# Report from the Council of Europe and Social Platform training on 'How to make the best use of the Collective Complaints Mechanism under the European Social Charter'

## January 29, 2014

Mr **Riccardo Priore** (Council of Europe) welcomed the NGO participants as well as the distinguished members of the European Committee of Social Rights that attended the first session of the meeting.

Mr **Pierre Baussand** (Director of Social Platform) thanked the Council of Europe for hosting and recalled that we held trainings on the Charter together in 2004 and 2007 and that hehoped in the future we will continue on a more regular basis.

### Session I : Presentation by the representatives of the Council of Europe

Mr **Regis Brillat** (Executive Secretary of the European Committee of Social Rights) presented the Council of Europe, explaining that all its activities build on the principles of democracy, rule of law and human rights. The Social Charter covers many of the social rights that are not included in the UN Convention on human rights.

The collective complaints procedure can be used by NGOs and trade unions. Out of the Council of Europe's 47 members, 43 have ratified the Social Charter and 15 members the collective complaints mechanism. 77 NGOs are entitled to lodge a complaint; first they need to have participatory status within the Council of Europe and secondly they have to apply for status to lodge complaints. Decisions on applications are taken twice a year. All together there have been 103 registered complaints; 13 were filed in 2012 and 16 in 2013.

On admissibility, Mr Brillat pointed out a couple of conditions: NGOs do not have to consult with governments but they will be invited to submit their response to the complaint. NGOs don't have to be the victim themselves. The articles evoked have to be accepted by the country concerned (there has been a case when the complaint was lodged on an article not accepted by Greece with the purpose of raising awareness and visibility of the problem). The procedure includes a written part where the government can respond, in some cases there can be an oral hearing and a third party intervention by e.g. institutions or individuals.

The complaint can lead to 'immediate measures' where the government will be invited to freeze procedures or take essential measures. There have been four such cases - two were accepted and two rejected. All documents submitted by the parties to the complaint are public but the decision on the merits is kept secret for four months. A case takes on average 15.7 months.

Compared to ECHR cases the complaint mechanism does not require all national remedies to be exhausted and the time until decision is shorter. Even if the decision is not binding in many cases it leads to changes at national level, in legislation or in interpretation. For more information Mr Brillat recommended the Committee's Annual Activity Report.

Mr **Luis Jimena Quesada** (President of the European Committee of Social Rights) started with stating that the main purpose of legislation should be its effective implementation. The use of the (non-binding) collective complaints mechanism can sometimes give more results than e.g. ECHR judgements and lead to important decisions and changes.

Mr Jimena Quesada encouraged NGOs to focus on evidence and also on third party interventions by e.g. other NGOs to support the complaint, sometimes one can also take into account media

reporting. One can also see synergies, e.g. the Charter of Fundamental Rights has taken into account the Social Charter increasing levels of protection.

**Questions and answers I**

- *YFJ*: is considering looking into remuneration of internships for young people by using Article 4 and Article 7 of the Charter
- *PICUM*: planning to lodge complaints on access to shelters for undocumented women who are victims of violence and asked about what impact a negative decision can have
- *AGE Platform*: asked about the relevance of national court decisions parallel with a collective complaint
- *Kerk in Actie*: addressed the unclear definition of what 'immediate measures' actually means
- *FIDH*: asked if NGOs can lodge complaints against several member states in one complaint to address extra-territorial responsibility by states to international obligation (e.g. relating to the EU crisis)

Mr Brillat answered if the first complaint turns out inadmissible NGOs can lodge a new complaint with more complementary information, which could lead to the Committee changing its opinion. If the decision on the complaint is negative due to merits it dpesn't imply negative consequnces. NGOs should not wait for decisions at national level; the complaint can be made in parallel.

Mr Jimena Quesada welcomed YFJ ideas for complaints. Even if a decision is negative it is always worth to take the risk and challenge. The use of immediate measures is new so there is still need for more knowledge about it.

