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## **Tobacco Control and The Council of Europe: The Potential and Limits of the Collective Complaints Procedure of the European Social Charter**

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### **Abstract**

The role of the Council of Europe (CoE) in tobacco control remains largely unexplored. This paper aims to fill this gap, focusing on the CoE's European Social Charter. Article 11 of the Charter protects the right to health, and adequate tobacco control measures are necessary to respect this article. This paper examines the potential and limits of the Collective Complaints procedure, one of the two monitoring mechanisms of the Charter, as a means to evaluate the compliance of national tobacco control measures with Article 11. It demonstrates that, so far, this mechanism has never been used in this way. However, although the Collective Complaints procedure presents several drawbacks, it should not be underestimated. Indeed, it possesses certain features, such as the collective nature of the complaint and the lack of the requirement of the exhaustion of domestic remedies, which might make it a particularly suitable tool for the abovementioned purpose.

### **Keywords**

right to health; human rights; tobacco control; smoking; Council of Europe; European Social Charter; Collective Complaints procedure; European Committee of Social Rights

## 1. Introduction

Across the globe, the tobacco epidemic kills more than 8 million people every year.<sup>1</sup> Of these deaths, 1.2 million are caused by exposure to second-hand tobacco smoke, *i.e.*, the smoke from burning of tobacco products and that breathed out by the smoker.<sup>2</sup> Europe is not exempt. The World Health Organisation (WHO) European Region ‘has the highest prevalence of tobacco smoking among adults’ (28 per cent), and 16 per cent of the deaths of adults living there over 30 are attributable to tobacco.<sup>3</sup> In the European Union (EU), tobacco consumption remains the most relevant cause of premature death.<sup>4</sup>

Among the health consequences of smoking are ‘cancer, heart disease, stroke, lung diseases, diabetes, and chronic obstructive pulmonary diseases (COPD), which includes emphysema and chronic bronchitis’.<sup>5</sup> Smoking also enhances the risk of ‘tuberculosis, certain eye diseases, and problems of the immune system, including rheumatoid arthritis’.<sup>6</sup> Second-hand smoke provokes stroke, lung cancer, and coronary heart disease in adults, and increases the risk of a high variety of diseases in children, such as acute respiratory infections and sudden infant death syndrome.<sup>7</sup>

The tobacco epidemic has also major financial repercussions. Tobacco consumption results in serious economic consequences in terms of loss of productivity and healthcare expenditure.<sup>8</sup> Noteworthy is the human capital lost due to tobacco-related mortality, and the costs entailed by curing diseases provoked by first-hand and second-hand smoking. Furthermore, tobacco use has also more intangible costs, such as ‘the value of lost life, or pain and suffering due to illness’, which also have an impact on the economy.<sup>9</sup>

Over time, national and international tobacco control policies have been developed to reduce smoking prevalence. These encompass, for example, taxes on tobacco products, warnings on cigarette packages, and bans on smoking. At the European level, the fight against tobacco is commonly associated with the work of the WHO and the EU, since these two organisations have adopted various legislative and policy measures for this purpose. Among them are the Framework Convention on Tobacco Control (FCTC),

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<sup>1</sup> World Health Organization, 2021, ‘Tobacco’, 26 July. Retrieved 20 May 2022, <https://www.who.int/news-room/fact-sheets/detail/tobacco>. The date of retrieval is the same for all sources. Hereinafter it will not be repeated.

<sup>2</sup> *Ibid.*

<sup>3</sup> World Health Organisation Regional Office for Europe, ‘Data and Statistics’. <https://www.euro.who.int/en/health-topics/disease-prevention/tobacco/data-and-statistics>.

<sup>4</sup> European Commission, ‘Tobacco: Overview’. [https://ec.europa.eu/health/tobacco/overview\\_en](https://ec.europa.eu/health/tobacco/overview_en).

<sup>5</sup> Centers for Disease Control and Prevention, ‘Smoking & Tobacco use: Health Effects’. [https://www.cdc.gov/tobacco/basic\\_information/health\\_effects/index.htm#:~:text=Smoking%20causes%20cancer%2C%20heart%20disease,immune%20system%2C%20including%20rheumatoid%20arthritis](https://www.cdc.gov/tobacco/basic_information/health_effects/index.htm#:~:text=Smoking%20causes%20cancer%2C%20heart%20disease,immune%20system%2C%20including%20rheumatoid%20arthritis).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> L.S. Flor, M.B. Reitsma, V. Gupta, M. Ng and E. Gakidou, ‘The Effects of Tobacco Control Policies on Global Smoking Prevalence’, *Nature Medicine* 27 (2021) 239-243, doi: 10.1038/s41591-020-01210-8.

<sup>9</sup> Institute for Health Research and Policy, 2019, ‘Economic Costs of Tobacco Use’, [https://tobacconomics.org/files/research/523/UIC\\_Economic-Costs-of-Tobacco-Use-Policy-Brief\\_v1.3.pdf](https://tobacconomics.org/files/research/523/UIC_Economic-Costs-of-Tobacco-Use-Policy-Brief_v1.3.pdf).

adopted under the auspices of the WHO, and the Tobacco Products Directive (2014/40/EU), adopted by the EU.<sup>10</sup>

On the contrary, the role played in this context by the Council of Europe (CoE), a European intergovernmental organization with the aim of promoting and protecting human rights, remains largely unexplored.<sup>11</sup> This is striking considering the connection between human rights and tobacco control.<sup>12</sup> In fact, inadequate tobacco control policies can constitute human rights violations. In the words of Cabrera and Constantin, ‘the design of tobacco control policies [...] should be carried out in accordance with the fulfilment of international human rights obligations’.<sup>13</sup>

In this regard, rights that can be negatively impacted include the right to life, right to health, right to education, and also rights connected more generally to certain vulnerable groups such as children and women. The right on which this paper will focus is the human right to health, which in the context of the CoE is protected by the European Social Charter, under Article 11.<sup>14</sup>

The purpose of this paper is to examine the potential and limits of the Collective Complaints procedure, one of the two monitoring mechanisms of the European Social Charter, as a means to assess the compliance of national tobacco control measures with the right to health (Article 11). In doing so, it aims to fill the gap in the literature mentioned above.

More specifically, the paper will explore the following research questions: What are the obligations of States in terms of tobacco control under Article 11? Can the Collective Complaints procedure be used, in theory, to monitor the compliance of national tobacco control policies with Article 11? Has this mechanism ever been used for this purpose? Which are the strengths and weaknesses of the Collective Complaints procedure in this context? Are there other bodies/mechanisms within the CoE that might contribute to the fight against tobacco?

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<sup>10</sup> Framework Convention on Tobacco Control, 2003, 2302 UNTS 166; Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.

<sup>11</sup> More widely, it can be argued that the role of human rights law in tobacco control remains ‘somewhat under-researched’ (M.E. Gispén, ‘Introduction’, in: M.E. Gispén and B. Toebe (eds.), *Human Rights and Tobacco Control* (Cheltenham: Edward Elgar, 2020).

<sup>12</sup> On the connection between human rights and tobacco control, see D. Reubi, ‘Making a Human Right to Tobacco Control: Expert and Advocacy Networks, Framing and the Right to Health’, *Global Public Health* 7 (2012) S176-S190, doi: 10.1080/17441692.2012.733948; and R. de Silva de Alwis and R. Daynard, ‘Reconceptualising Human Rights to Challenge Tobacco’, *Faculty Scholarship AT Penn Law* 1689 (2009), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2690&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2690&context=faculty_scholarship).

