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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

28 November 2012

**Case No. 5**

**Federation of employed pensioners of Greece (IKA –ETAM) v. Greece**

Complaint No. 76/2012

**Panhellenic Federation of Public Service Pensioners (POPS° v. Greece**

Complaint No. 77/2012

**Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.)**

**v. Greece**

Complaint No. 78/2012

**Panhellenic Federation of pensioners of the public electricity corporation  
(POS-DEI) v. Greece**

Complaint No 79/2012

**Pensioners' Pensioner's Union of the Agricultural Bank of Greece (ATE)**

**v. Greece**

Complaint No. 80/2012

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

Registered at the Secretariat on 13 August 2012





European Trade Union Confederation (ETUC)  
Confédération européenne des syndicats (CES)

## **Collective Complaints**

from the

**Federation of employed pensioners of Greece  
(IKA –ETAM) v. Greece  
(No. 76/2012)**

**Panhellenic Federation of Public Service Pensioners  
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**Pensioner's Union of the Agricultural Bank of Greece  
(ATE) v. Greece  
(No. 80/2012)**

## **Joint Observations**

by the

**European Trade Union Confederation (ETUC)**

12 August 2012

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In making use of the opportunity provided for in the Collective Complaints Procedure Protocol (Article 7§2) and appreciating the new deadline for submission of 13 August 2012 as agreed by the President of the European Committee of Social Rights (ECSR) and confirmed to the ETUC by letter of 12 July 2012, the ETUC would like to present the following joint observations in the five cases dealing with the same problem in respect of pension reforms and reductions of pension benefits in Greece.

## **I. Landmark cases in respect of the social consequences of the crisis**

In particular in times of (sometimes extreme) austerity measures, these cases reveal the extent to which people have to bear the consequences even if they have worked for during their whole professional life expecting that they would receive as pensioners their pensions to which they had contributed.

Although there are already two Greek cases which are examined by the ECSR at the moment dealing with important aspects of the austerity measures, the actual five cases appear to be the first which cover the important problem of pensions as such.

More particularly, it will be the first cases in respect of which the ECSR will have to assess the real impact of Article 31§1 ESC outside Article 6§4 (the respective Appendix referring to Article 31 ESC). The question of interpretation and application of this provision is therefore of great importance.

This is all the more important because the substantive right at issue is of a dynamic character (see below III.D.3.c)(2)). Taking into account the ECSR's case-law it might appear that this is a more technical balancing exercise. However, and especially given the current times of crisis having such tremendous impact in the social field and on fundamental social rights in particular, the ETUC is convinced that there is an even more necessity for the ECSR to remain vigilant on the ongoing developments in these areas and to interpret the ESC in an even more effective way. In any event, the relationship between the two relevant ESC provisions (article 31 and 12§ 3 ESC) has to be clarified and their combination will set a new framework for evaluating the conformity with the Charter's requirements in cases of austerity measures.

Although the complaint does not specifically refer to the gender dimension of the problem, the Committee might also consider looking at this dimension in respect of evaluating the merits.]

## **II. The facts**

The complaints describe in detail the legislative framework and its consequences on the rights to a pension. Nevertheless, it could appear helpful to supplement this description by referring to statements by international, European (i.a. of the ECSR) and national (i.a. the Greek National Commission for Human Rights) which have already dealt with the impact of austerity measures in general and the Greek situation in particular:

## A. European Committee of Social Rights

In Conclusions XIX-2<sup>1</sup>, the ECSR has already referred to pension reductions in Greece based on information from International Social Security Association (ISSA)<sup>2</sup> and asked the Greek Government to provide further information.

*“Moreover, the Committee notes from information available from the International Social Security Association (ISSA) that outside the reference period, on 20 March 2008 the Greek parliament adopted, by a very small majority, an old-age pension reform to which the trade unions were opposed as the conditions for granting early retirement will become stricter under the new law, with an increase to the retirement age for women from 60 to 65, and an increase by two years to the contribution period required for entitlement to a pension for those working in dangerous conditions. In addition, mothers with children who are minors will no longer be able to retire before the age of 55 (50 at present), and the early retirement pension will come with degressive tax relief from 2009. According to ISSA, the other main disputed change made by the reform was the pooling of over 130 pension funds into just 13, in order to reduce administrative costs and social security system debt. Opponents of this change fear that the best managed pension funds will lose out. The reform will also affect complementary pensions, which will be reduced to 20 % of the main pension. Entitlement to medical benefits will also be subject to a longer contribution period, affecting in particular several hundred thousand part-time workers.*

*The Committee recalls that the criteria it takes into account to assess the conformity of restrictions on the right to social security as a result of economic and demographic factors are listed in the General Introduction to Conclusions XIV-1. They are:*

- *the nature of the changes (field of application, conditions for granting allowances, amounts of allowance, lengths, etc.);*
- *the reasons given for the changes and the framework of social and economic policy in which they arise;*
- *the extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);*
- *the necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued);*
- *the existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made (this information can be submitted under Article 13);*
- *the results obtained by such changes.*

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<sup>1</sup> Available at: [http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/GreeceXIX2\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/GreeceXIX2_en.pdf) ; pp. 22-23

<sup>2</sup> ISSA, Country profile on GREECE at <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Europe/Greece> - [2008 Pension reform adopted].

