DECISION ON THE MERITS

9 September 2009

Confédération Française Démocratique du Travail (CFDT)
v. France

Complaint no. 50/2008

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 238th session attended by:

Mrs Polonca KONČAR, President
Mssrs Andrzej SWIATKOWSKI, Vice-President
Colm O’CINNEIDE, Vice-President
Jean-Michel BELORGEY, General Rapporteur
Mrs Csilla KOLLONAY LEHOCZKY
Mr Lauri LEPPIK
Mrs Monika SCHLACHTER
Birgitta NYSTRÖM
Lyudmila HARUTYUNYAN
Mssrs Rüçhan IŞIK
Petros STANGOS
Alexandru ATHANASIU
Luis JIMENA QUESADA
Mrs Jarna PETMAN

Assisted by Mr Régis BRILLAT, Executive Secretary
Having deliberated on 8 and 9 September 2009,

On the basis of the report presented by Ms Polonca KONČAR,

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint lodged by the Confédération française démocratique du travail (CFDT) was registered on 1 April 2008. It alleges violations of Articles 4, 18 and 19 of the revised European Social Charter, read alone or in conjunction with Article E, on the ground that the situation of the civilian staff of the French forces stationed in Germany integrated into the French civil service following the dissolution of these forces is discriminatory because the services they performed in Germany cannot be validated in the same way as they would have been had they been performed in France.

2. The Committee declared the complaint admissible on 23 September 2008.

3. Pursuant to Article 7§§1 and 2 of the Protocol providing for a system of collective complaints ("the Protocol") and the Committee’s decision on the admissibility of the complaint, on 29 September 2008 the Executive Secretary communicated the text of the admissibility decision to the French Government ("the Government"), the CFDT, the states party to the Protocol, the states that have ratified the Revised Charter and have made a declaration under Article D§2, and the organisations referred to in Article 27§2 of the Charter.

4. In accordance with Article 31§1 of the Committee’s Rules, the Committee set a deadline of 21 November 2008 for presentation of the Government’s submissions on the merits. Its submissions were registered on 21 November 2008.

5. Pursuant to Rule 31§2, the President set 6 February 2009 as the deadline for the CFDT to present its response to the Government’s submissions. At the CFDT’s request and in accordance with Rule 28§2, the deadline was extended to 20 February 2009. The response was registered on 19 February 2009.

THE PARTIES’ SUBMISSIONS

A. – The complainant organisation

6. The CFDT asks the Committee

- to find that the legal provisions concerning the situation of civilian officials of the French forces in Germany, a member State of NATO, in particular the conditions governing their integration into the French public service, are incompatible with Articles 4, 12, 18 and 19, combined with Article E, of the revised European Social
Charter and constitute unlawful discrimination against these officials under these articles;

- to award the CFDT the sum of € 5 000 to cover its expenses, with all ensuing legal consequences.

7. Although, the CFDT does not formally ask the Committee to find a breach of Article 12, it nevertheless points out it considers that this provision is violated.

**B – The Government**

8. The French Government concludes that the complaints, which derive from a misunderstanding of the articles of the European Social Charter referred to by the complainant, are unfounded and asks the Committee to reject the complaint.

**RELEVANT INTERNATIONAL AND DOMESTIC LAW**

**A – Legal rules on employment and employment conditions**

9. “The North Atlantic Treaty created a regional collective security system which could be linked with the peacekeeping mechanism provided for by the United Nations’ founding charter. Under this system, member states are required to provide mutual assistance where one of them has been the victim of an act of aggression. For a system of this type to operate, the military forces of one member state of the alliance have to be sent to serve in another to protect it. For this purpose, the states party to the North Atlantic Treaty were required ‘to define the status of such forces while in the territory of another Party’, which was the goal of the London Convention of 19 June 1951 as defined in its preamble. In Article IX, paragraph 4 of this Convention reference is made to the ‘local civilian labour requirements of a force or civilian component’, which are to be ‘satisfied in the same way as the comparable requirements of the receiving State and with the assistance of the authorities of the receiving State through the employment exchanges’. With regard to this civilian labour, it is added that ‘the conditions of employment and work, in particular wages, supplementary payments and conditions for the protection of workers, shall be those laid down by the legislation of the receiving State’. It is further stated that ‘civilian workers employed by a force or civilian component’ must not be ‘regarded for any purpose as being members of that force or civilian component’.”