**Questions and answers II**

- *FEANTSA*: asked if there is a way to receive legal support from the Council of Europe when defining articles for a complaint
- *Dynamo International*: raised the issue of the third optional protocol of the UN Convention of the Rights of the Child, which would allow for individual complaints for violation of the rights of children
- *Platform Minors in exile*: raised the issue of how to deal with territorial differences within one state (e.g. Belgium)

Mr Brillat explained that the Council of Europe doesn't have legal resources but NGOs could be in contact with the Academic Network on the European Social Charter and Social Rights. Mr Jimena Quesada added that this training occasion is a way for the Council of Europe to support NGOs.

The ratification of the third optional protocol of the UN Convention of the Rights of the Child will simply complement the collective complaint mechanism; there is no problem to raise the same issues with different mechanisms. In the case of Belgium the Committee would make a judgement on the issue.

## Session II: Exchange of views and experiences among the participants

**Marie Cécile Renoux, ATD Quart Monde**

ATD Quart Monde lodged a complaint together with FEANTSA in 2006 against France regarding extreme poverty and the right to housing. The individuals did not have access to running water or electricity and were repeatedly evicted from their homes leading to among others their children not being able to attend school. The Committee acknowledged that France was not implementing its legislation on the right to housing. The result of the complaint was that the families' voices were finally heard and since then France has introduced new legislation enforcing housing rights.

Ms Renoux urged other NGOs to also lodge complaints as it has been a successful tool for ATD Quart Monde, but it requires a lot of preparatory work to collect information, to analyse and access legal advice.

**Marieka Vandewiele, IPPF-EN**

IPPF-EN lodged a complaint against Italy (file 87 /2012) on the implementation of their abortion law where doctors can reject to perform an abortion based on their consciousness and if the women's life is not in danger. According to the law hospitals must ensure that women are given the service but considering 70 percent of doctor's object the hospitals cannot guarantee the service and in practice women do not have access to abortion.

In terms of advocacy it was a success leading to the biggest trade union in Italy lodging a similar complaint from the perspective of discrimination of doctors that do not object and women's health.

For IPPF-EN the process took about six months and they had good support from partners in Italy; a Cabinet of Italian Lawyers in Milan (*Studio Marilisa D'Amico, Constitutional lawyer and Constitutional Law professor*) and LAIGA (*Free Italian Association of Gynecologists for the implementation of the Law 194, created in 2008*). Most of the work was done at national level but it also helped that the advocacy person in Brussels was Italian.

The decision will be made public in mid-March 2014.

**Samara Jones, FEANTSA**

FEANTSA lodged complaints against in France 2006, Slovenia in 2008 and the Netherlands in 2012 on the right to housing. Based on their experiences Ms Jones gave provided tips to other NGOs:

EU NGOs need good connections with national and local member organisations or other partners on the ground to identify the issues, gather research and data and for the language. A complaint requires some work on an EU level but most work is done at national level. FEANTSA has used their networks and pro-bono lawyers for drafting and advice.

The complaint mechanism is an advocacy measure to evoke people's rights that governments do not respect. For example in Slovenia the laws were changed and it also positively affected neighbouring countries.

FEANTSA had a case against Ireland but in the meantime the government adopted new ambitious homelessness measures so they decided it was not strategic to take the complaint forward (representing homeless and housing service providers), instead the case was followed-up by another organisation (FIDH).

It is important to know what one wants to achieve; if it is to change the law, to have rights recognised or to get NGOs to work together on a national level. One can make publicity by e.g. press releases announcing the lodging of the complaint. It can also be good to follow-up by e.g. monitoring or shadowing the national reports submitted every four years to the Council of Europe. FEANTSA's 'Housing Rights Watch' is a database collecting jurisprudence also on the national level.

For FEANTSA the process took on average two years from the initial idea until the complaint was lodged. Ms Jones welcomed cooperation with other NGOs and recommended training national member organisations in the countries that you can file complaints in order to build capacity for the future.