*The Committee asks that the next reports provide information on the above mentioned reform of the social security system as well as of any other development of the social security system which will occur in the reference period in the light of the above criteria.”*

## **B. Council of Europe Parliamentary Assembly**

In a recent Resolution on “Austerity measures – a danger for democracy and social rights”<sup>3</sup>, the Parliamentary Assembly states that it *“is worried about the impact of current austerity programmes on democratic and social rights standards. It is concerned that the restrictive approaches currently pursued, predominantly based on budgetary cuts in social expenditure, may not reach their objective of consolidating public budgets, but risk further deepening the crisis and undermining social rights as they mainly affect lower income classes and the most vulnerable categories of the population.”* (para. 2)

The Parliamentary Assembly furthermore notes that *“[T]he implementation of austerity measures is often linked to bodies whose character raises questions of democratic control and legitimisation, such as the so-called “troika” of the International Monetary Fund, the European Commission and the European Central Bank, or newly composed, technocratic governments as set up in several member States recently. (...)”* (para. 5)

Taking into account that *“with regard to the protection of human rights (including social rights) the revised European Social Charter remains the main reference”* (Para. 9) and *“in light of the evaluation made, the Parliamentary Assembly calls on the member states of the Council of Europe to “ amongst others:*

- *sign and ratify the revised European Social Charter and the European Convention on Social Security (ETS No. 078), if this has not yet been done, and consider supporting an update of the latter in accordance with the needs of today's work situations and life styles, so as to improve the rights of member States' citizens to a level at least equal or above the rights guaranteed by bilateral agreements* (para. 10.3);
- *closely assess current austerity programmes from the point of view of their short- and long-term impact on democratic decision-making processes and social rights standards, social security systems and social services, such as pension and health systems, family-oriented services or assistance services to the most vulnerable groups (people with disabilities, migrants, the unemployed, etc.)* (para 10.6);
- *design budget consolidation programmes not only based on savings to be applied to government budgets at various levels and social expenditure in particular, but also on higher income to be generated,(...) (para. 10.7).*

In sum, and taking into account the issue at stake in these collective complaints, *“the Assembly recommends a profound re-orientation of current austerity programmes, ending their quasi-exclusive focus on expenditure cuts in social areas such as pensions, health services or family benefits.(...) ”* (para. 6) and it notes that *“more recently, both the economic effectiveness of austerity measures and*

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<sup>3</sup> Parliamentary Assembly Resolution 1884 (2012) of 26 June 2012; available at: [http://assembly.coe.int/ASP/Doc/XrefATDetails\\_E.asp?FileID=18916](http://assembly.coe.int/ASP/Doc/XrefATDetails_E.asp?FileID=18916)

*the root causes of the crisis are increasingly being questioned by international experts and organisations. The short- and long-term negative effects of the measures on democratic processes and social rights standards have also come in for criticism.” (para 1)*

In the Explanatory Memorandum to the draft of this Resolution by Rapporteur Mr. Hunko is amongst others stated as well that<sup>4</sup>:

- *“The purpose of this work therefore is to give an overview of the consequences of austerity measures that have already become evident until May 2012, and to develop, on this basis, a set of recommendations. These are intended to contribute to public management and economic approaches involving long-term perspectives, transparent and democratic decision-making processes and the highest respect for European human rights standards, including social rights standards as enshrined in the revised European Social Charter (ETS No. 163).” (para. 6)*
- *“In some countries which have been applying austerity programmes since 2010, such as Greece, Ireland or Portugal, it can already be observed that the measures taken led to further economic recession which affected growing sections of the population, thus deepening the crisis, without necessarily providing the expected effects for public finances and the economy more generally. (...)”(para. 18, Underlining added)<sup>5</sup>*
- *“The most important legally binding instrument at European level is the revised European Social Charter, which ensures a broad protection of social rights and includes, for example, the protection against poverty and social exclusion (Article 30) and the right to housing (Article 31). However, a certain number of countries have not yet ratified this revised instrument. Amongst these countries are also some of those who applied austerity programmes to their public budgets and will continue to do so, such as Germany, Greece, Spain or the United Kingdom. In the face of continuous austerity policies, one should continue to urge these countries to ratify the revised Charter and respect a minimum level of social standards in any decision taken subsequent to the crisis. In addition, the particular situation of groups in need of special protection such as single parents, the elderly or children needs to receive special attention.” (para. 37, Underlining added)*
- *“Wherever policies aimed at lowering budget deficits are deemed necessary, it needs to be ensured that they do not disproportionately affect middle and lower income groups and those categories of the population which are in need of special protection (children, the elderly, people with disabilities, migrants, etc.) or reduce their living standards. (...)” (para. 51)*
- As to more recent developments in Greece (March 2012) but indicating in a way the general tenure of the austerity measures taken, the report notes that *“the Greek bailout was to be granted on the condition that the country would be implementing a further round of austerity*

