



## **Explanatory Report to the Protocol amending the European Social Charter**

Turin, 21.X.1991

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### **Background**

1. On 5 November 1990 an informal ministerial conference on human rights was held in Rome. One of the topics discussed was the European Social Charter, with the result that the Committee of Ministers of the Council of Europe was invited to take the necessary measures so that a detailed study of the role, contents and operation of the European Social Charter might be undertaken as soon as possible.
2. At their 449th meeting (November-December 1990), the Ministers' Deputies decided to authorise the convening of an ad hoc committee, the Committee on the European Social Charter (Charte-Rel), which would have the task of making proposals for improving the effectiveness of the European Social Charter and more particularly the functioning of its supervisory machinery.
3. The Committee was composed of experts designated by each member state. In addition, representatives of the Parliamentary Assembly, ILO, ETUC and UNICE took part in its meetings, but without the right to vote. The Committee of Independent Experts and the Governmental Committee as well as several other Council of Europe committees also participated in this work.
4. At its first meeting (February 1991), the Committee decided to concentrate, in the first instance, on the improvement of the supervisory machinery before addressing the reform of the substance of the Charter. As concerns the improvement of the supervisory machinery, its efforts resulted in three reforms which together make up a coherent whole: the present Protocol; the draft Additional Protocol laying down a system of collective complaints; the change in the reporting procedure, which the Committee of Ministers decided in September 1992 to introduce for a trial period of four years.
5. The Charte-Rel Committee adopted the draft Protocol at its third meeting (September 1991) and decided to communicate the text to the Committee of Ministers.
6. The Committee of Ministers, to which Parliamentary Assembly Recommendation 1168 (1991) had also been referred, adopted the text of the Protocol on 16 October 1991 and agreed that it should be opened for signature on 21 October 1991 in Turin, at a ministerial conference commemorating the 30th anniversary of the signature of the European Social Charter.

## General structure of the Protocol

7. At the very outset of its work, the Charte-Rel Committee was unanimous on two preconditions for any significant improvement in the functioning of the Charter:

- a. a political will should be clearly expressed in the supervisory process. The main weakness of the present functioning of the system of supervision lay in the absence of any political sanction. The Committee of Ministers ought to adopt individual recommendations on the basis of Article 29 of the Charter – a step which it had so far never taken;
- b. a substantial and rapid increase in the resources available for implementing the Charter, particularly the resources of the Secretariat, was required.

8. A consensus also emerged on various other points:

- a. the Governmental Committee ought to be retained;
- b. it was essential to clarify the functions and competences of the various supervisory organs, particularly those of the Committee of Independent Experts and of the Governmental Committee;
- c. according to its own representatives, the role of the Parliamentary Assembly ought to be revised: it should cease to be a supervisory organ in the strict sense of the term and become a political body for stimulation and discussion;
- d. the length of the supervisory procedure ought in any event to be reduced;
- e. it was necessary to improve the participation of the social partners within the national framework;
- f. efforts should be made to promote the Charter and make it better known, especially at national level.

9. The discussion was devoted for the most part to the clarification of the respective powers of the Committee of Independent Experts and the Governmental Committee. The text finally adopted is based on the idea that, of these two bodies, the Committee of Independent Experts alone would be competent to make a legal assessment of whether the national legislation, regulations and practices of a Contracting Party complied with its undertakings under the Charter. The role of the Governmental Committee would be to examine national situations and provide a specific viewpoint based on social, economic and other policy considerations. It could select the most problematical situations for consideration by the Committee of Ministers, suggesting, where appropriate, that the Ministers adopt one or more recommendations for the attention of this or that state. In this context, the Governmental Committee would not be a political organ *per se*, but rather a guide assisting the Committee of Ministers in reaching its decisions. Through its role as a forum of governmental experts examining the reasons for the various states' main difficulties in the implementation of the provisions of the Charter, the Governmental Committee could play an important part in instigating measures to ensure social progress in Europe.

10. These considerations had several consequences, the main ones being as follows:

- a. for the Committee of Independent Experts: increase in the number of members; modified procedure for election of members;

b. for the Governmental Committee: to consider the more frequent use of paragraph 2 of Article 27 of the Charter, under the terms of which the Governmental Committee may consult international non-governmental organisations having consultative status with the Council of Europe in respect of questions with which such organisations are particularly qualified to deal;

c. for the Committee of Ministers: adoption of individual recommendations; modification of the majority provided for under Article 29;

d. for the Parliamentary Assembly: new role (see paragraph 8.c above);

e. changes necessary prior to the conclusions of the Committee of Independent Experts, above all, gathering information as full and as balanced as possible. In this connection, special mention may be made of the possibility for the Committee of Independent Experts to refer directly to the Contracting Parties to request additional or more detailed information and to hold meetings with governmental representatives.

11. Not all these proposals required amendments to the Charter in order to be implemented. Nevertheless, in the light of past experience, the Charte-Rel Committee felt that several of the proposals should be incorporated into the text of the Charter.

