

Working Group II

Working document 13

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

from :	Secretariat
to :	Working Group II
Subject:	Auditions of MM. Schoo, Piris and Petite, on 23 juillet 2002

Members of the Working Group will find enclosed the speaking notes of the interventions of Mr Schoo, Director-General of the Legal Service of the European Parliament, Mr Piris, legal consultant and Director-General of the Council's Legal Service, and Mr Petite, Director-General of the European Commission's Legal Service, during the audition of 23 July

THE CHARTER OF FUNDAMENTAL RIGHTS

Comments

by Mr Johann SCHOO
Director in the Legal Service
of the European Parliament

Brussels, 23 July 2002

I. Introduction

Your working party's task is to deal with the following two issues:

- the ways in which the Charter might be incorporated into the treaties and the implications of such a step, **and**
- the implications of any accession by the EU to the European Convention on Human Rights (ECHR).

I am certainly not going to deal with the political issue, i.e. **whether** the Charter should be incorporated; Parliament's views on the matter were clear before, during and after the proceedings of the first Convention. Furthermore, that Convention drew up its text **as though** the Charter were to be incorporated wholesale.

II. Ways in which the Charter might be incorporated into the treaties and the implications of such a step

The question which concerns us here is that of deciding whether or not the Charter – with its existing substance and structure – is suitable for incorporation.

Arguing against such incorporation is a whole series of reservations which may be grouped under three main criticisms:

- (1) the Charter contains fundamental rights which do not fall within the EU's area of competence;
- (2) the Charter contains provisions which appear in a different form in the treaty or in the ECHR;
- (3) the general clauses of the Charter are not sufficient to enable the latter to be incorporated into the treaties.

First criticism

- (1) As regards the fundamental rights which lie outside the EU's area of competence, the following three points may be made:

Firstly:

- (a) The task of the Convention on the Charter was to bring fundamental rights together in a single text, drawing on various sources, in particular the constitutional traditions common to the Member States and their common general principles. That text therefore reflects the wealth of the fundamental rights recognised by the Member States, irrespective of the current applicability thereof.
- (b) Although some of those rights are not applicable at first sight and as things currently stand, this does not mean that they will not be so in future (particularly in view of the way in which Union law is evolving within the third pillar and under Title IV of the EC Treaty **and** Articles 54 to 58 of the Schengen Agreement). In any event the inclusion of virtual (or dormant) fundamental rights is not a problem, since Article 51(2) stipulates that the Charter does not establish any new power or task and, pursuant to Article 52(2), the fundamental rights recognised are based on the treaties, i.e. they are exercised solely within the context of Community law.
- (c) It is still difficult to define exactly which fundamental rights lie outside the EU's area of competence. To give an example: no-one would have thought that the right to freedom of religion would be a fundamental right falling within that area. However, Case 130/75, PRAIS (ECR 1976, 1589) - a staff case - teaches us quite the opposite. It is not therefore impossible that other fundamental rights which do not currently appear to be a matter for the EU may in future be taken into consideration by the Court of Justice.

Second criticism

- (2) The Charter contains provisions which appear in a different form in the treaty or in the ECHR

As regards consistency of the Charter provisions with the EC Treaty, there are a number of issues to be discussed:

- (a) the scope of the general cross-reference contained in Article 52(2) of the Charter,
- (b) duplication of those provisions, and
- (c) the specific case of the relationship between Article 21(1) of the Charter and Article 13 of the EC Treaty.

re (a) In our opinion the cross-reference clause contained in Article 52(2) of the Charter adequately clarifies the relationship between the fundamental rights detailed in the Charter and the treaty provisions concerned with the same subject, by stating that rights recognised by the Charter shall be exercised under the conditions and within the limits defined by the Treaties. At one and the same time this clause elegantly acts as an inherent limit on each fundamental right and thereby avoids constant repetition of the limits in each article.

re (b) As regards the duplication of provisions, it should first of all be pointed out that the number of provisions involved is very small (the freedoms laid down in the EC Treaty, the rights stemming from citizenship, and non-discrimination).

The cross-reference clause contained in Article 52(2) of the Charter also removes any ambiguity which may arise as a result of there being two identical provisions.

However, it must not be forgotten that the treaty provisions to which the Charter refers often serve a purpose which goes beyond that of creating a right: they contain legal bases and objectives to be achieved, and they should therefore remain in force.

re (c) As regards the specific case of non-discrimination referred to in Article 21(1) of the Charter and Article 13 of the Treaty, there is - in our opinion - no incompatibility, given that the two provisions pursue different aims:

- Article 13 of the EC Treaty is primarily a legal basis authorising the EC to combat discrimination by means of legislative measures applicable to individuals. Article 21 of the Charter, on the other hand, is a fundamental right directly applicable and binding on the Community bodies and institutions and, to a certain extent, on the Member States (Article 51(1) of the Charter).
- Furthermore, the rather unusual two-paragraph structure of Article 21 is the result of the fact that the drafters of the Charter had to abide by and incorporate the principle of non-discrimination between EU citizens, as laid down in Article 12 of the EC Treaty. For this reason, discrimination based on nationality is no longer mentioned in the first paragraph of Article 21 of the Charter. The Member States and the EU are therefore free to practise a degree of differential treatment in favour of EU citizens.