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<sup>4</sup> Parliamentary Assembly Doc. 12948 of 7 June 2012; available at: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=18745&Language=EN>

<sup>5</sup> For a concrete evaluation of the impact of the concerned austerity measures in Greece in relation to social protection and social benefits, see Matsaganis, M. and Leventi, C. (2011), “Inequality, poverty and crisis in Greece”, ETUI Policy Brief, Issue 5/2011, Brussels: ETUI; available at: <http://www.etui.org/Publications2/Policy-Briefs/European-Economic-and-Employment-Policy/Inequality-poverty-and-the-crisis-in-Greece>



measures, including a decrease in minimum wages, a reduction of 150 000 public servants by 2015, the continuation of privatisation, and the prohibition of collective wage negotiations against the rights stated in the revised European Social Charter, the Charter of Fundamental Rights of the European Union and respective International Labour Organization (ILO) agreements.” (para. 16)

## C. International Labour Organisation (ILO)

### 1. High level mission (Report)

The International Labour Office published a ‘Report on the High Level Mission to Greece (Athens, 19-23 September 2011)’<sup>6</sup> which examines in some detail the Greek situation also in respect of pension reforms.

#### a) Legislative texts

In respect of pensions, the report refers to the following acts:

**33. Act No. 3863 of 8 July 2010 on the “New Social Security System and relevant provisions”** (FEK A’115/8-7-2010). *This Act:*

- *established as of 1.1.2015 a welfare entitlement to a basic pension (set by Article 2 at €360) supplemented by a retributive pension financed by the budget of the social security funds through the contributions of workers and employers, and limited the funding of social security by the State to the basic pension only. The Act resulted in the drastic reduction of pensions as well as the drastic extension of the minimum contributory period and the increase of the pensionable age. The State withdrew its guarantee for the funding of auxiliary pension; ...*

**41. After the conclusion of the High Level Mission, and at the time of writing this report, Act No. 4024/27-10-2011 on “Provisions concerning pensions, the common pay-scale and grading system [in the public sector], the labour reserve and other provisions for the implementation of the mid-term fiscal strategy 2012-2015”** was adopted by Parliament. ...In particular, the Act: ...

- *introduced pension cuts in the order of 40 per cent of the amounts over €1,000 which were received by persons below 55 years of age and 20 per cent of pensions for the amounts over €1,000 received by persons above 55 years of age. It also introduced reductions in supplementary pensions; ...*

#### b) Summary of information

In the final chapter of its report (‘VII. Conclusions and way forward’), the High level mission summarised the consequences as follows:

#### **Social security**

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<sup>6</sup> [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@normes/documents/missionreport/wcms\\_170433.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/missionreport/wcms_170433.pdf)

**322.** *The mission was informed that an actuarial study on the new pension system is being prepared in line with the provisions of Act No. 3863 which reformed the pension system by introducing significant pension cuts in July 2010, in order to assess the viability of the system which is at the heart of the reforms. The High Level Mission takes note of the ongoing cooperation between the Government and the ILO in the area of actuarial analysis.*

**323.** *The High Level Mission was informed that questions such as the impact of the pension reform on poverty levels as well as the sustainability of the social security system in the light of the wage and employment policies pursued in parallel, have not been addressed in discussions with the Troika. Data on these questions is not available at the level of the actuarial authority or the Ministry of Labour and Social Security. Its collection would be important for the purposes of the High Level Mission.*

**324.** *Another important question which emerged in discussions with the social partners and independent authorities has been the need to strengthen the governance of the social security system.*

## **2. ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)**

### ***a) CEACR observations 2011 on ILO Convention No. 102***

In its last report, the CEACR examined the situation in Greece in respect of ILO Convention No. 102 (Observation (CEACR) - adopted 2011, published the [101<sup>st</sup>] ILC session [2012] – Greece<sup>7</sup>) and concluded that there were no actual problems in respect of this Convention. However, it pointed to the severe underlying problems which should be prevented and

*“taking into account the gravity of the situation, the Committee calls on the ILO to continue to provide comprehensive technical assistance to Greece in reforming its social security system, and to draw the attention of all the parties implementing the support mechanism for Greece to the need, in order to prevent the drastic impoverishment of the population and mounting social unrest, to maintain social security benefits at least at the minimum levels prescribed by the Convention, as well as to establish the statistical monitoring system of the spread of poverty among different categories of the population and use its indicators to closely coordinate social security, tax and employment policies.”*

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<sup>7</sup> [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2699205](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2699205)

***b) CEACR report and conclusions on the annual reports submitted to the Secretary-General of the Council of Europe on the application of the European Code of Social Security and its Protocol.<sup>8</sup>***

In accordance with the arrangement made between the International Labour Organization and the Council of Europe under Article 74(4) of the European Code of Social Security, 20 reports were communicated to the Director-General of the International Labour Office by the Secretary-General of the Council of Europe with a view to their examination by the Committee of Experts on the Application of Conventions and Recommendations (considered to be the appropriate body of the ILO under the above provision of the Code) at its 82nd Session, in November–December 2011. One of these reports concerned the 29<sup>th</sup> Greek report.

