EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

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Case Document No. 5

***Syndicat CFDT des Transports de l'Aube* v. France**
Complaint No. 181/2019

***Syndicat CFDT de la Métallurgie de la Meuse* v. France**
Complaint No. 182/202

OBSERVATIONS BY THE EUROPEAN TRADE UNION CONFEDERATION

Registered at the Secretariat on 17 August 2020

Collective Complaints

No. 181-182/2019

Syndicat CFDT général des transports et de l'environnement de l'Aube

and

Syndicat CFDT de la métallurgie de la Meuse

v.

France

Observations by the European Trade Union Confederation (ETUC)

17/08/2020

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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, France, has ratified not only the Revised European Social Charter (RESC) but also the Collective Complaints Procedure Protocol (CCPP).

3 Whereas both complaints concern Articles 2 (the right to just conditions of work), 24 (the right to protection in case of dismissal), 25 (the right of workers to the protection of their claims in the event of the insolvency of their employer) and 29 (the right to information and consultation in collective redundancy procedures) of the Revised European Social Charter, these ETUC observations focus primarly on the alleged violations of Articles 25 and 29 of the Revised European Social Charter and these observations aim mainly to clarify the international and European legal framework applicable to the issues at stake.

I. General observations

4 The main content of the complaint is described in the Decisions on admissibility of 13 May 2020 whereby both complainants allege:

> that the provisions of the Law of 13 July 1973 and Order No. 2017-1387 of 22 September 2017 on the predictability and increased security of employment relationships as incorporated into the Labour Code relating to public holidays with pay (Articles L. 3133-1, L.3133-3, L.3133-4 and L.3133- 5), to dismissal for economic reasons (Articles L.1233-2 and L.1233-3) and appropriate compensation in the event of unfair dismissal (Articles L.1235-3-1 and L.1235-3-2), to protection of workers' claims in the event of the insolvency of the employer (Articles L.3253-8, L.3253-9, L.3253-10, L.3253-14, L.3253-17 and D.3253-5), and to redeployment or reinstatement of workers in the context of collective redundancies (Article L.1233-4) constitute a violation respectively of Articles 2, 24, 25 and 29 of the Charter.[1]

5 In substantive terms, these collective complaints concern the first collective complaints dealing explicitly with Article 25 RESC on "the right of workers to the protection of their claims in the event of the insolvency of their employer" and Article 29 RESC on "the right to information and consultation in collective redundancy procedures". Hence, the particular interest of ETUC to limit its observations to those Articles of the collective complaints only.

6 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;[2] eventual footnotes are, in principle, omitted.

[1] ECSR Decision on the Admissibility, Syndicat CFDT général des transports et de l'environnement de l'Aube v. France, Complaint No. 181/2019, 13 May 2020, para. 1 and ECSR Decision on the Admissibility, Syndicat CFDT de la métallurgie de la Meuse v. France, Complaint No. 182/2019, 13 May 2020, para. 1.

[2] Where the original text contains emphases, they are highlighted in italics.

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II. International law and material

7 The ETUC would like to start by referring to pertinent international law and material.[3] 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.

A. International Covenant on Economic, Social and Cultural Rights (ICESCR)[4]

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

8 The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a specific provision on the protection of workers in cases of (collective) dismissal or for redeployment in cases of insolvency of the employer. 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;

[3] 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.

[4] Ratified by France in 1980.

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(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.

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

9 Concerning the right to work, the CESCR has elaborated a 'General Comment' on Article 6 ICESCR[5] which defines the content and legal obligations deriving from this provision. Several elements are to be highlighted.

10 In its description of the "Normative Content of the Right to Work", 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.**

11 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)

12 Concerning the right to just and favourable conditions of work, the CESCR has elaborated a 'General Comment' on Article 7 ICESCR[6] which defines the content and legal obligations deriving from this provision.

13 As Article 6 ICESCR, Article 7 ICESCR does not explicitly refer to the issue of (unlawful) (collective) dismissal, redeployment/reinstatement or insolvency. 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.[7]

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[5] 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.

[6] 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 .

[7] CECSR General Comment No 23, para. 1.

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14 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***
>
> 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. (…)[8]
>
> 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**. (…)[9]
>
> (…) **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.[10]
>
> 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.**[11]
>
> 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.[12]
>
> ***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 (…).[13]**
> 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.[14]**

[8] CECSR General Comment No 23, para. 10.
[9] CECSR General Comment No 23, para. 31.
[10] CECSR General Comment No 23, para. 33.
[11] CECSR General Comment No 23, para. 43.
[12] CECSR General Comment No 23, para. 59.
[13] CECSR General Comment No 23, para. 77.
[14] CECSR General Comment No 23, para. 77.

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4. CECSR Concluding observations concerning France

15 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 following[15]:

> **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.**

16 It is thereby to be noted that the Macron Order of 22 September 2017 as referred to in the complaint, has been adopted in the same spirit of increasing flexibility of the labour market by creating a more 'business-friendly regulatory framework/environment', in particular by offering more flexibility to companies to fix working conditions and to make the applicable dismissal protection legislation less rigid and costly.

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

[15] 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)

No. 158 on Termination of Employment Convention, 1982 (No. 158)[16] and accompanied by another Recommendation on Termination of Employment Recommendation, 1982 (No. 166)[17] which replaced the Recommendation No 119.

18 ILO Convention No. 158 contains the core of international regulation of the protection against unfair dismissal. France has ratified this important Convention on 16 March 1989.[18] Furthermore, in a landmark 2006 ruling, the French Cour de Cassation found that Convention No. 158 had direct force in French law.[19]

19 Furthermore, reference should be made to Convention No. 173 on the Protection of Workers' Claims (Employer's Insolvency) which provides for the protection of workers' claims in cases of insolvency and bankruptcy of the employer by means of a privilege or through a guarantee institution. This Convention is accompanied by Recommendation No. 180 on the Protection of Workers' Claims (Employer's Insolvency), 1992. France did however not ratify the Convention No. 173.[20]

1. ILO Convention No. 158

20 ILO Convention No. 158 deals with termination of employment in general, but also includes specific supplementary, in particular procedural, provisions for collective redundancies. In cases of collective redundancies, the Convention provides in particular that governments should aim at encouraging employers to consult workers' representatives and to develop alternatives to mass lay-offs (such priority of rehiring, a hiring freezes or working time reductions, etc.).

21 As for its scope, Article 2 provides for an overall broad scope of coverage as regards relevant workers and only allows for certain specific exclusions. It is also to be noted that it does not provide for territorial/geographical limitations nor in general nor in relation for the eventual alternatives that need to be found the collective dismissals, like redeployment.

[16] 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.

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

[19] Euromédia v Christophe X, C Cass – Soc, 29 III 2006.

