

**DECISION ON THE MERITS**

**COMPLAINT No. 12/2002**

The Confederation of Swedish Enterprise  
against Sweden

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (hereafter referred to as "the Committee"), during its 194<sup>th</sup> session attended by:

Messrs	Jean-Michel BELORGEY, President
	Nikitas ALIPRANTIS, Vice-President
Ms	Polonca KONCAR, Vice-President
Messrs	Rolf BIRK
	Matti MIKKOLA
	Konrad GRILLBERGER
	Tekin AKILLIOĞLU
Ms	Csilla KOLLONAY LEHOCZKY
Messrs	Lucien FRANCOIS
	Andrzej SWIATKOWSKI

Assisted by Mr Régis BRILLAT, Executive Secretary of the European Social Charter

After having deliberated on the 2 April and 14 and 15 May 2003,

On the basis of the report presented by Mr Rolf BIRK,

Delivers the following decision adopted on 15 May 2003:

## PROCEDURE

1. On 19 June 2002, the Committee declared the complaint admissible.
2. In accordance with Article 7 para. 1 and para. 2 of the Protocol providing for a system of collective complaints and with the Committee's decision on the admissibility of the complaint, the Executive Secretary communicated, on 13 November 2002, the text of the admissibility decision to the Swedish Government, to the Confederation of Swedish Enterprise, to the Contracting Parties to Protocol, to the states that have made a declaration in accordance with Article D para. 2 of the revised European Social Charter, as well as to the European Trade Union Confederation (ETUC), the Union of the Confederations of Industry and Employers of Europe (UNICE) and the International Organisation of Employers (IOE), inviting them to submit their observations on the merits of the complaint. In accordance with Article 25 para. 2 of the Committee's Rules of Procedure, the President fixed a deadline of 30 August 2002 for the presentation of observations.
3. On 4 September 2002, the Swedish Government presented its observations on the merits of the complaint. The ETUC submitted its observations on 30 August 2002. The IOE submitted observations on 18 September 2002.
4. The President set 4 November 2002 as the deadline for the Confederation of Swedish Enterprise to present its observations in response to the Government. At the request of the Confederation of Swedish Enterprise the deadline was extended to 28 November 2002. The observations were registered on 2 December 2002.
5. During its 192<sup>nd</sup> session (3 – 7 February 2003), the European Committee of Social Rights decided, in accordance with Article 7§4 of the Protocol providing for a system of collective complaints and Article 29§1 of the Committee's Rules of Procedure, to organise a hearing with the representatives of the parties.
6. The hearing took place in public at the Human Rights Building in Strasbourg on 31 March 2003. The Confederation of Swedish Enterprise was represented by Mr Kent BRORSSON, Director of Labour Law of the Confederation of Swedish Enterprise, and by Mr Gustav HERRLIN, Head of Labour Law of the Swedish Construction Federation. The Government was represented by Mr Örjan HÄRNESKOG, Legal Adviser and Mr Stefan HULT, Head of the Labour Law Division, both from the Ministry of Industry, Employment and Communications.

In accordance with Article 29 para. 2 of its Rules of Procedure, the Committee invited the ETUC and IOE to participate in the hearing. ETUC was represented by Mr Klaus LÖRCHER, Legal Adviser, by Mr Ulf EDSTRÖM and by Mr Kurt JUNESJÖ of the Swedish Trade Union Confederation (LO). IOE did not participate in the hearing. The President also granted a request for participation in the hearing by the Swedish Building Workers' Trade Union (SBWU), which was represented by Mr Ola WIKLUND, Advocate.

The Committee heard addresses by Mr BRORSSON, Mr HERRLIN, Mr HÄRNESKOG, Mr LÖRCHER, Mr EDSTRÖM and Mr WIKLUND and replies to questions put by members of the Committee. Following the hearing, the Secretariat received supplementary

observations from Mr WIKLUND dated 10 April 2003, from Mr EDSTRÖM dated 17 April 2003 and from Mr BRORSSON dated 9 May 2003. These observations were sent to the parties for information.