The Committee expresses particular concern over the situation in Greece, where the overall reduction of social security benefits threatens to undermine the level of protection guaranteed by the Code.

In the general introduction, the Committee notes that

*“since the beginning of 2010, many European governments have chosen to implement severe austerity plans aimed at addressing the challenge of public debt and budget deficit and enhancing fiscal consolidation. The resulting social austerity measures and drastic reductions in the level of benefits undermine people’s trust in the social security system and raise concerns for social justice in handling the crisis. The Committee observes that the general responsibility of governments for the proper governance of the social security system obliges them to restore people’s confidence in their ability to be an effective and just regulator and provider of services in the interests of the people. To achieve this, the following principles of social solidarity and justice on which the Code is based become particularly important when times are bad:*

- that the cuts in benefits, likewise their costs, shall be borne collectively, spread equitably among the members of the society in a manner which avoids hardship to persons of small means and takes into account the economic situation of the country and of the classes of persons protected (Article 70(1) of the Code);*
- that the cuts in benefits shall not result from the unilateral withdrawal of the State or of the employers from the financing of the benefits, thus leaving the employees protected to bear more than 50 per cent of the total financial resources allocated to the protection of employees and their families (Article 70(2));*

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<sup>8</sup> This report and conclusions were also discussed at the meeting of the Governmental Committee of the European Social Charter and the European Code of Social Security at its 125<sup>th</sup> meeting from 26-30 March 2012 in Strasbourg. In view of this, the report and conclusions were integrated in working document GC(2012)04 , Governmental Committee of the European Social Charter and the European Code of Social Security, Report and Conclusions concerning the application of the European Code of Social Security and its Protocol by Germany, Belgium, Cyprus, Denmark, Spain, Estonia, France, Greece, Ireland, Italy, Luxembourg, Norway, The Netherlands, Portugal, the United Kingdom, Slovenia, Sweden, Switzerland, Czech Republic and Turkey, GC(2012)04, Strasbourg, 25 January 2012

- *that the cuts in benefits and related austerity measures shall be decided and managed in consultation with the representatives of the persons protected as well as of the employers and of the public authorities through the established mechanisms of tripartite social dialogue (Article 71(2)). “ (para. 3)*

Furthermore, the Committee notes that

*“The need to strengthen the governance of the social security system would require governments to plan and assess past and future social austerity measures in relation to one of the main objectives of the Code, which consists in the prevention of poverty among the categories of persons protected. The social security system would not fulfil its role if the benefits it provides were so low as to push workers below the poverty line; in such cases the State will be seen as failing to fulfil its general responsibilities under Articles 70(3) and 71(2) of the Code. Recalling that social progress is measured by the reduction of poverty, the Committee hopes that governments, in pursuing the objectives of curtailing the deficit, recapitalizing the banks and repaying the debts to their international creditors, will not lose sight of the objectives of social progress and the reduction of poverty. In this context, the Committee considers it the duty of any government to assess, together with the social partners, the spread of poverty in the country, particularly among persons of small means, and the ability of the available social security benefits to withstand this trend and “maintain the family of the beneficiary in health and decency” (Article 67(c) of the Code). (...)Taking into account the gravity of the situation in some European countries, the Committee considers that, in assessing the application by them of the European Code of Social Security, the competent bodies of the Council of Europe should draw the attention of all the parties concerned to the need to maintain social security benefits at least at the minimum levels prescribed by the Code, prevent the impoverishment of the population and preserve social peace.” (para. 4 and 5)*

As to the particular situation in Greece, the Committee finds that the adverse fiscal and economic situation of the country and the social austerity measures taken in law and practice have called into question the sustainability of the national social security system and resulted in the reduction of many social security benefits, threatening the application of all accepted Parts of the Code (Parts II, III, V, VI, VIII, IX, X). The conclusions concerning Greece appear in Appendix VIII to the report.

#### **D. The Greek National Commission for Human Rights (GNCHR)**

The Greek National Commission for Human Rights (GNCHR) was established and is operating under the UN Paris Principles (UN General Assembly, 85th Plenary, 20.12.1993, A/ RES/48/134) as an independent advisory body to the Greek State for the protection of Human Rights. In this capacity, it has adopted several recommendations in relation to the detrimental impact of the crisis and the related austerity measures adopted by the Greek government for the protection of human rights in Greece.<sup>9</sup> Most relevant in this regard are:

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<sup>9</sup> All GNCHR recommendations are available at: [www.nchr.gr](http://www.nchr.gr); the ones mentioned above and relating to the “impact of the” crisis can be found at: [http://www.nchr.gr/category.php?category\\_id=376](http://www.nchr.gr/category.php?category_id=376)

## **1. Recommendation of 7 June 2010 on “The need for constant respect of human rights during the implementation of the fiscal and social exit strategy from the debt crisis”**

Besides recalling the Governments’ due commitment as laid down in the Greek Constitution to amongst others ensure

