



Explanatory Report to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints

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Background

1. The idea of setting up a system of collective complaints for the European Social Charter along the lines of the existing International Labour Organisation (ILO) arrangements is not new (see, for example, Recommendation 839 (1978) of the Parliamentary Assembly). It has been revived as part of the efforts initiated in 1991 to give a new impetus to the Charter.

2. The introduction of a system of this type is designed to increase the efficiency of supervisory machinery based solely on the submission of governmental reports. In particular, this system should increase participation by management and labour and non-governmental organisations (already improved by the Protocol amending the Social Charter of 21 October 1991). The way in which the machinery as a whole functions can only be enhanced by the greater interest that these bodies may be expected to show in the Charter. The procedure provided for in the Protocol will also be shorter than that for examining reports. The system of collective complaints is to be seen as a complement to the examination of governmental reports, which naturally constitutes the basic mechanism for the supervision of the application of the Charter.

3. The committee set up by the Committee of Ministers in December 1990 to draw up proposals for reforming the Charter (Committee on the European Social Charter, Charte-Rel) examined this matter from the outset. At its second meeting (22-24 May 1991), it decided to set up a working party to draw up proposals on ways of establishing a collective complaints system under the Charter, and on the operation of such a system. The working party, which met on 3 and 4 July 1991, submitted most of its proposals in the form of draft articles for incorporation in a protocol to the Charter. It was agreed that all other procedural details could be laid down in rules of procedure drawn up by the body responsible for ruling on the admissibility of complaints (in this case the Committee of Independent Experts).

4. In the light of the comments submitted in particular by the Committee of Independent Experts and international organisations of employers and trade unions (UNICE and ETUC), the Charte-Rel Committee examined the report of the working party at its third meeting (3-6 September 1991) and adopted draft articles for an additional protocol to the Charter. This draft was transmitted to the Committee of Ministers.

5. Bearing in mind the decision to hold a ministerial conference in Turin on 21 and 22 October 1991 to mark the thirtieth anniversary of the signing of the European Social Charter, the Ministers' Deputies agreed that the examination of this draft "should be pursued both by the Experts, who would meet in Turin on 21 October 1991 in the morning, and by the Ministers' meeting in Turin". In the Final Resolution of the conference the Ministers – after stressing the importance, for the purposes of the effectiveness and development of the Charter, of the widest possible participation by management and labour, and stating that a majority of them considered that such participation would be strengthened by the introduction of a system of

collective complaints – recommended that the Committee of Ministers "examine at their earliest opportunity a draft protocol providing for a system of collective complaints, with a view to its adoption and opening for signature".

6. In the meantime the Parliamentary Assembly had adopted Recommendation 1168 (1991). The appendix to this recommendation contained a new article 25bis on the collective complaints procedure (see also Resolution 967 (1991)).

7. The Charte-Rel Committee resumed examination of the draft protocol at its fourth meeting (3-6 February 1992), following which it decided to set up another working party, which met on 30 and 31 March 1992. The Committee finalised the text of the draft protocol at its fifth meeting (18-20 May 1992) and decided to transmit it to the Committee of Ministers for adoption.

8. After consulting the Committee of Independent Experts and the Parliamentary Assembly, the Committee of Ministers adopted the text of the Protocol on 22 June 1995 and opened it for signature on 9 November 1995.

General structure of the Additional Protocol

9. The structure of the Protocol is simple. It basically answers two questions: who? how? Who can submit complaints and who examines them? Following which procedure?

10. The following organisations can submit complaints, sometimes subject to certain conditions: international and national organisations of employers and trade unions and other international and national non-governmental organisations (in the case of national NGOs, a declaration by the state concerned recognising this right is required).

11. The complaint is initially examined by the Committee of Independent Experts which, after determining admissibility, reviews both sides' explanations and information as well as any observations submitted by other Contracting Parties to the Protocol or by international organisations of employers or trade unions referred to in paragraph 2 of Article 27 of the Charter. The Committee then draws up a report containing, in particular, conclusions as to whether or not the state concerned has complied with the Charter. This report is transmitted *inter alia* to the Committee of Ministers and made public no more than four months later. On the basis of this report the Committee of Ministers adopts a resolution and, if the conclusions of the Committee of Independent Experts are negative, addresses a recommendation to the state concerned. The latter should provide information on the measures taken to comply with the recommendation of the Committee of Ministers in its next report to the Secretary General under Article 21 of the Charter.

