

**Working Group II**

**Working document 03**

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

**From: António Vitorino, President**

**To: Working Group II**

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**Subject : The relationship between the Charter and the Union's competencies**

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1. It has been observed that some articles set out in the Charter concern areas in which the Community or the Union have little or no competence to act. This point has notably been made for the right to strike or to education, freedom of religion, the prohibition of the death penalty and of torture, the articles of the Charter on criminal law, as well as the articles on social security and social assistance and on access to healthcare<sup>1</sup>. The concern has been expressed that integration of the Charter into the Treaties could lead to an extension of Community / Union competencies in such areas, despite the provision in Article 51 § 2 of the Charter that "this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties".
2. This issue was extensively discussed in the preceding Convention which established the Charter. It might be worthwhile to recall some considerations which had helped to build consensus, within that Convention, on inclusion of the above-mentioned articles in the text of the Charter.

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<sup>1</sup> Articles 2, § 2, 4, 10, 14, 19 - § 2, 28, 34, 35, 48 - 50 of the Charter.

3. The preceding Convention was guided by the idea that a distinction should be made between the extent of the Union's legislative competencies, on the one hand, and respect by the Union of all fundamental rights wherever it acts, on the other hand. Indeed, several examples drawn from the institutions' practice appear to illustrate that the Union's action may well have important impacts even on such fundamental rights that concern areas where the Union would have no or little competence to legislate:

- Council Regulation No 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States, in which it was deemed necessary to include an article ensuring that the regulation is without prejudice to respect notably for the right to strike <sup>1</sup>;
- the exclusion, in agreements with third countries on mutual legal assistance in criminal matters, of extradition of persons facing a serious risk of being subjected to the death penalty;
- the current draft Directive on minimum standards for the reception of asylum seekers in the Member States, on which the Council has reached political agreement, and which includes provisions guaranteeing asylum seekers access to school education and to health care;
- convocation of a staff competition by a Community institution on a Jewish holiday which may impinge on freedom of religion of the participants; it was in this situation that the European Court of Justice recognised freedom of religion as part of the fundamental rights of Community law <sup>2</sup>.
- Community agriculture legislation which could have impacts on freedom of religion by limiting ritual slaughtering as practised by certain religions.

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<sup>1</sup> See Article 2: "This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States." See also recital N° 4: "Whereas such measures [i.e. measures which the Member States are obliged to take under the regulation with a view to facilitating the free movement of goods in their territory] must not affect the exercise of fundamental rights, including the right or freedom to strike."

<sup>2</sup> Case 130/75, *Vivien Prais v. Council*, ECR 1976, 1589.

4. This distinction is already reflected in the opinion 2/94 of the Court of Justice, points 27 - 35, where the Court found no general power of the Community to enact rules on fundamental rights<sup>1</sup> but at the same time recalled that respect for fundamental rights, as general principles of Community law, is a condition of the lawfulness of Community acts. Furthermore, it appears that in Regulation 2679/98, the Council has recognised explicitly the point that its acts, as well as Member States' action implementing them, must *respect* even such fundamental rights as the right to strike on which it would not have *competence to legislate*.
5. It is in the light of this distinction that the preceding Convention opted for a complete catalogue of all fundamental rights which the Union is to respect, including the above-mentioned articles, while at the same time stipulating in Article 51 § 2 that the Charter does not establish new Community / Union powers, or modify the existing ones.
6. In addition, some more recent extensions of the Union's competencies should be noted, notably in the field of criminal law, as created by the Treaty on the European Union ("3rd pillar"), which informed inclusion in the Charter of the fundamental safeguards set out in its Articles 48 through 50.<sup>2</sup>
7. It has however been argued that Article 51 § 1, second sentence, of the Charter, stipulating that the institutions of the Union not only respect the rights and observe the principles of the Charter, but also "promote the application thereof", could be interpreted as creating new competencies insofar as the above-mentioned Charter articles are concerned, and that this wording could be regarded as contradicting Article 51 § 2 of the Charter. However, in full the provision at issue reads: "They [i.e. the institutions and bodies of the Union *and* Member States when implementing Union law] shall respect the rights, observe the principles and promote the application thereof *in accordance with their respective powers*." (emphasis added). It appears that this wording can be read as clarifying that obligations to promote the

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<sup>1</sup> It should be noted that while such general power is lacking, the Community does in some areas adopt specific measures relating to fundamental rights, either on the basis of particular Articles of the Treaty (see, for example Articles 13 and 141 of the EC Treaty) or "annexed" to the exercise of the competences attributed to it, see on this point doc. CONV 116/02, page 22, footnote 1.

<sup>2</sup> In particular, as noted in the Praesidium's Explanations to Article 50 of the Charter, the right not to be tried or punished twice is already enshrined in Articles 54 to 58 of the Schengen Convention, as well as in Article 7 of the Convention of the Communities's Financial Interests and in Article 10 of the Convention on the fight against corruption (conventions established by the Council in accordance with the EU Treaty).

application of Charter rights and principles arise only within the limits of the existing division of competencies between the Union and the Member States, thus confirming the principle of Article 51 § 2 of the Charter, and that the extent to which competencies for such "promotion" exist may vary, depending on the different Charter articles and on whether Union institutions or Member States authorities (implementing Union law) are concerned.

*In the light of the above elements, can it be assumed that the Charter, if integrated into the Treaties, would not create new powers of the Community / the Union, or modify its existing powers, as it states in its Article 51 § 2?*

*If the body of the articles of the Charter were to be inserted into the EU Treaty itself or in a new basic Treaty (option f), would then a possible drafting adjustment of Article 51(2) of the Charter, clarifying that the Charter articles do not alter the powers and tasks as defined by the other provisions of the Treaties, be necessary or useful?*<sup>1</sup>

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<sup>1</sup> On this point, see already doc. CONV 116/02 WG II 1, page 7, footnote 1.