

PROCEDURE ON **NON-ACCEPTED PROVISIONS** OF THE EUROPEAN SOCIAL CHARTER



Danuta Wisniewska-Cazals



European
Social
Charter

Charte
sociale
européenne

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

PROCEDURE ON **NON-ACCEPTED PROVISIONS** OF THE EUROPEAN SOCIAL CHARTER

Danuta Wiśniewska-Cazals, PhD

Secretary of the Academic Network
on the European Social Charter
and Social Rights (ANESC)

*The opinions expressed in this work
are the responsibility of the author
and do not necessarily reflect the
official policy of
the Council of Europe.*

The publication is developed
within the framework of the
Council of Europe Project
"Promoting social human rights as
a key factor of sustainable
democracy in Ukraine".

All requests concerning the
reproduction or translation of all or
part of this document should be
addressed to the Directorate of
Communication
(F-67075 Strasbourg Cedex
or publishing@coe.int).

All other correspondence
concerning this document should
be addressed to the Department of
the European Social Charter, DGI,
Council of Europe,
F-67075 Strasbourg
Cedex or social.charter@coe.int.

Cover design and layout:
Sergiy Nizhynskiy PE

Photo: © Freepik

This publication has not been
copy-edited by the SPDP Editorial
Unit to correct typographical
and grammatical errors.

© Council of Europe,
September 2020
Printed at the Council of Europe

Table of Contents

I. BRIEF CONSIDERATIONS REGARDING THE EUROPEAN SOCIAL CHARTER	5
II. PROCEDURE ON NON-ACCEPTED PROVISIONS OF THE EUROPEAN SOCIAL CHARTER	7
1. Purposes of the procedure	7
2. Implementation of the procedure	8
III. IMPLEMENTATION OF THE PROCEDURE ON NON-ACCEPTED PROVISIONS OF THE EUROPEAN SOCIAL CHARTER IN UKRAINE	12
1. Ukraine and the European Social Charter	12
2. Meetings on non-accepted provisions and opinion of the European Committee of Social Rights as to the provisions that Ukraine is ready (or nearly ready) to accept	12

I. Brief considerations regarding the European Social Charter

The European Social Charter is a Council of Europe treaty that guarantees fundamental social and economic rights as a complement to the European Convention on Human Rights, which mainly concerns civil and political rights. Both instruments have their origin in the United Nations Universal Declaration of Human Rights adopted in 1948. They can both be directly applied by the national courts.

The scope of the Charter is very wide. It contains 31 articles or 98 numbered paragraphs covering what is generally recognised as human social rights, such as the right to housing, health, employment, education, social protection and welfare. In each of these areas there are also provisions that protect specific target groups such as children, people with disabilities, older people and migrants. The enjoyment of protected rights must be guaranteed without discrimination.

No other legal instrument at European level offers such extensive and comprehensive protection of fundamental social rights as the Charter, which also serves as a reference in European Union law in this field. The Charter is therefore perceived as the Social Constitution of Europe and is an essential element of the continent's entire human rights system.

Adopted in 1961 and revised in 1996, the Charter has been ratified by 43 of the 47 Member States of the Council of Europe, with 34 countries bound by the revised Charter and 9 still bound by the 1961 Charter.

The Charter establishes a monitoring mechanism to ensure its respect by State Parties: reporting system and the collective complaints procedure. The latter, which entered into force in 1998, has been ratified by 15 countries (Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic,

Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden).

The State may decide at the time of ratification which provisions of the Charter it intends to accept, subject to the choice of a certain minimum: at least 16 items, including 6 of those which constitute the 'core' of the Charter (Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20) or 63 numbered paragraphs. This means that different countries may be bound by different provisions of the Charter.

The table of provisions accepted by State Parties can be consulted on the Internet site: www.coe.int/socialcharter .

The articles or paragraphs selected by the State shall be notified to the Secretary General of the Council of Europe at the time when the instrument of ratification, acceptance or approval is deposited.

The State may, at a later date, declare by notification addressed to the Secretary General that it considers itself bound by any additional articles or any numbered paragraphs of the Charter which it has not already accepted.

