

Working Group II

Working document 09

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

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To: Working Group II

**Subject : Possible drafting adjustments of Article 51 (2) and of Article 52 (2) Charter;
the question of "replication" in the Charter**

I. Possible drafting adjustment of Article 51 (2) of the Charter

1. Following a request made by members of the Group at the meeting of 12 July, a possible wording of the drafting adjustment in Article 51 § 2 of the Charter, as envisaged by the Group in the hypothesis of incorporation of the Charter into the Treaties according to option f), could for example read as follows:

"This Charter [*or*: this Title / Chapter]¹ does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by other provisions of the present Treaty or by the Treaty on the European Union or the Treaty establishing the European Community."

2. It should be noted that the question of such a drafting adjustment would arise only in the hypothesis of option f) (i.e., insertion of the body of the Charter articles into a new basic Treaty or into the Treaty on the European Union). Conversely, under options a) to e), the Charter would technically remain a separate instrument apart from "the Treaties" (although,

¹ If the possible new Title or Chapter of the TEU or a new basic Treaty containing the articles of the Charter were to receive the heading "The Charter of Fundamental Rights of the European Union", it would then appear possible to maintain the reference to "this Charter" in the general provisions of the Charter; in the alternative, one could refer to "this Title" or "this Chapter".

under some of these options, it would have legal rank equal to the Treaties); consequently, there would be no ambiguity as to the meaning of the referral in current Article 51 § 2 *from* the Charter *to* the Treaties.

3. Furthermore, it should be kept in mind that the concrete drafting adjustment to be made would obviously depend on the decision on the legal personality and on the Treaty structure envisaged by the Convention. Thus:
 - In the event of the creation of one simple legal personality of the Union, the words "for the Community or" could be deleted.
 - In the event that the Convention opted for incorporation of the articles of the Charter into the Treaty on the European Union, rather than for a new basic Treaty, the words "the Treaty on the European Union" would be deleted since the term "the present Treaty" would refer to the TEU.
 - The reference to the "Treaty on European Union" or the "Treaty establishing the European Community" could need further adjustment in the event of the current structure and/or title of these Treaties being modified in the course of their simplification.

II. The question of "replication" in the Charter

4. As explained in section 4 of document CONV 116/02, in order to draw up a full catalogue of the fundamental rights of the Union, the Charter, in a number of its articles, simply restates rights already expressly enshrined in the EC Treaty, often, however, in the interests of readability, shortening the wording as compared with the corresponding articles of the Treaty.

These relate to rights to freedom of movement, almost all the rights in the "citizenship" chapter of the Charter (right to vote, access to documents, right of petition, etc.) and the clauses relating to non-discrimination on grounds of nationality and equality between the sexes². Since the previous Convention had no mandate to modify the Treaties, but only to draft a Charter which could be added to them, it formulated a referral clause (Article 52(2) of the Charter³) to make it clear that, with regard to those rights, the legal situation as defined in the Treaties was unaffected by the Charter. That clause also made it possible to avoid the repetition, in each Charter article in question, of formulae to the effect that these rights are exercised under the conditions and within the limits provided for in the corresponding article of the Treaty and of secondary legislation⁴.

The Group should now examine more closely how this situation of "replication" of rights could be dealt with in the event of possible incorporation by the Charter into the Treaties. For purposes of such analysis, it appears appropriate to distinguish between legal aspects and in particular questions of legal certainty, on the one hand, and questions of legibility and presentation of fundamental rights, on the other hand.

5. As concerns legal aspects, and in particular concerns of legal certainty, it seems in principle that, if one of the options a) to e) were chosen, the referral clause of Article 52 § 2 of the Charter, as it stands, would clarify in a satisfactory manner that the conditions and limits for the exercise of the rights in the Charter which result from the Treaties are governed by those Treaties, and that the Charter does not alter the regime of those rights. The decisive

² Article 15 (2) Charter, corresponding to Articles 39, 43 and 49 et seq. EC Treaty (on freedom of movement for workers, freedom of establishment and freedom to provide services); Article 21(2) Charter, corresponding to Article 12 EC Treaty (on discrimination on the grounds of nationality); Article 23 Charter, corresponding to Articles 2, 3 (2) and 141 (3) and (4) EC Treaty (on equality between the sexes); Articles 39, 40, 41(3) and (4), 42 – 46 Charter, corresponding to Articles 18 to 21, 190 (1), 194, 195, 288 EC Treaty (on the rights of EU citizens).

