Revista catalana de dret públic #49

www.rcdp.cat

ADOPTION AND REJECTION OF AUSTERITY MEASURES: CURRENT CONTROVERSIES UNDER EUROPEAN LAW (FOCUS ON THE ROLE OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS)

Luis Jimena Quesada*

Abstract

The article intends to demonstrate that the economic crisis cannot play as a pretext to undermine the *social acquis* already consolidated in Europe. Indeed, the austerity measures have not only been a source of disagreement within the European Union itself (which has even shown different speeds when preparing pacts or mechanisms for economic stability), but have also led to the emergence of discrepancies with the Council of Europe. In particular, the rejection of these measures (i.e. anti-crisis legislation in Greece) by the Council of Europe (by some decisions of the European Committee of Social Rights) illustrates that some presumed "economic stability pacts" adopted in a cyclical manner and without consensus of the EU Member States (currently 28) are not consistent with the legal, economic and social stability fostered by the true "European Pact for Social Democracy" that is the European Social Charter (accepted by 43 of the 47 Members of the Council of Europe, including all belonging to the EU). In other words, the Social Charter implies a consolidation for decades (since 1961) of a social model based on a treaty that gives legal certainty to the European continent, since it has become a potential source of synergy and harmonization between the European Union and the Council of Europe, at both judicial and political levels of the two organizations.

Keywords: *social acquis*; legal certainty; economic stability; times of crisis; complementarity of guarantees.

ADOPCIÓ I REBUIG DE LES MESURES D'AUSTERITAT: ACTUALS CONTROVÈRSIES EN L'ÀMBIT DEL DRET EUROPEU (ATENCIÓ ESPECIAL AL ROL DEL COMITÈ EUROPEU DE DRETS SOCIALS)

Resum

Aquest article pretén demostrar que la crisi econòmica no pot ser un pretext per a degradar el patrimoni jurídic social ja aconseguit a Europa. En efecte, les mesures d'austeritat no tan sols han estat una font de desacord al si de la mateixa Unió Europea (la qual, fins i tot, ha mostrat l'existència de diverses velocitats en el moment de la preparació de pactes o mecanismes d'estabilitat econòmica), però també han provocat l'emergència de discrepàncies amb el Consell d'Europa. Particularment, el rebuig d'aquestes mesures (com ara la legislació anticrisi a Grècia) per part del Consell d'Europa (per mitjà d'algunes decisions del Comitè europeu de drets socials) il·lustra que alguns pressuposats "pactes d'estabilitat econòmica" adoptats amb un enfocament merament cíclic i sense cap tipus de consens entre el estats membres de la Unió Europea (actualment 28) no són coherents amb el veritable "Pacte europeu per la democràcia social" constituït per la Carta Social Europea (acceptada per 43 dels 47 membres del Consell d'Europa, inclosos tots els que pertanyen a la Unió Europea). En altres paraules, la Carta Social comporta la consolidació al llarg de dècades (des de 1961) d'un model social basat en un tractat que forneix seguretat jurídica al continent europeu, ja que és una potencial font de sinèrgia i d'harmonització entre la Unió Europea i el Consell d'Europa, tant a nivell judicial com a nivell polític dins ambdues organitzacions.

Paraules clau: patrimoni jurídic social; seguretat jurídica; estabilitat econòmica; temps de crisi; complementarietat de garanties.

* Luis Jimena Quesada, Professor of Law at the University of Valencia (Spain), Avda. dels Tarongers, s/n, 46010 València, luis.jimena@uv.es. President of the European Committee of Social Rights (Council of Europe). The views and opinions expressed herein are those of the author and do not necessarily reflect the views of the Committee. The present paper has been elaborated in the framework of the Research Project "The Age of Rights" (Code 09I060) corresponding to the Consolider-Ingenio 2010 Programme sponsored by the Ministry of Science and Innovation of the Spanish Government.

Article received: 18.08.2014. Blind review: 18.09.2014 and 20.09.2014. Final version accepted: 29.09.2014.

Recommended citation: Jimena Quesada, Luis. «Adoption and Rejection of Austerity Measures: Current Controversies Under European Law (Focus on the Role of the European Committee of Social Rights)». *Revista catalana de dret públic*. No 49 (December 2014), p. 41-59, DOI: 10.2436/20.8030.01.31.

Summary

1 Introduction

The adoption of austerity measures, as such, is neither positive nor negative. The problem lies in their conception in an unbalanced manner by forgetting that the goal of economics (like law) should be at the service of people. Unfortunately, the concept of austerity measures (in economic and legal terms), especially within the European Union (EU) in the context of the present crisis of the 2000s, appears to have asymmetrically transmitted a legacy of shared debt, instead of producing a common heritage of prosperity.

However, when reading the major texts of the Council of Europe and the EU, one may find this common idea of achieving greater unity through economic and social progress based on the observation of minimum standards in the field of human rights. Moreover, the objective set out in the EEC Treaty of 1957 according to which "the removal of existing obstacles calls for concerted action in order to guarantee a steady expansion of balanced trade and fair competition" is not necessarily contradictory to the dynamics of the *international social concertation* that (to avoid loss of external competitiveness of a country) guides the introduction of all social progress and, consequently, also inspired the adoption of the European Social Charter in 1961.

Indeed, the adjective "social" was explicitly added to the definition of the *European economic model* late in the primary law of the EU, particularly in the Lisbon Treaty. Nevertheless, the European Social Charter of 1961, which reflects to a large extent the *European social model*, has been ratified by all Member States of the EU (in most cases even before EU membership). For this reason, it is incomprehensible that some EU Member States did not accept at first a non-binding instrument such as the Community Charter of the Fundamental Social Rights of Workers of 1989 (which does not compete with the 1961 Social Charter, but is rather based on it),[1] or they have also articulated a confusing opt-out clause from the Charter of Fundamental Rights of the European Union[2] (whose catalogue of social rights—especially those under the heading "Solidarity"[3]—has been based precisely on the Revised Social Charter of the Council of Europe).[4]

With these premises, the present paper is structured as follows: firstly, in section 2, an approach to the foundations of the social and economic dimension of Europe (with emphasis on the European Social Charter as well as on the synergies between it and the instruments of the European Union) is presented in order to properly contextualize the adoption of the austerity measures. Secondly, in section 3, the specific case-law of

1 Clapham, Andrew. "Is there any Competition between the two Social Charters?". *Affari sociali internazionali*, No. 1 (1992), p. 189-198.

2 See Editorial. "Does the United Kingdom have a General Opt Out from the EU Charter of Fundamental Rights?". *European Law Review*, No. 39 (2014), p. 1-2.

3 E.g. Protocol no. 30 appended to the treaties and concerning the application of the EU Charter to Poland and the United Kingdom, restricts its interpretation by the Court of Justice and the domestic courts of these two countries, in particular concerning the rights on "Solidarity". Indeed the ECJ has activated a recent restricted approach to the EU Charter, as illustrated by case C-176/12, *Association de médiation sociale*, Judgment of 15 January 2014: "Article 27 of the Charter of Fundamental Rights of the European Union, by itself or in conjunction with the provisions of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the French Labour Code, is incompatible with European Union law, *that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision*". See also, in the same restrictive direction (concerning Article 20 of the EU Charter), ECJ, Case C198/13, *Julián Hernández*, Judgment of 10 July 2014.

4 The Explanations of the following provisions of the EU Charter (established by the Praesidium of the Convention which drafted the EU Charter) mention the provisions of the European Social Charter as a source of law: Explanations on Article 14 (the right to education: Article 10 of the Social Charter), on Article 15 (freedom to choose an occupation and right to engage in work: Article 1§2 of the Social Charter), on Article 23 (equality between men and women: Article 20 of the Social Charter), on Article 25 (the rights of the elderly: Article 23 of the Social Charter), on Article 26 (integration of persons with disabilities: Article 15 of the Social Charter), on Article 27 (workers' right to information and consultation within the undertaking: Article 21 of the Social Charter), on Article 28 (right of collective bargaining and action: Article 6 of the Social Charter), on Article 29 (right of access to placement services: Article 1§3 of the Social Charter), on Article 30 (protection in the event of unjustified dismissal: Article 24 of the Social Charter), on Article 31 (fair and just working conditions: Article 3 of the Social Charter concerning §1 of Article 31 and Article 2 of the Social Charter concerning §2 of this provision), on Article 32 (prohibition of child labour and protection of young people at work: Article 7 of the Social Charter), on Article 3 (family and professional life: Articles 8 and 27 of the Social Charter) on Article 34 (social security and social assistance: Article 12 of the Social Charter concerning §1 of Article 34, Articles 12§4 and 13§4 of the Social Charter concerning §2 of this provision and Article 13 of the Social Charter concerning §3 of this provision) and on Article 35 (health care: Articles 11 and 13 of the Social Charter).

the European Committee of Social Rights on anti-crisis legislation is analyzed, in order to better understand the rejection of the austerity measures. Thirdly, in section 4, the follow-up of the Committee's decisions and its synergies (or asymmetries) with other institutions (judicial or not) of the Council of Europe or the EU are examined. Then, in section 5, the impact of the austerity measures in terms of political democracy (indivisibility) is tackled. Finally, in section 6, some concluding reflections with proposals aiming at strengthening and improving economic harmonization and social concertation under European Law are submitted.[5]

2 Foundations of the social and economic dimension of Europe

2.1 The European Social Charter as an Alternative European Pact for Stability… also in the European Union

First of all, it is worthwhile recalling that, like the 1950 European Convention on Human Rights, the 1961 European Social Charter derives from the Universal Declaration of Human Rights. Both the Convention and the Charter were adopted within the Council of Europe (currently composed of 47 member States) in order to effectively guarantee both civil and political as well as social rights. Both the Convention and the Charter are international treaties and, obviously, they are legally binding. They both also established specific monitoring bodies (the European Court of Human Rights and the European Committee of Social Rights, hereinafter ECtHR and ECSR) to ensure the compulsory character and effectiveness of the rights.