## Comments

### Article 1

12. This article amends Article 23. Apart from purely technical changes, it introduces a new system for communicating copies of governmental reports and observations on these reports.

#### *Paragraph 1*

13. Compared with the original text, the amended text states that when submitting their reports to the Secretary General governments shall send a copy to national organisations of employers and workers; the copy may of course be sent in the national language before being translated into one of the official languages of the Council of Europe.

14. The last two sentences replace the existing paragraph 2. Henceforth, both sides of industry can send their observations on the governmental reports directly to the Secretary General of the Council of Europe, while governments will also have the chance to submit their comments.

#### *Paragraph 2*

15. This paragraph is new. It provides that certain international non-governmental organisations (INGOs) shall be informed. This provision, which is mainly inspired by the important role which INGOs may play in developing the Charter and giving it fresh impetus, should be read in conjunction with Article 27, paragraph 2, and with the draft Additional Protocol introducing a system of collective complaints. There is merely a duty to inform: in contrast to the national social partners mentioned in paragraph 1, these INGOs will not have an opportunity to pass comments on governments' reports.

#### *Paragraph 3*

16. This paragraph is also new. With the aim of helping to promote the Charter and improve knowledge about it, provision is made for reports and comments to be communicated on request, without this implying a duty for the national authorities or the Council of Europe to make these documents the subject of an actual publication.

## **Article 2**

17. This article amends Article 24 pertaining to the examination of governmental reports by the Committee of Independent Experts, whose powers and functions it defines.

### *Paragraph 1*

18. This paragraph reproduces the text of the existing Article 24 with some technical changes.

### *Paragraph 2*

19. Like the two following paragraphs, this paragraph is new and represents one of the essential provisions of the Protocol. In conjunction with paragraphs 3 and 4 of the new Article 27, it is intended to express in the text of the Charter the new allocation of powers between the Committee of Independent Experts and the Governmental Committee (see paragraph 9 above). It therefore clearly states that the task of the Committee of Independent Experts is to assess national law and practice in relation to provisions under the Charter from a legal standpoint.

### *Paragraph 3*

20. In this paragraph, provision is made for practical measures to introduce greater flexibility into the procedure, especially by helping to avoid misunderstandings – which cause tension and delays – between the Committee of Independent Experts and governments.

21. Accordingly, when examining a particular report, the Committee may get in touch directly with the government concerned in order to obtain information or clarifications without having to wait for the government's next report.

22. Similarly, the Committee may also hold a meeting with representatives of a Contracting Party. It was nevertheless considered that such meetings should remain the exception and that they should not be of a compulsory character.

23. Informing employers and workers (on a national and international level) in accordance with the last sentence may be done in various ways. Their organisations should at least be informed by the government concerned of the holding and outcome of the meeting. Moreover, it would be possible for a government to invite representatives of the organisations in its country, which satisfy the criteria of paragraph 1 of Article 23, to attend the meeting of the Committee of Independent Experts together with its own representatives.

### *Paragraph 4*

24. Like paragraph 3 of Article 23 as amended, this paragraph is designed to promote the Charter and encourage better participation by the various bodies concerned, by providing for the widest possible publicity of the relevant work.

## **Article 3**

25. As indicated above (paragraph 10), certain provisions in the Protocol are the direct result of the new distribution of powers between the Committee of Independent Experts and the Governmental Committee. The amendments to Article 25 are an illustration of this change. This article refers to the membership of the Committee of Independent Experts whose title is given official status here.

*Paragraph 1*

26. Between October 1988 and October 1991, six new states ratified the Charter, which represents a remarkable increase compared with past events. During the preparation of the Protocol it also became increasingly likely that the Additional Protocol of 1988 would enter into force in the near future, as in fact happened on 4 September 1992. As a result, many voices were raised to recommend, as did the Committee itself, an increase in the membership of the Committee of Independent Experts. This would enable it to have a more representative composition and to enjoy more satisfactory working conditions for coping with its workload.

27. Currently, the Committee of Independent Experts consists of "not more than seven members". Under the terms of this paragraph 1, the number is increased to nine, which is moreover regarded as a minimum ("at least nine members"). Thus, in order to meet new needs in the future without having to amend the text of the Charter each time, it is provided that the Committee of Ministers will fix the exact number of members of the Committee of Independent Experts.

28. In order to strengthen the independence of the Experts it is provided that they will no longer be appointed by the Committee of Ministers but elected by the Parliamentary Assembly from a list drawn up by the Contracting Parties.

*Paragraph 2*

29. The term of office of members of the Committee remains at six years but, in the future, it can be renewed only once.

30. The second sentence of this paragraph and the whole of paragraph 3 of the present text of Article 25 have been deleted because they have become superfluous, since the Committee of Independent Experts is already functioning and the system of partial renewal of membership is already operative.

