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The collective complaint procedure of the European Committee of Social Rights

I. A brief outline of the European Social Charter

The European Social Charter (hereinafter referred to as: Charter) is the result of a protracted negotiation process, which started as early as in 1949, when the Council of Europe's ambition was to draft a comprehensive human rights treaty that would embody all the rights of the 1948 Universal Declaration. However, the Member States decided to adopt a different treaty, which would concern only civil and political rights. That treaty is the European Convention on Human Rights.

During the negotiations on the Charter in the 1950s, there seemed to be a wavering between two possibilities: 1. to draft an ambitious human rights treaty at the same level as the Convention, 2. to draft a sort of European framework for social policies, which would allow the Member States to coordinate or harmonise their social policies.

Finally, the Charter - adopted in 1961 - was in many ways a compromise between the two above mentioned options.¹

At present, after several treaty developments, notably the adoption of the collective complaints protocol in 1995 and the Revised Charter in 1996, and after more than 50 years of practice, the Charter is beyond doubt a human rights instrument. Anyone who reads the output of the Charter's regulatory body, the European Committee of Social Rights, its conclusions and decisions, its statements of interpretation, will see that it consistently interprets the Charter in human rights terms referring to key underlying values such as respect for human dignity, solidarity and non-discrimination.²

Hence, the European Social Charter is one of the Council of Europe's main human rights treaties. In fact, it is very much regarded as a complement to the European Convention on Human Rights (1950). However, within the Council of Europe, the differential treatment of the European Convention on Human Rights and of the Charter is obvious.

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¹ ED. NIKLAS BRUUN – KLAUS LÖRCHER – ISABELLE SCHÖMANN – STEFAN CLAUWERT: *The European Social Charter and Employment Relation*, Bloomsbury Publishing, 2017, p. 5.

² DAVID HARRIS: *Collective Complaints under the European Social Charter: Encouraging Progress?* in *International Law and Power: Perspectives on Legal Order and Justice* ...edited by Kaiyan HomiKaikobad, Michael Bohlander, Brill, 2009, pp. 6–7.

The ratification of the former is compulsory for every Member State, while this is still not the case for the latter. 43 of the 47 Member States are bound by the Charter, but 10 States are still only bound by the 1961 Charter.

As Europe's human rights watchdog, the European Committee of Social Rights has consistently defended the idea that social rights are human rights on an equal footing with the civil and political rights contained in the Human Rights Convention.³ The Charter⁴ is sometimes referred to as a "social constitution" for Europe and since its initial adoption in 1961 it has become an important frame of reference for successive EU treaties and for the EU Charter of Fundamental Rights.⁵

In terms of the rights it protects, the Charter is an extremely wide-ranging treaty based on the Universal Declaration of Human Rights and also inspired by several conventions of the International Labour Organisation. The revised Charter in 31 Articles sets out rights in areas such as employment, social security, health, housing, education, movement of persons and non-discrimination. Although the right to work and everything related to the world of work is a very important component of the Charter, it is much more than that: the legal status of children, equality of men and women within the marriage, integration of persons with disabilities, protection of the elderly, conscientious objection to military service, healthy environment, emergency shelter for failed asylum seekers, corporal punishment of children... these are just a few examples of the many issues it touches upon.

As for the status and effectiveness of social rights, the indivisibility and interdependence of human rights is an oft-repeated refrain in the Council of Europe, but the reality is that social rights remain marginalised when compared to civil and political rights and that States hesitate or are not inclined at all to fully engage with the Charter and the Committee's case law.⁶

The fulfilment of the States' obligations under the Charter is monitored⁷ through two procedures: 1. the reporting procedure, which is mandatory for all States Parties and 2. the collective complaints procedure,⁸ which is optional.⁹ However, the collective complaints procedure complements the protection provided under the European Convention on Human Rights. As the Convention's rights, the Charter's rights derive from the Universal Declaration of Human Rights.

³ As stated in the United Nations' Vienna Declaration of 1993, "All human rights are universal, indivisible and interdependent and interrelated". The unity and indivisibility of fundamental rights, including civil and political rights on the one hand and social and economic rights on the other hand, has been recognised since the adoption in 1948 of the United Nations' Universal Declaration of Human Rights.

⁴ The Charter has been ratified by 43 out of the 47 Member States. Liechtenstein, Monaco, San Marino and Switzerland have yet to ratify, all other Member States are bound by the Charter.