Pierre Eckly, “L’émergence du droit européen au travail. La garantie de l’emploi du personnel civil de droit allemand au service des Forces françaises stationnées en Allemagne” (“The emergence of European labour law: guaranteed employment of civilian staff employed under German law on behalf of the French forces stationed in Germany”), in Études dédiées à la mémoire de Pierre Ortscheidt, Presses Universitaires de Strasbourg (studies dedicated to the memory of Pierre Ortscheidt, Strasbourg University press).
10. During the negotiations on Germany’s accession to the North Atlantic Treaty Organisation, it was agreed that the London Convention would not apply to the staff of the military forces of other member states of the alliance stationed in Germany. On 3 August 1959 an agreement supplementing the North Atlantic Treaty was signed on the NATO foreign forces stationed in the Federal Republic of Germany. Under Article 56 of this agreement, which took the London Convention as its basis with regard to the legal rules on civilian staff but not in so far as they were deemed to be external to the armed forces, these personnel were subject both to German and to French labour legislation.

B – Guarantee of employment, termination of service and integration into the French civil service

11. A collective agreement for employees of the French armed forces stationed in the Federal Republic of Germany was concluded on 16 December 1966. Article 44 of the agreement granted staff entitlement to the protection against dismissal and guaranteed income specified in appendix 0 of the agreement. This appendix gives staff guaranteed employment. Article 44 provides that: “si un salarié, ayant un contrat à durée indéterminée et comptant une ancienneté minimale de 2 ans auprès des forces d’un même Etat d’origine... perd son emploi ou si la valeur de l’emploi est modifiée à la suite de mesures de réorganisation..., il lui sera offert un emploi vacant ou qui deviendra vacant avant l’expiration de la période de préavis”

12. In view of this guarantee of employment, the civilian personnel of the French forces stationed in Germany, whose contracts were governed by German law, were integrated as state manual employees (ouvriers d’Etat) into the French Ministry of Defence.

C – Decree of 27 January 1970 on the career structure of C and D category public officials

13. According to Article 6 of Decree 70-79 of 27 January 1970 on the career structure of C and D category public officials, “non-established officials of central government, local government or bodies responsible to them who are recruited in accordance with the normal statutes to one of the grades or posts specified in Article 1 [of the Decree] must be classified with reference to three-quarters of the period of civilian service they have completed, on the basis of the average period of service required for each advancement to a higher grade”.
THE LAW

PRELIMINARY

A – Article E of the revised Charter

14. The CFDT submits that its complaints relate to several substantive articles of the Charter and to Article E.

15. On closer examination, the Committee notes that, in law, the CFDT’s arguments relate not to the articles referred to alone but only to Article E read in conjunction with them.

B. – The complaints under Article E of the revised Charter read in conjunction with Article 12

16. The Committee points out that in its decision on admissibility, it declared the complaint admissible only in relation to Articles 4, 18, 19 and E of the revised Charter. In the body of its complaint the CFDT mentions certain complaints under Article 12 but in its requests to the Committee at the end of the complaint, it no longer refers to them, mentioning only Articles 4, 18, 19 and E. However, in its observations on the merits of the complaint, the Government presents arguments in its defence in relation to allegations under Article 12. Despite this, the CFDT’s response to the Government’s observations does not take up the matter of Article 12 again and reiterates the requests it made in the original complaint.

17. The Committee would like to take this opportunity to clarify certain aspects of the procedure for the examination of complaints.

18. Firstly, the parties to the complaint are bound by the Committee’s decision on admissibility, particularly as regards the provisions of the Charter to which the complaint relates.

19. However, with a view to ensuring full compliance with the substantive provisions of the treaty, the Committee reserves the right to examine a complaint which it has previously declared admissible under certain articles, under other provisions of the Charter. In this event, when the merits of the complaint are examined, the Committee will ask the parties to present their arguments as to whether the provision or provisions concerned have been complied with.

20. In the present case, the Committee considers it beneficial for the proper administration of justice to examine the conformity of the situation complained of with Article E read in conjunction with Article 12 even if the CFDT has omitted to mention this provision in its conclusions. As the Government presented its arguments on the subject in its observations on the merits despite not being invited to do so, the Committee considers that it has all the relevant items of fact and law to enable it to give a ruling.
C. – Conclusion

21. In substance therefore the complaint relates to the allegations of violations of Article E as read in conjunction with each of the substantive provisions referred to, namely Articles 4, 12, 18 and 19 of the revised Charter.