## **SUBMISSIONS OF THE PARTICIPANTS IN THE PROCEDURE**

### *a) The Complainant Organisation*

7. The Confederation of Swedish Enterprise (SN) asks the Committee to state that Sweden is in breach of Article 5 of the Revised Charter because the right not to join a trade union is violated in practice in two respects:

- firstly, pre-entry closed shop clauses continue to exist in collective agreements;
- secondly, non-unionised workers are forced to accept compulsory deductions (wage monitoring fees) from their wages at source for direct transfer to a trade union.

### *b) The Swedish Government*

8. The Government asks the Committee to find the complaint unfounded in both respects. In the Government's opinion the absence of legislation prohibiting pre-entry closed shop clauses cannot constitute a violation of Article 5 and the deduction of wage monitoring fees from the wages of non-unionised workers does not amount to compulsory unionism or undue pressure to join the union and the right not to join a trade union is therefore not infringed.

### *c) The European Trade Union Confederation (ETUC)*

9. The ETUC considers that the negative aspect of the right to organise should be interpreted restrictively so as not to weaken the material content of the positive right to organise. ETUC holds that the situation as regards pre-entry closed shop clauses does not infringe Article 5 and it therefore asks the Committee to re-examine its previous conclusions relating to Sweden on this point. ETUC finally asks the Committee to conclude that Sweden complies with Article 5 in respect of the wage monitoring fees.

### *d) The International Organisation of Employers (IOE)*

10. The IOE states that it supports the arguments of the complainant in both aspects of the complaint. IOE considers that trade union monopoly clauses are contrary to the letter and spirit of the Revised Charter and that the wage monitoring fees represent strong and unjustified moral pressure on non-unionised workers.

## **RELEVANT DOMESTIC LAW**

11. On the basis of the submissions by the parties, the relevant domestic law may be summarised as follows:

Swedish law contains no express statutory protection of the right not to join a trade union. In Judgment No. 20/2001 (the Swedish Construction Federation v. SBWU, judgment of 7 March 2001) by the Swedish Labour Court it is stated that "Through the incorporation of the European Convention on Human Rights the negative freedom of association has been

given legal protection [...]” The Court further states that “[...] the protection of the negative freedom of association under Swedish law is grounded exclusively on the European Convention on Human Rights.”

12. a) With respect to pre-entry closed shop clauses

The pre-entry closed shop clauses under consideration in this case are clauses contained in so-called substitute agreements, i.e. collective agreements concluded between trade unions and individual employers who are not members of an employers’ organisation. The clauses, which differ in wording, provide in essence that the employer shall give priority to trade union members when recruiting employees. If an employer does not act in accordance with such a clause the trade union may in principle invoke a breach of the collective agreement.

13. Although it follows from Section 7 of the Employment Protection Act that dismissal of workers who refuse to join a particular trade union or who wish to withdraw from a union is unlawful, Swedish law does not prohibit pre-entry closed shop clauses and the Swedish Labour Court has found such clauses to be lawful, notably in Judgment No. 68/1986.

14. b) With respect to wage monitoring fees

According to certain collective agreements concluded between trade unions and employers’ organisations, *in casu* the construction sector collective agreement (*Byggnadsavtalet*) concluded between SBWU and the Swedish Construction Federation, the trade union has a right to check and examine the correctness of the wages paid to workers, normally by reviewing pay records. For this monitoring activity the union is entitled to a percentage of each worker’s wage which is deducted by the employer from the wages of workers, members of SBWU and non-unionised workers alike. This “wage monitoring fee” (*granskningsavgift*) is transferred to the relevant local chapter of the trade union party to the collective agreement. In the construction sector collective agreement the wage monitoring fee is set at 1.5%. Wage monitoring may involve examination of material (reporting lists, etc.) submitted by the employer to the local union chapter as well as in some cases visits to the enterprise.