⁵ JEAN-FRANCOIS AKANDJI-KOMBE: *The European Social Charter and the European Convention on Human Rights: prospects for the next ten years*. <https://tm.coe.int/CoERMPublicCommonSearchServices/> (15.07.2020.)

⁶ Social rights are not inherently less justiciable than civil and political rights, as amply demonstrated by national procedures where adjudication in social rights cases takes place on a daily basis.

⁷ Cases concerning social rights have also proved justiciable before UN and regional monitoring bodies (for example, CERD, CEDAW, ILO-CFA, the African Commission on Human Rights and the Inter-American Court of Human Rights).

⁸ The collective complaints procedure enables an international body to pronounce on a question on a more general level, without having to wait for a suitable individual complaint to be lodged. The procedure may also help to alleviate the case-load of the European Court of Human Rights (Strasbourg) in cases where the issue falls within the scope of the two treaties and concerns a wider circle of applicants than just one. It may thus assist in resolving certain issues of a general or systemic nature before they give rise to repetitive individual cases before the European Court of Human Rights.

⁹ At the moment only 15 of the 43 States Parties are bound by this procedure.

II. The European Committee of Social Rights

The key monitoring body in both the above mentioned monitoring procedures is the European Committee of Social Rights (hereinafter: ECSR), an independent body composed of 15 members elected by the Committee of Ministers. The primary task of this body is to make a legal assessment of whether law and practice in the States Parties are in conformity with the Charter. In carrying out this task the Committee has over the years developed important case law¹⁰ interpreting the different articles and giving them meaning and scope. Interpretations adopted by the ECSR in decisions in collective complaints are subsequently applied to all the States Parties in the context of the reporting procedure.

The ECSR adopts a dynamic and teleological approach when interpreting the Charter. It considers the Charter to be a “living instrument” the meaning and scope of which evolves with changing standards and values. The Charter is dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity and the text of the treaty must be interpreted in its contemporary context and in the light of its object and purpose (cf. Article 31§1 of the Vienna Convention on the Law of Treaties).¹¹

In adopting the above approach the Committee acts in a way which is similar to that of other international human rights bodies, including the European Court of Human Rights.¹²

According to the Turin Protocol and the Protocol providing for a system of collective complaints itself it is for the ECSR to make a legal ruling on conformity with the Charter in law and practice whereas the Committee of Ministers is to ensure the implementation of the rulings through its resolutions and recommendations. This separation of powers is essential; the Committees rulings are final and cannot be overruled or set aside by the Committee of Ministers.

1. The reporting procedure

Under the reporting procedure, States are required to submit written reports with regular intervals on the application of the Charter in law and in practice. For the purpose of reporting, the articles have been divided into four thematic groups with one group being examined per year. This means that States have to report on each accepted article every four years. Comments are possible by social partners and in some cases also by NGOs.

Having examined the national reports, the ECSR adopts a *conclusion* as to whether the situation is in conformity with the European Social Charter or not for each article and for each State concerned and it makes these conclusions public.¹³ *Follow-up* to the

¹⁰ The European Court of Human Rights increasingly makes reference to the decisions of the ECSR in its judgments.

¹¹ DAVID HARRIS 2009, p. 8.

¹² HOLLY CULLEN: *The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights*, Human Rights Law Review 2009. 9 (1) p. 63.

¹³ For example, the conclusions point to several generalised problems in the application of the Charter which affect many States Parties while varying in scope and severity. One such problem concerns the continued existence of certain forms of child labour in Europe, whether due to lax or imprecise rules on the types of (light) work that children can be engaged in or, more frequently, due to inadequate monitoring of child labour in practice. Another recurrent problem concerns remuneration of young workers and apprentices and the inclusion of time spent on training in working time and remunerating it as such. While the integration of young people in the labour market is

findings of violations by the ECSR is ensured by the Committee of Ministers with the help of the Governmental Committee. On the proposal of the latter, the Committee of Ministers may address recommendations to States that do not take the necessary measures to implement the conclusions and decisions.