To conclude as regards these points

- There is no uncertainty, therefore, regarding the way in which the Charter provisions are to be interpreted by comparison with the Treaty articles on the same topic. The cross-reference clauses contained in Article 52 of the Charter have enabled relationships to be clarified.
- The same approach has been adopted in the case of the Charter articles which incorporate the guarantees contained in the ECHR: Article 52(3) serves to ensure that the rights laid down in both texts are applied in the same way, whilst allowing the EU to provide more extensive protection.

Third criticism

- (3) The general clauses (Articles 51 to 54) are not sufficient to enable the Charter to be incorporated into the Treaty

It is considered in certain quarters that the general clauses - Articles 51 to 54 of the Charter - are not sufficient to enable the Charter to be incorporated into the Treaty, either because they constitute a source of ambiguity at a time when the articles of the Charter have the same legal value as those of the Treaty, or because they would

undermine legal certainty in so far as they are designed to prevent conflicts between the Charter and the corresponding provisions of the ECHR.

- (a) In our opinion, there would be no fear of either ambiguity or legal uncertainty if the Charter were to be incorporated into the Treaty - quite the contrary. As has already been said, the cross-reference clauses serve to clarify the relationship between the Charter and the Treaty and the ECHR, with a view to making that relationship binding. Such clauses would be superfluous in the case of a Charter with mere political value but they are, on the other hand, essential to the proper application of fundamental rights which are part of primary legislation.

At the risk of repeating myself:

- Although the Charter and the Treaty are on an equal footing, the cross-reference clause contained in Article 52(2) of the Charter states unequivocally that the fundamental rights concerned are exercised under the conditions and within the limits defined by the Treaties. The only editorial change to be made would be to replace the reference to 'Community Treaties' and to the 'Treaty on European Union' by a wording which takes into account the way in which the Charter would be incorporated into the Treaty.
 - It should also be pointed out that the current Treaty also contains cross-references to provisions of equal status, and that this has not created any ambiguities (e.g. Articles 19 and 21 of the EC Treaty on citizenship which refer to Articles 190, 194 and 195 on participation in elections to the European Parliament and on the right to petition to the European Parliament or to apply to the Ombudsman).
- (b) As regards the alleged legal uncertainty stemming from the relationship between the Charter and the ECHR which - according to some authors - has not been resolved by means of the cross-reference clause contained in Article 52(3) of the Charter, suffice it to say that the purpose of that clause is to ensure that the corresponding rights are applied and interpreted identically. Since the ECHR lays down only a minimum standard, the clause takes account of the fact that, as applied by the Court of Justice,

Community law has already gone well beyond this minimum standard and will certainly continue to do so.

There are several examples of higher levels of protection under Community law than are provided by means of the ECHR:

- Article 47 of the Charter - right of access to justice - extends to all the rights guaranteed under EU law and is not restricted solely to civil or criminal-law rights as provided for in Article 6 of the ECHR.
- Article 50 of the Charter - the principle of *non bis in idem* - is not restricted to a single State - (as in the case of the ECHR) but covers the entire territory of the EU.

In this connection there is a second ground for criticism: the risk of differing interpretations by the EU Court of Justice and the Court of Human Rights. However, Article 52(3) of the Charter does not affect current relations between the two courts, which remain quite separate as they interpret the law which is placed before them for their examination.

Any differences of interpretation will be excluded if the EU acceded to the ECHR. This would be an ideal arrangement leading to perfect harmony between the two bodies.

But even as the relationship between the two courts currently stands, any difference of opinion is largely theoretical since the Court of Justice, when referring to Court of Human Rights case law, has never refused to apply that law.

What is more, the relationships between the Member States' constitutional courts and the Court of Justice are not based on subordination either, but rather - as stated by the German Federal Constitutional Court in its 'Maastricht' judgment of 12 October 1993 - on cooperation. This same relationship should provide a framework for the Court of Justice and the Court of Human Rights as they seek to interpret the fundamental rights which fall within their area of competence.

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I should also like to deal briefly with other issues which are included within your working party's terms of reference and which, if need be, may subsequently be considered in greater detail at the hearing. These issues are:

- (III) The technical arrangements for the incorporation of the Charter into the Treaty,
- (IV) The effects which such incorporation would have on appeals procedure, and
- (V) The value of accession to the ECHR following incorporation of the Charter.

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III. Technical arrangements for the incorporation of the Charter into the Treaty

In the basic document drawn up by your working party you have already listed the six technical options for incorporation of the Charter, ranging from appending it to the treaties in the form of a Solemn Declaration to including the full text in a title or chapter of the EU Treaty or even of a constitutional treaty.

The choice between these various options is undoubtedly a political one.

What is important from the legal point of view is that the rights should be binding. This would be achieved only if the Charter were to be incorporated into the Treaty, either in a Protocol appended to the Treaty or, at least, by means of a direct reference in the Treaty to the Charter as something incumbent upon the various bodies and institutions and, to a certain extent, upon the Member States.

If we opt for wholesale incorporation of the Charter into the EU Treaty or into a constitutional treaty (which is the best option as regards visibility and the one which is most in accordance with most of the Member States' constitutional traditions), a number of legal problems will arise.

1. The question of deleting Article 6(2) of the EU Treaty which refers to the external sources of fundamental rights, namely the constitutional traditions common to the Member States and the ECHR.