The Social Charter of 1961 recognized a first list of social rights related to work and non-discrimination, social protection and vulnerable people, as well as the so-called reporting system as a mandatory monitoring mechanism. The Charter though evolved and was improved: in 1988, a first Protocol extended the range of protected social rights; in 1995, another Protocol provided for a judicial procedure of collective complaints; and, in 1996, the revised Charter added other important rights[6] and it also established a consolidated version of the Charter, including the whole catalogue of rights and the clauses incorporating the two mechanisms (national reports and collective complaints).[7]

In spite of the diversity of commitments made by each EU Member State under the Social Charter "system" on the basis of its sovereign will,[8] normative interactions between the Social Charter and EU law are explicit. Firstly, the references to the Social Charter have been confirmed by the current sources of EU primary law after the entry into force of the Treaty of Lisbon,[9] including the Charter of Fundamental Rights of the

5 For further critical reflection on these two last sections, see Alfonso, Alexandre. *Social Concertation in Times of Austerity. European Integration and the Politics of Labour Market Reforms in Austria and Switzerland*. Amsterdam: Amsterdam University Press, 2013. On one hand, the author shows that the involvement of trade unions and employers in policymaking is a strategy of compromise-building used by governments to insulate policies from electoral dynamics when they are faced with partisan divisions, or to pre-empt mass protest when unpopular reforms are likely to have risky electoral consequences. On the other hand, he suggests that European integration is somehow undermining the patterns of "social concertation" by illustrating the political underpinnings of social concertation with a focus on the regulation of labour mobility and unemployment protection in Austria and Switzerland, as well as empirical examples from other European countries.

6 In some cases as a result of the positive influence of International NGOs, e.g. in the elaboration of Articles 30 and 31 on the protection against poverty and social exclusion as well as the right to housing.

7 At present, among the 47 Member States of the Council of Europe, 43 (with the exception of Liechtenstein, Monaco, San Marino and Switzerland) have ratified the Social Charter, 13 are bound by the 1961 original Charter and 30 by the 1996 revised Charter. And 15 have accepted the collective complaints procedure.

8 Indeed, the current 28 EU Member States are part of the Charter "system" (Charter of 1961, Additional Protocol of 1988, Additional Protocol of 1995, Revised Charter), with differences as to the commitments made: 9 states are bound by the 1961 Charter (5 of which are also bound by the 1988 Protocol) and 19 by the Revised Charter. The 14 EU Member States that have accepted the 1995 Protocol providing for a collective complaints system comprise the great majority of Contracting Parties that have accepted this Protocol (the remaining Party is Norway).

9 See the Treaty on European Union [Preamble, §5: "(High Contracting Parties) confirming their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers"] as well as the Treaty on the Functioning of the European Union (Article 151: "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation

EU (*supra*). Secondly, the links between the Social Charter and the sources of EU secondary law are also important in both directions as well.[10] Finally, the Social Charter is also presented in significant non-binding instruments of the EU, precisely related to legal synergies between the Council of Europe and the EU[11] and the debate on austerity measures (see below, in section 4.2).

However, these normative links appear to be more complex in practice. On the one hand, in contrast with the "Bosphorus doctrine",[12] the ECSR has not accepted a general presumption of compatibility between social standards of EU law and the Social Charter. This stance has also been held by the ECSR in controversial areas such as organisation of working time[13] or delocalisation of undertakings and social dumping,[14] without forgetting anti-crisis legislation and austerity measures (see below, in section 3).

This lack of presumption is very significant "in view of the overlapping membership of the European Union and the Council of Europe, and the far-reaching impact of EU law on domestic law",[15] which is admittedly notorious in the field of social legislation.[16] From this point of view, the complexities of the judicial dialogue are accentuated, since the ECSR is increasingly occupying a place next to the two European Courts (ECJ and the ECtHR) in this area.[17]

On the other hand, the legal instruments and mechanisms for economic stability[18] have paradoxically provoked a component of legal instability and legitimacy within the EU.[19] In addition, the difficulties of the judicial dialogue at European horizontal level have become even more complex in terms of stability and

while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy. They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action").

10 As well known, the Community Charter of the Fundamental Social Rights of Workers (a declaration adopted in 1989 by eleven Heads of State and Government of the European Economic Community) was explicitly inspired by the Charter of 1961. On the basis of this declaration, the community institutions then adopted a series of directives on labour law. On the other hand, the Explanatory Report of the Revised Social Charter makes clear that some of its provisions were inspired by those directives.

11 I.e. *European Parliament Resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012)*: "The European Parliament, […]—having regard to the European Social Charter, as revised in 1996, and the case law of the European Committee of Social Rights, […]".

12 ECtHR, *Bosphorus Hava Yollari Tutizim ve Ticaret Anoniom Sirketi v. Ireland*, Application no. 45036/98, Judgment of 30 June 2005.

13 E.g. Decision on the merits of 23 June 2010 on Complaint No. 55/2009, *Confédération Générale du Travail v. France*, §§31-42.

14 E.g. Decision on admissibility and the merits on Complaint No. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*), §§72-74.

15 Ryngaert, Cedric. "Oscillating between Embracing and Avoiding *Bosphorus*: The European Court of Human Rights on Member State Responsibility for Acts of International Organisations and the case of the European Union". *European Law Review*, No. 39 (2014), p. 191.

16 See further developments in Stangos, Petros. "Les rapports entre la Charte sociale européenne et le droit de l'Union européenne: le rôle singulier du Comité européen des Droits Sociaux et de sa jurisprudence". *Cahiers de droit européen*, No. 49 (2013), p. 319-393.

17 See Douglas-Scott, Sionaidh. "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis". *Common Market Law Review*, No. 43 (2006), p. 629.

18 As well known, the European Stability Mechanism (ESM) is the permanent crisis resolution mechanism for the countries of the euro area. The ESM issues debt instruments in order to finance loans and other forms of financial assistance to euro area Member States. The decision leading to the creation of the ESM was taken by the European Council in December 2010. The euro area Member States signed the intergovernmental treaty establishing the ESM on 2 February 2012.

19 It is therefore reasonable to denounce that attempts to get Europe back on track rely too heavily on technocratic governance and abandon some of the EU's core values. In this sense, I share the proposal of an alternative, more legitimate route, according to which the ESM-like financial assistance should be integrated into the framework of the EU's legal order and, at the same time, its shortcomings must be addressed and assessed in terms of human rights protection and rule of law. In this sense, Schwarz, Michael. "Memorandum of Misunderstanding – The doomed road of the European Stability Mechanism and a possible way out: Enhanced cooperation", *Common Market Law Review*, No. 51 (2014), p. 389-424.

legitimacy when classic misgivings are promoted by constitutional courts,[20] due to the classic reluctance concerning sovereignty.[21]

2.2 Austerity measures and application of the European Social Charter in the context of the global economic crisis: general approach

It is obvious that assessing the impact of a global economics crisis is not a novelty for the ECSR, first in the framework of the original reporting system.[22] Indeed, after the entry into force of the 1961 Social Charter (in February 1965), the energy crisis of the early seventies of the last century also raised problematic questions which unfortunately are not currently unknown, i.e. housing crisis[23] or high rate of unemployment.[24] In any case, the ESCR has proceeded to a balanced assessment between the possible restrictions and the necessity of respecting the positive obligations imposed by the Social Charter.[25]

Along these lines, the ECSR has explicitly considered that restrictions or limitations to rights in the area of social security were compatible with the Charter as they appeared necessary to ensure the maintenance of a given system of social security and they did not prevent members of society from continuing to enjoy effective protection against social and economic risks.[26] The ECSR has also concluded that in view of the close relationship between the economy and social rights, the pursuit of economic goals is not incompatible with Article 12. It has considered that the contracting parties

20 I.e., request for a preliminary ruling from the Bundesverfassungsgericht (Germany) lodged on 10 February 2014 — *Peter Gauweiler and Others* (Case C-62/14). See Editorial comments. *Common Market Law Review*, No. 51 (2014), p. 384: "By not ruling out in theory the possibility of not following the ECJ ruling, one may argue that the German Constitutional Court has hung a sword of Damocles above the ECJ, which undermines the latter's authority in a way contrary to *inter alia* the duty of loyal cooperation under Article 4(3) TFEU, as it affects the very purpose of the reference for a preliminary ruling, i.e. a fundamental mechanism of EU law aimed at enabling Member States' courts to ensure *uniform* interpretation and application of the law within the Union". On this point, see more extensively Panzera, Claudio. "Il bello dell'essere diversi. Corte costituzionale e Corti europee ad una svolta", *Rivista Trimetrale di Diritto Pubblico*, Anno LIX, Fasc. 1, 2009, p. 1-43, and Vidal Prado, Carlos. *El impacto del nuevo Derecho europeo en los Tribunales constitucionales*. Madrid: Colex, 2004.

