for a profession and who therefore holds a diploma or certificate proving that he/she has a certain qualification in this profession, can no longer conclude an apprenticeship contract with a view to achieve the same level of qualification in this profession (Article 5(3)). The duration of the apprenticeship contract cannot be less than six months (Article 13).

37. According to Article 25, the apprentice receives a monthly apprenticeship allowance from the employer both for practical training in the company and for the complementary and general theoretical training. The method of calculation of the apprenticeship allowance is set out in the apprenticeship regulation established by the King, on the proposal of the competent joint apprenticeship committee (Article 47 (2)). The King sets, after consulting the National Labour Council, the maximum apprenticeship allowance, as a percentage of monthly minimum average income for workers of 21 years old as set by the collective labour agreement concluded within the National Labour Council (Article 25(2)). After consulting the National Labour Council, the King sets the conditions and modalities according to which the employer can reduce the amount of the allowance in the event of the apprentice's unjustified absence

from the general theoretical and complementary training (Article 25(3)1). According to Article 25(4)), the apprenticeship allowance is considered as remuneration within the meaning of the Act of 12 April 1965 on the protection of workers' remuneration.

5. Ordinance of 10 March 2016 relating to internships for job seekers (Brussels-Capital Region)

38. Internship, in the sense of this Ordinance, is any formative professional experience with an internship provider aiming to promote the integration or reintegration of a job seeker into the labour market (Article 4). In order to be eligible for the internship, jobseekers must be registered with Actiris as an unoccupied jobseeker and be domiciled in the Brussels-Capital Region (Article 5). The duration of the internship cannot be less than 1 month nor exceed 6 months (Article 6). The internship is regulated by an agreement concluded between the intern, the internship provider and a public training body when the agreement contains a support plan, or with Actiris, when the agreement contains a support plan (Article 8).

39. According to Article 10, the trainee receives an internship allowance for the duration of his/her internship. The Government (of the Brussels-Capital Region) fixes the amount and the terms of payment of the allowance. However, if the trainee already receives or satisfies the conditions for receiving unemployment allowance, s/he cannot receive internship allowance (Article 11(1)). The intern can obtain an additional allowance corresponding to the difference between the daily amount of the internship allowance and the unemployment allowance if the latter is lower (Article 11(2)). The internship allowance cannot be granted for the days during which the intern is absent without justification (Article 13(2)).

6. Decree of the Government of the Brussels-Capital Region relating to the internship of first professional experience of 29 September 2016

40. Relevant parts of this Decree provide:

> "Article 1
>
> The first professional experience internship allows a young unemployed jobseeker registered after studies with Actiris to acquire a first professional experience, the objective of which is to integrate the young person, after the internship, directly and sustainably in the labour market by removing the obstacles that might be encountered when accessing it.
>
> Article 2
>
> The first professional experience internship is regulated by an internship agreement concluded between the intern, the internship provider and Actiris.
>
> Article 3
>
> A support plan for the intern is appended to the internship agreement. The support plan includes at least the relevant information relating to the internship provider, the terms of the internship as well as the respective commitments of the internship provider, Actiris and the intern.

Article 4

In order to be eligible for this internship, the young person must, at the beginning of the internship, under 30 years old and hold, at most, an upper secondary education diploma or certificate, be domiciled in the Brussels-Capital Region, be registered with Actiris as a job seeker, unoccupied for at least 78 days.

(…)

Article 8

Actiris ensures the follow-up of the internship for both the intern and the internship provider.

Article 9(1)

Before the beginning of the internship, the internship provider has the obligation to ensure the trainee against industrial accidents and commuting accidents, as well as for any damage that the trainee could cause to third parties in the exercise of its tasks through civil liability insurance.

(…)

Article 11

The intern receives a daily internship allowance set at 26.82 euros, subject to adjustment annually by the Minister of Employment. The internship allowance, referred to in the previous paragraph, is paid monthly by the body or bodies designated by the Minister of Employment.

Article 12

The internship provider pays the intern, in addition to the allowance provided for in Article 11, a monthly allowance of 200 euros subject to adjustment annually by the Minister of Employment.

(…)"

Article 14

1. Actiris takes the initiative or is informed by the trainee of any violation of the ordinance of 10 Mars 2016, of the present decree, of the internship agreement or of the support plan. Actiris notifies the internship provider without delay by registered letter of the finding of this violation and gives the provider to present its defence (…).

2. After examining the observations of the internship provider and, if necessary, receiving the testimonies of the intern and the internship provider, Actiris may (…) decide to refuse the internship provider, for a period of 1 year minimum and 5 years maximum, the possibility of hosting an intern, in the event of:
(…)
- non-payment of the internship allowance provided for in Article 12 of this decree;
-premature termination of the internship; (…)
- non-compliance with the internship agreement or the support plan. In this case, Actiris may also decide to immediately withdraw all trainees who are still accompanied by the traineeship provider at the time of this decision.

3. Actiris notifies its reasoned decision by registered letter to the internship provider, as well as to all interns affected by this decision. (…)"

7. Employment Promotion Act of 24 December 1999

41. Chapter VIII of this Act concerns the “first employment agreement” (“Rosetta Plan”):

> Article 27 (as amended by Act of 15 May 2014)
>
> “For the purposes of this chapter, a first-employment agreement” is defined as a first-time employment agreement:
>
> 1. a part-time contract at least between one young person and an employer;
> 2. a combination of a part-time contract between a young person and an employer and a training followed by the young person starting from the day the young person begins the execution of his/her employment contract;
> 3. (…) b. any other type of training or insertion agreement or contract that the King determines.”

42. Article 39 regulates the obligation of public and private employers to recruit, under certain conditions, employees under the first employment agreement:

> Article 39
>
> “1. Public employers, who have a unit-based workforce of at least 50 workers on 30 June of the previous year, must employ an additional number of new workers (…), calculated in full-time equivalent, in the second quarter of the previous year. The King determines this number by a deliberate decree in the Council of Ministers.
>
> 2. Private employers, who have a unit-based workforce of at least 50 workers on June 30 of the previous year, must employ new workers up to 3% of their full-time equivalent staff in the second quarter of the previous year.”

43. Articles 33 and *seq.* concern the amount of minimum wages payable to employees recruited under the first employment agreement:

> Article 33
>
> “The new worker employed in the private sector, including in the non-commercial private sector, as part of the first employment agreement set out in Article 27, 1 and 2, is entitled to a wage which a worker in the same position can claim, in accordance with the to the salary scale that is applicable in the company. The new worker employed in the public sector under the first employment agreement defined in Article 27, 1 and 2, is entitled to pay equal to the initial remuneration granted to a staff member with the same professional qualification, as established by the diploma or certificate of study. The new part-time worker is entitled to the remuneration covered by paragraph 1, reduced in proportion to the length of work provided under the first-job agreement set out at Article 27, 1 and 2.
>
> However, the first employment agreement set out in Article 27, paragraph 1, may provide that, during the first 12 months of performance, the employer spends a portion of the compensation to the training of the new worker.
>
> In this case, the new worker is, for the period referred to in paragraph 1, entitled to equal pay to the salary referred to in paragraph 1, reduced by the [training] part covered in paragraph 1, but the reduction cannot be more than 10% of that salary and the salary less than the minimum guaranteed monthly income.
> (…)”

RELEVANT INTERNATIONAL MATERIALS

1. Committee of Ministers - Council of Europe

44. The Committee of Ministers of the Council of Europe, in its Recommendation CM/Rec(2015)3 on access of young people from disadvantaged neighbourhoods to social rights, considered that "[y]oung people living in disadvantaged neighbourhoods face serious challenges in their transitions to the working life including a lack of qualifications, poor self-confidence, stigma or discrimination, and once in the labour market, often experience precarious working conditions. These challenges are exacerbated by the fact that the neighbourhoods in which they live are often peripheral, isolated and segregated." The Committee therefore considered in particular that the following measures are effective in facilitating the transition of young people from disadvantaged neighbourhoods to sustainable and secure employment:

> "ii. Employment and education
>
> – adapting apprenticeship, training and vocational programmes so that they are inclusive, linked to employment opportunities and have clearly defined paths of progression;
>
> – developing all efforts (in particular through legislation) to ensure that apprenticeships are adequately remunerated, so as to be a viable option for young people from disadvantaged neighbourhoods;
>
> – ensuring (in particular through legislation) that internships are a secure and legal form of employment and a viable entry point into the labour market for young people starting out. Involving employers in the process can ensure better results;
>
> – improving existing and developing new approaches to youth information and career counselling, taking into account the specific barriers experienced by young people from disadvantaged neighbourhoods in searching for and acquiring vocational training opportunities, apprenticeships and later employment;
>
> (…)"

45. In its Recommendation CM/Rec(2016)7 on young people's access to rights (Appendix), the Committee of Ministers stated that members States should undertake to:

> "3.1. With regard to access to education:
>
> (…)
>
> - Increase efforts to recognise non-formal learning and youth work (Strasbourg process) and ensure compatibility with the standards and quality of vocational education and training (VET) as well as higher education and qualifications (Bologna process and Copenhagen process).
>
> (…)
>
> 3.2. With regard to autonomy and social inclusion of young people:
>
> (…)

facilitate smooth transition from education to the labour market, ensuring that internships and apprenticeships, acknowledged as important steps in the transition process, are quality experiences that have a clear educational value and are decently remunerated and regulated;

remove barriers depriving young people access to quality jobs, which can support a decent standard of living;

(…)

ensure policies reflect and address the special needs of young people living in rural areas and disadvantaged neighbourhoods, by improving access to education, employment, housing and transport.

3.6. With regard to access to information and protection

(…)

provide effective mechanisms for informing and advising young people of their rights and the possibilities for seeking redress if these rights are violated or withheld. Such mechanisms must be accessible to all groups of young people, especially those who are at risk of being discriminated against or socially excluded and who have fewer opportunities. In addition, legal advice and representation should be provided to all young people who cannot afford it;

(…)

46. The Explanatory Memorandum to the Recommendation CM/Rec(2006)7 after underlining that "young people are finding the transition from dependency to autonomy increasingly precarious" and that "[t]he transition from education to employment is getting more and more difficult for young people to navigate", considers that:

"41. With the growth in the use of unpaid internships and low-paid apprenticeships as first steps to accessing the labour market, young people who for one reason or another do not have available to them financial support from their families face particular challenges. Internships provide an important step in the transition process for some, but they should be properly compensated to protect equal opportunities and to support young people's right to autonomy and to a decent standard of living. Internships can be exploitative, with too many young people moving between several badly paid or unpaid internships. There is mounting evidence that internships outside formal education are frequently replacing quality employment for young people. Ensuring young people have full access to rights in this area requires improved protection from bad practice such as the perpetuation of internships, as well as the application of quality standards and a system of certification to support the recognition of knowledge and skills acquired through internships and apprenticeships."