II. Procedure on non-accepted provisions of the European Social Charter

(implementation of Article 22 of the 1961 Charter)

The procedure on non-accepted provisions of the European Social Charter is set out in Part IV of the 1961 Charter, amended by the 1991 Turin Protocol:

► Article 22 – Reports concerning provisions which are not accepted

The Contracting Parties shall send to the Secretary General, at appropriate intervals as requested by the Committee of Ministers, reports relating to the provisions of Part II of the Charter which they did not accept at the time of their ratification or approval or in a subsequent notification. The Committee of Ministers shall determine from time to time in respect of which provisions such reports shall be requested and the form of the reports to be provided.

1. Purposes of the procedure

The procedure on non-accepted provisions is designed, on the one hand, to complement the procedure relating to accepted provisions for the purpose of assessing the state of the legislation and practice of the State Parties with regard to the requirements of the Charter as a whole and, on the other hand, to promote the acceptance of further provisions of the Charter.

In this context, it is relevant to recall the decision of the European Committee of Social Rights of 26 June 2007 on the admissibility of collective complaint No. 41/2007 (Disability Advocacy Center (MDAC) v. Bulgaria), in which the Committee has made the following comment on the

relationship between accepted and non-accepted provisions:

” The Charter was conceived as a whole and all its provisions complement each other and overlap in part. It is impossible to draw watertight divisions between the material scope of each article or paragraph. It therefore falls to the Committee to ensure at the same time that obligations are not imposed on States Parties stemming from provisions they did not intend to accept and that the essential core of accepted provisions is not amputated as a result of the fact it may contain obligations which may also result from unaccepted provisions.

The procedure on non-accepted provisions should encourage States to review their legislation or practice which they consider to be inconsistent with the Charter with a view to ensuring their conformity with the requirements of the Charter.

The ultimate goal of the procedure on non-accepted provisions is to achieve full acceptance by all State Parties of all the rights enshrined in the Charter.

■ 2. Implementation of the procedure

As regards the implementation of the procedure on non-accepted provisions, the Committee of Ministers of the Council of Europe decided in December 2002 that

” states having ratified the Revised European Social Charter should report on the non-accepted provisions every five years after the date of ratification
and
invited the European Committee of Social Rights to arrange the practical presentation and examination of reports with the states concerned

(Decision 4.1 of the Committee of Ministers adopted during its 821st meeting on 11 December 2002).

Following this decision, it was agreed that the European Committee of Social Rights would examine with the authorities of the State concerned, either in a meeting or by written procedure, the level of conformity of the country's situation, in law and in practice, with non-accepted provisions. This review would therefore be carried out for the first time five years after ratification of the European Social Charter, and then every five years thereafter, to assess the situation on an ongoing basis and to encourage States to accept additional provisions.

Indeed, experience has shown that governments tend to overlook that selective acceptance of the provisions of the Charter is intended to be transitory. In accordance with the decision of the Committee of Ministers of 11 December 2002, governments are therefore required to review the national situation at regular intervals. Only states which have ratified the Revised Charter are entitled to participate in this procedure.

a. Oral procedure

Following the decision taken by the European Committee of Social Rights, the states concerned are invited to organise a meeting to assess the legislative and practical developments which might make it possible to accept new provisions of the Charter.

States, in respect of which the procedure applies for the first time after ratification of the Charter, are systematically invited to organise a meeting.

This invitation is sent in the year preceding the year of implementation of the procedure in order to enable the authorities to organise the meeting in the best possible conditions.

Representatives of the ministries concerned should attend the meeting and report on the legal and practical situation regarding the areas covered by the provisions of the Charter that have not been accepted

by the State. Parliamentarians, representatives of trade unions and NGOs are also welcome.

High-level participation is strongly recommended.

During the meeting, the provisions of the Charter that have not been accepted by the country concerned are reviewed from the point of view of the national legislation and practice in force.

The national authorities shall indicate the possibilities for accepting additional provisions (specifying the timeframe) or they declare that the acceptance of new provisions is not possible and give the reason for this.

On the basis of the information provided at the meeting and the exchanges which have taken place, the European Committee of Social Rights gives its opinion as to whether there are no significant obstacles, in law and in practice, to the acceptance of certain provisions of the Charter not yet accepted, as to whether the obstacles are of minor importance to the acceptance of certain provisions, or it considers that the current situation does not meet the requirements of certain provisions of the Charter which have not yet been accepted.

If the information obtained during the meeting is not sufficient for the Committee to prepare its opinion, it may request the authorities of the particular State to provide additional information in writing.

The opinion of the Committee is notified to the authorities of the State concerned.

b. Written procedure

Following the decision taken by the European Committee of Social Rights, the states concerned are invited to submit a report on the legal and practical situation regarding the areas covered by the provisions of the Charter that have not been accepted by the state.

