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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**

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Case Document No. 3

Confederation Generale du Travail - Force Ouvriere (CGT-FO) v. France
Complaint No.160/2018

**OBSERVATIONS BY THE
EUROPEAN TRADE UNION CONFEDERATION (ETUC)**

Registered at the Secretariat on 15 November 2018

Collective Complaint

**Confédération Générale du Travail – Force Ouvrière
(CGT-FO)**

v.

France

Complaint No. 160/2018

15/11/2018

**Observations
by the
European Trade Union Confederation
(ETUC)**

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- 1 In availing itself of the opportunity provided in the Collective Complaints Procedure Protocol (CCPP - Article 7§2) the European Trade Union Confederation (ETUC) would like to submit the following observations.
- 2 The ETUC welcomes the fact that the respondent State has ratified not only the Revised European Social Charter (RESC) but also the Collective Complaints Procedure Protocol (CCPP).
- 3 These observations focus on the core allegation of the complaint, i.e. the upper limit put on compensation in situations of unfair dismissal. Other elements raised in the complaint (and the discriminatory aspect introduced in this regard by Order N° 2017-1387 of 22 September 2017), such as reinstatement, other indemnities, access to conciliation or other alternative avenues for legal redress. The access to tribunals is not directly considered by these considerations. Whereas the national legal framework (and practice) is in a detailed manner described in the complaint, these observations aim to clarify in particular the international and European legal framework applicable to the issue at stake.
- 4 These observations have been drafted in consultation with the complainant organisation CGT-FO being also an affiliated organisation of ETUC.

I. General observations

- 5 The main content of the complaint is described in the Decision on admissibility of 11 September 2018 as follows:

CGT-FO alleges that the situation in France constitutes a violation of Article 24 of the Charter on the grounds that Order No. 2017-1387 of 22 September 2017 on the predictability and increased security of employment relationships, by introducing a mandatory scale of compensation placing an upper limit on compensation for damage incurred by employees dismissed without valid reasons, excludes the possibility for courts to review the situation and rule that workers have suffered greater damage because of their dismissal. CGT-FO further argues that in the cases where the scale is applied and therefore an upper limit is placed on compensation, Order No. 2017-1387 provides for all relevant payments to be lumped together which does not make it possible to ensure that in all cases, full compensation for the damage actually suffered by the employee is achieved and does not make it generally and sufficiently possible to make use of other remedies.¹

- 6 It is thereby to be noted that - as indicated in the complaint - firstly Order No. 2017-1387 of 22 September 2017 forms a further phase in a process to reform the regulation on dismissal after earlier attempts were made but which were overturned by the French Constitutional Court.² However, it also forms part of a larger process of reforming the French legislation in the field of labour law and labour market policy whereby one of the objectives of the French government was to mitigate the impact of the economic and financial crisis by which France

¹ [ECSR Decision on the Admissibility](#), Confédération Générale du Travail Force Ouvrière (CGT-FO) v. France, Complaint No. 160/2018, 11 September 2018, para. 1.

² See in particular section 3.2.1 on page 6-7 of the Complaint.

was also hit.³ Accordingly, in these observations the case law of authoritative bodies, like the ECSR, on the impact of the crisis and related (austerity) measures on fundamental (social) rights is referred to.

- 7 In substantive terms, this collective complaint concerning Article 24 RESC is the fifth collective complaint (following Collective Complaints No 74/2011 *FFFS v. Norway*, No.106-107/2014 *Finnish Society of Social Rights v. Finland* and N° 158/2017 *CGIL v. Italy*)⁴ dealing explicitly with the “right to protection in cases of termination of employment”. Having provided in the past certain indications as to its general understanding (see in particular Conclusions 2012), the ECSR will therefore have (and probably will wish to use) also this opportunity to further develop its case-law on this Charter important provision on an issue which forms also a core and crucial element of labour law protection in all European states.
- 8 At an editorial level, it is indicated that all quotations will be governed by the following principles: they focus on the issues at stake (while still showing the relevant context) and will be ordered chronologically (beginning with the newest text). In principle, emphases in bold are added by the ETUC;⁵ eventual footnotes are, in principle, omitted.

II. International law and material

- 9 The ETUC would like to start by referring to pertinent international law and material.⁶ From the outset, it should be noted that France has ratified all instruments (as far as they are open for ratification) mentioned below, unless otherwise mentioned.

³ Indeed, in May 2017, the French government announced and launched a vast work programme containing a total of six reforms in the following areas: labour law, purchasing power of workers, vocational training, apprenticeship schemes, unemployment protection and pensions. In the area of ‘labour law’ changes were mainly introduced in relation to the system of collective bargaining, social dialogue/workers’ representation and dismissal law. To introduce all these reforms, the French government applied indeed the method of adopting so-called “Ordonnances”. The latter method is however not that innocent as by applying it the French government mainly intended to limit to a maximum the intervention of the legislator, the democratic debate and thus potential opposition (including from trade unions). Although a certain ‘concertation’ took place with the social partners, the latter often did not have full access to the legislative texts under preparation and this ‘concertation’ can be described as a mere information process rather than a real social dialogue on the proposed reforms.

⁴ To be noted is that ETUC has also submitted observations in relation to all these complaints with the exception of Collective Complaint No 74/2011 *FFFS v. Norway*.

⁵ Where the original text contains emphases they are highlighted in italics.

⁶ As to legal impact of the ‘Interpretation in harmony with other rules of international law’ see the ETUC Observations in No. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden* - [Case Document no. 4, Observations by the European Trade Union Confederation \(ETUC\)](#), paras. 32 and 33.

A. International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷

1. The Right to work (Article 6 ICESCR) and Right to just and favourable conditions at work (Article 7 ICESCR)

- 10 The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a specific provision on the protection against unfair dismissal. However, via its case law, its main monitoring body, the Committee on Economic, Social and Cultural Rights (CECSR), established a clear link between protection of workers in case of (unjustified) dismissal and Article 6 ICESCR on the right to work (see section II.A.2 below). Similarly, it did so with Article 7 ICESCR on the right to just and favourable conditions of work (see section II.A.3 below).

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

⁷ Ratified by France in 1980.

2. General Comment No. 18 on the Right to Work (Article 6 ICESCR)

- 11 Concerning the right to work, the CESCR has elaborated a 'General Comment' on Article 6 ICESCR⁸ which defines the content and legal obligations deriving from this provision. Several elements are to be highlighted:
- 12 In its description of the "Normative Content of the Right to Work" (II.) the CECSR i.a. refers to ILO Convention No. 158 (see below II.B.1.):

11. ILO Convention No. 158 concerning Termination of Employment (1982) defines the lawfulness of dismissal in its article 4 and in particular imposes the requirement to provide valid grounds for dismissal as well as **the right to legal and other redress in the case of unjustified dismissal.**

- 13 Concerning the possible violations of Article 6 ICESCR, the CESCR includes the necessity to protect workers against unlawful dismissals:

"Violations of the obligation to protect

35. Violations of the obligation to protect follow from the failure of States parties to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to work by third parties. They include omissions such as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others; **or the failure to protect workers against unlawful dismissal."**

3. General Comment No. 23 on the Right to just and favourable conditions of work (Article 7 ICESCR)

- 14 Concerning the right to just and favourable conditions of work, CESCR has elaborated a 'General Comment' on Article 7 ICESCR⁹ which defines the content and legal obligations deriving from this provision.
- 15 As Article 6, Article 7 ICESCR does not explicitly refer to the issue of (unlawful) dismissal. However, Article 7 is considered to be the "corollary of the right to work" and "the enjoyment of just and favourable conditions is a prerequisite for, and result of, the enjoyment of other Covenant rights.¹⁰ Furthermore, Article 7 identifies a non-exhaustive list of fundamental elements to guarantee just and favourable conditions of work and the CECSR has over time identified and systematically underlined other factors and issues. In that sense, it also established a clear link between Article 7 and (unfair) dismissals (incl. pecuniary elements). See amongst others:

II. Normative Content

⁸ CESCR, The Right to Work - General comment No. 18 - Adopted on 24 November 2005 - E/C.12/GC/18 (6.2.2006) - <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/403/13/PDF/G0640313.pdf?OpenElement>.