2. International Labour Organisation (ILO)

47. In its 2012 Resolution "The youth employment crisis: A call for action", ILO considered that:

"24. The global economic and financial crisis exacerbated old problems and created new ones:

The slow and insecure transition from school to work generates further difficulties for integration in the labour market as a result of lack of experience. In this context, internships, apprenticeships and other work-experience schemes have increased as ways to obtain decent

work. However, such mechanisms can run the risk, in some cases, of being used as a way of obtaining cheap labour or replacing existing workers.

(…)

26. Governments should give serious consideration, as appropriate, to:

(…)

(e) Regulating and monitoring apprenticeship, internship and other work-experience schemes, including through certification, to ensure they allow for a real learning experience and not replace regular workers.

(…)

(i) Supporting the training of trainers which has emerged as one of the major needs in expanding the skills development system

27. Social partners should give serious consideration, as appropriate, to:

(d) Raising awareness about labour rights of young workers, interns and apprentices.

(…)

47. Recent national experience demonstrates that, during economic downturns, well-designed and targeted wage subsidies can facilitate the entry of young workers into the labour market and moderate the depreciation of skills. However, proper monitoring and supervision are required to prevent these measures from being abused. (…)

48. Governments should give serious consideration, as appropriate, to:

(…)

(j) Designing, monitoring and properly supervising policy measures such as wage subsidies to guarantee that they are time bound, targeted and not abused. Linking these policies to skills transfer training is also important."

48. In its General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), the ILO stated that:

"187. The Committee is fully cognizant, however, that problems have been raised in several countries relating to unpaid internship programmes and other similar arrangements, when they are used to evade the payment of applicable minimum wages and to curtail employment opportunities. In the United States, for instance, an unpaid internship is only lawful in the context of an educational training programme when the intern does not displace regular employees, works under close supervision, and the employer derives no immediate advantage from the intern's activities. If the employer would have hired additional employees or required existing staff to work additional hours had the intern not performed the work, then the intern will be viewed as an employee and be entitled to compensation under the Fair Labour Standards Act.

188. *Recalling the overarching principle of equal pay for work of equal value, the Committee considers that persons covered by apprenticeship or traineeship contracts should only be paid at a differentiated rate where they receive actual training during working hours at the workplace.*

> *In general, the quantity and quality of the work performed should be the decisive factors in determining the wage paid.* In this regard, the Committee recalls the resolution entitled *The youth employment crisis: A call to action*, adopted by the International Labour Conference at its 2012 session, to which it has already referred. In this resolution, the Conference emphasized that "Education, training and lifelong learning foster a virtuous cycle of improved employability, higher productivity, income growth and development." The implementation of quality programmes to enhance skills, particularly for young people, is therefore to be welcomed. However, as the Conference also highlighted, "such mechanisms can run the risk, in some cases, of being used as a way of obtaining cheap labour or replacing existing workers". In that context, the Conference particularly encouraged governments to "[regulate and monitor] apprenticeship, internship and other work-experience schemes, including through certification, to ensure they allow for a real learning experience and do not replace regular workers"."

3. European Union

A. European Parliament

Resolution of 6 July 2010 on promoting youth access to the labour market, strengthening trainee, internship and apprenticeship status (2009/2221(INI))

49. In its Resolution of 6 July 2010, the European Parliament considered that young people mainly enter the labour market via typical, highly flexible, insecure and precarious forms of employment and warned the States that "*employers seem to be using traineeships and internships more frequently to replace regular employment, thereby exploiting the obstacles to entering the labour market faced by young people*" and stated that "*such forms of exploitation of young people need to be addressed and effectively eradicated by Member States*".

50. In the same Resolution, the European Parliament stressed the importance of adequate training to secure the high-skilled workforce companies will need in the future and called on the Commission and the Council of the European Union to set up a "*European Quality Charter on Internship setting out minimum standards for internships to ensure their educational value and avoid exploitation, taking into account that internships form part of education and must not replace regular jobs*".

51. In particular, the European Parliament called

> "25. (…) for young people to be protected from those employers – in the public and private sector – who, through work experience, apprenticeship and traineeship schemes, are able to cover their essential and basic needs at little or no cost, exploiting the willingness of young people to learn without any future prospect of becoming fully established as part of their workforce;"

B. Council of the European Union

Recommendation of the Council of the European Union on a Quality Framework for Traineeships

52. A 2012 Study on a Comprehensive overview on traineeship arrangements in Member States, prepared for the European Commission, noted that as a result of an increasing focus by governments as effective school-to-work transition mechanisms, "*traineeships are increasingly integrated into active labour market policies ("ALMP's") and/or from an integral part of educational courses. In view of the proliferation of traineeships undertaken by young people in the open market, Member States have also sought to raise the quantity and quality of such traineeships though either well-structured programmes and/or regulations or voluntary quality charters aimed at providing some protection to trainees.*" The Commission also noted that "*across Europe there is a plurality and variety of legislation and regulations governing traineeships. (…) This, in turn, reflects the fact that the concept of traineeship itself is very diverse. Traineeship related to education/training and ALMP's tend to be the most regulated, while open market traineeships are subject to much less regulation."* The Commission underlined moreover that "*legislative and regulatory frameworks do not necessarily guarantee the quality of traineeships. Rather, it is the implementation of regulations and the robust monitoring of the entire process which play a key role in ensuring quality traineeships. There is particular concern about the inadequacy of regulations for traineeships in the open market.*"

53. The Explanatory Memorandum to the European Commission's Proposal for a Council Recommendation on a Quality Framework for Traineeships (SWD(2013)495 final; SSWD(2013) 496 final, 4 December 2013) states that:

> "Over the past two decades, traineeships have become an important entry point into the labour market for young people. Fostering the employability and productivity of young people is key to bringing them onto the labour market. However, although traineeships increasingly represent a standard feature in our labour markets, their spread has been accompanied by growing concerns as to learning content and working conditions. If traineeships are really to facilitate access to employment, they must offer quality learning content and adequate working conditions and should not be a cheap substitute for regular jobs.
>
> (…)
>
> The Commission's consultations [with social partners] on the matter along with other studies and surveys, identified a range of problems currently affecting traineeships in the EU.
>
> Stakeholders highlighted the issue that a large proportion of unpaid or low-paid traineeships may create an equal access problem and also leads to a tendency to replace paid workers with trainees. Also, trainees are sometimes not told clearly whether they will receive remuneration or compensation, or informed about key working conditions such as health and accident insurance or holiday entitlements."

54. The Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships states, in its relevant paragraphs, that:

> "(1) Young people have been hit particularly hard during the crisis. Youth unemployment rates have reached historical peaks in the past years in several Member States, without any sign of decrease in the short term. Fostering the employability and productivity of young people is key to bringing them onto the labour market.
>
> (…)
>
> 4) Socio-economic costs arise if traineeships, particularly repeated ones, replace regular employment, notably entry-level positions usually offered to trainees. Moreover, low-quality traineeships, especially those with little learning content, do not lead to significant productivity gains nor do they entail positive signalling effects. Social costs can also arise in connection with unpaid traineeships that may limit the career opportunities of those from disadvantaged backgrounds.
>
> (5) There is evidence that links exist between the quality of the traineeship and the employment outcome. The value of traineeships in easing the transition to employment depends on their quality in terms of learning content and working conditions. Quality traineeships bring direct productivity benefits, improve labour market matching and promote mobility, notably by decreasing search and matching costs both for enterprises and for trainees.
>
> (…)
>
> 9) Problems have also been identified as regards working conditions, e.g. long working hours, lack of social security coverage, the presence of health and safety or occupational risks, little or no remuneration and/or compensation, a lack of clarity on the applicable legal regimes, and the excessively prolonged duration of the traineeship.
>
> (10) Traineeships are currently unregulated in some Member States and sectors and, where regulation exists, it is very diverse and provides different quality elements or different implementing practices. In the absence of a regulatory framework or instrument, or because there is a lack of transparency regarding working conditions for traineeships and their learning content, many traineeship providers are able to use trainees as cheap or even unpaid labour.
>
> (…)"

C. European Ombudsman

Decision in case 454/2014/PMC concerning the European External Action Service's practice of offering unpaid traineeships in EU delegations and Recommendation

55. In 2014, a young Austrian citizen who worked as an unpaid trainee in an EU delegation in Asia (European External Action Service), introduced a complaint before the European Ombudsman claiming that the practice of unpaid internships constitutes unjustified discrimination against young professionals coming from less well-off backgrounds. In reply, the EEAS considered that the complainant had been given an unpaid traineeship "*at her request*" and that she signed a traineeship agreement in which she affirmed "*I am a volunteer with the Delegation and will receive no salary, wage or benefit* […]). In its decision of 21 September 2017, the European Ombudsman considered in particular that:

> "23. The complainant's argument, that unpaid traineeships are discriminatory towards those coming from a less privileged social background, has some substance. Undeniably, a young graduate wishing to do an unpaid traineeship may encounter practical difficulties without financial backing, such as from his or her family. A traineeship in an EU delegation involves not only travel costs, but also costs for accommodation, living and insurance. Therefore, unpaid traineeships in EU delegations risk becoming a privilege for the few - namely, those with financial means.
>
> (…)
>
> 25. The Ombudsman does not doubt that trainees in a delegation value the traineeship. Indeed, such opportunities can constitute a significant steppingstone in their careers. In fact, this is why traineeship opportunities should be made available to as broad a range of persons as possible - and not only to those who can afford it. Unpaid traineeships may perpetuate social exclusion, since persons from less privileged backgrounds are likely to lack the financial means to undertake a traineeship. They will thus miss out on this valuable opportunity to enhance their qualifications and skills. This may, eventually, lead to fewer future job opportunities for the less privileged, initiating a vicious circle where "privilege follows privilege". Not paying trainees may very well be a practice that appears to be neutral but which, in the words of the ILO, in fact has a negative impact on less privileged persons."

56. While accepting that the Council of the European Union, in its recommendation on a Quality Framework for Traineeship, does not exclude unpaid traineeships outright, the Ombudsman observed that this recommendation acknowledges nevertheless the social costs that can arise from such traineeships. These social costs include the limiting of career opportunities for those from disadvantaged backgrounds. Regarding the concern previously expressed by the Council of the European Union that trainees may be used as cheap or even unpaid labour, the Ombudsman considered that the fact that the trainees get to do "real work" as an inherent part of the training is to the benefit of the trainees and mitigates against any risk of exploitation. The Ombudsman considered that:

> "The fact that trainees bring added value to the delegations is reflected in the EEAS's note on unpaid traineeships, sent to the EU delegations, which states that "non-remunerated traineeships are established for the benefit of trainees as well as in the interest of the delegation" (emphasis added). The EU delegations gain from the input of trainees and may even depend on their contribution. With this in mind, the Ombudsman observes that the system of unpaid traineeships may possibly lead to the undesired consequence that the EU delegations fail to attract all of the best candidates for traineeships; it will attract only those with sufficient financial resources to pay for themselves. This is clearly not in the interest of EU delegations."