*“the due undeviating respect of the principle of proportionality while adopting measures which aim to serve the public interest, even in particularly difficult or/and extraordinary conditions in times of peace, so as that adopted measures do not burden unilaterally, unjustly and disproportionately only a part of the population and especially the most vulnerable social groups with a serious and permanent impact on the enjoyment of their fundamental human rights” (art. 25 paragraph 1 of the Greek Constitution), the GNCHR also conveys to the State amongst others “its strong belief that the country’s binding international obligations as regards the protection of fundamental freedoms and social rights, especially during the current economic and social situation, must be fully respected, according to the constitutional principle of the supremacy of ratified international Conventions over any contrary provision of Law (art. 28 paragraph 1 of the Greek Constitution).”<sup>10</sup>*

This State obligation is according to the GNCHR imperatively imposed by the UN International Covenant on Economic, Social and Cultural Rights, the ILO Conventions N° 87 and 98 as well as

*“iii) the European Convention on Human Rights of 1950 (L.D. 53/1974) and the case-law of the European Court of Human Rights, according to which, inter alia, a drastic reduction of a social security benefit as a result of the statutory changes in the rules, based on which it has been established and calculated, can arise issues under the provisions of the Convention (Kjartan Asmundsson v. Iceland – judgment of 12.10.2004, Goudswaard-van der Lans v. Netherlands – judgment of 22.09.2005, Buchheit & Meiberg – judgment of 02.02.2006);*

*iv) the European Social Charter of 1961 (L. 1426/1984) and the case law of the European Committee of Social Rights, according to which, inter alia, when a State has to strike a balance between contradictory interests and make choices in terms of priorities and resources, given the current social situation, the adopted measures should be compatible to three criteria: to be implemented within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources (ECSR decisions on complaint No. 13/2002 of 4.11.2003, paragraph 53 and No. 31/2005 of 18.10.2006, paragraph 35).”*

## **2. Recommendation of 8 December 2011 “On the imperative need to reverse the sharp decline in civil liberties and social rights”.**

This Recommendation deplores the dramatic deterioration of living standards in Greece, which is coupled with the dismantling of the Welfare State, with unprecedented negative effects on the

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<sup>10</sup> Interesting to note thereby is also that the paragraph continues as follows: “The due observance of these obligations is not only imposed to the State, but also to the international organisations with whom the country co-operates in order to exit the external debt crisis” and thereby refers to the Report of the UN Independent Expert on the effects of external debt and other related international financial obligations of States on the full enjoyment of all human rights, 12 August 2009, paragraph. 30.

enjoyment of a wide spectrum of human rights. In particular, the GNCHR expresses even deeper concern at:

- *the ongoing drastic reductions in even the lower salaries and pensions; (...)*
- *the disorganization, reduction or elimination of social infrastructures;*
- *the drastic reduction or withdrawal of vital social benefits; (...) and*
- *the avalanche of unpredictable, complicated, conflicting, and constantly modified "austerity measures" of immediate and often retroactive effect, which exacerbate the general sense of insecurity.*

because these *"are rendering a significant part of the population destitute, widening the social divide, disrupting the social fabric, strengthening extremist and intolerant elements and undermining democratic institutions."* For the GNCHR it is amongst others clear that *"there is no way out of the socio-economic and political crisis which plagues Europe as a whole, nor any future for the Union, if fundamental civil liberties and social rights are not guaranteed."*

### **III. The law**

#### **A. Preliminary observations**

At first, the consequences of admissibility decision have to be clarified. In its decision the ECSR was of the opinion that Article 31§1 ESC has no legal value on its own:

*"The Committee recalls that Article 31 of the Charter of 1961 .... cannot lead to a violation as such ..."* (para. 6)

However, *"the Committee considers that the complaint alleges, in substance, a violation of Article 12"* (para. 7): Therefore, Article 31§1 ESC has to be evaluated in the context of Article 12§3 ESC. Within the framework of the interpretation of the latter provision it would appear helpful to start the legal analysis with an analysis of Article 31§1 ESC (at first on its own) in order to better assess its impact on the legal analysis of the cases in respect of Article 12§3 ESC.

#### **B. General principles as interpretation framework**

Before going into any details of a legal assessment in respect of the cases at hand it appears important to re-state fundamental principles for which the ESC has been elaborated, adopted and - together with the Revised European Social Charter (RESC) - ratified by nearly all Member States of the Council of Europe. These fundamental principles are enshrined in the ESC's preamble.

The preamble refers to the aim of the Council of Europe as facilitating the 'economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms' (1<sup>st</sup> recital). Moreover, the Governments declare themselves 'resolved to make every effort in common to improve the standard of living and to promote the social well-being of both their urban and rural populations by means of appropriate institutions and action' (4<sup>th</sup> recital).

The general line may be summarised as ‘social progress’. This should be borne in mind when interpreting specific ESC’s provisions in particular in times of economic and financial crisis.

## C. Article 31 ESC and its impact on the merits of the cases

### 1. Wording of Article 31(1) ESC

Article 31 ESC<sup>11</sup> reads as follows<sup>12</sup>:

#### **Article 31 – Restrictions**

The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

### 2. Legal analysis on the merits

Notwithstanding problems with the ECSR’s admissibility decisions in these cases, the ETUC will concentrate its arguments on the merits.