<sup>13</sup> O. Cabrera and A. Constantin, ‘Tobacco Control in International Human Rights Law’, in: M.E. Gispén and B. Toebe (eds.), *supra* note 11, p. 47.

<sup>14</sup> Article 11 (the right to protection of health) European Social Charter, 1961, ETS 35; Article 11 (the right to protection of health) European Social Charter (Revised), 1996, ETS 163. A detailed explanation of the European Social Charter of 1961 and its revised version of 1996 can be found in Section 3. This paper will use the expressions ‘Charter’/‘European Social Charter’ to refer to both ESC and ESC(rev), while it will employ the expressions ‘ESC’ and ‘ESC(rev)’ when it is necessary to distinguish between the two treaties.

The paper will demonstrate that Article 11 already constitutes a legal basis for the European Committee of Social Rights, the body that oversees the implementation of the Charter, to evaluate national tobacco control legislations. This commonly happens under the Reporting system, the other monitoring mechanism of the treaty. Consequently, the Collective Complaints procedure could also address violations of the right to health caused by inadequate tobacco policies. However, up to now, this mechanism has never been used in this way. After a thorough analysis of the potential and limits of the Collective Complaints procedure, this paper will argue that although this mechanism presents several drawbacks, it should not be underestimated. Indeed, it presents certain features, such as the collective nature of the complaint and the lack of the requirement of the exhaustion of domestic remedies, which might make it a particularly suitable legal tool in the fight against tobacco.

This article adopts a doctrinal legal methodology. Primary sources, such as international treaties, and secondary sources, such as academic journals, are analysed and discussed. The paper also relies on the HUDOC database, which is the official database of the CoE.<sup>15</sup>

The paper is organised as follows. After this brief introduction, Section 2 will present the role that the WHO and the EU play in the fight against tobacco. Section 3 will address how the CoE can also contribute to it, providing some background information on the CoE and describing how Article 11 (right to health) of the European Social Charter has been interpreted by the European Committee of Social Rights (ECSR) in a way that requires States to adopt adequate tobacco control measures. Section 4 will outline how the Collective Complaints procedure works and will examine whether this mechanism has been used to monitor the compliance of national tobacco control policies with Article 11. Section 5 will highlight the drawbacks and the advantages of this procedure. Section 6 will explain why the potential of the CoE in supporting the fight against tobacco in the European region is not limited to the role of the ECSR. Section 7 will conclude the paper with some final remarks.

## **2. Tobacco Control in Europe: The Role of the World Health Organization and the European Union**

International and regional organisations have adopted several legal and policy instruments to reduce tobacco consumption. At the international level, the main instrument in this regard is the Framework Convention on Tobacco Control (FCTC). The FCTC is an international treaty that requires States to adopt certain measures related to, *inter alia*, tobacco prices and taxes, tobacco advertising, packaging, and labelling, education and public awareness, and illegal trade in tobacco.

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<sup>15</sup> Council of Europe, 'European Social Charter HUDOC'. <https://hudoc.esc.coe.int/>.

The FCTC, which was adopted in 2003 and entered into force in 2005, is the first, and so far, the only, convention adopted under the auspices of the WHO.<sup>16</sup> This instrument is one of the most widely embraced treaties in United Nations history, with 168 signatories and 182 parties, as of 17 May 2022.<sup>17</sup> In 2012, the first protocol to the FCTC was adopted: the Protocol to Eliminate Illicit Trade in Tobacco Products.<sup>18</sup>

The FCTC can be praised for several reasons. It led to the development and implementation of tobacco control policies at the national level, supported the denormalization of smoking, and created a forum where different actors can meet and exchange information (the Conference of State Parties).<sup>19</sup> Furthermore, the FCTC demonstrated all its legal weight in different court cases initiated by the tobacco industry against national governments. Research conducted by Zhou *et al.* illustrates that the FCTC has supported the defence of States and significantly contributed to the reasoning of courts.<sup>20</sup> However, the FCTC is not exempt from criticism. Hoffman *et al.*, for example, sustain that global cigarette consumption has not decreased since the adoption of the FCTC.<sup>21</sup> Nonetheless, an expert group that was asked by the Conference of State Parties to carry out an impact assessment of the FCTC observed that ‘while it will never be possible to identify precisely how many measures are directly or indirectly attributable to the Convention [...], the FCTC has undoubtedly played a critical role as an authoritative and agreed catalyst and framework for action’.<sup>22</sup> This seems to be confirmed by several high-level studies that suggest that the treaty contributed to the rapid adoption of tobacco control legislation.<sup>23</sup>

At the regional level, several tobacco control measures have been adopted by the EU, including ‘legislation, recommendations and [...] information campaigns’.<sup>24</sup> The most well-known is arguably the Tobacco Products Directive (2014/40/EU), which was

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<sup>16</sup> L. Gostin, D. Sridhar and D. Hougendobler, ‘The Normative Authority of the World Health Organization’, *Public Health* 129(7) (2015) 854-863, doi: 10.1016/j.puhe.2015.05.002.

<sup>17</sup> United Nations Treaty Collection, 2022, ‘WHO Framework Convention on Tobacco Control’, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IX-4&chapter=9&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en).

<sup>18</sup> Protocol to Eliminate Illicit Trade in Tobacco Product, 2012.

<sup>19</sup> S. Zhou and J. Liberman, ‘The Global Tobacco Epidemic and the WHO Framework Convention on Tobacco Control – the Contributions of the WHO’s First Convention to Global Health Law and Governance’, in: G.L. Burei and B. Toebe (eds.), *Research Handbook on Global Health Law* (Cheltenham: Edward Elgar, 2018), p. 341; L. Gostin, *Global Health Law* (London: Harvard University Press, 2014), p. 214.

<sup>20</sup> S. Zhou, J. Liberman and E. Ricafort, ‘The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures’, *Tobacco Control* 28(2) (2019) s113-s118, doi:10.1136/tobaccocontrol-2018-054329.

<sup>21</sup> S. Hoffman, M. Poirier, S.R. Van Katwyk, P. Baral, L. Sritharan, ‘Impact of the WHO Framework Convention on Tobacco Control on Global Cigarette Consumption: Quasi-Experimental Evaluations Using Interrupted Time Series Analysis and In-sample Forecast Event Modelling’, *British Medical Journal* 365 (2019) I2287, doi:10.1136/bmj.I2287.

<sup>22</sup> Conference of the Parties to the WHO Framework Convention on Tobacco Control, 2016, ‘Impact Assessment of the WHO FCTC’, 27 July, p. 5, <https://fctc.who.int/who-fctc/governance/conference-of-the-parties/seventh-session-of-the-conference-of-the-parties/main-documents/fctc-cop-7-6-impact-assessment-of-the-who-fctc>.

<sup>23</sup> S. Zhou and J. Liberman, *supra* note 19, pp. 366-367.

<sup>24</sup> European Commission, *supra* note 4.

adopted in 2014 and became applicable two years later in 2016.<sup>25</sup> The Directive sets the norms concerning the manufacture, the presentation and the sale of tobacco products, with a view to complying with the FCTC, ratified by the EU in 2005. Among other things, the Directive imposes the presence of health warnings on tobacco products that must occupy more than 65 per cent of the front and back of the packages. It forbids cigarettes with characterising flavours, and also prohibits promotional elements on tobacco products.