[20] For the General Survey of the reports concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949, in particular paras. 298 – 353. - https://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-iii-1b.pdf

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Article 2

1. This Convention applies **to all branches of economic activity and to all employed persons.**

2. A Member **may exclude** the following categories of employed persons from all or some of the provisions of this Convention:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

22 PART III of the Convention provides for supplementary provisions concerning terminations of employment for economic, technological, structural or similar reasons (or thus 'collective dismissals) and specifies the following:

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on **measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.** (…)

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2. ILO Recommendation No. 166

23 ILO Convention No. 158 has - as mentioned above - been accompanied by the Termination of Employment Recommendation, 1982 (No. 166).

24 As regards collective redundancies, section "III. Supplementary Provisions concerning Terminations of Employment for Economic, Technological, Structural or Similar Reasons" provides the following:

> 19.
>
> (1) All parties concerned should **seek to avert or minimise as far as possible termination of employment** for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service**, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.**
>
> (2) Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated. (…)
>
> MEASURES TO AVERT OR MINIMISE TERMINATION
>
> 21. The measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature might **include, inter alia, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.**
>
> 22. Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice. (…)
>
> PRIORITY OF REHIRING
>
> 24.
>
> (1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, **should be given a certain priority of rehiring** if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.
>
> (2) Such priority of rehiring may be limited to a specified period of time.
>
> (3) The criteria for the priority of rehiring, the question of retention of rights-particularly seniority rights-in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

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MITIGATING THE EFFECTS OF TERMINATION

25.

(1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, **the placement of the workers affected in suitable alternative employment as soon as possible**, with training or retraining where appropriate, **should be promoted by measures suitable to national circumstances**, to be taken by the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned.

(2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.

(3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

26.

(1) With a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, **consideration should be given** to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and **with finding and taking up employment which requires a change of residence**.

(2) The competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of this Paragraph, in accordance with national law and practice.

3. ILO Covention No. 173 and Recommendation No. 180 on the Protection of Workers' Claims (Employer's Insolvency)

25 Firstly, it needs to be noted that the protection of workers' wages in situation of bankruptcy, insolvency or other forms of liquidation of an undertaking was already provided for in the ILO Protection of Wages Convention, 1949 (No. 95), in particular in Article 11 which states that:

Article 11

1. In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations.

2. Wages constituting a privileged debt shall be paid in full before ordinary creditors may establish any claim to a share of the assets.

3. The relative priority of wages constituting a privileged debt and other privileged debts shall be determined by national laws or regulations.

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26 As for the **personal scope** of this Protection of Wages Convention n° 95, this is defined very broadly in its Article 2 and allows only for certain restricted exclusions and does also not provide – like Convention n° 158- for territorial/geographical limitations/exclusions:

> Article 2
>
> 1. This Convention **applies to all persons to whom wages are paid or payable**.
>
> 2. The competent authority **may, after consultation with the organisations of employers and employed persons directly concerned**, if such exist, **exclude** from the application of all or any of the provisions of the Convention categories of persons whose circumstances and conditions of employment are such that the application to them of all or any of the said provisions would be inappropriate and who are not employed in manual labour or are employed in domestic service or work similar thereto. (…)

27 Article 11 of the Convention n° 95 was partially revised by the Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173), adopted in 1992, with a view to improving the protection provided for in 1949 in two ways: first, by setting specific standards concerning the scope, limits and rank of the privilege, which are scarcely addressed in Convention No. 95, and secondly by introducing new concepts, such as wage guarantee schemes, designed to offer better protection than the traditional privilege system. The need for revision/improvement was mainly due because Article 11 of this Convention was criticsed because "*first, it may be without much practical effect where there are not sufficient realizable assets in the bankrupt estate. Secondly, it seeks to provide a relative priority for workers' claims, but fails to guarantee a minimum rank for such claims. Moreover, Article 11* ***recognizes the possibility of setting a ceiling to the privilege, without establishing a minimum standard of socially acceptable protection****. Finally, it does not address the question of wage claims for work performed after the insolvency in situations where the latter does not necessarily involve the closure of the enterprise*."[21]

28 Although France has ratified the Convention No. 95, it did not ratifiy Covention No. 173 which in sum, provides for the protection of wage claims in insolvency and bankruptcy by means of a privilege (Part II of the Convention) or through a guarantee institution (Part III of the Convention) and provides for a description of the term insolvency on the one hand and the (minimal) protected claims of workers on the other hand.

29 It is to be noted that also Convention No. 173 provides in its Article 4 again for a **very broad personal scope** as it '*shall apply to all employees and to all branches of economic activity*' (para 1.) and only allows eventual exclusions in a restricted way as '*the competent authority, after consulting the most representative organisations of employers and workers, may exclude from Part II, Part III or both Parts of this Convention specific categories of workers, in particular public employees, by reason of the particular nature of their employment relationship, or if there are other types of guarantee affording them protection equivalent to that provided by the Convention*'.

[21] Para. 331 of CEACR, General Survey concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949, adopted at the International Labour Conference, 91st Session, 2003.

30 As for the protection of workers' claims PART II. PROTECTION OF WORKERS' CLAIMS BY MEANS OF A PRIVILEGE

PROTECTED CLAIMS

(…)

Article 6

The privilege shall cover **at least**:

(a) the workers' claims for wages relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment;

(b) the workers' claims for holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year;

(c) the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than three months, prior to the insolvency or prior to the termination of the employment;

(d) severance pay due to workers upon termination of their employment.

LIMITATIONS

Article 7

1. National laws or regulations **may limit the protection by privilege of workers' claims to a prescribed amount, which shall not be below a socially acceptable level**.

2. Where the privilege afforded to workers' claims is so limited, the prescribed amount shall be adjusted as necessary so as to maintain its value.

31 PART III on the other hand deals with the PROTECTION OF WORKERS' CLAIMS BY A GUARANTEE INSTITUTION:

CLAIMS PROTECTED BY A GUARANTEE INSTITUTION

Article 12

The workers' claims protected pursuant to this Part of the Convention shall include **at least**:

(a) the workers' claims for wages relating to a prescribed period, which shall not be less than eight weeks, prior to the insolvency or prior to the termination of the employment;

(b) the workers' claims for holiday pay due as a result of work performed during a prescribed period, which shall not be less than six months, prior to the insolvency or prior to the termination of the employment;

(c) the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than eight weeks, prior to the insolvency or prior to the termination of employment;

(d) severance pay due to workers upon termination of their employment.

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Article 13

1. Claims protected pursuant to this Part of the Convention **may be limited to a prescribed amount, which shall not be below a socially acceptable level.**

2. Where the claims protected are so limited, the prescribed amount shall be adjusted as necessary so as to maintain its value.

32 As for the accompanying Recommendation No. 180, it provides the following in relation to claims of workers:

II. PROTECTION OF WORKERS' CLAIMS BY MEANS OF A PRIVILEGE

PROTECTED CLAIMS

3.

