



The European Committee of Social Rights and cooperation between the Council of Europe and the European Union in social issues. Selected issues

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Abstract. The aim of the article is to demonstrate that the ECSR remains one of the important organizational factors of the formally regulated cooperation of the Council of Europe and the European Union in the sphere of social fundamental rights. The analysis is dominated by the dogmatic-legal method. The paper includes an analysis of the formal basis of cooperation between the CoE and the EU, the specificity of their cooperation in the field of social rights, the analysis of the ECSR as a body of the ESC and its activity in cooperation with EU structures. The analyses carried out show that the framework of cooperation between the two organizations is formalised and the ECSR finds its place within it. At the same time, it has been shown that the Committee's role in cooperation with the EU and in promoting ESC standards - in view of the autonomy of the two organizations' legal systems - remains important, particularly at the level of organizational cooperation with EU institutions and bodies.

Keywords: Council of Europe, European Union, European Social Charter, European Committee for Social Rights

JEL Classification: K33, K38, K39.

Citation: Dubowski T. (2023). The European Committee of Social Rights and cooperation between the Council of Europe and the European Union in social issues. Selected issues. *Eastern European Journal of Transnational Relations*, 7(3), 51-59.
<https://doi.org/10.15290/ejtr.2023.07.03.04>.

Academic Editors: Anna Drabarz & Lucja Kobroń-Gąsiorowska

Publisher's Note:



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INTRODUCTION

The importance of social fundamental rights and their protection is undeniable nowadays. From the European perspective, this issue is of interest to both the Council of Europe (CoE) and the European Union (EU). Although in this sphere the convergence of goals and objectives of both organizations is clearly noticeable, there are certain differences at the level of implementation of social rights within both organizations. This is related, inter alia, to the detailed conditions of functioning of the CoE and the EU resulting essentially from the different nature of the integration models adopted in both organizations and their legal character. This does not mean, however, that cooperation between the two organizations is excluded of the question. On the contrary, it seems desirable, also in the area of social rights.

The subject of this paper are selected organizational aspects of the cooperation between the CoE and the EU in the field of social affairs reduced to the place and role of the European Committee of Social Rights (ECSR) in this process. This paper aims to show that both organizations are engaged in structured and formally regulated cooperation covering also the sphere of social fundamental rights, of which the ECSR remains one of the important factors. The construction corresponds with these assumptions. First, the general conditions of cooperation between the CoE and the EU and their foundations will be discussed. Then the area of social rights will be presented as the subject of cooperation between the two organizations. The next element of the analysis will be a presentation of the Committee itself as a body of the ESC functioning within the system of the Council of Europe. Finally, the ECSR activities in the field of cooperation with the EU structures in the matter in question will be considered.

The assumptions of the article will be realized by using research methods adequate to the assumed aims. Among them a dogmatic-legal analysis will obviously dominate. At the same time the following considerations aim at the analysis of only selected aspects of the topic and pointing out the key issues. They do not aspire to exhaust the problem, but rather to be a contribution to further discussion on the examined issues.

COOPERATION BETWEEN THE COUNCIL OF EUROPE AND THE EUROPEAN UNION - GENERAL REMARKS

Both the Council of Europe and the European Union are international governmental organizations. The special (supranational) nature of the Union does not seem to prevent it from being qualified as this type of international law entity (Barcz, 2008, p. 60-62; van Vooren & Wessel, 2014, p. 4). Thus, both organizations remain forms of cooperation between states, with specific organs and a set of competences designed to enable them to pursue objectives common to their members (Doliwa-Klepacki, 1999, p. 14; Menkes & Wasilkowski, 2010, p. 86-93). At the same time, it should be pointed out that the nature and scope of the tasks carried out by both organizations remain consistent to a certain extent (Polakiewicz, 2021, p. 2). They are also linked by a kind of identity of their regional location. Consequently, their cooperation seems not only desirable, but even inevitable.