Comments

Preamble

12. The Preamble gives the main reasons why the member States of the Council of Europe decided to adopt the Protocol and the aim pursued.

13. In the second paragraph, the term "new measures" highlights the fact that improvements have already been made in the form of the first Additional Protocol (5 May 1988), the Protocol amending the Social Charter (21 October 1991) and changes to the system of governmental reports (decision of the Ministers' Deputies of September 1992, 479th meeting, item 25).

14. The last paragraph of the Preamble refers implicitly to the Final Resolution of the Turin Conference (see paragraph 5 above) and also expressly mentions non-governmental organisations other than those of management and labour.

Article 1

15. The main purpose of this article is to indicate the organisations that are entitled to submit complaints solely by virtue of the fact that the Protocol is in force *vis-à-vis* the State concerned. In the introductory sentence it establishes the principle of recognition of this right by the Contracting Parties and briefly describes the scope of complaints.

16. The organisations concerned are mentioned in three separate paragraphs.

a. international organisations of employers and trade unions

17. This refers to organisations that can take part in the work of the Governmental Committee as laid down in paragraph 2 of Article 27 of the Charter;

b. other international non-governmental organisations (INGOs)

18. By virtue of the aforementioned paragraph 2 of Article 27 of the Charter, these other organisations are also entitled to take part in the work of the Governmental Committee. The fact that they are mentioned in the Protocol highlights the originality of the European Social Charter as compared to other equivalent international systems. In fact several provisions of the Charter are not exclusively concerned with the world of work and do not fall within the direct competence of management and labour. In this connection, it should be noted that in the Amending Protocol the new paragraph 2 of Article 23 lays down special arrangements for notifying these organisations.

19. However, in contrast to the arrangements for international organisations of employers and trade unions, a mere reference to paragraph 2 of Article 27 was not deemed sufficient in the case of INGOs. Therefore, in order to be entitled to submit a complaint, an INGO must not only have consultative status with the Council of Europe, but must also appear on a special list.

20. This list is drawn up by the Governmental Committee using the following procedure, laid down by the Committee of Ministers (decision of 22 June 1995):

- INGOs which hold consultative status with the Council of Europe and consider themselves particularly competent in any of the matters governed by the Charter are invited to express their wish to be included on a special list of INGOs entitled to submit complaints;

- each application must be supported by detailed and accurate documentation aiming to show in particular that the INGO has access to authoritative sources of information and is able to carry out the necessary verifications, to obtain appropriate legal opinions, etc., in order to draw up complaint files that meet basic requirements of reliability;

- all applications are transmitted to the Governmental Committee, accompanied by an opinion of the Secretary General which reflects the degree of interest and participation shown by the INGO in its normal dealings with the Council of Europe;

- an application is considered accepted by the Governmental Committee unless it is rejected in a ballot by a simple majority of votes cast;

- inclusion on the special list is valid for a period of four years, after which it lapses unless the organisation applies for renewal in the six-month period preceding the expiry date. The procedure described above applies to renewal applications.

21. The inclusion of an INGO on this list does not relieve the Committee of Independent Experts, when examining admissibility, from the obligation to ascertain that the complaint actually falls within a field in which the INGO concerned has been recognised as being particularly competent (see paragraph 29 below).

c. national organisations of employers and trade unions

22. As laid down in paragraph 1 of Article 23 of the Charter, each Contracting Party must forward a copy of its report to certain of its national organisations of employers and trade unions. It is only normal that organisations of this type should be entitled to submit complaints, because they are very well informed of the situation in their country. For this reason those who drafted the Protocol considered that it would be wrong to restrict this right to the national organisations mentioned in Article 23 (that is those which are members of the international organisations referred to in paragraph 2 of Article 27).

23. To ensure the efficient functioning of the procedure established by the Protocol and in view of the very large number of trade unions operating in some states, it was deemed necessary to stipulate that the organisation must be "representative". The Committee of Independent Experts will judge whether the organisation meets this criterion when examining whether the complaint is admissible, in the light of information and observations submitted by the state and the organisation concerned (see Article 6). In the absence of any criteria on a national level, factors such as the number of members and the organisation's actual role in national negotiations should be taken into account.