THE ALLEGED VIOLATION OF ARTICLE E READ IN CONJUNCTION WITH ARTICLES 4, 12, 18 AND 19 OF THE REVISED CHARTER

A. – Submissions of the parties

a. The complainant organisation

22. After the reorganisation of the French forces in Germany, several persons who were employed by the French forces in Germany did not benefit from the application of Article 6 of Decree 70-79 of 27 January 1970 because they had performed their job on the basis of employment contracts governed by the German labour law; for this reason they were not treated as public officials as they would have been if they had worked in France.

23. The CFDT submits that the distinction between staff of the French forces in Germany and staff performing the same duties within France is contrary to Article E, read in conjunction with the following articles:

   - Article 4, which recognises the right of men and women workers to equal pay for work of equal value;

   - Article 12, which guarantees equal treatment in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;

   - Article 18, under which the Parties undertake, with a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, to apply existing regulations in a spirit of liberality and to liberalise, individually or collectively, regulations governing the employment of foreign workers; and recognise the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other parties;

   - Article 19, which requires the Parties to secure for workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment no less favourable than that of their own nationals, particularly in respect of remuneration and other working conditions.
24. The CFDT states that the purpose of this complaint is to obtain from the French authorities legislation or regulations that take the length of service of staff who have worked or are working with the French forces in Germany into account in the context of their integration into the French public service and the determination of their social rights, and in particular their retirement pension.

b. The Government

25. The Government refers to the case-law of the Committee and that of the European Court of Human Rights, particularly the judgment of 23 July 1968 on the Belgian language case and the Thlimmenos v. Greece judgment, no. 34369/97, ECHR 2000, according to which the principle of equality reflected in Article E means treating equals equally and unequals unequally.

26. Civilian staff working for the French forces in Germany (FFSA) fell into three categories:

- civil servants and public employees of the French state;
- employees whose contracts were governed by French private law;
- foreign civilian staff, including French nationals with an employment contract governed by German private law.

27. In the present case the German state was responsible for recruiting the foreign civilian staff in question. These people could be either German or French nationals but had an employment contract that was covered entirely by German private law and validated by the member states through an international agreement, as well as by the staff themselves, who agreed to these contracts in full knowledge of the facts.

28. As private law contractual employees of the German state, these staff were covered by working and wage conditions negotiated under highly favourable collective agreements that cannot be compared with those of non-established public employees of the French state.

29. In view of the foregoing considerations, which show that the staff concerned did not have public employee status and could not therefore legitimately claim that the provisions in question should be applied to them, the Government considers that the Committee should dismiss the argument on the ground that the situation of non-established public employees and that of foreign civilian staff cannot be regarded as comparable. It follows that the allegation of discrimination is unfounded and should be dismissed.

30. The Government also puts forward a series of arguments on the application of each of the substantive provisions concerned.
31. Article 4§1 guarantees the right to a remuneration which ensures a decent standard of living. To be considered to comply with Article 4§1, remuneration must be above the poverty threshold of the country concerned, which has been set at 50% of the national average wage. According to a wage scale setting out the remuneration of state manual employees, which is the current status of some of the civilian staff represented by the complainant, these wages are considerably higher than the average wages of employees of the French state, particularly those of the non-established public employees covered by the Decree of 1970.

32. With regard to Article 4§3, the Government asks what prompted the complainant to refer to this provision, which guarantees the right to equal pay without discrimination on the ground of sex, as there is nothing in the case file to indicate that there was any discrimination between women and men among the staff in question or between them and non-established public employees. Clearly, the arguments submitted by the complainant do not justify any reference to this provision of the Charter. As a result, the Government considers that this allegation is irrelevant and that it is particularly unjustified for the complainant to refer to Article 4§3 of the Charter.

33. With regard to Article 12§4 a), French legislation does not impose any prohibition or restriction on the enjoyment by its nationals of social benefits to which they are entitled as a consequence of having worked in another state. It follows that French civilian staff who worked for the French forces in Germany must have preserved the pension rights they acquired under German legislation for the period when the Federal Republic of Germany was their employer. The French state cannot take the place of the German state and cover the entire cost of the pension benefits to which these staff may be entitled. The staff in question may therefore claim their right to a pension from the Federal Republic of Germany corresponding to the periods when their working conditions in Germany were determined by a German-law employment contract and collective agreements between the German state and German trade unions. Given these circumstances, the complainant cannot reasonably claim that the French state has violated Article 12 of the European Social Charter.