The CoE Statute does not contain direct and explicit references to the necessity of cooperation with other international organizations. However, it certainly does not exclude such cooperation. Its detailed grounds and directions, however, result from the decisions of member states, expressed i.a. in the form of appropriate declarations or action plans. The treaties establishing the EU (Treaty on European Union - TEU and Treaty on the functioning of the European Union - TFEU) are somewhat richer in content. In accordance with Article 220(1) TFEU, the Union shall establish all appropriate forms of cooperation not only with the organs of the United Nations and its specialised agencies, but also with the Council of Europe (as well as with the Organization for Security and Cooperation in Europe and the Organization for Economic Cooperation and Development). On a more specific level, the TFEU provides the basis for EU cooperation with the CoE in a sectoral dimension - in the field of education and sport (Article 165(3) TFEU) and in the field of culture (Article 167(3) TFEU).

The institutional framework of cooperation between the two organizations is also based on mutual agreements. One of the key elements in this area is the 2007 Memorandum of Understanding between the Council of Europe and the European Union (MoU), preceded by a series of agreements on institutional relations dating back to the 1980s. The MoU now appears to lay the foundations of cooperation between the two organizations - both at the organizational and the substantive level.

In organizational dimension, CoE and EU cooperation, as envisaged in the MoU, should be based on two pillars - regular consultation, at political and technical level, on issues of common priority and the development of joint activities and cooperation at the level of CoE and EU specialised bodies and procedures. The cooperation model defined in this way should include, among others, an enhanced political dialogue aimed at setting common priorities and strategies (in the long or medium term), regular exchange of information and the development of joint

opinions and initiatives, coordination of operational activities in areas identified as priorities or enhanced consultation between networks or bodies with activities in the same priority areas.

In substantive terms, the MoU provides for cooperation between the CoE and the EU in a number of areas. In fact, the MoU defines shared priorities and focal areas for cooperation. They include: human rights and fundamental freedoms, rule of law (including legal cooperation and addressing new challenges), democracy and good governance, democratic stability, intercultural dialogue and cultural diversity as well as education and youth (including promotion of human contacts). However, what is most important from the point of view of the considerations presented in this paper - the MoU also assumes the cooperation of both organizations in the field of social cohesion. This area is therefore one of the common priorities of the CoE and the EU, and thus an area of desirable and expected cooperation of both entities. This area, as the subject of cooperation between the CoE and the EU, should therefore be presented in more detail. This is where the European Committee of Social Rights will be active.

SOCIAL ISSUES AS AN AREA OF CO-OPERATION BETWEEN COE AND EU

When describing the sphere of social affairs or (according to the MoU nomenclature) social cohesion, its scope and the understanding of cooperation in this field presented by the parties to the MoU should first be determined. The MoU itself does not contain particularly extensive provisions in this area. Point 39 states that the European Social Charter (ESC) and relevant EU acts remain the basis for cooperation between the two organisations in this field. Paragraph 40 states that the CoE and the EU will support the efforts of Member States to exchange good practices on “social cohesion and solidarity - in particular in combating violence, poverty and exclusion and in protecting vulnerable groups (...)”. It should be added that these provisions also correspond to the TFEU, in the part that deals with social policy (Part III, Title X TFEU). Article 151 TFEU also refers directly to the ESC: The Union and the “Member States, having in mind fundamental social rights such as those set out in the European Social Charter (...), shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion”.

Therefore, there seems to be no doubt that one of the cornerstones of cooperation between the CoE and the EU in the area of social affairs remains the European Social Charter and the standards derived from it. The ESC naturally forms part of the Council of Europe *acquis*. However, it cannot be ignored that, if only in the light of the provisions of the TFEU cited above, the influence of the ESC on the EU *acquis* has a certain potential. It is worth noting, among other things, that in the area of the rule of law, democracy and, above all, human rights - including social rights - it is the CoE and its *acquis* that constitute the relevant point of reference. This is explicitly confirmed by point 10 of the MoU and also, to some extent, by Article 151 TFEU cited above (and even the preamble of the Charter of Fundamental Rights of the European Union). In other words, it seems that in the interaction between the CoE and the EU systems, the *acquis* of the former occupies a special position.

