15ème Congrès de l'Union Syndicale Fédérale
30 mai – 2 juin 2019
Bratislava, Slovakia

Resolution: Enabling International Organisations to comply with the European Social Charter

Considering that:

- the institutional set-up of many International Organisations (IOs) usually foresees an internal rule-setting body and an executive body;
- these IOs claim to have unlimited freedom to establish and apply their own staff rules;
- these IOs are also able and expected to update these staff rules to align them with external, universal social and labour law standards;

Worried that:

- the internal rules of many lag behind and do not sufficiently comply with universal labour and social legislation, including IOs comprising Member States the majority of which are also signatories to the European Social Charter (ESC);

Grateful for:

- the attention of the Parliamentary Assembly of the Council of Europe for social and labour-related issues in IOs;

The USF Congress demands:

- that these IOs include in their staff rules as a general guiding principle the ESC (the so-called "Revised European Social Charter of 1996");
- that, in cooperation with the respective staff and / or union representatives, the IOs develop specific procedures that enable interpretations of the ESC by the European Committee of Social Rights (ECSR) which ensure internal decisions compliant with the ESC.

The USF Congress invites:

- the Parliamentary Assembly of the Council of Europe, especially the Committee on Social Affairs, Health and Sustainable Development, to take this suggestion into account and consider recommending a follow-up by the bodies and instruments available at the Council of Europe.
- the Member Organisations of USF to suggest that their employer organisations include a reference to the ESC within their staff regulations.

Explanatory memorandum

External, universal social and labour law standards

The historical starting point of individually protected European Fundamental Rights is the European Convention of Human Rights signed in 1948, the creation of the Council of Europe and the European Court of Human Rights. The original intention was to create a second pillar of rights: the European Social and Labour Rights with the European Social Charter signed in Turin 1961 and its revised version signed in 1996.

The financial crisis and excessive austerity policy it entailed kindled anew the debate on whether the ESC's authority should, indeed, be raised to the level of the European Convention on Human Rights and include the body that is responsible for interpreting the ESC: the European Committee of Social Rights (ECSR).

In his study published on 14th November 2018, Professor Olivier De Schutter raised this issue[1]. He noted that the Charter of Fundamental Rights of the European Union suffered from an inherent flaw: social rights are not sufficiently developed, although Articles 151-155 of the Treaty on the Functioning of the European Union (TFEU) have been used extensively to develop EU social legislation (EU Directives). The case law of the CJEU also reveals divergences as regards ECSR decisions, owing to divergences between respective national legislations. These divergences appeared in the context of austerity following the financial crisis.

In November 2017, the European Council, the Parliament and the Commission proclaimed the "European Pillar of Social Rights" (EPSR). This could be considered as a promising initiative and, initially, could serve to fill the gaps identified in fundamental EU social legislation. The future will tell whether there is a genuine willingness within the EU Institutions and the Member States to follow up on the EPSR.

In addition to the instruments used by the European Union and the Council of Europe, there are UN and ILO Conventions. A number of these Conventions should be relevant as regards the relationship between the IOs comprising these signatories and the staff within these IOs.

Universal social and labour law standards: internal effects in IOs

The most obvious assessment is probably the effect of the Charter of Fundamental Rights of the EU on the relationship between EU Institutions and their staff: the EU FRC is applicable[2] in the relationship between these Institutions and the staff. The CJEU even considered the

[1] „The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order", 14th November 2018, the study was prepared at the request of the Secretariat of the Council of Europe and of the CoE-FRA-ENNHRI-Equinet Platform on Economic and Social Rights.
[2] See CJEU case C-334/12 RX „Jaramillo"

application of general EU legislation such as the EU's Working Time Directive 2003/88/EC as binding on the Institutions[3].

Unfortunately, this obligation to ensure compliance with EU legislation applicable to all Member States does not preclude all problems. In particular, small and / or remote EU entities (agencies, offices…) can escape the attention of the media, so that unacceptable behaviour of local management often remains unnoticed.

The limited means of the CJEU[4] (only annulment of a decision is practiced, the Court is reluctant to issue a decision in lieu of the administration of the relevant EU institution) sometimes raises questions as regards compliance of EU institutions with the Charter of Fundamental Rights of the EU.