34. As to Article 18, which lays down the general rules governing the right of workers to engage in an occupation in the territory of a state of which they are not a national, the Government submits that this provision does not apply in the current case as the staff concerned were French nationals. The assertion that this Article of the Charter has been violated is unfounded.

35. The Government is surprised to find a reference to Article 19 in the CFDT’s collective complaint. Article 19 of the Charter, which has been the subject of many complaints to the European Committee of Social Rights and much interpretation by it, enshrines the right of migrant workers and their families to protection and assistance on the territory of states party. The French workers in the present case, who have since been integrated into the French public service, cannot claim to have “migrant worker” status. The Government considers that, in view of their working conditions when they were working in Germany under the responsibility of the German state and their particularly advantageous integration into the administrative services of the French Ministry of Defence, the complainant’s reference to Article 19 is particularly ill-
founded, especially when these workers’ situations are compared to the considerably more difficult ones of true migrant workers and their families.

**B. – Assessment of the Committee**

36. Article E of the European Social 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.”

   (i) Article E of the revised Charter

37. Article E complements the other substantive clauses of the revised Charter. It has no independent existence as it applies only to “the enjoyment of the rights” safeguarded by these clauses. Although the application of Article E does not necessarily presuppose a breach of these clauses – and to this extent it has an autonomous meaning – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, *mutatis mutandis*, European Court of Human Rights, Rasmussen judgment of 28 November 1984, Series A No. 87, p. 12, § 29).

38. Under Article E, a difference of treatment is discriminatory if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (see, *mutatis mutandis*, European Court of Human Rights, judgments on the Belgian language case, Marckx and Rasmussen, Series A No. 6, p. 34, § 10, No. 31, p. 16, § 33, and No. 87, p. 14, § 38; see also European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, § 40).

39. The states party enjoy a certain “margin of appreciation” in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (see the Rasmussen judgment cited above, *ibid.*, p. 15, §40), but it is ultimately for the Committee to decide whether the difference lies within this margin.

40. In the present case the CFDT contests the French authorities’ refusal to grant civilian officials of the French forces in Germany the benefit of Article 6 of Decree 70-79 of 27 January 1970 on the career structure of C and D category public officials for the sole reason that their former contracts were private law contracts under German labour legislation, meaning that they are not entitled to the status of public officials.
41. The complainants were not integrated into the C or D category of public officials as the period of service in Germany was not taken into consideration as a period of employment of persons having the civil servants status. The Committee is asked therefore to decide whether in essence the applicants belong to the category of public officials and have only been formally excluded from it because of discrimination or, alternatively, the grounds for the differing treatment that has been applied are justified and proportionate.

(ii) Whether there was discrimination

42. Article E attempts to prevent discrimination in the enjoyment of the rights enshrined by the Charter where there are different ways of complying with the requirements deriving from it. The notion of discrimination within the meaning of Article E includes, in general, cases where a person or group is treated, without proper justification, less favourably than another, (see, mutatis mutandis, European Court of Human Rights, Abdulaziz, Cabales and Balkandali judgment of 28 November 1984, Series A No. 87, p. 12, § 82).

43. In the present case the reason given by the authorities for denying the staff concerned the benefit of the Article in question is simply that they carried out their duties in the service of the French forces stationed in Germany under German law. This deprives these people of the rights that are granted to officials who have carried out the same duties in identical authorities or departments within French territory.

44. This ground is not explicitly listed as a prohibited ground of discrimination under Article E. However, it is covered by the reference in the Article to “other status”.

45. The Committee considers that in the present case it must begin by determining whether the difference in treatment constitutes discrimination, then, if this is the case, whether it falls within the scope of any of the provisions to which the CFDT refers in combination with Article E. Only if both of these conditions are met concurrently can it find a violation of the Charter.

46. The Committee notes that the applicants were integrated into the French civil service as state manual employees whilst persons performing similar duties on French territory have enjoyed more favourable conditions in accordance with the Decree of 27 January 1970 which allowed them to receive higher remuneration and later a higher retirement pension.

