

OPEN ACCESS

ISSN 2280-4056

*E-Journal of
International and Comparative*

LABOUR STUDIES

Volume 14 No. 03/2025



ADAPT
www.adapt.it
UNIVERSITY PRESS

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@ 2026 ADAPT University Press

Online Publication of the ADAPT Series
Registration No. 1609, 11 November 2001, Court of Modena
www.adaptbulletin.eu

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The Impact of the European Committee of Social Rights Monitoring Tools in Strengthening the Labour Rights of People with Disabilities and Illnesses in times of Crisis: The Case of Portugal

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Abstract. This article aims to discuss the low impact of the European Committee of Social Rights monitoring tools on Portugal's national Labour Law, namely in times of crisis, despite its potential to support major changes in the legislation of the Member States, namely related to the discrimination at workplace against people with disabilities (pwd) or illnesses. To point out that position this research discusses the system of reports that were taken and the absence of complaints on this subject.

Keywords: *Discrimination, People with disabilities and illnesses; European Committee of Social Rights; Portugal; European Social Charter.*

1. The European Social Charter: A Brief Overview

1. Main Goals and Structure

The European Social Charter (ESC), revised in 1996 by the European Social Charter Revised (ESCR), is a Council of Europe treaty that deals with fundamental social and economic rights, complementing the European Convention on Human Rights (ECHR), related with civil and political rights. The ESC covers a significant range of human rights concerning to employment and social protection, housing, health,

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education, etc. The Charter aims to guarantee access to these rights without discrimination, on equal terms, for everyone, including people in vulnerable situations, such as people with disabilities (pwd).

The implementation of the ESC by States Parties is supervised by the European Committee of Social Rights (ECSR) through the collective complaints procedure and the reporting system, a complex system that, as has been argued, should be regarded as a unitary system¹. As will be shown, Portugal is one of the countries with more complaints, but none of them are related with the protection of pwd. Moreover, as will be exposed more deeply, the reporting system is not delivering results in the matter at hand.

The ESC, signed in Turin on 18 October 1961, entered into force on 26 February 1965, subsequently revised in 1996, and the European Social Charter Revised (ESCR), together with the European Convention on Human Rights (ECHR), form part of the Conventions issued by the Council of Europe.

So, the ESC is composed by 5 texts: the ESC, two additional protocols, one amending Protocol reforming the supervisory mechanism and the Revised European Social Charter. The body responsible for monitoring the Charter Texts application is the ECSR.

The Council of Europe is a supranational body, made up of 47 Member States and 6 Observer States, with a European scope, created on 5 May 1949 with the aim of defending human rights and fundamental freedoms. This international organisation, based in Strasbourg, has bodies that monitor compliance with its legal instruments: the European Court of Human Rights (ECHR), the Committee of Ministers (the decision-making body composed by the ministers of foreign affairs of each Member State or their permanent diplomatic representatives) and the ECSR.

In international literature, the ESC has been the subject of several studies, particularly focussing on its level of binding force including at judicial level², including in the case of States that have not ratified the Revised

¹ L. JIMENA QUESADA, *Interdependence of the Reporting System and the Collective Complaint Procedure: Indivisibility of Human Rights and Indivisibility of Guarantees, European Social Charter and the challenges of the XXI century – La Charte Social Européenne et les défis du XXIe siècle*, Marilisa D’Amico e Giovanni Guiglia (ed), Ed. Scientifiche Italiane, Nápoles, 2014.

² C. NIVARD, *La justiciabilidad de los Derechos Sociales en el Consejo de Europa*, *Lex Social*, Vol. 6, n.º 2/2016, 2016, 12-30, C. SALCEDO BELTRAN, *La Aplicabilidad Directa De La Carta Social Europea Por Los Órganos Judiciales*, *Trabajo Y Derecho*, n.º 13/2016 (Enero), N.º 13, 1, 2016, pp. 1- 27.

CSE³ many of them with the intention of counteracting its weak local implementation but valuing its potential impact on strengthening social rights⁴, particularly in crisis contexts⁵.

The binding nature of the decisions of the ECSR has been discussed, particularly with regard to a decision condemning Spain⁶. Although the binding nature of the decisions of the ECSR has been claimed by doctrine⁷. This understanding is not unanimous. It is argued that there is a duty to take account of the pronouncements of human rights treaty bodies, they are not enforceable⁸.

The discussion around monitoring mechanisms and their effectiveness has offered important contributions⁹ and stills one of the main goals regarding the subject matter.

³ I. ALZAGA RUIZ, *La aplicabilidad de la Carta Social Europea por los órganos jurisdiccionales internos*, *Trabajo y derecho*, n.º64, 2020, pp. 1-64.

⁴ M. MIKKOLA, (2000), *Social Rights as Human Rights in Europe*, *European Journal of Social Security*, 2(3), 259-272. Available at: <https://doi.org/10.1023/A:1010028716459> ; F. JIMÉNEZ GARCÍA, *La Carta Social Europea (Revisada): Entre el desconocimiento y su revitalización como instrumento de coordinación de las políticas sociales europeas*, *Revista Electrónica de Estudios Internacionales*, 2009, 1697-5197, n.º17. Available at: [CartaSocialrevisada \(urjc.es\)](http://CartaSocialrevisada(urjc.es)) ; L. JIMENA QUESADA, *Introducción: sostenibilidad y efectividad de los derechos sociales, incluso y sobre todo en tiempos de crisis*, *La jurisprudencia del Comité Europeo de Derechos Sociales frente a la crisis económica* in Carlos L. Alfonso Luis Jimena Quesada, Marian Carmen Salcedo Beltran, Bomarzo, Albacete, 2014, pp.13-48;

⁵ N.A. PAPADOULOS, *Austerity Measures in Greece and Social Rights Protection under the European Social Charter Comment on GSEE v. Greece case, Complaint No. 111/2014*, *European Committee of Social Rights*, 5 July 2017, *European Labour Law Journal*, Vol. 10(1), 2017 85–97.

⁶ Regarding the Complaint No. 218/2022, *Confederación Sindical de Comisiones Obreras (CCOO) v. Spain*, despite the Committee's unanimous finding of a violation of Article 24.b of the Charter, Carmen SALCEDO BELTRAN submit a concurring opinion where emphasizes the obligation to respect ratified human rights treaties incorporated into the Spanish legal system.

⁷ L. JIMENA QUESADA, *La primera decisión de fondo contra España del comité europeo de derechos sociales: evidentemente vinculante*, *Lex Social, Revista De Derechos Sociales*, 14 (1), 2024, 1–6[6].

⁸ A. SPAGNOLO, *They are not enforceable, but states must respect them: an attempt to explain the legal value of decisions of the European Committee of Social Rights*, *European Papers*, Vol. 7, 2022, n.º3, pp.1495-1516, [1516].

⁹ B. LIBERALI, *Il sistema di controllo della Carta social europea: il sistema dei rapporti nazionali*, *La Carta Social Europea e la tutela dei diritti sociali –Atti del convegno del 18 gennaio 2013*, Università degli Studi di Milano, a cura di Marilisa D'Amico, Goivanni Guiglia e Benedetta Liberali, Edizione Scientifiche Italiane, Nápoles, 2013; P. STANGOS, *Les rapports entre la Charte Sociale Européenne – Le rôle singulier du Comité Européen des Droits Sociaux et de sa jurisprudence*, *Cahiers de Droit Européen*, n.º 49, 2013, pp. 319-393; L. JIMENA QUESADA, *Introducción: sostenibilidad y*

The national literature has also sought to analyse the application of the CSE at national level, calling on the case law of the CJEU¹⁰, discussing the monitoring procedures¹¹ and its effectiveness in crisis contexts¹², or referring to its impact on the protection of specific matters and articles of ESC/ESCR such as wages¹³, collective bargaining¹⁴, health and safety at work¹⁵, the right to social and medical assistance¹⁶, but also from a more general perspective¹⁷.

efectividad de los derechos sociales, incluso y sobre todo en tiempos de crisis, La jurisprudencia del Comité Europeo de Derechos Sociales frente a la crisis económica in Carlos L. Alfonso Luis Jimena Quesada, Marian Carmen Salcedo Beltran, Bomarzo, Albacete, 2014, pp.13-48; H. CULLEN, The Collective complaints mechanism of the European Social Charter, *EL Rev.* 2000, 25 Supp (Human rights Survey), 18-30; H. CULLEN, The Collective Complaints System of European Social Charter : Interpretative Methods of European Committee of Social Rights, *Human Rights Law Review* 9:1, 2009, 61-93; P. ALSTON, Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System, in G. de Búrca de Witte (eds.), *Social Rights in Europe*, Oxford, Oxford University Press, 2005; R. CHURCHILL/ U. KHALIQ, The Collective Complaints System of the European Social Charter: An Effective Mechanism for ensuring Compliance with Economic and Social Rights?, *EJIL* (2004), 15, n.º 3, 2004, pp. 417-456; K. LUKAS, The Collective Complaint Procedure of the European Social Charter: Some Lessons for the EU?, *Legal Issues of Economic Integration*, Volume 41, Issue 3, 2014, pp. 275-288.

¹⁰ F. C. ALVES, Understanding the revised European Social Charter: Treaties and their municipal law effects, *Revista Jurídica de Los Derechos Sociales, Lex Social, Monográfico 1*, 2017, pp 17-41, [19].

