The European Social Charter
The Collective Complaints Procedure: A Mechanism of Justiciability?

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The European Social Charter

• European Social Charter (ESC), 1961/1965 (27 ratifications);
• Additional Protocol, 1988/1992 (13 ratifications); Protocol Amending the European Social Charter, 1991, not yet in force (but applied to most parts. 23 ratifications);
• Additional Protocol to the European Charter providing for a system of collective complaints, 1995/entry into force 1 July 1998 (12 ratifications);
• Revised European Social Charter, 1996/1 July 1999 (27 ratifications).

As of 16 October 2009,
42 States (of the 47 CoE Members) were parties to either the ESC or the ESC Rev (or both);
14 states have accepted the collective complaints procedure.
ESC – content and structure

- Part I Declaration of policy aims (a very general legal obligation to maintain a national policy inspired by these principles)
- Part II Legal commitments
- Part III Undertakings (a la carte convention)
- Part IV Supervision
- Part V Derogations, restrictions
- ESC Revised includes a separate provision on non-discrimination (Part V, Article E). In ESC, non-discrimination included only in preamble

- **Appendix** to the (Revised) ESC - integral part of the (Revised) ESC. Includes scope of the persons protected as well as specification concerning the meaning of a wording in some articles.
ESC and Revised ESC – Substantive Rights

- Article 1 – right to work
- Article 2 – *just conditions of work*
- Article 3 – *safe and healthy working conditions*
- Article 4 – right to a fair remuneration
- Article 5 – right to organise
- Article 6 – right to bargain collectively
- Article 7 – *protection against child labour / children at work*
- Article 8 – *maternity protection at work, special protection of women at work*
- Article 9 – right to vocational guidance
- Article 10 – right to vocational training

(the articles *in italics* are those amended in the Revised ESC)
ESC and Revised ESC – Substantive Rights (cont.)

- **Article 11** – right to protection of health
- **Article 12** – right to social security
- Article 13 – right to social and medical assistance
- Article 14 – right to social welfare services
- **Article 15** – rights of persons with disabilities
- Article 16 – protection of the family
- **Article 17** – social protection of mothers and children
- Article 18 – right to work across boarders (other Contracting Parties)
- **Article 19** – protection of migrant workers

(the articles *in italics* are those amended in the Revised ESC)
Revised ESC –
Substantive Rights

• Article 20 – Workers’ right to equal opportunities and equal treatment without discrimination on the grounds of sex
• Article 21 – Workers’ right to information and consultation
• Article 22 – Workers’ right to participation
• Article 23 – Social protection of elderly

(Articles 20-23 are included in the Additional Protocol of 1988)

NEW PROVISIONS ABSENT IN ESC AND ADDITIONAL PROTOCOL

• Article 24 – Protection in case of termination of employment
• Article 25 – Protection at employer’s insolvency
• Article 26 – Right to dignity at work
• Article 27 – Equal treatment of workers with family responsibilities with other workers
• Article 28 – Protection of workers’ representatives
• Article 29 – Information at collective redundancy
• Article 30 – Protection against poverty and social exclusion
• Article 31 – Right to housing

• Article E – Non-discrimination
Specific features of the ERC

- Menu convention: Part III on Undertakings, so called hard core Articles 1, 5, 6, 12, 13, 16, 19 (and 7, 20 in the Revised ESC) and others.
- Personal scope of the ESC: Appendix “foreigners only insofar as they are nationals of other contracting parties lawfully resident or working regularly within the territory of the party concerned.” Not strictly reciprocity as there is no requirement that the provision in question is ratified by the contracting party of which the foreigner is a national.
- Implementation by also by collective agreements (Article 33 ESC/Article I Revised ESC)
- Implementation of Article 2(1)(2)(3)(4)(5) and (7), Article 7(4)(6) and (7), Article 10(1)(2)(3) and (5) of (Revised) ESC as well as Articles 21 and 22 of the Revised ESC is regarded as effective if applied to the great majority of workers concerned.
Supervision of the ESC

1. **Reporting** – mandatory.
   Legal basis: Part IV, Art. 21-29 ESC; Protocol Amending the ESC Article 2-6; Part IV, Article C of the Revised ESC.