There is nothing to prevent this provision from being deleted, since the rights laid down in the ECHR have already been incorporated into the Charter, which is already recognised (by the Court of First Instance and the Advocates-General of the Court) as being the best distillation of the Member States' common constitutional traditions as regards fundamental rights (Case T-54/99, Court of First Instance judgment of 31 January 2002, max-mobil).

2. Another problem concerns the preamble to the Charter, which could be kept in its existing form if the Charter became a Protocol, but which would have to be incorporated into the preamble of a new treaty and constitute the first part thereof if the Charter were to be incorporated.
3. There is still the issue of the 'duplication' of treaty articles in the Charter. This issue has already been dealt with briefly in connection with the cross-reference clauses.

If we examine this aspect more closely, we could draw a distinction between two types of duplication:

- on the one hand, the treaty articles which are not just fundamental rights but which also provide a legal basis upon which the legislator is authorised to act (e.g. Articles 12, 13, 141, 39 and 40 of the EC Treaty). The two bodies of text should therefore continue to coexist.
- on the other hand, the treaty articles which contain only citizens' rights (such as Articles 18 and 19 of the EC Treaty) and which are a mere repetition of the rights contained in the Charter, could be deleted.

IV. The effects of Charter incorporation on appeals procedures

Should the Charter be incorporated into primary law and be made binding, this would have a number of effects as regards the powers of the Court of Justice.

1. Article 46(d) of the EU Treaty

First of all, I entirely agree with the idea contained in your first working memo, in which it is suggested that Article 46(d) of the EU Treaty should be amended in order to enable the Court of Justice to carry out judicial review for the purpose of ensuring that actions by EU bodies and institutions are in accordance with the Charter, as are those of the Member States when the latter implement EU law. This minimal adjustment is needed in order to bring the Treaty into line with the case law established by the Court which, since the Amsterdam Treaty came into force, has included the Member States in monitoring observance of fundamental rights when they act within the scope of Community law.

2. Extending the Court's powers to the third pillar

Consideration should likewise be given to whether and how the Court of Justice should play its role as a constitutional court in respect of justice and internal affairs (third pillar) and in Title IV of the EC Treaty. This should in principle be done in the same way as under traditional Community law.

This concerns the amendment to Article 35 of the EU Treaty and Article 68 of the EC Treaty.

I shall merely point this out, since the details of such a revision should be considered in the context of the general design of the new treaty and within the working party on justice and home affairs.

3. Improvements to the procedure for appeals by individuals

To round off this chapter, consideration should be given to the ways in which those who enjoy fundamental rights (i.e. private individuals or legal persons) are able to assert their rights before the courts.

There are at least two possibilities:

- either through the creation of a new appeals procedure based on the German model of a constitutional appeal ('Verfassungsbeschwerde')
 - or by means of an amendment to the terms and conditions of the existing Article 230(4) of the EC Treaty.
- (a) Given the current state of Community law and taking into account existing appeals procedures, the first option strikes me as excessively ambitious. A constitutional appeal (which would require other means of redress to be exhausted) would further prolong the duration of procedures. Furthermore, matters relating to fundamental rights may usefully be dealt with in appeals to national courts with the possibility of a reference for a preliminary ruling or in direct appeals lodged by individuals.
- (b) As regards Article 230(4) and the Court's highly restrictive interpretation of the criterion '*of direct and individual concern*', it may usefully be considered whether or not the terms and conditions should be amended so as to allow private individuals and legal persons easier access to a judge, although without opening the door too wide and thereby allowing mass appeals.

This question is of topical interest: in his conclusions of 21 March 2002, Advocate-General Jacobs called for a degree of openness and acknowledged that an individual had a right of appeal '*where, to a significant extent, a measure is, or may be, damaging to his interests*'.

We still need to wait until the day after tomorrow (until 25 July, when the Court is to issue its judgment in the above-mentioned case) in order to know whether or not there has been any development in case law or whether a revision of Article 230(4) of the EC Treaty will have to be envisaged.

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V. Accession to the ECHR

The final question is that of deciding whether or not, once the Charter has been incorporated into Community primary law, there will still be a need for accession to the ECHR. A reply in the affirmative has been received from the recognised authorities (such as the Presidents of the two Courts concerned) and also from the European Parliament.

It is broadly agreed that the two options – the adoption of a binding Charter **and** accession to the ECHR – are complementary to one another and are not alternatives.

A number of legal questions need to be answered before such a statement can be made.

1. First of all, what is the point of accession if more extensive protection is available under EU law?

Answer: even if that is the case, the Court of Justice could arrive at a restrictive interpretation which would require a means of external review (to which, incidentally, all the Member States and their constitutional or supreme Courts are already subject).

2. Secondly, would accession to the ECHR not be incompatible with the autonomy of Community law and, in particular, with that of the Court of Justice (which is the highest body entitled to interpret EU law)?

Answer: the Court of Justice's monopoly on interpretation is not affected by accession to the ECHR. In its opinion 1/94 on conformity between the EEA and the EC Treaty, the Court was in favour of setting up another court whose task would be to interpret and apply the rules drawn up under the agreement.

EU accession to the ECHR is a comparable situation and, therefore, does not therefore undermine the Court's autonomy.

In any case, following EU accession the Court of Human Rights will not become a supreme court vis-à-vis the Court of Justice, just as it has not become so vis-à-vis the Member States' supreme courts. Its area of competence will continue to be restricted

to monitoring observance of the fundamental rights laid down in the ECHR. It will not be allocated any other power. The Court of Justice will retain sole responsibility for settling disputes both between the Member States and between the Member States and the institutions.

