

The role of the European Social Charter for the protection (migrant) workers' rights, in particular after Brexit.

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Outline



European
Social
Charter

Charte
Sociale
Européenne

- I. The role of the European Social Charter in protecting workers' rights
- II. The specific protection of migrant workers' rights
- III. The specific situation of the UK (in particular Post-Brexit)
- IV. Conclusions and Proposals

I. The role of the European Social Charter (ESC) in protecting workers' rights

- General information
- The specific role of the ESC in protecting workers' rights
- Monitoring mechanisms

General information (1)

- The **European Social Charter** is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights.
- No other legal instrument at **pan-European level** can provide such an extensive and complete protection of social rights as that provided by the Charter, which also serves as a point of reference in European Union law; most of the social rights in the EU Charter of Fundamental Rights are based on the relevant articles of 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.
- <https://www.coe.int/en/web/turin-european-social-charter>

General information (2) - The general role of the ESC

- guarantees a broad range of human rights with respect to everyday essential needs **related to employment and working conditions**, housing, education, health, medical assistance and social protection;
- lays specific emphasis on the protection of **vulnerable persons** such as elderly people, children, people with disabilities and **migrants**. It requires that enjoyment of the abovementioned rights be guaranteed without discrimination;
- is aimed at applying the [United Nations' Universal Declaration of Human Rights of 1948](#) within Europe; for this reason, it is linked to the [United Nations' Human Rights Treaty System](#) and the [European Union's Charter of Fundamental Rights](#);

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General information (3) - The general role of the ESC

- is based on the principle of universality, **indivisibility**, interdependence and interrelation of human rights, as set forth in the [United Nations' Vienna Declaration of 1993](#), which confirms that social rights are human rights on an equal footing with civil and political rights;
- **complements** at pan-European level the safeguards contained in the [European Convention on Human Rights](#), referring to civil and political rights;

[Meeting between ECSR and ECtHR 11 May 2017]



- is **at the heart** of the [Council of Europe's statutory goals: human rights, rule of law and democracy](#), which cannot be realised without the respect of social rights.

- <https://www.coe.int/en/web/turin-european-social-charter/about-the-charter>

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General information (4) - The Treaty framework

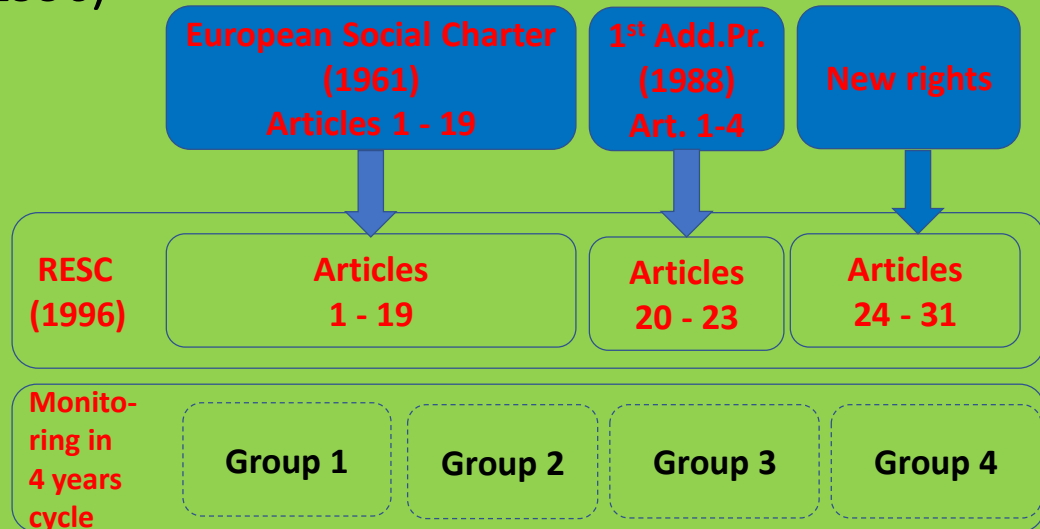
- The original [European Social Charter](#) (ETS No. 35) was adopted in 1961
- while taking into account the evolution which has occurred in Europe since then the [Revised European Social Charter](#) (ETS No.163), adopted in 1996:
 - embodies in a single instrument all the rights guaranteed by the 1961 Charter and its [Additional Protocol of 1988](#) (ETS No. 128),
 - adds new rights and amendments adopted by the Parties.
 - <https://www.coe.int/en/web/turin-european-social-charter/about-the-charter>