¹¹ R. CARVALHO., The monitoring mechanisms of the RESC conducted by the European Committee of Social Rights: the report system and the collective complaints procedure, *Revista Jurídica de los Derechos Sociales Lex Social, Monográfico 1*, 2017, 42-61.

¹² C.S., BOTELHO, Os direitos sociais em tempos de crise – Ou revisitar as normas programáticas, Almedina, Coimbra, 2015; C. CARVALHO, O impacto da jurisprudência do Comité Europeu de Direitos Sociais em matéria laboral no ordenamento jurídico português, *Revista Jurídica de los Derechos Sociales Lex Social, I*, 2017, 211-243; C. MARTINS DA CRUZ, A Carta Social Europeia no contexto do direito do trabalho de excepção, *Revista do CEJ, Lisboa*, n.º1(1º Semestre 2020), 2020, pp.203-236.

¹³ L. ALVES, *El cumplimiento de la Carta Social Europea en materia de salarios. Un estudio comparado de los ordenamientos laborales portugués, español e italiano*, Atelier Libros Jurídicos, 2014, Barcelona.

¹⁴ L. ALVES, *Breve nota sobre o “direito de negociação coletiva” na Carta social europeia, Estudos em homenagem ao Professor Doutor Manuel António Pita*, Org. Luís Vasconcelos de Abreu, 2022, pp. 507-517.

¹⁵ A. RIBEIRO COSTA, The European Committee of Social Rights Audacity in Protecting Occupational Health and Safety, *Revista Jurídica de los Derechos Sociales, Monográfico 1* (2017), 2017, pp. 244-265.

¹⁶ J. GOMES, O Artigo 13.º da Carta Social Europeia Análise das Conclusões do Comité Europeu de Direitos Sociais relativas a Portugal, Católica, Faculdade de Direito, Escola do Porto, 2020 and M. ROUXINOL, A jurisprudência do Comité Europeu de Direitos

More specifically in the field of the protection of the rights of pwd, doctrinal analysis has focussed on the points of confluence between the objectives of the CSE and EU anti-discrimination law¹⁸. At national level, although there are some contributions¹⁹ the analysis with that focus has been less densified.

In fact, the ESC represents a step towards recognising the indivisibility of human rights, supporting the complementarity between civil and political rights and economic and social rights, thus aligning itself with the meaning of UN Resolution 32/130 and reconciling economic and social rights²⁰. The ECHR incorporates civil and political rights, and the ESC complements it by incorporating a collection of social rights.

It is important to highlight that, although the protective content of social rights is significantly higher in the ESC/ESCR than in the ECHR, Community law is not bound by their level of protection, unlike in the ECHR (Article 53 of the CFR).

Therefore, ECHR case law obliges Member States to carry out an exhaustive proportionality test in favour of the poor and vulnerable before imposing limitations on their rights²¹. The complementarity between the CSE and the ECHR, which was affirmed in the Turin

Sociais, Centro de Estudos Judiciários, Oral intervention., 2017 Available at: <https://educast.fccn.pt/vod/clips/22yt8jsgpa/streaming?locale=pt>

¹⁷ M. ROUXINOL, A jurisprudência do Comité Europeu de Direitos Sociais, Centro de Estudos Judiciários, Oral intervention., 2017 Available at: <https://educast.fccn.pt/vod/clips/22yt8jsgpa/streaming?locale=pt>

¹⁸ G., QUINN, 'The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose' in Gráinne de Búrca, Bruno de Witte, and Larissa Ogertschnig (eds), *Social Rights in Europe* (Oxford, 2005, online edn, Oxford Academic, 22 Mar. 2012) <https://doi.org/10.1093/acprof:oso/9780199287994.003.0014>, accessed 24 Aug. 2024; M. BELL, 'Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination', in Gráinne de Búrca, Bruno de Witte, and Larissa Ogertschnig (eds), *Social Rights in Europe* (Oxford, 2005, online ed, Oxford Academic, 22 Mar. 2012), <https://doi.org/10.1093/acprof:oso/9780199287994.003.0013>, accessed 29 Sep. 2025.

¹⁹ F. VENADE SOUSA, *The Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of Persons with Disabilities: a dynamic pro unione and pro homine with particular reference to the CJEU case-law*, 2019 <https://revistas.uminho.pt/index.php/unio/article/view/255>.

²⁰ I. ALZAGA RUIZ, *La aplicabilidad de la Carta Social Europea por los órganos jurisdiccionales internos*, *Trabajo y derecho*, n.º64, 2020, pp. 1-64, [3].

²¹ A. ARANGUIZ, *Bringing the EU up to speed in the protection of living standards through fundamental social rights: Drawing positive lessons from the experience of the Council of Europe*, *Maastricht Journal of European and Comparative Law*, 28(5), 2021, 601-625, [624].

Process and guarantees a high-level system of protection, has therefore been upheld²².

So, like was mentioned, the ESC is not within the domain of European Community. The EU's lack of adherence to the CSE raises a number of questions, namely divergences between the decisions of the CJEU and those of the ECtHR, as well as with the decisions of the ECSR²³.

In fact, some authors highlight the divergences between the ESC and European Union law, particularly in initiatives such as the European Pillar of Social Rights (EPSR). Unlike the Opinion of the Secretary General of the Council of Europe on the European Union initiative to establish a European Pillar of Social Rights, the EPSR makes no reference to the ESC and does not incorporate provisions of the Revised ESC and his system of collective complaints²⁴. The plenary session of the European Economic and Social Committee, on 15 June 2023, approved an opinion, related to *A protocol on social progress*, with reference SOC/7567²⁵, with the objective of the recognition of the ESC for the purpose of reforming the EU Treaties which includes a protocol on social progress, that, among other things, 'ensure that, in the event of conflict, the rights and freedoms of employees and their families are not violated'.

The *Part II* of the CSE includes wide-ranging list of rights with different nature and scope foreseen on set of articles that concretise the enumeration of principles contained in *Part I*. The content of these rights includes labour rights, namely the right to work, right to fair regulation of labour and trade union rights included on *Part III* of the CSE, consisting only of Article 20, determines the commitments that result for the contracting parties from ratifying the charter. According to this rule, the scope for binding is different in Part I, which sets out its objectives, and Part II, which, by establishing a scope for acceptance and/or refusal, is only partially binding²⁶.

²² C. MARTINS DA CRUZ, *A Carta Social Europeia no contexto do direito do trabalho de excepção*, *Revista do CEJ*, Lisboa, n.º 1 (1º Semestre 2020), 2020, pp.203-236, [234].

²³ I. ALZAGA RUIZ, *La aplicabilidad de la Carta Social Europea por los órganos jurisdiccionales internos*, *Trabajo y derecho*, n.º 64, 2020, pp. 1-64, [4].

²⁴ X.M. CARRIL VÁZQUEZ, *Los golpes bajos de la Unión Europea a la Carta Social Europea*, *Lex Social, Revista De Derechos Sociales*, 13 (2), 2023, 1–22, [14-17]. Available at: <https://doi.org/10.46661/lexsocial.8350>

²⁵ Available at: [Social Progress Protocol | EESC \(europa.eu\)](https://eesc.europa.eu/content/social-progress-protocol)

²⁶ M. RODRÍGUEZ PINERO, M., *La carta social europea y la problemática de su aplicación*, 1978, 11-19, [5].

2. The Evolution of the Labour Protection of Vulnerable Groups, Namely Disabled People in the ESC and the Revised ESC

The recognition of the rights of pwd in the ESC up to the present day is the result of an evolutionary process. This process is related to the way in which the concept of disability has been shaping according to the different models of protection on the grounds of disability that have emerged historically.

The definition of disability, consistent with a human rights approach, should be focused on the barriers faced by pwd and not on their limitations or impairments²⁷ like resulted from the medical conception of disability model, and combine the factors of person with the factors of context²⁸. The relational or biopsychosocial model, anchored in a human rights perspective, makes it possible to overcome the limitations of a medical model with only focus on the individual rehabilitation and a social model that disregards the specific limitations of the disabled person²⁹.

The 1991 and 1996 version of the ESC include the right to employment and the labour protection of vulnerable persons, like pwd. The Revised ESC of 1996 provided a wider protection of disabled persons and on Article E, about Non-discrimination, determines that the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as health.

According to the explanatory report of the Revised CSE³⁰, the original text had a limited impact on the area of rehabilitation and should accommodate a concern to promote autonomy and the right to independent living from the perspective of the social paradigm of human rights³¹.

²⁷ L. WADDINGTON, M. PRIESTLEY, *A human rights approach to disability assessment*, *Journal of International and Comparative Social Policy* 37, 2021, 1–15, [2] <https://doi.org/10.1017/ics.2020.21>

²⁸ T.A. DEGENER, *A new human rights model of disability*, in Della Fina, V. et al. (eds), *The United Nations Convention on the Rights of Persons with Disabilities*, New York, 2017, pp. 41-59.

²⁹ J. NETO, *Deficiência, doença e discriminação: os 3 D's da desigualdade laboral*, *A discriminação em razão da deficiência e doença pela lenta da Convenção dos Direitos das Pessoas com deficiência*, *Prontuário de Direito do Trabalho I/2021*, Centro de Estudos Judiciários, Lisboa, 2021, pp.181-209, [184-185].