The advantages of accession are obvious: the EU will subject itself to the same external judicial review as its Member States whilst, at the same time, there will be uniform interpretation of the ECHR provisions (which is already envisaged in Article 52(3) of the Charter).

3. As regards the technical arrangements for accession, it is clear that the Treaty should provide a specific legal basis for that purpose in the wake of Opinion 2/94 of the Court of Justice (which took the view that Article 235 [now 308] is not adequate as a legal basis for accession).

The alternative arrangements imaginable (ranging from a referral mechanism to a right of appeal to the Court of Human Rights without accession) strike me as neither appropriate nor in accordance with Community law.

VI. Conclusion

The first Convention on the Charter was a success: it provided a complete text of the fundamental rights derived from the constitutional traditions and the international obligations common to the Member States.

It was designed – thanks in particular to the general and final provisions – as though it were to be incorporated into a constitutional treaty.

From Parliament's point of view there is nothing to prevent it from being incorporated as it stands, subject to a few purely technical adjustments to the cross-reference clauses, depending on the way in which the Charter is to be incorporated into a constitutional treaty.

SPEAKING NOTE

Speech by Jean-Claude PIRIS ¹ to the Convention Working Group on the Charter of Fundamental Rights of the EU (23 July 2002)

Taking account of the mandate of the Working Group ², and of the Note from the Praesidium ³, I shall mainly address the question of the procedures required for integrating the Charter into the Treaties. My comments will be based on the political hypothesis of the Charter being incorporated either into the TEC, or into a unified TEU ("constitutional Treaty") embracing the current TEC. I will also address the question of possible EU/EC accession to the European Convention on Human Rights.

INTRODUCTORY COMMENTS:

The aim of the Charter, as laid down by the European Council ⁴, is neither to create new fundamental rights, nor to free existing rights from the conditions and limits imposed on them by legal texts currently in force, nor to address the Member States directly. As the preamble to the Charter points out, its aim is to make fundamental rights "*more visible*" and to "*reaffirm*" those rights "*with due regard for the powers and tasks of the Community and the Union*".

The "*Text of the explanations*" relating to the Charter ⁵, which played a decisive role in making it possible for certain Member States to adopt the Charter, and which was approved by the Praesidium

¹ Mr PIRIS, Legal Adviser to the Council of the European Union, Director-General of the Council Legal Service, stated that he was speaking in a purely personal capacity.

² CONV 72/02 of 31 May 2002.

³ SN 2565/02 of 10 June 2002.

⁴ Presidency conclusions of the European Council held on 3 and 4 June 1999, paragraph 44: "*The European Council takes the view that, at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident*".

⁵ CHARTE 4473/00 CONVENT 49 of 11 October 2000.

of the previous Convention, sets out the origin of each of the rights reaffirmed by the Charter. It also recalls the conditions and limits attached to those rights by the TEC, the ECHR or by case-law ⁶.

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My comments will be divided into two main parts:

I. Would straightforward incorporation of the Charter into the Treaties, without any modification, give rise to risks of legal uncertainty and a lack of clarity?

II. Are Articles 51 to 53 of the Charter sufficient to overcome those risks and, if not, what technical arrangements would it be appropriate to make to ensure greater clarity and legal certainty, while fully respecting the substantive content of the Charter?

I will then say a few words on the legal implications of options other than incorporation of the Charter into the Treaties, and I will end by considering the question of possible EU (EC) accession to the ECHR on the same basis as a State, or its functional accession.

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⁶ Given the clarifications which it contains, it would be sensible to examine the possibility of taking over this text in an appropriate fashion, for example as a declaration annexed to the final act of the IGC which decides to incorporate the Charter into the Treaty.

**I. WOULD INCORPORATION INTO THE TREATY OF THE CHARTER AS
CURRENTLY FORMULATED GIVE RISE TO RISKS OF LEGAL UNCERTAINTY
AND INSUFFICIENT CLARITY?**

As stated in the mandate of the Working Group and the Note by the Praesidium, the Charter should be considered as adopted, without amendment to its substantive content. The final provisions of the Charter, particularly Articles 51 and 52, are an essential part of that substantive content:

under **Article 51(1)**⁷, the Charter is not addressed to the Member States acting in the framework of their national competences. It is addressed exclusively to the Union's institutions. It is only addressed to the Member States when they are implementing the law adopted by those institutions of the Union.

under **Article 52(2)**⁸, the rights enshrined in the Treaty and reflected by the Charter shall be exercised under the conditions and within the limits defined by the Treaty.

under **Article 52(3)**⁹, the meaning and scope of the rights guaranteed by the ECHR and reproduced in the Charter shall be the same as those conferred by the ECHR.

⁷ "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers".

⁸ "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".

⁹ "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

These provisions constituted a condition for the approval of the Charter. To be certain of complying with them when incorporating the Charter into the Treaty, there is a need for a thorough legal scrutiny of the Charter. This examination shows that the Charter contains some differences in relation to the provisions of the TEC and the ECHR ¹⁰.