Another area where the EU has been active concerns tobacco advertising and sponsorship, which has been significantly restricted through the adoption of multiple instruments, such as the Tobacco Advertising Directive (2003/33/EC), the Audio-visual Media Service Directive (2010/13/EU) and Council Recommendation (2003/54/EC/EU) on the prevention of smoking and on initiatives to improve tobacco control.<sup>26</sup> Finally, it is worth mentioning Council Recommendation on smoke-free environments of 2009, which recommends that Member States protect individuals from exposure to tobacco smoke in indoor workplaces, indoor public places, and on public transport; and Council Directive 2011/64/EU on the structure and rates of excise duty applies to manufactured tobacco, which sets out an increase in the level of taxation for tobacco products.<sup>27</sup>

The reduction of tobacco consumption is also a fundamental element of the recently launched Europe's Beating Cancer Plan, one of the key pillars of the European Health Union package.<sup>28</sup> The Plan aims to create a 'Tobacco-Free Generation', with the aim of reducing the number of smokers, now 25 per cent of the population, to a maximum of 5 per cent by 2040. Finally, it must be noted that also the Court of Justice of the EU has issued some key judgements on tobacco control.<sup>29</sup>

Considering the quantity and legislative strength of the measures adopted in the context of the WHO and the EU, it comes as no surprise that the fight against tobacco in Europe is commonly associated with these two institutions. In contrast, the role played in this field by the CoE, which is a human rights intergovernmental organisation, remains a subject of little investigation. This is striking given the link between human rights and tobacco control. Indeed, various human rights can be adversely affected by inadequate tobacco control measures. As previously mentioned, these include, among others, the

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<sup>25</sup> *Supra* note 10.

<sup>26</sup> Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products; Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services; Council Recommendation of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control (2003/54/EC).

<sup>27</sup> Council Recommendation of 30 November 2009 on smoke free environment 2009/c 296/02; Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco.

<sup>28</sup> European Commission, 2021, 'Europe's Beating Cancer Plan', 3 February, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_342](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_342).

<sup>29</sup> On the point see A. Garde and B. Toebe, 'Is There a European Human Rights Approach to Tobacco Control?', in: M.E. Gispen and B. Toebe (eds.), *supra* note 11.

right to life, right to health, right to education, children's rights, and women's rights.<sup>30</sup> A human rights approach to tobacco control can thus be useful in shaping the fight against tobacco. For this reason, an analysis of the role of the CoE in this area can be of great value.

### **3. Tobacco Control in Europe: The Council of Europe, the European Social Charter, and the Right to Health**

Before going further into the subject matter, it is necessary to provide some background information on: a) the CoE and the European Social Charter; and b) Article 11 on the right to health and its connection with tobacco control. The aim of this Section is thus twofold. First, to provide the reader with the essential technical knowledge on the CoE and the Charter that is needed to understand the subsequent sections and the legal arguments presented therein. Second, to explain the specific obligations of States in terms of tobacco control under Article 11.

The CoE is a regional intergovernmental organisation composed of 46 States, including all 27 members of the EU. Its ambition is to uphold human rights, democracy and the rule of law in Europe.<sup>31</sup> The principal bodies of the CoE are the Committee of Ministers, the Parliamentary Assembly (PACE), the Congress of Local and Regional Authorities of Europe, and the Commissioner for Human Rights. For the purposes of this paper, we will focus on the first two. The Committee of Ministers is the decision-making body of the CoE and is composed of the Ministers for Foreign Affairs of the Member States or their Permanent Representatives to the CoE.<sup>32</sup> The PACE is the deliberative body of the CoE, composed of more than 300 parliamentarians from the 46 State Parties, and can discuss and make recommendations regarding any matter within the aim and scope of the CoE.<sup>33</sup>

To promote human rights, democracy and the rule of law, State Parties to the CoE have adopted several international agreements. The most famous one is probably the European Convention on Human Rights (ECHR).<sup>34</sup> This treaty was adopted in 1950 and focuses on civil and political rights, such as the right to life, freedom from torture, and right to a fair trial. The respect for the norms included in the ECHR by the State Parties is overseen by the European Court of Human Rights, whose judgements are legally binding. The Court can receive both inter-State and individual applications.

The so-called 'sister' of the ECHR is the European Social Charter.<sup>35</sup> The treaty was adopted in 1961 and guarantees social and economic rights, such as the right to education,

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<sup>30</sup> *Supra* note 12.

<sup>31</sup> Statute of the Council of Europe, 1949, ETS 1.

<sup>32</sup> S. Palmer, 'The Committee of Ministers' in: S. Schmahl and M. Breurer (eds.), *The Council of Europe: Its Law and Policies* (Oxford: Oxford University Press, 2017), pp. 137-165.

<sup>33</sup> P. Leach, 'The Parliamentary Assembly of the Council of Europe', in: S. Schmahl and M. Breurer (eds.), *supra* note 32.

<sup>34</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, ETS 5.

<sup>35</sup> *Supra* note 14.

the right to health and rights related to working conditions. The Charter was subsequently amended in 1996 to include additional rights. However, not all the Parties to the 1961 European Social Charter (ESC) accepted the Revised European Social Charter (ESC(rev)). This creates a two-level system, whereby some States are bound by the 1961 ESC (7 States) and others by the ESC(rev) (35 States).<sup>36</sup> To avoid confusion, hereinafter the expressions ‘Charter’/’European Social Charter’ will be used to refer to both ESC and ESC(rev), whereas the expressions ‘ESC’ and ‘ESC(rev)’ will be used when it is necessary to distinguish between the two treaties.

Finally, the Charter relies on a ratification system thanks to which the States can choose the provisions that they are willing to accept.<sup>37</sup> This ‘à la carte approach’, as Dörr describes it, has the advantage that States might more easily agree to be bound by an international treaty, having this ‘yes or no’ option on every provision.<sup>38</sup> On the other hand, this feature might weaken the value of the treaty, as not all rights it foresees must be respected by State Parties.

The monitoring framework of the Charter consists of two different mechanisms, the Reporting system and the Collective Complaints procedure. These mechanisms are supervised by a body termed European Committee of Social Rights (ECSR), which is a committee of independent and impartial experts.<sup>39</sup> Under the Reporting system, State Parties submit reports on how they are implementing the Charter and then the ECSR adopts documents named ‘Conclusions’ evaluating them.<sup>40</sup> Under the Collective Complaints procedure, collective complaints alleging violations of the Charter can be lodged by the CoE’s social partners and non-governmental organisations (NGOs).<sup>41</sup> Then, the ECSR decides whether the State is in conformity with the Charter in so called ‘Decisions’. On the basis of these Conclusions (Reporting system) or Decisions (Collective Complaints procedure), the Committee of Ministers may adopt a resolution closing the proceedings. It may also formulate a recommendation to the State. Conclusions and Decisions of the ECSR, as well as resolutions and recommendations of the Committee of Ministers are, strictly speaking, non-legally binding.<sup>42</sup>

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<sup>36</sup> Council of Europe, 2021, ‘European Social Charter: Signatures & Ratifications’, 1 May, <https://www.coe.int/en/web/european-social-charter/signatures-ratifications>.

<sup>37</sup> Article 20 ESC, Article A ESC(rev).

<sup>38</sup> O. Dörr, ‘European Social Charter’, in: S. Schmahl and M. Breurer (eds.), *supra* note 32, p. 514.

<sup>39</sup> Council of Europe, ‘European Committee of Social Rights’, <https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>.