General information (5) - The Treaty framework

- Today, the Charter treaty system is **one of the most widely accepted human rights set of standards within the Council of Europe**. The widespread support for social rights is assured by the fact that 43 out of the [47 member States of the Council of Europe](#) are parties to either the 1961 Charter or the Revised Charter. Only Liechtenstein, Monaco, San Marino and Switzerland have not ratified either of these treaties.
 - [More information on the acceptance of the Charter treaty system by the Council of Europe member States](#)
- The Charter is based on a [ratification system](#), enabling States, under certain conditions, to choose the provisions they are willing to accept as binding international legal obligations. They are encouraged to progressively accept all the Charter's provisions.
 - [More information on the ratification system and the acceptance of further provisions](#)

Structure of the Revised European Social Charter (1996)



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The specific role of the ESC in protecting workers' rights (1)

- For the purpose of monitoring within a four-years cycle, the **substantive 31 Articles are divided** into four groups
 - **Group 1:** *Employment, training and equal opportunities*
 - **Group 2:** *Health, social security and social protection*
 - **Group 3:** *Labour rights*
 - **Group 4:** *Children, families, migrants*

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The specific role of the ESC in protecting workers' rights (2)

- **Group 1: *Employment, training and equal opportunities***
 - Article 1 – **The right to work**
 - Article 9 – **The right to vocational guidance**
 - Article 10 – **The right to vocational training**
 - Article 15 – **The right of persons with disabilities to independence, social integration and participation in the life of the community**
 - Article 18 – **The right to engage in a gainful occupation in the territory of other Parties** (see below)
 - Article 20 – **The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex**
 - Article 24 – **Article 24 – The right to protection in cases of termination of employment**
 - Article 25 – **The right of workers to the protection of their claims in the event of the insolvency of their employer**

The specific role of the ESC in protecting workers' rights (3)

- **Group 2: *Health, social security and social protection***
 - Article 3 – **The right to safe and healthy working conditions**
 - Article 11 – **The right to protection of health**
 - Article 12 – **The right to social security**
 - Article 13 – **The right to social and medical assistance**
 - Article 14 – **The right to benefit from social welfare services**
 - Article 16 – **The right of the family to social, legal and economic protection**
 - Article 17 – **The right of children and young persons to social, legal and economic protection**
 - Article 23 – **The right of elderly persons to social protection**
 - Article 30 – **The right to protection against poverty and social exclusion**
 - Article 31 – **The right to housing**

The specific role of the ESC in protecting workers' rights (4)

- **Group 3: Labour rights :**

- Article 2 – **The right to just conditions of work**
- Article 4 – **The right to a fair remuneration**
- Article 5 – **The right to organise**
- Article 6 – **The right to bargain collectively**
- Article 21 – **The right to information and consultation**
- Article 22 – **The right to take part in the determination and improvement of the working conditions and working environment**
- Article 26 – **The right to dignity at work**
- Article 28 – **The right of workers' representatives to protection in the undertaking and facilities to be accorded to them**
- Article 29 – **The right to information and consultation in collective redundancy procedures**

The specific role of the ESC in protecting workers' rights (5)

- **Group 4: Children, families, migrants**

- Article 7 – **The right of children and young persons to protection**
- Article 8 – **The right of employed women to protection of maternity**
- Article 19 – **The right of migrant workers and their families to protection and assistance** (see below)
- Article 27 – **The right of workers with family responsibilities to equal opportunities and equal treatment**

Monitoring mechanisms - Overview

Reporting system

- Government report
 - Possibility for trade unions
- Examination by ECSR
 - ‚Conclusions‘, in case of non-conformity:
- (possible) Proposal to CM
- (Final) Resolution or Recommendation by Committee of Ministers