57. Against this background, the Ombudsman found that EASS's practice of providing unpaid traineeship in its delegations constitutes "maladministration". Arising from this maladministration, the Ombudsman recommended that the EEAS should pay all its trainees, including those in EU delegations, an appropriate allowance. The amount of allowance to be paid could be based on the cost of living in the country to which the trainees are assigned. The Ombudsman recommended that:

> "The EEAS should pay all its trainees, including those in EU delegations, an appropriate allowance. While the nature of this allowance will be a matter for the EEAS, the Ombudsman

believes that the allowance should be such as to respect the principle of non-discrimination and should ensure that young people will be encouraged to apply for a traineeship irrespective of their (or their family's) financial status."

58. Following this recommendation, the EEAS informed the Ombudsman that it has requested funds for paying its trainees in EU delegations and that, in the meantime, it has suspended unpaid traineeships.

D. Case law of the Court of Justice of the European Union ("CJEU")

59. In the decision of Lawrie-Blum (1986)(Deborah Lawrie-Blum v Land Baden-Württemberg, 66/85, EU:C:1986:284), the European Court of Justice provided an autonomous interpretation of the term "worker" within the meaning of Article 45 TFEU concerning free movement of workers. The proceedings were brought by a British national, who, after passing at the University of Freiburg the examination for the profession of teacher at a Gymnasium was refused admission, on the ground of her nationality, by the Education Office to a period of preparatory service leading to the Second State Examination to be qualified as teacher. The national court essentially asked whether a trainee teacher undergoing a period of service as preparation for the teaching profession during which s/he enjoys civil service status and receives remuneration must be regarded as a worker within the meaning of Article 48 EEC (Article 45 TFEU). The respondent State considered that a trainee teacher appointed as a temporary civil servant may not be regarded as a worker within the meaning of Article 48. Considering that the Community concept of a "worker" must be interpreted broadly, the Court stated that:

> "(…) A trainee teacher who, under the direction and supervision of the school authorities, is undergoing a period of service in preparation for the teaching profession during which he provides services by giving lessons and receives remuneration must be regarded as a "worker" within the meaning of Article 48 (1) of the EEC Treaty, irrespective of the legal nature of the employment relationship".

60. In the 1992 case of Bernini v Minister van Onderwijs en Wetenschappen (M. J. E. Bernini v Minister van Onderwijs en Wetenschappen, 26 February 1992, C-3/90, EU:C:1992:89), in response to the question raised by the national tribunal on whether a national of a Member State who has worked in another Member State as a trainee in the context of occupational training must be classified as a worker within the meaning of Article 48 EEC Treaty, the Court stated that:

> "14. It must be recalled at the outset that the Court has consistently held that the concept of worker within the meaning of Article 48 of the EEC Treaty has a specific Community meaning. To come within the definition of worker a person must pursue an activity which is effective and genuine to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. The essential characteristic of the employment relationship is that for a certain period a person performs services for and under the direction of another person in return for which he receives remuneration.
>
> 15. As the Court held in its judgment in Case 66/85 Lawrie-Blum v Land Baden Wuerttemberg [1986] ECR 2145, paragraphs 19 to 21, a person engaged in preparatory training in the course of occupational training must be regarded as a worker if the training period is completed under the conditions of genuine and effective activity as an employed person.
>
> 16. That conclusion cannot be invalidated by the fact that the trainee' s productivity is low, that he works only a small number of hours per week and, consequently, receives limited remuneration (see the judgment in Lawrie-Blum, cited above, paragraph 21, and the judgment

> in Case 344/87 Bettray v Staatssecretaris van Justitie [1989] ECR 1621, paragraph 15). However, since a training period completed in the context of occupational training is intended above all to develop occupational aptitude, the national court is entitled, when assessing the genuine and effective nature of the services in question, to examine whether in all the circumstances the person concerned has completed a sufficient number of hours in order to familiarize himself with the work.
>
> 17. The reply to the first question must therefore be that a national of a Member State who has worked in another Member State in the context of occupational training must be regarded as a worker within the meaning of Article 48 of the EEC Treaty and of Regulation No 1612/68 if he has performed services in return for which he has received remuneration, provided that his activities are genuine and effective."

61. According to this case law, in the context of free circulation of workers, the fact that a person is working as a trainee does not mean that s/he is not a "worker" if the training period is completed under the conditions of genuine and effective activity as an employed person (see, concerning professional traineeship performed by a trainee lawyer, *Kranemann*, C-109/04, EU:C:2005:187, § 13). The origin of the funds from which the remuneration is paid or the limited amount of that remuneration cannot have any consequence as to whether or not the person is a worker for the purpose of Community law (see, *Mattern*, C-10/05, EU:C:2006:220, § 22). However, the Court also indicated, in the case of Bettray (concerning work performed as part of a rehabilitation program) that:

> "an activity cannot be regarded as an effective and genuine economic activity if it constitutes merely a means for rehabilitation or reintegration and the purpose of the employment, which is adopted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life" (*Bettray*, 344/87, EU:C:1989:226, § 17).

62. The case of Balkaya (2015) (Balkaya v Kiesel Abbruch- und Recycling Technik GmbH, 9 July 2015, C-229/14. EU:C:2015:455) concerned the lack of notification of a projected collective redundancy and the lawfulness of a dismissal on economic grounds upon the closure of an establishment. The question raised by the referring court was whether, in the interpretation of Article 1(1)(a) of Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies, it is necessary to regard as a worker for the purposes of that provision a person, who, while not receiving remuneration from his employer, performs real work within the undertaking in the context of a traineeship – with financial support from, and the recognition of, the public authority responsible for the promotion of employment – in order to acquire or improve skills or complete vocational training. The CJEU considered in this case that:

> "In that regard, it must be recalled, in the first place, that it is clear from the Court's well-established case law that the concept of 'worker' in EU law extends to a person who serves a traineeship or periods of apprenticeship in an occupation that may be regarded as practical preparation related to the actual pursuit of the occupation in question, provided that the periods are served under the conditions of genuine and effective activity as an employed person, for and under the direction of an employer. The Court has stated that that conclusion cannot be invalidated by the fact that the productivity of the person concerned is low, that he does not carry out full duties and that, accordingly, he works only a small number of hours per week and thus receives limited remuneration.
>
> (…) it is also clear from the Court's case-law that neither the legal context of the employment relationship under national law, in the framework of which the vocational training or internship

> is carried out, nor the origin of the funds from which the person concerned is remunerated and, in particular, in the present case, the funding of that remuneration through public grants, can have any consequence in regard to whether or not the person is to be regarded as a worker (…).
>
> Accordingly, (…) Article 1(1)(a) of Directive 98/59 must be interpreted as meaning that it is necessary to regard as a worker for the purposes of that provision a person, such as the one in question in the main proceedings, who, while not receiving remuneration from his employer, performs real work within the undertaking in the context of a traineeship — with financial support from, and the recognition of, the public authority responsible for the promotion of employment — in order to acquire or improve skills or complete vocational training."

THE LAW

PRELIMINARY CONSIDERATIONS

As to the scope of the present complaint

63. The Committee observes upon the examination of the relevant domestic law related to internship schemes, that different internship and apprenticeship modalities coexist in Belgium which are governed by distinct legal frameworks, such as professional immersion agreement, internship of first professional experience, first employment agreement ("Rosetta Plan"), internships for job seekers, apprenticeships for salaried workers etc. The YFJ and the Government both explain that in Belgium, most internships take place within the framework of a recognised or regulated training programme via an educational institution. These internships are compulsory and are included in the curriculum and are carried out during the studies with an explicit agreement of the educational institution. During such internship as part of the school curriculum, the intern cannot be remunerated, except, in some cases, the reimbursement of expenses incurred for travel between home and place of work.

64. In addition, in some professions, there is a statutory obligation to complete a traineeship after finishing the studies, concerning for instance doctors, lawyers and barristers. Remuneration for such traineeships is regulated by the relevant professional association, such as the Bar Association.

65. The YFJ explains that the present complaint does not concern internships linked to a curriculum, but rather internships undertaken after graduation, i.e. those undertaken outside of secondary or post-secondary education, in order to gain professional experience. The Committee understands therefore that the present complaint concerns so-called "open market'" internships which are agreed between the intern and the internship provider (private companies, non-profit organisations, government agencies etc.) without the involvement of an educational institution, and outside the framework of a curriculum, and being conducted after completion of

studies, generally as part of a job search and experience gathering after graduation from university.

As to the applicability of Article 7§5 of the Charter

66. According to the YFJ, the fact that unpaid internships have become *de facto* requirements for gaining full-time employment makes it clear that such internships are not in compliance with Article 7§5 of the Charter as they do not meet the standard for the protection of young people from exploitative employment situations that deprive them of remuneration or fair benefits. The YFJ recalls that the Committee has previously concluded that apprentices must be granted an allowance that must equal at least one third of the adult minimum or starting wage at the beginning of the apprenticeship and at least two thirds at the end (Conclusions 2011, Belgium, Article 7§5). The YFJ observes that whereas apprenticeship wages below an adult minimum wage are justified as apprenticeships are meant to impart valuable skills on the apprentice, those internships impart little or no skills and are unpaid. The YFJ concludes that if the Committee found that inadequate allowances paid to apprentices are in violation of Article 7§5, then the same conclusion should be drawn in a case concerning the practice of "non-academic unpaid internships".

67. The Committee recalls that Article 7§5 of the Charter is intended to guarantee an appropriate remuneration to apprentices and young workers and to prevent them from being exploited as cheap labour.

68. The Committee considers, firstly, that although the distinction between apprenticeship and internship can be blurred in some cases, apprenticeship under Article 7§5 of the Charter differs from "internship" as understood in the present complaint. Such internships (outside a formal curriculum framework) are limited periods of work practice (a few weeks, up to six months, in certain exceptional cases one year) in private companies, public bodies etc., by young people having recently completed their education, in order to gain work experience before taking up a regular employment. The predominant aim of an internship in this sense is to facilitate the transition of recently graduated young people from education to the labour market and to provide practical work experience (including the acquisition of skills and knowledge) related to an occupation, which can be documented.

69. By contrast, an apprenticeship is a systematic, structured, long-term training which expands over several years (usually up to three or four years) alternating periods at the workplace and in an educational institution. The training component in an apprenticeship concerns the acquisition of the full set of knowledge, skills and competences required to practice a particular trade or occupation and its successful completion leads to a nationally recognised qualification with regard to this occupation.