This invitation is sent in the year preceding the year of implementation

of the procedure in order to enable the authorities to gather all the information necessary to draw up a comprehensive report.

In the report, as in the case of the oral procedure, the national authorities shall indicate the possibilities of accepting additional provisions (specifying the provisions concerned and indicating the timeframe) or/and they shall declare that the acceptance of certain provisions is not possible and give the reason for this.

The report should not contain the texts of the laws or links to the corresponding websites, but an analysis of these laws from the point of view of conformity with the provisions of the Charter that have not been accepted, and a conclusion.

On the basis of the information provided in the report, the European Committee of Social Rights gives its opinion as to whether there are no significant obstacles, in law and in practice, to the acceptance of certain provisions of the Charter not yet accepted, whether the obstacles are of minor importance for the acceptance of certain provisions, or it considers that the current situation does not meet the requirements of certain provisions of the Charter not yet accepted. It may also request further clarifications.

The opinion of the Committee is notified to the authorities of the State concerned.

III. Implementation of the procedure on non-accepted provisions of the European Social Charter in Ukraine

1. Ukraine and the European Social Charter

Ukraine accepted 76 of the 98 paragraphs of the Charter. It has not accepted the system of collective complaints.

Table of accepted provisions

Violet = accepted provisions

1.1	1.2	1.3	1.4	2.1	2.2	2.3	2.4	2.5	2.6	2.7	3.1
3.2	3.3	3.4	4.1	4.2	4.3	4.4	4.5	5	6.1	6.2	6.3
6.4	7.1	7.2	7.3	7.4	7.5	7.6	7.7	7.8	7.9	7.10	8.1
8.2	8.3	8.4	8.5	9	10.1	10.2	10.3	10.4	10.5	11.1	11.2
11.3	12.1	12.2	12.3	12.4	13.1	13.2	13.3	13.4	14.1	14.2	15.1
15.2	15.3	16	17.1	17.2	18.1	18.2	18.3	18.4	19.1	19.2	19.3
19.4	19.5	19.6	19.7	19.8	19.9	19.10	19.11	19.12	20	21	22
23	24	25	26.1	26.2	27.1	27.2	27.3	28	29	30	31.1
31.2	31.3										

2. Meetings on non-accepted provisions and opinion of the European Committee of Social Rights as to the provisions that Ukraine is ready (or nearly ready) to accept

The European Social Charter entered into force in Ukraine in 2006 and therefore the procedure on non-accepted provisions was applied for

the first time in 2011 (meeting in Kyiv on 29-30 September 2011) and for the second time - in 2016 (meeting in Kyiv on 23 March 2016).

On the basis of the information provided and the exchanges which have taken place, the European Committee of Social Rights has given its opinion as to *whether there were no significant obstacles, in law and in practice, to the acceptance of certain provisions of the Charter not yet accepted (a), as to whether the obstacles are of minor importance to the acceptance of certain provisions (b) or it has considered that the current situation in Ukraine does not meet the requirements of certain provisions of the Charter which have not yet been accepted (c).*

(a) On the basis of the information presented at these meetings and the exchanges that took place in 2016, the European Committee of Social Rights was of the view that there were no significant obstacles, in law and in practice, to the acceptance by Ukraine of the following provisions of the Charter:

► Article 2.3 - Annual holiday with pay

The Committee recalled that Article 2.3 of the Charter guarantees the right to a minimum of four weeks (or 20 working days) annual holiday with pay.

The Committee, referring to its comments in the First Report on non-accepted provisions, considered that the planned reform to increase the minimum length of annual paid leave from 22 to 28 days would clarify the situation in respect of the minimum number of days (28) and allow for the acceptance of this provision.

► Article 12.3 - Development of the social security system

The Committee recalled that Article 12.3 requires states to improve their social security system even though the social security system has not attained the levels required under the two first paragraphs of Article 12. A restrictive evolution in the social security system is not automatically in violation of Article 12.3 and measures taken in order to consolidate public finances may be considered as a necessary means

to ensure the maintenance and sustainability of the social security system.

During the 2011 assessment, the Committee considered that the information at its disposal did not indicate any major obstacle to acceptance of Article 12§3 of the Charter by Ukraine. On the basis of the information at its disposal, the Committee confirmed this opinion in 2016.

