ARTICLES

THE EUROPEAN SOCIAL CHARTER TURNS 60: ADVANCING ECONOMIC AND SOCIAL RIGHTS ACROSS JURISDICTIONS

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ASSESSING THE EFFECTIVENESS OF THE EUROPEAN SOCIAL CHARTER: A CASE STUDY ON DISMISSAL REFORMS

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ABSTRACT: In the aftermath of the Eurozone crisis, several states in Europe carried out structural reforms targeting existing laws on dismissals, thus weakening employee protection. In that context, the Revised European Social Charter, as interpreted by the European Committee of Social Rights, established itself as a reliable legal instrument protecting employees against certain types of unfair (unjustified) dismissal in Europe. This *Article* follows a case study design to undertake a comparative examination of the impact of the Revised Charter's perspective vis-à-vis unfair dismissals in some European jurisdictions (Italy, France, and Greece), with a particular focus on the reasoning of their domestic courts in recent relevant decisions. In light of the findings, it provides a discussion of the Charter's renewed potential to advance economic and social rights, especially the right to protection in cases of termination of employment, across domestic jurisdictions in Europe.

KEYWORDS: economic and social rights – unfair dismissals – art. 24 Revised European Social Charter – European Committee of Social Rights – collective complaints procedure – domestic courts.

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I. Introduction

To respond to the challenges precipitated by the Eurozone crisis, several European states followed the "recipe" of austerity, implementing structural labour market reforms, either within "bailout" programmes or under the EU economic governance framework. A similar focal point of these reforms was that they targeted existing laws on dismissals,[1] within the framework of the neoliberal dogma of labour market flexibilisation and liberalisation,[2] thus weakening specific aspects of employee protection.[3]

One particular feature of the reforms was that they relaxed the requirement for the employer to justify the dismissal of an employee under specific circumstances, by narrowing its scope, limiting its control by judges, or by weakening the sanctions that may be imposed on the employer.[4] For a long time, such a justification requirement, in most European countries, such as Italy and France, has entailed the obligation of the employer to reinstate or compensate the dismissed employee. Its goal has been to dissuade employers from dismissing employees (except as a last resort measure), control the abuse of managerial power, and secure employment positions. Greece, on the other hand, is a prominent example among a few European countries having developed a liberal concept of dismissal,[5] according to which the requirement for justification is absent.[6] The underlying objective of the reforms was to give precedence to the certainty and security of employers, as well as to limit the control of an impartial judge over economic and organisational choices of employers in relation to the preservation of the employees' position.

In Italy, the introduction in 2015 of the so-called Jobs Act (Legislative Decree n. 23/2015) marked the beginning of a new era in Italian labour law.[7] The reform introduced *inter alia* an automatic arithmetic system (a "scale" or "benchmark") to calculate financial compensation for unfair (*i.e*. unjustified and, therefore, unlawful) dismissal (without just

[1] E Kovács, 'Individual Dismissal Law and the Financial Crisis: An Evaluation of Recent Developments' (2016) European Labour Law Journal 368.

[2] M Yannakourou and C Tsimpoukis, 'Flexibility Without Security and Deconstruction of Collective Bargaining: The New Paradigm of Labor Law in Greece' (2014) Comparative Labor Law & Policy Journal 331, 333.

[3] See, for an overview, I Schömann, 'Labour Law Reforms in Europe: Adjusting Employment Protection Legislation for the Worse?' (ETUI Working Papers 02-2014).

[4] B Palli, 'Les réformes nationales de la justification du licenciement au prisme des standards européens et internationaux' (2018) Revue de droit du travail 618.

[5] B Palli, 'La place du "barème" dans certains pays européens' (2019) Droit social 310.

[6] This freedom of the employer was compensated for in Greece through comparatively long notice periods and high severance payments, which were however drastically reduced during the Eurozone Crisis. See M Aleksynska and A Schmidt, *A Chronology of Employment Protection Legislation in Some Selected European Countries* (International Labour Office 2014) 11-12.

[7] For an overview see, among many, MT Carinci, '"In the Spirit of Flexibility": An Overview of Renzi's Reforms (the so-called Jobs Act) to "Improve" the Italian Labour Market' (CSDLE "Massimo D'Antona" Working Papers 285-2015); C Cester, 'I licenziamenti nel Jobs Act' (CSDLE "Massimo D'Antona" Working Papers 273-2015).

cause – *giusta causa*),[8] based solely on the criterion of the employee's seniority of service.[9] The objective of introducing such a technical instrument of governance as a scale was to make compensation for unfair dismissal – in companies with more than 15 employees – perfectly calculable and predictable in advance.[10] It thus excludes the possibility that judges make subjective decisions about the amount of compensation to be given to an employee who has been dismissed (for economic reasons) without justification.

In particular, the standard amount of compensation that the Italian judge may (automatically) grant to employees hired after the entry into force of the Jobs Act (7 March 2015) is set at two monthly lump-sum instalments of the last remuneration per year of seniority in the company. The compensation "floor" (minimum or lower limit) is set at four months' salary and its "ceiling" (maximum or upper limit) at 24 months' salary. Notably, in 2018, the floor of four months' wages and the ceiling of 24 months' wages were raised (by Legislative Decree n. 87/2018) to six and 36 months respectively, but the calculation system did not change.

Remarkably, after three years of applying this system, the lump-summing of compensation for unfair dismissal, based solely on the criterion of seniority, was found by the Italian Constitutional Court (*Corte costituzionale* – hereafter ItCC) to be contrary to the Italian Constitution in relation to art. 24 of the Revised European Social Charter (hereafter RevESC) (among a few constitutional principles).[11] In its judgment n. 194/2018 of 26 September 2018, the ItCC found – giving due consideration to the basic lines of the "jurisprudence" of the European Committee of Social Rights (hereafter ECSR or Committee) – that the automatic character of the Italian scale does not provide adequate compensation for the damage suffered by the employee unjustly dismissed, nor does it deter the employer from proceeding with a dismissal.[12]

In a similar fashion to the Italian reforms, in 2017 the French government introduced a mandatory reference system of compensation for dismissals without real and serious cause (*cause réelle et sérieuse*),[13] amending art. L. 1235-3 of the French Labour Code.[14] This scale – known as *barème Macron* – sets a floor (*plancher*) and a ceiling (*plafond*) for the compensation of damage (in months of gross salary) that the judge may grant to an employee dismissed

[8] Law n. 604 of 15 July 1966 (Italian Official Gazette n. 195, 6 August 1966) subjects the validity of dismissal to a just cause, as well as to a justified objective or subjective reason.

[9] E Ales and MC Degoli, 'Le licenciement et la réforme du droit italien' (2015) Revue de droit du travail 771; P Ichino and F Martelloni, 'Le *Jobs Act* italien: quelles inspirations?' (2015) Revue de droit du travail 299.

[10] T Boccon-Gibod, 'La "barémisation" comme technique de gouvernement' (2019) Droit social 285.

[11] European Social Charter (Revised) [1996].

[12] See *e.g.* S Giubboni, 'Il contratto di lavoro "a tutele crescenti" (parzialmente) conformato a Costituzione' (2019) LavoroDirittiEuropa 1.

[13] See French Labour Code – *Code du Travail* art. L. 1232-1, as modified by Law n. 2008-596 of 25 June 2008.

[14] Through Ordinance n. 2017-1387 of 22 September 2017 art. 2. See J Mouly, 'Le plafonnement des indemnités de licenciement injustifié devant le Comité européen des droits sociaux' (2017) Droit social 745.

without real and serious cause, according to the sole legal criterion of the employee's seniority in the company – in companies employing more than eleven employees.

As a result, the employee is no longer guaranteed "full compensation" for the damage suffered. One of the cardinal principles of the law of civil liability under French law is therefore set aside in the field of dismissals without real and serious cause.[15] The objective of this reform is the same as that of the Italian reform: a reduction of uncertainty for employers, predictability (particularly for small and medium-sized enterprises), and the circumscription of the judges' discretionary power in that respect. Evidently, the Jobs Act and the *barème Macron* have brought the Italian and French dismissal mechanisms closer together, although differences remain.[16]

Notwithstanding, despite the fierce criticism that the *barème Macron* provoked – and in contrast to the relevant judgment of the ItCC – the French Council of State (*Conseil d'État*),[17] having the competence to conduct a treaty-based review of legislation (*contrôle de conventionnalité*), found no contradiction with art. 24 RevESC and art. 10 of International Labour Organization (ILO) Convention n. 158.[18] A few months later, the French Constitutional Council (*Conseil constitutionnel*), which only carries out a constitutional review of legislation, found no contradiction with the Constitution and validated the scale.[19] However, the French Constitutional Council does not carry out a treaty-based review of legislation, while both the Council of State and the Constitutional Council confined themselves to a mere superficial scrutiny of the provisions in dispute. These facts have sparked a huge debate in the French legal doctrine and the judicial practice of labour courts (*conseils de prud'hommes*) *vis-à-vis* the compatibility of the new dismissal provisions with the RevESC and ILO Convention n. 158.