47. The Committee considers that this difference results from the fact that the persons concerned were not in the same situation by reason of the very different conditions of their recruitment, the legal status which applied to them, as well as the obligations of the French State pertaining to the applicable legal status, and thus the difference in the conditions of their integration into civil service cannot be considered to amount to discriminatory treatment.
48. As a consequence it is not necessary to examine whether the complaints submitted by the complainant organisation fall within the scope of the substantial provisions invoked.

CONCLUSION

49. For these reasons the Committee concludes by 12 votes to 2 that there is no violation of Article E read in conjunction with Articles 4, 12, 18 and 19.

Polonca KONČAR  Régis BRILLAT
President and Rapporteur  Executive Secretary

In accordance with Rule 30 of the Committee’s Rules, a dissenting opinion of Mr. Luis JIMENA QUESADA is appended to this decision.
DISSENTING OPINION OF MR LUIS JIMENA QUESADA

1. I regret that I am unable to subscribe to the majority opinion of the Committee in this case. The reasons are both procedural and substantial.

A. -THE CONDUCT OF THE PROCEEDINGS

2. From a procedural standpoint, I think that it would have been desirable to suspend the adoption of a final decision on the merits in order to ask the parties to comment on the possible impact of Article 14 of Decree 2005-1228 of 29 September 2005 on the career structure of category C public officials, which repealed Decree 70-79 of 27 January 1970 on the same subject, particularly as the substance of the collective complaint is based on the scope of Article 6 of the 1970 decree.

3. What is at issue in this case, which concerns the integration into the French public service of civilian personnel of the French forces in Germany (FFSA) following the withdrawal of these forces, is the scope of application of the 1970 decree, which was the legislation in force at the time of the alleged violation. Irrespective of whether or not the 2005 decree is retroactive, in other words whether the level of the retirement pensions can be recalculated as from the outset or only from when it came into force, the fact that this decree might have no effect did not mean that the parties should not be asked to give an opinion on the subject, as this would have offered the Committee more information on which to base its findings.

B.-THE MERITS OF THE CASE: WHETHER THERE WAS DISCRIMINATION

4. Turning to the merits, my disagreement concerns paragraphs 43-48 of the Committee's decision, and the conclusion that the majority of my colleagues reached (paragraph 49).

5. I believe that, despite the vague or superficial reasoning behind the various complaints lodged by the complainant (the Confédération française démocratique du travail – CFDT), the one maintaining that there was discrimination within the meaning of Article E of the revised Charter deserves closer and more specific attention from the Committee. Indeed, I have the impression that the rather general wording of the claims presented by the CFDT (see document 1 of the case file in the European Social Charter web site - www.coe.int/socialcharter) has led the Committee to undertake a similarly over-general examination of the merits of the case.

6. I agree with the majority that in this case "the reason given by the authorities for denying the staff concerned the benefit of the Article in question is simply that they carried out their duties in the service of the French forces stationed in Germany under German law", and that the case also concerns "officials who have carried out the same duties in identical authorities or departments within French territory" (paragraph 43). Similarly, I agree with the Committee's comparison of the applicants, who "were integrated into the French civil service as state manual employees", with "persons performing similar duties on French territory" (paragraph 46).
7. I would therefore point out that, even according to the majority of the Committee, the situations concerned are fully comparable: "same duties", identical authorities or departments" and "similar duties". However, this - I believe correct - starting point for establishing whether or not there was discrimination, was not followed by any precise statement of the particular aspect to which the principle of equality should be applied. In other words, an effort should have been made to determine the object of the collective complaint, namely the level of the retirement pension of the civilian employees of the FFSA as part of their integration into the French public service. This was specified by the CFDT in Part V of the collective complaint (again, document 1 of the case file), albeit with an additional confused and abstract reference to their "social rights". I believe that this somewhat abstract demand caused the Committee to focus its examination of the application of the equality principle to "rights [in general] that are granted to officials who have carried out the same duties" (paragraph 43), and to the enjoyment of "more favourable conditions [in general] (paragraph 46).

8. I therefore consider that the majority's reasoning in paragraphs 43 and 46 of the decision on the merits reveals something of a qualitative discrepancy between its starting point - what I believe to be the correct identification of the "same duties", identical authorities or departments" and "similar duties" - and the conclusion it draws - the dubious attempt to relate these comparable situations to the enjoyment of all "rights" or favourable "conditions". So while I agree with the majority of the Committee on what constitutes the starting point, I cannot accept the approach it adopts to reaching its conclusion.

