

APPENDIX II : COMMENTS BY THE GERMAN AUTHORITIES



Comments

by the Federal Republic of Germany

on the Report of the Committee of Experts on the German State Report on the Application of the European Charter for Regional or Minority Languages in the Federal Republic of Germany

Federal Ministry of the Interior

October 2002

I. Preliminary Remarks

On 5 July 2002, the Committee of Experts set up under the European Charter for Regional or Minority Languages (hereinafter referred to as the "Charter") submitted a Report to the Council of Europe's Committee of Ministers on Germany's implementation of the Charter.

The Report was forwarded to Germany under cover of the letter by the Directorate of Co-operation for Local and Regional Democracy of 14 August 2002.

The Federal Republic of Germany values the activities of the Committee of Experts in the process of monitoring the implementation of the Charter and welcomes the efforts made by the Committee of Experts in assessing the achieved level of compliance with Germany's obligations arising from the Charter. Germany notes that the comments of the Committee of Experts show professional examination of the situation of regional and minority languages in Germany and that the Committee has in fact paid attention to important questions and problems.

Germany considers the fulfilment of the obligations under the Charter and the Committee's Report as a continued pan-European process aimed at the creation of international standards laying down the foundations for a legal regulation of relations within a community of citizens in a given State and thus providing for sustained protection of the existing regional or minority languages.

Germany's State Report on the implementation of the Charter, which serves as the basis of the monitoring mechanism, is based on the principle of transparency, and Germany considers it important to maintain an open and constructive dialogue with the bodies responsible for monitoring the implementation of the Charter, i.e. the Committee of Experts and the Committee of Ministers of the Council of Europe.

These comments by the Federal Republic of Germany were drawn up by the Federal Ministry of the Interior as the lead agency and were co-ordinated with the Governments of the Federal *Länder* which, because of the federal structure of the Federal Republic of Germany, are to a large extent responsible for the Charter's implementation.

In view of the volume of the Committee's monitoring report, the necessary translation work and the required co-ordination with the *Länder*, and the planned involvement of the respective language groups, the Federal Republic of Germany is not in a position, within the tightly set time limit, i.e. by 14 October 2002, to submit in-depth comments on the Report of the Committee of Experts, which would provide adequate answers to the issues raised and would do justice to the detailed matters brought up in the monitoring report. The Federal Republic of Germany will, in co-ordination with all bodies and groups concerned, examine the claimed deficits as regards the Charter's application, and reserves the right to elaborate, in the next State Report to be submitted in the course of the year 2003, on the findings of this examination and, where relevant, on any supplementary measures that may have been introduced in the meantime. The additional information on the factual situation, as requested by the Committee of Experts, will also be provided in the forthcoming State Report. The language groups will again be involved in the drafting of that Report. Given the little time available, as stated above, such involvement has not been possible as regards the present comments.

Germany will publish the Report of the Committee of Experts along with the present comments.

Against the background of current events, the Federal Republic of Germany wishes to point out that, due to the course of the Elbe River, the national flood disaster in Germany in August this year has, in particular, struck those *Länder* that cover the settlement areas of the majority of the members of language groups, and that the damage caused by the disastrous flooding, the extent of which is still incalculable at this time, will in the years to come have a strong and lasting impact on the use and appropriation of public funds.

In view of the aforesaid and bearing in mind the generally positive nature of the findings in the Committee's Report on Germany, the Federal Republic of Germany makes the following preliminary comments:

II. Regarding the relationship between the Charter and the Framework Convention

Germany – like an encouragingly large number of other members of the Council of Europe – is among the countries that have ratified the Framework Convention for the Protection of National Minorities; but it also belongs to the – regrettably fewer – countries that have ratified the European Charter for Regional or Minority Languages. In Germany, the Framework Convention is applied to the national minorities of the Danes, the Frisians, the Sorbs and the German Sinti and Roma. In German legal practice – both at government agencies and among national minorities – both Conventions are perceived as legal instruments that are used first and foremost to protect national minorities and their languages. As both instruments were drawn up by the Council of Europe and both were ratified by Germany within a short space of time of each other and as both pursue comparable objectives regarding the languages of national minorities, the two Conventions together represent the authoritative legal instruments for the benefit of national minorities and their languages. This implies that the two Conventions will be interpreted and applied concordantly.

