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Explanatory Report to the Additional Protocol to the European Social Charter

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Introduction

1. In the Declaration on Human Rights of 27 April 1978, the Member States of the Council of Europe decided "to give priority to the work undertaken in the Council of Europe of exploring the possibility of extending the lists of rights of the individual, notably rights in the social, economic and cultural field, which should be protected by European conventions or any other appropriate means".

2. Further to this declaration, the Committee of Ministers of the Council of Europe initiated extensive consultations with a number of steering committees which were invited to draw up opinions on the possibility of including new economic and social rights in instruments such as the European Convention on Human Rights and the European Social Charter (hereafter "the Charter").

3. The Steering Committee for Social Affairs (CDSO) was instructed to take the lead in this process with regard to the Charter.

4. Having been instructed in 1980, in its initial terms of reference (Decision No. CM/174/240180), to "undertake a review of the rights incorporated in the European Social Charter to determine whether they should be updated or supplemented" and "to consider whether there are any rights which might be suitable for inclusion in the European Convention on Human Rights", the CDSO was instructed in 1981 (Decision No. CM/252/250981) "to undertake the drafting of a preliminary working paper presenting in standard-setting form the various proposals for the rights to be incorporated in an additional Protocol to the European Social Charter".

5. Subsequently, on the basis of this working paper drafted by the CDSO, the Committee of Ministers adopted a third set of terms of reference (Decision No. CM/219/190183) asking the CDSO to "prepare a preliminary draft for a Protocol to the European Social Charter".

6. The CDSO carried out this task at meetings which it held in March, July and October 1983 and again in April, July and October 1984 and adopted the text of a preliminary draft additional protocol including an appendix forming an integral part of it.

7. At their 378th meeting, the Ministers' Deputies (November-December 1984) considered it necessary to consult management and labour and instructed (386th meeting, June 1985) the CDSO to re-examine the preliminary draft additional protocol in the light of the views expressed by the European Trade Union Confederation (ETUC) and the Union of Industries of the European Community (UNICE) on the occasion of the annual meeting of the Liaison Committee between the Council of Europe and management and labour (LCML) held on 18 and 19 February 1985.

8. Furthermore, in response to the wish expressed by the Assembly in its Recommendation 1022 (1986) on the European Social Charter for "a political appraisal", the Ministers' Deputies (394th meeting, March 1986) decided to consult the Assembly on the text of the preliminary draft additional protocol before finalising the position of the Committee of Ministers on the matter.

On 26 January 1987, the Assembly adopted Opinion No. 131 (1987) proposing some amendments to the preliminary draft both as regards the wording of the rights proposed and also the conditions for ratification of the future protocol and the scope of its application to persons *ratione personae.*

9. The Committee of Ministers adopted the Additional Protocol to the Charter on 26 November 1987 during its 81st session; this Protocol was opened for signature on 5 May 1988.

General remarks

10. The Protocol is to be regarded as an instrument which, although in some respects is an "extension" of the Charter, is nonetheless legally independent of it.

11. Its structure has deliberately been modelled on that of the Charter; thus there is the same sub-division into a Part I, containing a general statement of rights and principles having the force of "aims", and a Part II presenting the same rights in the form of detailed rules and stating explicitly the Parties' undertakings. Equally, the articles which follow have been grouped into Parts III, IV and V, corresponding to those parts of the Charter with the same numbering.

12. For the same reasons of harmony, the introductory sentences to Parts I and II of the Protocol are identical to those appearing in the Charter.

13. The Protocol, however, takes into account developments in labour legislation, the definition of social policies and, to some extent, terminology, since the Charter was drawn up. For this reason, new expressions have sometimes been used, the exact meaning of which has been indicated where necessary; on the other hand, when the same concepts are used, they should as a rule be interpreted in association with the corresponding provision of the Charter.

Part I

14. As stated above, this part enunciates the right and principles guaranteed in accordance with the corresponding articles of Part II.

15. The wording of Part I and of Article 5, paragraph 1.a, of Part III of the Protocol reproduces that of Part I and Article 20 of the Charter respectively. Thanks to the flexible drafting of these texts, they have been accepted by a number of states, not all of which have the same concept of economic and social rights and, in particular, of the way in which they are exercised.