70. The Committee therefore considers that the term "apprenticeship" under Article 7§5 of the Charter does not cover "internships" or "traineeships" as understood in the present complaint, undertaken outside of secondary or post-secondary education with

the aim of gaining professional experience ahead of taking up regular employment.

71. Secondly, as to the term “young worker” under Article 7§5 of the Charter, the Committee recalls that although the Charter does not provide a precise definition of the notion of “young worker” under this provision, this term is understood as covering workers under the age of 18 (see, for instance, Conclusions 2015, Norway, Article 7§5; Conclusions 2019, Ireland, Article 7§5; Conclusions XIX-4, Germany, Article 7§5). Considering that the present complaint concerns internships after completion of secondary or post-secondary education (university graduates), the Committee considers that Article 7§5 of the Charter which guarantees a fair remuneration to apprentices and young workers, is not applicable in the present context.

72. Whether and to what extend the term “worker” under the Charter also covers interns as understood in the present complaint will be examined under Article 4§1 of the Charter.

I. ALLEGED VIOLATION OF ARTICLE 4§1 OF THE CHARTER

73. Article 4§1 of the Charter reads:

> **Article 4 – Right to a fair remuneration**
>
> Part I: “All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families.”
>
> Part II: “With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:
>
> 1. to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living;
>
> (…)”

A – Arguments of the parties

1. The complainant organisation

74. The YFJ underlines at the outset that young people entering the job market are in a precarious economic situation. According to the YFJ, across Europe, and in Belgium in particular, those who wish to enter into the professional world are faced with the *de facto* mandate that in order to gain experience and build the connections that will enable them to find paid professional work in the future, they must complete several internships. Internships are therefore increasingly becoming required experiences for gaining full-time employment. In this respect, the European Commission’s 2013 study on traineeships (European Commission, Apprenticeship and Traineeship Schemes in EU27: Key Success Factors, A Guidebook for Policy Planners and Practitioners, December 2013) reports that study-related work experience increases the chance of being employed after graduation by 44%. The YFJ adds that there is a wide consensus that internships are becoming a standard feature of young

people's transition from education and training to the labour market as they have also become increasingly commonplace in EU member states.

75. Nevertheless, despite the crucial importance of traineeships in young people's transition from education to the labour market and the valuable work experience and exposure to different career paths and opportunities they provide in favour of young people, the YFJ, referring to a 2013 survey conducted by the European Commission (Flash Eurobarometer 378, The Experience of Traineeships in the EU, Report, November 2013, p. 47 *et seq.)*, observes that 59% of interns across the EU reported that their last internship was without any financial compensation. According to this report, Belgium has one of the highest percentage of unpaid interns in the EU, with only 18% being paid for their internships.

76. Referring to its Quality Charter on Internships and Apprenticeships which outlines quality standards to ensure that internships and apprenticeships are truly quality experiences for young people, the YFJ stresses in particular that internships should be primarily a learning experience and should not replace jobs. However, many internships fall short of these standards: referring to a 2012 Communication of the European Commission (SWD(2012)407final), the YFJ claims that approximately 50% of unpaid internships lack satisfactory learning content and that organisations are increasingly relying on unpaid interns to fill roles that might otherwise be entry-level jobs. The YFJ also refers to the decision of 21 September 2017 of the European Ombudsman concerning the European External Action Service's practice of offering unpaid traineeships in EU delegations (see, §56 *et seq*.) and underlines that unpaid interns make up significant parts of some organisations' workforces, and those organisations could not function without them. This results in that interns are being exploited as free labour. The YFJ also states that according to the European Commission's Traineeship Study, using internships as free labour is a growing phenomenon (mainly in the case of traineeships in the open market, i.e. undertaken outside of secondary and post-secondary education), and the risk of substituting regular employment with internships is greater in Member States with high unemployment and/or unfavourable labour market conditions for young people.

77. According to the YFJ, contrary to what the Government has asserted, the problem of unpaid internships in Belgium is not limited to, or predominantly prevalent solely within the EU institutions in Brussels. Relying on a statement by Commissioner Oettinger in October 2017 before the European Parliament, the YFJ observes that on 1 June 2016, there were 202 atypical (unpaid) trainees in the European Commission, whereas the number of "bluebook" trainees (remunerated traineeship scheme in the EU) was 1300. A survey conducted by the Youth Intergroup of the European Parliament indicates a low percentage of unpaid trainees in the Parliament (%8 of the 233 respondents indicated that they did not receive any compensation during their traineeship). Following the decision of the European Ombudsman in February 2017, the EU's External Action Service suspended its practice of offering unpaid traineeships

in the EU Delegations worldwide, opting to offer paid traineeship (see §57 *et seq*.). However, the YFJ underlines that unpaid internships exist in particular in the representations and lobbying and advocacy organisations around the European institutions in Brussels, which are, as opposed to the international organisations, subject to Belgian Law.

- *Legal framework for internship schemes in Belgium*

78. The YFJ observes that in Belgium, specific laws have been enacted concerning different types of internships and volunteer work, and detailed rules have been imposed concerning the internship contracts, the procedure for the authorisation of traineeships, the allowances to be paid to the interns and the oversight of the training process by responsible public bodies. For instance, under the Programme Act of 2 August 2002 concerning the professional immersion agreement (*convention d'immersion professionnelle)* (see, §29 *et seq* above), the internship contract must clearly specify the objectives of the internship as well as the tasks to be carried out by the trainee. A prior authorisation should be obtained by the hiring organisation from the "*Bruxelles Formation*", the public body officially responsible for professional training of French-speakers in the Brussels-Capital region, before offering the traineeship. An intern over the age of 21 under this scheme should be provided with a monthly allowance of minimum € 751. Public employment agencies, such as Actiris in the Brussels-Capital region, or VDAB in Flemish Region closely monitor the placement of interns and ensure that hiring organisation comply with any applicable regulations (see above, for instance, Decree of the Government of the Brussels-Capital Region relating to the internship of first professional experience of 29 September 2016, Article 14). If the organisation does not comply with the immersion contract, the "*plan d'accompagnement*" or the insurance requirements, Actiris terminates the internship and find the intern a new placement.

79. However, the YFJ observes that while specific legislation have been enacted concerning a number of internship schemes, the "unpaid internship" in the open market, undertaken outside of secondary or post-secondary education, is not an official legal category, but has evolved through hiring practices in the sector. According to the YFJ, many unpaid internships should have been actually classified as either professional immersion internships or paid contractual positions. As a result, the intern who undertakes an informal volunteer position does not benefit from the advantages provided in specific legislation and by-laws regarding different -formal- internships and enjoys little, if any, oversight by public employment agencies. This situation not only disallows the intern to foresee the nature of the training s/he will undertake, but also undermines the government's efforts in easing the transition of young people from education to labour market. The YFJ points at the low number of registered paid interns (under 25 years old) in Flemish Region by VDAB despite the existence of a legislative framework: 130 in 2015 and 329 in 2016, concluding that the majority of internships are undertaken outside legal framework, in an informal manner.

80. Referring to a 2010 Report on Volunteering in the European Union (Volunteering in the European Union, Educational, Audio-visual and Culture Executive Agency (EAC-EA) Directorate General Education and Culture (DG EAC), Final Report submitted by GHK, 17 February 2010) and the ETUC observations, the YFJ underlines that the

concept of volunteering and its distinction with paid work has been blurred in the practice. In particular, as a result of the lack of clarity concerning the exact link between the Volunteer Rights Act and Belgian Labour Law and the applicability of the latter in the context of volunteer work, the key challenges concerned the unclarity related to the definitions and notions of volunteer work/services and protection of social rights of volunteers, including the informal unpaid internship contracts concluded under the Volunteer Rights Act.

81. According to the YFJ, this situation has been exacerbated as a result of the following factor: while the competence to regulate traineeships has been transferred from federal to regional level via the 4th State Reform agreed in December 2011, legal changes or modifications are yet to be made. Furthermore, although the Federal Public Service for Employment is no longer responsible for regulating traineeships, it continues to be responsible for "bogus traineeships" (disguised employment relationships), i.e. work performed under the authority of an employer but for which no remuneration is received. Therefore, in the practice, young people can easily fall in a gap between the federal and regional levels, failing to benefit from any protection at all.

- *Remedies in case of abusive internships*

82. Labour inspection in Belgium, according to the YFJ, has proven inadequate to address the issue of unpaid internships under the Volunteer Rights Act. Although organisations are subject to inspection and must keep an accurate list of all volunteers by calendar year, including allowances they receive, volunteers do not have to be declared to the government and inspectorates have avoided inspection of voluntary organisations that do not conduct commercial activities and serve a social purpose. As to the potential avenues of individual complaint which young people can make use of pointed at by the Government, the YFJ underlines that young people undertaking unpaid internships are unlikely to take legal action, in particular because of the imbalance of power between themselves and their host organisations: the eventuality of being employed long-term by the organisation they are interning for is likely to dissuade them from pursuing legal action. Also, young people are unaware of their rights and/or of the existence of social and labour inspection services.

- *Survey data*

83. In its response to the Government's submissions on the merits, YFJ states that, in order to gather evidence on the existence of unpaid internships in Belgium, it monitored over the course of May 2018 several online job-search engines, and gathered *data* concerning the practice of unpaid internships in Belgium and testimonies from young people who have undertaken unpaid internships.

84. According to this data, the website of the Federal Public Service for Foreign Affairs regularly advertises unpaid internships both in Belgium and abroad. Some of the unpaid internship advertisements published on this website required the applicants to be "bachelors with a financial-administrative profile", "to have obtained at least their

bachelor degree" or to be "recent graduates", to have "a relevant university degree" or "to have obtained a university diploma".

85. Unpaid internships are regularly offered by Belgian Embassies or Permanent Representations, and vacancies often target young people who have already obtained a university degree. Examples of unpaid internship advertisements by Belgium's Permanent Representation to the European Union in Brussels, Belgium's Permanent Representation to the United Nations in New York or Belgium's Embassy in Tokyo have been provided in the Annex to the response from the YFJ to the Government's submissions on the merits. Those unpaid internships require the applicants "to hold a university diploma" or "to be in the last year of their university studies or already have obtained their diploma".

86. According to the data, unpaid internships are also advertised by Actiris, the Employment Office for the Brussels region and VDAB, the equivalent to Actiris for Flemish Region. Although some of those advertisements are unclear as to whether a remuneration is provided or not, some of them clearly provide that the position is unpaid, and it is rarely clarified whether only students are targeted or not.

87. The Brussels Interns NGO (BINGO), in the framework of the campaign "Just Pay!" launched in 2017, monitored internship adverts in the Belgian job market. According to the data gathered during this campaign, unpaid internships are being advertised on a regular basis. Out of 61 cases analysed by BINGO, 22 internships were advertised as unpaid, while remaining adverts either promoted low-remunerated internships, or were unclear as to the level of remuneration or type of contract offered. Out of 22, 9 unpaid internship advertisement targeted students.