21 Czaplinski, Wladyslaw. "European Union Law and the Laws of the Member States. Sources of EU Law", in *Introduction to European Studies: A New Approach to Uniting Europe* (ed. Darius Milczarek, Artur Adamczyk and Kamil Zajaczkowski). Warsaw: Centre for Europe/University of Warsaw, 2013, p. 124-125: "The EU Member States, both the 'old' and the 'new' one, which joined the EU in the 21st century, are sensitive about retaining their sovereignty. They are seldom willing to acknowledge absolutely and unconditionally the primacy of EU law over their internal (national) laws. The European point of view on the issue in question has not been unambiguously and unconditionally accepted by the EU Member States. Particularly the constitutional courts of Germany, France, Italy, Spain and the Supreme Court of Denmark, acting as a constitutional court, are not willing to completely agree with the position of the ECJ". A more extensive comparative approach in Tajadura Tejada, Javier, and De Miguel Bárcena, Josu (coord.). *Justicia Constitucional y Unión Europea*. Madrid: Centro de Estudios Políticos y Constitucionales, 2008.

22 According to the original reporting system, States Parties were supposed to submit a national report every two years on the implementation of the accepted provisions. After the accession of Central and Eastern European countries to the Council of Europe as well as the adoption of the 1996 revised Charter, the workload for both States to report and the Committee to assess national situations increased significantly. That led the Committee of Ministers to modify the system of reporting, so that States Parties had (from 31 October 2007) to present a report annually only on one of the four parts ("thematic groups") into which the provisions of the Charter were divided: "employment, training and equal opportunities" (group 1), "health, social security and social protection" (group 2), "labour rights" (group 3) and "children, families, migrants" (group 4). In this way, each provision of the Charter is reported on once every four years which means that, while alleviating the workload somewhat, it is clear that sometimes the conclusions of the Committee risk becoming quite slow and ineffective if, e.g., changes in domestic legislation and practices have intervened between each supervision cycle.

23 *Conclusions IV,* 1975, United Kingdom: "The Committee fully appreciated the difficulties arising from the housing crisis, but it could not retain this fact as valid argument for not taking appropriate steps in accordance with the Charter".

24 *Conclusions IV*, 1975, Germany: the Committee welcomes "the fact that the ban on the recruitment of foreign workers issued by the Federal Republic following the petrol crisis did not apply to nationals of the Contracting Parties to the Charter". See also Conclusions IV, 1975, Italy: "the effects of the oil crisis seemed to have affected the employment situation in Italy in 1974 much less than in other Western European countries. (…) [It] seemed at least to prove that Italy had made a considerable effort to honour the undertaking arising out of [the Social Charter]. The report admittedly remained rather vague as to specific measures - both short and medium-term - which are claimed to have been taken in order to maintain, and indeed improve the employment situation in the different categories of the working population, especially among young people, women, and elderly workers, and to remove certain cases of regional imbalance".

25 See on this point Jimena Quesada, Luis. "Les obligations positives dans la jurisprudence du Comité européen des Droits sociaux", in *L'homme et le droit. Mélanges en hommage au Professeur Jean-François Flauss*. Paris : Éditions Pedone, 2014, p. 429-443.

26 General observation on Article 12§3; *Conclusions XIII-4*, 1996, p. 143.

may consider that the consolidation of public finances, in order to avoid mounting deficits and debt interest, constitutes a means of safeguarding the social security system.[27]

The ECSR has in particular considered that the adoption of austerity measures aiming to ensure the financial viability of pension schemes, regard being had to demographic trends and the employment situation, may come within this field.[28] It has likewise stated that new financing methods conducive to greater solidarity may be introduced in this context without contravening the Charter.[29] More specifically, the ECSR has indicated that, with a view to pronouncing upon the compatibility with the Charter of any restrictions on the rights relating to social security as a result of economic and demographic factors, account must be taken of the following criteria:

> a) the nature of the changes (field of application, conditions for granting allowances, amounts of allowance, lengths, etc.);
>
> b) the reasons given for the changes and the framework of social and economic policy in which they arise; the extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);
>
> c) the necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued);
>
> d) the existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made; and
>
> e) the results obtained by such changes.[30]

More recently, on the occasion of the assessment of national reports in 2009 (dealing with health, social security and social protection), the ECSR decided to recall several general principles concerning the application of the Social Charter in the context of the current global economic crisis. Indeed, after observing that during the previous years the economic climate in Europe was still generally favourable and many governments were expanding their social safety nets, the ECSR noted that:

> the severe financial and economic crisis that broke in 2008 and 2009 has already had significant implications on social rights, in particular those relating to the thematic group of provisions 'Health, social security and social protection' of the current reporting cycle. Increasing level of unemployment is presenting a challenge to social security and social assistance systems as the number of beneficiaries increase while tax and social security contribution revenues decline.[31]

The ECSR recalled anyway, by emphasizing the notion of positive obligations, that under the Charter the Parties have accepted to pursue, by all appropriate means, the attainment of conditions in which *inter alia* the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised. From this point of view, the ECSR considered that:

> the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed.[32]

3 Specific approach of the European Committee of Social Rights concerning "anti-crisis" legislation

The above mentioned general principles have been further developed within the framework of the collective complaint procedure especially in relation to several cases concerning the so-called "anti-crisis" legislation

27 *Conclusions XIV-1*, 1998, Austria.

28 *Conclusions XIV-1*, 1998, Belgium.

29 *Conclusions XIV-1*, 1998, France.

30 General Introduction to Conclusions XIV-1, 1998, p. 11.

31 *Opinion on the repercussions of the economic crisis on the social rights*, General introduction to Conclusions XIX-2, 2009.

32 *Ibidem*.

adopted in Greece in 2010, and in particular, in the field of restrictive measures affecting labour rights and young workers (*section 3.1*) as well as social cuts affecting pension schemes (*section 3.2*).

Indeed, the collective complaints system has profoundly changed the image of the ECSR, since it has become more effective and pro-active than the reporting system. The independence and impartiality of the Committee and of its members, its methods of interpretation, the format of its decisions, the external impact of its case law and the examples of implementation of its decisions confirm its increasingly judicial image. The collective complaints procedure is adversarial in nature and it also guarantees due process of law. In addition, it provides for the possibility of holding public hearings. By the end of June 2014, 109 complaints had been registered since the entry into force of the procedure in 1998. The average duration of the admissibility stage was from 4 to 5 months, while the average duration of the phase on the merits was less than 11 months. This represents a very reasonable length of proceedings. In any case, the feedback between the two systems (reports and complaints) is evident.[33]

3.1 Flexicurity and labour market policy

The economic crisis has significantly affected Cyprus, Greece, Ireland, Portugal and Spain and has provoked an increase of the unemployment rate in such countries, especially among the young, to a greater extent than in most other European countries. Unfortunately, the measures aimed at countering the effects of the recession by reducing the level of unemployment, particularly among young people (the group hardest hit at present by the economic crisis), have been controversial.

It seems that in particular the measures imposed by the "Troika" (European Commission, European Central Bank and International Monetary Fund) have put more accent on facilitating employers to proceed to cheap dismissal than in encouraging employers through job-creating, job-saving and training measures (e.g. reduction of employer's contributions to social security).[34]

In relation to labour rights, the two first decisions on the merits were adopted by the ECSR on 23 May 2012 in relation to two complaints (No. 65/2011 and No. 66/2011) submitted by two trade unions [*General federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*].

In the first one (Complaint No. 65/2011), the ECSR declared that the 2010 Greek legislation allowing dismissal without notice or compensation of employees in an open-ended contract during an initial period of twelve months is incompatible with Article 4§4 of the 1961 Charter as it excessively destabilizes the situation of those enjoying the rights enshrined in the Charter. The ECSR reached its particular conclusion by taking into account the above mentioned general principles:

33 The Committee of Ministers of the Council of Europe has recognised the contribution of the collective complaints procedure to furthering the implementation of social rights and has called on Member States that have not yet accepted the procedure to consider doing so (*Declaration of the Committee of Ministers on the 50th anniversary of the European Social Charter, adopted by the Committee of Ministers on 12 October 2011 at the 1123rd meeting of Ministers' Deputies*). This recognition was explicitly reflected in the decision the same Council of Europe body made in April 2014 on simplifying the reports system for States that have accepted the collective complaints procedure: the arrangement decided upon is that States should submit a simplified report on application of the Charter every two years on the grounds that they are subject to a more detailed examination by the Committee of the compliance of their law with the Charter than States that have not accepted the collective complaints procedure and that will continue to be subject to the obligation under the provisions of the Charter in force to submit a report on application every year [*European Social Charter – Governmental Committee of the European Social Charter and the European Code of Social Security – Ways of streamlining and improving the reporting and monitoring system of the European Social Charter,* 1196th meeting – 2-3 April 2014 (CM(2014)26].

34 Factors such as the level of employers' social contributions or the cost of vocational training are controversial in terms of potential creation of new jobs: see Ilcheon Yi, "Labour costs", in Fitzpatrick et alii, *International Encyclopedia of Social Policy* [Routledge: London, 2010], p. 735-737, at 736. In general, it has been maintained that the social dimension does not imply a danger for the market economy, Rodríguez-Piñero Bravo-Ferrer, Miguel. "Droits sociaux et crise", in *Le travail humain au Carrefour du droit et de la sociologie. Hommage au Professeur Nikitas Aliprantis*. Strasbourg: Presses universitaires de Strasbourg, 2014, p. 513-514: "La dimension sociale ne met pas en danger l'économie de marché, elle la renforce". On the other hand, the most important challenge in times of crisis is optimising economic resources instead of sacrificing respect for social rights, Sala Sánchez, Pascual. *Discurs d'Investidura com a Doctor "Honoris Causa" per la Universitat de València, 26 de maig de 2014*. Valencia: Universitat de València, 2014, p. 85 and p. 196.