9. Admittedly, it is not the Committee's job to fill in the gaps in the complainant organisation's presentation. Nevertheless, the lack of precision in the complaint about the enjoyment of social rights other than the retirement pension, which the CFDT does not clarify in its response (document 4) to the government's submissions on the merits (document 3), does not prevent the Committee from considering the one precise aspect of the complaint, namely the level of this retirement pension, rather than all the social rights or the general status to which persons performing the same duties on French territory are entitled.

10. Nor was there any need to:
- consider the working conditions, including salaries, of FFSA employees during the years they were working in Germany. These were governed by German private law and subject to the German courts, in accordance with the international instruments under the regional collective security system instituted by the North Atlantic Treaty on which their legal situation was based. The applicability of these international sources is not open to challenge in this particular case;
- grant FFSA civilian staff the status of public officials, a professional classification or other features of the French public service, such as steps, grades and remuneration scales, which are best dealt with by the national authorities, who have a wide margin of appreciation on the subject. The relevant French administrative courts, including the Conseil d'Etat, have ruled on whether or not FFSA civilian staff should be granted the status of public officials. This approach has also been adopted by the Committee, which said that it was asked to decide "whether in essence the applicants belong to the category of public officials"
Nevertheless, I would repeat that the notion of complete professional recognition, involving all the rights inherent to a national public service, is a dubious basis for applying the test of equality, when in fact the focus should be more specifically on the method used to calculate the retirement pension for years of service in Germany. Moreover, the more specific approach that I am proposing does not conflict with French administrative case-law.

11. Having regard to the foregoing, I cannot agree with the general approach (and conclusion) of the Committee in paragraphs 47 ("the Committee considers that this difference results from the fact that the persons concerned were not in the same situation by reason of the very different conditions of their recruitment, the legal status which applied to them, as well as the obligations of the French State pertaining to the applicable legal status, and thus the difference in the conditions of their integration into civil service cannot be considered to amount to discriminatory treatment") and 48 ("as a consequence it is not necessary to examine whether the complaints submitted by the complainant organisation fall within the scope of the substantial provisions invoked").

C.-THE VIOLATION OF ARTICLE E COMBINED WITH ARTICLE 12 OF THE REVISED CHARTER

12. According to my criterion:
   - since it is not contested that FFSA civilian staff were in a similar situation to the equivalent officials performing their duties in French territory ("same duties", identical authorities or departments" and "similar duties" – once more paragraphs 43 and 46);
   - and since it is no longer contested that by virtue of these duties or departments, FFSA civilian staff were integrated into the staff of the French defence ministry as state manual employees, in accordance with a complex classification that the French government itself terms "non-established public employees" (paragraph 10 of the government's memorial on the merits, document 3 of the case file: "State manual employees form a particular category of employee. They are neither civil servants nor private law employees but non-established public employees, who are still subject to basic civil service rules but covered by special provisions.");

In the specific case of validating years of service in Germany for retirement pension purposes, I can see no objective and reasonable justification, based on the proportionality principle or the notion of legitimate purpose, for the French authorities to treat FFSA civilian staff differently from persons performing the same duties in France. I therefore consider that this discrimination constitutes a violation of Article E combined with Article 12 of the revised Charter.

13. Based on this reasoning, I consider that for the purposes of calculating their retirement pension, the complainants are entitled to sums corresponding to the German period of their careers, under conditions no less favourable than those applicable to civilian officials performing the same duties in France.

14. Nevertheless, a number of other points should be made:
   - firstly, deducing discrimination from the fact that the actual and legal situations of FFSA civilian staff and the equivalent personnel in French territory are
the same but their retirement pensions are calculated differently does not imply a right to general assimilation, since states have a wide margin of appreciation in determining the arrangements for incorporation into the ranks of the public service in accordance with specified recruitment procedures, particularly competitive examinations, which themselves must satisfy the principle of equality;

- secondly, it is also clear that the complainants' right to the same method of calculating retirement pensions as comparable personnel in France does not require the French authorities to bear the full cost of the pensions to which FFSA personnel might be entitled, since account must be taken of any accumulation of insurance or employment periods completed under German legislation (from the standpoint of Article 12.4 of the revised Charter);