If, therefore, referring to the provisions of the MoU, it is reasonable and desirable to achieve a kind of synergy and avoiding duplication of the solutions adopted in this regard, two issues come to our attention. First, it is worth recalling that the European Union is not a party to the ESC, and the Treaties establishing it do not provide for EU accession to the Charter (as they do in relation to the European Convention on the Protection of Human Rights and Fundamental Freedoms - ECHR). Thus, the path of unification of standards and the impact of the CoE *acquis* on the EU system through the accession of the latter to the ESC is, at least for the time being, excluded. Second, as O. de Schutter notes, the model of ensuring coherence of the jurisprudential activity of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights in relation to the ESC and the Union's Charter of Fundamental Rights (CFR) diverges from a similar model relating to the ECHR-CFR relationship (de Schutter,

2021, p. 15). Rights and freedoms contained in the CFR and having their equivalents in the ECHR are generally interpreted in line with the case-law of the European Court of Human Rights (Polakiewicz, 2021, p. 16). A similar mechanism does not function when it comes to interpreting the ESC, even though a number of CFR provisions were inspired by the Charter (de Schutter, 2021, p. 15).

Of course, this does not mean that the ESC remains irrelevant from the perspective of the EU legal system. On the contrary - it can be treated as an important guideline in the process of interpreting European Union law (de Schutter, 2021, p. 15-16), which CJEU case-law seems to confirm. Representatives of the doctrine cite in this regard two fundamental judgments of the CJEU (de Schutter, 2021, p. 16; Świątkowski & Wujczyk, 2016, p. 430-431). In Case C-116/06 (Kiiski), the CJEU explicitly referred to Article 8 of the ESC on the right of female workers to protection before and after childbirth, together with the issue of ensuring that women are entitled to a reasonable amount of leave. The Court directly referred to the fact that Article 151 TFEU refers to the ESC, to which all Member States are parties, as a result of having acceded to the Charter in its original version, revised version or both. On that basis, it used the ESC as the basis for interpreting the EU directive on improving the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

The Court adopted a similar approach to the ESC in Case C-268/06 (Impact), interpreting the Framework Agreement on fixed-term work annexed to Directive 99/70/EC. It again referred to Article 151 TFEU and then to the ESC itself. It stated that the European Social Charter includes among its objectives the right of all workers to "fair remuneration ensuring them and their families a decent standard of living". In the opinion of the CJEU, Clause 4 of the Framework Agreement (containing the principle of non-discrimination) should be interpreted as expressing a principle of Community social law that cannot be interpreted in a restrictive manner (Świątkowski & Wujczyk, 2016, p. 431), in line with the objective of ensuring fair remuneration under the ESC.

It follows from the above that the CJEU does indeed refer to the ESC when interpreting EU law. Importantly, however, in the Council of Europe system, the interpretation of ESC provisions is carried out by the European Committee for Social Rights. However, practice shows that the effects of its activity in this dimension do not necessarily coincide with the ideas presented by the CJEU in the context of the interpretation of the ESC. This may concern, for instance, differences in the approach to interpreting the scope of a given right under the ESC in interaction with the fundamental freedoms of the EU market (e.g. freedom to provide services versus Article 6 of the ESC), which, from the perspective of the CJEU, seem to have a significantly fundamental character (more extensively: de Schutter, 2021, p. 17-20). Even if certain rights contained in the ESC are reflected in the CFR, the EU Court will treat them - in doubtful situations - rather as exceptions to economic freedoms (de Schutter, 2021, p. 17). And it is difficult to expect the CJEU to directly refer to or rely on the effects of the ECSR's quasi-judicial activity in its activities. There is no doubt, however, that in view of potential or real conflicts of interpretation, some kind of cooperation and dialogue between the ECSR and the CJEU becomes desirable.