Against this background, this *Article* analyses the perspective of the European Social Charter (hereafter: Charter) on the right to protection in cases of unfair (unjustified) dismissals, as part of the wider European and international socio-economic rights protection framework. Thereafter, the *Article* undertakes a comparative exploration of the impact of the (Revised) Charter on Italian and French courts' reasoning in relevant cases of unfair dismissals under the newly adopted compensation regimes. Following that, the analysis turns to Greece, a country that has recently forcefully witnessed the impact of the Charter's perspective on the right to protection in cases of unfair dismissals, despite traditionally having a structurally different dismissal regime. It concludes by synthesising the findings and

[15] J Mouly, 'La barémisation des indemnités prud'homales: un premier pas vers l'inconventionnalité?' (2019) Droit social 122.

[16] Before the introduction of the lump-summing mechanisms, the Italian and French systems were different in that the former favoured the reinstatement of the employee unjustly dismissed, which had a reparative and dissuasive function. The latter, on the other hand, favoured the full compensation of the employee's loss, having a reparative and dissuasive character that was accomplished through the existence of compensation floors in certain circumstances. See C Alessi and T Sachs, 'La fin annoncée du plafonnement de l'indemnisation du licenciement injustifié: l'Italie montre-t-elle la voie?' (2018) Revue de droit du travail 802.

[17] French Council of State (summary proceedings) decision of 7 December 2017 n. 415243.

[18] International Labour Organization of 1982 C158 – Termination of Employment Convention www.ilo.org.

[19] French Constitutional Council decision of 21 March 2018 2018-761 DC.

discussing the Charter's renewed potential to advance economic and social rights, especially the right to protection in cases of termination of employment, across domestic jurisdictions in Europe.

II. The Charter's perspective on the right to protection in cases of termination of employment

II.1. The scope and significance of art. 24 RevESC

Envisaged as a bulwark against employers' arbitrary dismissal decisions, art. 24 RevESC enshrines the right of all workers, who have signed an employment contract,[20] to protection in cases of termination of employment. According to para. 84 of the Explanatory Report to the RevESC, art. 24 sets out in particular two general principles: *i)* the right of workers not to be dismissed, on the initiative of the employer,[21] unless there are valid reasons[22] "connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service",[23] and *ii)* the right to the remedy of "adequate compensation or other appropriate relief" in cases of unfair dismissal,[24] as well as a right to appeal to an impartial body in such cases.[25]

It should be noted that art. 24 RevESC is one of the new provisions inserted in the revised Charter, which had not been included in the original Charter[26] or the 1988 Protocol.[27] A similar provision – albeit very broadly formulated[28] – can also be found in art. 30 of the EU Charter of Fundamental Rights (EUCFR),[29] which, according to the Explanation

[20] The Appendix to the RevESC regarding art. 24 lists "exhaustively" (Conclusions n. 2012/def/IRL/24/EN of the European Committee of Social Rights of 7 December 2012 on Ireland) three categories of employed persons that a state may exclude from some or all of its protection.

[21] See Explanatory Report to the European Social Charter (Revised) [1996] para. 87; Appendix to the European Social Charter (Revised) [1996].

[22] The notion of "valid reasons" is to be considered an autonomous legal notion, authentically interpreted as such by the ECSR. See D Vassiliou, 'Limitations on the Abusive Termination of the Employment Contract on the Employer's Initiative and Protection Against Abusive Dismissals' (2017) Epitheoresis Ergatikou Dikeou 535 (translated from Greek).

[23] Para. 3 of the Appendix to the RevESC concerning art. 24 lays down a non-exhaustive – according to para. 89 of the Explanatory Report to the RevESC – list of non-valid grounds for termination of employment.

[24] The remedies "adequate compensation or other appropriate relief", shall, according to the Appendix to the RevESC, "be determined by national laws or regulations, collective agreements or other means appropriate to national conditions".

[25] The right to appeal to an impartial body is verbatim reproduced in the RevESC as enshrined in art. 8(1) of ILO Convention n. 158.

[26] European Social Charter [1961].

[27] Additional Protocol to the European Social Charter [1988].

[28] M Schmitt, 'Article 30: Protection in the Event of Unjustified Dismissal' in M Schmitt and others (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing 2019) 506.

[29] Charter of Fundamental Rights of the European Union [2012].

on the latter, draws inspiration from art. 24 RevESC. This means in substance that art. 30 EUCFR is also to be interpreted in light of the "jurisprudence" of the ECSR.[30] Notwithstanding, as is clear, under art. 51(1) EUCFR, the EU Charter is addressed to the Member States only when they are implementing Union law. Furthermore, the EU, in practice, has not exercised the competence conferred on it by art. 153(2)(d) of the TFEU in the area of "protection of workers in the event of termination of their employment contract" by adopting a specialised Directive on the consequences of unjustified dismissals.[31] As a result, the scope of protection of art. 30 EUCFR is restricted. In addition to that, the Court of Justice of the EU (CJEU) maintains a rather irreconcilable position, by denying the applicability of art. 30 EUCFR – at the admissibility stage – in cases where litigants challenge national austerity measures on dismissals.[32]

On the other hand, another similar provision to art. 24 RevESC is enshrined in art. 10 of ILO Convention n. 158, which has in fact been the source of inspiration for the former.[33] Remarkably, most of the provisions of art. 24 (and its Appendix) have been either taken *verbatim* from provisions of ILO Convention n. 158 or are consistent with the latter.[34] Consequently, it could be argued that art. 24 must be interpreted in accordance with ILO Convention n. 158,[35] even if a contracting party to the RevESC has not ratified the ILO Convention (see *e.g.* Italy or Greece). This is particularly important, since only 36 countries around the globe have ratified this ILO Convention, of which only 10 are EU Member States (including France), whereas art. 24 RevESC is binding on 31 European countries, of which 17 are EU Member States.[36] Furthermore, the International Covenant

[30] See G Heerma van Voss and B ter Haar, 'Common Ground in European Dismissal Law' (2012) European Labour Law Journal 215, 221; N Bruun, 'Protection Against Unjustified Dismissal (Article 30)' in B Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights* (Nomos Verlag 2006) 337. For the potential obstacles and shortcomings in that respect see G Orlandini, 'L'art. 24 della Carta sociale europea e i possibili effetti della decisione del Comitato europeo dei diritti sociali "Cgil v. Italy" sulla disciplina del licenziamento' (2021) Diritti Lavori Mercati 83.

[31] On the reasons for the EU's omission in that regard see J Kenner, 'Article 30: Protection in the Event of Unjustified Dismissal' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 146. The Union has legislated only partially on dismissals. Directives cover the procedure in collective redundancies, discriminatory dismissals, and dismissals in specific situations concerning, *e.g.* transfer of undertakings or maternity. Consequently, it is mainly national rules that apply – with considerable variations – in respect of the consequences of unfair dismissals.

[32] See case C-361/07 *Polier* ECLI:EU:C:2008:16; case C-117/14 *Nisttahuz Poclava* ECLI:EU:C:2015:60; joined cases C-488/12, C-491/12 and C-526/12 *Nagy and others* ECLI:EU:C:2013:703; case C-323/08 *Rodríguez Mayor and others* ECLI:EU:C:2009:770.

[33] See para. 86 of the Explanatory Report to the RevESC.

[34] See *e.g.* arts 2, 3, 4, 5, 6, 8, 9, and 10 of ILO Convention n. 158.

[35] M Schmitt, 'Article 24: The Right to Protection in Cases of Termination of Employment' in N Bruun and others (eds), *The European Social Charter and the Employment Relation* (Hart Publishing 2017) 416.