I would like to make four comments on this subject:

(1) ***Some provisions of the Charter relate to areas in which the Treaties have not conferred competence on the EC***

Some provisions of the Charter relate to areas where the Community does not have competence, which is reserved to Member States by virtue of the principle of the allocation of competence (see first paragraph of Article 5 of the TEC). In this respect one might mention Article 28 of the Charter on the right of collective bargaining and action, which includes the right to strike, whereas this right is expressly excluded from the Community's competence by Article 137(6) of the TEC. Article 2(2) of the Charter on the death penalty, Article 4 prohibiting torture, Article 14 on the right to education, Article 34 on the entitlement to social security benefits and social assistance, and indeed Articles 48, 49 and 50 on criminal law, might also be cited.

¹⁰ On this subject, see the matching results of the studies presented by Mr Rodriguez Bereijo on "The protection of fundamental rights" during the seminar on the "Present and future of the Court of Justice of the European Communities" held in Madrid on 25 October 2001, and the studies presented at the colloquy organised by the Commission on 15 and 16 October 2001, as below:

Professor Grainne De Burca: "Human Rights: the Charter and beyond"

Professor Jacqueline Dutheil de la Rochère: "Droits de l'homme : la Charte des droits fondamentaux et au-delà" ("Human Rights: the Charter of Fundamental Rights and beyond").

Professor Christopher McCrudden: "The future of the EU Charter of Fundamental Rights".

The obligation to respect fundamental rights is not to be placed on the same level as competence to legislate, since the latter depends on the existence of a legal basis in the Treaty. That said, Article 51(1) imposes an obligation on the institutions and bodies of the Union not only to respect the provisions of the Charter but also to promote its application. The text states that they should do so "in accordance with their respective powers". But how? Could they promote the application of rules relating to matters where they have no competence? How can an article prohibiting torture be justified in a text which is only addressed to the institutions of the EU/EC and not to the Member States except when they are implementing Union law? There is a constant ambiguity in the text in that it appears to be addressed directly to the Member States, or to enlarge the existing competences of the European institutions, or to do both of these, when in fact each of these three hypotheses has in principle been ruled out.

(2) **Some provisions of the Charter draw on provisions in the TEC or the ECHR, but modify them**

Some articles of the Charter, which deal with an area covered by the TEC and the ECHR, contain provisions which differ from those texts. This is the case with the principle of non-discrimination ¹¹: drawing on Article 13 of the TEC and Article 14 of the ECHR, Article 21(1) of the Charter ¹² provides for the prohibition of any discrimination based "on any ground such as " a range of examples, whereas Article 13 of the TEC ¹³ confers competence on the Community to take appropriate action to combat discrimination based on a smaller number of matters, which are not just quoted as examples (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation).

¹¹ This also applies to the right to marry: compare Article 9 of the Charter with Article 12 of the ECHR.

¹² In the "Text of the explanations" of the Charter (4473/1/00 REV 1), Article 21 of the Charter is not mentioned either amongst those articles of the Charter whose meaning and scope are the same as the corresponding articles of the ECHR, or amongst those where the meaning is the same but the scope wider.

¹³ The text of Article 14 of the ECHR, supplemented in 2000 by Protocol No 12 to the ECHR, differs from the other two. However, it should be remembered that the ECHR is a "minimal" instrument: one can do more or better, but not less or worse. Hence, the fact that the Charter offers more protection than the ECHR is not a legal obstacle to its incorporation into the Treaties.

However, it might be queried whether the differences between Article 21(1) of the Charter and Article 13 of the TEC could give rise to uncertainty over the interpretation to be given to Article 13 of the TEC: in the cases of non-discrimination referred to in Article 21 of the Charter but not recognised by Article 13 of the TEC, such as colour, language, or membership of a national minority, would the Council be able to intervene on the basis of Article 13?

(3) **Some provisions of the Charter reproduce the wording of a right recognised by the TEC or the ECHR, but without reproducing the conditions and limits**

In the case of the TEC, this applies to the provisions on citizenship, for example Articles 39 and 40 of the Charter on the right to vote and to stand as a candidate at elections to the European Parliament and municipal elections respectively. Article 39 of the Charter lays down in a brief and apparently clear manner that: "*Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State*". Although this article corresponds to the right guaranteed by Article 19(2) of the TEC, it does not reproduce the limits to the exercise of that right which are expressly laid down in the latter: "*This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State*". These arrangements have been adopted by the Council in a Directive which will obviously have to be taken into account in determining the scope of the right referred to in Article 39 of the Charter, as would the national laws adopted to implement the Directive.

Thus, after becoming aware of his right by reading Article 39 of the Charter, the citizen would then have to refer to Article 51(2) of the Charter, then to Article 19(2) of the TEC, then to the Directive and finally to the national law relating to it, to discover that the extent of his right was not that apparently conferred by Article 39.

The same problem arises for other articles of the Charter, such as Article 40 on the right to vote and to stand as a candidate at municipal elections (see Article 19(1) of the TEC), Article 42 on the right of access to documents (Article 255 of the TEC), Article 43 on the Ombudsman (Article 195 of the TEC), Article 44 on the right to petition (Article 194 of the TEC), and Article 46 on diplomatic and consular protection (Article 20 of the TEC), which do not contain the limits and conditions laid down in the corresponding articles of the TEC, and which do not refer to them.

The reading of the articles of the Charter could therefore risk giving rise to legitimate expectations and infringing the principle of legal clarity: citizens are given to understand that they have some right, the possibility to obtain some benefit, or the power to exercise some competence or other, without specifying in a clear and utterly transparent fashion that that right, benefit or competence is subject to conditions and limits.