In this way the promotion, dissemination of ESC standards as an element of CoE and EU cooperation requires channels other than the EU's accession to the Charter itself. In view of the shape of the legal basis of the EU legal order - also in the dimension of economic integration - it also does not seem possible for the CJEU to rely on the interpretation of the ESC presented by the ECSR. In this light, the mechanisms of organizational and substantive cooperation between the CoE and the EU indicated in the MoU and described above take on particular significance. It is also in this light that the field opens up for an analysis of the role and significance of the ECSR for the cooperation of the two organizations in the sphere of social rights and an assessment of the methods by which it can and does affect the cooperation of the CoE with the EU.

EUROPEAN COMMITTEE OF SOCIAL RIGHTS AS PART OF THE ESC SYSTEM

Possibilities and mechanisms of cooperation between the ECSR and the EU, and thus influencing its acquis, should be preceded by an outline of the nature of the Committee as a body created by the ESC. In addition to strictly organizational elements, attention should be paid to the scope and nature of its competences. This will allow us to assess how, through which channels and according to which mechanisms the ECSR contributes to the development of cooperation between the CoE and the EU in terms of integrating their acquis in the field of social affairs.

The Committee originally functioned within the 1961 ESC as the Committee of Experts, later (since 1998) as the Committee of Independent Experts. Initially, the number of Committee members did not exceed seven, but over time this number was increased and currently the ECSR consists of 15 members. Their term of office is six years, renewable once. They shall be elected "by the Committee of Ministers from a list of independent experts of the highest integrity and of recognised competence in international social questions, nominated by the Contracting Parties" (Art. 25 of the ESC). According to the ESC, they are independent - they sit in the Committee in their personal capacity and, during their term of office, may not perform functions which are incompatible with the requirements of independence, impartiality and availability inherent in their mandate. Since 1998, the Committee uses its current name - the European Committee of Social Rights.

The details relating to the composition of the Committee, the manner of its composition, its internal structure and its operating procedures are largely the subject of the Committee's Rules of Procedure.

The Committee elects its President, one or more Vice-Presidents (there are currently two in the Committee) and a General Rapporteur. Their term of office is two years and together they form the Bureau of the Committee. The President chairs the work of the ECSR and chairs its meetings. He/she may delegate some of his/her responsibilities to the Vice-President(s). In case the Chairperson is unable to discharge his/her duties or in case of a vacancy, the Vice-President shall take over the functions of the President.

The Committee's key competences may, in simple terms, be largely reduced to a monitoring profile. This means that the Committee's main task remains the monitoring of the situation in the countries with respect to compliance with the requirements and standards of the European Social Charter as well as the 1988 Additional Protocol and the Revised European Social Charter (Gadkowski, 2014, p. 89). However, the role of the ECSR in shaping standards of labour law, social security and social policy is also recognised (Gadkowski, 2014, p. 89).

In the dimension of purely controlling powers, two main competences of the ECSR can be distinguished. Firstly, it adopts conclusions within the reporting procedure and, secondly, it adopts decisions under the collective complaints procedure. Both procedures - including the role of the Committee bodies - are described in relative detail in the Rules.

The latter competence of the ESC draws particular attention. The system of monitoring compliance with the ESC based on the consideration of reports presented by states - which is the primary monitoring mechanism under the ESC - obviously presents a certain efficiency. However, as emphasized in the literature, in the light of extensive control mechanism - mainly of a judicial nature - under the ECHR, the effectiveness of the mechanism based on the reporting method may have raised some doubts (Gadkowski, 2016, p. 39). They mainly concerned the disproportion between the possibilities of verification (and correction) of violations of the provisions of the ECHR and the ESC by states (Gadkowski, 2016, p. 39). In this light, through the reform of the ESC system (Additional Protocol of 1995), the institution of a collective complaint was introduced into its system. This was intended, as A. Gadkowski points out, to ensure a certain level of balance with regard to the level of protection of political rights and social rights in the legal space of the Council of Europe (Gadkowski, 2016, p. 39).