⁹ CECSR, General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights); Adopted on 27 April 2016. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f23&Lang=en.

¹⁰ CECSR General Comment No 23, para. 1.

- A. Article 7 (a): remuneration which provides all workers, as a minimum, with:
2. Fair wages

(...) Workers should not have to pay back part of their wages for work already performed and should **receive all wages and benefits legally due upon termination of a contract** or in the event of the bankruptcy or judicial liquidation of the employer. (...) ¹¹

- C. Article 7 (c): equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence

(...) The reference to equal opportunity requires that hiring, promotion and termination not be discriminatory. (...) ¹²

In the public sector, States parties should introduce objective standards for hiring, promotion and termination that are aimed at achieving equality, particularly between men and women. Public sector promotions should be subject to impartial review. For the private sector, States parties should adopt relevant legislation, such as comprehensive non discrimination legislation, to guarantee equal treatment in hiring, promotion and termination, and undertake surveys to monitor changes over time. ¹³

- D. Article 7 (d): rest, leisure, reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

(...) **Upon termination of employment, workers should receive** the period of annual leave outstanding or **alternative compensation amounting to the same level of pay entitlement or holiday credit.** ¹⁴

- B. Specific legal obligations

For example, States should ensure that laws, policies and regulations governing the right to just and favourable conditions of work, (...), are adequate and effectively enforced. States parties should **impose sanctions and appropriate penalties on third parties, including adequate reparation**, criminal penalties, **pecuniary measures such as damages**, and administrative measures, in the event of violation of any of the elements of the right. ¹⁵

IV. Violations and remedies

States parties must demonstrate that they have taken all steps necessary towards the realization of the right within their maximum available resources, **that the right is enjoyed without discrimination (...).** ¹⁶

Violations of the right to just and favourable conditions of work can occur through acts of commission, which means direct actions of States parties. Adoption of labour migration policies that increase the vulnerability of migrant workers to exploitation, **failure to prevent unfair dismissal** from work of pregnant workers in public service, **and introduction of deliberately retrogressive measures** that are incompatible with core obligations **are all examples of such violations.** ¹⁷

¹¹ CECSR General Comment No 23, para. 10.

¹² CECSR General Comment No 23, para. 31.

¹³ CECSR General Comment No 23, para. 33.

¹⁴ CECSR General Comment No 23, para. 43.

¹⁵ CECSR General Comment No 23, para. 59.

¹⁶ CECSR General Comment No 23, para. 77.

¹⁷ CECSR General Comment No 23, para. 77.

4. CECSR Concluding observations concerning France

- 16 In its Concluding observations on the fourth periodic report of France, adopted in 2016, the CECSR highlighted in relation to measures 'to increase the flexibility of the labour market' taken in France the following¹⁸:

The right to just and favourable working conditions

24. The Committee is concerned by the fact that derogations from acquired rights regarding working conditions, including derogations intended to increase the flexibility of the labour market, are being proposed in the current labour bill (draft legislation aimed at introducing new freedoms and new safeguards for businesses and workers) without it having been demonstrated that the State party has considered all other possible solutions (arts. 6 and 7).

25. The Committee urges the State party to make certain that the mechanisms for increasing the flexibility of the labour market that it is proposing do not have the effect of rendering employment less stable or reducing the social protection available to workers. It calls upon the Committee to ensure that any and all retrogressive measures relating to working conditions:

(a) **Are unavoidable and fully justified in relation to the totality of the rights under the Covenant in the light of the State party's obligation to pursue the full realization of those rights to the maximum of its available resources;**

(b) **Are necessary and proportionate to the situation, i.e., that the adoption of any other measure, or the failure to adopt any measures, would have an even more adverse impact on Covenant rights;**

(c) **Are not discriminatory and do not have a disproportionate impact on disadvantaged or marginalized groups.**

26. The Committee draws the State party's attention to its general comment No. 23 (2016) on the right to just and favourable conditions of work.

B. International Labour Organisation (ILO)

- 17 Whereas already in a resolution adopted in 1950, the ILO noted the absence of international standards on the termination of contracts of employment, it adopted in 1963 the 'Termination of Employment Recommendation (No 119). This was later than followed by the ILO Convention No. 158 on Termination of Employment Convention, 1982 (No. 158)¹⁹ and accompanied by another Recommendation on Termination of Employment Recommendation, 1982 (No. 166)²⁰ which replaced the Recommendation No 119.

¹⁸ CECSR (2016), Concluding observations on the fourth periodic report of France, adopted at its 58th meeting of 6-24 June 2016. (Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fFRA%2fCO%2f4&Lang=en)

¹⁹ Convention concerning Termination of Employment at the Initiative of the Employer (Entry into force: 23 Nov 1985).

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312303:NO.

²⁰ Recommendation concerning Termination of Employment at the Initiative of the Employer http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312504:NO

18 ILO Convention No. 158 contains the core of international regulation of the protection against unfair dismissal. This is even more important since it has served as basis for Article 24 RESC.²¹ France has ratified this important Convention on 16 March 1989.²²

1. ILO Convention No. 158

19 In its “Part II. Standards of General Application” the Convention defines the substance of the requirements as far as this complaint is concerned.

20 As regards the consequences of a dismissal the Convention stipulates under the heading of “Division C. Procedure of Appeal Against Termination” the following:

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, **they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.**²³

21 Furthermore, “Division E. Severance Allowance and Other Income Protection” addresses the necessary financial consequences in case of a dismissal:

Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

²¹ “86. The provision has been inspired by ILO Convention No. 158 (Termination of Employment) of 1982.” <http://conventions.coe.int/Treaty/en/Reports/Html/163.htm>.

²²

See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312303.

²³ This Article is clearly inspired by paragraph 6 of the ILO Recommendation N° 119 which stated in section II. Standards of General Application that “6. The bodies referred to in Paragraph 4 should be empowered, **if they find that the termination of employment was unjustified, to order that the worker concerned, unless reinstated, where appropriate with payment of unpaid wages, should be paid adequate compensation, or afforded such other relief as may be determined under the methods of implementation set out in Paragraph 1, or granted such compensation and other relief as may be so determined. (...)**”

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

2. ILO Recommendation No. 166

- 22 ILO Convention No. 158 has - as mentioned above - been accompanied by the Termination of Employment Recommendation, 1982 (No. 166).
- 23 Under the heading “II. Standards of General Application” this Recommendations states the following in relation to **income protection**:

SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

18.