In the case of the ECHR, one might cite as an example the short Article 6 of the Charter on the right to liberty and security (*"Everyone has the right to liberty and security of person"*). The rights laid down in this Article correspond to those guaranteed by Article 5 of the ECHR, but Article 6 of the Charter does not reproduce the exceptions listed in Article 5 of the ECHR. The same applies to other articles of the Charter, which simply replicate the wording of the rights stated in the ECHR, without mentioning the exceptions and limits given there: Article 5(2) on forced labour (Article 4(3) of the ECHR), Article 7 on respect for private and family life (Article 8(2) of the ECHR), Article 10 on freedom of thought, conscience and religion (Article 9(2) of the ECHR), Article 11 on freedom of expression and information (Articles 10(1) and (2) of the ECHR) and Article 12 on freedom of assembly and of association (Article 11(2) of the ECHR). Article 15 of the ECHR, on the possibility of taking measures derogating from obligations under that Convention in time of war or other public emergency, is not reproduced in the Charter. Is the political choice that the exceptions, limits and derogations provided for in the ECHR will not apply within the EU, which is legally possible? But Article 52(3) of the Charter is ambiguous in this respect. It begins by stating that the meaning and scope of the rights contained in the Charter which correspond to rights guaranteed by the ECHR shall be the same as those laid down by the Convention, but adds that *"this provision shall not prevent Union law providing more extensive protection"*. If the Charter were to be incorporated into the Treaty, it would therefore be difficult to determine what the legal situation would be.

(4) **Some provisions of the Charter reproduce rights which stem neither from the TEC nor the ECHR and have not yet been recognised in all the Member States**

This applies for example to Article 3 (origin: Council of Europe Convention on Human Rights and Biomedicine, not yet ratified by all the Member States; the fourth indent of Article 3(2) goes beyond that Convention, with the prohibition on the reproductive cloning of human beings); Article 10 (conscientious objection: origin – the constitutions of certain Member States); Article 24 (origin: United Nations Convention on the Rights of the Child; some Member States entered reservations when they concluded it).

(5) **Some provisions of the Charter lack precision**

Although, according to its preamble, the Charter contains "*rights*", "*freedoms*" and "*principles*", it does not state which provisions of the Charter contain respectively "*rights*", "*freedoms*" or "*principles*", nor what are the consequences of this division into three categories. With the incorporation of the Charter into the Treaty, this lack of distinction between those provisions of the Charter which contain "*rights*" and those which contain "*freedoms*" or "*principles*" could lead to risks of legal uncertainty and the creation of legitimate expectations. This might be the case, for example, with Article 25 ("*the Union recognises and respects the rights¹⁴ of the elderly to lead a life of dignity and independence and to participate in social and cultural life*") and Article 33(1) ("*the family shall¹⁴ enjoy legal, economic and social protection*"), where the wording seems to indicate that this is a question of rights and not of principles.

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¹⁴ My underlining.

I now come to the second stage of my analysis, in which I will endeavour to answer the following question:

II. ARE THE GENERAL PROVISIONS OF THE CHARTER (ARTICLES 51 TO 53) SUFFICIENT TO OVERCOME THESE RISKS AND, IF NOT, WHAT MINIMAL TECHNICAL ARRANGEMENTS COULD BE MADE TO ENSURE GREATER LEGAL CLARITY AND CERTAINTY, WHILE FULLY RESPECTING THE CONTENT OF THE CHARTER?

(1) Articles 51 and 52 of the Charter are intended to avoid conflicts between the provisions of the Charter and those of the TEC, but are insufficient to guarantee that:

Article 51(2) of the Charter states 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"*.

Article 52(2) states that *"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"*. These two provisions appear to be necessary since, in their absence, the Charter would result in drastic modification to the Treaty on a number of points. It ensues that each article of the Charter containing rights stemming from the TEC should be read and interpreted as "**subordinate**" to the latter: the "substantive" provisions of the Treaty would prevail over those of the Charter. However, Articles 51(2) and 52(2) would risk lacking clarity if the Charter were to be incorporated into the Treaty, since the substantive articles of the Charter would have legal force equivalent to that of the other articles of the Treaty.

With legal certainty and clarity in mind therefore, a case could be argued either for clarification of these two articles (by an explicit reference to compliance with the conditions and limits laid down in other provisions of the Treaties, i.e. those which confer competence on the EC), or for the deletion of those articles, on the express condition, however, that:

every provision of the Charter is examined;

the minimal technical amendments are introduced which are necessary to ensure that none of

the provisions implies a modification to the competence conferred by the TEC; and

the conditions and limits provided by the TEC are included for those rights (e.g. Articles 39 and 40 of the Charter and Article 19 of the TEC).

Neither of these options, which are purely a matter of legal form, would modify the substantive content of the Charter. One would achieve exactly the result sought by the previous Convention, but with more clarity and legal certainty.

(2) Articles 52(3) and 53 of the Charter are intended among other things to avoid conflicts between the provisions of the Charter and of the ECHR, but their content is not clear

Article 52(3) states that: *"Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"*.¹⁵

Article 53 states that: *"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions"*.¹⁶

¹⁵ In connection with this provision, the text of the explanations contains a list of articles of the Charter whose meaning and scope are the same as the corresponding articles of the ECHR, and another list of articles whose meaning or scope are not the same as the corresponding articles of the ECHR.