(1) The **protection** afforded by a privilege **should cover the following claims**:

(a) wages, overtime pay, commissions and other forms of remuneration relating to work performed during a prescribed period prior to the insolvency or prior to termination of the employment. This period should be fixed by national laws or regulations and should not be less than 12 months;

(b) holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year;

(c) amounts due in respect of other types of paid absence, end-of-year and other bonuses provided for by national laws or regulations, collective agreements or individual contracts of employment, relating to a prescribed period, which should not be less than 12 months, prior to the insolvency or prior to the termination of the employment;

(d) payments due in lieu of notice of termination of employment;

(e) severance pay, compensation for unfair dismissal and other payments due to workers upon termination of their employment;

(f) compensation payable directly by the employer in respect of occupational accidents and diseases.

(2) The protection afforded by a privilege **might cover** the following claims:

(a) contributions due in respect of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;

(b) contributions due in respect of private, occupational, inter-occupational or enterprise social protection schemes independent of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;

(c) benefits to which the workers were entitled prior to the insolvency by virtue of their participation in enterprise social protection schemes and which are payable by the employer.

(3) Claims enumerated in subparagraphs (1) and (2) that have been awarded to a worker through an adjudication or arbitration within 12 months prior to the insolvency should be covered by the privilege regardless of the time-limits specified in those subparagraphs.

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LIMITATIONS

4. Where the amount of the claim protected by a privilege is limited by national laws or regulations, **in order that this amount should not fall below a socially acceptable level** it should take into account variables such as the minimum wage, the part of the wage which is unattachable, the wage on which social security contributions are based or the average wage in industry.

III. PROTECTION Of WORKERS' CLAIMS BY A GUARANTEE INSTITUTION

(…)

CLAIMS PROTECTED BY THE GUARANTEE

9.

(1) The guarantee **should cover the following claims**:

(a) wages, overtime pay, commissions and other forms of remuneration relating to work performed during a prescribed period, which should not be less than three months, prior to the insolvency or prior to the termination of the employment;

(b) holiday pay due as a result of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year;

(c) end-of-year and other bonuses provided for by national laws or regulations, collective agreements or individual contracts of employment, relating to a prescribed period, which should not be less than 12 months, prior to the insolvency or prior to the termination of the employment;

(d) amounts due in respect of other types of paid absence relating to a prescribed period, which should not be less than three months, prior to the insolvency or prior to the termination of the employment;

(e) payments due in lieu of notice of termination of employment;

(f) severance pay, compensation for unfair dismissal and other payments due to workers upon termination of their employment;

(g) compensation payable directly by the employer in respect of occupational accidents and diseases.

(2) The guarantee **might cover the following claims**:

(a) contributions due in respect of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;

(b) contributions due in respect of private, occupational, inter- occupational, or enterprise social protection schemes independent of national statutory social security schemes, where failure to pay adversely affects workers' entitlements;

(c) benefits to which the workers were entitled prior to the insolvency by virtue of their participation in enterprise social protection schemes and which are payable by the employer;

(d) wages or any other form of remuneration consistent with this Paragraph, awarded to a worker through adjudication or arbitration within three months prior to the insolvency.

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LIMITATIONS

10. Where the amount of the claim protected by means of a guarantee institution is limited, **in order that this amount should not fall below a socially acceptable level**, it should take into account variables such as the minimum wage, the part of the wage which is unattachable, the wage on which social security contributions are based or the average wage in industry.

4. Other relevant ILO instruments

33 In 2009, the ILO adopted unanimously the Pact called "Recovering from the crisis: A Global Jobs Pact".[22] 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. (…)

[22] 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)

5. ILO supervisory bodies' case-law

Convention n° 158 on termination of employment

34 The relevant case-law of the Committee of Experts on the Application of Conventions and Recommendation (CEACR) regarding Convention No. 158 is contained in its General Survey 1995.[23]

35 As for the **personal scope**, the CEACR confirms in this General Survey that:

> These terms refer to **all persons in an employment relationship**. The Convention applies to both foreign and national employed persons. It also covers public servants, who may, however, be excluded from its scope under certain conditions; it should be noted that the very purpose of the Convention rules out its application to self-employed persons.
>
> Although the scope of the Convention is very broad, it does at the same time afford a great deal of flexibility: having laid down the principle of general application, it **offers ratifying States the option of excluding certain types or categories of workers** (Article 2, paragraphs 2 to 6). Such exclusions are based on the nature of the contract of employment or the category of workers concerned. The Committee points out that the exclusions may be made with respect to all or some of its provisions. **However, the Convention makes this possibility of exclusion subject to adequate safeguards in the case of exclusions based on the nature of the contract of employment. It lays down procedures, conditions and criteria, including consultation with employers' and workers' organizations, for the exclusion of certain permitted categories of employed persons "in so far as necessary"** (para. 34)

36 From the different examples provided in the General Survey (para. 34-74), the list of mostly excluded workers concern i.a.: workers on fixed-term contract, workers on probation, public sevants, seafarers, workers' in family businesses, domestic workers, etc. It should thereby be noted that the Convention only allows the exclusion of 'limited" categories of workers and that when excluded, the necessary safeguards have to be provided, including the obligatory consultation of workers' and employers' organisations. Note also that although the General Survey dates from 1995, there is no reference to eventual exclusions of workers based on territorial or geographical reasons or business structures.

37 In relation to collective redundancies, the General Survey states in first instance that the concerned Articles 13 and 14 of the Convention:

> (…) must be read in conjunction with Parts I and II of the Convention, and in particular with Articles 2 (scope) [including the allowed/necessary exclusions according to the accompanying footnote 2], 3 (definitions), 4 (justification), 8 to 10 (procedure of appeal) of the Convention. Indeed, Articles 13 and 14 supplement rather than replace the preceding Articles. (para. 276)

38 Articles 13 and 14 encompass a number of objectives (mainly to avert or minimize terminations of employment and mitigate their consequences) within the framework of certain procedures, namely information and consultation of workers (Article 13) and notification to the authorities (Article 14). As paragraph 282 of the General Survey states:

[23] 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.

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'except for an explicit reference to 'finding alternative employment' in Article 13, the Convention does not indicate the substantive content of such measures. It therefore leaves the determination of their content to national methods of implementation. The matters covered by such consultation might usefully, although they do not have to be based on Recommendation No. 166, Paragraphs 21 to 26, which specify the kind of measures which could be adopted. Since specific mention is made in the Convention of measures to find alternative employment, consultations should in any event include this aspect of the measures. **Finding alternative employment, either within the establishment or elsewhere, is one of the measures** which can be taken to avoid terminations of employment and mitigate the adverse effects'.

39 Wheres Articles 13 and 14 of the Convention concern mainly procedures to be followed in order to avert or minimize termination of employment and to mitigate its effects, the accompanying Recommendation No. 166 also refers to these procedures, but in addition puts forward a number of specific measures to achieve this aim (paragraphs 21-22). Furthermore, it contains provisions with regard to the criteria to be applied in selecting workers whose employment is to be terminated (para. 23) and in determining priority of rehiring workers whose employment has been terminated (para. 24). Lastly, it includes provisions on the measures to be taken to mitigate the effects of termination of employment (paras. 25-26). The following references in the General Survey (paras. 315-349) are of particular relevance to the complaints at stake:

Measures to avert or minimize termination

320. Paragraphs 21 and 22 reflect the principle whereby, when an employer is faced with economic difficulties or when he is obliged to introduce technological or other changes, he should only use **termination of employment as a last resort** as a means of solving these problems, and he should first consider all other possible measures that would allow him to avoid terminations. (…)

324. **Internal transfers are another way of limiting the number of terminations of employment**. Rapidly changing technology generally means that such transfers go hand in hand with training and retraining measures to allow workers who have been transferred to adapt to their new jobs.