> 17. The Committee considers that what applies to the right to health and social protection should apply equally to labour law and that while it may be reasonable for the crisis to prompt changes in current legislation and practices in one or other of these areas to restrict certain items of public spending or relieve constraints on businesses, these changes should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter.
>
> 18. The Committee considers that a greater employment flexibility in order to combat unemployment and encourage employers to take on staff, should not result in depriving broad categories of employees, particularly those who have not had a stable job for long, of their fundamental rights in the field of labour law, protecting them from arbitrary decisions by their employers or from economic fluctuations. The establishment and maintenance of such rights in the two fields cited above is indeed one of the aims the Charter. In addition, doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems, particularly social assistance, unless it was decided at the same time to stop fulfilling the obligations of the Charter in the area of social protection.

In the second one (Complaint No. 66/2011), the ECSR also found several violations of the European Social Charter (Articles 4§1, 7§7, 10§2, 12§3) on the basis of the same legal reasoning. The provisions regarding entitlement to annual holiday with pay, systematic arrangements for apprenticeships and training, as well as social security coverage were considered violated by means of domestic legislation which introduced "special apprenticeship contracts" for employees aged between 15 to 18 years. The provisions on fair remuneration and non-discrimination based on age were also breached by means of domestic legislation which allowed employers to pay new entrants to labour market, aged less than 25 years, a smaller percentage of the national minimum wage.

In this second decision, an interesting point is that, together with the idea of proportionality (disproportionate consequences for employees when facing the economic crisis), the ECSR developed the idea of progressiveness and non-regression in relation to changes to the social security system.[35] The Committee has also interpreted this notion in a broader sense.[36]

3.2 Flexicurity and pension system

It is precisely in the field of the social security system that the ECSR adopted five new decisions on the merits against Greece (Complaints No. 76, 77, 78, 79 and 80/2012).[37] In its decisions, adopted on 7 December 2012, the ECSR considered that even though restrictions to the benefits available in a national social security system do not under certain conditions breach the Charter, the cumulative effect of restrictions introduced as "austerity measures", together with the procedures applied to put them into place, may amount to a violation of the right to social security.

With this in mind, the ECSR maintained that due to the cumulative effect of the restrictive measures and the procedures adopted to put them into place, certain regulations introduced by the Government of Greece from

35 See §§ 47-49 of the Decision on the Merits (Complaint No. 66/2011). Indeed, in spite of the absence of a general clause of progressiveness within the European Social Charter, the practice of the ECSR has covered such an absence, Chatton, Gregor T. *Vers la pleine reconnaissance des droits économiques, sociaux et culturels*. Genève/Paris: Schulthess Médias Juridiques/LGDJ, 2013, p. 184-185.

36 See §27 of the Decision on the Merits of 25 June 2010 (Complaint No. 58/2009, *COHRE v. Italy*). Read a profound analysis in Courtis, Christian (comp.). *Ni un paso atrás. La prohibición de regresividad en materia de derechos sociales*. Buenos Aires: Editores del Puerto, 2006. In particular, Sarlet, Ingo Wolgang. "Los derechos sociales a prestaciones en tiempos de crisis", in *Crisis económica y atención a las personas vulnerables* (coord. Miguel Ángel Presno Linera). Oviedo: Universidad de Oviedo/Procuradora General del Principado de Oviedo, 2012, p. 41: "Although there are a lot of differences in the way countries recognize, protect and promote social rights, the provision of social rights in international law and the diffusion in regional and national contexts provide a common grammar of rights, a common patrimony of humanity. In this field, instruments such as the prohibition of regressivity, the protection of the minimum core of rights and the existential minimum, could be, especially if taking into consideration the legal and economic limitations, a counter-weight against the erosion of social rights in time of crisis".

37 *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece* (Complaint No. 76/2012), *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece* (Complaint No. 77/2012), *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P) v. Greece* (Complaint No. 78/2012), *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v. Greece* (Complaint No. 79/2012) and *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece* (Complaint No. 80/2012).

May 2010 onwards, modifying both public and private pension schemes, constituted a violation of Article 12§3 (right to social security) of the Charter.

The added value of these new decisions consist of having introduced, together with the above mentioned substantial parameters based on proportionality and progressiveness, other specific substantial criteria in the field of the social security system as well as several important procedural criteria when assessing the possibility to limit social rights in times of crisis.

Furthermore, the Committee said that, despite the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions, the Government:

a) had not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society;

b) neither had it discussed the available studies with the organisations concerned, in spite of the fact that they represented the interests of many of the groups most affected by the measures at issue;

and c) it had not been discovered whether other measures could have been put in place, which might have limited the cumulative effects of the contested restrictions upon pensioners.

In other words, the economic crisis cannot be a mere pretext for the use and abuse of urgent legislation both at national (e.g. decree-law in Spain)[38] or international level (e.g. suspension of some economic and social rights in times of crisis).[39]

3.3 Best attainable standard and complementarity of levels of protection

Three important aspects can be drawn from the analysis of these five decisions delivered in December 2012 (which can also be extended to the other two decisions adopted in May 2012), that is to say: (a) non-acceptance of less favourable international standards, (b) positive interplay between national and international organisations and (c) complementarity with national and international jurisdictions:

a) Firstly, the ECSR did not accept the observation made by the Government to the effect that the rights safeguarded under the Charter had been restricted pursuant to the Government's other international obligations, namely those it had under the loan arrangement with the EU institutions (European Commission and European Central Bank) and the International Monetary Fund within the "Troika". In other words, these obligations did not absolve the Government from their obligations under the Charter.[40]

b) Secondly, the Government had not made the necessary efforts to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, as it is required by Article 12§3, even though the effects of the adopted measures risked bringing about a large scale of pauperisation of a significant segment

38 On this point, by focusing on the impact on the enjoyment of some social rights (right to housing, labour rights or social security benefits), see the critic approach from Carrillo, Marc. "L'impacte de la crisi sobre els drets de l'àmbit social". *Revista catalana de dret públic*, No. 46 (2013), p. 47-72, in particular p. 56-61. On the theoretical reasons to justify an "urgent need", see also Carmona Contreras, Ana Mª. "El decreto-ley en tiempos de crisis". *Revista catalana de dret públic*, No. 47 (2013), p. 1-20. In any case, this abusive use of the decree-law implies a "radical transformation of the Law sources system", as pointed out by Álvarez Conde, Enrique. "El Derecho constitucional y la crisis". *Revista de Derecho Político*, No. 88 (2013), p. 115.

39 On the criteria for the application of international legal obligations with regard to economic, social and cultural rights in times of crisis, by focusing on the legal problems involved in qualifying an economic crisis as an exceptional situation threatening the life of the nation (enabling the State to suspend certain human rights during exceptional situations), see the interesting analysis by Bonet Pérez, Jordi. "Dret internacional dels drets humans en períodes de crisi: criteris d'aplicació de les obligacions jurídiques internacionals en matèria de drets econòmics, socials i culturals". *Revista catalana de dret públic*, No. 46 (2013), p. 14-46. The author focuses on three criteria (offered by international social rights legal practice) which are potentially aimed at limiting the State's discretion to regulate enjoyment of economic, social and cultural rights: the existence of core obligations, the prohibition of retrogressive measures and indirect protection. According to the author, respect for such criteria could avoid abusive practice as a result of the crisis and ensure the progress of ESCR, ensuring that social goals already achieved are not lost, but the relativity of the scope of ESCR jurisdiction adds a structural legal difficulty in the local domain.

40 See *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece*, Complaint No. 76/2012, decision on the merits of 7 December 2012, §52.

of the population, as observed by various international and national organisations.[41]

c) Thirdly, apart from amending the contested domestic legislation ("erga omnes" impact) when implementing the Committee's decisions, the Committee also underlined that other mechanisms were more suited to complaints relating to the effects of the contested legislation on individual pensioners' right to property ("inter partes" effect). In this last regard, the ECSR explicitly highlights that domestic courts have a significant role and, of course, the European Court of Human Rights after exhaustion of domestic remedies.[42]

4 The follow-up of the decisions on austerity measures adopted by the Committee: arranging multilevel spheres of authority

4.1 The Council of Europe level

As is well known, the Committee of Ministers of the Council of Europe has (regarding the judgements from the European Court of Human Rights) the role of supervising the execution of the decisions adopted by the European Committee of Social Rights. Of course, the level of political will when executing each case may differ significantly.