(1) A worker whose employment has been terminated should be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which should be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

(2) A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in subparagraph (1) (a) of this Paragraph solely because he is not receiving an unemployment benefit under subparagraph (1) (b).

(3) Provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1) (a) of this Paragraph in the event of termination for serious misconduct.

3. Other relevant ILO instruments

- 24 Whereas ILO Convention No. 158 focusses specifically on termination of employment, a number of other ILO instruments (both Conventions and accompanying Recommendations), and in particular the basic instruments on the protection of human rights, provide protection in the area of employment security, for example in relation to protection against acts of anti-union discrimination, or against discrimination in employment and occupation, maternity protection, the protection of workers' claims in the event of the insolvency of their employer, or part-time work.²⁴

²⁴ See amongst others The Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Workers with Family Responsibilities Convention, 1981 (No.156), the Maternity Protection Convention (Revised), 1952 (No. 103), the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173) and the Part-Time Work Convention, 1994 (No. 175).

25 Furthermore, the ILO adopted unanimously in 2009 the “Recovering from the crisis: A Global Jobs Pact”.²⁵ This global policy instrument addresses the social and employment impact of the international financial and economic crisis and “its fundamental objective is to provide an internationally agreed basis for policy-making designed to reduce the time lag between economic recovery and a recovery with decent work opportunities”. In its section III. Decent Work Responses, subsection on “Strengthening respect for International Labour Standards”, the Pact makes a reference to importance of protection against dismissal in this regard:

14. International labour standards create a basis for and support rights at work and contribute to building a culture of social dialogue particularly useful in times of crisis. In order to prevent a downward spiral in labour conditions and build the recovery, it is especially important to recognize that:

(1) Respect for fundamental principles (and rights at work) is critical for human dignity. It is also critical for recovery and development. Consequently, it is necessary to increase:

(i) vigilance to achieve the elimination and prevention of an increase in forms of forced labour, child labour and discrimination at work; and

(ii) respect for freedom of association, the right to organize and the effective recognition of the right to collective bargaining as enabling mechanisms to productive social dialogue in times of increased social tension, in both the formal and informal economies.

(2) A number of international labour Conventions and Recommendations, in addition to the fundamental Conventions, are relevant. These include ILO instruments concerning employment policy, wages, social security, the employment relationship, the termination of employment, labour administration and inspection, migrant workers, labour conditions on public contracts, occupational safety and health, working hours and social dialogue mechanisms. (...)

4. ILO supervisory bodies’ case-law

26 The relevant case-law of the Committee of Experts on the Application of Conventions and Recommendation (CEACR) is contained in its General Survey 1995.²⁶

27 In interpreting Article 10 of the Convention (see above para. 20), the CEACR clarifies that in principle reinstatement has preference over other remedies:

“The wording of Article 10 gives preference to declaring termination invalid and reinstating the worker as remedies in the case of unjustified termination of employment. (...) **The text specifies, moreover, that when compensation is paid it should be “adequate”.**”²⁷

28 However, if reinstatement is not possible, desired or wanted, the CEACR states the following

²⁵ ILO (2009) “Recovering from the crisis: A Global Jobs Pact”, adopted by the International Labour Conference at its Ninety-eighth Session, Geneva, 19 June 2009. (available at http://www.ilo.org/gender/Informationresources/Publications/WCMS_115521/lang--en/index.htm)

²⁶ ILO, [Protection against unjustified dismissal, General Survey on the Termination of Employment Convention \(No. 158\) and Recommendation \(No. 166\)](#), 1982, International Labour Conference, 82nd Session 1995, Report III (Part 4B), Geneva 1995.

²⁷ *Ibid.*, para. 219.

232. In the light of the above, the Committee considers **that compensation, in the case of termination of employment impairing a basic right, should be aimed at compensating fully, both in financial and in occupational terms, the prejudice suffered by the worker**, the best solution generally being reinstatement of the worker in his job with payment of unpaid wages and maintenance of acquired rights. In order to do this, the impartial bodies should have all the necessary powers to decide quickly, completely and in full independence, and in particular to decide on the most appropriate form of redress in the light of the circumstances, including the possibility of reinstatement. When reinstatement is not provided as a form of redress, when it is not possible or not desired by the worker, **it would be desirable for the compensation awarded for termination of employment for a reason which impairs a fundamental human right to be commensurate with the prejudice suffered, and higher than for other kinds of termination.** (...) ²⁸

- 29 As for **specific case law in relation to France**, reference should be made to the CEACR Direct Request as adopted in 2017 and published in the framework of the 107th ILC session of 2018. In relation to Convention n° 158, the CEACR

notes the detailed information contained in the Government's report for the period ending August 2016. The Committee notes that, at its 329th Session (March 2017), the Governing Body declared receivable a representation alleging non-observance of the Convention by France, made under article 24 of the ILO Constitution by the General Confederation of Labour–Force Ouvrière (CGT–FO) and the General Confederation of Labour (CGT). The Committee will therefore take up its examination under article 22 of the ILO Constitution once again when the Governing Body procedure has been concluded. ²⁹

C. Council of Europe

- 30 The Council of Europe (CoE) is characterised by two main human rights instruments, the European Convention on Human Rights (ECHR, see below 1)) and the European Social Charter (ESC, see below 2)) which is at the very core of this complaint. However, there are also other relevant documents (see below 3)).

1. European Convention on Human Rights (ECHR)

- 31 In recent times, the European Court of Human Rights (ECtHR) has developed its jurisprudence on in particular Article 8 ECHR (right to respect of private life) as containing more and more the protection against unfair dismissals. In part, it refers to Article 24 RESC (as well as to ILO-Convention No. 158). ³⁰

²⁸ Ibid., para 232.

²⁹

See

https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3336338,102632,France,2017 . For the representation which is still pending see Document GB.329/INS/21/2 of March 2017 and https://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:3327250,en:NO .

³⁰ However, from a substantive point of view, the ECtHR has also assessed termination of employment from the perspective of Article 9 (freedom to hold religious beliefs), Article 10 (freedom of expression) and Article 11 (freedom of association). From a procedural point of view, but which forms not the primary focus of the complaint (and these ETUC observations), there is of course also the link with Article 6§1 ECHR (right to a fair trial). On the applicability of Article 6§1 to cases of (unjustified) termination of employment, see European Court of Human Rights (2017), Guide on Article 6 of the

32 It is thereby interesting to highlight that the Court stresses in its case law that the dramatic consequences that usually result from a dismissal, not only in financial terms but also regarding the capacity to develop a 'social private life'³¹:

"With regard to Article 8, the Court has already held in a number of cases that **the dismissal** from office of a civil servant **constituted an interference with the right to private life** (see *Özpinar v. Turkey*, no. 20999/04, §§ 43-48, 19 October 2010; and *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 165-167, 9 January 2013)."³²

33 Personal consequences of dismissals are described in a way that

"the applicant's dismissal had an impact on her "inner circle" as the loss of her job must have had tangible consequences for the material well-being of her and her family (see *Oleksandr Volkov*, cited above, § 166). The applicant must also have suffered distress and anxiety on account of the loss of her post. What is more, the applicant's dismissal affected a wide range of her relationships with other people, including those of a professional nature and her ability to practise a profession which corresponded to her qualifications (see *Sidabras and Džiautas*, cited above, § 48; *Oleksandr Volkov*, cited above, § 166; and *İhsan Ay*, cited above, § 31). Thus, the Court considers that Article 8 is applicable to the applicant's complaint."³³

2. European Social Charter (ESC)

a) Text

34 The European Social Charter provides in Article 24 the following

"Article 24 – The right to protection in cases of termination of employment

With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a) the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b) **the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.**

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body."