325. When the Recommendation was adopted, the legislation of some countries made provision for **finding alternative employment, which was also the subject of negotiation between the social partners**. As pointed out by the Committee, its importance was recognized in the Convention, which emphasizes the finding of alternative employment as one of the measures to be considered in the consultation with workers' representatives with a view to averting or minimizing the terminations and mitigating their effects. Alternative employment is now recognized in the legislation and collective agreements in some countries as an essential component of measures to limit terminations of employment. **In some cases, the obligation to find alternative employment was established in case-law before being incorporated into legislation**.(…)[24]

[24] In an accompanying footnote reference is made to France and states: "For example France: the dismissal of a worker for economic reasons can only take place in the event of workforce reductions if it is not possible to find alternative employment for the person concerned (Cass. Soc, 1 Apr. 1992)."

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Priority of rehiring

341. This provision [paragraph 24 of the Recommendation] is based on the idea that, where an employer who has had to reduce his staff for any of the reasons mentioned may later have to hire staff once again, out of fairness a certain priority should be granted to the workers whose employment was previously terminated. (…)

342. The legislation in many countries establishes the principle of priority of rehiring, when the employer takes on staff once again, for workers who have had their employment terminated for economic, technological, structural or similar reasons.[25] In other countries, the principle is included in collective agreements or other methods of implementation. (…)

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

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.** (…)[26]

41 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 No. 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.[27]

Convention No. 173 on the Protection of Workers' Claims (Employer's Insolvency)

42 The relevant case-law of the Committee of Experts on the Application of Conventions and Recommendation (CEACR) regarding Convention No. 173 is contained in its General Survey

[25] In an accompanying footnote 88, references is amongst others made to 'France: Labour Code'
[26] Ibd., para 232.
[27] 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 .

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concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949, in particular in Chapter V on 'The preferential treatment of workers' wage claims in case of employer's bankruptcy' (paras. 298 – 353).[28]

43 The General Survey starts off with recalling that:

> 298. Article 11 of the Convention [n° 95 on protection of wages; ratified by France] **embodies one of the oldest measures of social protection**, namely the priority accorded to wage debts in the distribution of the employer's assets in case of bankruptcy. To avoid a situation where wage earners are deprived of their livelihood in the event of the bankruptcy of their employer, **provisions have to be made to guarantee the immediate and full settlement of debts owed by employers to their workers.** (…) Article 11 of the Convention was partially revised by the Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173), which was adopted in 1992, with a view to improving the protection provided for in 1949 in two ways: first, by setting specific standards concerning the scope, limits and rank of the privilege, which are scarcely addressed in Convention No. 95, and secondly by introducing new concepts, such as wage guarantee schemes, designed to offer better protection than the traditional privilege system.

44 As mentioned before, there was a need to revise/improve Article 11 of Convention No. 95 as it was faced with the following criticisms:

> 331. Over the years, the protection of workers' wage claims in the event of bankruptcy by means of a privilege has not proven to be very satisfactory. Article 11 of Convention No. 95 has been criticized on several grounds: first, it may be without much practical effect where there are not sufficient realizable assets in the bankrupt estate. Secondly, it seeks to provide a relative priority for workers' claims, but fails to guarantee a minimum rank for such claims. **Moreover, Article 11 recognizes the possibility of setting a ceiling to the privilege, without establishing a minimum standard of socially acceptable protection.** Finally, it does not address the question of wage claims for work performed after the insolvency in situations where the latter does not necessarily involve the closure of the enterprise. (…)
>
> 332. In addition, significant developments in national law and practice since the adoption of Convention No. 95 pointed to the necessity to adopt new standards. First**, the labour legislation in many countries extended the scope of wages covered by the privilege to cover various bonuses and allowances**. (…)

45 As for the **personal scope**, the General Survey that '*the legislation in all countries primarily seeks to protect the wages of those employed under a formal contract of employment or those who are in an employment relationship with the insolvent employer*.' (with the exception of public servants) (para. 302) and '*in certain countries the preferential treatment of wage claims covers all workers without distinction*' whatsoever (para. 303). In some countries, '*the legislation excludes specific employees from privileged protection on account of their possible responsibility for the insolvency of the enterprise. Thus, claims of managerial employees or other influential persons considered as having clearly contributed to the financial straits of the enterprise are granted no privilege. The assumption is that those accountable for business*

[28] CEACR, General Survey concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949, adopted at the International Labour Conference, 91st Session, 2003.

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failure should not, by the mere fact of their legal status as employees of the insolvent enterprise, be allowed to benefit from the legal mechanism designed to protect the unintentional victims of the insolvency'. (para. 304) However, *'in other cases, while no creditors are excluded from privileged protection of their wage claims on account of their managerial position in the insolvent enterprise or their close relationship with the insolvent employer, they are conferred a lower priority in the distribution of assets*.' So even for certain excluded groups the exclusion is conditional or not at all but they are referred a lower priority only.

46 Convention No. 173 has tried to improve the weaknesses from Convention No. 95 as follows:

> 335. With respect to the privilege system, Convention No. 173 marks a clear improvement over the standards set out in Convention No. 95 in three different respects. First**, it defines the minimum coverage of the privilege**, namely: (i) workers' claims for wages relating to a prescribed period of not less than three months prior to the insolvency or prior to the termination of the employment; (ii) claims for holiday pay as a result of work performed during the year in which the insolvency or the termination of the employment occurred and in the preceding year; (iii) claims for amounts due in respect of other types of paid absence (e.g. sick leave or maternity leave) relating to a prescribed period which may not be less than three months prior to the insolvency or prior to the termination of the employment; and (iv) severance pay. Secondly, the Convention requires that national laws or regulations must give workers' claims a higher rank of privilege than most other privileged claims, and in particular those of the State and the social security system for arrears in taxes or unpaid contributions. **Thirdly, the Convention specifies that whenever national laws or regulations set a ceiling to the protection by privilege of workers' claims, the prescribed amount may not fall below a socially acceptable level, and that it therefore has to be reviewed periodically so as to maintain its value.**
>
> 336. As regards wage guarantee schemes, Convention No. 173 provides that they must cover as a minimum: (i) workers' claims for wages relating to a prescribed period of not less than eight weeks prior to the insolvency or prior to the termination of the employment; (ii) claims for holiday pay as a result of work performed during a prescribed period which may not be less than six months prior to the insolvency or the termination of the employment; (iii) claims for amounts due in respect of other types of paid absence relating to a prescribed period which may not be less than eight weeks prior to the insolvency or prior to the termination of the employment; and (iv) severance pay. The minimum coverage under a wage guarantee scheme is more limited than that afforded by the privilege system, since a guarantee institution offers an assurance of payment which is not present in the case of privilege. **The Convention allows for the limitation of guaranteed compensation to a certain amount, but requires such amount not to fall below a socially acceptable level, and to be periodically adjusted so as to maintain its value.**
>
> 338. **It should be mentioned that the standards set out in Part III of the Convention dealing with wage guarantee institutions bear a certain similarity to the provisions of the European Council Directive 80/987/EEC** of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. (…) The **Directive also allows Member States to set a ceiling for the liability for employees' outstanding claims**,(…). (…) [on the Directive, see Section D.3 below]