With respect to the two decisions adopted in May 2012 the reaction of the Greek Government has been ambiguous:

> The Greek delegation [...] stated that the Greek authorities did not contest the conclusions of the ECSR and accepted that the specific labour laws of 2010 in question were not in conformity with the Charter. The delegation pointed out that this situation had come about because of the financial vortex threatening the survival of its country's economy. [...].
>
> Against this background, the Greek delegation reiterated the fact that its government accepted the conclusions of the ECSR concerning the issues of non-conformity with the European Social Charter. Secondly, it pointed out that the measures were of a provisional nature. Thirdly, it stated that the Greek Government had the firm intention to revoke these measures as soon as the economic situation of his country would allow. However, in this respect, and with regard to the political and economic constraints, it was not possible to envisage a set timeframe, although it was unlikely that tangible results in Greece would be apparent before 2015. […].[43]

The other five decisions delivered in December 2012 have already had a recent reaction from the Committee of Ministers.[44] In this regard, a difficult example of synergy (between the ECtHR and the ECSR)[45] arises when considering this second issue of concern (pension schemes). In effect, in a Decision of 7 May 2013, the ECtHR declared inadmissible the cases of *Ioanna Koufaki and ADEDY* (applications no. 57665/12 and 57657/12) *v. Greece*. Relying on Article 1 of Protocol No. 1, the applicants complained of the cuts in wages and pensions resulting from Laws nos. 3833/2010, 3845/2010 and 3847/2010 (the second applicant also

41 E.g. reference is made to recommendations, resolutions, reports and other documents produced by the Parliamentary Assembly of the Council of Europe, the ILO or the Greek National Commission for Human Rights.

42 The Committee refers in its decision to several judgments delivered by the European Court of Human Rights against Greece concerning the situation of Greek applicants complaining about the privatisation or the reduction of pensions, to which they have previously been entitled: E.g. *Ichtigiaroglou v. Greece*, application no.12045/06, judgment of 19 June 2008; *Tsoukalas v. Greece*, application no. 12286/08, judgment of 22 July 2010; *Kokkinis v. Greece*, application no. 45769/06, judgment of 6 November 2008, or *Reveliotis v. Greece*, application no. 48775/06, judgment of 4 December 2008.

43 See Resolution CM/ResChS(2013)2 (adopted by the Committee of Ministers on 5 February 2013 at the 1161st meeting of the Ministers' Deputies), in particular the appendix containing the reply by Greece to both decisions of the ECSR.

44 At the 1204th meeting of the Ministers' Deputies on 2 July 2014, the Committee of Ministers adopted Resolutions CM/ResChS(2014)7, CM/ResChS(2014)8, CM/ResChS(2014)9, CM/ResChS(2014)10 and CM/ResChS(2014)11, following the decisions on the merits adopted on 07/12/2012 by the ECSR in these five Complaints (see the appendix to each Resolution including the specific measures adopted by the Greek authorities).

45 On this issue, see Chatton, Gregor T. "La armonización de las prácticas jurisprudenciales del Tribunal Europeo de Derechos Humanos y del Comité Europeo de Derechos Sociales: una evolución discreta". *Revista de Derecho Político*, No. 73 (2008), p. 271-310.

alleged violations of Articles 6 § 1, 8, 13, 14 and 17 of the European Convention).

In spite of the substantial similarities with Complaints No. 76 to 80/2012, the ECtHR reached its decision without referring to the decisions on the merits of the ECSR of 7 December 2012. As a matter of fact, it considered that "the complaint concerning Article 1 of Protocol No. 1 is manifestly ill-founded" (§ 49). In addition, with regards to the complaint concerning the other alleged provisions of the Convention, the Court found nothing in the case file which might disclose "any appearance of a violation of these provisions" (§ 50).

Of course, the first ground (§ 49) of this decision of the ECtHR may be considered as a mere procedural one and can be read as implying that the European Convention and the Social Charter have two different material scopes in the issue at stake, without substantial contradiction (complementarity rather than competition). By contrast, the second ground (§50) may be submitted to criticism, since it suggests a serious asymmetry between the ECtHR and the ECSR which is far from the clear synergies highlighted by both bodies in the recent years:[46] these synergies have been a clear expression of *inter-textuality* as a hermeneutical tool for judges and professors.[47]

4.2 The European Union level

Turning to the EU, in spite of the asymmetries derived from the "Laval case" of the ECJ (which is also connected with the difficult conciliation between economic freedoms and social rights),[48] it is important to note that the austerity measures promoted by the Troika have not led for the moment to a "direct" conflict between the ECJ and the ECSR at a judicial level.[49]

On the other hand, at another EU institutional level, the adoption of austerity measures in Greece has been submitted to the attention of the European Ombudsman: in particular, in case 0973/2012/ANA (decision of 7 November 2012)[50] the complainant alleged that the Commission had failed to reply to the complaint contained in his letter of 13 March 2012 to the Commission, in which he essentially argued that: (a) the Commission's role in the operation of the Memorandum of Understanding of May 2010 (MoUs) is incompatible with the Treaties; (b) by taking measures to implement the MoUs, Greece has limited its sovereignty and has entrusted its economic policy-making to the Troika;[51] and (c) the Commission infringed numerous provisions

46 For an illustration, see ECtHR, *Sørensen and Rasmussen v. Denmark*, Judgment of 11 January 2006, as well as *Demir and Baykara v. Turkey*, Judgment of 12 November 2008.

47 Dorssemont, Philip, and Lörcher, Klaus. "The ECHR and the Employment Relation", in *The European Convention on Human Rights and the Employment Relation* (ed. Filip Dorssemon, Klaus Lörcher and Isabelle Schömann). Oxford and Portland: Hart Publishing, 2013, p. 423.

48 On the conflict between the Judgment of the ECJ (Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet,* 18 December 2007) and the Decision on admissibility and the merits of the ECSR [decision of 3 July 2013, Complaint No. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*] see Guamán Hernández, Adoración. "De nuevo sobre la ley aplicable en los supuestos de desplazamiento temporal de trabajadores: el caso Laval", *Relaciones Laborales*, No. 2, 2008, p. 187-212. See also extensively a recent approach in Salcedo Beltrán, Carmen. *Negociación colectiva, conflicto laboral y Carta Social Europea*. Albacete: Bomarzo, 2014, in particular p. 37-127. See also, under the principle of proportionality perspective, Llobera Vila, Mireia. *El desplazamiento transnacional de trabajadores. Libre prestación de servicios, Constitución económica y principio de proporcionalidad*. Valencia: Tirant lo Blanch, 2013.

49 Nevertheless, as highlighted by Athanasiu, Alexandru. "Foreword", in *The Frontier Worker. New Perspectives on the Labour Market in the Border Regions* (ed. Adrian-Claudiu Popoviciu and Dana Cigan). Bucharest: Editura C.H. Beck, 2013, p. 8: "Of course, even today the economic crisis as well as EU's enlargement have put under discussion the guarantees of maintaining the European social model. Some decisions of the Court of Justice (see the Laval case) see to prioritize the EU values, considering that the EU is rather a freed trade market and not a space of democracy, freedom, prosperity and solidarity. The appeal to some prejudices and eve fantasies of obsolete epochs, such as xenophobia, supposedly unfair foreigners' competition to the labour market, see the 'Polish plumber' case, restricting access to the labour market in some European countries, seems to mark a trend in the practice of some EU countries. It is obvious that against the background of the economic crisis, such attitudes in society, sometimes supported by the public institutions, prejudice the European spirit and affects the confidence in the sincerity and determination of EU efforts".

50 *Decision of the European Ombudsman closing his inquiry into complaint 973/2012/ANA against the European Commission.*

51 The complainant then referred to the agreement reached in May 2010 on the economic adjustment programme for Greece in return for financial assistance. The Programme included the Council's general economic policy guidelines; the Memorandum of Understanding of May 2010 ('MoU I'); the Loan and Credit Facility Agreements; and Greece's medium-term stability and economic development programme. The complainant provided an outline of: the macroeconomic objectives of the Programme; the fiscal

of the Treaties, the European Convention on Human Rights, the Charter of Fundamental Rights of the EU and the European Social Charter.[52]

More specifically, emphasising the obligations arising from the European Social Charter and the practice of the ECSR, the complainant argued that, when a State needs to balance conflicting rights so as to give priority to the allocation of public funds, it should take into account the following three criteria: the measures taken should apply for a reasonable time, they should contribute in a quantifiable manner to progress, and they should make optimal use of the allocated resources.

The final decision from the European Ombudsman consisted in suggesting synergies with other EU institutions, namely the European Parliament (*infra*). In this sense, he invited the complainant to bring his dissatisfaction with the Commission's reply to the European Parliament's attention:

> He can do so by exercising his right to petition Parliament, which, as a political body, is competent to take a view on all the issues raised by the complainant. In fact, within the framework of Complaint 747/2012/ANA against the European Central Bank and at the complainant's request, the Ombudsman transferred the complaint file to the European Parliament's Petitions Committee to be dealt with as a petition made under Article 227 TFEU.