# COLLECTIVE COMPLAINTS PROCEDURE UNDER THE ESC

Council of Europe Office, Bruxelles
Meeting with the Social Platform
29 January 2014






COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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## 3 Statutory Goals/Objectives :

- Democracy
- Rule of Law
- Human Rights

3

## THE EUROPEAN CONVENTION OF HUMAN RIGHTS/ THE EUROPEAN COURT OF HUMAN RIGHTS



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# THE EUROPEAN SOCIAL CHARTER AND THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS




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# WHO MAY LODGE A COMPLAINT ?

| |
|---|
| **EUROPEAN TRADE UNIONS/ EMPLOYEURS** |
| EUROPEAN NGOS |
| **NATIONAL TRADE UNIONS/ EMPLOYEURS** |
| NATIONAL NGOS |

## STATES HAVING ACCEPTED COMPLAINTS

| | |
|---|---|
| **15 states**<br>**Belgium**<br>**Bulgaria**<br>**Croatia**<br>**Cyprus**<br>**Czech Republic**<br>**Finland**<br>**France**<br>**Greece**<br>**Ireland**<br>**Italy**<br>**Norway**<br>**Netherlands**<br>**Portugal**<br>**Slovenia**<br>**Sweden** | |
| | **43** States Party to the Charter |
| | **47** CoE Member States |
| | |

## 77 Ngos **entitled to lodge complaints collectives**

- Conditions :
  - having participating status within the CoE **300**
  - apply to the secretariat to be included in the list
  - decisions taken by the Governmental Committee of the Social Charter

## 103 Registered complaints

| | |
|---|---|
| France : | 31 |
| Greece : | 15 |
| Portugal : | 11 |
| Bulgaria : | 6 |
| Belgium : | 7 |
| Italy : | 7 |
| Finland : | 5 |
| Ireland : | 6 |
| Netherlands : | 3 |
| Sweden : | 3 |
| Croatia : | 2 |
| Slovenia : | 2 |
| Norway : | 2 |
| Cyprus : | 1 |
| Czech Republic: | 1 |

- **On average :**

**6,91**
**Complaints/ year**

**13 in 2012**
**16 in 2013**

## Admissibility

- **PROCEDURE**
  - Not compulsory to consult the respondent Governement
  - Possibility of written submissions
- **CRITERIA/ CONDITIONS**

## Admissibility

**95 decisions**

**4** complaints **NOT** admissible

**91** complaints admissible (at least in part)

- **95.8 %** admissible
  Formal criteria (no examination of the merits at this stage)

New practice : single decision on admissibility and merits

## Merits

- Written procedure
- Oral hearing
- Third party intervention
  - Compulsary
  - Optional
- Immediate measures

# Merits

**81 decisions**

**14** complaints
**NO** violation

**67** complaints
violation(s)
(at least in part)
**(83%)**

New practice : single decision on admissibility and merits

# Publicity

All Case Documents (i.e. documents submitted by the parties to the complaint

**ARE PUBLIC**

www.coe.int/socialcharter
(unless the Committee decides otherwise)

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All internal documents of the Committee

**ARE SECRET**

**Decisions on the admissibility are immediatly PUBLIC**

www.coe.int/socialcharter

**Decisions on the merits are SECRET for a maximum period of 4 months.**

www.coe.int/socialcharter

## Length of procedure

**15,7 Months**

**Admissibility :**
**5.1 months**

**Merits**
**10.6 months**

**OBJECTIVE**

**Admissibility**
**6 months**

**Merits**
**12 months**

## FOLLOW UP

CHANGES AT NATIONAL LEVEL

Legislation/Practice/caselaw

Yearly Activity Reports of the Committee

# MORE INFORMATION

www.coe.int/socialcharter

- Hudoc database
- Factsheets per country
- Infos on changes and improvments at national level

# Interpretation rules of the European Committee of Social Rights: substantial issues concerning the Collective Complaint Procedure

Luis Jimena Quesada

*Social Platform*, Brussels, 29th January 2014

## I. PRELIMINARY REMARKS

* Important to "exploit" a jurisdictional image from the perspective of the format of the Committee's decision after the exam of one complaint, without any "obsession" concerning the judicial or quasi-judicial nature or character of the body.