15. The Swedish Labour Court has on several occasions confirmed that provisions on wage monitoring fees in collective agreements which impose payment also on non-unionised workers are lawful, most recently in Judgment No. 20/2001. In this judgment the Labour Court held the compulsory deduction of wage monitoring fees from the wages of non-unionised workers provided by the above-mentioned construction sector agreement not to be in breach of Article 11 of the incorporated European Convention on Human Rights. The Labour Court did not directly address the question of whether the monitoring fees were in conformity with the Revised Charter, but stated - referring to the 1961 European Social Charter and the 1989 Community Charter - that “there is nothing to support that any of these legal instruments entails a more far-reaching protection of the negative freedom of association than that following from the case law of the European Court of Human Rights.” It also follows from domestic case law that the wage monitoring fee cannot be lawfully imposed on workers who are members of another trade union than the one party to the collective agreement as this would constitute violation of the positive right to organise of those workers (Labour Court Judgments No. 19/1954 and No. 222/1977).

## AS TO THE LAW

16. The complainant alleges that the situation in Sweden as regards pre-entry closed shop clauses on the one hand and wage monitoring fees on the other hand is in violation of Article 5, the relevant part of which reads as follows:

*“With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom.”*

### I. Pre-entry closed shop clauses

#### A. Arguments of the parties

17. SN refers to several different clauses. Firstly, according to substitute agreements concluded by SBWU before 1 January 2000, but still in force, union members should “take precedence in cases of employment”. At the hearing, the complainant cited further examples from other agreements to which SBWU is a party, such as “all work pertaining to this agreement shall be completed by members of the Swedish Building Workers’ Union” and “members of the Swedish Building Workers’ Union residing within a 10 kilometre radius of a worksite have priority in the hiring of workers”. Secondly, in certain more recent agreements concluded by the SBWU the wording has been changed to stipulate that “the parties to this collective agreement agree on the value of workers’ trade union membership.” Thirdly, the Swedish Electricians’ Union and the Swedish Painters’ Union carry substitute agreements with a clause pursuant to which “the employer is required to encourage that employees be members of [name of union].”

18. In SN’s view these clauses are clearly pre-entry closed shop clauses, the intention of which is to give priority in recruitment to members of the trade union. This state of affairs is not altered by the recent changes in wording of the clauses in certain agreements. The clauses cannot be interpreted in any other way than that the employer has a legal obligation to take measures to ensure that the person employed is a member of the union(s) concerned.

19. According to SN close to 10,000 substitute agreements, the majority (about 9,000) concluded by SBWU, contain clauses, which may be construed as pre-entry closed shop clauses. Approximately 5,000 of the agreements concluded by SBWU contain unconditional and directly applicable pre-entry closed shop clauses. SN emphasises that not all pre-entry closed shop clauses in existence are necessarily known and the above statistics may therefore not provide an exhaustive picture of the situation.

20. In SN’s view the dialogue between the Government and certain trade unions is not an appropriate method of implementing the obligations arising from Article 5 of the Revised Charter. Although SBWU has, as a result of the dialogue, informed all employers in writing that the union does not intend to invoke any existing closed shop clauses, SN observes that this attitude could, in the absence of a legal guarantee, be revised at any time in the future and the union could at any time attempt to enforce a closed shop by industrial action.

21. SN refers to the Labour Court's Judgment No. 68/1986 in which the Court found the following clause in a substitute collective agreement to be valid and lawful: "Members of the Building Workers Union, resident in the municipality where the workplace is situated, take precedence in cases of employment." SN further refers to the case law of the Committee, which already in Conclusions XIII-1 (1990-1991) noted that Swedish law did not afford protection against pressure to join a trade union in order to obtain employment. The Committee subsequently reached a decision of non-conformity on this point due to the existence in practice of pre-entry closed shop clauses. SN also points out that the Swedish Government has not so far taken any action to bring the situation in law into conformity with Article 5.