³⁰ Explanatory Report to the European Social Charter (Revised) Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ccde4>

³¹ F. VENADE SOUSA, *Direitos fundamentais das pessoas com deficiência e jurisprudência multinível*, Universidade Católica Editora, 2021, 68

After the revision of Article 2, *the right to just conditions of work*, two paragraphs have been amended (paragraphs 3 and 4), the others remain unchanged. On *Paragraph 3* the provision provides for an increase in annual holidays, from the two weeks to four weeks. On *Paragraph 4*, the provision, which in the Charter provides for additional paid holidays or reduced working hours for employees engaged in dangerous or unhealthy occupations, has been amended to reflect policies which aim to eliminate the risks to which employees are exposed and so the aim is that additional paid holidays or reduced working hours should only be provided where it has not been possible to eliminate or reduce sufficiently the risks inherent in dangerous or unhealthy occupations. This provision should be seen as a complement to the revised Article 3, which emphasise the prevention of occupational accidents. Two new paragraphs have been added to paragraph 6, the obligation on the Parties under this paragraph is to ensure that employees are informed about the essential aspects of their contract or employment relationship. The "essential aspects" of the contract or employment relationship of which employees shall be informed have not been specified in the provision.

However, the mentioned report makes a reference to the minimum requirements in European Community Directive (91/533) that states the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (Article 2). The provision covers all employees, but the appendix stipulates that two exceptions can be made to employees whose contract of employment covers a very short period of time or whose contract or employment relationship is of a casual or of a specific nature provided it is justified by objective considerations; in the paragraph 7, the general recognition of the fact that night work places special constraints on employees, both men and women led to the inclusion of this paragraph in the Revised Charter.

In the revised version of the ESC, Articles 1, 2, and 3, determine the rights to work, just conditions of work, and safe and healthy conditions at work and Article 15 also determines the right of persons with disabilities to independence, social integration and participation in the life of the community.

According to Article 15.2 ESC, the access to employment of pwd should be promote through all measures tending to encourage employers to hire and keep in employment pwd in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. Such measures may require recourse to specialised placement and support services.

Therefore, the scope of protection of the CSE and of the CSER expressly cover the legal protection of pwd, namely their right to access and maintain employment. In a certain way, the revision of the charter seems to be following part of the evolution of the disability models. Nevertheless, the reference to sheltered employment may raise questions about the controversial options of segregated hiring, which should be passed over policies of access to employment in an open and inclusive market.

3. *Monitoring Procedures*

The European Committee of Social Rights (ECSR) is a *quasi-judicial* body (Papadopoulos, 2017:89), responsible to rule on the conformity of the situation in States with the ESC, using two monitoring tools: the *National Reports System* and the *Collective Complaints Procedure*.

The *National Reports System* is formally regulated by Part IV, Articles 21-29, of the 1961 Charter, as amended by the 1991 Turin Protocol (ETS No. 142). The reporting procedure is being applied on the basis of a unanimous decision taken by the Committee of Ministers. The States Parties must regularly submit a report on the implementation of the Charter in law and in practice. Those National reports are examined by the Committee, which rules on whether the described national situations compliance with the Charter. The ECSR examines not only those national reports, but also the comments received from third parties and information received in meetings. After a global evaluation of all that information, the ECSR makes a legal assessment of the conformity of the situation with the Charter Texts and adopts conclusions regarding the implementation of the ESC by each of the States concerned.

The *Collective Complaints Procedure* was introduced by the Additional Protocol to the ESC providing for a collective complaints system adopted in 1995 and entered into force in 1998. This system aims to strength the role of the social partners and non-governmental organizations and can be logged without domestic remedies having been exhausted. The procedure is started by the social partners and other non-governmental organizations that directly apply to the ECSR for rulings on possible non-implementation of the Charter in the countries that have accepted its provisions and the complaints procedure. The Committee takes non-binding decisions of conformity or non-conformity with one or more of the provisions of the Charter.

The acceptance of the the *Collective Complaints Procedure* has implications for the *Reports Procedure*.

Since 2014, the Report procedures³² have changed. So, the States, that have accepted the Collective Complaints procedure, must do simplified report every two year and the States that have not accepted the Collective Complaints procedure need to do an annual report.

More recently, the decision of 27 September 2022 of the Ministers' Deputies establishes a new reform of the system of presentation of reports relating to the application of the ESC. According to the new rules, States Parties which having not accepted the collective complaints procedure, should submit a report every two years responding to questions on one of two groups of Charter provisions. The reform measures, adopted by the Committee of Ministers, aimed at modernising the ESC system³³ in order to ensure the respect for social rights and ensure greater effectiveness of the ESC. The emphasis was on reinforcement on the dialogue between the Charter organs (ECSR and Governmental Committee), States Parties and organisations concerned (like the national human rights institutions and national equality bodies), the trade unions and other civil society organisations. So, in addition to the regular reporting procedure, the new reform introduced the possibility of asking States Parties to submit *ad-hoc reports* related to new or critical issues arise for analysis or review by the ECSR. Even if the ECSR, in the context of the *ad hoc reporting* procedure, will not make conclusions on the conformity of the situation with the Charter, may propose general orientations.

The reporting system are organized by thematic groups. The themes were divided into four and each one incorporates a set of articles³⁴. Directly related with the topic of this article, we have Group 1 *Employment, training and equal opportunities*, includes Article 1, Article 9, Article 10, Article 15, Article 18, Article 20, Article 24 and Article 25 and Group 3 called *Labour rights*, contains Article 2, Article 4, Article 5, Article 6, Article 21, Article 22, Article 26, Article 28, Article 29

³² Available at: <https://www.coe.int/en/web/european-social-charter/national-reports>

³³ CM (2022)114-final, 4.4 Implementation of the Report on Improving the European Social Charter system, 27/09/2022. Available at: <https://search.coe.int/cm?i=0900001680a8412f>

³⁴ The Group 1, Employment, training and equal opportunities, includes Article 1, Article 9, Article 10, Article 15, Article 18, Article 20, Article 24 and Article 25; the Group 2, Health, social security and social protection, Article 3, Article 11, Article 12, Article 13, Article 14, Article 23, Article 30; Group 3: Labour rights, contains Article 2, Article 4, Article 5, Article 6, Article 21 - Article 22, Article 26, Article 28, Article 29 and Group 4, Children, families, migrants, related to Article 7, Article 8, Article 16, Article 17, Article 19, Article 27, Article 31.

So, the ESC includes the dimension of employment protection, namely protection in health and safety at work, against harassment, the access of pwd to rehabilitation and employment and collective labour rights and the protection from discrimination, specifically on the grounds of disability provided for in *article E*.

In the *Group 1*, related with non-discrimination, it is important to highlight the *article 15* that provides a fundamental principle to the guarantee of the right to maintain the employment of pwd, the right to reasonable accommodation of the workplace in the ordinary working environment and to adjust the working conditions to the needs of the disabled. It is also relevant to underline *article 25* about protection in the termination of the contract, context in which pwd and chronic illness are especially vulnerable. The *Group 3* includes a wide range of labour rights and that means individual and also collective rights.

The ECSR and the Governmental Committee decided to request an *ad hoc report* on the cost-of-living crisis (decision adopted by the Governmental Committee during its 146th meeting from 9 to 12 May 2023).

In turn, the States are organised according to the number of complaints. Portugal is one of the countries with the highest number of complaints and therefore included in Group A. Between 1993 and 2024, Portugal submitted 9 reports on the application of the Charter and 19 on the application of the Revised Charter. Portugal was also submitted an *ad hoc report* on the cost-of-living crisis. On 15 January 2024, the 18th report concerns the follow-up given to the relevant decisions of the Committee in the framework of the collective complaints' procedure. The assessments of the Committee on the follow up to decisions in complaints have been published in March 2024.

In this study, we will take into account Conclusions of the ECSR concerning Portugal about the thematic group *Labour rights* from 2022 and *Employment, training and equal opportunities* from 2020. However, according to the applicable rules, the Conclusions of 2020 only refer to the information submitted by the Portuguese Government on the follow-up given to the relevant decisions of the ECSR in the framework of the collective complaint's procedure.

4. The Third Parties Organisations and NGOs Role

The inputs bring by third parties organisations are very relevant to a more accurate diagnosis of reality. For example, regarding the latest *ad-hoc report*, the ETUC addict information and material it received from its affiliates,

namely the ETUC Austerity Watch and its statutory bodies like the ETUC Executive Committee (hereafter 'ETUC EXCO').

It is possible to find references to disability in these contributions which explain the impact of the public policies in the most vulnerable groups and namely to the inclusion of pwd, particularly in the case of Serbia. The ETUC Austerity Watch #3 (November 2023) mentions the introduction in 2023 of the modified "Swiss formula", following the approval in 2003 of the Law on Pension and Disability Insurance, had significant impacts.³⁵ The comments submitted by the ETUC concerning the supervision cycle XXII-4 / 2023 on 'Children, families and migrants' had some interesting inputs. ETUC comments refer three situations related with the protection of pwd, namely in Latvia, Lithuania and Moldova³⁶ but not with the articles analysed in this article.

Recognising NGOs influence, the Council of Europe provides international NGOs with the opportunity to acquire participatory status. There is a list of international non-governmental organizations NGOs registered (Disabled Rights), like European Disability Forum or Alzheimer Europe (AE)³⁷.