2. *The collective complaints procedure*

2. 1. Main aims of the CC procedure

The collective complaints procedure (CCP) was introduced by an additional protocol to the European Social Charter for the purpose of improving the enforcement of the rights guaranteed by the Charter. The Additional Protocol providing for a system of collective complaints¹⁴ – ETS No. 158 – was opened for signature by the Council of Europe Member States on 9 November 1995 and entered into force on 1 July 1998.¹⁵

The aim of the collective complaints procedure was to increase the effectiveness, speed and impact of the implementation of the Charter.¹⁶ The Preamble to the Protocol providing for a system of collective complaints speaks of the resolve of its signatories “to take new measures to improve the effective enforcement of the social rights guaranteed by the Charter, [...] in particular by the establishment of a collective complaints procedure which, *inter alia*, would strengthen the participation of management and labour and of non-governmental organisations.”

The collective complaints procedure is intimately linked to core democratic values and to the rule of law. Fully-fledged participation of the social partners and of civil society,¹⁷ including the possibility for them to seek legal remedies for real or perceived injustices, is a defining characteristic of any functioning democracy.¹⁸

of crucial importance at a time when youth unemployment rates are alarmingly high in many European countries, the Committee’s conclusions are a warning not to abandon principles of fairness and to avoid exploitation of young workers and apprentices. Access to and the quality and quantity of social services and benefits targeted at children and families such as child care, family benefits, assistance for vulnerable children, education and housing allowances are far from satisfactory in many countries. The rights of foreign populations in the States Parties remain a very problematic issue, which has been accentuated further by restrictive measures taken in many countries in the face of the migratory movements of recent years, often in flagrant violation of the Charter’s requirements. Discrimination of foreigners in the allocation of family benefits is a widespread problem, migrant workers face discrimination in the labour market (employment conditions, trade union rights, procedural lacunae, etc.), sometimes in law and often in practice. The right to family reunion poses particularly thorny issues with many countries imposing excessive conditions for the exercise of this right, such as length of residence requirements, onerous language and integration tests, excessive means requirements and so on.

¹⁴ In brief, the Protocol entitles social partners and non-governmental organisations to lodge collective complaints of violations of the Charter in States which have ratified it. The complaint is examined by the European Committee of Social Rights, which declares it admissible if the formal requirements have been met. The Committee then takes a decision on the merits of the complaint, which it forwards to the parties concerned and to the Committee of Ministers in a report, which is made public within four months of its being forwarded.

¹⁵ <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158> (04. 07. 2020.)

¹⁶ DAVID HARRIS 2009, p. 4.

¹⁷ The procedure strengthens the role of the social partners and non-governmental organisations by enabling them to apply directly to the European Committee of Social Rights (ECSR) for rulings on the implementation of the Charter.

¹⁸ HOLLY CULLEN 2009, p. 61.

The complaints procedure and the reporting procedure are complementary and when operating together, they increase the prospects of fully implementing the rights laid down by the Charter.

The fact that the substance of a collective complaint has been examined as part of the reporting procedure does not impede its admissibility. On the contrary, the complaints procedure allows for a more in-depth examination of national situations on the basis of the detailed information and arguments generated in the course of an adversarial process.

The complaints procedure may be regarded as a pre-condition for achieving true indivisibility of human rights, which is a stated objective for the Member States of the Council of Europe.

The collective complaints procedure brings the Charter closer to civil society and to European citizens at large¹⁹ and may thus contribute to regaining the trust of citizens in the European construction. Moreover, the complaints procedure may be used to safeguard the rights of vulnerable groups, such as children, migrants, the elderly, Roma or people with disabilities.

The collective nature²⁰ of the procedure ensures that only serious matters will be brought before the Committee, which exercises an important gate-keeping function.²¹ The number of possible complainants is subject to limitations and here the Governmental Committee has its own gate-keeping function when it admits international non-governmental organisations to the list of the organisations²² entitled to lodge collective complaints.²³

Experience shows that States will not be flooded by complaints. Since the entry into force of the complaints mechanism in 1998, that is over a period of 22 years, a total of 196 complaints have been lodged (as per 1 March 2020).

This procedure which allows trade unions, employers organisations and NGOs to lodge complaints has done more for the visibility and impact of the Charter than any other development over the last 50 years: it represents a step towards indivisibility in the enforcement of fundamental rights, it involves civil society directly in ensuring respect for the rights and it firmly establishes the European Committee of Social Rights as a quasi-judicial body handing down decisions. Decisions that may be declaratory, but

¹⁹ While most of the books speak about “European” as a synonym to the “European Union”, but the Council of Europe (CoE) norms – for example, European Social Charter - cover a number of countries outside of the EU that significantly differ from the EU social model, such as Russia, Serbia, Turkey, Ukraine and others. Hence, it is difficult to speak about a single “Wider European Social Model” compared to the narrower “European Social Model” of the EU as long as the CoE countries are much less homogenous in their legal and social traditions than the EU Member States. This issue causes difficulties mainly in reporting procedures several times.