A further doubt arises on account of the risk encountered by claimants when the defendant Institution makes use of external, expensive lawyers to represent the administration in court.

However, the situation at the other IOs contrasts with the situation at the EU Institutions. The Staff of IOs are in a clearly inferior situation, for the following reasons.

IOs are legal entities "sui generis". They generate their staff rules themselves. In order to meet Article 6 ECHR requirements (access to a court), a judicial body is responsible for hearing cases when administrative decisions are challenged. This body can be an internal body as in the case of the European Schools or a judiciary ready to take on this task as the ILOAT. None of these judiciaries seem to be well equipped to assess the compliance of the staff rules generated by an internal body with universal principles of labour and social law (especially the ESC). Even the CJEU is reluctant to consider questions put by these courts on fundamental EU principles in the framework of a preliminary ruling procedure[5]. The CJEU implicitly encouraged the Member States to provide such an alignment procedure on EU social legislation inspired from all national legal orders in the EU, but the Member States did not act on this. National courts refuse to assess the legality of internal staff rules as the autonomy requirements of the IO normally impose immunity before national courts. There is also no judiciary that would assess the justification for upholding immunity or the autonomy of the IO (with the exception of the EU system, where the CJEU is competent for assessing the justification for upholding the immunity of any EU Institution or Agency).

Human Resources departments of IOs usually lack the means and / or will to monitor the evolution of universal social legislation and update staff rules regularly. Small IOs may be overburdened with such a task, larger IOs lack this pretext - with the result that reluctance or negligence becomes an obstacle. Most of the IOs simply restate regularly that their system does not provide for any obligation to align staff rules on general social legislation, not even on the social legislation that is commonly shared by all Member States in their

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[3] See CJEU case C-579/12 RX "Strack"

[4] See the harassment cases against the EU Parliament, CJEU cases T-76/18 and T-83/18

[5] See the European Schools case C-196/09 „Miles" and the Opinion of AG E.Sharpston

domestic environment. The IOs also lack a central service that would give advice to all IOs to avoid lack of compliance with ILO Conventions, EU social legislation or the ESC.

Specific Examples

"Male / female" salary scales in which female colleagues are specifically discriminated against do not necessarily exist. However, in practice, staff rules often penalise or discriminate against the career prospects of part-timers (mostly mothers) and teleworkers, who are expected to achieve higher productivity. This also applies with regard to pension rights' transfers from national systems with unfavourable conditions for women, resources allocated to staff representatives, social dialogue conditions, annual leave provisions (limited transfer to the following year), working time, health and safety provisions, protection of disabled workers, data protection as well as provisions safeguarding the interests of breastfeeding workers. None of the founding texts of these IOs mandate, encourage or legitimise an amendment or annulment of universal social and labour legislation governing conditions of employment in these IOs.

Non-compliance with the ESC frequently occurs but is not always immediately apparent.

Internal judiciaries (ILOAT etc.) are hard to convince when claimants cannot provide any evidence of wrong-doing of an administration that "correctly" applies internal rules, even when these rules do not comply with universal social legislation[6].

The impact of the systemic deficiencies ranges from unfortunate situations and demotivation of staff to disastrous results, toxic working atmosphere and the flooding of the ILOAT with individual appeals. This compromises the reputation of IOs.

Support given by the Council of Europe

In the Council of Europe, systemic gaps harmful for staff and the IOs have attracted attention. The Parliamentary Assembly of the Council of Europe (PACE) has raised the issue on a number of occasions[7]. An assessment was carried out and resolutions adopted. This is highly welcome for the staff of IOs and, indeed, the IOs themselves. The reason is that the weakness of their systems and the internal rule of law constantly undermine the reputation of the IOs and the ability of IOs to recruit staff at the appropriate level. The USF Congress is grateful for this attention and strives to use this momentum to achieve progress.

The European Social Charter

The European Social Charter (ESC) is a supervisory system which is deeply rooted in the history of Europe. It is signed by 45 Member States and covers duties that go beyond those that employers would normally be expected to perform. Areas covered by the ESC include

[6] See ILOAT Judgements 351, 429, 902, 2236

[7] See PACE documents Doc. 14443 of 29th November 2017, "Jurisdictional immunity of international organisations and rights of their staff"; Resolution 1979 (2014) "Accountability of international organisations for human rights violations"; Doc. 14487 of 24th January 2018 "Jurisdictional immunity of international organisations and rights of their staff", Committee on Social Affairs, Health and Sustainable Development

social welfare and inclusion issues. As IOs, too, mostly should assume duties that go beyond those covered by employers, the ESC constitutes an important reference for these IOs.