35 The Appendix (Part II) to Article 24 stipulates i.a.:

"1) It is understood that for the purposes of this article the terms "termination of employment" and "terminated" mean termination of employment at the initiative of the employer. ...

European Convention on Human Rights Right to a fair trial (civil limb), Strasbourg, updated to 31 December 2017, in particular paras. 21, 29, 34 and 35.. (available at: https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf)

³¹ ECtHR 2.12.2014 – Nr. 61960/08 - *Emel Boyraz / Turkey*.

³² *Ibid.* § 43.

³³ *Ibid.* § 44.

4) It is understood that compensation or other appropriate relief in case of termination of employment without valid reasons shall be determined by national laws or regulations, collective agreements or other means appropriate to national conditions.”

36 Article 24 was explicitly inspired by the ILO Convention No 158 (see above section II.B.1), some provisions of which are reproduced verbatim.³⁴ As a consequence, when interpreting Article 24 due regard must be taken of this Convention and the related ILO Recommendation No 166 (see above section II.B.2) as well as the case law of the CEACR.³⁵

37 Article 24 is also closely related to other articles of the Charter, in particular Article 1 (Right to Work). This direct link is not only established by international bodies such as the UN CESCR and the ILO CEACR, but also the ECSR has established this direct link between the right to work and the employment termination, especially as regards the obligation “to protect effectively the right of the worker to earn his living in an occupation freely entered upon”.³⁶

b) Compilation of case law (Digest 2008)

38 The ‘Digest of the Case Law of the European Committee of Social Rights’ (Digest 2008) compiles the main principles deriving from the ECSR’s case law based on Statements of Interpretation, Conclusions or Decisions³⁷.

39 Concerning the protection offered by Article 24 ESC, in particular in relation to relief in case of unfair dismissal, the Digest 2008 states the following:

Adequate compensation

(...) Damages

Employees dismissed without valid reason must be granted adequate compensation or other appropriate relief. Compensation systems are considered appropriate if they include the following provisions:

- reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;
- the possibility of reinstatement;
- and/or compensation of a high enough level to dissuade the employer and make good the damage suffered by the employee.

c) Specific appreciation of the ECSR of other national legislations

40 As also mentioned in the Complaint³⁸, in relation to Article 24, the ECSR has expressed itself on the particular issue of relief in case of unfair dismissal (reinstatement and/or compensation) when evaluating other national legislations and this in the framework of the reporting system and the collective complaints procedure.

41 In its Conclusions 2008 concerning (amongst others) Finland, the ECSR has observed that:

³⁴ Council of Europe (1996) Explanatory Report to the European Social Charter (Revised), Strasbourg, 03.05.1996, § 86.

³⁵ For a recent academic analysis of Article 24 ESC, see Schmitt, M. (2016) Article 24 – The Right to Protection in Cases of Termination of Employment, in Bruun, N., Lörcher, K., Schömann, I. and Clauwaert, S. (2016) The European Social Charter and the Employment Relation, London: Hart Publishing, pp. 412-438.

³⁶ See, e.g. Conclusions XVI(2002), Austria; Conclusions (2008), Azerbaijan.

³⁷ Available at: <https://www.coe.int/en/web/turin-european-social-charter/case-law>

³⁸ See in particular sections 4.3 “Relevant ECSR case law” of the complaint.

The Committee holds that Article 24 of the Revised Charter requires that courts or other competent bodies are able to order adequate compensation, reinstatement or other appropriate relief. In order to be considered appropriate, compensation should include reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body ruling on the lawfulness of the dismissal, the possibility of reinstatement and/or compensation sufficient both to deter the employer and proportionate to the damage suffered by the victim. The Committee finds the situation in Finland not to be in conformity with Article 24 of the Revised Charter in this respect.³⁹

- 42 In its Conclusions 2012 concerning (amongst others) Finland, the ECSR observed that although ceilings are not prohibited as such, the following should be taken into account:

Remedies and sanctions

In its previous conclusion the Committee held that the situation in Finland was not in conformity with Article 24 of the Charter on the ground that the compensation for unlawful termination of employment was subject to an upper limit. (...) **In this connection, the Committee recalls that compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers.** Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are proscribed. If there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation), and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time.⁴⁰

- 43 For this reason, ceilings are in most cases not in conformity with Article 24.
- 44 For instance, in its Decision on the merits on Collective Complaint No 106 Finnish Society of Social Rights v. Finland, the ECSR observed that an upper limit of 24 months' pay may not constitute an adequate compensation:

i) Adequate compensation

45. The Committee recalls that under the Charter, employees dismissed without valid reason must be granted adequate compensation or other appropriate relief. **Compensation systems are considered appropriate, if they include for the following:**

- reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body;
- possibility of reinstatement;
- compensation at a level high enough to dissuade the employer and make good the damage suffered by the employee.

46. **Any upper limit on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is in principle, contrary to the Charter.** However, if there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation) (Conclusions 2012, Slovenia).

47. As regards the allegation that Finland is in breach of Article 24 of the Charter on the grounds that the Employment Contracts Act provides for a limit on the amount of compensation that may be awarded in the event of an unlawful dismissal the Committee recalls that in

³⁹ Conclusions (2008), Finland.

⁴⁰ Conclusions (2012), Finland.

Conclusions 2008 it found that the situation in Finland was not in conformity with that provision of the Charter on the ground that compensation for unlawful dismissal was subject to an upper limit of no more than 24 months pay. (...)

48. The Government states that employees may in addition to the Employment Contracts Act seek compensation for unlawful dismissal under the Non-Discrimination Act and the Act on Equality between Women and Men. However, the Committee notes that only persons who were dismissed on discriminatory grounds may seek compensation under these pieces of legislation. In a case of unfair dismissal, not having a discriminatory element, it is not possible to claim compensation under them.

49. The Committee considers that in some cases of unfair dismissal an award of compensation of 24 months as provided for under the Employment Contracts Act may not be sufficient to make good the loss and damage suffered. (...)

53. The Committee considers that the upper limit to compensation provided for by the Employment Contracts Act may result in situations where compensation awarded is not commensurate with the loss suffered. In addition, it cannot conclude that adequate alternative other legal avenues are available to provide a remedy in such cases.⁴¹

45 And also lower limits such as one year or 6 months are not in conformity with Article 24. See in this sense, respectively the ECSR Conclusions 2012 concerning Albania and Conclusions 2016 concerning Bulgaria, the ECSR also observed that:

Conclusions 2012, Albania

Remedies and sanctions

(...) In its previous conclusion the Committee noted that pursuant to Article 146§3 of the Labour Code when the termination of an employment contract is considered to be invalid, the employer shall be under an obligation to pay the employee a compensation of up to maximum one year's salary. **The Committee held that this situation was contrary to the Charter as the compensation for unlawful dismissal was subject to a maximum of one year's wages.**

In this regard the Committee notes from the report of the Governmental Committee of the Social Charter to the Committee of Ministers of the Council of Europe (T-SG (2010) 6, §243) that the Government considered amending Article 146 to take into account the conclusion of non-conformity of the Committee. It was planned to intervene during 2010 in order to promulgate a specific regulation on this issue. A working group had been established with a view to preparing amendments to Article 146 of the Labour Code.