[36] 35 Council of Europe Member States have ratified the RevESC, including 22 EU Member States. However, Austria, Belgium, Hungary, Germany, and Sweden have opted not to be bound by art. 24 RevESC, in

on Economic, Social and Cultural Rights (ICESCR)[37] does not enshrine the right to protection in cases of termination of employment, albeit the UN Committee on Economic, Social and Cultural Rights (CESCR) has considered that such protection could be derived from the right to work, as enshrined in art. 6 of the Covenant.[38] Finally, it should be noted that many constitutions of European states do not explicitly recognise the right to protection in cases of termination of employment.

Since the objective of art. 24 is to preserve the stability and security of employment relations,[39] its importance for the protection of employees becomes even more manifest in the context of an economic crisis and the measures implemented therein. Furthermore, it is worth noting that art. 24 RevESC resembles more the structure of a classic civil right such as those enshrined in the European Convention on Human Rights (ECHR)[40], rather than that of a social (welfare) right dependent on state intervention. In addition, it is a clear-cut case of a set of clear and precise provisions, containing both substantive and procedural obligations (including the right to a judge), which have been even further interpretively substantiated by the Charter's monitoring body.

These assertions have been confirmed on many recent occasions by domestic courts, which have been increasingly granting direct effect to the provisions of art. 24, while at the same time giving significant weight to their interpretation by the ECSR, as delineated below. As a result, in light of the above considerations, it can be concluded that art. 24 RevESC is *prima facie* the most reliable treaty provision that could provide a solid standpoint of a justiciable and effective socio-economic right at the domestic level, protecting employees against certain types of dismissal in Europe, especially in times of crisis.

II.2. The interpretive approach of the European Committee of Social Rights

The ECSR has had the opportunity to provide a rich interpretation of art. 24 RevESC in its "conclusions" under the reporting procedure.[41] Concerning the rather vague principle of

accordance with Part III, art. A of the RevESC establishing an *à la carte* system of acceptance of Charter provisions. Seven Member States to the Council of Europe have so far only ratified the 1961 Charter.

[37] International Covenant on Economic, Social and Cultural Rights [1966].

[38] CESCR General Comment n. 18 of 24 November 2005 (The Right to Work), paras 11 and 35 cited in M Schmitt, 'Article 30' cit. 517.

[39] M Schmitt, 'Article 24' cit. 413.

[40] European Convention for the Protection of Human Rights and Fundamental Freedoms [1950]. Several ECHR provisions, as interpreted by the European Court of Human Rights ("ECtHR"), have been deemed as applicable by the latter in cases of termination of employment, namely, arts 6(1), 8(1), 9, 10, and 11. Remarkably, in ECtHR *KMC v Hungary* App n. 19554/11 [10 July 2012], the Strasbourg Court made explicit reference to art. 24 RevESC. See, generally, H Collins, 'An Emerging Human Right to Protection against Unjustified Dismissal' (2021) Industrial Law Journal 36.

[41] For a detailed analysis see Council of Europe, 'Digest of the case law of the European Committee of Social Rights' (2022) 182 ff. See generally on the ECSR, O de Schutter and M Sant'Ana, 'The European Committee of Social Rights (the ECSR)' in G de Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of*

"adequate compensation or other appropriate relief", the Committee has stressed that: "compensation systems are considered appropriate if they include: a) reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body ruling on the lawfulness of the dismissal,[42] b) the possibility of reinstatement [which the ECSR has deemed a form of *other appropriate relief*],[43] and/or c) compensation of a high enough level to dissuade the employer and make good the damage suffered by the employee".[44]

With respect in particular to "ceilings" (*i.e*. upper limits) on compensation, the Committee asserted that:

> "any such ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive, is proscribed. If there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (*e.g*. anti-discrimination legislation). In that context, the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time".[45]

Despite its analytical interpretive work on art. 24 through the reporting procedure, the ECSR was given the opportunity to enrich its content and further substantiate the "adequate compensation or other appropriate relief" notion in a series of collective

Europe (Routledge 2012) 71; J-F Akandji-Kombé, 'The Material Impact of the Jurisprudence of the European Committee of Social Rights' in G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005) 89.

[42] Conclusions n. 2012/def/SVK/24/EN of the European Committee of Social Rights of 7 December 2012 on Slovak Republic; Conclusions n. 2003/def/BGR/24//EN of the European Committee of Social Rights of 30 June 2003 on Bulgaria.

[43] Conclusions n. 2012/def/FIN/24/EN of the European Committee of Social Rights of 7 December 2012 on Finland. Reinstatement is not mentioned in art. 24 RevESC (in contrast to art. 10 of ILO Convention n. 158). However, the ECSR regards reinstatement a primary sanction in case a worker is dismissed without valid reason, and considers that it should be provided for by national law or practice (Conclusions n. 2012/def/FIN/24/EN of the European Committee of Social Rights of 7 December 2012 on Finland; Conclusions n. 2012/def/ALB/24/EN of the European Committee of Social Rights of 7 December 2012 on Albania), but on condition that the employee wishes to be reinstated (Cf. Conclusions n. XIII-5_Ob_-1/Ob/EN of the European Committee of Social Rights – Statement of interpretation – arts 1-2, 4-3, 1 Additional Protocol of 1997) or that reinstatement is objectively impossible.

[44] Conclusions n. 2012/def/TUR/24/EN of the European Committee of Social Rights of 7 December 2012 on Turkey. According to the ECSR, the amount of compensation is always determined individually, based on consideration of all the circumstances pertaining to the case.

[45] Conclusions n. 2012/def/SVN/24/EN of the European Committee of Social Rights of 7 December 2012 on Slovenia; Conclusions n. 2012/def/FIN/24/EN of the European Committee of Social Rights on Finland; Conclusions n. 2012_163_10/Ob/EN of the European Committee of Social Rights – Statement of interpretation – art. 24 of 2012; Conclusions n. 2012/def/NLD/24/EN of the European Committee of Social Rights of 7 December 2012 on the Netherlands.

complaints decisions analysed below. This "quasi-case law"[46] raises important novel questions, which are directly linked to and of great significance for the Italian and French dismissal reforms discussed above, while reflecting a settled position on the interpretation of art. 24 RevESC.

a) Finnish Society of Social Rights v Finland (complaint n. 106/2014).
In its decision on the merits delivered on 8 September 2016, the Committee repeated its adherence to the "principle of full and dissuasive compensation", subject to alternative legal remedies, when there is a ceiling on dismissal compensation. It did so to reprimand Finland for having a compensation mechanism in force similar to those mechanisms introduced by Italy and France respectively in 2015 and 2017. In particular, although Finnish law does not introduce a scale based on the employee's seniority (as Italian and French law do), it does establish a floor of three months' salary and a ceiling of 24 months' salary to the compensation owed due to unfair dismissal. Furthermore, the law only gives parameters that the judge must take into account when setting the compensation between the two legal limits, considering the particular situation of each employee.

The Committee considered that "in some cases of unfair dismissal, an award of compensation of 24 months as provided for under the Finnish Employment Contracts Act may not be sufficient to make good the loss and damage suffered".[47] It then noted that employees, who have been unfairly dismissed, may also seek compensation under the Finnish Tort Liability Act, but only in restricted situations. Consequently, the Committee found a violation of art. 24 RevESC, since the upper limit to compensation provided for by the Employment Contracts Act may result in situations where the compensation awarded is not commensurate with the loss suffered. In addition, adequate alternatives or other legal avenues could not be regarded as available to provide a remedy in such cases.

Having delineated the ECSR's stance on the existence of ceilings on compensation due to unfair dismissal, an attempt to apply it analogically *mutatis mutandis* to the Italian and French situations could hardly lead to a different conclusion than that reached with respect to Finnish law. Italy and France are among the 14 (out of the 16 in total) states that have ratified the (optional) Collective Complaints Protocol[48] and are bound by the RevESC. In addition, an important feature of this Protocol is that it does not require the complainant organisations to have exhausted domestic remedies before lodging a collective complaint with the ECSR. These facts most probably prompted the Italian General Confederation of

[46] On the quasi-judicial character of the Collective Complaints Procedure see *e.g.* H Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) HRLRev 61; P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G de Búrca and B de Witte (eds), *Social Rights in Europe* cit. 45-67.

[47] See Complaint n. 106/2014 of the European Committee of Social Rights decision on admissibility and the merits of 8 September 2016 *Finnish Society of Social Rights v Finland* para. 49.