1. **Collective complaints** – optional.
   Legal basis: Additional Protocol Providing for a System of Collective Complaints; and Part IV, Article D of the Revised ESC.
Supervision of the ESC

Main bodies involved in the supervision of the ESC:

1. **European Committee of Social Rights**, formerly Committee of Independent Experts (individual experts)

2. **Governmental Committee** (national civil servants of each Contracting Party)

3. **Committee of Ministers** (Minsters of Foreign Affairs of all the Member States)
Reporting

- Until 1998 the only form of supervision. Detailed interpretation of various provisions developed within the reporting procedure (Conclusions).
- Complicated procedure with regard to the articles subject to reporting and procedure followed.
- Rights divided in four groups. Each group reported on every four years. Previously (Until Oct 2007) so called “hard core” articles subject to more frequent reporting (every two years) than other articles (every four years).
- Also reporting on provisions not accepted (art. 22 of ESC and Article C of the Revised ESC), requested by the Committee of Ministers.
Procedure for reporting

- ECSR gives its legal assessment of the compliance by a Contracting Party.
- The Governmental Committee prepares the decision of the Committee of Ministers and selects those issues which should be subject to the recommendations in the resolution of the Committee of Ministers.
- The Committee of Ministers adopts a resolution containing individual recommendations to the Contracting Parties concerned (two-thirds majority, voting limited to the Contracting Parties).
- International labour organisations participate in the process (consultative capacity in the deliberations of the ECSR, observations in a consultative capacity to the Governmental Committee). International NGOs with consultative status with the CoE and with particular competence in the matters governed by the ESC may be consulted by the Governmental Committee Art 27(2) of ESC.
- Prior to the adoption of the Protocol Amending the ESC, the role of the Governmental Committee and its relation to the ECSR (Committee of independent Experts) unclear. Now clear that the Governmental Committee does no legal assessment, only a policy assessment.
Collective complaints

- States can accept collective complaints procedure by
  1. ratifying the Protocol
  2. making a declaration under Article D of the Revised Social Charter
Standing
Who has the right to complain?

- International organisations of employers and trade unions that are observers to the meetings of the Governmental Committee of the CoE: European Trade Union Confederation (ETUC); Union of the Confederation of Industry and Employers of Europe; and the International Organization of Employers
- International NGOs which have consultative status with the CoE and which have been placed on a list drawn up by the Governmental Committee for this purpose
- Representative national organisations of employers and trade unions (autonomous concept of what is representative). But see No. 28/2004 Syndicat national des dermato-vénérologues (SNDV) v. France (concerning the alleged discriminatory nature of regulation on fees for independent medical doctors in France):
  - “... The Fact that the complainant trade union is not considered in French law as representative for the purpose of collective bargaining, is not in itself decisive for the purpose of Article 1 c of the Protocol.

From the documents at its disposal, the Committee is unable to determine whether the complainant organisation is representative for the purposes of the collective complaints procedure, and in particular for that of presenting complaints on behalf of all specialist practitioners. However, given the conclusion it reaches in para. 8, it does not find it necessary to consider these matters.” (decision of admissibility, para. 4-5)

- Other representative national NGOs with particular competence in the matters governed by the charter (specific declaration by state needed: so far only Finland)
Admissibility

- Admissibility requirements are less strict than in complaints procedures for instruments protecting civil and political rights, e.g. ECHR and CCPR.
- Article 4 of the Protocol providing for collective complaints (CCP): The complaint must refer to a provision which the State Party has accepted to be bound by. Inadmissible on this ground No. 3/1999 European Federation of Employees in Public Services (EUROFEDOP) v. Greece
Admissibility