Since the report does not provide any further information on this issue, the Committee considers that the situation which it has previously found not to be in conformity on this ground has not changed. **Therefore, it reiterates its previous conclusion of non-conformity.**⁴²

Conclusions 2016, Bulgaria

Remedies and sanctions

(...) The Committee recalls that Article 24 of the Charter requires that courts or other competent bodies are able to order adequate compensation, reinstatement or other appropriate relief. In order to be considered appropriate, compensation should include reimbursement of financial

⁴¹ ECSR Decision on the merits, Collective Complaint No 106 *Finnish Society of Social Rights*, 8 September 2016.

⁴² Conclusions 2012, Albania.

losses incurred between the date of dismissal and the decision of the appeal body ruling on the lawfulness of the dismissal, the possibility of reinstatement and/or compensation sufficient both to deter the employer and proportionate to the damage suffered by the victim.

Article 225, para 1, of the Labour Code, provides for compensation in cases of unlawful dismissal from the employer of an amount equal to the worker's pay for the period of unemployment caused by reason of the said dismissal, **but not more than six months**. This provision covers not only the cases of award of compensation, in case of unlawful dismissal due to discriminatory reasons, but also applies to all grounds for termination of employment stipulated in the Labour Code, 'taking into account the conclusions of the European Committee of Social Rights, in 2009 the Ministry of Labour and Social Policy initiated legislative amendments and prepared a draft Law amending and supplementing the Labour Code to repeal this 6 months restriction regulated by Article 225, para. 1., but due to objections by the Ministry of Finance and the Ministry of Defence the proposal was not accepted. **The Committee therefore notes from the report that there has been no follow up to these developments and the compensation for unlawful dismissal is still limited to 6 months' wage.**

The Committee notes that the interpretative judgement adopted by the Supreme Court of Cassation (which is binding on judicial and executive bodies, on local government bodies, as well as on all bodies issuing administrative acts) at the beginning of 2013 enacts that in cases of non performance of an obligation resulting from a contract, **the Court may award compensation for non-material damages which are a direct and immediate consequence of the tort. That type of compensation has no upper limit** (Obligations and Contracts Act, Code of Civil Procedure). On the ground that the labour relationships are also contract relationships it means that in cases of unlawful dismissal the employee disposes of another essential tool for civil protection the claim under the Obligations and Contracts Act. The Committee asks under which specific circumstances alternative legal avenue are provided. The Committee asks whether the law provides for a possibility of reinstatement.⁴³

- 46 The obligation to provide adequate compensation for workers dismissed without a valid reason seems thus to be strictly interpreted by the ECSR. And it even seems that compensation is required in addition to reinstatement and that only a possibility of being reinstated is not sufficient. See in this sense Conclusions 2003 concerning Bulgaria:

The Committee considers with regard to Article 24 of the Revised Charter that when a dismissal is ruled to be null and void and an employee's reinstatement is ordered, or the employment relationship is held to have been uninterrupted, such decisions must at a minimum be accompanied by an entitlement to receive the wage that would have been payable between the date of the dismissal and that of the court decision or effective reinstatement. The Committee therefore considers that in Bulgaria, the maximum compensatory payment of six months' wages cannot be considered as adequate with respect to Article 24.

- 47 Also in relation to Italy, the ECSR has expressed itself on the particular issue of relief in case of unfair dismissal (reinstatement and/or compensation) in its Conclusions 2016:

The Committee recalls that **any ceiling in compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are prohibited**. If there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination

⁴³ Conclusions 2016, Bulgaria.

legislation) and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time (Conclusions 2012, Slovenia and Finland). **The Committee asks whether in case there is a ceiling, it is possible to seek compensation through other legal avenues.** In the meantime the Committee reserves its position.

- 48 It is to be noted amongst others following these Conclusions, the CGIL lodged a complaint against Italy (N° 158/2017) which is still pending and in which the ETUC has also submitted observations.⁴⁴

d) Specific appreciation of the ECSR of the French legislation

- 49 Also in relation to France, the ECSR has expressed itself on the particular issue of relief in case of unfair dismissal (reinstatement and/or compensation) in its Conclusions 2016:

Remedies and sanctions

The Committee points out that, under Article 24 of the Charter, compensation in the case of unlawful dismissal is considered appropriate if it includes reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body. The Committee further notes (Statement of interpretation on Articles 8§2 and 27§3, Conclusions 2011) that compensation for unlawful dismissal must be both proportionate to the loss suffered by the victim and sufficiently dissuasive for employers. Any ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive is proscribed. If there is such a ceiling on compensation for pecuniary damage, the victim must also be able to seek compensation for non-pecuniary damage through other legal avenues (e.g. anti-discrimination legislation), and the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time. **The Committee asks what is the amount of compensation that is awarded in the case of unlawful dismissal and whether it is limited.**

Conclusion: Pending receipt of the information requested, the Committee defers its conclusion.⁴⁵

e) ECSR case law on the impact of austerity measures on fundamental social rights

- 50 As mentioned above (see para 6), Order No. 2017-1387 of 22 September 2017 forms a further phase in a process to reform the regulation on dismissal after earlier attempts were made but which were overturned by the French Constitutional Court. However, it also forms part of a larger process of reforming the French legislation in the field of labour law and labour market policy.

⁴⁴ See for all case documents on this complaint: https://www.coe.int/en/web/turin-european-social-charter/pending-complaints/-/asset_publisher/lf8ufoBY2Thr/content/no-158-2017-confederazione-generale-italiana-del-lavoro-cgil-v-italy?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fturin-european-social-charter%2Fpending-complaints%3Fp_p_id%3D101_INSTANCE_lf8ufoBY2Thr%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1

⁴⁵ Conclusions 2016, France.

51 At several occasions, the ECSR (like other international human rights monitoring bodies, see example Section II.A.3) expressed itself on the fact that such austerity measures should not infringe on the protection of workers' rights under in this particular case the ESC.

52 In its Decision on the merits on collective complaint 65/2011 *GENOP-DEI / ADEDY v. Greece*, the ECSR considered that

16. However the Committee said, in the general introduction to Conclusions XIX-2 (2009) on the repercussions of the economic crisis on social rights, (...) Accordingly, it concluded 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 at a period of time when beneficiaries need the protection most."

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."⁴⁶

53 Similarly, in its Decision on the merits on collective complaint 66/2011 *GENOP-DEI / ADEDY v. Greece*, the ECSR observed that:

12. With respect to this context of economic crisis which forms the background to this complaint, the Committee has commented, in the general introduction to Conclusions XIX-2 (2009) on the repercussions of the economic crisis on social rights, that while the "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", by acceding to the 1961 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." Accordingly, it concluded that "the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries most need the protection.

⁴⁶ ECSR Decision on the merits, Collective Complaints 65/2011 *GENOP-DEI* and *ADEDY v. Greece*, 12 June 2012, paras. 16-18.