²⁰ Unlike the European Court of Human Rights, the European Committee of Social Rights cannot consider individual applications.

²¹ Once a complaint is declared admissible, the ECSR proceeds to examine the merits (Article 7, Protocol). It will invite written submissions from the complainant organisation and the defendant state. Where the complainant is a national trade union or employer organisation, it shall also invite the international trade union and employer organisations recognised in Article 27 ESC to give their comments. The European Trade Union Confederation has often availed itself of this option, but the International Organisation of Employers only once. (See Complaint No. 12/2002, Confederation of Swedish Enterprise v Sweden, Merits, 15 May 2003.)

²² At present there are less than 70 international non-governmental organisations on the list drawn up by the Governmental Committee.

²³ HOLLY CULLEN 2009, p. 65.

nevertheless set out the law of the Charter and require States to take measures to give them effect in domestic law.

The complaints procedure is simple and transparent, the criteria for the admissibility of complaints are few and not difficult to fulfil.²⁴ Complaints may only raise questions of a collective nature and for this reason there is, for example, no requirement that domestic remedies be exhausted before lodging a complaint. The procedure is also quite rapid; the average duration of proceedings is around 16 months – sometimes more – from the date of registration to the decision on the merits by the Committee.

Once the Committee has rendered its decision on the merits – a finding of violation or non-violation – it transmits the decision to the Committee of Ministers, which is responsible for follow-up. Typically, the Committee of Ministers adopts a resolution taking note of the measures announced by the respondent State to address any violations found and inviting the State to inform it of progress made in bringing the situation into conformity.

The procedure furthermore provides practice that is of relevance to national and European courts, which are invited to give weight to the fundamental rights guaranteed by the Charter.

2. 2. The complainant parties

As it was mentioned above, the collective complaints procedure allows certain organisations to lodge complaints before the Committee, which decides on the admissibility and on the merits of complaints in a court-like procedure. One of the aims of the procedure was to strengthen the involvement of the social partners and civil society in the implementation of the European Social Charter.²⁵ This objective is reflected in the provisions of the Protocol, in the ECSR's Rules and in the Committee's case law pertaining to the *locus standi* of trade unions and employers' organisations.

The Protocol Article 1 confers entitlement to lodge complaints on two categories of trade unions and employers' organisations: on the international organisations referred to in Article 27 of the Charter, that is *de facto* ETUC on the workers' side and the International Organisation of Employers (IOE) on the employers' side as well as on representative national unions and employers' organisations.²⁶ The first category is entitled to lodge complaints against any State Party to the procedure while the second may only lodge complaints against the State Party to whose jurisdiction they belong.

²⁴ When lodged by the competent organisations, complaints must be drafted in one of the Council of Europe's official languages, that is, in English or French. Complaints lodged by national organisations may however be drafted in the official language, or one of the official languages, of the State concerned. There is no requirement that the complainant have victim status or that domestic remedies be exhausted. It is also no obstacle that the same complaint is simultaneously pending before other international mechanisms.

²⁵ In discussing how the collective complaints procedure can and does protect labour rights, one should begin by looking at the role of trade unions and employers' organisations in the procedure and also their use of it. Even though the role and power of the labour market interests' representation are weakening, the trade unions and employers' organisations are still key forces in determining labour rights outcomes in the European industrial societies, they are the main generators of labour rights complaints and they do in some respects have a special standing in the complaints procedure.

²⁶ Rule 24 of the Committee's Rules provides that complaints by national trade unions and employers' organisations may be submitted in an official language of the State concerned whereas international organisations must use one of the official languages of the Council of Europe.

Four types of organisations may lodge complaints: 1) the international organisations of trade unions and employers, 2) INGOs that have participatory status with the Council of Europe and have been admitted on a list drawn up by the Governmental Committee, 3) representative national organisations of trade unions and employers and 4) there is also a possibility that national NGOs may lodge complaints, but only if the State concerned²⁷ has made a special declaration that they will accept such complaints.