<sup>40</sup> Council of Europe, ‘Reporting System of the European Social Charter’, <https://www.coe.int/en/web/european-social-charter/reporting-system>.

<sup>41</sup> Council of Europe, ‘The Collective Complaints Procedure’, <https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure1>.

<sup>42</sup> de Beco, ‘A Comparative Analysis of European Human Rights Mechanisms’, in: G. de Beco (eds.), *Human rights Monitoring Mechanisms of the Council of Europe* (Abingdon: Routledge, 2012), p. 194; D.J. Harris, ‘Collective Complaints Under the European Social Charter: Encouraging Progress?’, in: K. Kaikobad and M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice* (Martinus Nijhoff, 2009), p. 5; R.H. Cullen, ‘The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights’, *Human Rights Law Review* 9(1) (2009), p. 75, doi: 10.1093/hrlr/ngn042; R. Churchill and U. Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic

Having briefly described the CoE, the European Social Charter and its two main monitoring mechanisms, we can now turn to the right to health, the human right on which this paper focuses. The right to health is protected by the Charter under Article 11. According to this provision, States Parties to the treaty are required to take appropriate measures designed to ‘remove as far as possible the causes of ill-health’ (Article 11(1)); ‘provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health’ (Article 11(2)); and ‘to prevent as far as possible epidemic, endemic and other diseases, as well as accidents’ (Article 11(3)).<sup>43</sup>

In its Conclusions, the documents adopted by the ECSR under the Reporting system, the ECSR clarified that smoking is an activity which damages health and that, in order to respect Article 11, the State has to adopt measures to prevent it. The Committee made clear that obligations of the State under Article 11 include adopting tobacco control measures in the field of production, distribution, advertising, and pricing;<sup>44</sup> prohibiting the sale of tobacco to persons of a young age;<sup>45</sup> forbidding smoking in public places, including public transport;<sup>46</sup> and banning tobacco advertising in newspapers and magazines.<sup>47</sup> However, according to the Committee, enacting legislation is not enough. There must be ‘*de facto* compliance with this legislation (inspectorate activities, court proceedings, and so on)’.<sup>48</sup> It is also worth noticing that the ECSR makes reference in its Conclusions to the FCTC and WHO indicators,<sup>49</sup> and assesses the efficacy of anti-tobacco policies on the basis of statistics on trends in tobacco consumption.<sup>50</sup> In the light of all of this, it can be affirmed that the ECSR has created a robust connection between the right to health and the need for adequate anti-tobacco measures.

A good summary of the relationship between Article 11 and tobacco control can be found in the Digest of the Case Law of the ECSR, which includes the interpretation that the ECSR gave to each article of the Charter.<sup>51</sup> The ECSR’s interpretation has a crucial value. The consolidated case law of the ECSR (*i.e.*, its Conclusions and Decisions)

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and Social Rights?’, *European Journal of International Law* 15(3) (2004), p. 437, 439, doi: 10.1093/ejil/15.3.417. Section 5 provides a more detailed explanation of the value from a legal point of view of the Conclusions/Decisions of the ECSR, and of resolutions/recommendations of the Committee of Ministers.

<sup>43</sup> Article 11 ESC(rev). Article 11 is practically identical in the two versions of the Charter. The version just presented is the one of the ESC(rev). The only difference from the 1961 version is the addition in Article 11(3) ESC(rev) of the words ‘as well as accidents’.

<sup>44</sup> *Conclusions XVII-2 (2005), Malta*.

<sup>45</sup> *Conclusions XV-2 (2001), Portugal*.

<sup>46</sup> *Conclusions 2013, Andorra*.

<sup>47</sup> *Conclusions XV-2 (2001), Greece*.

<sup>48</sup> *Conclusions XV-2 (2001), Iceland*.

<sup>49</sup> *Conclusions 2013, Malta, Conclusions 2021, Bosnia and Herzegovina*.

<sup>50</sup> *Conclusions XVII-2 (2005), Malta*.

<sup>51</sup> Council of Europe, ‘Digest of the Case Law of the European Committee of Social Rights’, 2018, p. 136, <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>.

‘indeed acts as the fundamental reference point in all the State Parties of the Charter system, for the implementation and application [...] of the Charter provisions’.<sup>52</sup>

It must also be recalled that Article 11 is almost unchanged in the 1961 Charter and in the 1996 revised version. Therefore, State Parties to both the ESC and its revised version have an obligation to respect the right to health, and are both supposed to take into account the interpretation that the ECSR gave to this article, including what the Committee maintained concerning tobacco control measures. This is not the case if the State did not accept to be bound by Article 11 in the first place, as made possible by the ratification system which characterises the Charter.

#### **4. The Collective Complaints Procedure as a Means to Monitor the Compliance of Tobacco Control Measures with Article 11? The Status Quo**

Having established the nexus between Article 11 and tobacco control, this Section will reply to the following questions: Can the Collective Complaints procedure be used, in theory, to monitor the compliance of tobacco control measures with Article 11 of the Charter? Has this mechanism ever been used for this purpose? In order to fully understand the answers to these and the other research questions, this section will firstly describe the Collective Complaints procedure in more detail.

As mentioned, the Collective Complaints procedure is one of the two monitoring mechanisms of the European Social Charter, together with the Reporting system. The Collective Complaints procedure was established by an additional protocol (the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints) adopted in 1995 and entered into force in 1998.<sup>53</sup> This protocol was one of the results of what Churchill and Khaliq name ‘a revitalisation process’ of the Charter, which started some years earlier.<sup>54</sup> Until then, the only monitoring system was the reporting by State Parties.

A State Party to the Charter is not automatically part of the Additional Protocol and is not obliged to be part of it. If the State wants to be subjected to the Collective Complaints procedure has to ratify the Protocol or, if the State is a party to the ESC(rev), it has to make a declaration as indicated by Article D2 of the ESC(rev).<sup>55</sup>

The Explanatory Report to the Additional Protocol states that the aim of the Collective Complaints procedure is ‘to increase the efficiency of the supervisory machinery based solely on the submission of governmental reports’, noting that the mechanism would enhance the participation of labour organisations and NGOs.<sup>56</sup> The

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<sup>52</sup> G. Palmisano, *Collective Complaints As a Means for Protecting Social Rights in Europe* (Anthem Press, 2022), p. 52-53.

<sup>53</sup> Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 1995, ETS 158.

<sup>54</sup> Churchill and U. Khaliq, *supra* note 42, p. 417.

<sup>55</sup> Article D2 ESC(rev).

<sup>56</sup> Council of Europe, ‘Explanatory Report to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints’, 1995, p. 1, <https://rm.coe.int/16800cb5ec>.

Report also highlights that the Collective Complaints procedure should be understood as a complement to the Reporting system.

The organisations that can lodge a collective complaint are: a) the European social partners, *i.e.*, the European Trade Union Confederation, Business Europe and the International Organisation of Employers; b) international NGOs with consultative status with the CoE and which have been put on a specific list drawn up for this purpose; and c) representative employers' organisations and trade unions in the State concerned.<sup>57</sup> Furthermore, a State can allow national NGOs to submit complaints against it (for the purposes of this paper, we will call this category, letter d)).<sup>58</sup> As a result, the complaints lodged by actors under letters a) and c) will likely refer to rights related to employment, whereas the ones by organisations under letter b) and d) will likely concern others rights protected by the Charter.