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* Indeed, the most important thing is convincing through the legal reasoning by underlining the legally binding character of the Social Charter and, therefore, the international legal obligation to follow the Committee's decision as the "living" expression of this treaty (see Dec. Merits of 9 September 1999 on Complaint Nº 1/1998, *ICJ v. Portugal*; § 32: "*The Committee recalls that the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact*".

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* "Justiciability" is only one aspect of real "effectiveness": examples of follow-up at the domestic level by national courts (Dec. Merits of 8 September 2004 on Complaint Nº 14/2003, *FIDH v. France*), by government (Dec. Merits of 30 March 2009 on Complaint Nº 45/2007, *INTERIGHTS v. Croatia*), by parliament (Dec. Merits of 18 February 2009 on Complaint Nº 48/2008, *ERRC v. Bulgaria*) or by government together with social partners (Dec. Merits of 13 September 2011 on Complaint Nº 59/2009, *ETUC and others v. Belgium*).

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## II. INTERPRETATION RULES AND WORKING METHODS

- In relation to both ADMISSIBILITY and MERITS:

  -*Ratione materiae*: connecting rights; divisions between the material scope of articles and overlapping of provisions of the Charter (Dec. Adm. of 26 June 2007 and Dec. Merits of 3 June 2008 on Complaint Nº 41/2007, *Mental Disability Advocacy Centre v. Bulgaria*). This "technique" is important in the field of the Charter (because of the "à la carte" system of acceptance of provisions), in order to transmit a positive impact of indivisibility at the domestic level (in so far as some constitutional systems also give priority of civil and political rights over social and economic rights).

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-*Ratione personae*: identification of individuals and groups as beneficiaries of human rights (e.g. right to housing and families belonging to vulnerable groups: Dec. Adm. of 8 September 2008 and Dec. Merits of 22 June 2010 on Complaint Nº 52/2008, *COHRE v. Croatia*).

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-*Ratione temporis*: notion of "continuing or continuous violation"; Dec. Adm. of 10 October 2005 and Dec. Merits of 6 December 2006 on Complaint Nº 30/2005, *Marangopoulos Foundation for Human Rights v. Greece* (Impact of lignite mining on the environment and on the health of the population living in the main lignite mining regions –also Dec. Merits of 23 January 2013, *FIDH v. Greece*).

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-*Ratione loci*: e.g. cases of collective expulsions (Dec. Merits of 25 June 2010 on Complaint Nº 58/2009, *COHRE v. Italy*; and Dec. Merits of 28 June 2011 on Complaint Nº 63/2010, *COHRE v. France*).

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-*Other criteria*: no exhaustion of domestic remedies and compatibility with other international remedies (e.g. Dec. Adm. of 1 July 2013 on Complaints Nº 86/2012 and Nº 90/2013, *FEANTSA v. The Netherlands* and *Conference of European Churches v. The Netherlands*); representativeness and competence to submit complaints (autonomous and "flexible" notions); *jura novit curia* (re-qualifying a complaint).

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- In relation to MERITS:

-1969 Vienna Convention: beyond a mere grammatical interpretation (purpose and spirit of the treaty; "exploiting" the idea of human dignity together with indivisibility); Dec. Merits of 8 September 2004 on Complaint Nº 14/2003, *FIDH v. France* (case-law which was confirmed by unanimity in Dec. Merits of 20 October 2009 on Complaint Nº 47/2008, *DCI v. the Netherlands*).

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-Precisely, indivisibility and complementary of human rights instruments: exporting and importing positive notions (e.g. ECSR has imported the notions of "adequate housing" and "forced eviction" from UN Committee on ESCR –General Comments Nº 4 and 7 in Dec. Merits of 5 December 2007 on Complaints Nº 33/2006 and 39/2006, *International Movement*

*ATD Fourth World v. France* and *FEANTSA v. France* as well as Dec. Merits of 28 June 2011 on Complaint Nº 63/2010, *COHRE v. France*– or the notion of "aggravated violation" and "aggravated responsibility from the "inter-American" case law: Dec. Merits of 25 June 2010 on Complaint Nº 58/2009, *COHRE v. Italy*).