13. The Committee considers that what applies to the right to health and social protection should apply equally to labour law. While it may be reasonable for state parties to respond to the crisis by changing current legislation and practice to limit public expenditure or relieve constraints on business activity, such measures should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter.

14. In particular, the Committee considers that measures taken to encourage greater employment flexibility with a view to combating unemployment should not deprive broad categories of employees of their fundamental rights in the field of labour law, which protect them against arbitrary decisions by their employers or the worst effects of economic fluctuations. The establishment and maintenance of these basic rights is a core objective of the Charter.⁴⁷

54 In its Decision on the merits on collective complaint 111/2014 also versus Greece, the ECSR furthermore observed that:

Having regard to the context of economic crisis, the Committee recalls that ensuring the effective enjoyment of equal, inalienable and universal human rights cannot be subordinated to changes in the political, economic or fiscal environment. The Committee has previously stated 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 at a period of time when beneficiaries need the protection most." (General introduction to Conclusions XIX-2, (2009)). The Committee subsequently reiterated this analysis and stated that "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 [...]." (GENOP-DEI and ADEDY v. Greece, Complaint No. 65/2011, op.cit., §18).⁴⁸

D. European Union

1. Primary law

55 Based on the **Treaty of the Functioning of the European Union (TFEU)**, the EU has the competence to regulate on the issues of (individual/collective) dismissals, Article 153 TFEU stipulates that:

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(d) **protection of workers where their employment contract is terminated;**

2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

⁴⁷ ECSR Decision on the merits, Collective Complaints 66/2011 GENOP-DEI and ADEDY v. Greece, 12 June 2012, paras. 12-14.

⁴⁸ ECSR Decision on the merits, Collective Complaints 111/2014 GSEE v. Greece, 23 March 2017, Para. 88.

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions. In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

- 56 So far however, the EU only developed particular legislation in relation to collective dismissals, but no specific legislation regarding individual dismissals (see also II.D.3)⁴⁹.
- 57 Secondly, there is of course also the **Charter of Fundamental Rights of the European Union (CFREU)** which provides in its Article 30 on “Protection in the event of unjustified dismissal” that⁵⁰:

CHAPTER IV SOLIDARITY

Article 30 Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

- 58 Article 30 CFREU thereby forms thus the first EU law provision that explicitly establishes the fundamental nature of the right to protection against unjustified dismissal, thus recognising this protection as a core element of solidarity.^{51 52}

⁴⁹ However, it should be noted that in order to overcome the unanimity voting rule applicable to adopting EU legislation in the specific area of individual dismissal, [Commission President Juncker's State of the Union 2018, and in particular its Letter of intent to President Antonio Tajani and to Chancellor Sebastian Kurz](#) announced he wanted to make, also in the social field, better use of what he called the “lost treasures of the EU Treaties”, i.e. the so-called passerelle clauses which allow to move by Council decision from unanimity to qualified majority voting. He indeed wants “more efficient law-making in social policy” and in that sense wants an identification of areas for an enhanced use of qualified majority voting, which would/could include the **protection of workers where their employment contract is terminated** as stipulated in article 153(1)d. A Communication by the Commission is scheduled for January/February 2019.

⁵⁰ From a substantive point of view the violation alleged by CGIL in this complaint, relates of course directly to Article 30. However, from a procedural point of view, it is relevant to mention that the CFREU also provides in Article 47§1 that “*Article 47 Right to an effective remedy and to a fair trial Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.(...)*”.

⁵¹ See Schmitt, M. (2018) Chapter 23 - Article 30 Protection in the event of unjustified dismissal, Lörcher, Dorssemont, Schmitt and Clauwaert (2018) The Charter of Fundamental Rights of the European Union and the Employment Relation, Hart Publishing: London (forthcoming).

⁵² It should be noted that in earlier versions of Article 30, the text read as follows: “Article IX ‘Right to protection in cases of termination of employment’ – ‘Workers have the right not to have their

- 59 The 'Explanations' on Article 30 CFREU show that this article is clearly based on and inspired by Article 24 ESC (and its case law) and should thus be interpreted in light of the ECSR requirements and case law.⁵³

Explanation on Article 30 — Protection in the event of unjustified dismissal

This Article draws on **Article 24 of the revised Social Charter**. See also Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC.

2. Fundamental rights texts

- 60 Over the course of time, the European Community/European Union has developed several mainly politically binding catalogues of fundamental social rights.
- 61 Whereas the **Community Charter of Fundamental Social Rights of Workers (1989)** only explicitly refers to the need for regulations in relation to collective dismissals, the recently solemnly proclaimed **European Pillar of Social Rights (November 2017)** (EPSR) provides the following in its Principle 7:

Chapter II: Fair working conditions

7. Information about employment conditions and protection in case of dismissals

Workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including on probation period.

Prior to any **dismissal**, workers have the right to be informed of the reasons and be granted a reasonable period of notice. They have the right to access to effective and impartial dispute resolution and, **in case of unjustified dismissal, a right to redress, including adequate compensation.**⁵⁴

- 62 The Preamble to the EPSR refers at several occasions to the European Social Charter and ILO Conventions in particular in relation to the interpretation and implementation of the EPSR:

The European Pillar of Social Rights shall not prevent Member States or their social partners from establishing more ambitious social standards. In particular, **nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting rights and principles as recognised, in their respective fields of application**, by Union law or international law and by international agreements to which the Union or all the Member States

employment terminated without valid reason and to adequate compensation or other appropriate relief if their employment is terminated without valid reasons." However, in further drafting process, the text (and title) of Article 30 was subsequently simplified and reduced. (Bruun, N. 12. Protection against unjustified dismissal (Article 30), in Bercusson, B. (ed.) (2006) European Labour Law and the EU Charter of Fundamental Rights, Baden-Baden: NOMOS Verlag, pp. 337-356).

⁵³ EXPLANATIONS RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS, OJ C(303), 14.12.2007. (Available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>)

⁵⁴ European Parliament, Council and Commission (2017), The European Pillar of Social Rights", Gothenburg (Sweden), 16 November 2017 (https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf)

are party, including **the European Social Charter signed at Turin on 18 October 1961 and the relevant Conventions and Recommendations of the International Labour Organisation.**

63 In the explanatory notes to the Pillar, it is stated that:

The Pillar also goes beyond the existing acquis by introducing procedural and substantive safeguards for workers in case of dismissals. Adequate reasoning should be provided and a reasonable period of notice be respected. Moreover, the Pillar provides that workers should have access to effective and impartial dispute-resolution procedures. This can include arbitration, mediation or conciliation procedures. **The Pillar also introduces the right to adequate redress in case of unjustified dismissals, such as re-instatement or pecuniary compensation. Unjustified dismissals are to be understood as those that are in breach of the rules applicable to the employment relationship in question.**⁵⁵

64 Furthermore, from these explanatory notes and more in particular in the listing of the applicable “Union acquis”, it is clear that Principle 7 builds on certain relevant Articles of the CFREU, and more in particular Articles 30 and 47 CFREU (see also above D.1) by stating:

1. The Union acquis

a) The Charter of Fundamental Rights of the European Union

(...) Article 30 of the Charter lays down the right for every worker to be protected against unjustified dismissal, in accordance with Union law and national laws and practices. Article 47 of the Charter guarantees everyone whose rights and freedoms guaranteed by Union law are violated the right to an effective remedy.