Once the complaint is submitted, it is examined by the ECSR. First, the ECSR checks that the complaint is admissible.<sup>59</sup> By way of illustration, conditions of admissibility require the complaints to be lodged in writing, and against a State that has accepted the Collective Complaints procedure. If the ECSR declares the complaints admissible, it then decides on the merits, indicating whether the defendant State has complied with the treaty or not. The decision is included in a report, which is transmitted to the Parties and the Committee of Ministers. Then, the Committee of Ministers may adopt a resolution concluding the proceedings. It may also adopt a recommendation asking the State to take specific measures.

We can now return to the main research questions of this Section. Can the Collective Complaints system be used, in theory, to monitor the compliance of national tobacco control measures with Article 11 of the Charter? The answer is yes. Proof of this is that the ECSR already addresses national tobacco control measures under the Reporting system and evaluates them in the light of Article 11.<sup>60</sup> To give some examples, the ECSR affirmed in *Conclusions XV-2 (2001)* that the situation in Greece was not in conformity with Article 11 'because of the inadequacy of the measures taken against smoking'.<sup>61</sup> It also found a situation of non-conformity with Article 11 in *Conclusions 2013, Moldova*, and in *Conclusions 2021, Serbia* on the grounds that it had not been established that adequate measures were taken to prevent smoking.<sup>62</sup> As seen in Section 3, it is precisely through its Conclusions (the documents adopted by the Committee in the context of Reporting system) that the ECSR was able to specify States' obligations under Article 11 in this area. In other words, Article 11 already constitutes a strong legal basis for the

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<sup>57</sup> Article 1 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, *supra* note 53.

<sup>58</sup> *Ibid*, Article 2.

<sup>59</sup> For a detailed description of the entire procedure see Council of Europe, *supra* note 41, and O. Dörr, *supra* note 38, p. 537.

<sup>60</sup> In the wording of Garde and Toebes, 'the Committee has paid ample attention to tobacco control in its State reporting procedure' (A. Garde and B. Toebes, *supra* note 29, p. 82).

<sup>61</sup> *Conclusions XV-2 (2001), Greece*.

<sup>62</sup> *Conclusions 2013, Moldova; Conclusions 2021, Serbia*.

ECSR to assess anti-tobacco policies adopted by States under the Reporting system. As a result, it can be argued that the Collective Complaints procedure could also be a tool for the ECSR to verify as to whether tobacco control measures are in compliance with the Charter.

The second question follows: has this monitoring mechanism ever been used for this purpose? The answer is no. As of 17 May 2022, none of the Decisions adopted by the ECSR since the entry into force of the mechanism in 1998 have concerned specifically tobacco-related measures. This is the outcome of text-based research carried out in the HUDOC database, the official database of the CoE, in the section dedicated to the European Social Charter.<sup>63</sup>

The aim of the research was to assess whether the ECSR adopted Decisions concerning tobacco control measures under the Collective Complaints procedure. For this reason, the following filters were applied: a) ‘decisions (complaints procedure)’ as documents searched; and b) the alternative use of the words ‘smoking’, ‘cigarettes’ and ‘tobacco’ in the free text filter.<sup>64</sup> The text-search with the words ‘cigarettes’ and ‘tobacco’ did not provide any results, while the word ‘smoking’ gave three results (*i.e.*, three Decisions on the merits). However, in none of the three Decisions are tobacco control measures the main subject of the decision.

The first Decision of the three results is *European Roma and Travellers Forum (ERTF) v. Czech Republic* (Complaint No.104/2014), where ERTF complained, among others, regarding a violation of Article 11 on the grounds that Roma suffer from poor health status due to inadequate living conditions.<sup>65</sup> In the Decision, the word ‘smoking’ appears as one of the topics with which, according to the Committee, the Government affirmed that it was dealing within the context of healthy lifestyle promotion.<sup>66</sup>

The second one is *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia* (Collective Complaint No. 45/2007), where INTERIGHTS claimed, among others, a violation of Article 11 on the grounds that Croatian schools did not provide adequate sexual and reproductive health education.<sup>67</sup> In the Decision, ‘smoking’ is cited among the activities damaging to health that should be prevented and as one of the subjects that health education should cover.<sup>68</sup>

Finally, the third is *Marangopoulos Foundation for Human Rights (MFHR) v. Greece* (Collective Complaint No. 30/2005), where MFHR complained, *inter alia*, citing a violation of Article 11 on the grounds that the State did not develop an appropriate strategy to prevent and combat health risks in the areas where lignite is mined.<sup>69</sup>

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<sup>63</sup> Council of Europe, *supra* note 15.

<sup>64</sup> The same search was carried out using the French words ‘fumer’, ‘cigarettes’, and ‘tabac’, and provided the same results.

<sup>65</sup> *European Roma and Travellers Forum (ERTF) v. Czech Republic* (Complaint No. 104/2014).

<sup>66</sup> *Ibid*, para. 106.

<sup>67</sup> *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia* (Collective Complaint No. 45/2007).

<sup>68</sup> *Ibid*, paras. 43-45.

<sup>69</sup> *Marangopoulos Foundation for Human Rights (MFHR) v. Greece* (Collective Complaint No. 30/2005).

‘Smoking’ is simply referred as one of the causes of the prevalence of cancer in certain Greek regions.<sup>70</sup>

This analysis shows that, so far, the Collective Complaints procedure has never addressed tobacco control legislation as a primary object of the complaints.

## **5. The Collective Complaints Procedure as a Means to Monitor the Compliance of Tobacco Control Measures with Article 11? Potential and Limits**

The lack of use of the Collective Complaints procedure as a means to monitor compliance of tobacco control measures with the Charter might lie, in first instance, in the absence of NGOs active in the fight against tobacco (hereinafter ‘anti-tobacco NGOs’) among the admissible complainants.

As described above, the organisations that can lodge a collective complaint are: a) the European social partners, *i.e.*, the European Trade Union Confederation, Business Europe and the International Organisation of Employers; b) some international NGOs; c) representative employers’ organisations and trade unions in the State concerned; and d) national NGOs (if the State granted them the right to do so). Since it is conceivable that a complaint concerning the absence or the inadequacy of tobacco control measures will likely come from the category under letter b), or d), *i.e.*, from international or national NGOs, rather than from employers’ organisations and trade unions, we will focus on the former.

It must be observed that not just any NGO can submit a complaint. NGOs under letter b) must have participatory status with the CoE and must be included in a list drawn up by the Governmental Committee of the Charter (a committee composed of representatives of State Parties).<sup>71</sup> The number of international NGOs that can submit a complaint is 63 in the last available list dated 1 January 2022.<sup>72</sup> This number is quite small if we consider that there are 327 international NGOs with participatory status.<sup>73</sup> In addition, none of the international NGOs in the list contributes specifically to the fight against tobacco. Finally, only one State (Finland) has granted the right to lodge complaints to representative national NGOs (letter d)).<sup>74</sup> Taking all this data into account, the fact that there are no ECSR’s Decisions concerning tobacco control policies is not surprising.

There can be many reasons behind the absence of anti-tobacco NGOs among the admissible complainants. It could be that many NGOs are still unfamiliar with the CoE system, especially the European Social Charter. Various NGOs could be national and not international in nature, and this again, would impede the request to be included in the list.

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<sup>70</sup> *Ibid*, para. 50.

<sup>71</sup> Article 1(b) Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, *supra* note 53.