On account of the fact that the two Conventions have been formulated according to different legal principles, difficulties are arising in respect of the concordant application of the two instruments and therefore are also encountered by the competent committees of the Council of Europe in examining whether they are being properly applied. Whereas all the Articles of the Framework Convention call for unqualified and uniform application, the Charter, designed as a so-called "menu convention", in its Part III leaves it to the discretion of the ratifying States to decide what obligations they undertake, as regards the range, scope and depth of these obligations as well as their territorial application and their scope of application with respect to the respective language groups. While Article 11 of the Charter, for instance, allows measures to be taken in respect of programmes broadcast on TV and/or on the radio in the respective minority or regional language, it gives the option to broadcast them as a full programme or as occasional programmes in that language; last but not least, the various options are expressed in the verbs used which are "*to ensure*", "*to facilitate*", "*to make adequate provision*" and "*to encourage*".

Both Conventions of the Council of Europe have become part of the German legal system, both as regards the personal scope of application as designated in the respective ratification document deposited with the Council of Europe, and in relation to the obligations undertaken under Part III of the Charter for Regional or Minority Languages with specific reference to language groups and regions.

The identical objectives pursued by both Conventions regarding the languages of national minorities and the authorship of the Council of Europe in both cases explain why the two instruments in question are interpreted and applied concordantly in Germany. This can also be of significance in evaluating whether the respective competent legislative or administrative bodies consider themselves to have met the obligations ensuing from the Conventions.

Germany suggests that the DH-MIN (Committee of Experts on Issues relating to the Protection of National Minorities), a body set up to deal with issues of minority law, which regrettably has not been convened in the past few years, should discuss this matter in depth; it would be appropriate and expedient to have the Committee of Experts on the Regional/ Minority Language Charter and the Advisory Committee on the Framework Convention take part in these discussions.

III. Preliminary Comments on the "Findings and Proposals for Recommendations" of the Committee of Experts under Chapter III

1. Under Section 3.1, *Lit. B*, the voluntary application, by the Federal Republic of Germany, of certain Part III obligations to Part II languages is, without any detailed explanations being given, seen by the Committee as a positive approach in the case of non-territorial languages, but is considered acceptable in the case of territorial languages only if there is an underlying intention to progress to full protection under Part III.

In its Declaration of 26 January 1998, the Federal Republic of Germany notified the Romany language - so far in all of the *Länder* - and the Low German language - in some of the *Länder* - for protection under Part II and, in addition, listed those Part III provisions which are met by the existing administrative practice. This helped to specify the basis for, and facilitate, monitoring of the implementation measures under Part II. Thus, this listing only serves to clarify the scope of protection afforded under Part II, and does not imply any declaration of intent as regards the expansion of the scope of Part III protection to these languages in the entire respective speech area. The aforementioned Declaration was accepted by the Contracting Parties without any objection. Apart from the distinction made in this context between territorial and non-territorial languages - which, at least for Germany, is somewhat hard to understand - the Federal Republic of Germany does not share the Committee's view that a declaration to this effect would be acceptable only if the aim is to provide progressively for full Part III protection of the given language. Neither the Declaration by the Federal Republic of Germany nor the provisions or the overall systematics of the Charter can provide a rationale for the Committee's view.

2. Under Section 3.1, *Litt. D* and *L*, the Committee of Experts observes that the lack of specific legal provisions hinders fulfilment of the obligations entered into, especially those under Articles 9 and 10 ("Justice" and "Administration"), and therefore, under para. 1 of its "Proposals for Recommendations", the Committee suggests that specific legal provisions, where these are still lacking, be adopted in order to implement the accepted undertakings.

In the opinion of the Federal Republic of Germany, the respective national law is the authoritative reference when answering the question as to the extent and the effects of direct national application of the accepted undertakings. In this respect, the Federal Republic of Germany once more points out that the Regional/Minority Language Charter, under the Act ratifying it, ranks in Germany as a federal law which takes precedence over subordinate law - including *Land* laws - and, as a matter of principle, is to be applied as the more specific law overriding other federal laws to the extent that the respective provisions of the Charter are by themselves self-executing. Thus, the pertinent accepted obligations under the Charter are directly binding upon the judiciary and the administration and must be complied with in administrative action. Accordingly, the legality of any specific administrative action must be verified on the basis of the standards constituted by these obligations.