- Article 4 of the CCP: Complaint must indicate in what respect the Charter the State Party has failed to **ensure the satisfactory application**

- see e.g. No. 5/1999 *European Federation of Employees in Public Services (EUROFEDOP) v. Portugal* where Portugal contested on the admissibility stage that the complaint indicated in which respect there was unsatisfactory application, but the argument was rejected by the ECSR: the reasons given in the complaint, although succinct, were sufficiently indicative of the extent to which Portuguese Government is alleged not to have ensured the satisfactory application of the Charter (Reference to the Portuguese constitution and provisions of the legislation allegedly in contravention with the Charter (decision on admissibility, para. 10).
Admissibility

- Article 3 of the CCP: The complaint must relate to a matter in which the NGO in question has **particular competence**
- Article 4 of the CCP: complaint shall be lodged in writing
Admissibility

- No victim requirement
- No requirement of exhaustion of local remedies
- No six months rule
- No “same matter” rule
- Most complaints have been decided as admissible (so-far only 4 in admissible)
Violation v. unsatisfactory application

- Terminology: unsatisfactory applications vs. victim of an alleged violation
- Protocol talks about unsatisfactory application. Explanatory report often refers to compliance.
- See dissenting opinion of Mr da Costa in 1/1998. Satisfactory application can be deemed to be concerned with the overall approach of the state to the issue in question. The use of terminology by ECSR emphasises the justiciability of the rights of the Charter.
Violation v. unsatisfactory application

• For an example of inconsistency in use of language, see 9/2000 Confédération Française de l’Encadrement (CFE-CGC) v. France on limitation on working hours. The ECSR concluded:

1. Article 2(1) on reasonably daily and weekly working hours - "violation"
2. Article 4(2) – fair remuneration for over time work “contrary to”
3. Article 6 (4) right to strike “in conformity with”
4. Article 27 on equal opportunity of persons with family responsibilities “is not contrary to”
5. But in “Conclusion” in the end of decision reference to violation/no violation
Outcome of procedure

- Article 8.1 CCP: ECSR shall draw a report and present its conclusions as to whether or not the Contracting Party concerned has ensured the satisfactory application of the provision(s) referred to in the complaint.

- Article 8.2 CCP: report shall be transmitted to the Committee of Ministers, as well as to the Parliamentary Assembly and made public at the same time the CoM resolution.

- Article 9 CCP: Committee of Ministers shall adopt a resolution (majority of those voting)

- Article 9 CCP: If the ECSR has found that the provision(s) in question have not been satisfactorily applied, the Committee of Ministers shall adopt a recommendation addressed to the Contracting Party concerned (2/3 majority of those voting)

- Article 10 CCP: The State concerned shall report back in its next periodic report.
Role of the CoM

- Article 9 of CCP:

1. On the basis of the report of the Committee of Independent Experts, the Committee of Ministers shall adopt a resolution by a majority of those voting. If the Committee of Independent Experts finds that the Charter has not been applied in a satisfactory manner, the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned. In both cases, entitlement to voting shall be limited to the Contracting Parties to the Charter.

2. At the request of the Contracting Party concerned, the Committee of Ministers may decide, where the report of the Committee of Independent Experts raises new issues, by a two-thirds majority of the Contracting Parties to the Charter, to consult the Governmental Committee.
Role of the CoM - explanatory report

Article 9
45. This article deals with the role of the Committee of Ministers, which intervenes immediately after the Committee of Independent Experts.
46. The duties of the Committee of Ministers are similar to those it carries out as supervisory body in the procedure instituted by the Charter.

On the basis of the report of the Committee of Independent Experts, the Committee of Ministers adopts a resolution, by a majority of those voting. However, if the conclusions of the Committee of Independent Experts are negative, the Committee of Ministers must adopt a recommendation addressed to the state concerned. In view of the importance of this decision and in accordance with the new rule introduced by the Amending Protocol (Article 5), a two-thirds majority of those voting is required.