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-Important role of non-discrimination principle: Dec. Merits of 4 November 2003 on Complaint Nº 13/2002, *Autism-Europe v. France*; Dec. Merits of 3 June 2008 on Complaint Nº 41/2007, *Mental Disability Advocacy Centre v. Bulgaria* [Difficult approaches: Dec. Merits of 18 February 2009 on Complaint Nº 48/2008, *ERRC v. Bulgaria*].

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-Positive obligations:

- and *Drittwirkung*/horizontal effect: Government's responsibility for acts and omission of a third party (Dec. Merits of 6 December 2006 on Complaint Nº 30/2005, *Marangopoulos Foundation for Human Rights v. Greece*).
- and progressiveness: Dec. Merits of 25 June 2010 on Complaint Nº 58/2009, *COHRE v. Italy* (§§ 27 and 107) (e.g. to encourage citizen participation of Roma and Sinti).
- and margin of discretion: Dec. Merits of 30 March 2009 on Complaint Nº 45/2007, *INTERIGHTS v. Croatia* (e.g. non discriminatory or non-exclusionary health education on the ground of sexual orientation).

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-"Management" of legal sources and evidences (when assessment is a matter of practice, not only of law): figures provided by the parties, third parties/*amicus curiae* [Art. 32A Rules of the Committee] (Dec. Merits of 29 October 2012, Complaint Nº 69/2011, *Defence for Children International v. Belgium*) and external sources (Dec. Merits of 9 September 1999 on Complaint Nº 1/1998, *ICJ v. Portugal*) as well as evidences from media could also be relevant (Dec. Merits of 25 June 2010 on Complaint Nº 58/2009, *COHRE v. Italy*)

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III. SOME CHALLENGES

- Strengthening synergies between international human rights instruments (mutual jurisdictional enrichment: see also Dec. Merits of 25 June 2010 on Complaint Nº 58/2009, *COHRE v. Italy*): pedagogical effort and positive judicial will (training sessions and exchanges of views).

- Strengthening synergies with and between the other actors which are concerned or involved (INGOs and social partners): pedagogical and collaborative efforts (e.g. at the European level, Conference of INGOs of the Council of Europe and EU Fundamental Rights Platform in order to submit and support complaints).
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- Effectiveness of social rights by affirming progressiveness and non-regression: see Dec. Merits of 23 May 2012 on Complaints Nº 65/2011 and 66/2011, *GENOP-DEI and ADEDY v. Greece*, as well as Dec. Merits of 7 December 2012 on Complaints Nº 76 to 80/2012 submitted by *different national trade unions v. Greece*, all of them on "anti-crisis" legislation.

- Making effective the *favor libertatis* principle: e.g. analogous clauses at European level (Art. 32 European Social Charter and Art. H of the Revised Charter; Art. 53 ECHR and Art. 53 EU Charter of Fundamental Rights).

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- Improving the credibility of views and decisions: taking care of the drafting (by not only saying there is violation of social rights, but also "suggest" positive measures of follow-up or execution to be adopted at national level, by including references to the importance of national jurisdictions to encourage them –e.g. Dec. Merits of 15 May 2003 on Complaint Nº 12/2002, *Confederation of Swedish Enterprise v. Sweden*; Dec. Merits of 7 December 2012 on Complaint 76/2012, *IKA-ETAM v. Greece*, etc.; that is to say, to include this kind of "suggestion" in the complaint/decision themselves).
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- *Interim measures* and enforcement (in the case of the ECSR, Rule 36 on "Immediate measures" –after the decision on the admissibility, but before and after the decision on the merits –e.g. Decisions on immediate measures of 25 October 2013 on Complaints Nº 86/2012, *FEANTSA v. The Netherlands*, and 90/2013, *Conference of European Churches v. The Netherlands*) as well as other mechanisms (follow-up within the reporting system and possible new complaints if new elements or evidences: e.g. cf. Dec. Merits of 7 December 2004 and of 5 December 2006 on Complaints Nº 20/2003 and Nº 34/2006, *World Organisation against Torture v. Portugal*).
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