¹⁶ This provision deals in an identical fashion with categories of law (international law and national laws) which do not have identical relations with Community law, which leads some people to believe that this article could be interpreted as going against the principle of the primacy of Community law as developed by the Court of Justice of the European Communities (judgment of 17.12.1970 in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR p. 1125, and judgment of 11.1.2001 in Case C-285/98 *Kreil*), and implicitly recognised by paragraph 2 of the Protocol on the application of the principles of

The apparent intention of these provisions is that, insofar as the rights of the Charter "correspond" to those guaranteed by the ECHR, their meaning and scope (including, a priori, their conditions and limits), should be the same as those provided by the ECHR. However, the same article provides that this provision *"shall not prevent Union law providing more extensive protection"*, which corresponds to the fact that the ECHR constitutes a minimum standard. Since all the articles of the Charter would effectively, by dint of being incorporated into the Treaty, constitute *"Union law"*, there would be an ambiguity: would the conditions and limits laid down by the ECHR apply or would they not? The Court of Justice in Luxembourg would have to decide on the matter. Insofar as the rights listed in the Charter correspond to rights guaranteed by the ECHR but are not identical, there would be a risk of divergent interpretations emerging from the two Courts.

(3) Since Articles 51 to 53 prove insufficient, minimal technical amendments to the Charter would therefore seem appropriate

It emerges from the legal analysis which I have just set out that Articles 51 to 53 of the Charter would only be sufficient if the Charter maintained its current status, or if the status conferred on it were subordinate to the other provisions of the Treaties; but they would not be sufficient to establish full legal clarity and certainty if the Charter were to be incorporated as currently worded into the Treaty, thus giving all its articles a binding legal force identical to that of all the other articles of the Treaty. This incorporation would infringe the principle of legal certainty and the objectives of simplification and visibility ¹⁷. Minimal technical

subsidiarity and proportionality which provides that *"the application of the principles of subsidiarity and proportionality...shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law.."*. Some feel that if the last part of Article 53 of the Charter were to be incorporated into the Treaties it would highlight the significance of the differences between the wording relating to fundamental rights in Union law and the constitutions of the Member States, thus increasing the risk of conflict between the Court of Justice of the EC and national supreme courts (see Ms Dutheil de la Rochère, 15.10.2001).

¹⁷ The incorporation of the Charter into the Treaty would have the effect of rendering applicable the provisions of the TEC relating to the Court of Justice. The Court could have violations of the Charter referred to it, either in the form of requests for a preliminary ruling from national courts (depending on which provisions of the TEU or TEC applied) or directly from the institutions, the Member States or

amendments to the Charter or to the Treaty would therefore seem appropriate if the Charter were to be incorporated into the Treaty.

As regards the ECHR, there would be no legal necessity to amend the Charter if the Convention and the future IGC were to decide that the Treaty (including the Charter) would offer even more protection than the ECHR than it does already in certain areas. In any case, reproducing in the Charter the full provisions of the corresponding articles in the ECHR would pose political difficulties in relation to those provisions of the Charter which represent a "step forward" in certain areas: see Article 3(2) (cloning), Article 8 (data protection), Article 9 (right for persons of the same sex to marry), Article 10(2) (right to conscientious objection), etc. If the Convention and then the Member States (at the IGC) were to confirm their desire to go further than the ECHR on these points, clear provisions to this end would have to be included in the Treaty.

As regards the EC Treaty, two avenues might theoretically be considered:

- Amendment to the Treaty: this possibility has been set aside by Article 51(2) of the Charter, according to which the Charter does not establish any new power or tasks for the Community or the Union, and does not modify the powers and tasks defined by the Treaties. This was, moreover, excluded by the Cologne European Council.
- Amendment to the Charter: if this path is followed, the Convention might wish to avoid any substantial amendment which risked calling into question the delicate compromise achieved when the Charter was being drawn up¹⁸. If this is the case, some minimal technical amendments would have to be envisaged:

Article 51(1): after *"promote the application thereof in accordance with their respective*

individuals under the conditions laid down by the Treaty. Since fundamental rights form part of the principles of law with which the Court must ensure compliance, the Court already verifies compliance with fundamental rights by the Communities and by the Member States when they are implementing Community law.

¹⁸ It would remain the case that some provisions, such as those quoted on page 4 above as well as the ambiguity mentioned on page 5, would contradict the fundamental principle stated in Article 51(1) of the Charter.

powers" add "and respecting the limits of the competences of the EC as conferred on it by other parts of this Treaty";

Articles 39, 40, 42, 43 and 44: the proposal which I made a moment ago would be the clearest, namely to include the conditions and limits laid down in the TEC when addressing the rights concerned. Otherwise, in each article, one could add "*under the conditions and limits set by Article (19), (20), (255), (194), (195) of (this Treaty/the TEC) [respectively]*". Another solution would be to replicate the conditions and limits and to delete the corresponding articles of the current TEC.

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III. WHAT WOULD BE THE LEGAL EFFECT OF OPTIONS OTHER THAN THE INCORPORATION OF THE CHARTER INTO THE TREATIES?

It might prove politically impossible to amend the text of the Charter, even in a limited fashion. If so, and as always when two different texts deal with the same question, the only reliable solution to ensure legal certainty would be to stipulate a hierarchy between the two texts, i.e. to make one have legal force **subordinate** to that of the other. At least five options are possible.