22. The Government supports the principle that trade union membership should be voluntary, but it also states that absolute protection against any pressure or influence cannot be expected: the interests of non-unionised workers must be balanced against the legitimate interests of trade unions. It further disputes that conclusions can be drawn from the 1986 Labour Court judgment quoted by the complainant, because it pre-dates the incorporation of the European Convention on Human Rights, which introduced a legal protection of the negative freedom of association the full extent of which is still to be determined.

23. The Government states that in 3,671 agreements concluded by SBWU the clause according to which union members "take precedence" has recently been replaced by a clause whereby the parties "agree on the value of trade union membership." In the Government's view such a "policy clause" has no binding legal effect and places no obligation on employers to put pressure on jobseekers. According to the Government the agreements concluded by SBWU containing the "old" clauses gradually disappear (the Government estimates that as many as about 2,500 disappear every year), which is, it implies, at least in part due to a successful dialogue carried on with this and other trade unions.

24. As to the clauses to be found in agreements concluded by the Swedish Electricians' Union and the Swedish Painters' Union according to which the employer "undertakes to work towards the employees [...] being members of [*name of trade union*]", the Government again holds that these are not pre-entry closed shop clauses *per se* but "policy clauses" which cannot be construed as involving any form of legal pressure or obligation to become a member of the trade union.

25. The Government finally states that the absence of legislation prohibiting pre-entry closed shop or priority clauses, which are in any case bound to disappear in the near future, cannot be said to violate Article 5. Even if the situation technically were to be found contrary to the Revised Charter this would not imply a serious violation. The clauses do not constitute a major problem in practice - indeed the clauses are rarely an issue of conflict between employers and trade unions; legal disputes are more or less non-existent and the Government has therefore not deemed it necessary to legislate.

## **B. Assessment of the Committee**

26. The Committee observes firstly that Article 5 must be interpreted in the light of Article I, which reads as follows:

*“Without prejudice to the methods of implementation foreseen in these articles the relevant provisions of Articles 1 to 31 of Part II of this Charter shall be implemented by:*

- a laws or regulations;*
- b agreements between employers or employers’ organisations and workers’ organisations;*
- c a combination of those two methods;*
- d other appropriate means.”*

27. It results from the combination of these provisions that when, in order to implement undertakings accepted under Article 5, use is made of agreements concluded between employers’ organisations and workers’ organisations, in accordance with Article I.b, States should ensure that these agreements do not run counter to obligations entered into, either through the rules that such agreements contain or through the procedures for their implementation.

28. The commitment made by the Parties, under which domestic legislation or other means of implementation under Article I, bearing in mind national traditions, shall not infringe on employers’ and workers’ freedom to establish organisations, implies that, in the event of contractual provisions likely to lead to such an outcome, and whatever the implementation procedures for these provisions, the relevant national authority, whether legislative, regulatory or judicial, is to intervene, either to bring about their repeal or to rule out their implementation.

29. Furthermore, the freedom guaranteed by Article 5 of the Charter implies that the exercise of a worker’s right to join a trade union is the result of a choice and that, consequently, it is not to be decided by the worker under the influence of constraints that rule out the exercise of this freedom.

30. The clauses at issue set out in the collective agreements in question which reserve in practice employment for members of a certain union are clearly contrary to the freedom guaranteed by Article 5. They restrict workers’ free choice as to whether or not to join one or other of the existing trade unions or to set up separate organisations of this type. Accordingly, the Committee considers that an obligation of this nature strikes at the very substance of the freedom enshrined in Article 5 and therefore constitutes an interference with that freedom.

31. The Committee considers that under these circumstances there is a violation of Article 5.

## II. Wage monitoring fees

### A. Arguments of the Parties

32. SN describes wage monitoring as a simple and rudimentary operation which is “almost completely devoid of its original purpose” and offers no real benefit to workers. In this respect wage monitoring differs from so-called “output monitoring” of piecework wages, where physical or technical measurements are usually required, and for which the union also collects a fee (*mätningssavgift*).