88. In the majority of the internship advertisements on popular, European level job-search engines, such as EuroBrussels, Euractive and LinkedIn, no clarification concerning the remuneration has been provided. A research conducted by the YFJ between the end of April and May 2018 revealed however that unpaid internship positions are regularly promoted on these websites. An advertisement concerning an unpaid internship position on Euractive, targeting candidates either currently studying or recently graduated, mentions that it is a "voluntary position with no compensation". Another advertisement indicates that while the position is unpaid, candidates will "gain valuable skills, experience, knowledge via contacts in Brussels". Unpaid internships are regularly promoted on EuroBrussels. In some of the advertisements, it is mentioned that "reimbursement is offered for travel and small expenses". In some others, the advertisement indicated that the internship is unpaid and is based on "a voluntary agreement". Some others do not clarify whether the position is paid or not but mentions that the position is "volunteer". The examples of advertisement provided by the YFJ are directed at candidates who hold "a PhD, a Master's or bachelor's degree", at "recent graduates or young professionals", at those who have obtained "relevant university degree".

89. The data provided also includes a number of testimonies by former interns, concerning unpaid internships in Belgian Permanent Representations, including that of the Council of Europe. The internship contracts referred to indicate that the Permanent Representations are not obliged to provide any remuneration to the intern during the 3-month internship.

90. The YFJ asks the Committee to consider the legal situation of unpaid interns in Belgium in light of the European Social Charter and to find that Belgium is not in conformity with the Charter. The YFJ specifies that the provisions in Belgian law that enable unpaid internships, and the lack of enforcement of provisions that aim to curtail them, violate Article 4 § 1 of the Charter, ("Right of workers to a remuneration such as will give them and their families a decent standard of living"). The YFJ also complains, under Article 4§1, about the inefficiency of the Labour Inspectorate in detecting and preventing abusive replacing of paid jobs with unpaid internships.

- *The concepts of worker, trainee or volunteer*

91. Referring to the CJEU judgment of 9 July 2015 in the case of Balkaya (see, § 62 above), the complainant organisation argues that in international and European Union law, the definition of "worker" or "employee" is an autonomous one that is not entirely dependent on domestic law. Following the reasoning in this judgment, the YFJ claims that the interns, in case they perform "real work within the undertaking in the context of a traineeship", should be considered as "worker" within the meaning of the Charter. The YFJ adds that evidence has suggested that young interns are increasingly performing work that is essential to the functioning of their host organisation, acting as "extensions of, or replacements for, regular staff" (European Youth Forum, Interns Revealed, 2011, p. 7), without remuneration.

92. According to the YFJ, although recent decisions of the Committee do not provide an explicit definition of "worker", they imply that unpaid interns would come under this category. In its 2016 Conclusions under Article 4§1 concerning Austria, the Committee, in its assessment, approved the test applied by the Austrian Supreme Court that, where the employer is not bound by any collective agreement, appropriate wage has to be determined on the basis of collective agreements for comparable activities, with factors such as wage levels in the geographical area (neighbouring towns), the size of the enterprise and the number of employees being also taken into account. The YJF puts an emphasis on the criteria of "comparable work", in cases where a specific group of labourers perform work "comparable" to that undertaken by similarly situated groups receiving higher wage, and concludes that the Committee should look at the quality and nature of work undertaken by Belgian interns, and consider that they should be regarded as "workers" under the Charter.

93. The YFJ underlines the Charter's overarching tendency in favour of remuneration (reference to *Confédération Française de l'Encadrement CFE-CGC v. France,* Complaint No. 9/2000, decision on the merits of 16 November 2001*)* and the scrupulous approach of the Committee to the issue of compensating employees for

the work they undertake outside contractually mandated working hours (for example, Conclusions 2014, Ireland, Article 4§2,). The YFJ stresses that while many unpaid interns in Belgium are performing work of a similar nature to that at issue in the above mentioned decisions, and should therefore be considered as “workers” under the Charter, a high percentage of them do not receive compensation because they lack the legal formalities, or happen to be young novices new to the job market.

94. The YFJ recalls that in its previous decisions, the Committee considered that the purpose of stimulating employment in the wake of the 2008 financial crisis (General Federation of employees of national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece, Complaint No: 66/2011, decision on the merits of 23 May 2012, §68) or that of fostering young persons’ choice to qualify further (Conclusions 2014, the Netherlands, Article 4§1,), or reasons such as “young workers’ reduced productivity and increased need for supervision” (*ibid*.) cannot justify a reduced statutory wage for young workers below the poverty level. The YFJ observes that in the case of unpaid interns, even the nominal reduced wages that the Committee found to be unfair in the above-mentioned decisions are lacking. This situation, in addition to the absence of housing allowances and other benefits, results in that unpaid interns, as young workers, cannot feasibly attain a decent standard of living.

95. The YFJ underscores that unpaid internships continue to be regularly offered and advertised in the Belgian labour market and still constitute a fairly widespread phenomenon, as established by the examples and testimonies provided (see above §§84 *et seq*.). However, the lack of regulation of unpaid internships and the absence of a legislative framework determining, in this context, the rights and obligations of stakeholders as well as the scope of inspection by responsible public bodies, undermines the efficiency of labour inspection in inspecting and preventing the use of interns as free labour and the substitution of regular employment with internship.

96. In response to the Government’s criticism concerning the lack of reliable data on unpaid internships, the YFJ stresses that the lack of data is due in large part to the fact that, in the absence of specific regulation, the registration of unpaid and underpaid traineeships is not compulsory. While organisations must keep a list of volunteers and the allowances they receive in case of inspection, volunteers do not have to be declared to the government: a situation that also applies to unpaid interns holding a volunteering contract.

97. The YFJ concludes that in the absence of even the minimum wages failing a quantitative threshold, which in previous decisions could not stand the legal scrutiny by the Committee, unpaid interns are in an even more precarious and uncertain position. The YFJ asks the Committee to find that Belgium is in violation of Article 4§1 of the Charter by allowing the frequent practice of unpaid internships and failing to appropriately regulate its practice.

2. The respondent Government

- *Survey data*

98. In their submission on the merits, the Government firstly asserts that the survey data presented by the complainant organisation should be treated with the utmost caution. The Government refers to the Flash Eurobarometer report (see §75 above) submitted by the complainant, which reported that in Belgium only 18% of interns were being paid for their services. However, the definition of traineeships used in this survey differs from what the YFJ is referring to in its complaint, i.e. unpaid traineeships after the end of studies. The figure in this report also covers placements in the context of education and training, that are linked to a curriculum or are agreed via an educational institution and that are unpaid. The fact that interns who are still studying are overrepresented in the report gives a distorted picture of the number of unpaid interns.

99. According to the Government, the reliability of the data submitted by the complainant, as regards “financial compensation during the most recent traineeship” is also doubtful: in Belgium, only 501 interviews were conducted for a population of 2.5 million young people (15-35 years old) and only half of the respondents answered the question about financial compensation during the last traineeship. The Government points also at another survey (2017) conducted by the Flemish Youth Council and observes that only 150 persons took part. The surveys presented by the YFJ suffer therefore from methodological flaws.

- *The concepts of worker, trainee or volunteer*

100. The Government considers that the interpretation given by YFJ of the term “worker”, which is not defined in the text of the Charter, is too extensive. According to the Government, internship, as a contract with the aim of undergoing practical training and gaining professional experience, should be clearly distinguished from “employment contracts” where the main factor is the performance of work in exchange for a wage. The ultimate purpose of an internship contract is not to perform work in return for a wage, but rather to acquire practical experience in the trade. Training contracts differ from the employment contracts in terms of the objective pursued by the parties. In the case of training contracts, the educational aspect is the key, whereas in the case of employment contracts the central feature is the performance of work for remuneration. Therefore, the term “employee” or “worker”, should only be used in the context of a contract of employment and not, for example, in the context of a training course or internship.

101. The Government adds that the wishes of the parties, as set out in the contract, are, also in the case of internships, of major importance for determining the status of that contract. If the courts find elements which are incompatible with the chosen status, they may refuse to accept the latter. The educational character of the internship is essential in determining which category the contract falls into.

102. In response to the YFJ's claim that the Volunteer Act of 3 July 2005 allows unpaid internships, the Government underlines that the Volunteering Act provides a statutory framework for voluntary work, which is clearly described in the legislation: the voluntary work is carried out (1) without remuneration or obligation, (2) for the benefit of one or more persons other than the person carrying out the activity or for the benefit of an organisation or the community as a whole, (3) is organised by an organisation other than the family or private circle of the person carrying out the activity (4)is not carried out by the same person and for the same organisation in the context of a contract of employment or service contract or a statutory appointment.

103. The Government puts an emphasis on the fact that the volunteer work cannot be carried out for the benefit of the person carrying out the activity and considers that internships undertaken after the termination of studies in order to gain experience are not covered by the statutory framework for voluntary work. There is a clear difference between volunteering (voluntarily, selflessly, without pay, serving the community) and all other forms of non-regular activities, including internships, internships abroad, internships in companies etc. In case of misuse of the law on volunteering, abuse and irregularities in its implementation, interested parties can always contact the *Direction du Contrôle des Lois Sociales* and the inspection services of National Social Security Office to assess whether a volunteering contract is compliant with the regulations.

- *Legal framework for internship schemes in Belgium*

104. The Government underlines that in Belgium, there are different internship schemes, outside school curriculum, at the disposal of young job seekers who wish to enter into a contract with the aim of undergoing practical training with an employer or gaining professional experience. Each of these internship schemes for young graduate job seekers is regulated by specific legislation. Concerning those internships for young graduate job seekers, the companies are obliged to pay their interns a monthly allowance, the amount of which is determined, on the basis of legal provisions in specific legislation, by the type of internship and the person's age.

105. In Brussels Region, the employment office, Actiris, operates two different types of internship which fall under this category and each of them has specific objectives, its own eligibility requirements, statutory framework and specific remuneration arrangements. The "First" scheme is aimed at young people who have been registered for six months as unemployed job seekers and who hold, at most, a certificate of upper secondary education. There are also "international internships" run by Actiris such as "European internships" programmes (for those registered with Actiris as an unemployed job seeker) and the "Eurodysee" programme, which provides for internships abroad to young job seekers. During those internships, a monthly grant, regulated by specific legislation, is paid to the intern.