16. In the introductory paragraph to Part I, it will be noted that the Parties acknowledge the aim of their policy to be "the attainment of conditions in which the following rights and principles may be effectively realised". In other words, a state may choose not to intervene directly if, according to its legal and institutional system, this is the best way of attaining the "conditions in which the [...] rights" in question "may be effectively realised", without the need to express any reservations whatsoever to this end.

17. Whilst right No. 1 opens with the words "All workers", rights Nos. 2 and 3 begin "Workers". The latter wording was chosen because Articles 2 and 3 provide for the possible exclusion from their scope undertakings employing less than a certain number of workers and further allow the rights in question to be exercised by delegation. It was therefore deemed preferable to avoid any inconsistency between the enunciation of the rights in Part I and the conditions of their exercise stipulated in the corresponding articles in Part II.

18. The term "workers" in right No. 1 in Part I shall be taken to include unemployed persons, persons seeking employment, those undergoing vocational training and all other potential workers.

19. Rights Nos. 2 and 3 refer to the concept of "undertaking", which is defined in the appendix (see paragraphs 68 and 69 below).

Part II

Article 1

Paragraph 1

20. The obligation on the Parties under paragraph 1 is, inter alia, to "ensure" or to "promote" the application of the right to equal treatment; this is to allow for the fact that the obligation in question may be met as much by government action (legislation, regulations, etc.) as by action by employers and labour (collective agreements) or individuals (bilateral agreements and contracts). The obligation to ensure equal treatment may further be met both by judicial processes and by such other appropriate means as exist or may be instituted by each Party.

21. The list of fields in which the provision is applicable reflects developments since the Charter's adoption. Reference is made, for instance, to occupational resettlement, a concept which does not appear as such in the Charter. The expression "occupational resettlement" covers several situations: the resumption of employment after a voluntary or involuntary break, moving from one job to another without a break, possibly after retraining. The term "retraining" covers any supplementary training to enable workers to adapt their knowledge and skills to industrial, technological and scientific progress.

22. The expression "terms of employment and working conditions" refers to all rights and situations associated with the specific position of the worker in his or her occupational relations and working environment. As stated, however, in the appendix, social security matters "may be excluded" (see paragraph 67 below).

23. It was understood that by the expression "terms of employment [...] including remuneration;" in the third sub-paragraph of paragraph 1, the equal treatment intended by this provision is wider in scope than the principle of "equal pay for work of equal value" in Article 4, paragraph 3, of the Charter. "Remuneration" shall, moreover, be understood to mean basic or minimum wages or salary plus all other benefits paid directly or indirectly in cash or kind by the employer to the worker by reason of the latter's employment.

Paragraph 2

24. Within the meaning of this paragraph, the protection afforded women is that guaranteed by current provisions in matters of pregnancy, confinement and post-natal care. The word "particularly" means, however, that other kinds of protection, essential in other situations, are admissible.

25. The protective provisions referred to are not only those of domestic legislation but also those resulting from international law. Articles 8 and 17 of the Charter are therefore not affected as such by this article of the Protocol (see also Article 8 of the Protocol – "Relations between the Charter and this Protocol"). It is understood that where several texts coexist, the provision most favourable to the persons concerned shall prevail. It is, however, acknowledged that in this particular context (equality between the sexes) it will sometimes be difficult to establish which measure is the most favourable to women, as opinions may differ. Account will need to be taken of changing attitudes in this regard.

Paragraph 3

26. This provision takes into account the need to expedite the elimination of continuing de facto inequalities generally affecting women. The specific measures permissible but not obligatory under this provision shall be transitional and repealed gradually once equality has been achieved.

Paragraph 4

27. As stated in the appendix, this paragraph allows Parties to exclude occupations without requiring them to embody a list thereof in laws or regulations. The Parties would, however, need to take care to state in the reports that they will submit under Article 6, whether any activities – and if so, which ones – are reserved to persons of a particular sex and the reasons for and criteria governing such reservation. The Parties will bear in mind that the intention is to gradually reduce the number of excluded activities to a strict minimum.