Finally, at this EU political level, it appears interesting to add that these five decisions of the ECSR on Greek "anti-crisis legislation" have been explicitly applauded by the European Parliament in a recent Resolution of 13 March 2014, in which it has strongly criticized the "Troika method" on austerity measures (which, by the way, is not even so consistent with the recent political-strategic documents concerning the economic governance of the EU)[53] and calls for compliance with these European social legal standards.[54]

In particular, the criticism from the European Parliament addresses two connecting aspects:

a) Firstly, from a substantial point of view, the Resolution underlines the synergies between the Council of Europe and EU human rights instruments (European Social Charter and EU Charter of Fundamental Rights) in terms of *social acquis*:

> having regard to the five decisions of the Council of Europe's European Committee on Social Rights […] concerning pension schemes in Greece; […] 26. Recalls that the Council of Europe has already condemned the cuts in the Greek public pension system, considering them to be a violation of Article 12 of the 1961 European Social Charter and of Article 4 of the Protocol thereto, stating that 'the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter' ; notes that this doctrine of maintaining the pension system at a satisfactory level to allow pensioners a decent life is generally applicable in all four countries [Greece, Portugal, Ireland and Cyprus] and should have been taken into consideration; […] 39. Calls for compliance with aforementioned legal obligations laid down in the Treaties, and in the Charter of Fundamental Rights, as failure to comply constitutes an infringement of EU primary law; calls on the European Union Agency for Fundamental Rights to assess thoroughly the impact of the measures on human rights and to issue recommendations in case of breaches of the Charter.

b) Secondly, from an institutional point of view, the European Parliament expresses once again deep concern on the democratic deficit within the EU:

consolidation measures Greece should adopt and the reforms it should implement; the financial support timetable; and the role of the Commission, the ECB and the IMF (the Troika) in ensuring the successful implementation of the Programme.

52 In particular, the complainant alleged that the Commission infringed Articles 2, 3(1) and 3(3) TEU; Articles 8, 9, 67 and 151-155 TFEU; the ECHR; Articles 1, 12 and 28 of the Charter of Fundamental Rights of the EU; and Articles 1, 2, 4, 7 and 30 of the European Social Charter.

53 An interesting approach to the reforms made in the economic governance of the EU by means of both political-strategic documents (such as the Stability and Growth Pact, Europe 2020, the Euro Plus Pact) and the legal provisions of Article 126 TFEU and the excessive deficit procedure; the amendment of Art. 136 of the TFEU and the European Stability Mechanism; the set of six legal instruments commonly known as "The Six Pack", and the new reinforcing set of two legal instruments commonly known as "The Two Pack", in Bar Cendón, Antonio. "La reforma constitucional y la gobernanza económica de la Unión Europea". *Teoría y Realidad Constitucional*, No. 30 (2012), p. 59-87.

54 Resolution of 13 March 2014 on *Employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries* (2014/2007(INI)).

> 40. Calls on the Troika and the Member States concerned to end the programmes as soon as possible and to put in place crisis management mechanisms enabling all EU institutions, including Parliament, to achieve the social goals and policies—also those relating to the individual and collective rights of those at greatest risk of social exclusion—set out in the Treaties, in European social partner agreements and in other international obligations (ILO Conventions, the European Social Charter and the European Convention of Human Rights); calls for increased transparency and political ownership in the design and implementation of the adjustment programmes.

To sum up, apart from the impact on the enjoyment of social rights, the acts adopted by the Troika together regarding the controversial nature and extent of the Stability Pacts,[55] go beyond a mere semantic confusion existing between openness and transparency in EU Law, insofar as they challenge the foundations of participation and democracy of the Union.[56]

4.3 The global judicial dialogue: interaction with the national judges

Apart from this follow-up at European level, the implementation of the decisions adopted by the ECSR may and must be supported or reinforced through judicial dialogue at national level, not only in relation to the country directly involved in a specific case, but also in relation to other countries having put into force similar contested measures.[57] Let me illustrate this kind of synergies by referring to the above mentioned areas, both labour rights and pension schemes, covered by the Greek decisions of the ECSR.[58]

A positive example concerning the first area is provided by a judgment adopted in November 2013 by a Labour Court in Spain (Labour Court no. 2 of Barcelona, judgment no. 412 of 19 November 2013) giving priority to the Social Charter over the contested national legislation (Decree-Law No. 3/2012 introducing the possibility of dismissal without notice and compensation during a probation period of one year in the framework of a new "contract to support entrepreneurs"). In particular, the national judge set aside the national provisions by explicitly and broadly basing its *ratio decidendi* in the Decision of the Committee on Complaint No. 65/2011, after considering that the measures concerned, also introduced in Spain following

55 See Editorial Comments. "Union membership in times of crisis". *Common Market Law Review*, No. 51 (2014), 1-12, at 2: "In the wake of the euro crisis we can observe the conclusion of treaties among the Member States (EFSF, ESM, Fiscal Compact and the forthcoming agreement on the Single Resolution Fund) impacting on the system of competences and the institutional balance set out in the EU treaties. The phenomenon goes beyond the scope of the management of the euro crisis, […] Disputes between Member States have also come to the forefront of the European agenda due to their interference with the common, founding values of the Union". With the same spirit, see Kochenov, Dimitry. "Europe's crisis of values". *Revista catalana de dret públic*. No. 48 (2014), p. 106-118: this author outlines that the key features of the crisis are analyzed as well as the reasons that led to the crisis, focusing not only on the EU's powerlessness to resolve it in terms of procedures and enforcement, but also on the justice void, which looms beyond the internal market, making EU's substantive involvement—indispensable for the successful resolution of the crisis—overwhelmingly difficult.

56 Alemanno, Alberto. "Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy". *European Law Review*, No. 39 (2014), p. 75.

57 This position is held, on the basis of the so-called "control of conventionality", by Guiglia, Giovanni. "Il diritto alla sicurezza sociale in tempo di crisi: la Grecia di fronte al Comitato Europeo dei Diritti Sociali". *Diritto Pubblico Comparato et Europeo*, Vol. IV (2013), p. 1414-1416. See more extensively Jimena Quesada, Luis. *Jurisdicción nacional y control de convencionalidad. A propósito del diálogo judicial global y la tutela multinivel de derechos*. Cizur Menor: Aranzadi, 2013.

58 Yannakourou, Matina and Tsimpoukis, Chronis Tsimpoukis. "Flexibility without security and deconstruction of collective bargaining: the new paradigm of Labour Law in Greece". *Comparative Labor Law&Policy Journal*, Vol. 35, No. 3 (2014), p. 341: "Decision 66/2012 of the ECSR, which interprets the provisions of the European Social Charter authentically, is of paramount importance for the Greek legal order; it practically keeps Greek courts from applying the current legislation concerning the employment and remuneration of young persons of up to twenty-five years of age, given that the ESC constitutes a statute of the Greek legislation that prevails over the Acts adopted by the Parliament. Of course, even if the above mentioned collective complaints against Greece had not been submitted and the issue at stake had never been examined by the Committee, Greek courts would still be obliged to examine—this time exclusively on their own—whether the provisions in question are compatible with the Charter or not" (available at SSRN: http://ssrn.com/abstract=2438797 or http://dx.doi.org/10.2139/ssrn.2438797). See also a shorter Spanish version of this paper in "La Reforma Laboral en Grecia (2010–2012)" [*Labor Law Reforms in Greece After the Economic Crisis (2010–2012)*]. *Revista General de Derecho del Trabajo y de la Seguridad Social*, nº 34 (2013), available at http://www.justel.com/v2/revistas/detalle_revista.asp? id_noticia413579. See also Deliyanni-Dimitrakou, Christina. "La Charte sociale européenne et les mesures d'austérité grecques: à propos décisions nº 65 et 66/2012 du Comité européen des droits sociaux fondamentaux". *Revue de Droit du Travail*, No. 7/8 (2013), p. 457-470. In Spanish doctrine, on the judicial impact of this "Greek" decisions of the ECSR, see Salcedo Beltrán, Carmen. "Crisis económica, medidas laborales y vulneración de la Carta Social Europea". *Revista Europea de Derechos Fundamentales*, nº 22 (2013), p. 81-135.

the measures promoted by the Troika, were analogous to the Greek case.[59]

This judgment had a significant media impact in Spain. In this respect, it is worthwhile recalling that Spain has not already accepted the collective complaint procedure. By contrast, in Portugal, one of the 15 State Parties having accepted this procedure, the social cuts introduced in the labour market in the context of the economic crisis have not been contested before the ECSR.

One of the reasons for this situation may perhaps reside in the procedural strategy of national trade unions, which have decided to rely on the Portuguese Constitutional Court (see, for example, Decision Nº 187 of 5 April 2013 repealing domestic provisions reducing wages and pensions of public employees).[60] This complementarity is positive, even if the constitutional jurisdiction has not cited the case-law of the Committee in this field.[61] From such perspective, the role of the Venice Commission of the Council of Europe is very relevant in promoting these synergies between Constitutional case-law and European case-law (in this case, the one elaborated by both the ECtHR and the ECSR).

5 Economic crisis, austerity measures and the challenge of indivisibility of all human rights

In this section it is demonstrated (even more strongly in the context of the economic crisis) that social rights are also at the service of freedom, like the other fundamental rights. This premise is a solid support to the force of social rights in the framework of the theory and practice of fundamental rights.[62] Freedom is, therefore, conceived as the basis of social rights; since these rights (like all fundamental rights) extend the autonomy, and also negative liberty, enjoyed by beneficiaries.[63] In other words, civil and political rights must be reinterpreted in the light of social rights and, vice versa, social rights must be reinterpreted in the light of the principle of freedom. This correlation is derived, as an inevitable consequence, from the principle of indivisibility,[64] which logically entails relativizing the classifications of human rights.[65]

59 *Sentencia No. 412/2013, de 19 de noviembre de 2013,* Juzgado de lo Social no. 2 de Barcelona (procedimiento No. 426/2013 en materia de despido), paragraph 4. See a comment on this first judicial decision and similar ones adopted by other Spanish judicial bodies in Salcedo Beltrán, Carmen. "Incumplimiento por España de los Tratados internacionales: Carta Social Europea y período de prueba (A propósito de la SJS nº 2 de Barcelona de 19 de noviembre de 2013)". *Revista de Derecho Social*, No. 64 (2013), p. 134. By contrast, the Spanish Constitutional Court has unfortunately decided (9 votes to 3) to fully ignore these international parameters (whose application is imposed by Articles 10§2 and 94 to 96 of the 1978 Spanish Constitution) by not even mentioning them in its recent Judgment of 16 July 2014 (appeal on unconstitutionality No. 5603/2012 against Law 3/2012, of 5 July, on urgent measures to reform the labour market). It has to be noted that one of the main grounds of unconstitutionality precisely dealt with is this new contract to support entrepreneurs (the dissenting opinion of the 3 judges composing the minority held their position on this point by referring to the case law of the ECSR). To approach the context of this constitutional judgment in Spain, consult García Ninet, Juan Ignacio (dir.). *El impacto de la gran crisis mundial sobre el Derecho del Trabajo y de la Seguridad Social. Su incidencia en España, Europea y Brasil.* Barcelona: Atelier, 2014.

