

Working Group II

Working document 07

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

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Subject: ANSWERS TO SOME OF THE QUESTIONS RAISED DURING THE FIRST MEETING OF THE WORKING GROUP

With reference to the discussion during the first meeting of the Working Group on the EU Charter on Fundamental Rights devoted to the modalities and possible consequences of incorporation of the Charter into the EU Treaty (Constitution), I would like to suggest answers to some of the questions raised in the course of the meeting, i.e.

1. What would be the consequences of

- a) "attaching" the Charter to the Treaties in the form of a "Solemn Declaration";**
- b) making a direct reference to the Charter in the EU Treaty or a new basic Treaty;**
- c) the Charter becoming a new Protocol annexed to the Treaties or to a new basic Treaty;**
- d) inserting the full body of the Charter into a title or chapter of the EU Treaty or into a new basic Treaty, of which it would for example form the first title or chapter?**

2. What would be the relationship of the Charter vis-à-vis the ECHR should options a), b) or c), d) be chosen?

3. What would the competencies of the Court of Justice be under one or another option?

A. “Attaching” the Charter to the Treaty in the form of a “Solemn Declaration” would not change the Charter’s status (it would further remain declarative in character). The difference from the present situation would be negligible. It would only acquire a greater political value. The institutions would have to further comply with the provisions of the Charter in the law-making and implementation process. The European Court of Justice would be able to make references to rights enshrined in the Charter as to general principles of Community law. Some believe, however, that the Charter’s declarative status would produce an opposite effect: it would symbolise Europe’s inability and refusal to take the rights seriously. It could be discussed whether retention of the declarative status is possible because this would go counter to the position of the Institutions that initiated and drafted the Charter and of some of the member states. It would also be hard to explain the reluctance to recognise the legal status of a document which merely integrates the rights already established in Community and international legal acts to which all the members states are parties.

B. Direct Reference to the Charter in Article 6 of the EU Treaty. This possibility had already been foreseen before the Nice conference. The consequences would depend on whether the Charter is annexed to the EU Treaty or to a new Treaty in the form of a Protocol. In the first case, the Charter would acquire a binding character, whereas in the second case its status would not change. A problem, however, would arise as to the existing reference in Article 6(2) to the rights enshrined in ECHR because the majority of rights stipulated in the Charter are based on the Convention. A reference to the Charter without changing its status would mean a mere formal acknowledgement of the rights enshrined in the Charter as general principles, an approach emerging in the case law of the Court of Justice. The rights enshrined in the Charter could be interpreted and applied by the Court of Justice on the basis of the structure and goals of the Community in the same way as it presently interprets the ECHR or the rights stipulated in the constitutions of the member states. In this case, the rights enshrined in Charter would serve as a basis for the repeal of acts of Community institutions if the Court of Justice establishes that the latter are in conflict with these rights. The provisions of the Charter would be binding on the member states as general principles of Community law with all the consequences thereof: they would have to comply with them in implementing the Community law, the national courts would have to refrain from applying provisions of national law that go counter to them, and in cases of non-compliance, member states would be liable for breach of Treaty obligations.

C. Incorporation of the Charter in the Form of a Separate Protocol annexed to the Treaty.

Since both international and Community law treats protocols as an integral part of a Treaty, the Charter would acquire the same legal value as the Treaty. This option would be in line with the wishes of some member states to see the Charter as a separate document and would provide a solution if no EU Constitution were adopted.

D. Incorporation of the Charter into the EU Treaty or into a new basic Treaty. If the provisions of the Charter are inserted into the Treaty, they would acquire a binding status, like in option C. The difference from option C would be purely technical (option C would be technically simpler). I believe that effective implementation of human rights is only possible when the document is binding.