In the area of collective complaints, the ECSR does not issue judgements. As a rule, the investigation ends with a report containing information on the progress of the examination of the complaint and a conclusion as to whether the State has ensured the correct application of the provision of the ESC to which the complaint refers. The report is transmitted to the Committee of Ministers, the organization which brought the complaint and to the States. On

the basis of the ECSR report, the Committee of Ministers shall issue a relevant resolution. If the findings of the ECSR indicate that it has not been applied in a satisfactory manner, the Committee of Ministers shall, by a two-thirds majority, adopt a recommendation addressed to the State concerned (Additional Protocol, 1995, articles 8 - 9). Thus, in its formal dimension, the ECSR does not perform a judicial function, remaining a body of non-judicial control of compliance with the ESC. Nevertheless, a comprehensive assessment of the ECSR's competence in the field of collective complaints leads some authors to argue that in its essence this body resembles a quasi-judicial entity in the ESC system (Gadkowski, 2014, p. 87; Gadkowski, 2016, p. 38).

In the above described way the role of the ECSR within the European Social Charter and, indirectly, within the Council of Europe system is defined. The Charter constitutes one of the pillars of the human rights acquis of the Council of Europe. Against this background, it is necessary to answer the question what is the place of the ECSR in the area of co-operation between the Council of Europe and the EU at the organizational and substantive level and in which areas the Committee's impact on the activities of the EU (its institutions and bodies) can be identified. These issues will be commented on in the following paragraph.

ECSR ACTIVITIES IN RELATIONS WITH EU STRUCTURES

For the reasons outlined earlier, the effects of the ECSR's quasi-judicial activity do not constitute a binding guideline for the CJEU, and there may even be some conflicts of interpretation in this context. However, as indicated in one of the previous paragraphs, a dialogue between the organs of the CoE system and the EU with regard to how the ESC is interpreted and its implementation is desirable. What seems to be the appropriate field for this dialogue is the area of organizational and substantive cooperation, where the ECSR, as an organ of the ESC, can influence cooperation between the CoE and the EU. This path also coincides with the MoU assumptions presented earlier.

Of course, the caveat is that the ECSR is not an CoE body but an ESC body. However, there is no doubt that as such it is firmly rooted in the ECRE system. On the other hand, it is clear from the MoU on cooperation between the two organizations that the basis for such cooperation in the field of social cohesion is provided by the ESC and it is implemented - from the perspective of the Council of Europe - through its specialised structures. The ECSR obviously seems to fit in this framework. Consequently, the two indicated paths of cooperation and influence need to be brought closer together.

Cooperation on the organizational level as an activity leading to substantive approximation (or unification) of positions is characterised by variety of forms and forums of mutual relations. The ECSR and its activities are no different. At the same time, it should be added that on the EU side, the Committee engages in dialogue with various partners, ranging from EU institutions (CJEU, European Commission) to EU agencies (Fundamental Rights Agency - FRA). Only a few examples of cooperation in this constellation will be presented below.

The relationship of the ECSR with the European Commission seems to have considerable importance and a certain regularity. Of course, the rank, level and forum of meetings with representatives of the Commission vary. Reducing considerations to contacts and meetings involving directly representatives of the Committee and the Commission, we can point, among others, to meetings held in 2013. They resulted in an important working document prepared by the Committee entitled "The relationship between European Union law and the European Social Charter". This document responded to the need to clarify the relationship between Union law and the ESC, and in so doing to improve the coordination of the two systems. It identifies the rights contained in the Charter and the corresponding sources of EU law (primary and secondary) and analyses the relationship between them. It also includes proposals to strengthen coherence between the two systems, taking into account any future accession of the EU to the Charter. The document recognizes, of course, that decisive progress in this dimension depends on a political decision taken at the highest level of both organizations. Thus, it became the basis for further discussions devoted to the ESC itself as well as its relation to EU law (Activity Report, 2014, p. 36-38).