► Article 13.2 - Non-discrimination in the exercise of social and political rights

The Committee recalled that, under Article 13.2, persons receiving assistance must not suffer any decrease in their political or social rights. Any discrimination against recipients of assistance which might result from an express provision must be eradicated.

It drew the attention of the Ukrainian authorities to the situation of internally displaced persons and confirmed that, although certain clarifications were necessary, in particular as regards the political rights of beneficiaries of assistance and the situation of persons without a fixed place of residence, the information in the Committee's possession did not indicate any particular obstacles to immediate acceptance by Ukraine of Article 13.2 of the Charter.

► Article 13.4 - Specific emergency assistance for non-residents

The Committee noted that Ukraine was not a State Party to the European Convention on Social and Medical Assistance (CETS No. 014), signed in Paris on 11 December 1953.

It recalled that State Parties that have ratified the European Social Charter but are not parties to the Convention mentioned above may accept Article 13.4, "provided that they grant to nationals of other [states that have ratified the Charter] a treatment which is in conformity with the provisions of the said convention".

The Committee considered that the information provided gives the necessary clarification on the entitlement to emergency social and medical

assistance of foreigners who are lawfully present, but not resident, in the territory of Ukraine and it was of the opinion that there would seem to be no legal obstacles to the immediate acceptance by Ukraine of Article 13.4 of the Charter.

► Article 19 - Right of migrant workers and their families to protection and assistance

Ukraine ratified the European Convention on the Legal Status of Migrant Workers (CETS No. 093) on 2 July 2007. This treaty, which entered into force for Ukraine on 1 October 2007, contains a number of provisions which set out obligations which are similar, if not identical, to certain provisions of Article 19 of the Charter. The provisions concerned of the Convention include Article 6 (information), Article 7 (travel), Article 10 (reception), Article 12 (family reunion), Article 13 (housing), Article 14 (education/training), Article 15 (teaching of the migrant worker's mother tongue), Article 16 (conditions of work), Article 17 (transfer of savings), Article 23 (taxation), Article 26 (access to courts) and Article 28 (right to organise).

In so far as Ukraine has already subscribed to the obligations under the Convention (except as regards the right to organise), the Committee invited Ukraine in 2011 to consider accepting several paragraphs of Article 19 of the Charter, and at least those for acceptance of which the Committee has not found any significant obstacles in law and practice. In the Committee's view, this would ensure consistency with Ukraine's obligations under international law in this particular area.

► Article 19.1 - Assistance and information on migration

The Committee recalled that Article 19.1 guarantees the right to free, reliable and objective information concerning migration for work purposes. It also requires State Parties to take measures to prevent misleading propaganda relating to immigration and emigration, including legal and practical measures to tackle racism and xenophobia as well as women trafficking.

On the basis of the information provided, in particular on the informa-

tion facilities set up and the legislative measures taken to combat racism, xenophobia and religious intolerance, although the practical situation requires more detailed examination, the Committee considered that there were no major legal obstacles to acceptance by Ukraine of Article 19.1 of the Charter.

▶ Article 19.2 - Departure, journey and reception

Under Article 19.2, States must adopt special measures for the benefit of migrant workers, beyond those which are provided for nationals to facilitate their departure, journey and reception.

Ukrainian legislation does not impose any restrictions on access of foreign migrant workers to health care, medical and health rehabilitation institutions, and they have the right to receive necessary medical care on an equal footing with citizens of Ukraine.

The Committee did not find any major obstacles to immediate acceptance by Ukraine of Article 19.2 of the Charter.

▶ Article 19.3 - Co-operation between social services of emigration and immigration states

Under Article 19.3, contacts and information exchanges should be established between public and/or private social services in emigration and immigration countries, with a view to facilitating the life of emigrants and their families, their adjustment to the new environment and their relations with members of their families who remain in their country of origin. Formal agreements are not necessary.

The State Migration Service of Ukraine takes part in international co-operation, and the mechanism of co-operation between Ukraine and the relevant authorities of other countries is defined in bilateral agreements on employment.

Although more details are needed on this co-operation and in particular on the content of the bilateral agreements mentioned, the Committee saw no significant obstacles to immediate acceptance by Ukraine of Article 19.3 of the Charter.

▶ Article 19.5 - Equality regarding taxes and contributions

Article 19.5 recognises the right of migrant workers to equal treatment in law and in practice in respect of the payment of employment taxes, dues or contributions.