One of the admissibility criteria for national trade unions and employers' organisations is that they must be "representative".²⁸ The Committee has also made it clear that trade unions once deemed to be representative, thereby have – unlike NGOs – the right to lodge a complaint on any matter falling within the scope of the Charter. This right of complaint is independent of which categories of employees the union is authorised to represent or unionise in the framework of domestic law.

While all this indicates that the complaints procedure to a significant degree enables and facilitates the participation of trade unions and employers' organisations, the question is what actual use these organisations have made of the procedure so far.

The procedure is very open and flexible, the admissibility criteria are very basic and the overwhelming majority of the 196 complaints registered so far have been declared admissible.

Rule 32 on *third party intervention* provides a special role for the international trade unions and employers' organisations by inviting them to submit observations on the merits of any complaints lodged, not only by national trade unions and employers' organisations, but also by NGOs. This possibility has been used very frequently by the ETUC and somewhat less so by IOE.

The procedure does have weaknesses, for example, the mere fact that individual complaints are excluded presents some cause for concern, as this limits the range of complaints and complainants.²⁹ Any complaints that essentially concern individual situations will be rejected. The ECSR has mitigated the impact of this rule by allowing NGO complainants to bring evidence of individual situations to support a complaint,³⁰ while reiterating that it has no competence to make findings on individual cases.³¹

2. 3. Subject matters of the CC

As for the subject matters of the collective complaints, not surprisingly trade unions and employers' organisations overwhelmingly complained about labour rights³² issues,³³

²⁷ NB only Finland has done this to date.

²⁸ The Committee holds that the notion of "representative" is an autonomous concept not determined by any national definitions and it has proceeded to accept even very small organisations, both in terms of their membership and their ability to conclude collective agreements. However, most commentators agree that the Committee has been very flexible, even generous, in accepting national unions and employers' as representative for the purposes of the complaints procedure.

²⁹ HOLLY CULLEN 2009, p. 62.

³⁰ Complaint No. 33/2006, supra n. 22 at paras 52-3.

³¹ HOLLY CULLEN 2009, P. 66.

³² The issues at stake in these complaints are numerous and include discrimination in access to work, forced labour, working time, health and safety at work, minimum wage levels, overtime payment, equal pay for women and men, freedom of association, including the negative aspect, collective bargaining, the right to strike, dismissal protection.

³³ Out of the 138 registered complaints a total of 76, or about 55%, concern labour rights.

only a handful of complaints from these organisations concerned other issues, in particular social security and vocational training, which are obviously closely linked to labour rights.

Moreover, the complaints have concerned a wide variety of issues touching upon most if not all of the Charter's substantive provisions: child labour, the right to organise, the right to strike, working time, remuneration, housing, Roma rights,³⁴ access of migrants to social and medical assistance,³⁵ abortion,³⁶ education for autistic children, corporal punishment of children, sex education in schools and lately also the impact of austerity measures.

There were some “outstanding” cases in the last years’ practice of the ECSR. For example, the Committee’s decisions in complaints against several countries concerning corporal punishment of children lodged by the INGO “APPROACH” have led to intense public debate and some of the States in question have already announced that new legislation to prohibit such punishment is being considered. Another complaint was against the Netherlands on the right of irregular migrants to emergency assistance and shelter – or bed, bath and bread. Dutch courts have used the decision to order assistance and shelter to failed asylum-seekers. As it was mentioned, in the Italian abortion case: Conscientious objection by many doctors in practice makes it difficult to have access to abortion (need to travel, even abroad). This also results in unreasonable working conditions for those doctors who are not objectors.

2. 4. Implementation of the ECSR’s CC decisions

Following from the collective nature of the complaint is the criticism that the ECSR has no power to order remedies.³⁷ Essentially, it makes declaratory decisions. The ECSR has stayed strictly within the limits of its powers under the Protocol, and has rejected claims for compensation, notably in Complaint No. 9/2000, Confédération française de l’Encadrement (CGC) v France, but has made requests to the Committee of Ministers to make a contribution to the costs of a successful complainant in Complaint No. 15/2003, European Roma Rights Centre (ERRC) v Greece, and Complaint No. 16/2003, Confédération française de l’Encadrement CFE-CGC v France. The Committee of Ministers did not accede to these requests.³¹

³⁴ Let us mention, for example, a series of cases concerning the situation of Roma in France, Italy, Belgium and Bulgaria lodged by different NGOs. The decisions in these cases have certainly not solved all the problems of discrimination and degrading treatment faced by Roma, but they have put the spotlight on the problems, raised political awareness and contributed to concrete initiatives being taken in the countries concerned.