- finally, the fact that FFSA civilian personnel might have enjoyed more favourable employment conditions during their "German period" than comparable staff working in France (a logical and easily understandable circumstance in the case of those who agree to work abroad) cannot be used to justify the discrimination in question. In this context, the Court of Justice of the European Communities has stated that "Regulation No 1408/71* seeks to achieve the objective set out in Article 51 of the Treaty by preventing the possible negative effects that the exercise of the freedom of movement for workers could have on the enjoyment, by workers and their families, of social security benefits, in particular so far as concerns the career of migrant workers who have contributed to various social security systems, and thus to provide workers with legal certainty that they will retain the pension rights deriving from their contributions to pension systems in a similar way to a worker who has not exercised his right to freedom of movement within the Community" (judgment of 3 April 2008, case C-331/06, K.D. Chuck, para. 32). The Community courts have also consistently held that "the aim of Articles 39 EC and 40 EC and Article 50 of the EC Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one Member State" (judgment of 18 December 2007, joined cases C-396/05, C-419/05 and C-450/05, Habelt, Möser and Wachter, respectively, para. 64).

15. Given these circumstances, the CFDT's complaint comes within the scope of one of the substantive provisions relied on (Article 12 of the revised Social Charter – right to social security), in conjunction with Article E, on account of the refusal to grant FFSA civilian employees the financial benefits to which they are entitled under French legislation. In practice, the French authorities have distinguished between recipients of a retirement pension according to the national territory in which they carried out their duties, which constitutes a form of discrimination prohibited by Article E concerning the exercise of their pecuniary rights under Article 12 of the revised Charter. Whether the territory was French or German was the sole criterion for distinguishing between civilian staff of French nationality in an otherwise identical situation, and this distinction lacks any objective and reasonable justification.

16. Moreover, even if it might be argued that, in principle, the distinction in question had the legitimate purpose of protecting the country's economic system, given the number of potential beneficiaries and the effects of any accumulation of

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benefits in France and Germany this particular case should not create for France any problems regarding the viability of their social security system or pressure on the national budget. I therefore consider that there was no reasonable relationship of proportionality between the aforementioned legitimate purpose and the means employed to achieve it. This conclusion is reinforced by the case-law of the Court of Justice of the European Communities concerning Council Regulation No 1408/71. The Court has held that "provisions of Community law may apply to professional activities pursued outside Community territory as long as the employment relationship retains a sufficiently close link with the Community .... That principle must be deemed to extend also to cases in which there is a sufficiently close link between the employment relationship, on the one hand, and the law of a Member State and thus the relevant rules of Community law, on the other" (aforementioned judgment of 18 December 2007, para. 122). If this case-law is applicable to professional activities pursued outside Community territory, it applies with even more force in this case, where the activities in question were carried out in the territory of the European Union and thus the principle of equal treatment in two countries established in Regulation 1408/71 makes it easier to consider FFSA civilian personnel and those performing the same duties in France as having the same status for the purposes of retirement pension entitlement.

17. One matter that remains to be considered was a subject of discussion in the Committee, namely the adjustment of the burden of proof in connection with article E of the revised Charter. Here it should be noted that, *mutatis mutandis*, "as to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified" (European Court of Human Rights, judgment of 18 February 2009, Andrejeva v. Latvia [GC] § 84, and judgment of 13 November 2007, D.H. and others v. Czech Republic [GC], § 177).

18. The French government clearly acknowledges that for the purposes of calculating retirement pensions FFSA civilian personnel and those who have performed the same duties in France are treated differently. Nor has the government supplied evidence of any objective and reasonable justification for this difference, which means that the distinction concerned does not pursue a legitimate aim and there is no reasonable relationship of proportionality between the means employed and the aim pursued.

19. Apart from that, given the absence of any other relevant information in the case file (see section A), it has to be assumed that the method used to calculate the retirement pension entitlement of FFSA civilian personnel for the German periods of their career was less favourable than that applied to staff in the identical situation in France. If that is not the case (depending on any old age benefits paid by the German authorities, the accumulation of benefits and so on), it needs to borne in mind that, in accordance with Article H of the revised Charter, the Charter is only a minimum standard and should in any case aim to secure a higher level of equality.

20. For these reasons, and given these circumstances, I consider that the Committee should have concluded that there was a violation of Article E combined with Article 12 of the revised Charter.