28. This paragraph also refers to the "context in which [certain occupations] are carried out" as a factor which may warrant their being reserved to workers of a particular sex. Such circumstances should ordinarily be quite exceptional. The accessibility of an occupational activity to persons of either sex or its restriction to persons of a particular sex is to be determined by the "nature" of the work. The words "context in which [certain occupations] are carried out" are accordingly to be construed restrictively.

Articles 2 and 3

29. The conjunction "or" used in the expression "workers or their representatives" is not exclusive. It simply means that the rights afforded by these two provisions may be exercised by workers, or by their representatives, or by both, and the fact that they are conferred upon one group does not mean that they cannot be conferred upon the other, as stipulated in the articles themselves.

30. The expression "in accordance with national legislation and practice" in the introductory sentence of each of these two articles covers:

i. the adoption or encouragement of the "measures" envisaged to ensure the exercise of the rights mentioned in the two articles;

ii. the designation of such workers' representatives as may be associated with the exercise of those rights.

31. A definition of "workers' representatives" is given in the appendix. It is drawn from Article 3 of the International Labour Organisation (ILO) Convention No. 135 concerning protection and facilities to be afforded to workers' representatives in the undertaking, so as to harmonise the definitions contained in the various international instruments.

32. With regard to point 30.i above, the Parties may naturally proceed by means of legislation or regulations but may also leave workers' representatives and employers to arrange the implementation of the provision by means of collective agreements, other agreements or any other form of voluntary negotiation. Implementation must, however, be effective and adequate.

33. In particular the Parties may leave management and labour to decide the level at which workers or their representatives are normally informed and consulted and take part (Articles 2 and 3): undertaking, production unit, sector or branch, or even local regional or national level, etc.

34. With regard to point 30.ii above, it shall likewise be permissible for Parties, in the above-mentioned conditions, to leave workers and their organisations to prescribe procedures and rules for the designation of representatives having access to information, consultation and participation in the determining of working conditions in the undertaking and for deciding at which level (local, regional, national, undertaking, branch, etc.) these rights are to be exercised.

35. The "national practice" mentioned earlier – which includes collective agreements and other contracts or agreements between employers and workers' representatives – also covers all customary practices between management and labour as well as existing or future judicial decisions in the matters referred to in the two articles.

36. The expression "certain number of workers to be determined by national legislation or practice" in Article 2, paragraph 2, and Article 3, paragraph 2, implies that the number in question may by determined in legislation or regulations, result from agreements between the Parties or be the result of long-standing custom, etc., although these methods are not necessarily mutually exclusive.

Article 2

Paragraph 1

37. The term "undertaking" is defined in the appendix. It should be noted that, although the undertaking should have the power to make decisions regarding its market policy, it is not essential for workers to be informed at the place at which the undertaking's management makes such decisions. On the contrary, this provision allows the Parties complete discretion to fix, or to leave management and labour to determine freely, the various levels of information and consultation, which need not coincide with the decision-making level. In the case of, for instance, decentralised undertakings, information and consultation should in any event, to be effective, occur in the various production units if they are also practised at the decision-making centres. See also the comment in the appendix about the "establishments of the undertaking".

38. With regard to multinational undertakings, the definition of the term "undertaking" shall be understood to apply to each production unit enjoying decision-making powers and located in the territory of a Party.

39. Sub-paragraph a of this paragraph stipulates that only information about the economic and financial situation of the undertaking must be communicated (subject to the proviso about secrecy and confidentiality). Other information, for example about industrial property or manufacturing or trade secrets, need not be disclosed.

40. This restriction supplements the general restriction which may be applied to the exercise of the rights set forth in this Protocol pursuant to Article 31 of the Charter, to which Article 8 of the Protocol refers.

41. It goes without saying that under this provision the possibility of refusing to disclose certain information or of requiring confidentiality may naturally be included not only in legislation or regulations but also in collective agreements or other agreements between employers and workers' representatives.

42. The expression "and in a comprehensible way" in sub-paragraph a has been inserted following a proposal by the Assembly in Opinion No. 131, which considered it useful to describe more precisely the kind of information to be disclosed.

43. In order to be effective, "consultation" in the relevant fields should be preceded by the furnishing of appropriate "information": the scope of consultation is thus coterminous with that of the information provision, the only restrictions being those provided in sub-paragraph b, emphasised by the use of the co-ordinating conjunction "and" at the end of sub-paragraph a.