#### *a) Concept of Article 31 ESC: justification obligation in case of regression*

In its admissibility decision, the ECSR is of the opinion that Article 31§1 ESC has no legal value on its own. It justifies this evaluation by a reference to the ECHR:

This Article corresponds to the second paragraph of Articles 8 to 11 of the European Convention on Human Rights. It therefore cannot lead to a violation as such.

But this assumption does not appear to take fully account of the wording of this provision. Comparing the wording of Article 31§1 ESC with paragraphs 2 of Articles 8 to 11 ECHR there is an important difference relating to the mentioning of ‘effective’ realisation or exercise in Article 31§1 ESC (“when effectively realised”, “effective exercise”) which does not appear in the aforementioned ECHR provisions. It means that at a given stage of a right “when effectively realised” (i.e. also in cases where the national situation is going beyond the minimum standard required by the specific right at

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<sup>11</sup> There is no Explanatory Report for the ESC; this provision has been transferred to the RESC without any change, the Explanatory Report for the RESC does not contain any explanation on the substance either: „138. These three Articles correspond, *mutatis mutandis*, to the provisions of Articles 30, 31 and 32 of Part V of the Charter.”

<sup>12</sup> (the further authentic French version:)

#### **Article 31 – Restrictions**

1 Les droits et principes énoncés dans la partie I, lorsqu'ils seront effectivement mis en œuvre, et l'exercice effectif de ces droits et principes, tel qu'il est prévu dans la partie II, ne pourront faire l'objet de restrictions ou limitations non spécifiées dans les parties I et II, à l'exception de celles prescrites par la loi et qui sont nécessaires, dans une société démocratique, pour garantir le respect des droits et des libertés d'autrui ou pour protéger l'ordre public, la sécurité nationale, la santé publique ou les bonnes mœurs.

2 Les restrictions apportées en vertu de la présente Charte aux droits et obligations reconnus dans celle-ci ne peuvent être appliquées que dans le but pour lequel elles ont été prévues.

stake, i.e. Article 12§3 ESC) specific justifications are needed to show the conformity with this provision.

### *b) Content of Article 31 ESC*

In any event, the measures promised by the Greek Government in the Memoranda of Understanding and subsequently adopted by the Greek Parliament have to be justified against the background of the requirements of Article 31§1 ESC. Assuming that they have been “prescribed by law”, the further two elements have to be evaluated:

#### *(1) Legitimate aim?*

The complaints state that it is necessary to

base ourselves on the reasons given in the basic Memorandum (the first of the series) and Act No. 3845/2010. According to these texts the economic recovery programme has two aims – firstly a financial adjustment, in other words redressing the imbalances in public finances and reducing Greece’s external debt, and secondly restoring competitiveness (Appendix III of the Memorandum, paragraphs II and III, particularly No. 7).

Against this background, it has to be evaluated whether these aims are in conformity with Article 31§1 ESC which defines the legitimate aims as follows:

for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals

At first, this list is exhaustive. Secondly, economic or financial aims are not mentioned in this list and therefore not legitimate. Even the term of ‘public interest’ does not allow referring to this aim for reducing rights for economic or financial reasons. This is confirmed by the French version referring to “l’ordre public”. In conclusion, the measures adopted by the Greek Parliament fall short of a legitimate aim.

#### *(2) Necessary in a democratic society?*

If the ECSR would decide otherwise and recognise a ‘legitimate aim’ (against the arguments raised above), the further examination requires an in-depth analysis of the justifications brought forward by the Greek Government in respect of their appropriateness being a prerequisite for their necessity.

##### *(a) Appropriateness*

The complaints have well described that the measures adopted by the Greek Parliament cannot be considered as ‘appropriate’.

##### *(b) Necessity*

Referring again to the convincing arguments brought forward by the complainants in respect of a lack of necessity they can be reinforced by the following considerations:

First, in its letter of intent of 6 August 2010 the Greek Government praises itself that “Parliament approved a substantial pension reform ahead of schedule”<sup>13</sup>. This demonstrates that there is no

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<sup>13</sup> Para 10, page 6 <http://www.imf.org/external/np/loi/2010/grc/080610.pdf> (in the respective table (2), the Government even qualifies the situation as “[w]ell advanced”).



necessity. Even assuming that the requirements deriving from the MoU could be considered as a general justification (what is strongly denied), the measures could have also been adopted later.

Second, the measures cannot be considered as 'necessary' if alternatives are available. It appears that in the Greek situation measures such as eliminating waste, inefficiency and fraud were available and have not been sufficiently taken into account and put into practice before reducing pension benefits.

### 3. Interim Conclusions

In conclusion, when examining the merits of an alleged violation of Article 12§3 ESC, the Committee would have to start its analysis by examining whether the justification for a regression in the right at stake is sufficient. In the cases at hand, the ETUC is of the opinion that this is not the case (for lack of appropriateness and necessity). This should result in a conclusion non-compliance with Article 12§3 read in conjunction with Article 31§1 ESC.

#### D. Article 12§3 RESC - Right to social security

Only in the case that the Committee would follow neither the concept described above nor the subsequent assessment, it would have to proceed to an analysis of compliance with Article 12§3 ESC on its own.