[48] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints [1995]. 16 states in total have ratified the Collective Complaints Protocol as of November 2022; however, Croatia and Czech Republic have ratified only the original Charter.

Labour (*CGIL*), as well as three major French trade union organisations (*CGT-FO*, *CGT*, and *Syndicat CFDT de la métallurgie de la Meuse*) to submit collective complaints (n. 158/2018, 160/2018, 171/2018, and 175/2019, respectively) to the ECSR for decisions on the (non)conformity of the compensation ceilings of their own dismissal systems with art. 24 RevESC. Remarkably, the government of France intervened in the proceedings of the complaint lodged by the Italian confederation, taking advantage of the adversarial character of the Collective Complaints Procedure to pre-empt a condemnation of the French compensation ceiling, after having pointed out its similarity to the Italian one.

b) Confederazione Generale Italiana del Lavoro (CGIL) v Italy (complaint n. 158/2017)

In its decision on the merits of 11 September 2019, the Committee straightforwardly repeated its settled adherence to the "principle of full and dissuasive compensation". Nevertheless, the Committee seems to have reinforced its requirements by being even more demanding on the adequacy of the dismissal compensation owed.[49] In this case, it found that "not only do the contested measures not allow for reinstatement, but they also provide for a compensation which does not cover the reimbursement of financial losses actually incurred".[50] This is because the amount of compensation "is subject to an upper limit of 6, 12, 24 or 36 times the reference monthly remuneration, as the case may be".[51] Notably, the Committee seems to have implied the incompatibility of the Italian system with art. 24 RevESC from the mere existence of compensation ceilings, without any real consideration of the level of compensation provided for by them, as it did in the Finnish case, and although the Italian maximum ceiling is even higher than the Finnish one condemned in 2017. Notwithstanding, the Committee did not include this parameter in its reasoning.

Subsequently, the Committee considered that the alternative legal remedies offer victims of dismissal the possibility of compensation exceeding the upper limit set by the law in force. However, such remedies do not make it possible in all cases of dismissal without a valid reason to obtain appropriate redress proportionate to the damage suffered or to discourage employers from resorting to dismissal. Consequently, the Committee held that there is a violation of art. 24 RevESC.

It is pertinent to point out that, although the Committee largely followed its approach as delineated in the Finnish case, it did not shy away from making a few clarifications that further strengthen its mistrust of systems that set floors and ceilings of compensation owed to unfairly dismissed workers. In particular, it was not enough for the Committee

[49] See J Mouly, 'Une nouvelle condamnation du plafonnement des indemnités prud'homales par le CEDS' (2020) Droit social 533; F Perrone, 'La forza vincolante delle decisioni del Comitato Europeo dei Diritti Sociali: riflessioni critiche alla luce della decisione CGIL v. Italia dell'11 febbraio 2020 sul Jobs Act sulle tutela crescenti' (2020) LavoroDirittiEuropa 1; G Orlandini, 'L'art. 24 della Carta sociale europea e i possibili effetti della decisione del Comitato europeo dei diritti sociali "Cgil v. Italy" sulla disciplina del licenziamento' cit.

[50] See Complaint n. 158/2017 of the European Committee of Social Rights decision on the merits of 11 September 2019 *Confederazione Generale Italiana del Lavoro (CGIL) v Italy* para. 92.

[51] *Ibid*. para. 92.

that, overall, such a compensation system provides "adequate" compensation for the damage. It should rather guarantee such compensation in all possible cases,[52] whereas in the Finnish case, the Committee considered that the granting of compensation up to the ceiling might not be sufficient "in certain cases".

c) CGT-FO v France and CGT v France (complaints n. 160/2018 and 171/2018).

In its decision on the merits of 23 March 2022,[53] the ECSR focused on ascertaining whether the reformed art. L. 1235-3 of the French Labour Code (introducing the *barème Macron*)[54] satisfies the requirement of adequate compensation, under art. 24(b) RevESC, by providing for the compensation of a high enough level to dissuade the employer and make good the damage suffered by the victim. The ECSR explicitly referred to and built on the established interpretation of this requirement, as elaborated in the Finnish and Italian cases discussed above, while also taking note of ItCC judgment n. 194/2018 and several dismissal decisions of French courts, analysed in the next section.

The Committee noted, in particular, that in French legislation the maximum ceiling of compensation for unjustified dismissal does not exceed 20 months and only applies for 29 years of seniority. The scale is lower for workers with low seniority and working for companies with fewer than 11 workers. As a result, the Committee asserted that, for these workers, both minimum and maximum amounts of compensation that they can receive are low and sometimes close together, which makes the compensation range not wide enough.[55] Therefore, the ceilings set by the *barème Macron* are not sufficiently high to make good the damage suffered by the victim and be dissuasive for the employer. Furthermore, according to the Committee, the fact that the established compensation ceiling aims at providing greater predictability of the costs of the legal proceedings might rather serve as an incentive for the employer to unlawfully dismiss workers in some situations, following a pragmatic estimation of the financial burden of an unjustified dismissal on the basis of cost-benefit analysis.

Additionally, the ceiling of the French compensation scale does not allow, in the view of the Committee, the award of higher compensation on the basis of the personal and individual situation of the worker, thus leaving courts with only a narrow margin of manoeuvre. Besides, there is no possibility to seek compensation for non-pecuniary damages through the general law of civil liability or other avenues in all cases of unjustified dismissals. In light of the above, the ECSR concluded unanimously that the right to

[52] See J Mouly, 'Une nouvelle condamnation du plafonnement des indemnités prud'homales par le CEDS' cit.

[53] See also, for a comment, K Chatzilaou and C Nivard, 'Controverse: la condamnation de la France par le Comité européen des droits sociaux: un coup d'épée dans l'eau?' (2022) Revue de droit du travail 483.

[54] French Labour Code art. L. 1235-3, as modified by Law n. 2018-217 of 29 March 2018 art. 11.

[55] See Complaints n. 160/2018 and 171/2018 of the European Committee of Social Rights decision on the merits of 23 March 2022 *Confédération Générale du Travail Force Ouvrière (CGT-FO) v France and Confédération générale du travail (CGT) v France* paras 159 ff.

adequate compensation or other appropriate relief, within the meaning of art. 24(b) RevESC, is not guaranteed by the contested provisions, and therefore France violates art. 24(b).

d) Syndicat CFDT de la métallurgie de la Meuse v France (complaint n. 175/2019).
Finally, in its latest decision (on the merits of 5 July 2022) against France, the ECSR followed its reasoning in *CGT-FO v France and CGT v France* with respect to the requirement of adequate compensation. However, unlike its prior decision, the Committee focused first on ascertaining whether the French compensation system satisfies the requirement of reinstatement. In that respect, the ECSR found that the situation is compatible with art. 24(b) RevESC, given that, according to the Committee, reinstatement of a worker (in the same or a similar post) is one of the possible remedies provided for in French law in case of a dismissal without real and serious cause.[56]

Returning to the requirement of adequate compensation, it is remarkable that the ECSR provided an unprecedented line of argumentation concerning the right to adequate compensation under art. 24(b) RevESC, but also, more generally, concerning the judicial enforcement of the Charter, as interpreted by the Committee. It should be recalled that the ECSR had not thus far explicitly required national courts to recognise the direct effect of the Charter. It had, however, considered that such recognition is necessary to ensure that the rights enshrined therein are effectively protected,[57] especially where legislation is not effectively applied and rigorously supervised.[58]

In particular, in this case, the Committee noted the approach taken by the French Court of Cassation (*Cour de Cassation*) in two recent decisions relating to the French compensation ceilings, which were published in May 2022 (discussed in detail in the next section).[59] According to the French Court of Cassation: *i)* the Charter is based on a "programmatic logic", *ii)* art. 24 RevESC has no direct effect in French law, and *iii)* the decisions of the ECSR are not of a judicial nature and thus not binding on the States Parties. Consequently, art. 24 RevESC cannot be relied upon by workers or employers in disputes before the court. Against this background, the Committee provided a forceful response to the restrictive approach of the French Court of Cassation *vis-à-vis* the enforceability of the Charter and the legal value of the ECSR's decisions, while breaking new ground in emphasising – in a rather straightforward manner – that:

[56] See Complaint n. 175/2019 of the European Committee of Social Rights decision on the merits of 5 July 2022 *Syndicat CFDT de la Métallurgie de la Meuse v France* paras 85-87.