The Committee of Ministers cannot reverse the legal assessment made by the Committee of Independent Experts [Committee of Social Rights]. However, its decision (resolution or recommendation) may be based on social and economic policy considerations.

47. In respect of the resolution as well as the recommendation, only the Contracting Parties to the Charter are entitled to take part in the vote.
48. The Charte-Rel Committee had foreseen that the Governmental Committee would not be involved in the procedure for examining complaints, but the Committee of Ministers decided before adopting the Protocol to add a second paragraph to this article, according to which the Committee of Ministers may decide, where the report of the Committee of Independent Experts raises new issues, by a two-thirds majority of the Contracting Parties to the Charter, to consult the Governmental Committee.
Role of the CoM

“The Committee cannot subscribe to the Government's view that when they considered Complaint No. 9/2000 CFE-CGC v. France, the Ministers' Deputies found that there had been no violation of the Revised Charter. It is clear from the wording of the Protocol providing for a system of collective complaints that only the European Committee of Social Rights can determine whether or not a situation is in conformity with the Charter. This applies to any treaty establishing a judicial or quasi-judicial body to assess contracting parties' compliance with that treaty. The explanatory report to the Protocol explicitly states that the Committee of Ministers cannot reverse the legal assessment made by the Committee of independent experts, but may only decide whether or not to additionally make a recommendation to the state concerned.” (No. 16/2003 Confédération Française de l'Encadrement (CFE CGC) v. France, decision on merits, para 20)
Outcome of procedure: compensation – legal costs

In No. 1/1998 International Commission of Jurists (ICJ) v. Portugal, ICJ requested Portugal to award FF 50 000 in compensation for costs occurred in preparing and submitting the case. ECSR left the matter to be decided by the Committee of Ministers. **No reference to matter in the resolution of the CoM.**

In ERRC v. Greece (15/2003) and in No. 16/2003 Confédération Française de l'Encadrement (CFE CGC) v. France, the ECSR held: "The Committee notes that the Protocol does not regulate the **issue of compensation for expenses** incurred in connection with complaints. However, it does consider that as a consequence of the Quasi-judicial nature of the proceedings under the protocol in case of finding a violation of the Charter, the defending State should meet at least some of the costs incurred."

**ERRC v. Greece (15/2003) and in No. 16/2003 Confédération Française de l'Encadrement (CFE CGC) v. France, the ECSR invited the Committee of Ministers to award compensation for expenses incurred. Committee of Ministers in its resolution decided “not to accede to the request for the reimbursement of costs [. . .].”**
In *Confédération Française de l’Encadrement (CFE-CGC) v. France* No. 9/2000, the CFC-CGC asked the ECSR to order the French Government to pay FRF 78 billion in compensation for collective damages caused to the profession. Claim rejected without reasons given. See para. 9 of the admissibility decision: "... Without prejudice to a decision concerning whether failure to satisfactorily apply the said Articles [2, 4, 6 and 27 of Revised ESC] may give grounds for a claim for compensation, the Committee in the present case considers that this ancillary claim made by the CFE-CGC in its complaint does not preclude the admissibility of the complaint and that the issue of compensation shall be considered at the stage of the assessment of the merits of the complaint.”

Committee rejected the claim in its decision on merits.

Conclusion: so far no compensation (costs or damages) awarded. The ECSR has made it clear that it has the right to award compensation for legal costs. Question of damages still left open.
Personal scope of the (Revised) ESC

Appendix

1. Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19. This interpretation would not prejudice the extension of similar facilities to other persons by any of the Contracting Parties.
Personal scope
Federation of Human Rights Leagues v. France No. 14/2003

ECSR has interpreted the scope of the convention flexibly:

Federation of Human Rights Leagues v. France No. 14/2003: (concerning reforms of the State medical assistance scheme and the universal sickness scheme allegedly depriving a large number of adults and children with insufficient resources of the right to medical assistance).