They start to have a consultative status for INGOs and this status was changed from consultative to participatory in 2003 and since 2016 the status is regulated by Resolution (2016)3 of the Committee of Ministers of the Council of Europe. According to the list of available NGOs there is a set of registered entities associated to the protection of pwd that may have a decisive contribution in the presentation of complaints regarding non-discrimination and protection of pwd.

Intersectional discrimination, due to more than one factor of discrimination, is still overlooked by organisations that seem to be more focused on the criteria of discrimination based on the factor they are working on.

³⁵ ETUC, *Comments submitted by the European Trade Union Confederation (ETUC) concerning the cost-of-living crisis*, 2024, pp. 58-59. Available at: <https://rm.coe.int/etuc-comments-cost-of-living-2024/1680b11b37>

³⁶ ETUC, *Comments by the European Trade Union Confederation (ETUC) concerning the supervision cycle XXII-3 / 2022 on 'Labour Rights'*, 2022. Available at: <https://rm.coe.int/etuc-observations-on-labour-rights-to-the-ecsr-/1680a82900>

³⁷ 1 July 2019 - 30 June 2023: European Action of the Disabled (AEH); 1 January 2021 - 31 December 2024: Validity - Mental Disability Advocacy Center (MDAC); 1 January 2022 - 31 December 2025: European Disability Forum (EDF); 1 July 2022- 30 June 2026: Alzheimer Europe (AE); International Association Autism-Europe (IAAE); Inclusion International - Inclusion Europe; Rehabilitation International (RI); Mental Health Europe.

Take, for example, the report by ILGA-Europe³⁸, which in response to the ECSR's request for information on at-risk-of-poverty rates for the population as a whole, as well as for children, analysed the following whole, as well as for children, families identified as being at risk of poverty, pwd and older persons. Please show the trend over the last 5 years, as well as forecasts for upcoming year, does not seem very geared towards a response that addresses this condition of double vulnerability, and does not give a clear answer as to the impact of discrimination against LGBT pwd. It is therefore desirable for the various NGOs to work together so that, for certain purposes, they can respond in a concerted and informed way to the issues raised.

The contribution of the UGT-P (Portugal), the only trade union centre that contributed to the Comments submitted by the European Trade Union Confederation (ETUC) concerning the cost-of-living crisis to the ETUC EXCO of October 2022, on October 9th³⁹, is completely silent when it comes to the labour rights of pwd. UGT emphasizes the tripartite Medium-Term Agreement for the Improvement of Income, Salaries and Competitiveness, but don't refer to pwd or other vulnerable groups, thus neglecting an important dimension of the guarantee of the right to work under equal conditions for all employees. The text does not mention any demands or objectives that could be achieved in line with the ESC.

However, the ETUC, both in its Comments and in the studies to which it refers, makes several references to disabled employees, noting this increased vulnerability.

5. *Applicability by jurisdictional bodies*

The ESC, particularly in its revised version, has sparked a doctrinal discussion, which is far from over, about the degree of binding nature of its rules⁴⁰. This subject is related with the doctrinal controversy of 'dualism/monism' about the international conventions.

According to the monist view which international law needs to be transposed by national law in order to be binding on citizens. The

³⁸ ILGA-Europe, *Comments submitted by the ILGA-Europe to the ECSR, concerning the cost-of-living crisis on ad-hoc Report on the Cost-of-Living Crisis*, 28/6/2024. Available at: [1680b0fc12 \(coe.int\)](#)

³⁹ ETUC, *Comments submitted by the European Trade Union Confederation (ETUC) concerning the cost-of-living crisis*, 25/7/2024. Available at: [1680b11b37 \(coe.int\)](#)

⁴⁰ F. ALVES, *Understanding the revised European Social Charter: Treaties and their municipal law effects*, *Revista Jurídica de Los Derechos Sociales, Lex Social, Monográfico 1*, 2017, pp 17-41, [40].

traditional dualist view affirms the existence of two different and autonomous sets of legal rules, with national law prevailing over international law, and the monist view with the primacy of international law⁴¹. Both, the moderate monist perspective and the moderate dualist perspective, have been commonly sympathised with. For example, doctrine qualified the Spanish system as a moderate dualist⁴¹.

As has already been argued, without prejudice to its *nomen iuris* ('Charter'), the Vienna Convention on the Law of Treaties should be applied to the CSE/CSER. This conclusion can be drawn from the degree of binding force that States have attributed to these instruments. The ESC/ESCR, like was mentioned above, is a Council of Europe treaty that it's called the Social Constitution of Europe, guaranteeing a wide range of human rights with a focus on social rights⁴². Despite the lack of knowledge about the Charter system, its potential as an instrument for coordinating the social policies of European states has been, pertinently, defended⁴³.

However, its application by judicial operators is limited. There is no evidence to clearly attribute a jurisdictional status to the ECSR's conclusions or even to its decisions derived from collective complaints. Its generic content is also an obstacle and makes it difficult for courts to apply it⁴⁴. As Martins da Cruz⁴⁵ states, the affirmation of the principles of non-regression, proportionality and reasonableness, proclaimed in the decisions and reports of the CESR, are an important tool to stop the suppression or undue restriction of social rights. Nevertheless, it would be important for the decisions and recommendations of the CESR to address the lack of knowledge about this legal instrument and also the lack of more effective mechanisms for monitoring and enforcing compliance, which could be decisive for the affirmation of these fundamental rights in contexts of economic crisis. It is no coincidence that the affirmation of

⁴¹ I. ALZAGA RUIZ, *La aplicabilidad de la Carta Social Europea por los órganos jurisdiccionales internos*, *Trabajo y derecho*, n.º64, 2020, pp. 1-64,[13].

⁴² M. MIKKOLA, *Social Rights as Human Rights in Europe*, *European Journal of Social Security*, 2(3), 2000, 259-272. Available at: <https://doi.org/10.1023/A:1010028716459>

⁴³ F. JIMÉNEZ GARCÍA, *La Carta Social Europea (Revisada): Entre el desconocimiento y su revitalización como instrumento de coordinación de las políticas sociales europeas*, *Revista Electrónica de Estudios Internacionales*, 2009, 1697-5197, n.º17. Available at: [CartaSocialrevisada \(urjc.es\)](http://CartaSocialrevisada.urjc.es)

⁴⁴ J. SAN CRISTÓBAL VILLANUEVA, *The applicability of the European Social Charter by the spanish jurisdictional bodies: reflections from the perspective of the regulation of labor appeals*. *Revista de Trabajo y Seguridad Social*. CEF, 460, 2021, 175-204,[204].

⁴⁵ C. MARTINS DA CRUZ, *A Carta Social Europeia no contexto do direito do trabalho de excepção*, *Revista do CEJ*, Lisboa, n.º1(1º Semestre 2020), 2020, pp.203-236, [235]. C. NIVARD, *La justiciabilidad de los Derechos Sociales en el Consejo de Europa*, *Lex Social*, Vol. 6, n.º 2/2016,12-30, [26].

these social rights presupposes state intervention, so their guarantee may depend on the implementation of public policies.

Notwithstanding the foregoing, it is possible to find good examples. According to the decision on the merits of the Collective Complaint No. 13/2002 *International Association Autism-Europe (IAAE) v. France*⁴⁶ article 15 applies to all pwd regardless of the nature and origin of their disability and irrespective of their age. The decision in question is pointed to as an example of similar detail to that of the European Court⁴⁷.

2. The Portuguese Case

1. The Ratification Process

The ESC was ratified by Parliament Resolution 21/91 of 6 August 1991. So, Portugal ratified the ESC after the transition to democracy in 1974 and a few years after joining the European Union in 1986, accepting all the social rights with exception of the 'lock out' (forbidden by the Portuguese Constitution), accepted the Additional Protocol providing for a system of collective complaints, but this international instrument has had little impact on the national legal system⁴⁸. After the 1996 revision, in which it adopted the name 'Revised ESC', the Portuguese Parliament Resolution 64-A/2001 of 17 October 2001 ratified the Revised ESC, accepting all its 98 paragraphs. However, has not yet made a declaration enabling national NGOs to submit collective complaints. To date only Finland has done it, and it could be important to strengthen the rights of pwd.

Portugal also ratified the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol on 23 September 2009.

Although Portugal has been proactive in the ratification of the charter documents, there is no evidence of an effective enforcement of the rights associated to the protection of the labour rights of pwd.

⁴⁶ Decision on the merits: *International Association Autism-Europe v. France*, *Collective Complaint No. 13/2002*. Available at: [Decision on the merits: International Association Autism-Europe v. France, Collective Complaint No. 13/2002 \(coe.int\)](https://www.coe.int/t/Doc/CM/13/2002/Decision%20on%20the%20merits%20International%20Association%20Autism-Europe%20v.%20France%20Collective%20Complaint%20No.%2013/2002%20(coe.int).htm)

⁴⁷ C. NIVARD, *La justiciabilidad de los Derechos Sociales en el Consejo de Europa*, *Lex Social*, Vol. 6, n.º 2/2016, 12-30, [26].

⁴⁸ C. CARVALHO, *O impacto da jurisprudência do Comité Europeu de Direitos Sociais em matéria laboral no ordenamento jurídico português*, *Revista Jurídica de los Derechos Sociales Lex Social*, I, 2017, 211-243;

2. The Legal Protection of pwd Today

The Portuguese Constitution incorporates a wide range of social rights into the fundamental rights, which concretise the Social State and an idea of equality and prohibition of discrimination. Those rights presuppose the obligation of positive discrimination with the aim of compensating for social inequalities and achieving real equality.