106. In the Flemish Region, different training contracts have been envisaged in order to enable a person to subsequently do another job or to gain more experience in the workplace. While undergoing training of this type, the interns are usually able to retain

their status as a job seeker and eligible for a grant during the internship or retain their entitlement to unemployment benefit. This type of internship, out of secondary and post-secondary education, covers specific contracts such as “vocational discovery placements” (part time placements for job seekers, unemployment benefit is retained), “activation placements” (for job seekers with an occupational disability), “formative work placements”, “individual vocational training” (a productivity bonus is paid to the intern, and an employment contract is offered at the end), “professional immersion agreements” (paid internship for job seekers, employees, self-employed persons and students among others and the programme of the training is approved by VDAB), introductory work placements, etc. In Walloon Region, in addition to the “professional immersion contracts” which falls under the authority of FOREM in the Region, there are internship programmes for job seekers (who retain the unemployment allowance and entitled to certain perks) and people with disabilities (internships supported by the Agence *pour une vie de qualité*).

107. The Government further explains that in cases where a particular internship agreement is not covered by one of the internship schemes regulated by legal framework, it necessarily falls within the scope of the “professional immersion agreement” (remunerated -not less than half the guaranteed average minimum monthly pay in the Flemish Region for instance- and governed by the Programme Act of 2 August 2002). The purpose of the regulations governing professional immersion contracts is to provide a basic statutory framework for internships or training arrangements that are not yet covered by other regulations. Therefore, according to the Government, the professional immersion agreements may be considered as the general legal framework for freely undertaken internships, or as a “safety net” for internships that are not regulated by any statutory framework and do not form part of a course of studies at an educational institution. In this respect, the Government refers to decisions of Mons Labour Court from January 2015 and September 2016 where the Court stated: “*Thus, if an agreement does not comply with regional or Community regulations on social and occupational training, it necessarily falls within the scope of the professional immersion agreement (…). These statutory arrangements are intended to cover all forms of apprenticeship, training or work placement which are not covered by any legal framework.*”

108. Therefore, the internship schemes outside of secondary or post-secondary education in Belgium, are paid internships (either a stipend or unemployment allowance). The Public Service of Walloon Region, for instance, accepts unpaid interns only in the framework of curriculum internships, under a tripartite agreement signed between the intern, the Public Service and the education institution. Any internship contact submitted to Forem must meet the conditions laid down for all professional immersion agreements. In Brussels-Capital Region, all internships administered by Actiris are paid internships.

109. Secondly, because of detailed legal rules concerning a variety of internship schemes for young job seekers and the general character of “professional immersion agreements” which cover all internships which are not covered by other schemes,

there is no internship scheme which does not fall under one of the categories defined in specific legislation and there is no unregulated area or a legislative gap in respect of the practice of internships in Belgium.

- *Remedies in case of abusive internships*

110. According to the Government, in the context of internships undertaken after graduation in order to acquire professional experience, the question may indeed arise as to whether the trainee actually performs an internship or whether s/he performs services under a "disguised" employment contract. The Government states that according to the case-law, the work performed in the framework of an internship agreement should not be profitable for the company where the internship takes place but contribute to the practical training of the intern. Otherwise, the internship agreement can constitute an employment contract.

111. The competence to detect "bogus internships" (disguised employment relationships), i.e. performing work under the authority of an employer without benefiting from a corresponding remuneration, belongs to Federal Public Service of Employment, Work and Social Consultation. The Government underlines, in this respect, the legal and regulatory obligations that employers have to comply with in the framework of concluding employment contracts: failure to declare an employee in advance to the social security bodies is punishable by a level 4 penalty, i.e. either imprisonment ranging from six months to three years plus a criminal fine of between € 4,800 and € 48,000 or one of these penalties only, or an administrative fine of between € 2,400 and € 24,000 per undeclared work. The implementation of these rules is monitored by the various social and labour inspection units of the Federal Public Service for Employment and the National Social Security Office and any young person who feels that they have been wronged and believes that they have been adversely affected in practice by an employment contract can complain to one of the local branches of the inspectorate.

112. Further, the Government reiterates the generally applicable character of professional immersion agreements (paid internship) in that they cover all other internship schemes which does not fall under one of the categories regulated by specific legislation. Professional immersion agreements are to be considered as mandatory social documentation and failure to possess or issue one is punishable by level 2 sanctions (either a criminal fine ranging from € 400 to € 4,000 or an administrative fine ranging from € 200 to € 2000). In addition, the agreement must stipulate that the intern is to receive certain minimum compensation. The Government states that if the internship agreement does not correspond to the facts and comply with legal requirements, the intern has the possibility to apply to the social and labour inspectorate or the regional labour inspectorates. An individual complaint must be submitted by the intern concerned or their manager and the complaint must be sufficiently detailed. The labour inspectorate might choose to act as a mediator before issuing a penalty notice. However, as to date, none or very few complaints has been received by the inspectors.

113. The Federal Labour Inspectorate can also intervene in accordance with the "regulatory social documents" and the Social Criminal Code of 6 June 2010. Article 186 of this Code concerns "failure to keep" (Article 186(3)) and "failure to issue" (Article

186(4)) the contract relating to a professional immersion agreement among others, and to draw up the contract on professional immersion in an incomplete or inaccurate way (Article 186(5)), and not to take the necessary measures to ensure that the professional immersion contract is available at all times to the officials and agents responsible for monitoring (Article 186(6)).

114. The Government adds that, interns can always turn to the courts and ask for the execution of a professional immersion agreement, since a judge has the power to determine the status of a contract.

115. In response to the complainant's claim that young people undertaking unpaid internships are unlikely to take legal action, in particular because of the imbalance of power between themselves and their host organisations, the Government underlines that the inspection services cannot check and evaluate each activity or each type of contract with each employer or internship provider. It is forbidden for the inspection to engage in "phishing", i.e. to search for possible infringements in general. The inspection services of the Public Service of Employment depend on individual and concrete complaints by the interns. In this case, all internship contracts of the establishment will be examined. Labour and social inspectors are subject to special professional secrecy which prohibits them from telling an employer that they are carrying out a check on the basis of a complaint and they certainly cannot report the name of the complainant. This professional secrecy requirement also applies to judges.

B – Assessment of the Committee

116. The Committee recalls that Article 4§1 guarantees the right of workers to a fair remuneration such as to ensure a decent standard of living. It applies to all workers, including to civil servants and contractual staff in the state, regional and local and public sectors (Conclusions XX-3 (2014), Greece), it applies to the labour market as a whole, to branches or jobs not covered by collective agreement, to atypical jobs (assisted employment) (Conclusions 2014, France) and to special regimes or statutes (minimum wage for migrant workers) (Conclusions 2014, Andorra).

117. The Committee notes that the allegations of the YFJ are twofold: first, the YFJ alleges that the "unpaid internships" in the open market is not an official legal category, but has evolved through hiring practices in the sector and the lack of remuneration for interns is in violation of Article 4§1 of the Charter. Secondly, also under Article 4§1 of the Charter, the YFJ alleges that the labour inspection has proven to be inefficient in detecting and preventing abusive "bogus internships", i.e. performing real and genuine work under the authority of and to the benefit of an employer without benefiting from a corresponding remuneration in the context of an internship.

(i) Applicability of Article 4§1: the concept of "worker"

118. The YFJ argues that in international law, the definition of “worker” or “employee” is an autonomous one that is not dependent on domestic law. The YFJ recalls that in the case of Balkaya (see §62 above), the CJEU considered that in cases where an intern performs “real work within the undertaking in the context of a traineeship”, s/he should be considered as “worker”. Underlining that the surveys, such as the one conducted by the YJF “Interns Revealed” in 2011, suggest that young interns are, to an increasing extent, acting as extensions of, or replacements for, regular staff, the complainant stresses that the “unpaid interns” should come under this category.

119. The Committee recalls that it has not hitherto in its case law undertaken to provide an explicit definition of “worker”. The Committee agrees, however, with the YFJ that the concept of “worker” cannot be defined for the purposes of the Charter solely by reference to the legislation of the member States, as otherwise, the implementation of different guarantees provided for “workers” would be within the State discretion and it would be possible for the States to alter the scope of those guarantees which would deprive them of any efficiency.

120. At the same time, the Committee notes that the CJEU judgments referred to by the YFJ, provide an autonomous definition of “worker” in the specific context of particular provisions of the Treaty on the Functioning of the European Union and of Council Directives. In the Balkaya case, the CJEU provided an autonomous definition of “worker” based on the criteria of “genuine and effective activity” for and under the direction of an employer, in the context of Article 1(1)(a) of Council Directive 98/59/EC on the approximation of the laws of the members States relating to collective redundancies. Also, an autonomous definition in Lawrie-Blum (1986) was provided by the CJEU in the specific context of Article 45 TFEU concerning the free movement of workers (see, §59 above).

121. The Committee refers to the Recommendation of the Council of the European Union of 10 March 2014 on Quality Framework for Traineeships (§52 *et seq*. above) and considers that the notion of traineeship must be understood as a limited period of work practice, whether paid or not, which includes a learning and training component, undertaken in order to gain practical and professional experience with a view to improving employability and facilitating transition to regular employment. In case of training contracts, either curriculum internships or open market internships after the end of studies, the education aspect is predominant, whereas in employment contracts, the central feature is the performance of work for remuneration. Therefore, the objectives pursued in case of an internship contract and an employment contract are different.

122. The Committee considers therefore that in the abstract, traineeship schemes, the predominant purpose of which is to acquire professional experience and to improve practical skills of the young person, do not fall within the scope of Article 4§1 which recognises the right of *workers* to a remuneration such as will give them and their families a decent standard of living.

123. Consequently, the Committee considers that Article 4§1 is not applicable in the context of the allegation that the lack of remuneration for interns is in violation of the right to a fair remuneration.

124. The YFJ underlines, however, that interns, in cases where they perform "real and genuine work" within the undertaking in the context of a traineeship, should be considered as "workers" for the purposes of the Charter. The YFJ refers to the relevant international material and surveys which draw the attention to the risk of the use of traineeships by employers as a way to obtain cheap or unpaid labour and to replace existing workers or entry-level jobs. The YFJ alleges, under Article 4§1, that the Labour Inspectorate has proven to be inefficient in detecting and preventing abusive "bogus internships".

125. The Committee notes that several international documents underline the practice of many countries in terms of which internships outside formal education are frequently used to replace quality employment for young people (see, for instance, the Explanatory Memorandum to the Recommendation CM/Rec(2006)7 of the Committee of Ministers of Council of Europe, §46). In its Resolution of 6 July 2010, the European Parliament warned the States that employers can use traineeships to replace regular employment, thereby exploiting the obstacles to entering the labour market faced by young people (see, §49 above). In its 2012 Resolution "The youth employment crisis: A call for action", the ILO considered that the regulation of internship schemes should ensure a real learning experience and not replace regular workers (§47 above).