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47 Overall, the General Survey confirms that:

> 352. in law and practice the large majority of countries therefore seem to have progressively departed from the generally worded provisions of Article 11 of Convention No. 95 and moved towards the adoption of more specific standards, which often reflect the principles and rules contained in Convention No. 173. Indeed, the Committee considers that **Convention No. 173 contains the most relevant standards in relation to the protection of workers' claims in the event of the employer's bankruptcy or insolvency and firmly encourages member States to consider the ratification of this instrument in the very near future.**

C. Council of Europe

48 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.

1. European Convention on Human Rights (ECHR)

49 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 ILO-Convention No. 158 (as well as Article 24 European Social Charter).[29]

50 It is 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" [30]:

> "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 *Özpınar v. Turkey*, no. 20999/04, §§ 43-48, 19 October 2010; and *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 165-167, 9 January 2013)."[31]

51 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

[29] 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 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)

[30] ECtHR 2.12.2014 – Nr. 61960/08 - *Emel Boyraz / Turkey.*

[31] Ibd. § 43.

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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."[32]

52 On the other hand, the ECtHR has not (yet) dealt with collective redundancies (and/or questions of insolvency), although more courage would have induced the judges to infer from Article 11 ECHR the principle of participatory democracy as a fundamental element of the right to association.

2. European Social Charter (ESC)

a) Text

Article 25 RESC

53 The European Social Charter provides in Article 25 on 'the right of workers to the protection of their claims in the event of the insolvency of their employer' that:

> With a view to ensuring the effective exercise of the right of workers to the protection of their claims in the event of the insolvency of their employer, the Parties undertake to provide that workers' claims arising from contracts of employment or employment relationships be guaranteed by a guarantee institution or by any other effective form of protection.

54 The Appendix to Article 25 highlights the following:

> 1. It is understood that the competent national authority **may, by way of exemption and after consulting organisations of employers and workers, exclude certain categories of workers from the protection provided by reason of the special nature of their employment relationship**.
>
> 2. It is understood that the definition of the term "insolvency" must be determined by national law and practice.
>
> 3. The **workers' claims covered by this provision shall include at least**:
>
> a the workers' claims for wages relating to a prescribed period, which shall not be less than three months under a privilege system and eight weeks under a guarantee system, prior to the insolvency or to the termination of employment;
>
> b the workers' claims for holiday pay due as a result of work performed during the year in which the insolvency or the termination of employment occurred;
>
> c the workers' claims for amounts due in respect of other types of paid absence relating to a prescribed period, which shall not be less than three months under a privilege system and eight weeks under a guarantee system, prior to the insolvency or the termination of the employment.
>
> 4. National laws or regulations **may limit the protection of workers' claims to a prescribed amount, which shall be of a socially acceptable level**.

[32] Ibd. § 44.

55 The Explanatory Report to Article 25 RESC stipulates i.a.:

> Article 25 – The right of workers to the protection of their claims in the event of the insolvency of their employer
>
> 91. This provision **has been inspired by ILO Convention No. 173** (Protection of Workers' Claims (Employers' insolvency)) of 1992 **and of European Community Directive 80/987** on the approximation of the laws of the member States relating to the protection of employees in the event of the insolvency of their employer. It lays down the general principle of the right of workers to protection of their claims in the event of the insolvency of their employer. (…)
>
> 93. The first paragraph of the appendix prescribes that **certain categories of workers may be excluded** by reason of the special nature of their employment relationship. The workers concerned are particularly public employees and managerial staff in small undertakings. (…)
>
> 95. The third paragraph of the appendix sets out the minimum requirement according to which claims shall be protected. The "other types of paid absence" referred to in sub-paragraph c have the same sense as in the ILO Convention.
>
> 96. Finally, the fourth paragraph of the appendix provides that national laws or regulations **may limit the protection of workers' claims to a prescribed amount, which must nevertheless be of a socially acceptable level.**

56 Article 25 was thus explicitly inspired by the ILO Convention No. 173.[33] As a consequence, when interpreting Article 25 due regard must be taken of this Convention and the related ILO Recommendation No. 180 (see above section II.B.23) as well as the case law of the CEACR.

57 Furthermore, Article 25 is also inspired by EC/EU law and in particular European Community Directive 80/987 on the approximation of the laws of the member States relating to the protection of employees in the event of the insolvency of their employer. As a consequence, when interpreting Article 25 due regard must be taken of this EU Directive and the CJEU case law (see below section D.3).

Article 29 RESC

58 On the other hand, Article 29 on 'the right to information and consultation in collective redundancy procedures' provides that:

> With a view to ensuring the effective exercise of the right of workers to be informed and consulted in situations of collective redundancies, the Parties undertake to ensure that employers shall inform and consult workers' representatives, in good time prior to such collective redundancies, **on ways and means of avoiding collective redundancies or limiting their occurrence and mitigating their consequences, for example by recourse to accompanying social measures aimed, in particular, at aid for the redeployment** or retraining of the workers concerned. (…)

[33] Council of Europe (1996) Explanatory Report to the European Social Charter (Revised). Strasbourg, 03.05.1996, § 91-96.

59 The Explanatory report to Article 29 highligts that for this Charter provision inspiration was drawn from the ILO Convention No. 158 on Termination of Employment (and related Recommendations) (see above section B.1.) as well as EC/EU Directive 92/58 on collective redundancies (see below section D.3).[34]

> 109. Under this Article the Parties undertake to ensure that employers inform and consult workers' representatives prior to collective redundancies. When drafting this Article the Committee examined European Community Directive 92/56 of 1992 amending Directive 75/129 on the approximation of the laws of the member States relating to collective redundancies as well as ILO Convention No. 158 (Termination of Employment) of 1982. The information and consultation shall concern the possibilities of avoiding collective redundancies, limiting their number or mitigating their consequences. **Recourse to social measures providing aid for redeploying** or retraining the workers concerned is mentioned **as an example of ways of mitigating the consequences of collective redundancies.**
>
> 110. It is understood that recourse to social measures in this context is not solely the responsibility of the employer. (…)

60 As a consequence, when interpreting Article 29 due regard must be taken of this this Convention (and related Recommendation) (see above section II.B.1) as well as the case law of the CEACR as well as the EU Directive and related CJEU case law (see below section D.3).

b) Compilation of case law (Digest 2008)

61 The 'Digest of the Case Law of the European Committee of Social Rights' (Digest 2018) compiles the main principles deriving from the ECSR's case law based on Statements of Interpretation, Conclusions or Decisions[35].