65 As Principle 7 thus builds on Article 30 CFREU (and its interpretation), which on its turn draws on Article 24 ESC (and which in its turn draws on ILO Convention No 158) (see section C.2.a), it is clear that both in the interpretation and implementation of Principle 7 due regard needs to be taken to the interpretation given to the latter mentioned ESC and ILO norms.

3. Secondary law

66 As mentioned above, and unlike the ILO (see section B), the EU has not (yet) developed a specific legislative act relating to individual dismissal. However, in different Directive the EU regulated partial aspects of (unfair) dismissal protection in particular circumstances and/or for certain groups of workers. Reference could thereby amongst others be made to: Directive 2001/23/EC, which regulates workers’ rights in the case of transfer of undertakings, stipulates that the transfer of an undertaking does not in itself constitute valid grounds for dismissal. Council Directive on insolvencies (Directive 2008/94) obliges Member States to take measures to ensure that institutions guarantee, in case of insolvency of the employer, the payment to employees’ outstanding claims including severance pay on termination of employment. Council Directive 92/85/EEC on maternity protection and the revised

⁵⁵ European Commission (2017) [COMMISSION STAFF WORKING DOCUMENT Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Establishing a European Pillar of Social Rights](#), SWD(2017) 201 final, Brussels, 26.04.2017.

Framework Agreement on parental leave concluded by social partners (BusinessEurope, UEAPME, CEEP and ETUC) – annexed to Council Directive 2010/18/EU – provide, respectively, specific protection against dismissal for women during their pregnancy and for parents taking paternity or adoption leave. Other EU anti-discrimination directives (such as Directive 2000/43/EC, Directive 2000/78/EC and Directive 2006/54/EC,) also provide specific protection against unfair dismissal. For instance, Council Directive 2000/78/EC (the Employment Equality Directive) on equal treatment in employment and occupation protects workers against dismissal where there is discrimination on a prohibited ground, including victimisation. Protection against dismissal and unfavourable treatment is also provided under EU law through the Part-time Work Directive, the Gender Equality Directive and the Directive on equal treatment between men and women engaged in an activity in a self-employed capacity.⁵⁶

67 These Directives have of course been reinforced by the case-law of the Court of Justice of the EU. In particular in relation to the effective and dissuasive nature of sanctions in case of discriminatory dismissals, reference could be for example made to the *Marshall* judgement and in which the CJEU also addresses the issues of upper limits to compensation awarded.⁵⁷

29 The Court's interpretation of Article 6 as set out above provides a direct reply to the first part of the second question relating to the level of compensation required by that provision

30 It also follows from that interpretation that **the fixing of an upper limit** of the kind at issue in the main proceedings **cannot, by definition, constitute proper implementation** of Article 6 [of the Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40)], **since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement**

⁵⁶ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p.6.; Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version), OJ L 283, 28.10.2008, p. 36–42; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348 of 28.11.1992, p. 1.; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC, OJ L68, 18.3.2010, p.13.; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L14, 20.1.1998, p.9; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 , 19/07/2000, p. 22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the Principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, 26.7.2006, p. 23; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the Principle of equal treatment between men and women engaged in an activity in a self-employed capacity, OJ L 180, 15.7.2010, p.1.

⁵⁷ C-271-01, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, Judgment of the Court of 2 August 1993.

of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal.⁵⁸

- 68 From the Opinion of the Advocate General in this case, it also appears that the “damage” has to be looked at with “regard to the most important components of damage which are traditionally taken into account in rules governing liability” such as loss of physical assets {damnum emergens), loss of income {lucrum cessans), moral damage and damage on account of the effluxion of time.⁵⁹ In that sense, it should thus be recalled that as mentioned in the complaint, the compensations set by Order N° 2017-1387 are solely made proportionate to and defined based on the seniority/length of service of the worker concerned and thus not taking into account other crucial components/criteria.
- 69 Finally, it is to note that, in the framework of the implementation of the EPSR, the Commission took the initiative to revise the so-called Written Statement Directive (Directive 91/533/EEC)⁶⁰ by incorporating a set of minimum rights attached to any employment relationship (including new forms of work and new categories of vulnerable workers). Among those rights the Commission identified, in its consultation documents addressed to the European social partners, (a) a ‘right to a reasonable notice period in case of dismissal/early termination of contract, (b) a right to adequate redress in case of unfair dismissal or unlawful termination of contract and, finally, (c) a right to access effective and impartial dispute resolution in case of dismissal and unfair treatment’.⁶¹ This specific language does not anymore appear in the Commission proposal for a Directive, but rather provides a general right to redress which states: “*Article 15 - Right to redress -Member States shall **ensure that workers, including those whose employment relationship has ended, have access to effective and impartial dispute resolution and a right to redress, including adequate compensation, in case of infringements of their rights arising from this Directive***”.⁶² This proposal for a Directive is currently going to the EU ordinary legislative process.

4. EU economic (governance) policy

- 70 Whereas the abovementioned international and European instruments (incl. EU law) have as a primary objective to protect fundamental social rights by laying down minimum standards, EU policy-making has, in particular since the outbreak of the economic and financial crisis and under the pretext of mitigating the negative consequences of the crisis, on the contrary been characterised and driven by a contested ‘soft law approach’ with as main objective to increase competitiveness, boost productivity, ensure budgetary discipline (i.e. via budgetary

⁵⁸ From the Opinion of the Advocate General it also appears that the “damage” has to be looked at with “regard to the most important components of damage which are traditionally taken into account in rules governing liability” such as loss of physical assets {damnum emergens), loss of income {lucrum cessans), moral damage and damage on account of the effluxion of time. (§18 of Opinion of Advocate General Van Gerven, delivered on 26 January 1993).

⁵⁹ §18 of Opinion of Advocate General Van Gerven, delivered on 26 January 1993.

⁶⁰ Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288, 18.10.1991, p. 32–35.

⁶¹ European Commission, Consultation Document of 26 April 2017, First phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive.

⁶² European Commission (2017f) Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, COM(2017) 797 final, Brussels, 21.12.2017.

cuts) and render labour markets more flexible (including by making labour law 'less rigid') rather than protecting or even enhancing the protection of workers' rights.