24. It is also stipulated that, in order to be admissible, a complaint must be submitted by a national organisation within the jurisdiction of the Contracting Party concerned.

Article 2

25. The Charter does not refer specifically to national non-governmental organisations (NGOs) other than organisations of employers and trade unions. Nevertheless, for the same reasons as those invoked in respect of international non-governmental organisations (paragraph 18) and national organisations of employers and trade unions (paragraph 22), it was thought that these national NGOs should also be entitled to submit complaints. However, recognition of this right is not mandatory for parties to the Protocol, but optional: NGOs may only submit a complaint against a state if the state in question has previously issued a declaration recognising that NGOs are entitled to do so. In addition, according to paragraph 2, such declarations may be made for a specific period.

26. With the same aim of preserving the efficiency of the machinery for examining collective complaints, NGOs are subject to the same conditions as laid down for international non-governmental organisations and national organisations of employers and trade unions: they must be "representative" and particularly "qualified" in issues covered by the Charter. The Committee of Independent Experts will judge whether these criteria are met when examining whether the complaint is admissible in the light of information submitted by both parties (see Article 6 and paragraph 23 above). As in respect of INGOs (see, paragraph 21 above and paragraph 29 below), the Committee should ascertain that the complaint actually falls within a field in which the NGO concerned is particularly competent.

27. As is the case for national organisations of employers and trade unions, NGOs must come within the jurisdiction of the state against which their complaint is made.

28. Subject to the considerations set out in the previous two paragraphs, when a State makes a declaration on the basis of this article, it recognises the right of all NGOs within its jurisdiction to submit complaints without, for example, drawing up a national list. In similar vein, it may not restrict this right to certain articles or paragraphs of the Charter.

Article 3

29. This article specifies that international and national non-governmental organisations may only submit complaints in respect of those matters regarding which they have been recognised as having particular competence.

Article 4

30. This article lays down three admissibility conditions which were deemed sufficiently important to be specifically mentioned in a separate article of the Protocol. These conditions complement those laid down in Articles 1 and 2, which specify the organisations entitled to submit complaints.

31. As indicated in paragraph 3 above, the Committee of Independent Experts may stipulate the conditions governing the admissibility of complaints in its rules of procedure. It must take account of the fact that the following was agreed in the course of negotiations within the Charte-Rel Committee:

- a complaint may be declared admissible even if a similar case has already been submitted to another national or international body;
- the fact that the substance of a complaint has been examined as part of the "normal" government reports procedure does not in itself constitute an impediment to the complaint's admissibility. It has been agreed to give the Committee of Independent Experts a sufficient margin of appreciation in this area;
- because of their "collective" nature, complaints may only raise questions concerning non-compliance of a state's law or practice with one of the provisions of the Charter. Individual situations may not be submitted.

Article 5

32. This article does not invite any specific comments, but two general remarks can be made.

33. The adverb "immediately" underlines that one of the advantages of the new procedure is its rapidity. This comment also applies to Articles 6 and 7, which invite the Committee of Independent Experts in several instances to prescribe time-limits for the submission of information and explanations.

34. It has been agreed that when the Committee of Independent Experts takes action under the Protocol, its membership shall be that laid down in Articles 25 and 26 of the Charter, namely with the participation of an ILO representative.

Article 6

35. This article concerns the assessment of the admissibility of complaints. The submissions of both parties must be examined: the state concerned and the organisation that lodged the complaint are invited by the Committee of Independent Experts to submit information and observations, and a complaint can only be declared admissible if the state concerned has had the opportunity to state its case. However, the article does not create an obligation for the Committee of Independent Experts to request such information, in order to permit it to reject a complaint that is manifestly inadmissible of its own volition.

Article 7

36. This article lays down the main stages in the examination of the merits of complaints. Again, heavy emphasis is placed on the fact that submissions from both parties must be examined and on its corollary, namely the need to work within reasonable time limits.

37. Paragraph 1 establishes a distinction between information and the possibility of submitting comments. All Contracting Parties to the Charter are notified that a complaint is admissible (first sentence). However (second sentence), only Contracting Parties to the Protocol may submit comments. These provisions reflect the fact that the follow-up to a complaint may be of interest to states other than the one directly concerned, while providing that those states that have not agreed to be bound by the Protocol are not entitled to submit comments.