[57] See Complaint n. 12/2002 of the European Committee of Social Rights decision on the merits of 22 May 2003 *Confederation of Swedish Enterprise v Sweden* paras 28 and 43.

[58] See Complaint n. 119/2015 of the European Committee of Social Rights decision on the merits of 5 December 2017 *European Roma and Travellers Forum (ERTF) v France* para. 66.

[59] See section III.2.

> "the Charter sets out international law obligations which are legally binding on the States Parties and that the Committee as a treaty body is vested with the responsibility of making legal assessments of whether the Charter's provisions have been satisfactorily applied. The Committee considers that it is for the national jurisdictions to rule on the issue at stake (*in casu*, adequate compensation) in the light of the principles it has laid down in this regard or, as the case may be, it is for the French legislator to provide the national jurisdictions with the means to draw the appropriate consequences as regards the conformity with the Charter of the domestic provisions in question".[60]

In light of the above, the ECSR unanimously concluded that the right to adequate compensation within the meaning of art. 24(b) RevESC is not guaranteed in France, given the compensation ceilings set by art. L.1235-3 of the French Labour Code.[61] This is in particular due to the fact that – considering the approach of the French Court of Cassation – in the French domestic legal order, art. 24 RevESC cannot be directly applied by national courts to guarantee adequate compensation to workers dismissed without valid reasons. The Committee here seems to be confirming that the right to protection in cases of termination of employment under art. 24 RevESC is an individual right, which includes the right to a judge, and which should be recognised as invocable by workers or employers in disputes before the court and as directly applicable by domestic courts.

III. The impact of the Charter on Italian and French courts' dismissal decisions

III.1. The stance of the Italian Constitutional Court: Judgment n. 194/2018 in perspective

Responding to a referral order by the Court of Rome,[62] in judgment n. 194/2018 – delivered one year before the ECSR's decision on the merits of complaint n. 158/2017 (*CGIL v Italy*) – the ItCC quickly dismissed the applicability of art. 10 of ILO Convention n. 158, as well as art. 30 EUCFR in this case. This is because, on the one hand, the ILO Convention has not been ratified by Italy and, on the other hand, because the EU has not, as discussed, exercised the competence conferred on it by art. 153(2)(d) TFEU with respect to unjustified dismissals.

Therefore, the ItCC, which focused solely on art. 3(1) of the Jobs Act,[63] considered that the latter provision, insofar as "it fixes compensation in an amount equal to two times

[60] See Complaint n. 175/2019 cit. para. 91.

[61] French Labour Code art. L. 1235-3, as modified by Law n. 2018-217 of 29 March 2018 art. 11.

[62] Court of Rome decision of 26 July 2017 n. 195.

[63] Legislative Decree n. 23 of 4 March 2015 art. 3(1): "Without prejudice to the provisions of para. 2, where it is established that there is no justification for dismissal on the grounds of objective or subjective justification or just cause, the judge shall declare the employment relationship terminated at the date of dismissal and order the employer to pay compensation not subject to social security contributions amounting to two

the last qualifying monthly salary for the purposes of calculating the end-of-service allowance for each year of service", violates arts 76 and 117(1) of the Constitution[64] in relation to art. 24 RevESC that Italy has ratified.[65] In fact, in annulling this passage and with due regard for the minimum and maximum compensation to be paid to employees in cases of unfair dismissal, the ItCC stated that the courts must take into account the length of service in addition to other factors (*e.g*. number of employees or circumstances of the parties). As a result, the amount of the compensation due on the basis of seniority for unfair dismissal – after the ItCC's judgment – is no longer automatically pre-determined nor can it now be considered a "scale" *per se*.

In support of this conclusion, the ItCC paid significant attention to the ECSR's decision in the Finnish case. It, therefore, recognised that "[t]he line of argumentation followed by the Committee involves an assessment of the system of compensation in terms of its dissuasive effect and of its giving due consideration to the loss suffered".[66] The ItCC then confirmed – as held for the first time in a previous ground-breaking judgment[67] – that the Charter is an "intermediate standard of review" (*parametro interposto*) of the constitutionality of ordinary legislation, thus being "capable of supplementing art. 117(1) of the Constitution". Furthermore, according to the ItCC, "the decisions of the Committee have authoritative status, although they are not binding on national courts".[68]

As a result, by "constitutionalising" the Charter and assigning great weight to the basic lines of the Committee's interpretation in its collective complaints decision against Finland (complaint n. 106/2014), the ItCC has enhanced the Committee's authoritativeness and the value of its collective complaints decisions. The judgment may, therefore, also be considered an important step towards the direction of enhancing the relevance of the Charter system for Italian law, thus strengthening the multi-level protection of socio-economic rights within that jurisdiction.[69]

months' salary of the last salary used as a reference for calculating the severance pay for each year of service, but in any event not less than 6 and not more than 36 months' salary" (unofficial translation).

[64] Art. 117(1) of the Italian Constitution: "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from the [European] community's legal order and international obligations".

[65] See Italian Constitutional Court judgment of 26 September 2018 n. 194/2018 para. 14.

[66] *Ibid*. para. 14.

[67] Italian Constitutional Court judgment of 11 April 2018 n. 120/2018. See on this, among many, C Panzera, 'La libertà sindacale dei militari in un'atipica sentenza sostitutiva della Corte costituzionale' (2019) federalismi.it 1, 15.

[68] Italian Constitutional Court judgment n. 194/2018 cit. para. 14.

[69] See also the subsequent case law of the ItCC on the compatibility of the "Jobs Act" with the Italian Constitution in light of art. 24 RevESC: Italian Constitutional Court judgment of 4 November 2020 n. 254/2020; Italian Constitutional Court judgment of 27 February 2021 n. 59/2021; Italian Constitutional Court judgment of 7 April 2022 n. 125/2022, and Italian Constitutional Court judgment of 23 June 2022 n. 183/2022.

III.2. The assertive stance of French labour courts

Although the relevant decisions of the French Council of State and the Constitutional Council, but also a (non-binding) "Opinion" of the Court of Cassation,[70] pointed towards the opposite conclusion, the majority[71] of the French labour courts have been considering – since December 2018[72] – the French scale as incompatible with the RevESC and ILO Convention n. 158 (either jointly[73] or separately[74]). A major driving force behind this significant development has undoubtedly been the constructive criticism of the French legal doctrine,[75] as well as strategic litigation by labour lawyers.[76] Following the coming into force of the *barème Macron* provisions, an internal working group within the French Lawyers' Trade Union (*SAF*), in collaboration with university professors, developed a very well-articulated "argument" against the upper limits of compensation for dismissal without real and serious cause, based on the RevESC and ILO Convention n. 158.[77] They thus openly invited anyone interested to "draw inspiration from this argument, or even to reproduce it in their writings in order to continue the judicial fight against this iniquitous provision".[78] As many more labour courts were handing down decisions on the subject at the time, the argument was modified several times to take them into account.

Remarkably, several labour courts were receptive to the "argument" and set aside the relevant Labour Code provisions on many occasions, by assigning unprecedented importance to the Charter. According to the reasoning of the labour courts, while the Constitutional Council is competent to control the conformity of laws with the French Constitution, the (diffused) control of the conformity of laws in relation to international treaties belongs to ordinary courts. In addition, in view of art. 55 of the French Constitution, treaties duly ratified or approved have an authority superior to that of ordinary legislation as soon as they are published.

[70] French Court of Cassation joined opinions of 17 July 2019 n. 15012 and 15013. For a critique, see, as indicative, T Sachs, 'La conventionnalité du plafonnement des indemnités de licenciement injustifié: des avis peu convaincants' (2019) Recueil Dalloz 1916; C Nivard, 'L'obscure clarté du rejet de l'effet direct de l'article 24 de la Charte sociale européenne révisée' (2019) Droit social 792.

[71] See T Coustet, 'Barème Macron: environ 38% des décisions de première instance ont validé le plafonnement' (2020) Dalloz Actualité.

[72] Troyes Labour Court decision of 13 December 2018 n. 18/00036.

[73] See *e.g.* Grenoble Labour Court decision of 18 January 2019 n. 18/00989.

[74] See *e.g.* Angers Labour Court decision of 17 January 2019 n. 18/00046; Amiens Labour Court decision of 19 December 2018 n. 18/00040.

[75] See also J Icard, 'Avis relatifs au barème Macron: la stratégie du flou' (2019) Semaine Sociale Lamy 1871.