The list of rights enshrined in the CRP also includes the rights, freedoms and guarantees of employees that are part of the ‘Labour Constitution’, in Articles 53 to 57. Those rights include protecting rules for more vulnerable groups of people, namely pwd, and the ‘credit rights’ enshrined on economic, social and cultural rights, Articles 58 to 59.

The human rights model of understanding disability inspired by the Convention on the Rights of Persons with Disabilities, ratified by the Portuguese state in 2009, had an impact on Portuguese legislation, giving legal backing to the valorisation of the will and autonomy of pwd⁴⁹.

The Portuguese Labour Code, approved by Law 7/2009, transposes, among other directives, Directive 2000/43 (Racial Equality Directive) and Directive 2000/78/EC (Employment Equality Directive), but also Directive 2006/54, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Protection against discrimination in the labour context is covered by the section on equality and non-discrimination and includes the general provisions on equality and non-discrimination, namely the prohibits direct and indirect discrimination set out in Articles 23 to 32 of the Labour Code, but also the prohibition of harassment and equality and non-discrimination on grounds of sex.

Law 38/2004, of 18 August defines the general bases of the legal regime for the prevention, habilitation, rehabilitation and participation of pwd and includes rules on the right to work and employment (Art. 26), reconciling work and family life (Art. 31) and the right to work (Art. 31).

With regard to access to employment, we must also consider Article 5, on discrimination in labour and employment, of Law 46/2006, which prohibits and punishes discrimination on the grounds of disability and the existence of an aggravated health risk, complements the provisions of the

⁴⁹ J. NETO, Assisted Decision-Making (Capacity): A New Legal System Where the Will of People with Disabilities Really Matters? The Portuguese Experience, *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*, Volume 36, April de 2022, Springer, pp. 745–765, [751].

Labour Code and establishes that the elements that constitute discrimination against pwd.

In turn, Article 85 e 86 of the Labour Code stipulates the right to equal treatment for disabled employees in terms of vocational training. Article 86 refers to vocational training measures to benefit disabled employee and include the right to reasonable accommodation at the workplace and provide, also, for positive action measures in favour of disabled or chronically ill employees in terms of access to employment, exemption from forms of working time organisation such as the adaptability regime, bank hours or concentrated hours and between 8pm one day and 7am the next, and the absence of an obligation to do extra work. However, the heading of Article 86, positive action measures, is criticised and considered to be ‘an expression with imprecise contours’⁵⁰.

We can classify the labour protection of pwd in *direct protection* to pwd, namely the reasonable accommodation and *indirect protection*, that includes the positive action measures. We don’t find any significant progress regarding indirect *protection*, the majority of measures are related to parenting measures for people with children with disabilities, where we find the right to telework or parenting rights, improved in the 2023 reform of the Labour Code.

Within the framework of anti-discrimination legislation it is include the legislation on quotas for the employment of pwd in the public and private sector. for pwd with a degree of incapacity equal to or greater than 60% but the percentage required is only 2% of disabled employees.

Both Laws, *Law against discrimination of pwd* that dates from 2006 and also the *Law on the Prevention, Habilitation, Rehabilitation and Participation of Persons with Disabilities* (that forbids direct and indirect discrimination on the basis of disability inter alia with respect to education and training) cover the labour dimension and also protect people with aggravated health risk.

3. Labor Code Amendments: The Social Rights Enforcement in times of Crisis

During Troika intervention, the ECSR found incompatibility of different States’ provisions with Article 15 ESC. The non-compliance was related with the presence of disability definitions focusing on individual

⁵⁰ J. VICENTE, Breves Notas sobre o estatuto jurídico laboral das pessoas com deficiência ou doença crónica no Código do Trabalho, Estudos do Instituto de Direito do Trabalho, Volume VIII, Instituto de Direito do Trabalho da FDUL, Lisboa, 2020, pp. 19-47, [33].

impairments rather than on the barriers that disabled people face⁵¹. The Committee argued violations of Article 15.2 ESC linked with lack of employment legislation prohibiting discrimination on the grounds of disability, insufficiency of measures protecting employees with disabilities from dismissal and of a legal obligation for employers to continue to employ a person who becomes disabled following an occupational injury or disease and also a sharp pay gap between employees in sheltered workplaces and those in the open labour market (ranging from 5% to 30%)⁵².

The effectiveness of social rights, particularly those recognised by the ESC, is particularly challenging in contexts of economic crisis, as was the case in Portugal during the 2008 crisis⁵³ and for the austerity measures imposed by the Troika intervention⁵⁴.

It is important to reflect about the compliance between the application of ESC and austerity measures, namely related with employment, that could openly violate social and human rights, with a significant impact in most vulnerable people. Also at constitutional level, as has been argued in Portuguese doctrine, fundamental rights constitute limits on corporate powers, as can be seen from Article 18 number 1 of the Portuguese Constitution, which refers to the horizontal effectiveness of fundamental rights with labour projection⁵⁵.

The austerity measures implemented in Greece and Portugal during the severe crisis (2010-2014), after Memoranda of Understanding, have significant economic and social impacts⁵⁶. Memoranda include measures,

⁵¹ M. SMUSZ-KULESKA, *Protection of the rights of persons with disabilities under the European Social Charter*, *Acta Iuris Stetinensis* 2020, No. 3 (Vol. 31), 2020, 107–122, [121], DOI: 10.18276/ais.2020.31-07.

⁵² M. SMUSZ-KULESKA, M. (2020), *Protection of the rights of persons with disabilities under the European Social Charter*, *Acta Iuris Stetinensis* 2020, No. 3 (Vol. 31), 107–122, [118] DOI: 10.18276/ais.2020.31-07.

⁵³ L. ALVES, *El cumplimiento de la Carta Social Europea en materia de salarios. Un estudio comparado de los ordenamientos laborales portugués, español e italiano*, *Atelier Libros Jurídicos*, Barcelona, 9, 2014.

⁵⁴ C. CARVALHO, The European Pillar of Social Rights, the new Directive on work-life balance and its impact on the Portuguese legal system, *Labour 2030*, II International Congress, Work Innovation, are we ready? The future is digital. And it's on!, 2019, 54-71, [58].

⁵⁵ J. ABRANTES, *Direitos fundamentais como limites aos poderes empresariais*, *Estudos do Instituto de Direito do Trabalho*, Volume VIII, Almedina, 2020, pp. 7-18[13].

⁵⁶ ETUC (The functioning of the troika: a report from the ETUC chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.etuc.org/sites/default/files/press-release/files/the_functioning_of_the_troika_finaledit2.pdf

within the framework of a markedly neo-liberal economic vision, like reducing labour rights and making labour legislation more flexible in order to increase working time, reducing the corresponding compensation, make it easier and cheaper for employers to terminate contracts and to reduce the power of trade unions in collective bargaining. However, the decisions of the Committee didn't seem to have impact, at least with a dissuasive effect

However, the Committee decisions have the potential to perform an important role to the enforcement of the protection of social rights and in particular labour rights and even to enforce changes in the legislation of the State (Papadopoulos, 2019:97). Greece case law⁵⁷, namely *GSEE v. Greece case*, Complaint No. 111/2014, ECSR, 5 July 2017⁵⁸, is a good example of the Committee's role. The complainant trade union, GSEE, alleges that some of the new legislation enacted as part of the austerity measures adopted in Greece during the economic and financial crisis affects employees' rights in a manner that is contrary to the Charter. According to the Committee's concluding remarks the complaints were particularly serious due to: a) the large number of provisions concerned and the effects for persons protected by the rights violated; and b) the number of victims of these violations, affecting a significant part of the population; c) the persistent nature of some of these violations, already identified in the examination of previous complaints.

The situation of vulnerable groups, due to age, disability, state of health, etc, has also been addressed in different contexts. For example, the case of the collective Complaint 167/2018 (*Sindacato autonomo Pensionati Or.S.A. v. Italy*)⁵⁹ concerned an alleged violation of Article 12 (3) ESC due to the total or partial suspension of the automatic indexation of a large share of

⁵⁷ G. GIOVANNI, *The European Committee of Social Rights case law during the economic crisis: the decisions concerning Greece*, *Revista Jurídica de los Derechos Sociales, Lex Sociale*, 2017, pp. 190-210.

⁵⁸ Complaint 111/2014, *GSEE v. Greece case*, ECSR, 5 July 2017. Available at: https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-111-2014-greek-general-confederation-of-labour-gsee-v-greece

⁵⁹ Complaint 167/2018, *Sindacato autonomo Pensionati Or.S.A. v. Italy*. Available at: https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-167-2018-sindacato-autonomo-pensionati-or-s-a-v-italy

pensions in 2011. The measure was extended in 2015 and revised in 2018, considering the position of particularly vulnerable persons⁶⁰.

3.1. Troika Intervention: during and afterwards

From 2011 till 2015, during Troika intervention, were *hard times* to pwd. As abovementioned where made The Tripartite Agreement⁶¹ and a subsequent Legislative amendment⁶² to the Portuguese Labour Code that, among other changes, has determined the reduction of compensation payable when labour contracts terminated and that has introduced mechanisms for making dismissal rules more flexible, namely in cases of dismissal for objective reasons. The Portuguese Constitutional Court rejected some amendments. A part of the Portuguese literature regarding that period argued that it sought to legally support the restriction and even rendering useless the rights and guarantees of employees⁶³.