Article 25 RESC

62 Concerning the protection offered by Article 25 RESC, in particular in relation to relief in case of unfair dismissal, the Digest 2018 states the following:

> Article 25 of the Charter guarantees individuals the right to protection of their claims in the event of the insolvency of their employer. States Parties having accepted this provision benefit from a margin of discretion as to the form of protection of workers' claims and so Article 25 does not require the existence of a specific guarantee institution.
> **However, the protection afforded, whatever its form, must be adequate** and effective, also in situations where the assets of an enterprise are insufficient to cover salaries owed to workers.
>
> Guarantees must exist for workers that their claims will be satisfied in such cases.
>
> The protection should also apply in situations where the employer's assets are recognised as insufficient to justify the opening of formal insolvency proceedings.

[34] For a recent academic analysis of Article 29 ESC, see Veneziani, B. (2016) Article 29 - The Right to Information and Consultation in Collective Redundancy Procedures, in Bruun, N., Lörcher, K., Schömann, I. and Clauwaert, S. (2016) The European Social Charter and the Employment Relation, London: Hart Publishing, pp.

[35] Available at: https://www.coe.int/en/web/turin-european-social-charter/case-law

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A privilege system, on its own cannot be regarded as an effective form of protection in situations where there is no alternative to it and alone it cannot provide effective guarantee of protection, due to the fact that the employer has no assets.

The Committee has found that a privilege system where workers' claims were ranked below mortgage obligations, foreclosure on property and bankruptcy costs did not amount to an effective protection under the Charter.

In order to demonstrate the adequacy in practice of the protection, States Parties must provide information, inter alia, on the average duration of the period from a claim is lodged until the worker is paid and on the overall proportion of workers' claims which are satisfied by the guarantee institution and/or the privilege system.

States Parties may limit the protection of workers' claims to a prescribed amount.

Domestic laws or regulations may limit the protection of workers' claims to a prescribed amount which shall be of a socially acceptable level, namely not less than three months wage under a privilege system and eight weeks under a guarantee system. The workers' claims covered should also include holiday pay due as a result of work performed during the year in which the insolvency or the termination of employment occurred.

Certain categories of employees may, exceptionally, be excluded from Article 25 protection because of the special nature of their employment relationship. T**he assessment of the conformity of such exclusion is done on a case-by-case basis.**

Exclusion of employees having worked less than one year for the same employer from protection against insolvency of their employer is contrary to the Charter.

Under no circumstances may this be a reason for the exclusion of part-time employees and employees on fixed-term or other temporary contract.

63 As for some specific ECSR statements of interpretation on Article 25, the following could be referred to:

Conclusions 2008 - Interpretative Statement on Article 25

Certain categories of employees may, exceptionally, be excluded from Article 25 protection because of the special nature of their employment relationship. However, it is for the Committee to determine on each occasion whether the nature of the employment relationship warrants such an exclusion. Under no circumstances may this be a reason for the exclusion of part-time employees and employees on fixed-term or other temporary contract.

Conclusions 2012 - Statement of interpretation on Article 25
The Committee recalls that, in the event of the insolvency of their employer, workers' claims must be guaranteed by a guarantee institution or by any other effective form of protection. The appendix to the Charter stipulates, inter alia, the minimum amounts of wages and paid absence that must be covered depending on whether recourse is had to a "privilege system" (three months prior to the insolvency) or a "guarantee system" (eight weeks). (…)

Article 29

64 Concerning the protection offered by Article 29 ESC, the Digest 2018 states the following:

(…)
Redundancies concerned
Under Article 29 the collective redundancies referred to are redundancies affecting several workers within a period of time set by law and decided for reasons which have nothing to do with individual workers, but correspond to a reduction or change in the firm's activity.
The definition of redundancies in domestic law, however, must not be too restrictive. (…)

Purpose of the consultation
Article 29 requires that the States Parties establish an information and consultation procedure which should precede the process of collective redundancies. Its provisions are directed – on the one hand – towards ensuring that workers are made aware of reasons and scale of planned redundancies, and – on the other hand – towards ensuring that the position of workers is taken into account when their employer is planning collective redundancies, in particular as regards the scope, mode and manner of such redundancies **and the extent to which their consequences can be avoided, limited and/or mitigated.**

(…) As part of this process, employers should be required to cooperate with administrative authorities or public agencies which are responsible for the policy counteracting unemployment, by for example notifying them about planned collective redundancies and/or cooperating with them in relation to retraining employees who are made redundant **or providing them with other forms of assistance with a view to obtaining a new job. (…)**

65 As for some specific ECSR statements of interpretation on Article 29, the following could be referred to:

Conclusions 2014 – Statement of interpretation Article 29

"With a view to ensuring the effective exercise of the right of workers to be informed and consulted in situations of collective redundancies, the Parties undertake to ensure that employers shall inform and consult workers' representatives, in good time prior to such collective redundancies, on ways and means of avoiding collective redundancies or **limiting their occurrence and mitigating their consequences, for example accompanying social measures aimed, in particular, at aid for the redeployment** or retraining **of the workers concerned.** (…)

The information and consultation process should be directed towards not only the possible avoidance or minimisation of the scope of collective redundancies, but also at mitigating their consequences. **It should therefore cover the possibility of undertaking actions aimed at** retraining and **redeployment of the workers concerned**. As part of this process, employers should be required to cooperate with administrative authorities or public agencies which are responsible for the policy counteracting unemployment, by for example notifying them about planned collective redundancies and/or cooperating with them in relation to retraining employees who are made redundant or providing them with other forms of assistance with a view to obtaining a new job."

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

66 As mentioned above (see para **Error! Reference source not found.**), the 'Macron' 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.

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67 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.

68 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."[36]

69 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**

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

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Charter are effectively guaranteed at a period of time when beneficiaries most need the protection.

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.**"[37]

70 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).[38]

D. European Union

1. Primary law

71 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:
>
> (…) (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

[37] ECSR Decision on the merits, Collective Complaints 66/2011 GENOP-DEI and ADEDY v. Greece, 12 June 2012, paras. 12-14.
[38] ECSR Decision on the merits, Collective Complaints 111/2014 GSEE v. Greece, 23 March 2017, Para. 88.

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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.

72 In this context, the EU has developed particular legislation in relation to collective dismissals as well as in relation to the protection of workers' claims in the case of employer's insolvency (see also II.D.3).

73 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" that:

> 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.

74 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.[39]

75 The 'Explanations' on Article 30 CFREU show that this article is based on and inspired by Article 24 ESC (and its case law) and Directives 80/987 and 2002/74.[40]

> 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

76 Over the course of time, the European Community/European Union has developed several mainly politically binding catalogues of fundamental social rights.