To give an example of the direct applicability of the provisions, reference is made to the closing of a Sorbian class in Crostwitz in the Free State of Saxony as mentioned in para. 431 of the Report of the Committee of Experts. By a Decision of 16 March 2001, the Ministry of Culture of the Free State of Saxony had, on account of the lack of pupils registered for that class, revoked the participation of the Free State of Saxony in the maintenance of the 5th-grade class of the Sorbian secondary technical school in Crostwitz for the 2001/2002 school year which started on 10 August 2001. The reason given by the Ministry for this measure was that, under the Schools Act and the School Regulations, in view of ensuring the required differentiation as regards the relevant educational offers and on account of the resources required for the purpose, at least two classes per year-group must be established at a given school (in order to avoid "mini" age-classes). On this basis, a class must as a rule comprise 25 pupils; as a minimum, however, it must consist of 20 pupils. For the 2001/2002 school year, only a total of 17 pupils had been registered for the 5th-grade class, instead of the 40 registrations required per age-class at *Mittelschulen* (secondary technical schools).

Crostwitz Municipality has taken legal action against that Decision. The Dresden Administrative Court considered the revocation of the participation in the age-class by the Ministry of Culture to be lawful since continuation of the school was in contradiction to the Schools Act. For its decision, the Court also thoroughly weighed the functioning of the public educational system against the particular need for protection of the national minority of the Sorbs. In particular, the Court also examined the extent to which the administrative authorities comply with the provision of Article 8, para. 1 (c) (iv), of the Regional/Minority Language Charter, which applies in the Free State of Saxony; in the last analysis, however, the Court did not establish any violation of the Charter.

In particular, the obligations undertaken under Articles 9 and 10 (e.g. Article 9, para. 1 (b) (iii) - allowing documents and evidence to be produced in the regional or minority languages - or Article 10, para. 3 (c) - allowing requests to be submitted in the regional or minority language) are self-executing provisions which must be complied with by the judiciary and the administration in their action and which establish a definite legal framework. The Federal Republic of Germany takes the view that further legal regulations would not provide any additional legal advantages regarding the implementation of the relevant provisions, but instead, for the major part, would only create redundant rules of law. On this basis, the Federal Republic of Germany sees only very little scope, if any, for the implementation of the proposal submitted by the Committee of Experts in para. 1 to the Committee of Ministers for a recommendation regarding adoption of legal provisions in Germany ("where these are lacking").

Thus, the focus of the process of the Charter's implementation in Germany is not on legal considerations, but for the major part on practical issues concerning the actual implementation or invocation of the relevant undertakings - a subject brought up by the Committee of Experts itself in para. 5 of its "Proposals for Recommendations", i.e. "establish a structural policy for making it practically possible to use regional or minority languages in dealings with the administration and, where relevant, in the courts". The Federal Republic of Germany will continue to accord high priority to this implementation process.

IV. Acceptance of additional obligations by the Federal Republic of Germany

With the Second Act of 18 September 2002 on the European Charter for Regional or Minority Languages, which entered into force on 19 September 2002, Germany expanded the scope of protection provided under the Charter.

With the acceptance of another four undertakings for the territory of the *Land* of Hesse as regards the Romany language of the German Sinti and Roma, a total of 35 detailed obligations under the Charter are now guaranteed for this language as well, and the requirement for its internationally binding notification to the Council of Europe for protection under Part III of the Charter is met. The obligations newly entered into are:

- a) use of the Romany language in the assemblies of regional authorities (Article 10, para. 2, *Lit. e*);
- b) use of the Romany language in the assemblies of local authorities (Article 10, para. 2, *Lit. f*);
- c) allowing the submission of requests in the Romany language to public service providers (Article 10, para. 3, *Lit. c*); and
- d) taking account of requests from public service employees having the required linguistic competence to be appointed in the territory in which that language is used (Article 10, para. 4, *Lit. c*).

For Frisian, the additional obligation under Article 10, para. 2 (g), is accepted for the territories of the *Länder* of Schleswig-Holstein and Lower Saxony, respectively, i.e. to allow the use of place names also in the minority language (German/North Frisian or German/Sater Frisian, respectively), which may be an option, in particular, as regards bilingual place-name signs to be put up in Nordfriesland and/or in Saterland *Gemeinde*. Frisian is already afforded protection under Part III of the Charter.