126. The Committee considers that in the examination of the applicability of Article 4§1 of the Charter to "bogus internships" (i.e. disguised employment which entails the performance of real work under the authority of and to the benefit of an employer) and in determining whether or not the intern in question should be considered as "worker" under Article 4§1, it should indeed take into account the following factors: the nature of the work performed by the intern and whether or not the education aspect is predominant in the work context. The formal criteria, such as the existence of an employment contract or payment of a remuneration, are of course lacking in case of a "bogus traineeship" which concerns performance of real work without a regular employment contract and without remuneration.

127. Therefore, the Committee considers that in cases where it is established that an internship does not include a learning and training component, but concerns performance of real and genuine work, then the trainee should be considered as a "worker" with the right to a decent remuneration under Article 4§1 of the Charter.

128. Consequently, Article 4§1 of the Charter is applicable to the present complaint insofar as it concerns the situation of "bogus internships" which are allegedly used to replace regular employments, and which concern the performance of real and genuine work under an internship contract.

129. However, the Committee notes that the data provided by the YFJ (see §§83-89 above) concerns merely concrete examples of advertisements of unpaid internships on several online job-search engines, launched by public bodies, including Actiris or VDAB. Although these examples indicate to a certain extent the existence of the practice of unpaid internships in Belgium and are indeed worrying as they point to a *contra legem* practice, they do not provide information concerning the nature of the work performed during those unpaid internships. The Committee cannot draw conclusions in the absence of information in this respect, as it is impossible to determine whether those unpaid internships concern performance of real and genuine work with immediate advantage for the employer (bogus internships - in which case Article 4§1 is applicable) or whether they concern work related trainings with a learning component to the benefit of the trainee (in which case Article 4§1 is not applicable).

130. The Committee considers however that several international documents (see, for instance, §47 above) underline that the work-experience schemes, such as internships or apprenticeships, run the risk of being used as a way of obtaining cheap labour or replacing existing workers. For the Committee, the central issue raised by the present complaint is therefore whether the national regulations concerning internship schemes provide sufficient safeguards against "bogus internships" and whether an efficient system of labour inspection has been put in place to prevent and eliminate them.

(ii) legal regulations concerning internships

131. According to the YFJ, because of the lack of clarity related in particular to the definitions and notions of volunteer work/services in the legislation (volunteering act), the practice of concluding unpaid internships under a volunteering contract has emerged. This situation and the lack of enforcement of provisions that aim to curtail the unpaid internships, are in violation of Article 4§1 of the Charter. For the YFJ, although specific legislation have been enacted concerning a number of internship schemes, the "unpaid internship" in the open market, undertaken outside of secondary or post-secondary education, is not an official legal category, but has evolved through hiring practices in the sector in an unregulated area. According to the YFJ, many unpaid internships should have been actually classified as either paid professional immersion internships or paid contractual positions. According to the Government, there is no internship scheme in Belgium which does not fall under one of the categories defined in specific legislation and there is no unregulated area or a legislative gap in respect of the practice of internships.

132. The Committee observes on the basis of the relevant domestic legal provisions and the explanations by the Government concerning those regulations, that according to Article 2§1 of the 2005 Volunteers Rights Act, this act governs voluntary service carried out on Belgian territory, as well as voluntary service carried out outside Belgium, but organised from within Belgium, and on condition that the volunteer has his/her main residence in Belgium. The Committee further observes that, although Article 2§1 of this act does not provide any clarification on whether or not the notion of "volunteer service" in this provision covers also unpaid internships, Article 3 of the same act provides in particular that "volunteering" is an activity which is exercised

without remuneration or obligation and carried out for the benefit of one or more persons other than the person who carries out the activity.

133. As the European Ombudsman considered in a decision of 21 September 2017, the activity carried out by an intern in the framework of an internship as an inherent part of the training, is in principle to the benefit of the trainee in terms of gaining professional experience as it increases the chances of being employed after graduation (see §55 et seq. above).

134. In view of the above, the Committee considers that the notion of "volunteering" in the meaning of Article 3 of the Volunteers Right Act, is different from the notion of "internship" in that, whereas the purpose of an internship is to benefit the intern who wishes to gain professional experience in the activity s/he carries out in the framework of an internship, volunteering, according to the clear wording of Article 3(1)(b) of the Volunteers Rights Act, is carried out for the benefit of one or more persons other than the person who carries out the activity. The text of Article 3 does not allow any unpaid internship under a volunteering contract according to the provisions of this law.

135. The Committee also examines whether the legal regulations on internship schemes have given rise to a practice of unpaid internship scheme outside legal categories, potentially leading to abuse in the absence of regulations determining the rights and obligations of the parties in an unpaid internship. The Committee observes in this respect that specific laws and regulations regulate different internship schemes in Belgium, designed for young people to gain professional experience (see §§ 105 and 106 concerning the different schemes in the Brussels Region, the Flemish Region and the Walloon Region). One particular internship scheme, which is remunerated, is the professional immersion agreement provided by the Programme Act of 2 August 2002. The Explanatory Note to the 2002 Act indicates that its purpose is to guarantee a legal framework for work services that take place during the new internship formulas which emerged in recent years that are organised in a "spontaneous" way without being part of an existing regulation or without being supervised by a competent body dependent on or approved by the community or the region concerned.

136. Therefore, the raison d'être of this Act, as explained in its Explanatory Note, is precisely to exclude any internship scheme which is not regulated by the existing regulation and which is not supervised by the competent authorities. Article 104 of this act provides a broad definition of immersion agreements so as to cover "spontaneous" internships: "these provisions regulate the professional immersion agreements in which any person, referred to as trainee, as part of his training, acquires knowledge or skills from an employer by performing work services". The same provision explicitly excludes from its scope of application a number of specific internships regulated under specific legislation, such as training in the framework of an employment contract, internships linked to an educational institution, compulsory internships leading to the issuing a diploma, certificate or attestation of professional experience, etc. Accordingly, professional immersion agreements appear to be the general legal framework for freely

undertaken internships that are not regulated by any statutory framework and do not form part of a course of studies at an educational institution.

137. Upon examination of the legal regulations in Belgium regarding internship schemes, in particular the professional immersion agreement, the Committee notes that those regulations do allow for unpaid internship schemes outside the legal categories set by law, potentially leading to abuse in the absence of regulation determining the rights and obligations of the parties. The Committee notes in this respect that any internship which does not fall within one of the specific categories, falls under the scope of professional immersion agreements which are regulated as to their content and are paid. In addition, it also appears that the wording of the provisions of the Volunteer Rights Act, clearly distinguishes volunteering from carrying out an activity in the framework of an internship and legally any internship scheme appears to be excluded from the scope of application of Volunteers Rights Act.

(iii) Situation in practice: inspection and remedies in respect of "bogus traineeships"

138. The YFJ explains that as a result of the State Reform agreed in December 2011, the competence to regulate internships have been transferred from federal to regional level, but legal modifications in this respect are yet to be made. The young people's protection in internship agreements can therefore easily fall in a legal gap between federal and regional authorities in this transition period. The YFJ observes in this regard that although the Federal Public Service for Employment is no longer responsible for regulating traineeships, it continues to be responsible to detect "abusive" or "bogus" traineeships. The absence of a specific regulation for unpaid internships determining the rights and obligations of the parties and the scope of inspection by responsible bodies undermines the efficiency of labour inspection in respect of the use of young people as free labour.

139. The Government underlines that since the reform, the federated communities exercise the totality of the competences concerning internships and this is also confirmed in the *travaux préparatoires* for the special act of 6 January 2014 relating to the sixth constitutional reform: *"the communities have in the matter all the legislative, executive, control and financing powers."* In the Walloon Region, for instance, by the Decree of 17 March 2016, the task of exercising powers and responsibilities within the framework of the professional immersion contract system has been entrusted to the Forum for Employment (FOREM). The Government explains further that "bogus internship", i.e. performing real work under the authority of an employer without benefiting from a corresponding remuneration, constitutes "undeclared work", the monitoring of which belongs to the Federal Public Service of Employment.

140. The Committee observes that under Social Criminal Code, failure to declare an employee in advance to the social security bodies is punishable with imprisonment until three years and/or criminal fine (up to € 48,000) or an administrative fine of between € 2,400 and € 24,000 per case of undeclared work. The implementation of the rules regarding undeclared work falls within the competence of the Federal Public Service of Employment, and any person who feels that they have been wronged in

practice by an employment contract can complain to one of the local branches of the inspectorate.

141. Moreover, professional immersion agreements, which have a generally applicable character, are mandatory social documentation and failure to possess or issue one is punishable by either a criminal fine up to € 4,000 or an administrative fine of up to € 2,000. Failure to keep or to issue the professional immersion agreement, or to draw up the contact in an incomplete or inaccurate way is also punishable by either a criminal or administrative fine under the Social Criminal Code (Article 186). The intern concerned has also the possibility to apply to the social and labour inspectorate or the regional labour inspectorates.

142. Concerning the Volunteer Rights Act, in its reply to the complainant's claim that voluntary organisations are not inspected in the practice, the Government replies that in case of misuse of the act on volunteering, abuse and irregularities in its implementation, such as internship contacts concluded under the volunteering act in violation of its Article 3(1)(b), interested parties can always contact the *Direction du Contrôle des Lois Sociales* and the inspection services of National Social Security Office to assess whether a volunteering contract is compliant with the regulations. For the Government, voluntary organisations have been monitored by inspection services, as opposed to what the complainant asserts, but not in a systematic manner. In addition, the statistics of the labour inspectorate do not specify the character of the inspected organisation, i.e. whether not-for-profit or not, which explains, according to the Government, the erroneous conclusions of the complainant.

143. The Committee considers that the main disagreement between the YFJ and the Government concerns the effectiveness of the inspection system regarding bogus internships and on whether a proactive approach has been adopted by the Labour Inspectorate in respect of "bogus internships". The YFJ puts forth two main criticism concerning the potential avenues of individual remedies pointed to by the Government. Firstly, young people are generally unlikely to take legal action because of the imbalance of power between themselves and their host organisations and the eventuality of being employed in the future might dissuade them from pursuing legal action. Secondly, young people are often unaware of their rights and/or the existence of social and labour inspection services. This also explains why, as to date, none or very few complaints have been received by the inspectors.

144. According to the Government, the Inspectorate depends on any individual and concrete complaints being brought forward by the interns concerned. In addition, labour and social inspectors are subject to special professional secrecy which prohibits them from informing an employer that they are carrying out a check on the basis of a complaint and they certainly cannot disclose the name of the complainant. This professional secrecy requirement also applies to judges.