[76] See N Moizard, 'La Charte sociale valorisée par les juges nationaux: le rôle perturbateur des syndicats' (2020) Europe des Droits & Libertés 79.

[77] The different versions of this argument have been put online on the SAF, *Le Syndicat des avocats de France* lesaf.org, and published in the journal "*Droit Ouvrier*", the legal journal of CGT.

[78] SAF, 'Argumentaire du SAF contre le plafonnement des indemnités de licenciement sans cause réelle et sérieuse: 4e version mise à jour – 15 novembre 2019' (2020) Le Droit Ouvrier 22.

Following these preliminary observations, the receptive labour courts noted that the Court of Cassation has established that arts 5 (right to organise) and 6 (right to bargain collectively) RevESC as well as the provisions of ILO Convention n. 158 are directly applicable[79] and that the Council of State has explicitly granted direct effect to art. 24 RevESC.[80] Consequently, they recognised that art. 24 RevESC is similar in wording to the provisions of ILO Convention n. 158; it confers subjective rights on individuals and, therefore, produces direct horizontal effect.[81]

Concerning the ECSR's interpretation of the notion "adequate compensation or other appropriate relief", French labour courts paid great attention to the Committee's reasoning in the Finnish case to argue, in that light, that the losses of the plaintiff worker must be *fully compensated*. Remarkably, a number of labour courts recognised that the ECSR is not a judicial body and that its decisions are not directly enforceable in the domestic legal order. However, they asserted that: "since the ECSR is a body interpreting an international treaty, and since the Council of Europe has indicated that the Committee's decisions and conclusions must be respected by the states concerned, its interpretation should be taken into account as a guide in determining the conformity of legislation with the Charter".[82]

Against that background, the conclusion to the majority of the cases was rather straightforward. The scale laid down in art. L. 1235-3 of the Labour Code[83] does not allow judges to assess the individual situations of employees unfairly dismissed as a whole and to give fair compensation for the damage they have suffered. Moreover, the compensation rates are not dissuasive for employers who wish to dismiss an employee without real and serious cause; they provide more security to the employers than to the workers and are therefore unfair. Additionally, under French law, there is no alternative legal remedy for the employee to obtain additional compensation in the event of unfair dismissal. As a result, since the dismissal ceiling does not commensurate the damage suffered and is not sufficiently dissuasive – an objective emphasised by the ECSR – the scale does not comply with art. 24 RevESC and ILO Convention n. 158.

Nevertheless, in contrast to most of the labour courts, the great majority of the French courts of appeal (*cours d'appel*) denied – rather inexplicably – the direct effect of art. 24 RevESC and the applicability of the ECSR's "jurisprudence", showing their adherence to the strong political message delivered by the plenum of the French Court of Cassation in its above-mentioned "Opinion". At the same time, it is rather peculiar that the appellate courts accepted the direct effect of art. 10 of ILO Convention n. 158 but,

[79] French Court of Cassation (social chamber) decision of 1 July 2008 n. 07-44124.
[80] French Council of State decision of 10 February 2014 n. 359892.
[81] See *e.g.* Longjumeau Labour Court decision of 14 June 2019 n. 18/00391.
[82] See *e.g.* Troyes Labour Court decision of 29 July 2019 n. 18/00169.
[83] French Labour Code art. L. 1235-3, as modified by Law n. 2018-217 of 29 March 2018 art. 11.

nonetheless, recognised the conformity of the scale with the latter.[84] They thus validated the application of the scale, without however excluding the possibility of derogating from it "on a case-by-case basis".[85]

As mentioned, in May 2022, the social chamber of the French Court of Cassation delivered two highly anticipated decisions, which were expected to eventually provide a definitive (judicial) solution to this important debate. The social chamber of the Court of Cassation confirmed the position taken by the plenum of the Court in its above-mentioned Opinion;[86] the *barème Macron* is compatible with art. 10 of ILO Convention n. 158, which produces direct effect,[87] whereas art. 24 RevESC (although it contains similar provisions to those of ILO Convention n. 158) does not produce direct effect.[88] However, while the Court of Cassation stressed that there is no possibility – not even on a case-by-case basis – for labour courts to derogate from the application of the scale when the owed compensation is not considered adequate, the matter should be considered far from over.

The French trade union confederations that also lodged the collective complaints on the matter before the ECSR have declared that they will continue to contest the compatibility of the scale with the RevESC and ILO Convention n. 158 before labour courts.[89] Furthermore, French judges of first and second instance are not required to transpose the solutions reached by the Court of Cassation, except in the event of a judgment handed down by the Plenary Assembly on a second appeal. In fact, very recently, in October 2022, a French court of appeal derogated from the application of the scale, in view of the exceptional circumstances of the dispute, by making express reference to the ECSR's decision on the merits of complaints n. 160/2018 and 171/2018.[90] Therefore, the *barème Macron* saga could eventually reach the plenum of the French Court of Cassation for a possibly definitive solution. The findings of the ECSR in its recently published decisions on the merits of the complaints lodged by the French trade unions may also serve as an important tool in the hands of the organisations to litigate or advocate for a change in law and policy through political means.

[84] See, among many, Paris Court of Appeal decision of 18 September 2019 n. 17/06676; Chambéry Court of Appeal decision of 15 September 2020 n. 18/02305.

[85] T Coustet, 'Barème Macron' cit.

[86] For a critique of the (very questionable) reasoning of the French Court of Cassation with respect to the direct effect of the Charter, see C Nivard, 'De l'aube au crépuscule: le rejet de l'effet direct de la Charte sociale européenne par la chambre sociale de la Cour de Cassation' (2022) Revue des droits et libertés fondamentaux 1; J Icard, 'Barème: une fin de saga bâclée' (2022) Semaine Sociale Lamy.

[87] French Court of Cassation (social chamber) decision of 11 May 2022 n. 21-14490.

[88] French Court of Cassation (social chamber) decision of 11 May 2022 n. 21-15247.

[89] CGT, 'Communiqué de Presse. La Cour de cassation au secours du barème Macron' (11 May 2022) La Cgt cgt.fr.

[90] Douai Court of Appeal decision of 21 October 2022 n. 20/01124.

IV. The impact of the Charter's perspective on the Greek law of dismissals

As already discussed, by contrast to Italy, France, and most European countries, Greece never adopted legislation making the validity of a dismissal conditional on the existence of a real and just cause.[91] Therefore, Greek labour law never enshrined provisions protecting employees against the unjustified termination of their open-ended contract on the initiative of the employer.[92] It rather laid down some substantive and procedural formalities upon which the validity of the dismissal is conditioned.

As a result of this structural choice, and as established by the case law of the Supreme Civil and Criminal Court of Greece (*Areios Pagos*) dating from the 1940s, employees could only invoke art. 281 of the Greek Civil Code in court, prohibiting the abusive exercise of rights, to protect themselves against abusive dismissals. When the judge establishes the abusive nature of a dismissal, the worker is granted a reinstatement to his/her job and compensation equal to the wages that were foregone before the reinstatement. However, the evidentiary regime was traditionally less favourable in Greek law, since it was the worker who had to prove the abuse by the employer upon dismissal, while in legal systems that require a just cause for dismissal, it is in principle up to the employer to prove the alleged grounds.[93]

Greece is not a party to ILO Convention n. 158, but it ratified the RevESC, including art. 24 thereof, in 2016. According to a considerable part of Greek labour law theory,[94] this development has had a significant impact on the physiognomy of the Greek law of dismissal. By its introduction in the Greek legal order, the RevESC – being an international treaty duly ratified – prevails over Greek legislation, in view of the supremacy clause of art. 28(1) of the Constitution. In addition, art. 24 RevESC is to be considered self-executing, thus rendering the judicial application of the existing system of dismissals incompatible with the right to protection against dismissal without a valid reason, as enshrined in art. 24 RevESC.

Consequently, the RevESC has been deemed to have had a significant effect in that, by its mere ratification, it has transformed Greek labour law of dismissal into a system of

[91] See D Zerdelis, 'Protection Against Dismissal after Law 4611/2019' (2019) Epitheoresis Ergatikou Dikeou 369 (translated from Greek).

[92] Except with regard to some categories of employees who are in need of enhanced protection, such as female employees during maternity or staff of trade unions.