Complaints system

- Collective complaint
 - by trade unions and Europ. NGOs
- Examination by ECSR
 - ‚Decisions on the merits‘, in case of non-conformity:
- (Final) Resolution or Recommendation by Committee of Ministers

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Monitoring mechanisms (1)

- Treaty framework
 - Enforcement of the Revised Charter is submitted to the same monitoring mechanism as the 1961 Charter, i.e. the reporting system; this system was further developed and strengthened in 1991 by an [Amending Protocol](#) (ETS No. 142), which is applied on the basis of a decision taken by the States concerned.
 - For the States parties which have accepted it, the reporting system is complemented by the [Additional Protocol of 1995 providing for a system of collective complaints](#) (ETS No. 158).
- In this framework, the honouring of commitments entered into by the States Parties is subject to the monitoring of the [European Committee of Social Rights](#) which **monitors compliance under the two existing monitoring mechanisms:**
 - through national reports drawn up by States Parties ([reporting system](#))
 - through collective complaints lodged by the social partners and other non-governmental organisations ([collective complaints procedure](#)).



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Monitoring mechanisms (2)

- it falls to the European Committee of Social Rights to determine whether the situation has been brought into compliance with the Charter by the State Party concerned. This is done by the Committee in the framework of the reporting system or the collective complaints procedure in which public hearings are possible

[Public hearing on Greece - 20 October 2016]



- Detailed information on the conclusions and decisions of the European Committee of Social Rights can be found in the [HUDOC Charter data base system](#) and the [Committee's Digest](#).

Monitoring mechanisms (3)

- Insofar as they refer to binding legal provisions and are adopted by a monitoring body established by a binding treaty and the relevant protocols, decisions and conclusions of the European Committee of Social Rights must be respected by the States concerned, even if they are not directly enforceable in the domestic legal systems. They set out the law and can provide the basis for positive developments in social rights through legislation and case-law at national level.

- The [Committee of Ministers](#) intervenes in the last stage of the Charter's monitoring mechanism through the adoption of *Resolutions* and *Recommendations*. It ensures the follow-up of the conclusions and decisions adopted by the European Committee of Social Rights. Relevant decisions of the Committee of Ministers are prepared by the [Governmental Committee of the European Social Charter and the European Code of Social Security](#).



- <https://www.coe.int/en/web/turin-european-social-charter/about-the-charter>

II. The specific protection of migrant workers' rights

- The legal framework
- Case law on Article 19§4
- Decision on posted workers
- Case law on Article 19§6

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The legal framework for the specific protection of migrant workers

- **Article 18 – The right to engage in a gainful occupation in the territory of other Parties (Group 1)**
- With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake:
 1. to apply existing regulations in a spirit of liberality;
 2. to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;
 3. to liberalise, individually or collectively, regulations governing the employment of foreign workers; and recognise:
 4. the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties.

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The legal framework for the specific protection of migrant workers

• Article 19 – The right of migrant workers and their families to protection and assistance (Group 4)

- With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake:
 1. to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;
 2. to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;
 3. to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries;
 4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment **not less favourable than that of their own nationals** in respect of the following matters:
 - a. remuneration and other employment and working conditions;
 - b. membership of trade unions and enjoyment of the benefits of collective bargaining;
 - c. accommodation;

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The legal framework for the specific protection of migrant workers

• Article 19 – The right of migrant workers and their families to protection and assistance (Group 4)

5. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;
6. **to facilitate as far as possible the reunion of the family** of a foreign worker permitted to establish himself in the territory;
7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;
8. to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;
9. to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire;
10. to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply;
11. to promote and facilitate the teaching of the national language of the receiving state or, if there are several, one of these languages, to migrant workers and members of their families;
12. to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to the children of the migrant worker.

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Specific protection for migrant workers Article 19, paragraph 4 (case-law)

- treatment not less favourable than that of the nationals in the areas of:
 - (a) remuneration and other employment and working conditions,
 - (b) trade union membership and the enjoyment of benefits of collective bargaining, and
 - (c) accommodation.
- States are required
 - to **guarantee certain minimum standards** in these areas with a view to assisting and **improving** the legal, social and material position of migrant workers and their families.
 - to **prove the absence of discrimination**, direct or indirect, in terms of law and practice, and should inform of any practical measures taken to remedy cases of discrimination.
- States should pursue a positive and continuous course of action providing for more favourable treatment of migrant workers.