Relationship between the Charter and the ECHR

If the Charter remains declarative in character, its relationship with the Convention would not change. According to Article 52(3) of the Charter, the rights (their content and scope, including limitations) which correspond to rights guaranteed by the ECHR are to be interpreted in the same way as the rights laid down by the Convention. The official commentary of the Charter contains a list of correspondence between the rights stipulated by the Charter and the Convention. The rights are broken down into three groups in the list: the rights that correspond to the ones enshrined in the ECHR; the rights the application of which is broader; and the rights not stipulated by the Convention. Since this commentary has no binding legal force, some authors believe that Article 52(3) does not rule out the possibility of conflicting interpretation of the rights by the Court of Justice and the European Court of Human Rights because the problem of identification of these rights remains open. Advocates of the Charter claim that provisions of Article 52(3) and 53 eliminate this problem because, in the case of collision, the Convention would have precedence over the Charter except the cases when Community legislation offers a more effective protection of rights. An analysis of rights enshrined in the Charter shows that a considerable number of them correspond to those in the Convention. One is justified in thinking that the drafters of the Charter tried to avoid a collision between the two documents. It is important to note that even prior to the adoption of the Charter there existed two independent mechanisms for the protection of fundamental rights (one to be found in Community law and the other in the form of Convention). Thus already before the Charter was adopted there were cases of courts interpreting the provisions of the Convention differently. I would think that problems would only arise in cases if the Charter

offers a lower level of protection than that established by the Convention. This variant would hardly be acceptable because it would call for the application of different standards of protection of rights. Articles 52(3) and 53 of the Charter rule such a situation out by stating: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by ... the European Convention for the Protection of Human Rights and Fundamental Freedoms” (Art. 53). I believe, therefore, that the opinion by some of the authors that the Charter poses a threat to the protection of rights enshrined in the ECHR has no grounds.

Compared with the Convention, the Charter has some advantages. The Charter’s scope of application is broader. Alongside political and civil rights of the EU citizen it also embraces social, economic and the “new” rights: the right to good administration, the right to environmental protection, and the right of access to documents. Some of the rights had been modified to take into account the developments after the adoption of the Convention and the case law of the European Court of Human Rights.

If the Charter is granted a legal character, member states would be bound by the same obligations vis-à-vis the Charter as vis-à-vis any other act of EU primary legislation. Depending on the character of amendments introduced to Article 6 of the EU Treaty, adjustments would have to be made to the provisions of Article 52(3) with regard to the relationship between the Charter and the ECHR.

Competencies of the ECJ

If the Charter were incorporated into the EU Treaty, the European Court of Justice would play the key role in the protection of rights enshrined in it (if decision is not made to set up a new institution for this purpose). It is therefore important to ensure that Article 46 or another similar article is changed accordingly, in order to grant the Court jurisdiction in this field.

In case such a decision is adopted, another issue would arise, i.e. who would have the right of legal action in cases related to the implementation of rights enshrined in the Charter. First of all, the standard forms of actions would have to be used:

- Actions by the Commission against member states for violations of the Charter’s provisions;
- Actions by the Institutions, member states, and individuals aimed at repealing EU legal acts, also actions in relation to institutions’ failure to act and to compensation for damage caused by institutions when the basis for the action is a violation of the Charter.

- Preliminary ruling procedure (ECJ, when requested by national courts of member states, could offer an opinion on the compliance of national measures or acts of EU institutions with the Charter).

The possibilities for individuals to take direct action before the ECJ against violations of the Charter by a member state or an EU Institution deserve to be considered separately (presently, the possibilities of direct appeal by individuals to the ECJ are very limited). In order to enable individuals to protect their rights enshrined in the Charter, either the grounds for taking the various existing forms of action have to be expanded or a new special form of action in relation to violations of human rights, and requirements for such an action, have to be introduced. The latter variant, in the opinion of Lithuanian experts, would not be expedient because this type of violation usually interrelates with a specific form of existing actions.

It must be noted that in case the EC/EU does not accede to the ECHR, the ECJ will be the last instance both in cases related to the violation of rights enshrined in the ECHR and stipulated in the Charter and those related to other fundamental rights. At the same time, the compliance with the Charter in member states will have to be ensured by national authorities and national courts. Individuals would be able to seek protection against violations of rights enshrined in the ECHR before the European Court of Human Rights, while this Court would not offer protection against the other rights which are stipulated in the Charter. Thus the Charter provisions would not have equal legal value and consequences vis-à-vis acts of member states. On all the rights stipulated in the Charter, the ECJ would be able to offer its opinion through the preliminary ruling procedure.

If the Charter is not granted legal character, the ECJ would be able to make references to and interpret the rights stipulated in the Charter; but in this case, too, the question of collision of jurisdictions of the ECJ and the European Court of Human Rights remains open.

Some authors believe that the only way to avoid this collision is accession by the EC/EU to the ECHR. It is important to underline that the Charter is not an alternative to the accession by the EC/EU to the ECHR. The accession of the EC/EU to the ECHR poses a number of problems. Adequate attention, therefore

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