The information provided to the Committee indicates that foreign workers are subject to the same obligations as citizens of Ukraine. The Committee therefore considered that there were no major legal obstacles to the acceptance by Ukraine of this provision.

▶ Article 19.7 - Equality regarding legal proceedings

Under Article 19.7, State Parties must ensure that migrants have access to courts, lawyers and legal aid on the same conditions as their own nationals. This obligation applies to all legal proceedings concerning the rights guaranteed by Article 19 (i.e. pay, working conditions, housing, trade union rights, taxes).

Having noted that foreigners are entitled to equal treatment in legal proceedings and that everyone has a right to legal assistance (free of charge in cases defined by the law), the Committee considered that there were no obstacles to the immediate acceptance by Ukraine of Article 19.7 of the Charter.

▶ Article 19.9 - Transfer of earnings and savings

Article 19.9 obliges States not to impose excessive restrictions on the right of migrants to transfer their earnings and savings, either during their stay or when they leave their host country. Migrants must be allowed to transfer money to their own or any other country.

The Committee noted that Ukrainian legislation does not impose any particular limits on the transfer of migrant workers' earnings and savings and it therefore saw no obstacles to the immediate acceptance by Ukraine of Article 19.9 of the Charter.

► Article 19.10 - Equal treatment for the self-employed

The Committee pointed out that while paragraphs 1 to 9, 11 and 12 concerns migrant workers and their families only, the very purpose of Article 19.10 is precisely to extend the protection of these provisions to self-employed migrant workers and their families.

States must ensure that there is no unjustified treatment which amounts to discrimination, in law or in practice, between wage-earners and self-employed migrants. In addition, equal treatment between self-employed migrants and self-employed nationals must be guaranteed in the areas covered by this provision.

The Committee understood the information provided by the Ukrainian authorities as a confirmation that self-employed migrants workers enjoy the same rights as self-employed citizens of Ukraine and, in particular, the rights provided for in all paragraphs of Article 19.

On the basis of this information, it appeared to the Committee that there were no obstacles to the immediate acceptance by Ukraine of Article 19.10 of the Charter.

► Article 19.12 - Teaching mother tongue of migrant

Under Article 19.12, States must promote and facilitate the teaching, in schools or other structures, such as voluntary associations, of those languages that are most represented among migrants within their territory. In practical terms, States should therefore promote and facilitate the teaching of the mother tongue where there are a significant number of children of migrants who would follow such teaching.

The Committee notes that Ukraine is taking measures to facilitate the teaching the mother tongue for children of migrant workers.

Although the Committee would need to know more about the representation of languages among migrant workers in Ukraine, it saw no major obstacles to the immediate acceptance by Ukraine of Article 19.12 of the Charter.

(b) With regard to certain provisions, the Committee was not in a position to express a final opinion, in particular because additional clarifications were needed on key issues or because of the lack of relevant information. These are the following provisions:

- ▶ **Article 12.2 - Maintenance of a social security system at a satisfactory level at least equal to that required for ratification of the European Code of Social Security**
- ▶ **Article 13.3 - Prevention, abolition or alleviation of need**
- ▶ **Article 19.6 - Family reunion**
- ▶ **Article 19.8 - Guarantees concerning deportation**
- ▶ **Article 31.3 - Affordable housing**

(c) Finally, with respect to the following provisions, it appeared to the Committee that the situation in Ukraine was not fully in compliance with the Charter:

- ▶ **Article 4.1 - Decent remuneration**
- ▶ **Article 12.1 - Existence of a social security system**
- ▶ **Article 12.4 - Social security of persons moving between states**
- ▶ **Article 13.1 - Adequate assistance for every person in need**
- ▶ **Article 19.4 - Equality regarding employment, right to organise and accommodation**
- ▶ **Article 19.11 - Teaching language of host state**
- ▶ **Article 25 - Right of workers to protection of their claims in the event of insolvency of the employer**

The next examination of the provisions not yet accepted by Ukraine will take place in 2021.

The European Social Charter, adopted in 1961 and revised in 1996, is the counterpart of the European Convention on Human Rights in the field of economic and social rights. It guarantees a broad range of human rights related to employment, housing, health, education, social protection and welfare.

No other legal instrument at pan-European level provides such an extensive and complete protection of social rights as that provided by the Charter.

The Charter is therefore seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture.

www.coe.int/socialcharter

ENG

www.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