[93] B Palli, 'La justificación del despido en derecho comparado europeo e internacional' (2019) Revista de la Facultad de Derecho de México 704, 711. In Italy, it is up to the employer to prove the alleged grounds, while in France, the employer shares with the employee the burden of proof.

[94] See, among others, N Gavalas, 'What Changes in Labour Law after the Ratification of the RevESC' (2016) Epitheoresis Ergatikou Dikeou 129 (translated from Greek); D Vassiliou, 'Limitations on the Abusive Termination of the Employment Contract on the Employer's Initiative and Protection Against Abusive Dismissals' cit. 535; C Tsimpoukis, 'Some Brief Notes on Decision Nº 3220/2017 of Piraeus' Single-Member Court of First Instance' (2018) Lex Social: Revista de Derechos Sociales 18.

protection against unjustified dismissals, which resembles, in principle, that of *e.g*. Italy or France. Henceforth, a dismissal on the initiative of the employer is valid only when it is based on a valid reason, within the meaning of art. 24 RevESC. Furthermore, according to the same view, the burden of proof that the dismissal was based on a valid reason is now reversed and is in the hands of the employer.[95]

This position was explicitly followed by a few Greek Single-Member Civil Courts of First Instance[96] starting in 2017.[97] In their decisions, the courts based their reasoning on the RevESC as the main legal basis to reverse the long-established foundational position of Greek case law on this matter. The judges stated emphatically that, following the ratification of the RevESC, the existing system of dismissals is not compatible with the principle of protection against dismissal without a valid reason guaranteed by art. 24 RevESC, which introduces "a self-standing right to protection of employees against dismissal". According to the judges, this derives either directly from art. 24 RevESC, given that it is precise, explicit, and unconditional, or from art. 281 of the Civil Code interpreted in light of art. 24 RevESC.

In addition, the judges also referred to the interpretive work of the ECSR on art. 24, actually describing it as "jurisprudence", while recognising the Committee's interpretive authority, as well as the reversal of the burden of proof. It seems, however, that the reference to the ECSR's interpretation by the Greek judges does not play a crucial role in their reasoning, since the provisions of art. 24 are presented as being clear enough by themselves and capable of introducing the principle of protection against dismissal without a valid reason in the Greek legal order, without the need to turn to the Committee's work to draw such a conclusion.

Nonetheless, it is important to point out that the "precedent" produced in the above-discussed decisions has not been followed so far by other first instance or appellate civil courts and by the *Areios Pagos*.[98] The latter courts adjudicate the cases on the basis of the regime that was applicable before the ratification of the RevESC. The justification for this lies, according to the courts, in the fact that the pre-existing regime on dismissals did not change after the ratification of the RevESC, since the protection offered by art. 24 RevESC was fully ensured under the legislation in force before the Treaty's ratification. In particular, in their view, even if there is no valid reason for a dismissal, its validity is not affected, given that the obligation of the employer to compensate the employee remains even when the employer could prove a valid reason for the dismissal.

[95] On the ECSR's position concerning the burden of proof see Conclusions n. 2012/def/FIN/24/EN of the European Committee of Social Rights of 7 December 2012 on Finland.

[96] In Greece there are no labour courts. Issues arising between employees and employers are resolved by civil courts, in accordance with the specialised procedure for labour disputes.

[97] Single-Member First Instance Civil Court of Piraeus decision n. 3220/2017; Single-Member First Instance Civil Court of Lasithi decision n. 17/2019.

[98] See *e.g*. Single-Member First Instance Civil Court of Thessaloniki decision n. 19510/2017; Single-Member Civil Court of Appeal of Athens decision n. 6375/2019; *Areios Pagos* decision n. 1512/2018.

This position has also been endorsed by several opposing labour law scholars in Greece, who argue that the Greek dismissal regime remains compensatory, in the sense that employees are sufficiently protected by high rates of severance allowances (still after the reductions put forward through the implementation of austerity measures) and can claim an abusive exercise of rights under art. 281 of the Civil Code before the court to contest the validity of a dismissal.[99]

The whole debate held out for some time, while reaching the news and serving as a topic for extensive political debate. In May 2019, the Ministry of Labour of the Cabinet of the centre-left SYRIZA, proposed a draft legislative act which – among many other subjects – contained a single provision specifying Greece's international obligations under art. 24 RevESC. The purpose of the provision was merely to add the "valid reason" for dismissal as an essential condition for the validity of dismissal, next to the already existing formal conditions for its validity. According to the Explanatory Memorandum to the bill, full consideration must be given to the ECSR's interpretation of art. 24 to avoid the risk of misinterpreting its provisions. Notably, the bill was approved by a considerable majority of the Greek parliament (including the votes of the MPs of the centre-right New Democracy party) and became law of the state.[100]

Nevertheless, three months later, the newly elected government of New Democracy, having a majority in the parliament and giving in to the pressure of employers' associations, surprisingly abolished the above legislative provision retroactively and without any warning.[101] While a potential response by the ECSR would be more than welcome, no collective complaint has been lodged (so far) addressing this situation, nor has the matter yet reached the Committee under the reporting system.

V. Concluding remarks

As this *Article* has shown, all three examined jurisdictions (Italy, France, and Greece) are bound both by art. 24 RevESC and the Collective Complaints Protocol. This has further facilitated the intensity of the Charter's influence on litigants and domestic courts. In the case of Italy, rather than exercising judicial restraint – as many other constitutional, supreme, or international courts did in the face of anti-crisis reforms –[102] the ItCC played

[99] See, among others, I Lixouriotis, *Individual Labour Relations* (Nomiki Bibliothiki 2017 fifth edition) 761 ff (translated from Greek); G Theodosis, 'The Justified Termination of the Open-ended Employment Contract' (2017) Epitheoresis Ergatikou Dikeou 527 (translated from Greek). For a very analytical critique see B Palli, 'The Consequences of the Obligations under Article 24 RevESC on the Law of Dismissal from a Comparative Perspective' (2020) Epitheoresis Ergatikou Dikeou 1299 (translated from Greek).

[100] See Law n. 4611 of 17 May 2019 art. 48.

[101] See Law n. 4623 of 9 August 2019.

[102] See *e.g.* L Mola, 'The Margin of Appreciation Accorded to States in Times of Economic Crisis: An Analysis of the Decision by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures' (2015) Lex Social: Revista de Derechos Sociales 174; C Fasone,

an active part in the legislative process, by laying down a ruling with significant policy implications and urging the legislature to pay more attention to constitutional principles.[103] It cannot be denied that, due to the major role the Charter had in the ruling, in conjunction with the fundamental rights provisions of the Italian Constitution, it contributed to achieving a rebalancing, at least partially, of the dismissal regime in Italy.[104]

In France, workers' litigation before French labour courts has had, as shown, significant effects on the reasoning of the courts, which now engage directly and in multiple ways with the Charter system. In addition, it has provoked extensive legal debate and has exerted considerable pressure on the political arena. Remarkably, several labour courts set aside the relevant Labour Code provisions on many occasions, by assigning unprecedented importance to the Charter, in conjunction with ILO Convention n. 158. They were thus "emancipating themselves from the straitjacket" imposed by the 2017 dismissal reforms,[105] which have been considered as emblematic for the Macron administration.

What the Greek situation illustrates are, first and foremost, the significant effects that the mere ratification of the RevESC and in particular art. 24 thereof, as interpreted by the ECSR, may have on domestic law and judicial practice, as well as on the policy agenda. In the case of Greece, and regardless of the above-described debate in the legal doctrine, the Charter system has made it more than evident that the current law on dismissals, which dates back to 1920, must be amended in a comprehensive manner that responds to the current societal needs, in accordance with the applicable socio-economic rights protection standards.[106] In addition, the RevESC's ratification and its impact on Greek legislation and judicial practice, have stimulated renewed interest in the Charter system in the country.

Similarly, it should be mentioned that, already within the first months following the ratification of the RevESC and the Collective Complaints Protocol by Spain, art. 24 RevESC, as interpreted by the ECSR, as well as the relevant discussion in Italy and France on the establishment of compensation scales, prompted one of the most prominent trade unions in Spain to lodge a collective complaint to the ECSR addressing a similar situation. In particular, in its complaint registered on 24 March 2022, *Unión General de Trabajadores* (UGT) alleged that the Spanish legislation on individual dismissal without just cause is in

'Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective' (EUI Working Papers 25-2014).