³⁵ Complaints can also be mentioned against the Netherlands on the right of irregular migrants to emergency assistance and shelter – or bed, bath and bread. Dutch courts have used the decision to order assistance and shelter to failed asylum-seekers.

³⁶ Italian abortion case: Conscientious objection by many doctors in practice makes it difficult to have access to abortion (need to travel, even abroad). This also results in unreasonable working conditions for those doctors who are not objectors.

³⁷ TONIA A. NOVITZ: *Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter*, 2002. *European Human Rights Law Review* 50. pp. 54–6.

However, the decisions of the European Committee of Social Rights refer to binding legal provisions and must be respected by the State concerned. On this basis, national authorities are required to take measures to give effect to the decisions under domestic law. In some countries, domestic courts can declare invalid or set aside domestic legislation if the European Committee of Social Rights has ruled that it is not in compliance with the Charter.

In addition, there is one more step by the Committee of Ministers' follow-up procedure to encourage the implementation of the particular collective complaints decisions by the European Committee of Social Rights. The rather cursory attention given by the Committee of Ministers to these decisions, and the paucity of the steps taken to ensure that violations are remedied, differs significantly from the importance given to the execution of judgments of the European Court of Human Rights. In terms of visibility and follow-up, the collective complaints procedure has proved to have more impact than the reporting procedure.

However, at national level, the implementation of the Committee's decisions and conclusions is also uneven and far from satisfactory, revealing the commitment of States to social rights to be mostly formal and rhetorical. The picture is not all negative, however, there are of course success stories with States immediately taking steps to implement the decisions of the ECSR.³⁸ In addition, there is also a promising tendency for domestic courts in several countries to be increasingly ready to rely on the Committee's case law, especially when it derives from decisions in collective complaints. However, there are also cases where the CC decision and even the follow-up have been inadequate as subsequently determined by the ECSR under the reporting procedure.³⁹ Perhaps in the majority of cases the situation is somewhere "in-between": the Government has taken some measures, but the situation is still not entirely in conformity with the Charter, i.e. the decision is not fully implemented.

2. 5. Importance of the CCP

Since the procedure entered into force in 1998, INGOs and trade unions have lodged a number of high-profile complaints which have contributed greatly to the visibility of the European Social Charter, to developing the Committee's case law and, more importantly, have had a significant impact on the situation in the States concerned. And this is despite

³⁸ As for positive examples, the following should be mentioned in particular: Complaint No. 45 (Croatia withdrew the discriminatory textbook material used in sex education in schools), Complaint No. 47 (following the Committee's decision the Dutch Supreme Court held that children in an irregular situation should enjoy the right to shelter and assistance, children should not be held responsible for the "bad" behavior of their parents, the Committee now considers that the situation has been brought into conformity), Complaint No. 93 (following the Committee's decision Ireland has adopted legislation prohibiting corporal punishment of children), Complaint No. 95 (Slovenia has now also adopted legislation prohibiting corporal punishment of children).

³⁹ There are perhaps even more negative examples, prominent ones are the austerity cases against Greece, but also Complaint No. 85 (Sweden has not yet changed its legislation concerning posted workers).

the fact that the acceptance of this procedure is optional, and unfortunately only 15 States⁴⁰ are bound⁴¹ by it at present.⁴²

Many of the Committee's decisions in these complaints have been important in developing the case law under the provisions concerned and they have arguably been met with a better follow-up or implementation by States than the ECSR is used to under the reporting procedure.

In the large majority of complaints (75%) the Committee has found violation, which is not due to any “radicalism” on the part of the Committee, but rather a function of skilful litigation strategies by the complainant organisations. However, the number of complaints in which no violations have been found is still significant: in about 25% of complaints no violations were found (calculated on the basis of the complaints where a decision was issued on the merits).

It should be noted that complaints are relatively few, concern serious matters and are generally well-prepared by organisations that have competence and resources (and which only lodge complaints when they have reasonable prospects of succeeding). Moreover, in some cases complaints are lodged in matters where the ECSR has already found a breach of the Charter under the reporting procedure, but where adequate follow-up⁴³ has yet to be given. These factors will tend to increase the rate of violations found.