<sup>72</sup> Governmental Committee of the European Social Charter, ‘List of International Non-Governmental Organisation Entitled to Submit Collective Complaints’, <https://rm.coe.int/gc-2021-20-bil-list-ingos-01-01-2022/1680a5282a>.

<sup>73</sup> Council of Europe, ‘INGOs Database’, <https://coe-ngo.org/#/ingos>.

<sup>74</sup> Council of Europe, *supra* note 41.

It might also be that anti-tobacco NGOs prefer other fora where they can pursue their advocacy actions. The resources that an NGO has at its disposal are often limited and participating in all possible platforms is simply not feasible. Finally, NGOs might believe that the Collective Complaints procedure is not worth it in terms of results. In any case, these are just possible suggestions. Explaining and demonstrating the reasons why there are no anti-tobacco NGOs among admissible complainants is beyond the scope of this paper. However, the last point deserves further exploration from a legal point of view. In other words, is it worth submitting a complaint regarding tobacco control measures? What are the potential and limits of the Collective Complaints mechanism as a means to monitor the compliance of tobacco control measures with Article 11?

The Collective Complaints procedure has several drawbacks. First, as already seen, the Decisions of the ECSR and the resolutions/recommendations of the Committee of Ministers are not legally binding.<sup>75</sup> Second, not every State accepted the procedure, but only 16 out of 42 State Parties to the Charter.<sup>76</sup> This element already significantly limits its scope of action as a monitoring mechanism. It should also be stressed that the majority of acceptances occurred between 1995 and 2006, with just two new acceptances since that year (The Czech Republic in 2012 and Spain in 2021).<sup>77</sup> That is to say that the initial impetus which led various States to accept the then-new monitoring system diminished with time. If this trend continues, it is likely that the number of ratifications (or declarations under Article D2 ESC(rev)) will not increase.

Another criticism that could be raised against the Collective Complaints procedure is that it seems to be built to favour the interests of the organisations of employers and trade unions rather than those of NGOs. Actors under letters b) and d) are more restricted in comparison to those under letters a) and c), since international NGOs have to be included in the specific list mentioned above and national NGOs can lodge complaints only if the State has accepted their competence to do so. In addition, NGOs can merely lodge complaints on matters that fall within their area of competence, whereas employers' organisations and trade unions can lodge complaints concerning any matter governed by the ESC/ESC(rev).<sup>78</sup>

Finally, the entire mechanism can be perceived as weak because of the final 'intervention' of the Committee of Ministers. In several instances, although the ECSR has found the State not in compliance with the Charter, the Committee of Ministers did not issue a recommendation.<sup>79</sup> Whether the Committee of Ministers can or cannot do so

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<sup>75</sup> See *supra* note 42.

<sup>76</sup> States that accepted the Collective Complaints Procedure are: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden (Council of Europe, 'Signatures and Ratifications', <https://www.coe.int/en/web/european-social-charter/signatures-ratifications>).

<sup>77</sup> *Ibid.*

<sup>78</sup> Article 3 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, *supra* note 53.

<sup>79</sup> R. Churchill and U. Khaliq, *supra* note 42, p. 439. An exemplary case in this regard is Complaint 9/2000. Although the ECSR found a situation of non-compliance, the Committee of Ministers did not issue a recommendation.

is an object of academic debate, as the text of the Protocol and its Explanatory Report are ambiguous on the point.<sup>80</sup> For instance, Trechsel highlights that the requirement that the Committee votes on the adoption of the recommendation implies that States can disregard the findings of the ECSR,<sup>81</sup> while Harris and Darcy are in favour of a stricter interpretation of the Protocol and argue that if the ECSR found a violation, the recommendation should follow.<sup>82</sup> Theoretical discussions aside, what happens in practice is that, in the words of Cullen, the ECSR makes ‘legal determination’ and the Committee of Ministers ‘a political decision as to the follow-up’, that is the Committee of Ministers does not necessarily adopt a recommendation even if the ECSR has found a violation of the Charter.<sup>83</sup> As observed by Churchill and Khaliq, in the Collective Complaints procedure ‘a governmental body has a decisive say in the outcome of the proceedings’, and this can be considered quite problematic.<sup>84</sup>

Nonetheless, the Collective Complaints procedure also presents significant advantages which NGOs against tobacco should consider. To begin with, the Collective Complaints procedure is another instrument that can contribute to holding a State accountable for inadequate anti-tobacco policies that violate the right to health. It is well known that the enforcement of social and economic rights, including the right to health, is still a thorny issue. These rights have often been regarded as second-class rights in comparison to first-class civil and political rights, and their justiciability and quasi-justiciability are still debated.<sup>85</sup> Several decisions of national and international judicial

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<sup>80</sup> Article 9 of the Additional Protocol, *supra* note 53, reads as follows: ‘On the basis of the report of the Committee of Independent Experts, the Committee of Ministers *shall* adopt a resolution by a majority of those voting. If the Committee of Independent Experts finds that the Charter has not been applied in a satisfactory manner, the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned. In both cases, entitlement to voting shall be limited to the Contracting Parties to the Charter.’ (emphasis added). The wording of the Explanatory Report, *supra* note 56, is also ambiguous: ‘On the basis of the report of the Committee of Independent Experts, the Committee of Ministers adopts a resolution, by a majority of those voting. However, if the conclusions of the Committee of Independent Experts are negative, the Committee of Ministers must adopt a recommendation addressed to the state concerned. In view of the importance of this decision and in accordance with the new rule introduced by the Amending Protocol (Article 5), a two-thirds majority of those voting is required. The Committee of Ministers cannot reverse the legal assessment made by the Committee of Independent Experts. *However, its decision (resolution or recommendation) may be based on social and economic policy considerations.*’ (emphasis added).

<sup>81</sup> S. Trechsel, ‘Conclusion’, in: Council of Europe, *The Social Charter of the 21st Century. Colloquy Organized by the Secretariat of the Council of Europe* (Strasbourg: Council of Europe, 1997), p. 185.

<sup>82</sup> D.J. Harris and J. Darcy, *The European Social Charter* (New York: Transnational Publishers, 2001), p. 366.

<sup>83</sup> R.H. Cullen, *supra* note 41, p. 67.

<sup>84</sup> R. Churchill and U. Khaliq, *supra* note 42, p. 447.

<sup>85</sup> Office of the High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights*, (Geneva: United Nations, 2008), p. 30. For a detailed discussion on the issue of justiciability and quasi-justiciability of socio-economic rights see A. Nolan, B. Porter and M. Langford, ‘The Justiciability of Social and Economic Rights: An Updated Appraisal’, in: T. Kamminga Menno, *Challenges in International Human Rights Law* (London: Routledge, 2014); A. Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in: A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (Boston: Martinus Nijhoff Publishers, 2001); M. Craven, ‘The Justiciability of Economic, Social and Cultural Rights’ in: R. Burchill, D. Harris and a. Owers (eds.), *Economic Social and Cultural Rights: Their Implementation in UK Law* (Nottingham: University of Nottingham, 1999).

and quasi-judicial bodies evaluating the State's respect for this category of rights, including the right to health, have been issued in the last few decades.<sup>86</sup> However, the enforcement of social and economic rights still lags behind the enforcement of civil and political rights. Thus, although the Collective Complaints procedure might not be the perfect solution, it is another precious platform where States' compliance with the right to health can be addressed. Moreover, using this monitoring mechanism to challenge the adequacy of tobacco control policies further strengthens the idea that the fight against tobacco can also be shaped in human rights terms. Adopting a human rights perspective might be particularly fruitful from a legal and advocacy point of view. We can consider the fight against HIV/AIDS and how powerful the right to health framework has been in that context.<sup>87</sup>

On a more technical note, it is true that the ECSR's Decisions and Committee of Ministers' resolutions and recommendations are only declaratory and not, strictly speaking, legally-binding (like the judgements of the European Court of Human Rights). Nevertheless, they must be respected by States, because they refer to norms (the European Social Charter) that legally bind them. Furthermore, the ECSR's Decisions 'are not devoid of any legal effect'.<sup>88</sup> In fact, if the ECSR finds a violation, the State is under obligation to report on the measures it takes to implement the Decision.