77 The **Community Charter of Fundamental Social Rights of Workers (1989)** explicitly refers to the need for regulations in relation to collective dismissals and bankruptcies and it is also clear from the Preamble that for this Charter inspiration was and should be drawn from the

[39] 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 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).

[40] 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)

Conventions of the International Labour Organization and from the European Social Charter of the Council of Europe:

> Improvement of living and working conditions
>
> 7. The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. (…)
>
> The **improvement must cover**, where necessary, the development of certain aspects of employment regulations such as **procedures for collective redundancies and those regarding bankruptcies.**
>
> Information, consultation and participation for workers
>
> 17. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States.
>
> **This shall apply especially in companies or groups of companies** having establishments or companies in two or more Member States of the European Community.
>
> 18. Such information, consultation and participation must be implemented in due time, particularly in the following cases: (…)
>
> • in cases of collective redundancy procedures; (…)

78 Also the recently solemnly proclaimed **European Pillar of Social Rights (November 2017**) (EPSR) provides in its Principle 7 references to the need of protection in case of **any** dismissals (in general terms and thus implying both individual and collective dismissals):

> Chapter II: Fair working conditions
>
> **7. Information about employment conditions and protection in case of dismissals**
>
> (…) 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.**[41]

79 It is also important to highlight that 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 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**.

[41] 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)

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80 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.[42]

81 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) and Council Directive 98/59/EC on collective redundancies 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**.** (…)
>
> c) Existing measures
> Council Directive 98/59/EC on collective redundancies requires employers to inform and consult workers' representatives and to notify public authorities prior to collective redundancies.

82 As Principle 7 thus builds on Article 30 CFREU (and its interpretation), which on its turn draws on Article 24 ESC and whereby the latter on 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

83 As mentioned above, the EU has developed specific legislative acts relating to collective dismissals as well as for the protection of workers' claims in cases of insolvencies. Council Directive on insolvencies (Directive 2008/94) as well as Council Directive on collective redundancies (Directive 98/59/EC) are indeed of particular relevance to the collective complaints at stake.

[42] 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.

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Directive 98/59/EC on collective redundancies[43]

84 This Directive forms the consolidated version of the amendments brought, in particular in 1992 to the initial 1975 Directive.[44] This Directive aims to improve protection for workers affected by decisions of collective dismissals and sets out rules on the information and consultation of workers' representatives before collective redundancies are made, as well as provisions on practical support for the employees who are laid off.

85 Under the Directive, any employer contemplating collective redundancies must hold consultations in good time with the workers' representatives, with a view to reaching an agreement (Article 2§1) and **these consultations must, at the minimum, cover means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences, in particular by recourse to accompanying social measures aimed at redeploying** or retraining those workers made redundant (Article 2§2).

86 As for the **personal scope** of the Directive, it in principle covers all workers with the exception of (a) collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts, (b) workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies), and (c) the crews of seagoing vessels (Article 1§2).

87 It is also to be noted that in its preamble, the Directive states makes reference in its consideration n° 7 to (then) Article 117 EC Treaty[45] (now Article 151 TFEU) which states:

> "The Community and the Member States**, having in mind fundamental social rights such as those set out in the European Social Charter** signed at Turin on 18 October 1961 and in **the 1989 Community Charter of the Fundamental Social Rights of Workers**, shall have as their **objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained**, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

88 Furthermore the preamble also states:

> (2) **Whereas it is important that greater protection should be afforded to workers in the event of collective redundancies** while taking into account the need for balanced economic and social development within the Community;

89 Furthermore in its final provisions, the Directive provides in Article 5 that 'this Directive shall not affect the right of Member States **to apply or to introduce laws**, regulations or

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[43] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective *redundancies*, *OJ L 225, 12.8.1998, p. 16–21.*

[44] Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective *redundancies*, *OJ L 48, 22.2.1975, p. 29–30);* Council Directive 92/56/EEC of 24 June 1992 amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective *redundancies*, *OJ L 245, 26.8.1992, p. 3–5.*

[45] (7) Whereas this approximation must therefore be promoted while the improvement is being maintained within the meaning of Article 117 of the Treaty;

administrative provisions **which are more favourable to workers** or to promote or to allow the application of collective agreements more favourable to workers.'

90 This Directive has of course been reinforced by the case-law of the Court of Justice of the EU.

Directive 2008/94 on the protection of employees in the event of the insolvency of their employer[46]

91 Also this Directive consists of a consolidated/codified Directive based on the initial Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the insolvency of their employer and which has been substantially amended over time.[47]

92 According to Article 4 of this Directive, Member States shall have the **option** to **limit the liability of the guarantee institutions** in particular in relation to the length of the period for which outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships, are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship. Article 4§3 **allows Member States to set ceilings on the payments** made by the guarantee institution, **however these ceilings must not fall below a level which is socially compatible with the social objective of this Directive**.

93 Although the Directive does not explicitly as such clarifies the '**social objective of this Directive**', it should be borne in mind that the initial Council Directive 80/987/EC contained a similar consideration in its Preamble like Directive 98/59/EC (see above), which made reference to (then) Article 117 EC Treaty (now Article 151 TFEU) which states:

> "The Community and the Member States, **having in mind fundamental social rights such as those set out in the European Social Charter** signed at Turin on 18 October 1961 and in **the 1989 Community Charter of the Fundamental Social Rights of Workers**, shall have as their **objectives** the **promotion of employment, improved living and working conditions**, so as to make possible their harmonisation while the improvement is being maintained, **proper social protection**, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

94 As for the **personal scope**, the Directive applies to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency. However, Member States **may**, **by way of exception, exclude claims by certain categories of employee** from the scope of this Directive, by virtue of the existence of

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[46] 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.

[47] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.1980, p. 23–27; Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 270, 8.10.2002, p. 10–13.

other forms of guarantee **if it is established that these offer the persons concerned a degree of protection equivalent** to that resulting from this Directive. Where such provision already applies in their national legislation, Member States may continue to exclude from the scope of the Directive: a) domestic servants employed by a natural person and b) share-fishermen. (Article 1, §§1-3) Furthermore, the Directive explicitly states that **Member States may not exclude from the scope of this Directive**: a) part-time employees, (b) employees with a fixed-term contract and c) employees with a temporary employment relationship within the meaning of Article 1(2) of Directive 91/383/EEC. Member States may also not set a minimum duration for the contract of employment or the employment relationship in order for employees to qualify for claims under this Directive.

95 It is also to be noted that under its general provisions, Article 11 states that this Directive shall **not affect the option** of Member States **to apply or introduce** laws, regulations or administrative **provisions which are more favourable to employees,** but also that **implementation of this Directive shall not under any circumstances be sufficient grounds for a regression** in relation to the current situation in the Member States and in relation to the general level of protection of employees in the area covered by it.

96 Also this Directive has of course been reinforced by the case-law of the Court of Justice of the EU.

4. EU economic (governance) policy

97 Whereas the abovementioned international and European instruments (incl. EU law) have as a primar 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 of 2008 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 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.