Another example of the influence of the ECSR on the EU space through cooperation with the European Commission can be the opinion of the Secretary General of the European Council on the initiative of the European Pillar of Social Rights. This opinion was forwarded to the President of the EC and included, *inter alia*, a suggestion to include the provisions of the ESC in the Pillar, which would strengthen the synergy between the two European systems of protection of fundamental social rights (Activity Report, 2016, p. 63).

The ECSR's relations with the Court of Justice of the European Union and its representatives remain relatively regular. The need to intensify cooperation was already recognised by the ECSR in 2010 when it took as a reference its relations with the European Court of Human Rights (Activity Report, 2010, p. 8).

It is worth noting again that the levels and forums of appropriate contact between the Committee and the CJEU remain diverse. They include, among others, the forum of scientific conferences. An example in this regard remains the February 2015 conference on the future of the protection of social rights in Europe. It provided an opportunity to exchange views and analyses on the relationship between the ESC and EU law with the participation of the President of the EU Court of Justice (Judge Koen Lenaerts). It resulted in the so-called Brussels Document envisaging, among other things, some pathways for a wider consideration of social rights in all EU policies (Activity Report, 2015, p. 54).

The Committee's relations with the CJEU also include standard bilateral meetings for the exchange of views between representatives of the two bodies. Meetings of this kind have quite a long tradition, although they take place every few years (2004, 2010, 2014, 2016). By way of example, it can be pointed out that during a meeting with Koen Lenaerts, President of the Court of Justice of the European Union, in October 2016, the issues raised included the participation of EU institutions in the conclusion of agreements outside the framework of EU law or discrimination (on the basis of various criteria) considered in the light of the case law of the CJEU and the Committee (Activity Report, 2016, p. 63). A similar meeting in December 2014, in turn, addressed two main strands of issues - the relationship between European Union law and the Charter and the economic crisis and social rights (Activity Report, 2014, p. 38).

Finally, it should be emphasised that the ECSR's cooperation with EU bodies also includes relations with the Fundamental Rights Agency. These relations are perceived by the Committee as an element of strengthening of links with the European Union. The effect of cooperation in this area was the establishment of a kind of collaborative platform on social and economic rights, assuming active participation of FRA. Current activities on the ECSR - FRA line include a meeting of Committee representatives with FRA experts. Its purpose was to discuss cooperation in the use by the ECSR of data held by agencies for reporting activities and in the processing of collective complaints. These data are of particular value from the perspective of the Committee, especially in relation to issues related to the rights of the child, persons with disabilities, migration or violence against women. In this way, cooperation at the level indicated appears to translate into efficiency for the Committee in carrying out its tasks (Activity Report, 2019, p. 59).

CONCLUSIONS

The above analyses lead to the following conclusions. Firstly, it should be noted that the framework of cooperation between the Council of Europe and the European Union is clearly defined and formalised. It seems to provide an appropriate basis for intensive cooperation between the two organizations. At the same time, this cooperation also covers issues related to the protection of fundamental social rights, with the Council of Europe acquis seeming to be the point of reference. Indeed, the ESC can and often does provide interpretative guidance to the CJEU. Importantly, the autonomy of both organizations' systems, including compliance monitoring systems, means that CoE standards do not always find a direct reflection in the practice of applying EU law. Assessed against this background, the role of the ECSR remains important. However, it does not consist in purely dictating the interpretation of social rights standards based on the ESC. It largely boils down to initiating and maintaining a dialogue with EU institutions (including the CJEU) and its bodies. This in turn should contribute to the gradual achievement of coherence in the protection of social rights within both organizations.

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