60 See Antunes, Aquilino Paulo. "Breves notas ao Acórdão do Tribunal Constitucional Nº. 187/2013 quanto à contribução extraordinária de solidariedade". *Pública. Revista Eletrónica de Direito Público*, No. 2 (2014); (visited on 9 July 2014). See also Guillem Carrau, Javier. "El Constitucional Portugués ante las medidas de ajuste: la Sentencia de 5 de abril de 2013". *Cuadernos Manuel Giménez Abad*, No. 5 (2013), p. 69-77, as well as Baylos Grau, Antonio. "La contracción del Estado social". *Revista de Derecho Social*, No. 63 (2013), p. 26.

61 *Acórdão 187/2013 of 5 April 2013*, Tribunal Constitucional, Plenário, Processo No. 2/2013, 5/2013, 8/2013 e 11/2013. This judgment only includes (in paragraph 61) a generic reference to Art. 1 of Protocol No. 1 to the ECHR in order to hold that the European Court of Human Rights has analysed under this provision situations in which pensions are at stake.

62 Escobar Roca, Guillermo. "Presupuestos de teoría y dogmática constitucional", in *Derechos sociales y tutela antidiscriminatoria* (Dir. Guillermo Escobar Roca). Cizur Menor: Aranzadi, 2012, p. 318-319.

63 *Ibídem*, p. 334-337.

64 Escobar Roca, Guillermo. "Indivisibilidad y derechos sociales: de la Declaración Universal a la Constitución", in *Tratado sobre protección de derechos sociales* (Dir. Manuel Terol Becerra and Luis Jimena Quesada). Valencia: Tirant lo Blanch, 2014, p. 78-81.

65 See extensively Abramovich, Víctor and Courtis, Christian. *Los derechos sociales como derechos exigibles*. Madrid: Trotta, 2002. See also in particular Carpizo, Jorge. "Una clasificación de los derechos de la justicia social", in *Construcción y papel de los derechos sociales fundamentales* (coords. Armin Von Bogdandy et alii). México: Instituto de Investigaciones Jurídicas-UNAM, 2011, p. 419. Accordingly, the traditional classifications (including, among others Alexy, Robert. *Theorie der Grundrechte*; Spanish version *Teoría de los Derechos Fundamentales*. Madrid: Centro de Estudios Políticos y Constitucionales, 2nd ed., 2007) offer an academic interest, but it is hard to derive from them concrete useful effects (including a structural classification, as suggested by Escobar Roca, Guillermo. *Introducción a la teoría jurídica de los derechos humanos*. Madrid: Trama, 2006, p. 54 ff.) since the dogmatic structure is not an obstacle to defend civil rights and social rights on an equal footing (Pisarello, Gerardo. *Los derechos*

In his recent *Report following his visit to Spain from 3 to 7 June 2013*,[66] the Commissioner for Human Rights of the Council of Europe (Nils Muižnieks) has highlighted the challenge of indivisibility of all human rights by denouncing the degradation of both civil and social rights in times of crisis.

On the one hand, he has highlighted that:

> the adoption by states, including Spain, of fiscal austerity measures has given rise to social unrest and public protests that have presented states with unprecedented challenges concerning the protection of a number of civil rights, such as the right to freedom of peaceful assembly, and freedom from ill-treatment in the context of the action of law enforcement authorities.

On the other hand, the Commissioner is concerned:

> by the impact on the enjoyment of human rights of the current global financial crisis and subsequent fiscal austerity programmes adopted by various European governments. He shares the serious concern expressed by the Parliamentary Assembly of the Council of Europe[67] that the impact of the financial crisis on the living conditions of citizens in Europe undermines fundamental social rights standards, especially those concerning protection against poverty and social exclusion (Article 30 of the revised European Social Charter).

The Commissioner stated that:

> in this context, Spain is called on to accede to the revised European Social Charter and to its mechanism of collective complaints. He also underlines the need for a systematic impact assessment of austerity measures on children and other vulnerable social groups, in close co-operation with civil society and National Human Rights Structures such as the national and regional ombudsmen. He is particularly concerned about the detrimental impact of forced evictions on children and their families.

In this last respect, it is worth mentioning two important decisions adopted by the ECSR concerning discriminatory legal and practical measures put into force in the context of the crisis.

On 25 June 2010, the Committee adopted a decision on the merits in Complaint No. 58/2009 (*Centre on Housing Rights and Evictions v. Italy*) finding serious violations of the Social Charter. It dealt with forced evictions and collective expulsions of particularly vulnerable persons on account of their ethnicity (Roma people) in the 2008 legal framework of the so-called the "*emergenza nomada*" ("nomad emergency") and the "*emergenza Rom*" ("Roma emergency").

In this case, the indivisibility of rights was demonstrated by the fact that the social exclusion had led not only to penury but also to denial of citizenship.[68] Furthermore, the Committee underlined the principle of progressiveness and non-regression in so far as the Italian authorities' policy of dismantling Roma camps was also one of the main issues at stake in a previous collective complaint.[69]

In the second decision, the ECSR dealt with Complaint No. 63/2010 (*COHRE v. France*), concerning the eviction and expulsion of Roma from their homes and from France during the summer of 2010. In its decision on the merits of 28 June 2011, the ECSR concluded that the conditions in which the forced evictions of Roma camps had taken place were incompatible with human dignity and they also constituted serious violations of

sociales y sus garantías. Elementos para una reconstrucción. Madrid: Trotta, 2007, p. 111-133).

66 *CommDH(2013)18*, Strasbourg, 9 October 2013.

67 See *Resolution 1651(2009) of the Parliamentary Assembly of the Council of Europe (PACE) on consequences of the global financial crisis*. See also PACE Committee on Social Affairs, Health and Sustainable Development, *Austerity measures – a danger for democracy and social rights*, revised draft report, 22 May 2012.

68 The Committee observed "that the segregation and poverty situation affecting most of the Roma and Sinti population in Italy (especially those living in the nomad camps) is linked to a civil marginalisation due to the failure of the authorities to address the Roma and Sinti's lack of identification documents. In fact, substandard living conditions in segregated camps imply likewise a lack of means to obtain residency and citizenship in order to exercise civil and political participation" (§ 103). It also considered "that the contested 'security measures' represent a discriminatory legal framework which targets Roma and Sinti, especially by putting them in a difficult situation of non-access to identification documents in order to legalise their residence status and, therefore, allowing even the expulsion of Italian and other EU citizens (i.e. Roma from Romania, Czech Republic, Bulgaria or Slovakia)" (§158).

69 Reference is made to *European Roma Rights Centre v. Italy*, Complaint No. 27/2004, Decision on the merits of 7 December 2005, §§ 24 and 27.

the Charter. In this case, the indivisibility was illustrated by the fact that the Committee did not accept the renunciation or relinquishment of civil rights when the enjoyment of social rights was not ensured.[70]

To conclude, it is interesting to note that in both complaints (No. 58/2009 and No. 63/2010) the ECSR used, as a significant element of its legal reasoning, the United Nations Committee on Economic, Social and Cultural Rights' General Comments on adequate housing (No. 4) and forced evictions (No. 7), and they also referred to the case-law of the European Court concerning prohibition of collective expulsions.[71] In addition, the European Committee used for the first time the notions of "aggravated violation" and "aggravated responsibility" which were borrowed from the Inter-American Court of Human Rights.[72]

I consider these two cases as two excellent examples of positive judicial dialogue and synergy.[73] Nevertheless, the background of Complaint No. 63/2010 suggested a divergent approach between the Council of Europe (decision on the merits of 28 June 2011) and the EU, insofar as the French government stated that the evictions and expulsions of Roma carried out in the summer of 2010 were declared to be compatible with EU law by the European Commission under the pretext that the latter decided not to undertake any procedure of infringement against France.