On the basis of the wording of Article 12§3 ESC (1.) and of an analysis of the respective ECSR's case-law (2.) an interpretation approach is developed (3.) which leads to a clear assessment of the cases at hand (4.).

#### 1. Wording of Article 12§3 ESC

Article 12§3 ESC reads as follows:

##### **Article 12 – The right to social security**

With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake: ...

3 to endeavour to raise progressively the system of social security to a higher level; ...

#### 2. The Committee's general interpretative approach

In its first 'statement on interpretation' on Article 12§3 ESC, the Committee made it clear that the aim was a gradual raising "above the level required by International Labour Convention No. 102" (Conclusions III).

However, in Conclusions XIII-4 ('General observation') the Committee "accepted **alterations** to social security systems in certain cases, so as to take the situation of states into account, in so far as these changes appeared necessary in order to **ensure the maintenance of a given system of social security**" (page 139, emphasis added). The list of criteria to be applied for the assessment re-appears in the Digest 2008 (with certain deletions as to the criterion of 'necessity of the reform' which in Conclusions XIII-4 reads in full 'the necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued)').

In Conclusions XVI-1 the Committee started a 'double approach' by looking at the

- "progressivity": "In the light of "progressivity" principle embodied in this paragraph the Committee wishes to know in particular whether the protection provided by the social security system has been extended to cover more of the population and whether new risks/benefits have been introduced."
- "restriction": "The restrictions on the right to social security should be assessed in the light of Article 31§2 of the Charter. In view of the changes made to social security systems as a result of economic and demographic factors the Committee requested in cycle XIII-4 that *inter alia* the following information on any changes to the social security system be submitted..."

Obviously, this represents a shift from 'alterations ... in order to ensure the maintenance of a given system of social security' (Conclusions XIII-4) to a broader concept of 'restrictions' in relation to 'changes made to social security systems as a result of economic and demographic factors' (Conclusions XVI-1).

However, this 'double approach' is not used in a coherent way in the sense that a lack of the first element (i.e. 'progress') would automatically lead to a conclusion of non-conformity. On the contrary, the Committee looks to the criteria it has developed. But even this list does not provide a clear guidance as how to assess the different criteria in relation to one another and on the whole. This case-by-case approach does not appear to be in line with the general progress requirement.

### 3. Required interpretative approach

On the basis of the ECSR's general interpretative rules (a)) the specific character of the right to social security as (social) human right is highlighted (b)) and the elements of interpretative rules enshrined in Article 31 of the Vienna Convention on the Law of Treaties (VCLT) are taken into account (c)).

#### a) General interpretative rules developed by the ECSR

The ECSR has developed its case-law on the interpretative rules to be observed in Complaint No. 47/2008, Defence for Children International (DCI) v. the Netherlands, decision on the merits of 20 October 2009 as follows (emphasis added):

34. The Committee recalls that the Charter was envisaged as a **human rights** instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality, solidarity (FIDH v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 27) and other generally recognised values. It must be interpreted so as to give life and meaning to fundamental social rights (FIDH v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 29).

35. The Committee interprets the Charter in the light of the rules set out in the **Vienna Convention on the Law of Treaties of 23 May 1969**, among which its **Article 31§3(c)**, which indicates that account is to be taken of "any **relevant rules of international law** applicable in the relations between the parties". Indeed, the Charter cannot be interpreted in a vacuum. The Charter should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including in the instant case those relating to the

provision of adequate shelter to any person in need, regardless whether s/he is on the State's territory legally or not.

36. The Committee considers that a **teleological approach** should be adopted when interpreting the Charter, i.e. it is necessary to seek the interpretation of the treaty that is the most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties (OMCT v. Ireland, Complaint No. 18/2003, decision on the merits of 7 December 2004, § 60). It follows *inter alia* that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter (FIDH v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 27-29).

### ***b) Right to social security as human right***

As social corollary to the European Convention on Human Rights, it would appear obvious that the rights enshrined in the ESC have to be considered as (social) human rights. More specifically in relation to the 'Right to social security' enshrined in Article 12 ESC this is confirmed by the fact that Article 12 (The right to social security) is one of the seven 'hard-core' provisions of the Charter (Article 20§1 lit b ESC). This underlines the specific importance attributed to this right which is aimed to protect "all workers and their dependents" (Part I No. 12) which makes the character of a (social) human right it even more obvious.

The ECSR concludes in the respect that the Charter "must be interpreted so as to give life and meaning to fundamental social rights" (see above a), para. 34).

### ***c) The general rules of interpretation - Article 31 Vienna Convention on the Law of Treaties***

The ECSR "interprets the Charter in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969" (see above a), para. 35). Article 31 VCLT contains several principles the most important of which are dealt with in more detail:

#### ***(1) Textual interpretation ('ordinary meaning')***

The main textual content of Article 12§3 ESC can be concentrated on the two words 'raise progressively'. This is clearly an 'upwards' obligation. The specific meaning of these terms is highlighted by the fact that all other provisions of the ESC do not contain such a specific progressive obligation<sup>14</sup>.