³ Article 52(2) reads as follows: "Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties."

⁴ On this point, see also the Explanations of the Praesidium (cited in footnote 1 on page 3) relating to this Article ("Paragraph 2 specifies that where a right results from the Treaties it is subject to the conditions and limits laid down by them. The Charter does not alter the system of rights conferred by the Treaties.")

point, again, is that the Charter would technically remain a separate instrument. There would thus be no ambiguity about Article 52 (2) Charter as a clause of referral *from* the Charter *to* the Treaties; whether or not the Charter would have equal legal value as the Treaties does not matter for this purpose⁵.

6. Conversely, if the Convention were to prefer option f), i.e. incorporation of the Charter articles themselves into the Treaties, a need for a drafting adjustment of Article 52 (2) similarly as discussed above in the context of Article 51 (2) - would arise in order to clarify the term "Treaties". The precise wording of such a drafting adjustment would essentially depend on the future Treaty structure (which goes beyond the mandate of this Group) and on the question which place the fundamental rights currently enshrined in the EC Treaty, and in particular the citizenship rights (see below, para. 8 and 9), should find in that Treaty structure. It is therefore difficult to anticipate the correct formula at this stage. However, the Group could usefully express itself on the *principle* of preserving a referral clause in Article 52 (2) - albeit slightly reworded - even under that option. Some have taken the view that Article 52 (2) Charter could simply be deleted in that hypothesis. However, it seems important, in the interest of legal certainty, to keep the referral in order to make it clear that more detailed provisions to be found elsewhere in Treaty law, for example on citizenship or on freedom of movement of workers, concretise and limit those rights, and that existing case law thereon remains fully valid.
7. Turning to considerations of legibility and presentation of fundamental rights in the Treaty framework, it has been argued that the replications between articles on the same rights both in the Charter and in the Treaties could appear confusing for the citizens, and that such replications should therefore be eliminated.

⁵ This point is demonstrated by referrals made from one article to another in the EC Treaty: For example, although Article 21 and Articles 194, 195 EC Treaty on the right to petition or to apply to the Ombudsman are of equal rank, it is clear that Article 21 EC Treaty is merely a referral and that the legal content of the right is defined by the latter Articles.

8. In this context, it should, however, first be observed that the issue appears to arise only in relation to a limited number of rights, i.e. essentially those linked to the citizenship of the Union; in other contexts such as equality between the sexes and freedom of movement for workers and the self-employed, co-existence of the very succinct Charter text and the more detailed text in the current Treaties seems perfectly appropriate and conducive to better comprehension by the citizens. As to fundamental rights flowing from EU citizenship, they were rightly included in the Charter in order to ensure their full visibility. On the other hand, the current articles on citizenship in the EC Treaty could not simply be deleted because they contain, in addition to the statement of the rights, important legal bases permitting to regulate them. These elements taken together would militate for accepting in principle the co-existence of articles on citizenship in both the Charter and the EC Treaty.
9. However, if the Convention were to favour incorporation of the body of the Articles of the Charter into a new basic Treaty (option f), it would face another question, which while going beyond the remit of this Working Group should not be ignored by it: Such a new basic Treaty would undoubtedly have to contain the most fundamental provisions on EU citizenship, including not only the citizens' rights which have been repeated in the Charter, although sometimes with shortened formulae, but also the definition of citizenship (current Article 17 EC Treaty) and perhaps a provision about its future development (current Article 22 EC Treaty). Combining these provisions with the Charter articles on citizenship going into the new Treaty pursuant to option f would require to define the respective places in that Treaty of these provisions, and thus possibly entail some complement or adjustment of the Charter chapter on Citizens' rights. Conversely, under the other options, there would then be a legally relevant chapter on citizenship in the EC Treaty or possibly in a new basic Treaty, whilst the articles "replicating" the citizens' rights in the Charter (existing as a technically separate instrument) would merely serve as a restatement enhancing the visibility of those rights.

How should the "replication" arising from the fact that some articles of the Charter repeat rights already enshrined in the EC Treaty be dealt with?