38. Paragraph 2 takes account of the key role played by international organisations of employers and trade unions in the supervisory machinery provided for by the Charter in giving them the possibility of submitting observations on complaints lodged by other organisations.

39. Paragraph 3 makes provision for each party concerned to react to the other party's comments.

40. Paragraph 4 authorises the Committee of Independent Experts to organise hearings with representatives of the state concerned and the organisation that lodged the complaint. In view of the fact that the previous paragraphs of this article make ample provision for both parties to make submissions, hearings of this type need not be organised systematically. It is simply an option available to the Committee of Independent Experts, which is responsible for determining on the basis of the available information whether a meeting with the representatives of the parties is necessary. Meetings of this type can also be arranged at the request of one of the parties.

Article 8

41. Paragraph 1 corresponds to the final stage of the consideration of the merits of the complaint by the Committee of Independent Experts. The Committee draws up a report featuring in particular its legal assessment of the complaint. This provision must be read in the light of the new paragraph 2 of Article 24 of the Charter (Article 2 of the Protocol amending the Charter).

42. Paragraph 2 specifies to which bodies the report of the Committee of Independent Experts is to be sent and lays down rules on its publication.

43. Initially (first sub-paragraph) the report, which is transmitted to the Committee of Ministers, the organisation that lodged the complaint and the Contracting Parties to the Charter, remains confidential (see, *mutatis mutandis*, paragraph 2 of Article 31 of the European Convention on Human Rights).

It should be borne in mind here that the whole of the procedure for considering complaints is confidential. It was not thought necessary to specify this in the Protocol because the rules of procedure of the Committee of Independent Experts already stated that its sessions "shall be held in private. All working documents shall be confidential". Nevertheless, this does not imply a total lack of information. In line with the procedure used within the framework of the European Convention on Human Rights, the following may be made public: the fact that a given organisation has lodged a complaint against a given state, the basis of the complaint and the decision on its admissibility.

44. Subsequently (second sub-paragraph) the report is transmitted to the Parliamentary Assembly and made public. This may take place at two different times:

- either four months after the report has been transmitted to the Committee of Ministers;
- or when the resolution referred to in Article 9 is adopted by the Committee of Ministers, if this occurs before four months have elapsed.

Article 9

45. This article deals with the role of the Committee of Ministers, which intervenes immediately after the Committee of Independent Experts.

46. The duties of the Committee of Ministers are similar to those it carries out as supervisory body in the procedure instituted by the Charter.

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.

47. In respect of the resolution as well as the recommendation, only the Contracting Parties to the Charter are entitled to take part in the vote.

48. The Charte-Rel Committee had foreseen that the Governmental Committee would not be involved in the procedure for examining complaints, but the Committee of Ministers decided before adopting the Protocol to add a second paragraph to this article, according to which the Committee of Ministers may decide, where the report of the Committee of Independent Experts raises new issues, by a two-thirds majority of the Contracting Parties to the Charter, to consult the Governmental Committee.

Article 10

49. Once the Committee of Ministers has adopted a recommendation, appropriate follow-up must be ensured. In line with the practice adopted for other international supervisory machinery (European Convention on Human Rights, ILO, Human Rights Committee, etc.), Article 10 requires the state concerned to provide information on the measures it has taken to give effect to the Committee of Ministers' recommendation.

50. This information will be contained in the "next report" that the state concerned submits to the Secretary General under Article 21 of the Charter. In other words, the state may not wait until the time when it would normally submit a report on the provision(s) concerned by the complaint; it must provide the information required in the report immediately following the decision of the Committee of Ministers.

Article 11

51. Throughout the Protocol, only the Charter itself is mentioned. This article specifies that if a state is also bound by the first Additional Protocol (5 May 1988), complaints may be submitted on the basis of the articles it has accepted.

52. If further protocols to the Charter are adopted in future, they must contain a provision specifying that this Protocol applies to the articles of these other protocols that have been accepted.

Article 12

53. In the course of the negotiations, the question arose as to whether the adoption of a system of collective complaints would be fully compatible with the wording of the appendix to the Charter concerning Part III, which states that "It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof."

54. To avoid any ambiguity, it was decided to include the present Article 12.

Articles 13 to 15

55. These articles, which contain the final clauses of the Protocol, conform to the model adopted by the Committee of Ministers of the Council of Europe.