Based mainly on the above discussed arguments and issues, here we collected some pros and cons of the collective complaint procedure (CCP):

⁴⁰ Naturally, the question would emerge why only 15 States accepted to be bound by the CCP. Doubtlessly, there are several reasons and some of them have been addressed in this note.

1. Some States adopt a “wait-and-see” approach. After 16 years of operation, the experience gathered should be sufficient to allow States to reach a decision and accept the procedure.
2. Some States may have concerns about an increased administrative work-load if they accept the procedure. This does not appear justified given the low number of complaints lodged and the low-bureaucratic nature of the procedure itself. In any event, if States are committed to social rights protection, modest additional resource allocation should not be an obstacle to the acceptance of the procedure.
3. Some States have expressed concern that the Governmental Committee is not involved in the follow-up to the ECSR's decisions in collective complaints. However, under Article 9§2 of the Protocol providing for a system of collective complaints, the Governmental Committee may be consulted by the Committee of Ministers whenever a decision gives rise to “new issues”. In addition, it must be assumed that the Committee of Ministers can adequately channel and represent the positions of Governments on the follow-up, even without the participation of the Governmental Committee (which is made up of the same Governments' officials).
4. Some States may also have hesitations about the ECSR's dynamic interpretations of the Charter. As noted above, the ECSR interprets the Charter in the light of contemporary conditions as does any other international human rights body. It applies this approach not only in the complaints procedure but also under the reporting procedure (which is mandatory for all States Parties).

⁴¹ DAVID HARRIS 2009, p. 24.

⁴² In terms of the States Parties, the complaints have so far been very unevenly targeted: almost a third of the complaints concern France, about 14% concern Greece, Italy and Portugal each account for about 10%, whereas some other States have had only 2 or 3 complaints over a period of more than 18 years.

⁴³ In the framework of reporting on follow-up to collective complaints, the Committee examined the follow-up to a total of 125 violations arising from the 40 decisions on the merits under consideration (in respect of 8 countries). In only 13 of these (10.4%) the Committee found that the violation had been remedied by appropriate follow-up.

Table 1.

Pros and cons of the CCP

Pros of CCP	Cons of CCP
One of the few international remedies for violations of economic & social rights (<i>protect the values of the ESC</i>)	Lack of remedial powers (declaratory decision).
ECSR quasi „social court” & CCP is a quasi-judicial process (result: developed economic & social rights jurisprudence).	Significant role played by the Committee of Ministers (<i>a) selecting eligible NGOs; b) involvement in the final stage of CCP</i>) - ECSR: legal determination - Committee of Ministers: political decision.
ECSR’s interpretative jurisprudence on ESC & RESC (better protection of economic & social human rights).	Procedure provides for collective, not individual complaints (restrictions only to collective nature = lack of enthusiasm).
The ECSR’s practice provides that economic and social rights may be satisfactorily adjudicated before an international treaty monitoring body.	Few countries (206:14) ratified the Protocol.
Complaint may relate to a continuing situation covered in previous report or a new situation.	It has employed techniques of reasoning drawn in part from the ECtHR.
CCP is an adversarial process (sometimes public hearing). ⁴⁴	
Reporting assessment does not create a res judicata in relation to a particular issue → same issue can be raised again in CCP.	

Source: Author’s own source.

⁴⁴ Most complaints are dealt with through an entirely written procedure, which means that they will be far less costly for all concerned than cases under the ECHR. At the end of this process of gathering evidence and argument, the ECSR will issue its decision. Article 8(1) of the Protocol describes this as a ‘report’ rather than a decision, but the ECSR refers to ‘decisions on the merits’, emphasising the quasi-judicial nature of their conclusions.

2. 6. Innovation of the CCP

While the main features of the complaints procedure have remained unchanged since 1998, the Committee has used its Rules to introduce a number of innovations which have contributed to making the procedure more dynamic and effective:

For example, Rule 29§2: enables the Committee to request the respondent Government to make submissions on the admissibility and merits at the same time. This allows the Committee to adopt a simultaneous decision on admissibility and merits which favours quicker proceedings (*LO/TCO v. Sweden*).