Paragraph 2

44. This paragraph makes it possible for the Parties to apply the provisions on information and consultation of workers only to undertakings employing more than a certain number of workers. This option was included because it appeared that for reasons of efficiency and having regard also to the special circumstances associated with the size of certain undertakings, the establishment of specific information and consultation structures was, in many countries, envisaged or required only when the number of employees exceeded a certain minimum. The establishment of such structures is generally not obligatory in undertakings employing fewer workers than the number stipulated in legislation, regulations or agreements in force between the Parties. Moreover, in small undertakings, information and consultation processes often exist in fact and operate readily, making the introduction of rigid and sometimes complex procedures unnecessary.

45. The Parties have accordingly been given the option of providing for the creation of information and consultation structures or systems only when the number of employees exceeds a certain level. If this option is exercised, the threshold (or thresholds) will need to be indicated in the reports to be submitted under Article 6. In the case of undertakings with fewer employees than the thresholds(s), the Parties will not, on the other hand, be required to explain information and consultation procedures but may communicate such information thereon as is in their possession.

46. It should further be noted that only the criterion of the undertaking's size (number of employees) is mentioned in this article, as other criteria relating to the undertaking's nature or activities may be covered by the appendix to the Protocol (Articles 2 and 3, paragraph 4), and/or by Article 31 of the Charter, to which Article 8 of the Protocol refers. The possibility that undertakings may also be excluded because collective agreements or other agreements applying to them contain no provisions relating to information or consultation is, on the other hand, covered by Article 7 of the Protocol. In this case, however, the workers not afforded this right must be a minority or, more exactly, those enjoying the right to be informed and consulted must constitute the great majority of the workers concerned in the country in question.

Article 3

Paragraph 1

47. The matters listed in this article are frequently covered by collective agreements or other agreements between employers and workers' representatives.

48. Sub-paragraph c comes from a proposal of the Assembly (see Opinion No. 131) and, for a better understanding of the text, a certain number of the services and facilities thus referred to have been listed in the appendix.

49. This article in no way prejudices the right to bargain collectively provided for in Article 6 of the Charter, as is clear from Article 8 of the Protocol.

50. The expression "to take part in" covers all situations in which workers or their representatives are in any way whatsoever associated with the procedures for making decisions or taking certain measures, without, however, enjoying a right of joint decision-making or of veto over decisions still the responsibility of the head of the undertaking.

51. The contribution to the "supervision of the observance" of health and safety regulations is to be effected pursuant to the rules in force in each country and without prejudice to the jurisdiction and responsibilities of the bodies and authorities vested with the necessary powers. The role of workers or their representatives is not to replace the bodies responsible for this supervision but rather to ensure that supervision is as effective as possible.

Paragraph 2

52. The earlier comments on the analogous provision in Article 2 also apply here.

Article 4

53. The use in this article of the expression "in particular" indicates that the provisions enumerated are not exhaustive. The means indicated are therefore intended simply for guidance. The Parties are free to adopt any other measures appropriate to the full achievement of the aim referred to in paragraph 4 of Part I and repeated in the introductory sentence of this article.

Paragraph 1

54. The expression "full members" means that elderly persons must suffer no ostracism on account of their age, since the right to take part in society's various fields of activity is not granted or refused depending on whether an elderly person has retired or is still vocationally active or whether such a person is still of full legal capacity or is subject to some restrictions in this respect (*diminutio capitis*).

55. The concept of "adequate resources" is to be interpreted in the light of Article 13 and, if necessary, Article 12 of the Charter. It is moreover understood that there is no inconsistency between the concept of "social assistance" used in Article 13 of the Charter and the concept of "social protection" embodied in Article 4 of the Protocol.

Paragraph 2

56. The ability of elderly people to remain in their familiar surroundings should be assessed in relation to their psychological and physical state, their living conditions, the standard of their accommodation, etc.

57. The "services" referred to in sub-paragraph 2.b include, where appropriate, admission to specialised institutions for elderly persons. This provision therefore assumes the existence of an adequate number of institutions and should be interpreted in the light of the introduction to the article, whereby each Party undertakes to adopt or promote appropriate measures either on its own or in co-operation with relevant public or private organisations.