98 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 and to ensure a more 'business-friendly regulatory framework/environment'.[48]

[48] 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 2014-2020; all available at https://www.etui.org/Publications2/Background-analysis .

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99 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 dismissals as set by Order N° 2017/1387. The European institutions, in particular the Commission, have always been very supportive of these reforms whereby for example 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.[49]

> *Recent reforms are expected to improve the functioning of the labour market over time*. (…) **Flexibility has been increased at company level, thanks to the simplifications of rules on collective dismissals,** the possibility to sign agreements at company level partially derogating from branch level provisions, and the creation of company-level agreements to modify wages and adapt working hours in case of economic difficulty. (p. 11)
>
> *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 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). (…) (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).

100 The following extracts from the respective Council Decisions in relation to the Country-specific Recommendations for France reveal also the stimulus by the EU institutions to continue the deregulatory approach to the benefit in first instance of the businesses and thus not the workers concerned:

> CSRs 2018-2019
>
> (12) The 2016 law on labour, modernising social dialogue and securing professional pathways **aims to improve firms' capacity to adjust to economic cycles** and reduce the share of workers on temporary contracts. (…) In this context, it is important to finalise the implementation

[49] 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 COMMUNICAITION 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)

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of the ongoing ambitious reform programme, which includes the recently adopted reform of the labour law, (…)[50]

CSRs 2017-2018

CSR n° 4. **Further reduce the regulatory burden for firms, including by pursuing the simplification programme.** (…)

(15) With the law of July 2016 on labour, social dialogue and professional pathways, **France introduced measures aimed at improving firms' capacity to adjust to economic cycles** and at reducing segmentation. **The law clarifies rules on economic dismissals**, extends the scope of majority company-level agreements and increases the effectiveness of collective bargaining (…)

(16) **Although France has improved its overall regulatory performance,** the business environment continues to be middle ranking in comparison to major competitors. **In particular, despite continued simplification efforts, businesses are still faced with a high regulatory burden** and fast-changing legislation. **This is one of the main obstacles to private investment**. (…)[51]

III. The law

101 From all the above mentioned references, it is crystal clear that both the protection of workers in case of collective redundancies as well as the protection of workers' claims in case of insolvency of their employer are explicitly and/or implicitly recognised as fundamental rights under international and European human rights law and its related case law. These rights have furthermore a direct relationship to the basic principle and foundation of all human rights which is **human dignity and the respect of principles and rights at work are critical for ensuring this human dignity.** Furthermore, international and European human rights supervisory bodies, like the ECSR, have stressed that the **respect and protection is even more important in times of crisis be them economic (like in 2008) or otherwise (like the current Covid-19 crisis).**

102 It is also clear from the abovementioned that all described international and European human rights standards are in different ways interdependent and have clearly mutually inspired each other. So even if the respondent State France would have not ratified (or be Member State to) one or some of them, due to the interdependence of those norms, the basic principles and rights enshrined in those standards (as well as the related case law) has to be taken into consideration in assessing the current complaints.

103 As for the **right to protection of workers' claims in case of insolvency of their employer**, the complainant organisations highlight that the Macron Order of 22 September 2017 has led

[50] Clauwaert S. (2018) The country-specific recommendations (CSRs) in the social field. An overview and comparison. Update including the CSRs 2018-2019, Brussels: ETUI, ETUI Background Analysis 2018.01, p. 107.
[51] Clauwaert S. (2017) The country-specific recommendations (CSRs) in the social field. An overview and comparison. Update including the CSRs 2017-2018, Brussels: ETUI, ETUI Background Analysis 2017.02, p. 109.

to a considerably reduced and partial protection for workers. However from the abovementioned international and European human rights (case) law, it is clear that:

- The protection applies in principle to all workers and eventual limitations/exclusions in relation to certain categories of workers are restrictively listed (often so-called atypical workers (fixed-term, part-time, domestic, etc.) and these limitations/exclusions are not unconditional as for instance they can only be established "where/when necessary", "in consultation/ agreement with the social partners", and/or "when equivalent protection is provided";
- Eventual limitations of the amount of workers' claims to a prescribed amount is possible but again is in no way unconditional and that in any case the amount should be of a socially acceptable level.

104 As for the **protection of workers in cases of collective redundancies**, the complainant organisations highlight that the Macron Order of 22 September 2017 has led to a reduced protection in particular by limiting the existing geographical possibilities within the company group for redeployment. However,

- The protection provided by these international and European standards apply in principle to all workers and eventual limitations/exclusions in relation to certain categories of workers are restrictively listed and these limitations/exclusions are also not unconditional as for instance they can also only be established "where/when necessary", "in consultation/ agreement with the social partners", and/or "when equivalent protection is provided". Even more, certain categories of workers (like so-called atypical workers) are additionally protected and listed as categories of workers which can not be excluded to avoid that employers would abuse recourse to such contracts and thus by-pass the protection afforded to those workers;
- Special procedures of information and consulation with workers' organisations have to be respected in particular with a view to reach an agreement to mitigate the negative/adverse (social) consequences of such dismissals. In fact, dismissal is to be considered the last resort and all other alternative solutions/possibilities have to be considered first. Most relevant alternative solutions/possibilites listed by international and European (case) law are in first instance redeployment, internal transfers, priority of rehiring, etc. None of the above described international and European norms limit these possibilities in a geographical way, on the contrary employers should assist in every possible way the concerned workers in finding (alternative) employment even if this would require a change of residence (see e.g. ILO Recommendation No. 166 above).

105 But even if these measures introduced by France would or could from a prima facie point of view look in conformity with international and European norms, consideration has to be given to the following underlying fundamental nature of those measures. As mentioned above, the concerned Macron Order of 22 September 2017 has clearly been taken (and even been stimulated by certain EU institutions) in the context of mitigating the negative effects of the 2008 economic crisis on businesses, and with a view to ensure in first instance a "business friendly regulatory framework/environment" by providing more flexibility and ensuring less "red

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tape" and costs for those businesses. And this with no or hardly any consideration of the protection of the workers' concerned.

106 However, all the abovementioned international and European standards and related case law, including of the Revised European Social Charter and the ECSR, is explicitly clear on the fact that in particular in times of crisis, including the current Covid-19 crisis which is leading already to a devasting wave of insolvencies and collective redundancies, (deliberate) retrogressive measures leading to reduced protection of fundamental social and workers rights are in violation of these standards. On the contrary, all those standards prescribe and promote a more favourable/greater protection and (progressive) improvement of their underlying social objectives, principles and rights. Hence, in the ETUC view, the contested Macron Order of 22 September 2017 can not be reconciled with both the letter, the spirit and the progressive attainment of the objectives and rights enshrined in those international and European human rights standards.

IV. Conclusions

107 Following all the abovementioned, the ETUC considers that the measures criticised by the complainant organisations in collective complaints No. 181 and 182 are indeed not in conformity with in particular Article 25 and 29 RESC on which these ETUC observations focus.

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