In terms of the effectiveness of the Decisions, it must be observed that, although in many cases the State does not take action and the situation of non-compliance with the Charter persists, 'there are also numerous examples of States that have spontaneously and quite rapidly reacted to ECSR's violation Decisions affecting them'.<sup>89</sup> Therefore, since the system can be, and has already been, effective, submitting complaints on tobacco control measures could lead to successful results as well.

Another point in favour of the use of the Collective Complaints procedure as a means to monitor especially national anti-tobacco policies is that the complaint brought under this mechanism must be 'collective', as the name of the procedure suggests. The complaint must be collective in two senses, one concerning the complainants and one the complaint. 'Collective' implies that, first, complainants can only be 'collective' organisations (NGOs, employers' organisations, trade unions) and not individuals. Second, it means that the complaint has to refer to a general situation.<sup>90</sup> By way of example, *International Association Autism-Europe (IAAE) v. France* (Complaint 13/2002) regarded the right to education of persons with autism in France (rather than

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<sup>86</sup> Examples of these decisions can be found in D.J. Harris, *supra* note 42, p. 19.

<sup>87</sup> S. Sekalala, *Soft Law and Global Health Problems: Lessons from Responses to HIV/AIDS, Malaria and Tuberculosis* (Cambridge University Press, 2017), p. 14; L. Stemple, 'Health and Human Rights in Today's Fight against HIV/AIDS', *AIDS* 22(Suppl 2) (2008) S113-S121, doi: 10.1097/01.aids.0000327443.43785.a1; M. Heywood, 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health', *Journal of Human Rights Practice* 1 (2009), p. 14-36, doi: 10.1093/jhuman/hun006.

<sup>88</sup> G. Palmisano, *supra* note 52, p. 49.

<sup>89</sup> *Ibid*, p. 59.

<sup>90</sup> See Council of Europe, *supra* note 56, para. 31.

just one person or certain selected persons with autism);<sup>91</sup> and *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece* (Complaint 173/2018) concerned various rights of unaccompanied migrant children (unaccompanied migrant children in general, rather than one child or certain specific children).<sup>92</sup> This feature of the collective complaints might make them particularly suitable for addressing tobacco control measures, as these commonly affect the general population or wide categories of people.

Furthermore, the Collective Complaints procedure does not foresee the so-called exhaustion of domestic remedies.<sup>93</sup> In the words of Romano, the exhaustion of domestic remedies is a rule that

stipulates that claims of violations of an individual's rights cannot be brought before an international adjudicative body or procedure unless the same claim has first been brought before the competent tribunals of the alleged wrongdoing State, and these judicial remedies have been pursued, without success, as far as permitted by local law and procedures.<sup>94</sup>

In some countries, exhausting domestic remedies can take several years. Consequently, the absence of this condition significantly shortens the usual time that elapses between a human rights violation and its review by a supranational body. This advantage in terms of time cannot be found easily in other international and regional human rights monitoring bodies. Romano stresses that this rule constitutes one of the admissibility clauses of 'most, and surely every major, human rights adjudicative procedure'.<sup>95</sup> The Committee on Economic, Social and Cultural Rights, which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights, is one of them. It may consider individual communications alleging violation of the treaty (including the right to health) but only if all available domestic remedies have been exhausted.<sup>96</sup> In addition, it must be noted that the ECSR's Decisions are final, as they can be appealed against neither before a judicial or quasi-judicial body, nor before a political body.

To conclude, complaints concerning violations of the Charter because of inadequate tobacco control measures can be brought against all the 16 States that have accepted the Collective Complaints procedure, since they are all bound by Article 11 (right to health).

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<sup>91</sup> *International Association Autism-Europe (IAAE) v. France* (Complaint 13/2002).

<sup>92</sup> *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece* (Complaint 173/2018).

<sup>93</sup> O. Dörr, *supra* note 38, p. 512.

<sup>94</sup> C. Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedure' in: N. Boschiero, T. Scovazzi, C. Pitea, C. Ragni (eds.), *International Courts and the Development of International Law: Essays in Honor of Judge Tullio Treves* (TMC Asser, 2013), p. 561.

<sup>95</sup> *Ibid*, p. 562.

<sup>96</sup> Article 3 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008, UNTS 2922.

As previously described, the ratification system gives State Parties to the Charter the possibility to choose the provisions to which they will be legally bound, and there is only one country out of the 42 State Parties to the Charter that did not accept Article 11: Armenia.<sup>97</sup> However, this is not relevant for this analysis as Armenia did not accept the Collective Complaints procedure either.

## 6. The Council of Europe and Tobacco Control: Other Avenues

The potential of the CoE in contributing to tobacco control in the European region is not limited to the role of the ECSR. The European Court of Human Rights has also issued several judgements concerning tobacco control, despite its focus on civil and political rights. The juridical bases for these decisions have usually been Article 2 (right to life), Article 3 (prohibition of torture), Article 8 (right to respect for private and family life), and Article 10 (freedom of expression) of the European Convention on Human Rights.<sup>98</sup> The case law of the Court is quite rich with cases concerning matters such as the protection from second-hand smoke and advertising of tobacco products.<sup>99</sup> A detailed analysis of the sometimes complex approach of the Court in these judgements can be found in an article published by Tsampi last year.<sup>100</sup>

The CoE Commissioner for Human Rights is another human rights monitoring mechanism that could conceivably address human rights violations caused by inadequate tobacco control policies. The mandate of the Commissioner is remarkably broad, covering all the human rights treaties of the CoE, including the European Social Charter.<sup>101</sup> However, up to now, the Commissioner has not really focused on tobacco (or the right to health more in general). One of the most relevant documents she published on the right to health is an ‘issue paper’ from 2021, probably because of the renewed attention this right gained due to the Covid pandemic, but there are almost no references to tobacco.<sup>102</sup>

There are also other bodies in the CoE structure that have dealt with tobacco-related issues in the past and might deal with them again in the future. One of them is the PACE. Among the most significant documents issued by this body on the subject, there are

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<sup>97</sup> Council of Europe, ‘Acceptance of provisions of the Revised European Social Charter (1996)’, <https://rm.coe.int/country-by-country-table-of-accepted-provisions/1680630742>.

<sup>98</sup> A. Tsampi, ‘The European Court of Human Rights and (Framework Convention on) Tobacco Control’, *European Convention on Human Rights Law Review* 3(1) (2021), doi: 10.1163/26663236-bja10022.

<sup>99</sup> Among the main ECtHR tobacco-related judgements, there are: *Stoine Hristov v Bulgaria* 36244/02 (ECtHR, 16 October 2008), *Florea v Romania* 37186/03 (ECtHR, 14 September 2010), *Yanez Pinon and Others v Malta* 71645/13, 7143/14 and 20342/15 (ECtHR, 19 December 2017), *Elefteriadis v Romania* 38427/05 (ECtHR, 25 January 2011), *Hachette Filipacchi Presse Automobile and Dupuy v France* 13353/05 (ECtHR, 5 March 2009).