Note interplay between Appendix para. 1 and Article 13(4) of ESC, latter “lawfully in territory”; Appendix: “nationals of other Contracting Parties lawfully resident or working regularly . . . ”

29. Thus the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.

30. As concerns the present complaint, the Committee has to decide how the restrictions in the Appendix ought to be read given the primary purpose of the Charter as defined above. The restriction attaches to a wide variety of social rights in Articles 1-17 and impact on them differently. In the circumstances of the particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment.
31. **Human dignity is the fundamental value and indeed the core of positive European human rights law** – whether under the European Social Charter or under the European Convention on Human Rights and health care is a prerequisite for the preservation of human dignity.

32. The Committee holds that the legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, **even if they are there illegally, is contrary to the Charter.**

(no violation on Article 13 since there was some form of medical assistance benefiting illegal immigrants. Not in conformity with Article 17 specifically on the protection of children: (reference to CRC). No violation/violation.

Voting:  No violation of Article 13 (9-4)
Violation of Article 17 (7-6)
Personal scope
European Roma Rights Centre v. Italy

- European Roma Rights Centre v. Italy No. 27/2004
- Para 18. The Committee recalls that *when it ruled on the admissibility of the case it did not examine this question* [extension of the protection to persons not covered according to the Appendix], which could be properly assessed when examining the merits of the case [. . . ] *Even assuming that, as the Government contends, it is impossible to distinguish among Roma to whom the protection afforded by Article 31 shall be compulsorily guaranteed and those Roma to whom, according to the Appendix (paragraph 1), the guarantee of such protection remains within the remit of States parties, the Committee does not see how such a circumstance would exempt the State from the Obligation of ensuring protection.*
Article I - Implementation of the undertakings given

- 2. Compliance with the undertakings deriving from the provisions of paragraphs 1, 2, 3, 4, 5 and 7 of Article 2, paragraphs 4, 6 and 7 of Article 7, paragraphs 1, 2, 3 and 5 of Article 10 and Articles 21 and 22 of Part II of this Charter shall be regarded as effective if the provisions are applied, in accordance with paragraph 1 of this article, to the great majority of the workers concerned.

- Explanatory report does not specify the meaning of “great majority of workers concerned”.

- Within the reporting procedure the Committee has adopted a view that this entails approximately 80 per cent of the workers.

- In No. 9/2000 Confédération Française de l’Encadrement (CGC) v. France the Committee held that “the application of Article I of the revised Social Charter cannot give rise to a situation in which a large number of persons forming a specific category are deliberately excluded from the scope of a legal provision” (para. 40). (managerial staff – approximately 5 per cent - excluded from legislation allowing for shorter weekly working hours).
interpretation on substantive rights/principles

Housing

Article 16 / Article 31 Revised ESC

- European Roma Rights Centre v. Greece 15/2003 Article 16 ESC
- European Roma Rights Centre v. Italy 27/2004 (Revised ESC Article 31 alone and in conjunction of with E)
- European Roma Rights Centre v. Bulgaria 31/2005 (Revised ESC Article 16 + E)

Housing rights are covered also under Article 16 ESC (the right of the family to social, legal and economic protection: provision of family housing), in spite of the fact that Article 31 specifically protects the right to housing.
Interpretation on substantive rights/principles

Discrimination:
Lack of a non-discrimination clause in the ESC. **Preamble** of the ESC has been used in order to address discriminatory situations and to find a violation is such situations. See *European Roma Rights Centre v. Greece 15/2003* Article 16 ESC

Compare the situation in *European Roma Rights Centre v. Italy* No. 27/2004 (**Revised ESC Article 31 alone and in conjunction of with E**) *European Roma Rights Centre v. Bulgaria* 31/2005 (**Revised ESC Article 16 + E**), where the States parties in question had ratified the Revised ESC, where Article E prohibits non-discrimination in the enjoyment of the rights set forth in the Charter.
Interpretation on substantive rights/principles

Wide interpretation of discrimination

- Not only **direct but also indirect discrimination** (No 13/2002 *International Association Autism-Europe (IAAE) v. France*, para. 52:
  
  “In this regard, the Committee considers that Article E not only prohibits direct discrimination but also all forms of indirect discrimination.”

