

Working Group II

Working document 1

**Working group II - "Incorporation of the Charter/
accession to the ECHR"**

**Subject: Modalities and consequences of incorporation into the Treaties of the Charter of
Fundamental Rights and accession of the Community/Union to the ECHR**

Please find attached a contribution by Mr. Bobby McDonagh to the working group.

The European Convention: Working Group on the Charter

Contribution by Bobby McDonagh (alternate representative of Irish Government)

The decision of the Praesidium to establish Working Groups is an important step in the work of the Convention. It is clear that their role should be to *assist* the Convention by setting out the full range of options for consideration by the Convention as a whole. It would be inappropriate for a Working Group, necessarily comprising a small cross-section of the Convention's membership, to *limit* the deliberations of the Convention by presenting only a single preferred option.

The Working Group on the Charter should therefore identify the full range of options as regards both the Charter on Fundamental Rights and the accession of the Community/Union to the European Convention on Human Rights (ECHR). It should explore these options including their advantages, the problems which they may give rise to and ways of addressing those problems.

3. As regards the Charter, it seems important as a first step to consider certain key questions. It will be possible to begin to assess coherently the merits of the various options- including as regards the basic political choices to be made in due course, which ought not to be pre-judged - in the light of the answers to those questions. The questions include:

(A) Could the incorporation of the Charter into the EU Treaties lead to the unintended extension of Union/Community competence, either in areas where it already has some competence or possibly across a wide range of new areas? Articles 51.2 and 52.2 of the Charter appear designed to preclude this but it is not clear that they would achieve this in the event of incorporation of the Charter into the EU Treaties. The stipulation in the Charter that the institutions and bodies of the Union should “promote the application” of its provisions- would need to be reconciled with a view that its incorporation would not involve an extension of competence. Also could the Charter impact on the exercise by EU institutions of their existing competences in areas that indirectly affected rights set out in the Charter?

(B) What is to be understood by the provision in Article 51.1 that the Charter is addressed to the Member States “only when they are implementing European law”? Given the strong emphasis on subsidiarity which has emerged at the Convention, it is important to clarify this point.

C) How is consistency to be ensured between the provisions of the Charter and (a) the existing EU/EC Treaty provisions and (b) the ECHR? Articles 52.2 and 53 of the Charter appear insufficient on their own to achieve this consistency if the Charter were incorporated in the EU/EC Treaties. The fact that similar rights are expressed in different terms in the various instruments is a significant consideration. If there are inconsistencies - for example in relation to socio-economic rights - is the judiciary to play an important role in determining policy and expenditure? As regards consistency with the ECHR, important considerations include the margin of appreciation allowed by it as well as the reservations and derogations entered by individual States. The question of defining what are to be deemed respectively “rights”, “freedoms” or “principles” under the Charter also arises.

(D) How is the potential for a conflict of jurisdiction between the Courts in Strasbourg and Luxembourg to be resolved?

(E) What would be the implications for the 2nd and 3rd Pillars of incorporation of the Charter into the Treaties?

4. It is precisely because of the importance of the rights enunciated in the Charter, as well as in the Treaties and other relevant instruments, that the Charter Working Group should address the questions identified above from the outset of its work so as to identify the most coherent and appropriate options for giving effect to those rights.
5. It will be important to draw on the expertise available in addressing these complex questions. Consideration should therefore be given to inviting the Head of the Council Legal Service, Mr Piris, as well as experts from the Council of Europe/Court of Human Rights to make known their views and to assist the Working Group in carrying out its mandate.

Dublin

16 June 2002