<sup>100</sup> A. Tsampi, *supra* note 98. On the point, see also C. Boruki, ‘When Healthcare Goes up in Tobacco Smoke: A Selective Healthcare System from a European Human Rights Perspective’, *Utrecht Law Review* 15(3) (2019), doi: 10.36633/ulr.539.

<sup>101</sup> L. Sivonen, ‘The Commissioner for Human Rights’ in: de Beco, *supra* note 42, p. 17.

<sup>102</sup> Commissioner for Human Rights, *Protecting the Right to Health through Inclusive and Resilient Health Care for All* (Council of Europe, 2021).

Recommendation 716(1973) on the control of tobacco and alcohol advertising and on measures to curb the consumption of these products, and Resolution 1286(2002) on campaigning against passive and active smoking.<sup>103</sup>

Finally, tobacco is under the radar of the Pompidou Group (the CoE International Cooperation Group on Drugs and Addictions). The Group is composed of 41 States and can be defined as the CoE's 'drug policy co-operation platform'.<sup>104</sup> Its aim is to try 'to balance the interests of the community at large with protection of the individual's fundamental rights in responding to drug use and illicit trafficking in drugs'.<sup>105</sup> For instance, the Group addressed tobacco policies in a prevention manual on the nightlife recreational use of tobacco, alcohol, and drugs in 2010.<sup>106</sup> Moreover, the revised statute of the Group, which was adopted in June 2021, should lead to 'an extended scope of the Group's work to include addictive behaviours related to licit substances (such as alcohol or *tobacco*)'.<sup>107</sup>

## 7. Conclusion

This article demonstrates that, although the fight against tobacco is commonly associated with the work of the WHO and the EU, the CoE could also play a notable role. In fact, the European Social Charter includes a provision protecting the right to health (Article 11), and the ECSR, the body that oversees the implementation of the said Charter, made it clear that adequate tobacco control measures are necessary to respect this article. The main purpose of this paper has been to examine the potential and limits of the Collective Complaints procedure, one of the two monitoring mechanisms of the Charter, as a means to assess the compliance of national tobacco control policies with that right.

It has been shown that since Article 11 already constitutes a legal basis for the Committee to evaluate national tobacco control legislations under the Reporting system, the Collective Complaints procedure could also have the potential to address violations of the right to health caused by inadequate tobacco policies. However, up to now, this mechanism has never been used in this way. This is not surprising, considering that there are few NGOs that can submit complaints and none of them has as a primary purpose the fight against tobacco. There can be various reasons behind the absence of this type of NGO among the possible claimants, including their unfamiliarity with the Charter, and their preference for other fora where they can pursue their advocacy actions.

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<sup>103</sup> Parliamentary Assembly, Control of Tobacco and Alcohol Advertising and on Measures to Curb the Consumption of these Products, Recommendation 716, 1973; Parliamentary Assembly, Campaigning against Passive and Active Smoking – Daring to Innovate and Step up Public Health Protection Measures, Resolution 1286, 2002. Another relevant document in this regard is Parliamentary Assembly, Protection of Non-smokers, Recommendation 1101, 1989.

<sup>104</sup> Council of Europe, 'Pompidou Group: Who We Are', <https://www.coe.int/en/web/pompidou/about>.

<sup>105</sup> *Ibid.*

<sup>106</sup> A. Calafat and Member of the Pompidou Group Prevention Platform, *Prevention Interventions in Recreational Settings* (Council of Europe, 2010).

<sup>107</sup> Council of Europe, 'Pompidou Group: Our Focus in 2022', <https://www.coe.int/en/web/pompidou/home> (emphasis added).

It has been argued that, although the Collective Complaints procedure presents several drawbacks, such as the low number of States that have accepted it and the declaratory nature of the decisions adopted by the Committee, this monitoring mechanism should not be undervalued. Indeed, the Collective Complaints procedure is a further viable route to put pressure on States for inadequate tobacco control measures violating the right to health, a right whose justiciability and quasi-justiciability still faces significant obstacles today. Furthermore, the ‘collective’ nature of the complaint and the lack of the requirement of the exhaustion of domestic remedies might make the Collective Complaints procedure particularly suitable for this purpose.

These findings add to a growing body of literature on CoE human rights mechanisms and advance the state of knowledge investigating the Collective Complaints procedure in the light of the connection between the right to health and tobacco control.

They also suggest that a complementary and multi-level strategy that plays to the respective strength of the WHO, the EU and CoE system could significantly add value to the fight against the tobacco epidemic. For this reason, the CoE, with its human rights approach, has the power to enrich and expand the legal protection already offered in the realm of the WHO and the EU. The references that the ECSR already makes to the WHO/EU data and legislation concerning tobacco in its Conclusions is a good sign in this direction.

It must be noted that the observations made in this article might have significant practical implications, as this paper could become a useful tool for anti-tobacco NGOs to increase their understanding of the Collective Complaints procedure, which seems to be as yet quite unknown within the context of the fight against tobacco. In doing so, it might help NGOs make an informed decision on whether to take advantage of this procedure or not for their litigation and advocacy purposes.

In this regard, two considerations can be made. First, in terms of the content of the complaint, NGOs could, for example, build on the ECSR’s Conclusions under the Reporting system that found that States’ tobacco control measures violate the right to health. If a State is found not in compliance with the European Social Charter because of inadequate tobacco control policies under that monitoring mechanism but it has not taken action, a complaint can be brought to increase pressure on the State to review its laws. Moreover, the ECSR’s Conclusions could constitute a source of inspiration for NGOs for other claims, with a view to increasing their chances of success. In other words, NGOs could analyse which tobacco policies have been found in violation of the Charter under the Reporting system and lodge complaints on similar issues.

Second, the procedural obstacles of having participatory status and being on the list of admissible complainants, as well as the need to be an international NGO, could also potentially be partially circumvented. In fact, national anti-tobacco NGOs could establish collaborations with the NGOs that are already in a position to lodge a collective complaint. To give an example, a national anti-tobacco NGO could enter into contact with Defence for Children International, an international NGOs for the promotion and

protection of the rights of the child that is already an admissible complainant.<sup>108</sup> Sharing their respective expertise, the national NGO could help Defence for Children International elaborate a complaint on tobacco control measures that violate children's right to health.

This research has also raised various questions in need of further investigation. Future studies might elucidate the reasons why only a limited percentage of States has accepted the Collective Complaints procedure; and why, for the moment, there are no anti-tobacco NGOs in the list of the organisations that are granted the right to submit a complaint. It would also be interesting to look beyond Article 11 and examine whether and how other articles of the Charter have or can be taken into consideration in assessing tobacco control policies (for instance, Article 3 on the right to safe and healthy working conditions and Article 17 on the right of children and young persons to social, legal and economic protection).<sup>109</sup>

To conclude, this paper has demonstrated that the Collective Complaints procedure has the credentials to address national tobacco measures that are not in compliance with the Charter. It is not certain that this procedure will be successful. But if we do not even give it a chance, we will never know.

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<sup>108</sup> Defence for Children International, 'About Us', <https://defenceforchildren.org/about-us/>.

<sup>109</sup> Article 3, Article 17 ESC(rev).