- Indirect discrimination “may arise by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are **genuinely accessible by and to all**.” (para 52)

- Discrimination can also arise from a failure “**to treat differently persons whose situations are significantly different.**” (para 52) (Reference to ECtHR Thlimmenos case)
Interpretation

- Not only direct but also indirect discrimination (No 13/2002 International Association Autism-Europe (IAAE) v. France, para. 52).
- Not only legal but also practical action (No. 1/1998 International Commission of Jurists (ICJ) v. Portugal, para. 32 “… Satisfactory application of Article 7 cannot be ensured solely by this operation of legislation if this is not effectively applied and rigorously supervised; and to an extent consistent with the maximum use of available resources”. (No 13/2002 International Association Autism-Europe (IAAE) v. France, para 53).
Interpretation

• Reference to within a reasonable time/maximum available resources. “When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, the State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities[ . . .]” No 13/2002 International Association Autism-Europe (IAAE) v. France, para 53.
Interpretation

Interpretation

• Underlying values: **dignity, autonomy, equality and solidarity** *(No. 14/2003 International Federation of Human Rights Leagues (FIDH) v. para. 27)*

• **Complementary instrument** to ECHR *(No. 14/2003 International Federation of Human Rights Leagues (FIDH) v. France, para. 27)*
Interpretation

Interpretation

- **Restrictions in the appendix must me read restrictively**, given the primary purpose of the Charter (see above the underlying values) (*No. 14/2003 International Federation of Human Rights Leagues (FIDH) v. France, para 30.*
Issues addressed under the collective complains procedure

Examples of complaints raising issues covered by instruments protecting civil and political rights (manifestations of the so-called integrated approach)

- **No. 2/1999 European Federation of Employees in Public Services (EUROFEDOP) v. France**
- **No. 4/1999 European Federation of Employees in Public Services (EUROFEDOP) v. Italy**, No. 5/1999 European Federation of Employees in Public Services (EUROFEDOP) v. Portugal, **absence of the right of members of armed forces to organise and bargain collectively** (Article 5 and 6 of the Revised ESC, in all cases satisfactory application). Case **No. 11/2001 European Council of Police Trade Unions v. Portugal** raises similar issues in regard to the police and public security personnel. Also in conformity with the ESC.

- **No. 8/2000 Quaker Council for European Affairs (QCEA) v. Greece**, **long alternative military service** not in compliance with Article 1(2), para. 25: The Committee therefore considers “that this additional duration [of 18 months], because of its excessive character, amounts to a disproportionate restriction on ‘the right of the worker to earn his living in an occupation freely entered upon’, and this is contrary to Article 1 papa. 2 of the Charter.” (6-3). No discrimination argument.

- **No. 12/2002 Confederation of Swedish Enterprise v. Sweden**, **pre-entry closed shop arrangements** was contrary to Article 5

- **Nos 17-21, World Organisation against Torture (OMCT) v. Greece, Italy, Ireland, Portugal, Belgium**: violation of Article 17 of ESC; **No. 34/2006 World Organisation Against Torture v. Portugal**: corporal punishment of children.
Concluding remarks

• Role of the CoM – problem of the a political body playing a key role in a ‘quasi-judicial’ process (compare with ECHR prior to Protocol No. 11). Detailed recommendations needed instead of implicitly questioning the finding of the ECSR

• Need to improve the legal reasoning of the ECSR

• More States to accept the collective complains procedure, including giving national NGOs the right to present complaints

• Lack of remedial powers

• advantages of the complaints procedure to the reporting?