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Specific protection for migrant workers Article 19, paragraph 4 (case-law)

- **a) remuneration and other employment and working conditions:** Under this sub-heading, States are obliged to **eliminate** all legal and de facto **discrimination** concerning remuneration and other employment and working conditions, including in-service training and promotion. The provision applies notably to vocational training.
- **b) membership of trade unions and enjoyment of the benefits of collective bargaining:** This sub-heading requires States to eliminate all legal and de facto discrimination concerning trade union membership and as regards the enjoyment of the benefits of collective bargaining, including access to administrative and managerial posts in trade unions.
- **c) accomodation:** The undertaking of States under this sub-heading is to eliminate all legal and de facto discrimination concerning access to public and private housing. There must be no legal or de facto restrictions on home-buying, access to subsidised housing or housing aids, such as loans or other allowances.

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Decision by ECSR of 3 July 2013 - *LO/TCO v. Sweden* (85/2012) on posted workers (1)

- (para. 134) the Committee recalls that posted workers are workers who, for a limited period, carry out their work in the territory of a State other than the State in which they usually work, which is often their national State. The Committee is aware that, in terms of
 - length and stability of presence in the territory of the so called “host State”, as well as of
 - their relationship with such State,
 the **situation of posted workers is different** from that of other category of migrants workers, and in particular from the situation of those foreign workers who go to another State to seek work and to be permanently embedded there.

Decision by ECSR of 3 July 2013 - *LO/TCO v. Sweden* (85/2012) on posted workers (2)

- (para. 134) **Nonetheless**, the Committee considers that, for the period of stay and work in the territory of the host State, **posted workers are workers coming from another State and lawfully within the territory of the host State**. In this sense, they fall within the **scope of application of Article 19** of the Charter and they have the right, for the period of their stay and work in the host State to receive **treatment not less favourable** than that of the national workers of the host State in respect of remuneration, other employment and working conditions, and enjoyment of the benefits of collective bargaining (Article 19§4, *a* and *b*).

Decision by ECSR of 3 July 2013 - *LO/TCO v. Sweden* (85/2012) on posted workers (3)

- (para. 141) In the light of the above, the Committee holds that, in conformity with Article 19§4 and the object and purpose of the Charter, **posted workers, for the period of their stay and work** in the territory of the host State, **should be treated** by the host State **as all the other workers who work in that State**; and foreign undertakings should be treated equally, by the host State, when they provide services by using posted workers.
- **Conclusions**
 - Unanimously concludes that there is a violation of Article 19§4 a of the Charter
 - Unanimously concludes that there is a violation of Article 19§4 b of the Charter

Specific protection for migrant workers Article 19, paragraph 6

- **6. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory**
- ***Appendix : For the purpose of applying this provision, the term “family of a foreign worker” is understood to mean at least the worker’s spouse and unmarried children, as long as the latter are considered to be minors by the receiving State and are dependent on the migrant worker***
- **Note : Appendix to Article 19§6 of the 1961 Charter reads as follows : “For the purpose of this provision, the term ‘family of a foreign worker’ is understood to mean at least his wife and dependent children under the age of twenty-one years”.**

Specific protection for migrant workers Article 19, paragraph 6 (case-law)

- This paragraph obliges States to allow the families of migrants legally established in their territory to join them. The worker's children entitled to family reunion are those who are dependent and unmarried, and who fall under the legal age-limit in the receiving state (under the Charter the age limit for admission under family reunion is set at the age of majority, which in most countries is 18 years).
- "Dependent" children are understood as being those who have no independent existence outside the family group, particularly for economic or health reasons, or because they are pursuing unpaid studies.