145. The Committee is of the view that the inspection system should be adapted to the features of the targeted population, such as disadvantaged young interns. In this

context, it is important to note that, given that they are at a very early stage of their work lives, young interns might not be aware of their rights or might not want to take any legal action in case of abusive internships in order not to affect their potential for future employment in the labour market. Given this strong disincentive for young interns to take legal action and their possible lack of knowledge concerning their rights in the implementation of internship contracts, a proactive approach, apart from an efficient inspection service, by the relevant authorities may be necessary. This might include the issuing of explanatory notes regarding the implementation of the law concerning internships and the possible avenues of complaint for interns in case of abusive internships, efforts to educate the public and to investigate potential problems in the implementation of internship agreements.

146. The Committee recalls that several international documents draw attention to the existence of evidence in many countries that internships outside any formal curriculum are in practice frequently used as unpaid labour to replace regular employment, thereby exploiting the obstacles to entering the labour market faced by young people (see §§44-58 above). Therefore, governments should give serious consideration to monitoring internships to ensure that such internships allow for a real learning experience and are not used to replace regular workers.

147. As to the data provided by the YFJ, although it does not as such specifically indicate any practice in Belgium of using internships as unpaid labour to replace regular employments, they point, on the basis of concrete examples, to the existence of the phenomenon of unpaid internships in practice in Belgium, which are excluded by the legal regulations in force. The Government does not provide any explanation concerning this contra legem practice, including that of public bodies such as Actiris and VDAB or Belgian embassies and Permanent Representations. The data and the lack of explanations by the Government in this respect cast serious doubts on the overall efficiency of the inspection and monitoring of internships in Belgium.

148. The Committee observes that the YFJ puts forth two arguments in order to prove the inefficiency of the Labour Inspectorate in respect of detecting “bogus internships”: that the State reform which resulted in the transfer of competences with regard to internships from federal to regional authorities deprived the Labour Inspectorate of its efficiency and that the individual complaint mechanism is inadequate on account of the disadvantaged situation of interns. Concerning the first argument, the YFJ does not sufficiently explain and provide for convincing reasons as to why the transfer of competences to the regional authorities negatively affected the efficiency of inspections. The Committee recalls in this regard that the competence in respect of detecting “bogus internships” rests with the Federal Public Service of Employment and finds that the YFJ did not put forth any argument to prove that the reform particularly affected the efficiency of the inspections conducted by this public body.

149. However, in reply to the allegation that because of their disadvantaged situation vis-à-vis their host organisations, the interns might not want to use the complaint mechanisms and that this situation hampers the efficiency of inspections, the Government limits its submission to stating that the inspection services cannot check

and evaluate each activity or each type of contract with each internship provider and that it is forbidden to the inspection to engage in "phishing" (to search for possible infringements in general). However, the Committee considers that apart from the special professional secrecy that labour inspectors are subjected to, which young interns might not be aware of, the Government did not indicate any measure taken to adapt the modalities of inspection to the situation of young and disadvantaged interns and to tackle satisfactorily the problem of risk of abusive job replacement in the implementation of internship agreements. This risk is not only indicated in several relevant international documents, but also recognised in the explanatory note to the 2002 Programme Act (see §135 above) which speaks of "new internship formulas which emerged in recent years that are organised in a 'spontaneous' way without being part of an existing regulation or without being supervised by a competent body."

150. The Committee considers that the domestic authorities have an obligation to assess the risks in the implementation of internship contracts and to determine concrete measures to uphold effectiveness of inspections in this context, in order to prevent young interns from being exploited as unpaid labour. However, an inspection system which solely depends on individual complaints by interns, in the absence of any other proactive measures taking into account the vulnerability of the targeted group, cannot be considered as efficient in these specific circumstances.

151. Consequently, the Committee holds that there is a violation of Article 4§1 of the Charter because the Labour Inspectorate is not sufficiently effective in detecting and preventing "bogus internships".

II. ALLEGED VIOLATION OF ARTICLE E IN CONJUNCTION WITH ARTICLE 4§1 OF THE CHARTER

152. Article E of the Charter reads:

> **Article E– Non-discrimination**
>
> The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

A – Arguments of the parties

1. The complainant organisation

153. Referring to Article E of the Charter in conjunction with its Article 4§1, the YFJ alleges that non-payment of interns results in discrimination against those young people who have no external financial support that would enable them to work for several months without pay. Despite the valuable work experience that internships can provide, because of the practice of non-remuneration of interns, many young people are prevented from accessing such experience. For young people who do not come

from families with the means to support them in paying for rent, food and transport, an unpaid internship, which can last for several months, is untenable. Therefore, young people, in order to perform an – unpaid – internship, are forced to rely on their own or their parents' savings and those without the necessary financial means are excluded of the process entirely.

154. Secondly, for the YFJ, the practice of unpaid internships is discriminatory also against the interns themselves by denying young people the right to fair wages while guaranteeing this right to other workers. Referring to the case of GENOP-DEI and ADEDY v Greece, the YFJ takes the view that arguments to the effect that lower wages encourage employers to hire young workers who would otherwise have difficulty in finding jobs, that younger workers incur lower expenditure on average than other categories of workers when it comes to housing, family support and other living costs, were dismissed by the Committee as justifications for dramatic wage reduction for young workers under the age of 25. While the Committee agreed that the integration of young workers into the labour market in a time of serious economic crisis was a legitimate purpose, it found that a wage reduction resulting in wages below the poverty level was disproportionate and constituted discrimination (GENOP-DEI) and ADEDY v. Greece, Complaint No. 66/2011, op. cit., §§ 68-69).

2. The respondent Government

155. The Government contests the allegation that a category of young people is discriminated against because of the practice of unpaid internships and underlines that several internship schemes regulated in specific legislation provide many advantages for young people by facilitating their transfer to regular employment and by increasing their chances of obtaining their first employment through practical training. The Government stresses that concerning internships for young graduate job seekers, a monthly allowance is paid. The amount of the allowance is determined by specific legislation on the basis of criteria such as the type of internship or the intern's age.

B – Assessment of the Committee

156. The Committee recalls that Article E prohibits all forms of discrimination. It confirms the right to non-discrimination which is established implicitly or explicitly by a large number of Charter provisions. It does not constitute an autonomous right which could in itself provide independent grounds for a complaint. However, a violation of Article E (combined with a substantive provision of the Charter) may exist even in the absence of a breach of the relevant substantive provision (*Association Internationale Autisme-Europe (AIAE) v. France*, Complain No. 13/2000, §51). As is the case under Article 14 of the European Convention on Human Rights (see, for instance, *Molla Sali v. Greece* [GC], no. 20452/14, 19 December 2018, §123), for Article E to become applicable, it suffices that the facts of a case fall within the ambit of another substantive provision of the Charter.

157. The Committee notes that the present complaint concerns an allegation of violation of Article E in conjunction with Article 4§1 of the Charter. Therefore, the Committee will examine the present complaint only on the basis of those provisions without expanding its analysis to other Charter provisions that may arise in the context of the present complaint.

158. The Committee notes that the YFJ alleges discrimination, first, in respect of young people without the necessary financial sources and who are unable to undertake an unpaid internship for several months, which puts them in a disadvantaged position at the beginning of their careers, vis-à-vis the young persons who benefit from such financial support. Secondly, the YFJ alleges discrimination also in respect of unpaid interns themselves, as they are deprived of the right to a fair remuneration which is guaranteed to other categories of workers.

159. Concerning the first part of the allegation of discrimination under Article E in conjunction with Article 4§1, the Committee acknowledges that unpaid internship schemes might put young persons without financial resources in a disadvantaged position compared to those who can afford such internships and that States should strive to prevent or reduce such inequality. It recalls, however, that in its assessment under Article 4§1, it held that internship schemes specifically aimed at the interns acquiring professional experience and improving their practical skills do not fall within the scope of Article 4§1 and the notion of "worker" under this provision, does not cover such interns (§123 above). Therefore, the Committee considers that no issue arises under Article E in conjunction with Article 4§1 in respect of the first part of the present complaint insofar as it concerns the situation of interns falling into this category.

160. The Committee also found that in cases where an internship concerns performance of real and genuine work ("bogus internships"), the intern should be considered as "worker" and Article 4§1 applies in this context (§128 above). The Committee considers therefore that the second part of the allegation under Article E in conjunction with Article 4§1, that unpaid interns are discriminated against, as they are deprived of the right to a fair remuneration guaranteed to other workers falls within the scope of application of Article E of the Charter in conjunction with Article 4§1, insofar as it concerns the situation of "bogus interns" who perform analogous or relevantly similar work to that performed by regular workers under an employment contract.

161. The Committee considers that the words "shall be secured without discrimination" in Article E, in addition to a negative undertaking, implies some positive obligations for the States Parties. Recalling that the aim and purpose of the Charter is to protect rights not merely theoretically, but also in fact (ICJ v. Portugal, Complaint No. 1/1998, §32), the Committee considers that conformity with Article E of the Charter might require States to take specific steps aimed at removing *de facto* inequalities, in the present case, between workers who work under an employment contract and are paid, and workers who work under an unpaid internship contract. Indeed, in such circumstances, a failure to attempt to correct inequality between the two categories through an efficient inspection system which is adapted to the features of the targeted population, i.e. disadvantaged young interns, could amount to a violation of Article E guaranteeing the principle of non-discrimination.

162. Although the YFJ did not provide any data specifically documenting a practice in Belgium of using internships as unpaid labour in order to replace regular employment, the Committee acknowledged, in its assessment under Article 4§1 of the Charter, on the basis of supporting international documents in particular, the existence of such a risk of abuse in practice. The Committee also recalls that where it is known that a certain category of persons is, or might be, discriminated against, it is the duty

of the national authorities to collect data to assess the extent of the problem (See, for instance, European Roma Rights Centre v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §27).

163. The Committee found that the inspection system which solely depends on individual complaints by interns, considering their disadvantaged situation, cannot be considered as sufficiently efficient in preventing misuses of unpaid internship contracts in violation of Article 4§1 of the Charter. The Committee considers that the insufficient efficiency of the Labour Inspectorate in this respect inevitably will have discriminatory consequences in respect of “bogus interns” as this category of workers is in practice deprived of an effective right to a fair remuneration guaranteed to other workers who perform analogous or relevantly similar work under a regular employment contract.

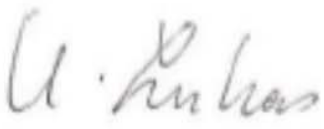
164. The Committee holds therefore that there is a violation of Article E read in conjunction with Article 4§1 of the Charter.

CONCLUSION

For these reasons, the Committee concludes:

- by 13 votes to 1 that there is a violation of Article 4§1 of the Charter on the ground that the Labour Inspectorate is not sufficiently effective in detecting and preventing “bogus internships”;

- by 11 votes to 3 that there is a violation of Article E read in conjunction with Article 4§1 of the Charter.


József HAJDU	Karin LUKAS	Henrik KRISTENSEN
Rapporteur	President	Deputy Executive Secretary