33. It is SN’s opinion that the compulsory deduction of wage monitoring fees from the wages of workers who are not members of the union and who do not wish to become so violates their negative right to organise and thus Article 5 of the Revised Charter. SN finds the fees to be considerable (about 300 SEK per month) and states that they are transmitted to the trade union thereby in fact representing a contribution to general union activities. SN states that the employers’ organisations have several times attempted to re-negotiate the agreements with a view to abolishing the fees for non-unionised workers, but so far to no avail.

34. Furthermore, although the Labour Court did not conclude as much in the above-mentioned Judgment No. 20/2001, SN holds the wage monitoring fee to be a covert union membership fee. It observes here that the monitoring fee is not imposed on workers who are members of a trade union other than the one holding the collective agreement. This is the result of other Labour Court decisions in cases brought by the Syndicalist Union. In a 1954 judgment (No. 19/1954) the Court held that where a wage monitoring fee exceeded the cost of the monitoring work this would represent a contribution to the general activities of the union (*in casu* SBWU) and could be put on an equal footing with a regular membership fee. For workers belonging to another trade union, the Syndicalist Union, such a fee would constitute a violation of the positive right to organise. A similar result on this point was reached by the Court in Judgment No. 222/1977.

35. SN underlines that the crucial issue is not whether the wage monitoring fee involves membership or strong pressure to join, but instead that the non-unionised worker is compelled to contribute financially to a union he or she has chosen not to join.

36. The Government observes that the system with deductions at source from each individual worker’s wage was in fact introduced following a proposal by the employers’ organisation during the collective negotiations in the construction sector. SBWU had initially preferred another model, whereby the fee was to be calculated as a percentage of the total sum of wages paid by the employer and not deducted from the wages of each employee. It is recalled that the complainant’s affiliate organisations are parties to collective agreements providing for the existing fee system and the Government emphasises that nothing prevents the employers’ organisation from seeking a re-negotiation of the agreements, if they so wish.

37. The Government further refers to the SBWU viewpoint according to which the monitoring fee does not entail a contribution to the general union activities because of the strict separation of the union’s finances in non-profit activities and business activities.

38. The Government summarises its position as follows:

- the monitoring fee does not represent or impose any obligation or pressure on the worker to join the union nor does it lead to the non-unionised worker being associated with the ideology or politics of the union as confirmed by Labour Court Judgment No. 20/2001;
- workers do in fact benefit from wage monitoring as substantial sums of money are transferred to workers every year as a result of corrections made in connection with wage monitoring by the trade union;
- the deductions are made from all workers' wages, and if deductions were not made for non-unionised workers this would represent an incentive for workers not to be unionised.

The Government concludes that the deduction of fees cannot be put on an equal footing with union membership and that it does not entail undue pressure on workers to join the union. Consequently, there is no violation of the negative right to organise under Article 5 of the Revised Charter.

## **B. Assessment of the Committee**

39. The Committee observes firstly that the fees deducted from the wages of workers pursuant to a collective agreement concluded between SBWU and the Swedish Construction Federation are, according to the collective agreement, for the service of wage monitoring. The Committee considers that the system of wage monitoring may, depending upon national traditions, be assumed either by public authorities, or, on the explicit or implicit authorisation of the legislator, by professional associations or trade unions. In the latter case this could legitimately require the payment of a fee.

40. Consequently, the Committee considers that the payment of a fee to the trade union for financing its activity of wage monitoring cannot be regarded in itself as unjustified. It also considers that it cannot be regarded as an interference with the freedom of a worker to join a trade union as the payment of the fee does not automatically lead to membership of the SBWU and in addition is not required from workers members of trade unions other than SBWU.

41. However, the Committee considers that doubts exist as to the real use of the fees and that, in the present case, if they were to finance activities other than wage monitoring, these fees would, on the grounds indicated in paragraph 29 be deducted, at least for a part, in violation of Article 5.

42. In the present case, the Committee is not in a position to verify the use of the fees and in particular to verify to what extent the fees are proportional to the cost of the service carried out and to the benefits wage monitoring confers on the workers. These are decisive factors in determining a violation of Article 5 with reference to paragraphs 39 and 40 or 41. The Committee considers therefore that it is for the national courts to decide the matter in the light of the principles the Committee has laid down on this subject or, as the case may be, for the legislator to enable the courts to draw the consequences as regards the conformity with the Charter and the legality of the provisions at issue.