After Troika, from 2015 to 2019, pwd *start breathing*, there was an enlargement of the protection of pwd: extension of the law on quotas, pilot projects to support independent living and the new social inclusion benefit.

The report on the Social Progress Protocol expressly mentions the contradiction between austerity policies and the principle of social progress advocated by the ESC.⁶⁴

⁶⁰ E. DE BECKER, Overview of recent cases before the European Court of Human Rights and the European Committee of Social Rights (June 2023 – December 2023), *European Journal of Social Security*, 26(1), 2024, 73-83. Available at: <https://doi.org/10.1177/13882627241236488>.

⁶¹ Letter of Intent, Memorandum of Economic and Financial Policies (Portuguese version), and Technical Memorandum of Understanding Available at: <https://www.imf.org/external/np/loi/2011/prt/051711.pdf>

⁶² Act 23/2012, 25th July. Available at: <https://diariodarepublica.pt/dr/en/detail/act/23-2012-178501>

⁶³ A. GARCIA PEREIRA, *As transformações recentes do Direito do Trabalho. Portugal - uma doutrina e uma jurisprudência ainda mais erosivas do que a lei, As transformações recentes do Direito do Trabalho Ibérico*, Livro Razão, Coord. Francisco Liberal Fernandes e Maria Regina Redinha, Porto, 2016, pp. 181-193,[181]. Available at: https://sigarra.up.pt/fdup/pt/web_gessi_docs.download_file?p_name=F1854330697/Livro_Razao.pdf

⁶⁴ See point 2.5

3.2. Pandemic period and Labor Code Reform

During the pandemic period (2019-2021), the structural inequalities experienced by the most vulnerable groups, particularly pwd, have become even more apparent. One decree published during this period, namely related to the declaration of emergency sparked a discussion about whether it discriminated against pwd. According to the Decree 2-A/2020 of 20 March, which executed the declaration of emergency, persons aged 70 or more were subject to a special duty of protection, regardless of having previous medical conditions and a special restriction on circulation without any reasonable justification being advanced for that. In particular, they were explicitly prevented from exercising any professional activity which was not the case for persons under 70, even if they had a previous medical condition, as long as they were not under medical leave. However, since the declaration of calamity, in 2020, no other potentially discriminatory measures have been established in Portuguese legislation⁶⁵. The pandemic period (2019-2021) was the *back to the bottom*, a high unemployment even if accompanied by State support for vulnerable groups⁶⁶. In 2023, after the pandemic period, it was a *losing chances* moment to pwd. Labor's Code Reform has taken several important steps towards strengthening labour protection for employees in general, but was disappointing concerning the extending parental rights and granting the right to telework to parents with children with disabilities (does not cover disabled people), increasing compensation for dismissal on economic grounds and some restrictions to some flexibilization working time ways, but new measures strengthening labour protection for pwd⁶⁷.

3.3. Inflation Crisis and the Mitigation Measures

In the context of the inflationary crisis, the Portuguese government envisaged a series of measures that considered the vulnerable situation of certain groups, particularly pwd. In practice, and according to the Portuguese report, these are measures that fulfil Article 15 (Right of pwd to autonomy, social integration and participation in community life) and Article 23(The right of elderly people to social protection) of the Charter.

⁶⁵ D. LOPES, J. VICENTE, *Country report 2021 on the non-discrimination directives Reporting period 1 January 2020 – 31 December 2021*. 2021, 152-153.

⁶⁶ Available at: <https://www.coe.int/en/web/european-social-charter/national-reports>

⁶⁷ J. NETO, *A agenda do trabalho digno: atos e omissões em matéria de tutela laboral em razão da deficiência* in *Revista do Centro de Estudos Judiciários*, 2022-II, 2024, 121-148,[148].

Regarding Article 23 CSE (The right of elderly people to social protection) has been published a few legislative acts to increase the social benefits, pensions and to introduce exceptional measures to support families. The general regime of the disability and old age pensions were increased by 3.57% compared to December 2022.

According to the *ad-hoc report*, social transfers, in 2022, related to illness and disability, family, unemployment and social inclusion contributed to reducing the risk of poverty by 5.1 pp a contribution greater than of the previous year (4.6 pp). The inequality indicators (both Gini and S80/S20) have also shown a decreasing trend, particularly when we look at a longer period (the last eight years).

The report also highlights that on December 16, 2021, the Government approved the National Strategy to Combat Poverty (ENCP) 2021-2030, as a central element in eradicating poverty, framed in the strategic challenge of reducing inequalities. It mentions also that the ENCP was defined in conjunction with the European Pillar of Social Rights¹ and the respective Action Plan and the Sustainable Development Goals of the 2030 Agenda and refers the dialogue with other public policy instruments aimed at individuals and population groups in vulnerable situations, such as the National Strategy for the Inclusion of Pwd (ENIPD 2021-2025).

3.4. Review of Developments in Labour Protection on grounds of Disability in Portugal

If we analyse a chronology related to the developments of labour protection on grounds of disability in Portugal since the Troika intervention (2011-2014), we can see that during that period there were profound changes in labour legislation, namely easing and making cheaper the dismissals, with a major impact in more vulnerable people, including pwd. One of the amendments rejected by the Portuguese Constitutional Court was precisely related to the elimination of the obligation to verify the existence of another available workplace before the dismissal by termination of employment⁶⁸.

After the end of the Troika's intervention, since 2015, although the changes in the Labour Code were not totally reverted, there was a set of legislative amendments with positive impact on the legal protection of the

⁶⁸ Constitutional Court Decision 602/2013, Case 531/12, Relator (Conselheiro Pedro Machete). Available at: <https://www.tribunalconstitucional.pt/tc/acordaos/20130602.html>

rights of pwd: like the extension of the law on quotas, pilot projects to support independent living and the new social inclusion benefit.

However, the pandemic period was a setback for pwd in terms of employment, increasing levels of unemployment, although the social benefits granted by the State.

After the recovery from this dark period this year came into force a major reform of the Labour Code. However, the vulnerable groups, namely pwd, have not been the focus. So, there was not an extension of the rights of persons with disabilities but only an enlargement of parenting rights of the employees with children with disabilities and the attribution to these employees of the right to telework.

3.5. Portuguese reports and Committee Conclusions

The Portuguese reports regarding pwd *Article E* of the revised Social Charter, which prohibits discrimination in the enjoyment of all the rights recognised by the Charter. and *Article 15* which determines the right of pwd to independence, social integration and participation in the life of the community as we shall see, they were often regarded as the fulfilment of a bureaucratic responsibility to account for a collection of legislative measures.

3.5.1. Portuguese Reports

If we go back to the 2008 Report of the ECSR on the application of Article 15 of the Revised European Social Charter (henceforth ESCR) in Portugal, it mentions Article 28 of Basic Law 38/2004, which imposes employment quotas for people with disabilities (5% in the public sector, 2% in the private sector) is a very residual %.

The CEDS concluded that Portugal complied with Article 15 of the CSER, but in the conclusions of the 2012 report on the application of the same Article 15 it referred to the 2010 Report on Anti-Discrimination Measures, according to which quotas were not being applied in practice, although the law provided for fines for non-compliance, which is why new data on their implementation was requested.

In the Committee decision it is stressed that there should be obligations on the employer to take measures in accordance with the reasonable accommodation requirement to ensure effective access to employment and to retain employed pwd, in particular those who have been incapacitated during the employment.

The Portuguese government's 16th report on the implementation of the CSE sent to the CEDS, dated 25/01/2021, refers to the country's structural problems in terms of poverty and inequalities, which mainly affect the most vulnerable groups, leading to social exclusion, and mentions people with lower qualifications and Roma communities.

As abovementioned, the last regular report, up to the date of this study, for Group 1, dates from 2015 and for Group 3 from 2022. In 2015, eight states were invited to make a follow-up: Belgium, Bulgaria, Finland, Greece, Ireland, Italy and Portugal.

Thus, the *11th Portuguese report*, on Group 1, deals with Article 1, 9, 10, 15, 18, 20, 24 and 25 for the period 2011 – 2014, namely with the right to work, the right of pwd to independence, social integration and participation in the life of the community, as well as protection upon termination of the contract. According to the conclusions of the Committee, dated 2016, on this report there were a number of situations where the Portuguese State was considered not to be following the CSE, namely article 1&1 regarding full employment policies. The period under review was marked by high levels of unemployment in Portugal. Further information was also requested on other articles, namely on discrimination based on sex, women with disabilities often face forms of multiple discrimination due to the duplication of vulnerability factors: sex and disability⁶⁹.

The *17th Portuguese report*, on Group 3, deals with a set of rights, namely those related to article 2, on fair working conditions and which have an impact on pwd. However, the rights of pwd are only referred to in order to mitigate the effects of COVID-19, with support measures being emphasised in the context of the suspension of teaching and non-teaching activities, social protection measures for illness and parenthood, and alternative ways of working.

Teleworking was allowed, at certain times, to employees with parental responsibilities could benefit from this regime, whenever their professional duties permitted it, in the case of essential employees assigned to the service, they could benefit from the aforementioned care services for dependants. This regime was compulsory, when duties allowed, if requested by an employee with a child or other dependent under the age of 12, or, regardless of age, with a disability or chronic illness, that, according to the guidelines of the health authority, is

⁶⁹ J. NETO, *As mulheres com deficiência e o emprego: dose dupla de desvantagem in Questões Laborais*, n.º 62, Almedina, Coimbra, 2023, pp. 79-115.

considered a patient at risk and is unable to attend school activities and training in a group or class context. This solution was subsequently laid down⁷⁰.

