

Working Group II

Working document 05

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

Working document by Mr. Vytenis Povilas Andriukaitis

Subject : Legal status of the Charter of Fundamental Rights of the European Union

Taking into account that the Charter of Fundamental Rights of the European Union (hereinafter "Charter") was adopted with a view to strengthening the protection of fundamental rights in the European Union, systematising all fundamental rights stipulated in different legal acts of the European Communities and international instruments and setting them out in a single text, making these rights more visible and explicit to the EU citizens, and ensuring the confidence of the European people in the process of further European integration as well as considering that the declarative nature of the Charter creates obstacles for the effective implementation of the rights foreseen in it, a conclusion may be drawn that the Charter should have a binding effect. This effect can be granted by incorporating the Charter into the Treaty on the European Union or the future EU Constitution.

The modality of the incorporation of the Charter into the Treaty (Constitution) should be determined on the basis of the requirements of legal certainty and clarity. As the Charter might be seen as a compromise in itself, the most appropriate way of its incorporation would be by introducing the least possible modifications in the contents of the Charter and the EU/EC legal system.

Modalities and consequences of the incorporation of the Charter into the Treaty on the EU (EU Constitution):

1. The incorporation of the Charter into the Treaty on the European Union or a new basic treaty

This alternative is supported by the Commission of the European Union, the European Parliament and a number of member states.

The preamble of the Charter, with minor changes, could be incorporated into the preamble of the Treaty on the European Union; the text of the Charter, excluding the general provisions, could be added as a separate chapter of the Treaty. Within the Treaty, the provisions of the Charter would have the status of the primary EU legislation (the legal status of the Charter would be similar to that of the EC/EU Treaties). Direct applicability of the provisions of the Charter could be guided by the general terms of the direct applicability of the EC law. A point should be made that the wording of some of the provisions of the Charter does not meet the terms of direct applicability set by the European Court of Justice. Therefore, problems could be avoided by applying the community method for the regulation of fundamental rights.

Some of the provisions in the Charter replicate the provisions of the Treaty establishing the European Communities, therefore, while integrating the Charter into the Treaty, the problem of the replication of rights should be addressed. This is primarily relevant to the rights of the citizens' of the European Union, principle of non-discrimination, and equal opportunities between men and women. Thus, the citizens' rights could be either deleted from the EC Treaty or only the provisions specifying these rights could be retained which establish additional obligations to institutions, certain procedures of their discharge, etc. Other rights envisaged in the Treaty could be modified. If some of the rights foreseen in the Charter were further regulated under the same or other Treaties, the wording "it shall be exercised within the limits and under conditions set in the treaties" should be added to every right stipulated in the Charter.

Major problems would be created by the need to change the general provisions of the Charter. If these provisions were left out, the meaning and effectiveness of the Charter as a whole could be jeopardised. Therefore, it would be expedient to consider the necessity of retaining (or modifying) each of the general provisions of the Charter in the new Treaty. Already now, it is possible to foresee that Article 51(1) would lose its sense if the Charter was included into the Treaty, while the necessity of Article 51(2) of the Charter will have to be assessed after the final solution of the issues of the status and competencies of the EC and EU. Article 52(2) and the provisions concerning the relationship between the Charter and the European Convention on Human Rights listed in Article 52(3) should be specified. There is some uncertainty about Article 53 of the Charter dealing with the relationship between the Charter and the national constitutions of the member states regarding its compliance with the principle of the supremacy of the EC law. The problem could be solved by indicating (like in the case of the definition of the EU citizenship) that the Charter shall not replace the human rights stipulated in national constitutions but rather supplement them. This could be laid down in Article 6 of the EU Treaty or in an article of the Constitution.

2. Incorporation of the Charter in the form of a separate Protocol annexed to the Treaty

In this case, incorporation of the Charter would have the same legal value and consequences as in the first case as under both international and EU law protocols are construed as an integral part of a Treaty. Such an option would be in line with the wishes of some EU member states to see the Charter as a separate document and would provide a solution if no EU Constitution is adopted. This option would be simpler in technical terms in comparison with the first option and would require fewer amendments to the Charter and the Treaties. In this case, however, the general provisions of

the Charter would have to be modified. A reference to the Charter could be made in Article 6(2) of the EU Treaty.

3. Reference to the Charter in Article 6(2) of the EU Treaty

This possibility was foreseen already before the Nice conference. The reference could be direct, in a separate additional part of the article, or indirect – by expanding Article 6(2) and making a reference to the Charter as to yet another source on which the European Court of Justice draws in protecting human rights as the general principles of the EC law. Although this option would be technically simpler than the first ones, a problem would arise with the reference to ECHR made in Article 6(2) because the greater part of the rights stipulated in the Charter are based on the Convention. An indirect reference to the Charter without changing its status would merely mean a formal statement of recognition of the rights stipulated in the Charter as general principles. It is doubtful whether such a reference would be expedient.

The control mechanism over the protection of the rights enshrined in the Charter.

In connection with incorporation of the Charter into the Treaties, the question arises whether paragraph 4 of Article 230 of the EC Treaty should be amended to extend the conditions of admissibility for direct action by individuals in the European Court of Justice or whether a new form of legal action should be introduced for the purposes of protection of fundamental rights. An introduction of a new form of legal action would not be expedient because violations of fundamental rights are usually related to a specific form of already existing actions. If the European Court of Justice is given the competence to apply and interpret the provisions of the Charter, it would become the last instance in cases related to the violation of rights stipulated in the ECHR and the Charter. Such a situation could lead to a conflicting case-law of the European Court of Human Rights and the European Court of Justice; besides, the Charter provisions with regard to actions by member states would not have equal legal value and consequences. It should also be noted that all the rulings by the European Court of Justice are passed unanimously. Such a method of handing down decisions could create obstacles for a dynamic interpretation of human rights provisions. As the European Court of Justice itself falls within the Charter's sphere of control, a question arises whether an external control mechanism should be introduced. That is why it may be worthwhile to discuss an option of establishing a judicial or legal institution with a competence to ensure the compliance with the standards enshrined in the Charter. In view of the problems mentioned above and of the possible extension of the competencies of the European Court of Justice in the field of justice and home affairs, some of the Lithuanian experts believe that it would be expedient to establish a new permanent judicial institution to ensure the implementation of the rights under the Charter. Initially, a Fundamental Rights Commission could be established which would also be able to supervise the compliance with the provisions of the Charter by EU institutions.

After an analysis of the modalities and consequences of incorporation of the Charter into the Treaty, it must be emphasised that this issue is closely linked with other issues being discussed at the Convention, such as division of competencies, accession by the Community/Union to the ECHR, simplification of the Treaties. It is therefore necessary to take into account the results of work of other working groups and their proposals.