Paragraph 3

58. This paragraph specifically concerned with elderly persons living in institutions should be read in conjunction with the other paragraphs of Article 4. It follows that the measures advocated in paragraphs 1 and 2 are also applicable to persons living in institutions, but only in so far as this mode of life does not render their implementation impossible or manifestly irrelevant.

59. Respect for privacy is mentioned only in relation to elderly persons living in institutions, a situation warranting special mention. Everyone in all circumstances is naturally entitled to respect for his or her private life as guaranteed by the European Convention on Human Rights.

Other provisions of the Protocol

60. In addition to the "substantive" articles, the Protocol contains a number of supplementary provisions whose purpose is:

a. to stipulate the extent of the undertakings subscribed to by the Parties (Article 5);

b. to recall the supervision procedure (Article 6);

c. to stipulate the means of implementing the Protocol (Article 7);

d. to explain the relationship between the Protocol and the Charter (Article 8);

e. to lay down the conditions for the signature, ratification, entry into force and denunciation of the Protocol, its territorial application and the notifications relating to these matters (Articles 9 to 12);

f. to stipulate that the appendix forms an integral part of the Protocol (Article 13).

61. These provisions call for no special comment; their wording is clear. Furthermore, they follow the model final clauses for conventions and agreements concluded within the Council of Europe.

62. It should, however, be pointed out that Article 7, which enunciates in its paragraph 2 the exclusions Parties may avail themselves of, pursuant to paragraph 2 of Articles 2 and 3, is largely based on Article 33 of the Charter but nevertheless departs from it to clarify the various modes of implementation envisaged.

63. In practice, however, the enjoyment of the rights set forth in Articles 2 and 3 may be guaranteed only to the great majority of workers concerned and therefore need not necessarily be afforded to all workers.

64. On the other hand, all the persons mentioned in Articles 1 and 4 must be guaranteed the rights set out there. There is no possibility of leaving a minority of workers or elderly persons outside the scope of the laws, regulations, collective agreements, etc., by means of which the implementation of the undertakings given in these articles is fulfilled.

Appendix to the Protocol

65. The appendix, which forms an integral part of the Protocol, includes a number of definitions, comments and interpretations of and on the "substantive" articles of the Protocol.

66. As regards "persons protected", it is pointed out that in its Opinion No. 131 the Assembly proposed not to restrict the protection of the four new rights to nationals of the Parties. Since the Protocol is a legal instrument distinct from the Charter, there was no obligation from a legal point of view to make the scope of its application to persons identical to that laid down in the Charter. It was considered, nevertheless, that the close relationship created between the two instruments militated in favour of a degree of harmonisation and the need to have an identical field of application to persons won the day. It was stressed that the extension of the application of the Protocol to any persons of whatever nationality was not legally excluded and that in practice most of the rights falling within the social or labour field by their very nature benefit in principle and without distinction all persons lawfully residing or working regularly in the territory of a Party.

67. The provision of the appendix relating to Article 1 allow the exclusion of, from "terms of employment and working conditions", social security matters within the meaning of ILO Convention No. 102 concerning minimum standards of social security, that is to say its nine traditional branches. It was agreed that this text is to be construed as also allowing the exclusion, from the field of application of Article 1, of conditions of employment genuinely linked to social security matters and other benefits mentioned.

68. Under the heading "Articles 2 and 3", paragraph 4 of the appendix has been inserted, inter alia, to meet the situation in the Federal Republic of Germany where certain categories of undertakings with an "orientation" (Tendenzbetriebe) are excluded from the scope of the 1972 Act on the Organisation of Undertakings or from certain of its provisions. These are "companies and establishments that directly and predominantly:

> 1. pursue political, coalition, religious, charitable, educational, scientific or artistic objects; or
>
> 2. serve purposes of publishing or expressing opinions covered by the second sentence of section 5 (1) of the Basic Law (Constitution)."

69. Under the heading "Articles 2 and 3", paragraph 5 of the appendix refers to "establishments of the undertaking". In fact an undertaking may consist of one or more production units economically and legally bound to a single management centre. Such production units then constitute as many component establishments of the undertaking, and it is understood that where within a state rights Nos. 2 and 3 are effectively exercised within the various establishments of the undertaking in question, the Party concerned shall be deemed to fulfil its obligations under these provisions.