Portugal has also presented its *Ad Hoc Report* drawn up in accordance with the new reporting system under the ESC (corresponding to the 19th report)⁷¹. The process aims to identify elements of good practice that the Committee can apply and to formulate guidelines or statements on the interpretation of certain provisions of the Charter. This *Ad Hoc Report* can also be seen as a way of counteracting the slowness of the reporting process, which has been criticised for hindering the feasibility of the Charter⁷².

The report specifically emphasises the case of pwd due to their particular vulnerability to the inflationary crisis and identifies the measures taken by the Portuguese state to mitigate this impact.

We can find third party organisation comments concerning the Ad hoc reports on the cost-of-living crisis (2024), but the analysis vulnerable groups, namely people with disability are neglected, especially in Portugal. It is clear from these reports that the way in which the Portuguese state reports on the state of the art in terms of protection from discrimination is linked to two factors: greater or lesser care in transparent reporting on the reality in question and, above all, greater or lesser focus on these matters. This is why there is a disparity between what was reported during the Troika period (2011-2014) and the reality experienced by pwd, as opposed to the greater signalling of problems in a period in which inclusion policies took on greater centrality (from 2015 onwards).

The Observatory on Disability and Human Rights and human rights reports point to a recovery in employment levels for pwd since 2016⁷³.

Portugal's reports during the troika period don't seem to reflect the reality at time. In the opposite direction, confirming the evidence that inclusion policies, since 2015, have had positive effects on the employment of pwd if we only analyze the period between 2016 and 2019, the overall trend

⁷⁰ According to article 5b(c) of DL 79-A/2020 of 1 October (consolidated version), supplemented by DL 99/2020 of 22 November.

⁷¹ Available at: <https://www.coe.int/en/web/european-social-charter/portugal> (15 january 2024)

⁷² I. ALZAGA RUIZ, *La aplicabilidad de la Carta Social Europea por los órganos jurisdiccionales internos, Trabajo y derecho*, n.º64, 2020, pp. 1-64, [10].

⁷³ Disability and Human Rights Observatory (2017), *Persons with Disabilities in Portugal – Summary of the main Human Rights Indicators 2017* (english version). Available at: [Persons with Disabilities in Portugal – Summary of the main Human Rights Indicators 2017 \(english version\)](#)

observed in the registered unemployment of the population with disabilities had an improvement⁷⁴. However, with the pandemic crisis, there was a significant increase. In short, the effects of the pandemic crisis were more serious on the employability of pwd, registering, in 2021, absolute values of unemployment never before verified⁷⁵.

3.5.2. ECSR Conclusions

A. 2012 Conclusions

In its 2012 conclusions on Portugal⁷⁶, the ECSR highlighted several omissions of requested information in the report submitted by Portugal, namely the total number of disabled people of working age, the number of those who were employed in an open market context, but rather in sheltered jobs. The Committee added that there was also no information on the rate of progression of pwd from sheltered employment to the normal labour market and asked for additional information on how the Labour Code concept of ‘employees with reduced capacity’ is fulfilled. In this regard, it questioned the Portuguese state in order to find out if there was any provision which actually materialised the level of capacity reduction it had in mind.

B. 2016 Conclusions

In the 2016 conclusions, concerning to the *Article 15*, paragraph 1, regarding the vocational training of pwd, the Committee requests that the next report indicate the number of students with other types of disability than physical and sensory disability. The report states that the Institute for Employment and Vocational Training (IEFP) oversees vocational training, in particular the qualification programme for pwd and incapacities which grants support for entities undertaking vocational qualification actions for pwd in the geographical areas covered by the operational programme concerning human potential (POPH).

In its previous conclusion (Conclusions 2012), the Committee asked how working capacity is assessed for the purposes of applying Article 84 of the

⁷⁴ Disability and Human Rights Observatory (2021), *Persons with Disabilities in Portugal – Human Rights Indicators 2021*. Available at: <https://oddh.iscsp.ulisboa.pt/en/publicacoes-en/publications-of-oddh-researchers-en/report-oddh-2021/>

⁷⁵ *Ibidem*.

⁷⁶ *Conclusions of ECSR on HUDOC, Portugal, 2012*.

Labour Code, which refers to ‘persons with reduced working capacity’. It also asked whether the law explicitly specifies the degree of disability at which these provisions apply. In the absence of information in the report, the Committee reiterates its request. The Committee reiterates also its question as to whether employees hired under the above-mentioned programmes are subject to normal conditions of employment, including in terms of remuneration.

With regard to *Paragraph 2 - Employment of persons with disabilities*, the report explains that the measures regarding the employment of pwd referred to in the 7th report were complemented by increases in the support provided for under certain measures, and by giving priority access to given measures to pwd or incapacity.

Concerning *Article 15, paragraph 3*, related to the *integration and participation of pwd in the life of the community*, the Committee mention to its previous conclusions (2012 and 2008) and the report details of the National Strategy for Disability for 2011-2013 (ENDEF). The Portuguese report allude to division of the strategy into five strands: disability and multiple discrimination, justice and exercising rights, autonomy and quality of life, accessibility and design for all and administrative modernisation and information systems and indicates that a working group is drawing up a new strategy to promote accessibility for pwd.⁷⁷

The Committee mentioned conclusions 2012 where asked for comments on the fact that NGOs representing pwd were not systematically consulted and their opinions were not taken into consideration. In reply, the report states that the participation of NGOs representing pwd is ensured by the National Institute for Rehabilitation (INR), which is responsible for promoting the rights of pwd.

With exception to IEFPP, that funded 85 persons in 2012 and 215 in 2013, the other agencies responsible for the system had reduced, during the troika intervention, the funded persons.

The Committee mentions the legislative acts that entered into force during the reference period which concerned the database on technical aid.

The Conclusions also mentioned questions related to the communication, mobility and transport, housing, culture and leisure, including measures to support athletes and trainers that were introduced in preparation for the 2012 London Paralympics, and the fact that, according to Portugal’s initial report (2012) some departments within the Secretariat of State for Culture

⁷⁷ *Conclusions of ECSR on HUDOC* (2016).

provide special services designed for pwd (production of Braille and audio books, audio guides, video guides in sign language and facilities for artists with disabilities).

Considering the information available, the Committee concluded that the situation in Portugal was in conformity with Article 15§1, 2 and 3 of the Charter.

C. 2022 Conclusions

According to the 2022 findings⁷⁸, a number of rights were found to be non-compliant, namely the right to fair compensation on public holidays and the elimination of risks for employees in danger or in violation of health and safety conditions at work. According to the report there is no provision for reduced working hours, additional paid holidays or another form of compensation in dangerous and unhealthy occupations. On this issue, the report points out that breaks and interruptions for health and safety reasons are included in the working time. The truth is that this response was insufficient.

In the context of the Covid-19 crisis, the Committee asked the States Parties to provide information on the impact on the right to just conditions of work and on general measures taken to mitigate adverse impact, namely regarding the right to reasonable working time in the following sectors: healthcare and social work; law enforcement, defence and other essential public services; education, transport.

The report states that alternative ways of providing work were introduced as a response to the Covid-19 pandemic. The legal limits for overtime were suspended in certain public entities and were then followed by private social solidarity institutions, non-profit associations, cooperatives and other social economic entities that carry out essential activities in the social and health areas, namely health services, residential or care facilities or home support services for vulnerable persons, elderly persons and pwd. The Committee asked, “that the next report clarify what the suspension of legal limits for overtime meant in practice”.

However, the Committee conclude, once again, that the situation in Portugal is in conformity with Article 2§1 of the Charter.

⁷⁸ *Conclusions of ECSR on HUDOC* (2022), Available at: <https://hudoc.esc.coe.int/eng#%7B%22sort%22:%5B%22escpublicationdate%20descending%22%5D,%22escdctype%22:%5B%22CON%22%5D,%22escstateparty%22:%5B%22PRT%22%5D%7D>

3.5.3. Portugal Collective Complaints and Committee Conclusions

In the case of Portugal, the complaints system does not seem to contribute to strengthening the rights of pwd. There are no complaints about this vulnerable group which may be an indicator of the lack of knowledge of this pan-European protection mechanism.

To date, Portugal has one pending complaint⁷⁹ and thirteen proceeding complaints. The list of violated rights is significant but none of the complaints submitted analysed the rights of pwd, in particular the potential violation of Article 15. Of the collective complaints submitted by Portugal, only one directly addresses discrimination in access to social housing by Roma communities⁸⁰, and this has not been remedied. The others are mainly about the exercise of collective rights, namely of police or militarized forces.

Thus, the conclusions do not the path by which it might be possible to reverse the situation of non-compliance and do not contribute significantly to changing the anomalous situations.

In summary, most of the complaints filed concern collective labour rights and do not focus on vulnerable groups.