Even accepting that 'endeavour to raise progressively' does not express 'are obliged to ...' the wording 'raise progressively' does not allow doing nothing and remaining at a given level, in any event it does not permit regression. This is confirmed by the general principles of the ESC which were summarised as obliging to move in the direction of 'social progress' (III.B.). Therefore, reductions in pensions, in particular large scale and high amount reductions cannot be considered as in line with the 'progressive' obligations enshrined in Article 12§3 ESC.

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<sup>14</sup> There is only one further provision containing a similar obligation (Article 2§1 ESC: to reduce 'progressively' the working time).

## (2) Teleological interpretation ('object and purpose')

The Charter's general principles in direction of social progress have been described above (see III.B.). Specifically, in respect of Article 12§3 ESC its specific character has to be taken into account. It obliges the responsible States to "endeavour to raise progressively the system of social security to a higher level". Referring also to the term 'progressively' it has to be considered as of dynamic character and, therefore, by this very nature prohibiting at least regression. This is particularly interlinked with and thus confirmed by the general principles mentioned above.

## (3) Systematic interpretation ('context')

Article 12§3 ESC has to be analysed in its context being defined on the one hand by its preceding provision (Article 12§2 ESC) and the general provision on permissible restrictions (Article 31 ESC).

Article 12§2 ESC contains a minimum obligation. It means that the requirements of ILO Convention No. 102 have to be satisfied in relation to old age pension. The effects of the measures taken most likely violate the substance of this ILO Convention (see above II.C.2.a) and therefore would also not be in conformity with Article 12§2 ESC). But Article 12§3 goes beyond this minimum protection in §2. Therefore, if already the latter provision is not respected, Article 12§3 by its additional dynamic character automatically cannot be considered as complied with.

Concerning Article 31 ESC it would appear impossible to combine it with Article 12§3 ESC. The very nature of a dynamic provision (Article 12§3 ESC) does not allow for general restrictions. It has to be considered as a *lex specialis* excluding any justification for 'restrictions' on its 'progressivity' part.

## (4) Internationally oriented interpretation ('relevant rules of international law')

Linked to the character as a fundamental social right, Article 12§3 ESC is embedded in the context of internationally recognised human rights provisions for social security.

### (a) *Recognised at European level*

From the outset, it should be noted that Article 12 ESC has served as a basis for the inclusion of 'social security' into the Charter of Fundamental rights of the European Union (CFREU):

#### **Article 34 Social security and social assistance**

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

#### *Explanation<sup>15</sup> on Article 34 — Social security and social assistance*

The principle set out in Article 34(1) is based on Articles 153 and 156 of the Treaty on the Functioning of the European Union, Article 12 of the European Social Charter and point 10 of the Community Charter on the rights of workers. ... .

### (b) *Recognised at International level*

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<sup>15</sup> OJ C 303/17, 14.12.2007.

Moreover, it should be recalled that the International Covenant on Economic, Social and Cultural Rights (ICESCR) includes a right to social security:

#### Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

In its respective 'General Comment No. 19'<sup>16</sup> the Committee on Economic, Social and Cultural Rights (CESCR) underlines the importance of this right in respect of 'human dignity':

1. Article 9 of the International Covenant on Economic, Social and Cultural Rights (the Covenant) provides that, 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.' The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights.

New reinforcement of the human rights approach in respect of social security comes from the ILO to which the ESC has specific relationship (Article 26 ESC). In its recent General Survey 2011 the Committee of the Application of Conventions and Recommendations (CEACR) expressly refers to "Social security as a human right and a duty of the State" and describes extensively its international context<sup>17</sup>.

#### *d) Interim conclusions*

Based on its character of a (social) human right and the generally recognised rules of interpretation Article 12§3 should be interpreted as having practical 'progressive' effects.

In any event, the very minimal content of a 'progressive' provision is the prohibition of a regression. Balancing exercises can only be permitted in cases of improvement. Therefore, it would not appear possible to alter the character of this provision from a progressive to a restrictive content. If interpreted as guaranteeing only basic subsistence level of protection in a non-discriminatory way Article 12§3 ESC would be deprived of nearly any substantial and specific meaning (in particular in relation to Article 12§1 and 2 ESC).

#### **4. Interim Conclusions**

According to the interpretation developed above, the Greek situation as described in the complaints is directly violating Article 12§3 ESC because it is not only refraining from improvements but, conversely, reducing - to an unknown large extent - old age pension benefits.

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<sup>16</sup> <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/403/97/PDF/G0840397.pdf?OpenElement>

<sup>17</sup> *International Labour Office*, International Labour Conference, 100th Session, 2011 General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization - Third item on the agenda: Information and reports on the application of Conventions and Recommendations Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Report III (Part 1B), Geneva 2011, Part II, Chapter 1, A., paras. 154 ff.

[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_152602.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_152602.pdf)

## **E. Conclusions**

As demonstrated above, the ETUC considers that the austerity measures criticised by the complainant organisations are not in conformity with

- Article 12§3 in conjunction with Article 31 ESC (III.C.) and in any event
- Article 12§3 ESC on its own (III.D.).