However, not all Articles of the ESC are equally relevant to IOs. The parts that deserve particular attention are:

The principles and rights set out in Part I of the ESC;

Article 2 The right to just conditions of work;

Article 3 The right to safe and healthy working conditions;

Article 4 The right to a fair remuneration;

Article 5 The right to organise (workers and employers);

Article 6 Social Dialogue (including the right to strike);

Article 7 The right of children and young persons to protection;

Article 8 The right of employed women to protection;

Article 9 The right to vocational guidance;

Article 10 The right to vocational training;

Article 12 The right to social security;

Article 19 The right of migrant workers and their families to protection and assistance;

Article 20 The right to equal opportunities (gender related);

Article 21 The right to information and consultation;

Article 22 The right to take part in the determination and improvement of the working conditions and working environment;

Article 24 The right to protection in cases of termination of employment;

Article 26 The right to dignity at work;

Article 27 The right of workers with family responsibilities to equal opportunities and equal treatment;

Article 28 The right of workers' representatives to protection in the undertaking and facilities to be accorded to them.

The European Committee of Social Rights

As regards the interpretation and implementation of the ESC, the European Committee of Social Rights (ECSR) plays a pivotal role. Every year , the ECSR establishes a report on the situation in Member States on compliance of national legislation with the ESC.

Pursuant to the "1995 Additional Protocol", a new system of Collective Complaints came into force in 1998. Much like a judicial body, the ECSR examines the admissibility and the merits of the cases filed by claimants. A number of organisations (NGOs, Union federations etc.) may file complaints regarding alleged non-compliance with the ESC.

The ESC cannot practically cover IOs because ESC membership is limited to EU Member States only. This is because of constitutional and ESCR work-load related considerations[8].

The "1995 Additional Protocol" appears to be the right entry point into the system of the ESC and ECSR[9]. The core issue, as described above, is to assess the compliance of staff rules with the ESC.

Cooperation models

First, the competent body which sets the internal rules ("Administrative Council", "Permanent Commission", ...) should include, as a preamble, the European Social Charter in the internal "staff rules" or "regulations" to be applied by the executive branch of the IO ("President", "Secretary General", ...).

Cooperation models between the participating IO and the ECSR would then be feasible and meet the objective as there would be limited institutional and procedural arrangements. The first issue to address when drafting a cooperation scheme is the ESCR's admissibility test. Questions which qualify should include:

- joint submissions to the ECSR by the Central Union or Staff Committee or Association of an IO and the IO itself, in respect of a specific staff rule that allegedly does not comply with the ESC;
- submissions to the ECSR by any competent internal joint body of an IO, when this body has to apply internal staff rules challenged in the light of the ESC;
- submissions by the competent judiciary, such as the ILOAT under Article 11 of the ILOAT Rules of Procedure[10].

In addition to the submissions and applicable staff rules, internal systems of participating IOs would be provided with an interpretation of the ESC as regards the relevant staff rules. This would mean that the internal executive, judiciary or quasi-judicial body could, on the

[8] The European Social Charter (Revised), 1996, Part III to VI

[9] Rules of ECSR, "Part VIII: The Collective Complaints Procedure", introduced with the "1995 Additional Protocol"

[10] Article 11 RoP is an instrument already in place and used by ILOAT: "Article 11 The Tribunal may, on its own motion or on the application of either party, order such measures of investigation as it deems fit, including the appearance of the parties before it, the hearing of expert and other witnesses, the consultation of any competent authority, and expert inquiry."

basis of the ESC articles introduced as the preamble of the IO rules in question, include the interpretation of the ECSR into its decision, ruling or opinion.

As the needs and culture vary between IOs, the unions and/or staff associations of each of these IOs should be invited by the executive branch for discussions on how to adapt internal staff rules or regulations to the cooperation scheme with the ECSR. The aim would be to ensure that European Social Charter becomes a framework for current and future decisions inside the participating IO.