This emphasises the importance of the so-called governance of minorities in Europe, which is built on the basis of the complementarity between the Council of Europe, the European Union and the Organization for Security and Cooperation in Europe. However, the performance of those European organizations (in particular, the performance of the bodies that constitute their respective institutional framework) depends on the operational autonomy that they have from the States, which is a requirement for the operation of governance.[74] From this point of view, the European Commission seems not to have shown significant operational autonomy in this matter. By contrast, the ECSR, also due to the independence of its members, receives input from NGOs as an important guarantee of the social rights at stake in terms of the participation of beneficiaries and, consequently, in terms of the effectiveness of protection mechanisms.[75]

70 Decision on 28 June 2011: "the Government justifies the measures taken against Roma of Romanian and Bulgarian origin in the summer of 2010, by invoking the 'voluntary' nature of their return, under the auspices of the humanitarian repatriation assistance programme provided for in the circular of 7 December 2006. The Committee considers that in practice these so-called 'voluntary' returns are disguised forms of forced collective expulsions, given that: -The returns in question were 'accepted' under the conditions laid down in the circular of 5 August 2010, that is subject to the constraint of forced eviction and the real threat of expulsion from France. -In particular, the willingness to accept financial assistance of € 300 per adult and € 100 per child reveals a 'situation of destitution or extreme uncertainty' (as the Government itself puts it in its submissions on the merits) in which the absence of economic freedom poses a threat to the effective enjoyment of their political freedom to come and go as they choose. The Committee therefore finds it impossible to conclude that given these conditions, the returns were accepted voluntarily" (§§72-74).

71 In particular, ECtHR, *Conka v. Belgium*, No. 51564/99, Judgment of 5 February 2002.

72 *COHRE v. Italy*, Complaint No. 58/2009, decision on the merits of 25 June 2010: "[…] the Committee considers that, the lack of protection and investigation measures in cases of generalized violence against Roma and Sinti sites, in which the alleged perpetrators are officials, implies for the authorities an aggravated responsibility (see, *mutatis mutandis*, the Inter-American Court of Human Rights in *Myrna Mack Chang v. Guatemala*, judgment of 25 November 2003, § 139; *Las Masacres de Ituango v. Colombia*, judgment of 1 July 2006, § 246; *Goiburú and others v. Paraguay*, judgment of 22 September 2006, §§ 86-94; or *La Cantuca v. Peru*, judgment of 29 November 2006, §§ 115-116)" (§§ 75-76). See also *COHRE v. France*, Complaint No. 63/2010, decision on the merits of 28 June 2011 (§§ 53-54).

73 These synergies between both the Inter-American and the European systems for the protection of human rights (in particular, social rights), have been recently emphasised by Burgorgue-Larsen, Laurence. "Los derechos económicos y sociales en la jurisprudencia de la Corte Interamericana de los Derechos Humanos", in *Tratado sobre protección de derechos sociales, Op.Cit.*, p. 469-490. See more extensively Leao, Renato Zerbini Ribeiro. *La construcción jurisprudencial de los sistemas europeo e interamericano de protección de los derechos humanos en materia de derechos económicos, sociales y culturales*. Porto Alegre: Núria Fabris Editora, 2009.

74 See Von Bogdandy, Armin. "La protección de los vulnerables: un ejemplo de gobernanza posnacional", in *Construcción y papel de los derechos sociales fundamentales*. *Op.Cit*., p. 317-326.

75 Pisarello, Gerardo. "Garantías sociales", in Escobar Roca, G. (Dir.): *Derechos sociales y tutela antidiscriminatoria*. Cizur Menor: Aranzadi, 2012, p. 743. This author adds that the reduction of the impact of social rights provisions (especially in the context of the crisis of the welfare state) is explained in parallel to the loss of the participatory capacity of the subjects interested in their protection. Indeed, NOGs take part in the social guarantee approach and, from this perspective, their action in the framework of the collective complaint procedure before the ECSR demonstrates how operational the concept of social guarantees can be made in order to improve lives, particularly those of the poor: *Realizing Rights through Social Guarantees*. Washington: The World Bank Group. Report No. 40047 – GLB, February 2008, p. i.

6 Concluding remarks and proposals

In the Preamble of the 1996 Revised European Social Charter the signatories expressed their wish "*to update and adapt the substantive contents of the Charter in order to take account in particular of the fundamental social changes which have occurred since the text was adopted*", as well as their will to progressively replace the 1961 Charter. The economic and financial crisis has actually consolidated the place of the Revised Charter as one essential instrument to face and manage these fundamental social changes.

The configuration of the Revised Social Charter as a kind of "European Pact for Social Democracy", which allows for improving social standards at European level, remains obvious under both the Council of Europe and the EU perspectives. Within the framework of the first Organization (47 Member States), the Committee of Ministers adopted an important political Declaration on the occasion of the 50th anniversary of the 1961 Charter, in October 2011, in which all State Members were invited to accept both the collective complaint procedure and the Revised Charter. This is consistent with the "social version" of the three pillars of the Council of Europe, that is to say, *Democracy, Human Rights and the Rule of Law* and, therefore, *Social Democracy, Social Rights and Social State*.

As far as the EU (28 Member States) is concerned, such configuration seems clear by the substantive and by the formal synergies between the Charter of Fundamental Rights of the EU (legally binding since December 2009 with the entry into force of the Lisbon Treaty) and the Revised Charter (in particular, the set of social rights, especially under the title of "Solidarity").

In this sense, it appears that there is a manifest lack of consistency between the fact of being an EU Member State and, at the same time, the fact of not having accepted the Revised Charter. In practice, both the EU Charter and the Revised Social Charter aim at improving the social standards at European level. Accordingly, when adopting secondary legislation (Directives and Regulations), EU institutions must take the EU Charter directly into account, and the Revised Social Charter indirectly so. In parallel, when transposing or incorporating this secondary legislation, EU Member States must also take the EU Charter directly into consideration and the Revised Social Charter indirectly so.

This is the best way, at the stage of drafting, to maintain a convergence between the EU and the Council of Europe and, by extension, to avoid subsequent interpretative or jurisdictional divergences. A high level Conference will be held in Turin, Italy, from 17-18 October 2014, bringing together political personalities from the Council of Europe and the European Union in order to hold an exchange of views and find political solutions to meet the challenge of enforcing human rights in times of austerity, and with a view to reinforcing the synergies between EU legislation and the Charter.

In the same spirit, it has been illustrated (specific case-law of the concerning "anti-crisis" legislation, in section 3 *supra*) that the collective complaint procedure before the ECSR is the adequate mechanism for increasing visibility and effectiveness to the rights recognized in the European Social Charter. It is worth remembering that the main virtue of the 1950 ECHR was not its set or catalogue of human rights, but its monitoring mechanism (the ECtHR). Indeed, the ECHR aimed at ensuring only some of the rights recognized within the Universal Declaration, being the right to formulate individual applications before the ECtHR initially conceived as optional, but it logically became mandatory for all member states since 1981.

At the universal level, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights providing for a system of individual communication was hopefully adopted on 10 December 2008 at the beginning of the crisis. Of course, there appears a clear lack of consistency with some European countries having accepted this Protocol (Bosnia and Herzegovina, Slovakia or Spain) and not having accepted the European collective complaints procedure. Accepting both procedures is a good example of international commitment to the idea of *indivisibility (of guarantees)*.

We all know that the key element is not the level of formal recognition of human rights but the establishment of effective remedies. Definitely, both universal and European Protocols, respectively providing for individual and collective remedies, represent the best opportunity to protect social rights in times of economic crisis.

Last but not least, regarding the establishment of coherent and harmonious relationships between the two normative systems (EU and Council of Europe) in order to avoid the kind of controversies analyzed in the present research, it is essential not to forget the EU accession to the European Social Charter[76] as a further step to complete the parallel accession to the ECHR.[77]

76 See De Schutter, Olivier. *L'adhésion de l'Union européenne à la Charte sociale européenne*. Bruxelles : Université Catholique de Louvain, 8 July 2014, 54 pages (visited on 6 August 2014). The report recalls the reasons why the dossier now deserves to be revisited. It examines the main legal arguments in favor of accession (and its modalities): accession, it shows, will contribute to reduce the risk of conflicts between the duties that are imposed under the (Revised) European Social Charter and EU law; and it will ensure the uniformity of application of EU law throughout all the EU Member States. The report also examines whether the EU has the required international competence to accede to the (Revised) European Social Charter. It answers the question in the affirmative, based on Article 216 of the Treaty on the Functioning of the European Union which codifies the implicit external powers that the EU may exercise. The report also questions whether the classical approach of the ECJ to the question of implicit external powers is well-suited to the specific nature of human rights treaties. The report considers, finally, the consequences that will follow from the accession of the EU to the (Revised) European Social Charter, taking into account the conditions under which the ECJ recognizes that international agreements concluded by the EU may be invoked.

77 As stated in the *European Parliament Resolution of 19 May 2010 on the institutional aspects of the accession of the EU to the ECHR* [Document of the European Parliament 2009/2241(INI)]: "[…] 30. Notes that accession by the Union to the ECHR signifies the recognition by the EU of the entire system of protection of human rights, as developed and codified in numerous documents and bodies of the Council of Europe; in this sense, accession by the Union to the ECHR constitutes an essential first step which should subsequently be complemented by accession by the Union to, inter alia, the European Social Charter, signed in Turin on 18 October 1961 and revised in Strasbourg on 3 May 1996, which would be consistent with the progress already enshrined in the Charter of Fundamental Rights and in the social legislation of the Union; 31. […] stresses also the need for the Union to be involved in the work of the Commissioner for Human Rights, the European Committee of Social Rights (ECSR), […] and asks to be duly informed of the conclusions and decisions of these bodies;…". On this point, see Gragl, Paul. "A giant leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights", *Common Market Law Review*, No. 51 (2014), p. 58: in emphasizing the synergies, the author concludes that "these courts must bear in mind that the purpose and objective of the accession is not to distinguish themselves in judicial battles with their respective counterpart, but to cooperate in order to improve the protection of human rights for individuals in Europe".