43. The Committee reserves the right to supervise the situation in practice through the reporting procedure and, as the case may be, the collective complaints procedure.

## **CONCLUSION**

On the above grounds, the Committee concludes

- unanimously that the situation in respect of pre-entry closed shop clauses constitutes a violation of Article 5 of the Revised Social Charter;
- by 7 votes to 3 that the wage monitoring fees as such do not constitute a violation of Article 5 of the Revised Social Charter.

Rolf BIRK  
Rapporteur

Jean-Michel BELORGEY  
Président

Régis BRILLAT  
Secrétaire exécutif

In accordance with Article 30 of the Committee's Rules of Procedure, a partly dissenting opinion of Mr Tekin AKILLIOĞLU and a separate opinion of Mr Konrad GRILLBERGER and Mr Matti MIKKOLA are appended to this decision.

## **Partially dissenting opinion of Mr Tekin Akillioğlu**

I cannot agree with the majority reasoning in the second part of the decision headed "wage monitoring fees".

1. Concerning paragraph 40: once the deduction takes the form of a withholding of wages without the employee's consent, this constitutes an obligation to operate through the trade union, which amounts to compulsory membership. The absence of automatic membership in no way alters the nature of this compulsory deduction, which can be considered as a partial membership fee. The fact that the deduction does not apply to workers who are members of trade unions other than the SBWU merely reinforces the argument that this is a partial membership fee requirement.

2. Concerning paragraph 41: exceptionally, the majority is ruling on a hypothetical case: allocating the sums deducted to pay for other trade union activities would be in breach of Article 5. I find this argument, which draws a distinction between wage monitoring and other union activities, very unconvincing. Even though this monitoring would normally be the responsibility of the authorities, in this case it is a trade union activity and there is no reason to legitimise it.

## **Separate opinion of Mr Konrad GRILLBERGER and Mr Matti MIKKOLA**

We do not agree with the majority as regards wage monitoring fees in this case and we voted against the decision adopted for the following reasons:

The decision of the Committee is ultimately based on the idea that Article 5 prohibits the parties to collective agreements from imposing fees on employees who are not members of the trade union. The exception the majority would seem to permit is a payment for services rendered by the trade union. In this case, the payment must be proportionate to the costs of those services and if this is not so, the fee imposed violates the freedom not to join a trade union. See paragraphs 41 and 42 in the decision.

We agree in principle with the case law pertaining to the negative aspect of the right to organise. But we cannot agree with the assessment that any payment not related to and not proportionate to services provided by trade unions is a violation of the freedom not to join a trade union.

We consider that the monitoring fee in the present case pursues the legitimate aims of protecting the results of collective bargaining more generally, of ensuring compliance with the provisions of the collective agreement specifically as well as of achieving a fair remuneration for the workers concerned. We recall that the exercise of trade union activities (Article 5), the right to bargain collectively (Article 6) and the right to a fair remuneration (Article 4) are fundamental rights guaranteed by the Revised Charter.

In view of the nature of the social and political issues involved in achieving a proper balance between the competing interests in the labour market and, in particular, in assessing the appropriateness of State intervention in existing collective agreements to restrict the activities of trade unions, and taking into account the divergence of domestic systems with respect to the degree of collective autonomy afforded to the social partners, we consider that States Parties should enjoy a wide margin of appreciation in their choice of the means to be employed (see also Eur.CourtHR, *Gustafsson v. Sweden*, judgment of 25 April 1996, Reports of Judgments and Decisions, 1996-II).

We do not consider that deduction of the monitoring fee entails compulsory unionism or undue pressure to join a union. It is undisputed that payment of the monitoring fee does not lead to formal membership of SBWU and no request to this effect is made by SBWU. Consequently, the monitoring fee does not strike at the very substance of the right not to join a trade union as protected by Article 5.