- 71 The most recent example of this is the 'European Semester'. In 2011, the EU established indeed a new economic governance system, called the European Semester, whereby it via so-called Council country-specific Recommendations (CSRs) "recommends" Member states to implement structural reforms, including in the area of 'Employment Protection Legislation' (EPL and including in particular also individual and collective dismissal law). The approach taken thereby is the same as described above, i.e. a deregulatory and flexibilization approach, and thus led over time to recommendations to several member states to make dismissal law less rigid and costly, including by reducing the (financial) sanctions for unjustified dismissal.⁶³
- 72 Also the French government received over the years several CSRs encouraging it to 'reform its labour law', 'flexibilise its labour market' and 'to further reduce the regulatory burden for firms', including the reforms in relation to individual dismissals as set by Order N° 2017/1387. The European institutions, in particular the Commission, have always been very supportive of these reforms whereby the most recent evidence speaks from the (language of the) so-called "country report" for France of 2018 in which the Commission evaluates the progress made in implementing previous CSRs and related reforms.⁶⁴

Recent reforms are expected to improve the functioning of the labour market over time. The labour law has been modified to encourage hiring on permanent contracts, notably by reducing legal uncertainty over individual dismissals (...) (p. 11)

*Recently adopted labour market reforms may also contribute to the competitiveness of the French economy. (...) Moreover, the 2017 reform introduces binding ceilings for compensations awarded by labour courts (called *prud'hommes* in France) (...) (p. 17)*

The new government is following an ambitious labour market reform agenda, beginning with a new reform of the labour law. After the Enabling Act of August 2017, five ordonnances were adopted by the French Council of Ministers on 22 September and the sixth on 20 December

⁶³ See amongst others Clauwaert, S. (2013) The Country-specific recommendations (CSRs) in the social field. An overview and initial comparison, Background analysis 2013.02, Brussels, ETUI. (available at: <https://www.etui.org/Publications2/Background-analysis>) as well as subsequent annual updates for the European Semester Cycles 2014-2017; all available at <https://www.etui.org/Publications2/Background-analysis> . See more specifically, S Clauwaert, 'The country-specific recommendations (CSRs) in the social field. An overview and comparison', Update including the CSRs 2017–2018, Background Analysis 2017/02, ETUI, Brussels, where for Spain (p 69) and Portugal (p 60) for instance, the country-specific recommendations (CSRs) focus on the uncertainty of firing costs in case of legal dispute following dismissals of permanent workers, especially when dismissals are deemed unfair, but also address high severance payments (Spain) and the possibility of reinstatement (Portugal), which are implicitly treated as financial obstacles to a flexible labour market.

⁶⁴ European Commission (2018) Commission Staff Working Document. Country Report France 2018 including and In-Depth Review on the prevention and correction of macroeconomic imbalances. Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN CENTRAL BANK AND THE EUROGROUP 2018 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) N° 1176/2011, SWD(2018) 208 final, Brussels, 7 March 2018. (available at: <https://ec.europa.eu/info/sites/info/files/2018-european-semester-country-report-france-en.pdf>)

2017 (Section 3). They follow on from the Law on labour, social dialogue and securing professional pathways of August 2016, including measures to redefine economic dismissals and to introduce indicative compensation thresholds for unlawful dismissals (European Commission, 2017d, 2018c).⁶⁵ (...) (p. 34)

The rules on dismissal have also been revised. Compulsory compensation ceilings have been introduced for unlawful dismissals (section 3) (...) At the same time, the timespan for introducing a lawsuit contesting a dismissal (except in cases of harassment and discrimination) has been reduced and the scope of the assessment of economic difficulties has been restricted from the international to the national level. (...) (p. 34)

Based on all this, the Commission concludes that in France “some progress has been made in further reducing the regulatory burdens for firms” thus indicating that further reforms are necessary. (p. 60).

III. The law

- 73 Generally speaking, the protection of workers against unfair dismissal is a cornerstone of workers’ protection. It has a direct relationship to the basic principle and foundation of all human rights which is **human dignity**. It is also directly related to the ‘**right to work**’ as well as the **right to just and favourable conditions at work**. (see e.g. above Section II.A)
- 74 Moreover, as the ECtHR pointed out dismissals have “tangible consequences for the material well-being” of the worker concerned as well as for his or her family. A dismissed worker will have to “suffer... distress and anxiety on account of the loss of (his or) her post”; the dismissal also affects “a wide range of (his or) her relationships with other people” (see above para. 33).
- 75 These elements require a high threshold for allowing termination of an employment relationship by a dismissal. This is all the truer if the reason for a dismissal does not lie in the worker’s but employer’s sphere (as it is the case in this complaint).
- 76 The ETUC therefore stresses the importance of this protection.
- 77 As for the particular consequences of an unlawful dismissal these are also of great importance. The two main remedies/measures to overcome the consequences of such a dismissal are reinstatement and/or compensation (and whereby the former should always be given priority) and which have both been already considered by the ECSR.
- 78 As for the ‘cap’ or upper limit for compensation for unlawful termination of employment, the ECSR has, as demonstrated above in more details (see Section II.C.2.c)), at several occasions already expressed itself on upper limits for unlawful dismissals. For example, in its Conclusions 2012, the ECSR stated:

⁶⁵ A footnote n° 34 stipulates: “While it is too early to assess the effective impact of the law, as far as recourse to judiciary is concerned, in 2016 new cases brought to labour courts decreased by 18.7 % in 2016 (Ministère de la Justice, Chiffres clés 2017). »

“In its previous conclusion the Committee held that the situation in Finland was not in conformity with Article 24 of the Charter on the ground that the compensation for unlawful termination of employment was subject to an upper limit.”

- 79 Other examples, concern conclusions in relation to Bulgaria, Italy and France itself whereby the ECSR expressed concerns about the existence of such an upper limit and whereby, also in the case of France (!), recalled in its Conclusions 2016 that “that any ceiling in compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive are prohibited”.
- 80 Applying these principles to the complaint at hand it is obvious that the ‘cap’ violates Article 24 ESC.
- 81 In addition, it is to be recalled that the compensation system as defined by Order N° 2017/1387 is only made proportionate to/ based on the seniority/length of service of the worker concerned and does thus not take into account other important constituent elements/criteria to define the damage or loss of the worker.
- 82 Furthermore, and whereas it is clear from different sources⁶⁶, in order to justify this new legislation, the French Government relies mainly on two aims the legislation is supposed to follow:
- **réduire l’insécurité juridique** liée au coût du licenciement pesant sur les entreprises, notamment les TPE-PME, puisque ces dernières auront une idée beaucoup plus précise du montant éventuel des indemnités de licenciement et donc du coût d’un licenciement.
 - réduire les écarts qui sont actuellement constatés (de 1 à 3 voire plus) dans les indemnités versées par les différentes juridictions en première instance voire en appel.
 - une réforme plus vaste et ambitieuse des juridictions prud’homales qui améliore la qualité, ainsi que les délais de traitement des dossiers
- 83 While with the first aim (reducing legal uncertainty) the Governemnt mainly wanted to ensure legal certainty for the employers/entreprises and at the same time demotivate the worker to use his/her right to access to court, with the second aim (reform of judicial system) it is shifting in a way the burden of lengthy processes on the worker.
- 84 In connection to the latter it also needs to be recalled, as mentioned in paragraphs 70-73 above, that further main drivers for this (but also all other) reform(s), see paragraph 6 and footnote 3) have been increasing labour market flexibility, boosting competitiveness and reducing (legislative) burdens on enterprises, but not the protection and enhancement of workers’ rights.
- 85 Finally, as mentioned in paragraph 6 above, also the method use to adopt the reforms via ‘Ordonances’ is questionable as it aimed at reducing to the minimum the intervention of the legislator, democratic participation and potential opposition (in particular of trade unions).

⁶⁶ See amongst others section 3.2.2 of the complaint, and the National Reform Programmes of [2017](#) and [2018](#) submitted by France under the European Semester (respectively at pages 99 and 32).

IV. Conclusions

- 86 As demonstrated above, the ETUC considers that the measure criticised by the complainant organisation CGT-FO are indeed not in conformity with Article 24 RESC as regards
- the consequences of unlawful dismissals, in particular the establishment of an (upper) limit for compensation.