*Paragraph 3*

31. This paragraph repeats the text of the existing paragraph 4, apart from a few technical changes.

*Paragraph 4*

32. This paragraph draws on the provisions recently incorporated into the European Convention on Human Rights by Protocol No. 8 (new Article 23 and Article 40, paragraph 7; see also Article 4, paragraph 7, of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment). The provisions it contains are of course intended for each member of the Committee, but also for governments of Contracting Parties when they submit candidates for election.

**Article 4**

33. This article amends Article 27 which deals with the membership and duties of the Governmental Committee, whose title is also given official status here.

*Paragraph 1*

34. This paragraph supplements the present paragraph 1 by mentioning further documents to be communicated to the Governmental Committee, namely: the comments by national organisations of employers and workers on governmental reports; the government's comments in reply (Article 23, paragraph 1) and any further information provided on the occasion of a meeting of the Committee of Independent Experts with the representatives of a Contracting Party (Article 24, paragraph 3).

*Paragraph 2*

35. Compared with the present text, it should be noted that the number of representatives of international non-governmental organisations who may be consulted by the Governmental Committee is no longer limited to two. In addition, the qualifications of these INGOs are defined in more general terms, and examples have been omitted.

*Paragraph 3*

36. Like paragraph 2 of the new Article 24, this paragraph is another essential provision of the Protocol. It defines the powers of the Governmental Committee as described above in paragraph 9. Basically, the idea is to make a clear distinction between its powers and those of the Committee of Independent Experts, which is achieved above all in the words "on the basis of social, economic and other policy considerations", which contrasts with the expression "from a legal standpoint", contained in paragraph 2 of the new Article 24.

37. In the same spirit as the remarks made in paragraph 7.b above, the accent is placed here on the individual recommendations which should be adopted by the Committee of Ministers.

38. The last sentence corresponds to the existing paragraph 3, but some changes have been introduced. In view of the new powers assigned to each of the two committees, the report by the Committee of Independent Experts acquires a new status of its own and is no longer an appendix to the Governmental Committee's report. Again with a view to promoting the Charter and making it more familiar to all those concerned (see paragraphs 16 and 24 above), the Governmental Committee's reports will be made public.

*Paragraph 4*

39. This paragraph supplements the foregoing one by extending the functions of the Governmental Committee beyond those of a mere monitoring body. Accordingly, it will be able to submit proposals to the Committee of Ministers for the preparation of studies on social issues or on articles of the Charter in need of revision.

**Article 5**

40. This article in fact amends the original Article 29 of the Charter because, with a view to highlighting the fact that the Parliamentary Assembly will no longer intervene directly in the supervisory procedure, the order of Articles 28 and 29 has been inverted.

*Paragraph 1*

41. This paragraph is based on the text of Article 29 but introduces major amendments, all of which are designed to make it possible for the Committee of Ministers to adopt individual recommendations.

42. The present majority (two-thirds of the Council of Europe member states, whether or not they are Parties to the Charter), was found to constitute an obstacle, since a few abstentions might prevent the required majority from being achieved. States not party to the Charter have indeed tended to abstain. For this reason, the new rule provides that only Contracting Parties may take part in the voting and that the two-thirds majority will be based on those voting (no account being taken of abstentions).

43. In order to highlight the need for the Committee of Minister to adopt individual recommendations taking account of the proposals by the Governmental Committee, the wording has been made more binding: "shall adopt ... individual recommendations", instead of "may ... make ... any necessary recommendations".

44. It is specified that the resolution adopted by the Committee of Ministers shall cover "the entire supervision cycle" as the recommendations will concern only some of the provisions that have been monitored.

45. In accordance with what was stated above in paragraph 40 and which has been made explicit in the new Article 29, the obligation on the Committee of Ministers to consult the Parliamentary Assembly has been discarded.

#### *Paragraph 2*

46. With regard to the functions to be performed by the Committee of Ministers, this paragraph corresponds to paragraph 4 of the new Article 27.

#### **Article 6**

47. From the very outset of the work on the Protocol, the representatives of the Parliamentary Assembly on the Charte-Rel Committee expressed the wish that the Assembly's role should be changed: it should no longer be a supervisory body as such, systematically verifying the application of all the provisions of the Charter for all Contracting Parties; rather, it should organise periodic debates on selected topics of social policy. This change should allow the Assembly to express its point of view on the action resulting from the Charter in the light of major debates on social policy, without necessarily being tied by the timetable of the control procedure. The said procedure would thereby be simplified and speeded up.

48. This new conception of the Assembly's role is spelt out in Article 6 of the Protocol, which in effect amends the present Article 28 of the Charter. As already pointed out (paragraph 40 above), the order of Articles 28 and 29 has been inverted to bring out more clearly that the Assembly, although still associated with the implementation of the Charter, is no longer implicated in the supervisory procedure as such.

#### **Articles 7 to 9**

49. These articles, which contain the final clauses of the Protocol, correspond to the models adopted by the Committee of Ministers of the Council of Europe.