III. The specific situation of the UK (in particular after the Brexit)

- Current situation
- Post-Brexit situation

Current situation of acceptances by UK

- UK has only ratified the 1961 ESC and **not accepted** all provisions like
 - Reduction of working time (Article 2.1)
 - Equal pay for men and women for work of equal value (Article 4.3)

1.1	1.2	1.3	1.4	2.1	2.2	2.3	2.4	2.5	3.1	3.2	3.3
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
9	10.1	10.2	10.3	10.4	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	16	17	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
AP1	AP2	AP3	AP4	AP=Additional Protocol				Grey = Accepted provisions			

Latest negative Conclusions in cycle XX-4 (2015, reference period: 01/01/2010 - 31/12/2013)

- Article 19§3 because appropriate co-operation between the social services of the United Kingdom and emigration and immigration states is not sufficiently promoted.
- Article 19§6 because
 - family members may be expelled following the deportation of their sponsor, without proof that they are a threat to national security, or offend against public interest or morals;
 - the language requirements imposed on the family members of migrant workers are likely to hinder family reunion;
 - the income requirement for migrants who wish their families to join them is too high and is likely to hinder family reunion.
- Article 19§10 of the 1961 Charter as the grounds of non conformity under Articles 19§3 and 19§6 apply also to self-employed migrant workers

Current situation of acceptances by UK

- UK has **not** ratified
 - the Revised European Social Charter
 - the ‚Turin‘ Amending Protocol
 - the Collective Complaints Procedure Protocol
- With its rejection to ratify the ‚Turin‘ Amending Protocol it prevents the entry into force of this Protocol (requiring the ratification of all Contracting Parties; still missing besides the UK: Denmark, Germany, Luxemburg); this is legally important for
 - the (interpretative) role of the ECSR as well as of
 - the Parliamentary Assembly’s role for the election of the members of the ECSR

Post-Brexit European Social Rights situation

- Reference to EU legal (social rights) framework will not any more be possible
- What will be left for workers protection at European level? Only CoE:
 - European Convention on Human Rights (ECHR)
 - containing only limited protection of social rights
 - ESC
 - Containing the most important social rights

Post-Brexit International Social Rights situation

Is there a ‚compensation‘ at international level? The current situation:

- At UN level: UK has ratified nearly all human rights instruments
 - missing i.a.: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families – CMW
 - but it has only accepted individual complaints procedures in relation to
 - Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP)
 - Convention on the Rights of Persons with Disabilities (CRPD-OP)
- At ILO level: UK continues to be subject to the three main quasi-judicial procedures
 - Complaints before the Committee on Freedom of Association (CFA)
 - Representations by virtue of Articles 24 and 25 of the ILO Constitution
 - Complaints by virtue of Articles 26 seq. of the ILO Constitution

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Post-Brexit International Social Rights situation

Is there a ‚compensation‘ at international level?

- In particular by referring to the ILO standards and procedures the current ‚compensatory‘ situation might be considered by some as ‚sufficient‘ compared to the current ESC ratification status;
- However, the advantages of striving for better legal protection at European (ESC) level would have the following advantages:
 - Ratification of the **RESC**: the **most far-reaching and modern protection** of fundamental social rights (in particular if all provisions were accepted)
 - Ratification of the ‚**Turin Amending Protocol**‘: would strengthen the **independence and interpretative role of the ECSR**
 - Ratification of the **Collective Complaints Procedure Protocol**: would offer in particular for trade unions new, fairly quick, **easily accessible procedures**

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IV. Conclusions and Proposals

- For trade union in general
- For UK trade unions in particular

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For trade unions in general

- **Support the 'Turin process' for the ESC**
 - aiming at strengthening the ESC treaty system
 - within the Council of Europe and
 - in its relationship with the law of the EU
 - aiming at the ratification by all CoE member States of all relevant instruments
- Use the **existing framework** for protection of workers' rights by
 - strategic litigation
 - comments on Government reports
 - political pressure (on Conclusions)
- Contribute to **strengthen the CoE in general**
 - in the specifically difficult situation of drastic cuts by the Russian Government



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For UK trade unions

- Use the momentum of ‚Brexit‘ by asking for ‚compensation‘ of the loss of EU social rights protection and, therefore,
- Call urgently (as concrete compensatory measures to protect workers‘ rights) for the **ratification** of
 - Revised European Social Charter (1996) and accepting all provisions
 - ‚Turin‘ Amending Protocol (1991)
 - Collective Complaints Procedure Protocol (Additional) (1995)

Thank you very much for your
attention.