4. Concluding Remarks

The prevalence of social rights is the basis of a legal system both national and international anchored to the paradigm of human dignity⁸¹. In fact, the ESC it is unequivocally relevant to the enforcement of the social rights⁸², in the spectrum of international conventions. However, the ESC has already been designed like the weakest link of the conventions that enshrine social and labour rights⁸³. This finding is entirely appropriate to the Portuguese case. This conclusion, with the appropriate caveats, has

⁷⁹ ECSR, Complaint No. 199/2021. Available at: . No. 199/2021 European Organisation of Military Associations and Trade Unions (EUROMIL) v. Portugal

⁸⁰ Complaint 61/2010: *European Roma Rights Centre (ERRC) v. Portugal*

⁸¹ G. GIUGLIA, *A Jurisprudência do Comité Europeu de Direitos Sociais em Tempos de Crise Económica: as decisões relativas à Grécia*, *Revista Jurídica de Los Derechos Sociales* (2017), *Lex Social*, 2017.

⁸² L. ALVES, *El cumplimiento de la Carta Social Europea en materia de salarios. Un estudio comparado de los ordenamientos laborales portugués, español e italiano*, *Atelier Libros Jurídicos*, Barcelona, 2014.

⁸³ L. ALVES, *Breve nota sobre o “direito de negociação coletiva” na Carta social europeia*, *Estudos em homenagem ao Professor Doutor Manuel António Pita*, Org. Luís Vasconcelos de Abreu, 2022, pp. 507-517, [508].

been withdrawn in the literature in relation to other States Parties, such as Spain. The lack of realisation of the rights enshrined in the CSE has been denounced, particularly as a result of situations of repeated non-compliance in crisis contexts.

Firstly, regarding the monitoring procedures it is possible to summarise some criticised shortcomings in a few points: i) the system of reports is very complex, long and not adjusted to the fast changes of the labour market transformation and not very effective in articulating with changes in employment legislation and non-binding; ii) the limited involvement of NGOs in the field of disability has meant that complaints about discrimination against pwd and illnesses have not been voiced; and iii) some of the Charter's rights are less clearly set out or even ignored in the conclusions, such as the right to reasonable accommodation of work arising from Article 15 of the ESC. With specific regard to Portugal, the mechanisms for monitoring the ESC are unknown and not well publicised.

The doctrine also identified other problems in the monitoring system, namely the uncertainty of the roles of the CEDS and the Governmental Committee; the lack of effective participation of the social partners in the Reporting System and the absence of significant political sanctions as a result of the procedure⁸⁴.

Still, there are some aspects to point out about the ESC, not only the extended set of fundamental rights that it integrates but also the complaints system that it contemplates. The complaints system does not require the exhaustion of domestic remedies unlike most international complaint mechanisms, which makes it more flexible and efficient.

The request for the ad-hoc reports it's also a clearly a positive sign. It shows flexibility to adapt its procedures to extraordinary needs or specific contexts that require monitoring and identification of good practices that all states can benefit from. However, it could also indicate that the existing procedure has some shortcomings. Even so, it seems that the practical impact of this system on domestic legal systems remains to be seen, and Portugal is a clear example. Despite the fact that the ECSR on National Labour Law does not have, at least nowadays, an effective impact on the Portuguese Labour Law, especially with regard to the employment protection of pwd, it is possible to overcome points of resistance by revising the monitoring mechanism and disseminating

⁸⁴ A. DRZEMCZEWSKI, *Fact-finding as Part of Effective Implementation: The Strasbourg Experience*, in A. Bayefsky (ed.), *The U.N. Human Rights Treaty System in the 21st Century* (The Hague, Kluwer, 2000), 2000, pp. 115-130.

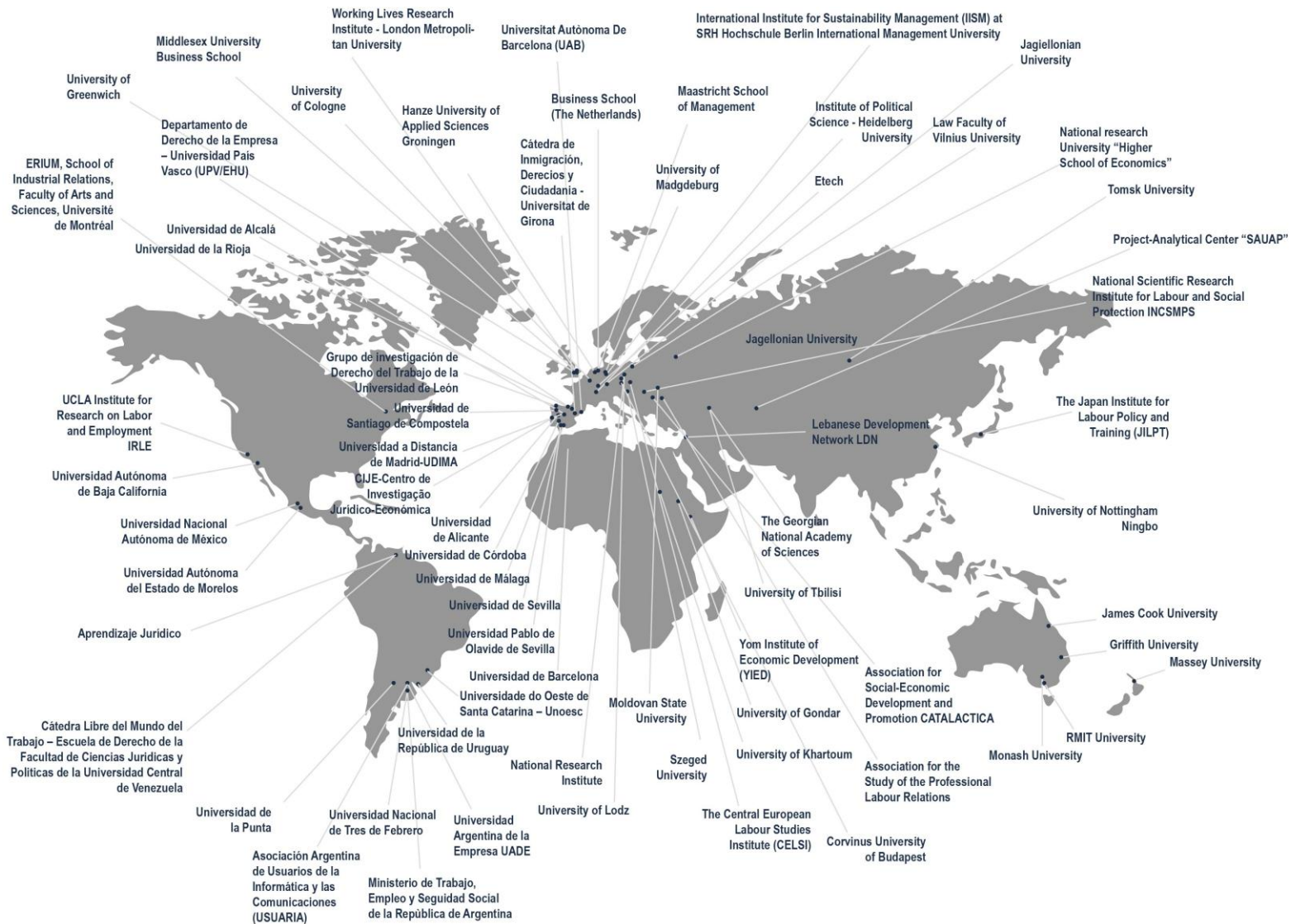
decisions more widely, which should be promoted by the Portuguese State. The strengthening of the ESC and the social rights it provides for, which have tended to be under attack in times of crisis and have a particularly significant impact on the most vulnerable groups, would also stand to gain from its recognition in the framework of EU law. The measures taken during the Troika, although omitted from the Portuguese report, were in clear collision with the objectives of the ESC, but somehow the monitoring system was unable to flag it properly. From 2015-2019 the government intended to break with that trajectory. Given the emerging needs, and perhaps above all for this reason, the implemented public policies focused on social protection with positive impacts on social exclusion and levels of poverty among pwd, and less on employment protection. Nevertheless, it is believed that complementarity between labour and social protection could have even more significant results. In this regard, it would be useful to ask Member States directly about positive discrimination measures in favour of employees with disabilities or with disabled dependants, including quota systems, reasonable accommodation measures in the workplace, changes to labour legislation to enforce the rights of vulnerable groups, and public support available in cases where a disproportionate burden on the employer is invoked. It is also important to ensure the effective participation of social partners, in the case of Portugal this could be through the Economic and Social Council, a constitutional recognised body (article 92 of the Constitution of the Portuguese Republic) where they have a seat, as well as NGOs, in the monitoring process and also through a specialised report by independent experts to complement the States' report⁸⁵. In line with these questions, carried out in more detail, it would be possible to issue recommendations with a higher potential for effectiveness. Finally, as it has been argued with regard to the case law of the Italian Constitutional Court⁸⁶, the national courts must provide a justification when they ignore the decisions of the ECSR, in line with a duty to take account of the positions of human rights treaty bodies, even if they are not binding in themselves, or if they are directly applicable⁸⁷.

⁸⁵ That could be similar do the European Network of Legal Experts.

⁸⁶ G. GUIGLIA, *Italian Constitutional Court and Social Rights in times of crisis: in search of a balance between principles and values of contemporary constitutionalism*, *Rivista* n.º3/2018, Associazione Italiana Dei Costituzionalisti, 2018.

⁸⁷ A. SPAGNOLO, *They are not enforceable, but states must respect them: an attempt to explain the legal value of decisions of the European Committee of Social Rights*, *European Papers*, Vol. 7, 2022, n.º3, 2022, pp.1495-1516[1516]

ADAPT International Network



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