Rule 32/A§: enables the Committee to invite any organisation, institution or person to make observations on a complaint. This possibility has resulted in a number of observations from various NGOs and also, for example, from UNHCR. In a pending complaint concerning austerity measures in Greece, the Committee has for the first time invited the European Commission to make observations pursuant to this rule.

Rule 36: enables the Committee to indicate immediate measures to the parties in cases where a risk of “serious irreparable injury” has been demonstrated. So far the Committee has only indicated immediate measures in two complaints against the Netherlands, and it is too early to evaluate the impact of this procedural innovation.

Nevertheless, giving a positive assessment of the complaints procedure should not hide that there are still significant problems to overcome before the procedure can reach its full potential. First of all, the fact that the procedure is optional and only 15 States have accepted it, but also the sometimes less than principled follow-up given by the Committee of Ministers and by Governments to the Committee's decisions are indeed serious shortcomings.

III. Summary

The original aim pursued with the introduction of the CC procedure was to increase the effectiveness, speed and impact of the implementation of the Charter. In this view, the collective complaints procedure has strengthened the role of the social partners and non-governmental organisations by enabling them to directly apply to the European Committee of Social Rights for rulings on possible non-implementation of the Charter in the countries concerned, namely those States which have accepted its provisions and the complaints procedure.

In the last two decades the ECSR has established its ability to act as an effective quasi-judicial body.⁴⁵ Its role and practice under the Collective Complaints Protocol to the ESC is now similar to that of other international human rights tribunals. The Protocol limits somewhat the capacity for development of the ECSR's quasi-judicial role. Being a system of collective complaints, the Protocol does not give the ECSR competence to order remedies, only to declare situations to be incompatible with the ESC. Nonetheless, the ECSR has established itself as the sole body with competence to provide authoritative legal interpretations of the ESC both in the reporting process and in complaints.

⁴⁵ HOLLY CULLEN 2009, pp. 61–93.

All critics of the Protocol focus on the role of Council of Europe political bodies in the collective complaints system.⁴⁶ More problematic still is the continuing level of political supervision by the Committee of Ministers, particularly the fact that the ECSR's decisions on the merits are not made public until political supervision is complete.⁴⁷

In one hand, the Governmental Committee decides which of the NGOs having consultative status with the Council of Europe will be permitted to complain under the Protocol. On the other hand, despite the use of the word 'shall' in Article 9(1) of the Protocol, the Committee of Ministers has not regarded itself as bound, where the ECSR finds against a state, to make recommendations to the defendant state.⁴⁸ Instead, the practice demonstrates a separation of roles, with the ECSR making legal determinations and the Committee of Ministers making a political decision as to the follow-up.

HAJDÚ JÓZSEF

A SZOCIÁLIS JOGOK EURÓPAI BIZOTTSÁGÁNAK KOLLEKTÍV PANASZELJÁRÁSA

(Összefoglalás)

Az Európai Szociális Karta az Európa Tanács (Strasbourg) egyik legfontosabb nemzetközi emberi jogi egyezménye, amelynek célja a részes államok polgárait megillető alapvető szociális jogok garantálása. A Kartát eredetileg az emberi és szociális jogok biztosításában élenjáró legfejlettebb nyugat-európai országok kormányai írták alá 1961. október 18-án Torinóban. Az Európai Szociális Kartában foglalt jogok betartását két eltérő eljárás – 1. monitoring és 2. a kollektív panasz eljárás – keretében ellenőrzik. Mindkét ellenőrzési mechanizmus a Szociális Jogok Európai Bizottságának a hatáskörébe tartozik. A kollektív panasz eljárás bevezetése (1998) a Karta ellenőrző mechanizmusának hatékonyabbá tételét szolgálta. Elsősorban terjedelmi okok miatt a két ellenőrzési mechanizmus közül ebben a tanulmányban a kontradiktórium kollektív panasz eljárás legfontosabb sajátosságai kerülnek bemutatásra és elemzésre.

⁴⁶ CHURCHILL and KHALIQ: *The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?*, (2004) 15 *European Journal of International Law* p. 218 and Novitz: *Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter*, (2002) *European Human Rights Law Review* 50.

⁴⁷ HOLLY CULLEN 2009, 71–82. pp.

⁴⁸ The strict interpretation of Article 9 has been advocated by Harris and Darcy. (Harris and Darcy (2001) *The European Social Charter*, 2nd ed. (New York: Transnational Publishers) at 306–54.)