

Working Group II

Working document 12

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

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**Subject: The relationship between the Charter and the ECHR**

- The question whether and how to incorporate the Charter in the Treaties is primarily for the EU to decide. The impact of each of the existing options on the legal status of the Charter have been very well set out in document CONV 116/02.
- However, when examining those options, one should also take into account their possible implications on the relationship between the Charter and the European Convention on Human Rights, an aspect which was given high importance by the Convention which drafted the Charter and gave rise to lengthy discussions within that body, given the sensitivity and the complexity of the matter. What was at stake here was nothing less than coherence and legal certainty in the protection of fundamental rights across Europe.
- In this context, it should be recalled that the solutions found by that Convention – in close cooperation with the Council of Europe's observers – are based on Articles 52 § 3 and 53 of the Charter and on a reference to the case-law of the European Court of Human Rights in the Preamble of the Charter. These solutions have been considered satisfactory by all parties concerned, including the Council of Europe Observers at the Convention and the Parliamentary Assembly of the Council of Europe.

- The importance of these references to the ECHR and the Strasbourg case-law for the proper interpretation of the Charter was recently stressed by the President of the ECJ, Mr Rodríguez Iglesias, in his address at the opening of the judicial year of the Strasbourg Court. Therefore, whatever solution for a possible incorporation of the Charter is chosen, we should ensure that these references are preserved (or at least adequately replaced).
- I know that this Convention is also called upon to look into the question of a possible accession of the EC/EU to the ECHR and that in the event of this accession taking place, much of the reasons for keeping these references may at first sight seem to become obsolete. However, while I do think, like the President of the ECJ and many others, that accession is a necessary complement to the Charter, I am personally not entirely convinced at this stage that accession would make references to the ECHR in the Charter superfluous, since Article 52 § 3 of the Charter also defines the proper *content* of many of the rights included in the Charter.<sup>1</sup> After all, several national Constitutions of States Parties to the ECHR also make a special reference to the ECHR.
- In any event, accession has not been decided yet and even if this Convention were to advocate this solution, it is not for it to decide and to amend the Treaties accordingly; so it should not be envisaged to drop the references to the ECHR and its case-law before accession has been duly decided.
- On the question of Article 6 § 2 TEU, it is clear that we need a reference to the ECHR in the Treaties for as long as the Charter (including its references to the ECHR) is not incorporated and/or as long as accession has not yet taken place. One should not forget that Article 6 § 2 TEU has turned out to be the basis on which the ECJ has followed the ECHR and the Strasbourg case-law in an exemplary way, thereby making a substantial contribution to legal certainty and coherence in this important area.<sup>2</sup>

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<sup>1</sup> See the wording of Article 52 § 3: “... the *meaning and scope* of those rights shall be the same as those laid down by the said Convention”

<sup>2</sup> “... even though the Convention is not formally applied as a constituent element of Community law, being instead merely taken into account as a source of inspiration for the purposes of identifying general principles, the case-law of the Court of Justice clearly shows that it applies the Convention as if its provisions formed an integral part of Community law” (Mr Rodríguez Iglesias, President of the ECJ, Strasbourg, 31 January 2002, translation).