[103] F Laus, 'Il rapporto tra Corte costituzionale e legislatore, alla luce delle pronunce sul caso Cappato e sulle tutele crescenti nel Jobs Act' (2020) Rivista Associazione Italiana dei Costituzionalisti 65, 84.

[104] G Fontana, 'La Corte costituzionale e il decreto n. 23/2015: *one step forward two steps back*' (CSDLE "Massimo D'Antona" Working Papers 382-2018) 19.

[105] T Sachs, 'La conventionnalité du plafonnement des indemnités de licenciement injustifié' cit.

[106] Notably, the Greek legislature recently attempted a radical revision of the Greek law on dismissal. However, according to Gavalas, the recently adopted legislation on dismissals (Law n. 4808 of 19 June 2021 (Greek Official Gazette n. A' 101, 19 June 2021) not only ignored art. 24 RevESC, but also introduced provisions that are in direct breach of its content. NK Gavalas, 'The Misadventures of the European Social Charter in Greece' (2022) Lex Social: Revista de Derechos Sociales 1, 21 ff.

breach of art. 24 RevESC in that it provides for "a legally predetermined system of calculation which does not allow for the legally foreseen or assessed compensation to be modulated to reflect the full damage suffered, nor does it guarantee its dissuasive effect".[107] In November 2022, a second collective complaint was lodged against Spain (complaint n. 218/2022) by another major Spanish trade union, *Confederación Sindical de Comisiones Obreras* (CCOO), addressing the same matter.[108]

Having said that, as the above show, compliance with the Charter may eventually prove to be principally more of a matter of political will and orientation, rather than a matter of respect for international human rights obligations or judicial "activism". The effectiveness of some of the economic and social rights guaranteed by the Charter may therefore only be *fully* realised if they draw upon a political project. In that context, it cannot be overlooked that there is always the risk that a government with a pro-employer agenda ignores or misinterprets the Charter's content and resists the ECSR's authority, without any particular fear of repercussions for breaches of state obligations. As regards in particular the right to protection in cases of termination of employment under art. 24 RevESC and the ECSR's interpretation thereof, states may raise compliance barriers due to their urge to retain the freedom to regulate their respective system of dismissals.

In any case, based on the objectives of "improving the effective enforcement of the social rights guaranteed by the Charter" as well as "strengthening the participation of social partners and NGOs",[109] the Collective Complaints Procedure seems to have fulfilled its purpose in the cases discussed in this study. On the one hand, the mobilisation of NGOs and trade unions before the ECSR and domestic courts has brought to the surface – in a detailed and specific manner – a very important topical discussion concerning the law of dismissals across several European jurisdictions, which has not been sufficiently taken into account under national law or even through the Charter's reporting system.[110] On the other hand, the Collective Complaints Procedure has enabled individuals, trade unions, and NGOs to participate, at the international and national levels, in the

[107] Complaint n. 207/2022 of the European Committee of Social Rights decision on admissibility of 14 September 2022 *Unión General de Trabajadores (UGT) v Spain*.

[108] CCOO, 'La legislación española no aplica las garantías de protección frente al despido improcedente establecidas en la Carta Social Europea' (22 November 2022) ccoo.es www.ccoo.es.

[109] See the second and third recitals of the preamble to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints cit.; See, also, NA Papadopoulos, 'Revisiting the Preamble of the European Social Charter: Paper Tiger or Blessing in Disguise?' (2022) HRLRev 1; J Peuch, '"Participer" à la Charte sociale à travers une épreuve quasi judiciaire: enjeux, intérêts et limites du système de réclamations collectives' (2017) Journal européen des droits de l'homme 202.

[110] See JM Belorgey, 'La Charte sociale du Conseil de l'Europe et son organe de régulation (1961-2011), le Comité européen des droits sociaux: esquisse d'un bilan' (2011) Revue trimestrelle des droits de l'homme 787, 798. On the deficiencies of the reporting system see C O'Cinneide, 'The European System' in J Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2020) 63 ff.

elaboration of the content of economic and social rights in light of the Charter – in particular the right to protection in cases of termination of employment – especially in an area where the protection offered by the ECHR or EU law is minimal. Regardless of the final outcome of the *barème Macron* saga, it is clear that the Collective Complaints Procedure serves as a unique platform to deliberate about social policy in Europe, the potential of which has not yet been fully appreciated.

On a slightly different note, as this case study on dismissal reforms has demonstrated, the Charter, as authentically interpreted by the ECSR in its conclusions and collective complaints decisions, has established itself in recent years as a "living instrument"[111] of economic and social rights protection in Europe that can have significant effects across national jurisdictions. Either on its own or through its interaction with national sources (constitutional or legislative) and other international treaties, such as ILO Conventions, the application of the Charter, *qua* international treaty, in domestic legal orders can significantly shape the scope and content of fundamental socio-economic rights and prompt policy change.

Furthermore, various actors (*e.g.* lawyers, academics, trade unions, NGOs, policy-makers) at the domestic level have recently become aware of the Charter's protective mechanism and develop their arguments on the basis of its provisions and the Committee's jurisprudence to advance their claims, especially in the field of labour law. Litigants are also more and more strategically and proactively invoking and relying on the Charter and the Committee's collective complaints decisions, even when concerning other countries. As also confirmed by the findings of this study, the analytical and well-articulated interpretive approach of the ECSR on the Charter has undoubtedly been an important contributing factor in these developments. Based on the quality and persuasiveness of its monitoring work – despite not being directly enforceable at the domestic level as such – the ECSR has managed to enhance its visibility and the recognition of its interpretive authority in recent years. The Committee is thus honouring the label "guardian of the welfare state in Europe" that is often attached to it,[112] especially in the face of regressive austerity measures.[113]

Finally, as was made clear in this study, progressively and culminating since the outbreak of the Eurozone crisis, domestic courts changed their stance towards the Charter; they have become more responsive and aware of its protective mechanism when

[111] See Complaint n. 14/2003 of the European Committee of Social Rights decision on the merits of 8 September 2004 *FIDH v France* para. 27.

[112] See *e.g.* C Nivard, 'Le comité européen des droits sociaux, gardien de l'état social en Europe?' (2014) Civitas Europa 95.

[113] See *e.g.* C Deliyanni-Dimitrakou, 'La Charte sociale européenne et les mesures d'austérité grecques: à propos décisions n° 65 et 66/2012 du Comité européen des droits sociaux fondamentaux' (2013) Revue de droit du travail 457.

conducting a constitutional review or treaty-based review of domestic legislation.[114] Judges base their decisions on the Charter and the ECSR's jurisprudence, as the main legal basis, or in conjunction with other human rights treaties and constitutional provisions. Furthermore, they are not reluctant to recognise that several Charter provisions confer subjective rights to individuals – rather than merely state obligations – and are capable of producing direct effect (*e.g.* in France and Greece) or serving as tools of consistent interpretation of national law (*e.g.* in Italy). As a result, the analysis provides a practical example of the renewed prospects of the Charter in relation to its justiciability and effective enforcement by domestic courts.[115]

In view of the foregoing, it can only be concluded that the right to protection in cases of termination of employment under art. 24 RevESC, as interpreted by the ECSR – while remaining close to the provisions' wording and spirit – is to be regarded as a very reliable treaty provision. It could thus provide a solid standpoint of a justiciable and effective socio-economic right at the domestic level, protecting employees against certain types of unfair dismissal and serving as a cornerstone of the evolution of labour law systems. Through this example, it could be argued that, despite the rather slow start, the dynamics of the Charter in effectively advancing economic and social rights protection across European jurisdictions show significant prospects for the future. It is, nevertheless, imperative that the contracting parties reinforce and honour their commitments to the Charter system if it is to be allowed to reach its full potential in advancing economic and social rights protection in Europe. Domestic political pressure from civil society, academics, trade unions and NGOs towards ratification and further acceptance of the RevESC provisions and the Collective Complaints Protocol, as well as towards stronger engagement with the Charter system is a key factor in accomplishing that objective.

[114] See also L Jimena Quesada, 'El control de convencionalidad y los derechos sociales: nuevos desafíos en España y en el ámbito comparado europeo (Francia, Italia y Portugal)' (2018) Anuario Iberoamericano de Justicia Constitucional 31.

[115] See also NA Papadopoulos, 'Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice' in C Boost and others (eds), *Myth or Lived Reality: On the (In)Effectiveness of Human Rights* (TMC Asser Press 2021) 99.