(1) The Charter could be included in the preamble to the Treaty

The text of the Charter would be reproduced, either in the preamble to the TEU, or in that of the "constitutional treaty" (in the case of a merger of the Treaties and the establishment of a "constitutional treaty"). However, according to case-law, the preamble to a Community act cannot be contrary to its enacting terms, at the risk of infringing the principle of legal certainty¹⁹. The basic principles on which this case-law is founded are equally valid for texts of primary law. The observations made earlier are therefore also applicable in this

¹⁹ See the judgment of 24.1.1995 (Case T-5/93 [1995] ECR p. II-0185), in which the Court of First Instance judged that: "*A contradiction in the statement of the reasons on which a decision is based constitutes a breach of the obligation laid down in Article 190 of the Treaty such as to affect the validity of the measure in question if it is established that, as a result of that contradiction, the addressee of the measure is not in a position to ascertain, wholly or in part, the real reasons for the decision and, as a*

case, to ensure legal clarity. Furthermore, the current form of the Charter, which is drafted in binding form (use of "shall" and wording expressing compulsion) is not appropriate for the text of a preamble.

(2) **The Charter could be "attached" ²⁰ to the Treaty in the form of a solemn declaration**

Attaching the Charter in this way would present no legal difficulty. It would reinforce the status of the Charter and its high symbolic and political value. The development of its legal force would probably be encouraged and accelerated.

(3) **Article 6(2) of the TEU could refer to the Charter**

In this case it would not be necessary to amend the text of the Charter, if it were mentioned in Article 6(2) of the TEU in terms which avoided conferring binding legal force on it. The European Parliament suggested (in 4804/00) to the IGC 2000 that reference should be made to the Charter in Article 6(2) of the TEU, using the following wording: "2. *The Union shall respect the Charter of Fundamental Rights of the European Union and fundamental rights.....*". Since this wording would confer binding legal force on the provisions of the Charter ("*The Union shall respect..*"), it would present the same difficulties as those raised by straightforward incorporation of the Charter into the Treaties. It would be possible to imagine appropriate wording by using the right vocabulary ("reflection", "confirmation", etc.).

(4) **The Charter could be both reproduced in a solemn declaration attached to the Treaty and mentioned in Article 6(2) of the TEU**

This option, which would combine the two possibilities described above, would strengthen the status of the Charter. Its status as a declaration attached to the Treaties would be reinforced by the explicit reference to it in Article 6(2) of the Treaty. Politically, one would be very close to "incorporation" into the Treaties. Legally, the development in the status and

result, the operative part of the decision is, wholly or in part, devoid of any legal justification". See also the judgment of 30.3.2000 (Case T-65/96 [2000] ECR p. II-1885).

²⁰ It would be preferable to use the verb "attach" rather than "annex" in order to avoid any ambiguity with the terms of Article 311 of the TEC.

value of the Charter would be facilitated, making it possible in future for all those involved, including the Court of Justice, to take account of the Charter, without actually conferring the force of positive law on those of its provisions which went beyond the conditions and limits provided by the TEC and the ECHR.

(5) **The Charter could maintain its current status**

What would be the consequences of maintaining its status? It would be inaccurate to say that the Charter currently lacks any legal significance, and that maintaining the status quo would deprive it of any legal force. The Charter already has great political value and a certain legal status which is likely to develop.

Firstly, the Charter already constitutes a political reference point for the implementation of Article 6 of the TEU ²¹.

Secondly, it is a highly symbolic text which is invested with definite legitimacy. The institutions are politically bound by the Charter, as their practice demonstrates. The President of the European Parliament has declared that "*.. the Charter will be the law of the assembly*". The Commission has decided ²² that any proposal for a legislative act will be scrutinised for compatibility with the Charter, and that any proposal for an act which has a specific link with fundamental rights will contain a recital specifying that the act complies with the Charter. The Council and the Parliament, as co-legislators, adopt such recitals ²³.

Thirdly, Advocates-General at the Court of Justice have already invoked the Charter, as has the Court of First Instance ²⁴.

²¹ See the Three Wise Men's report on Austria, which refers to Article 21 of the draft Charter: "*In the new Draft Charter of Fundamental Rights of 28 July 2000, Art. 21 prohibits any discrimination based on sex, race.....*"

²² SEC (2001) 380/3.

²³ There is an example of such a recital in Regulation No 1049/2001 of 30 May 2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.

²⁴ See the conclusions of Advocate-General Tizzano in Case C-173/99, Advocate-General Léger in Case C-353/99, and Advocate-General Jacobs in Case C-377/98. See also paragraph 48 of the judgment of the

In its communication of 11 October 2000 on the Charter, the Commission considers that *"it can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law"*.²⁵ Without going that far, it ensues in any event from the above that the Charter can already be regarded as constituting a sort of "soft law" which is likely to acquire more authority in future, even if its status is not explicitly altered.

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CONCLUSION

The incorporation of the Charter of Fundamental Rights into the Treaty will be an essential step in European construction. This incorporation should be carried out in such a way as to respect the imperatives of legal clarity and certainty so as to avoid any ambiguity or divergence in interpretation.

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Court of First Instance of 30 January 2002 in Case T-54/99 *MaxmobilTelekommunikation Service GmbH v. Commission*, not yet published, and paragraphs 41 and 42 of the judgment of the Court of First Instance of 3 May 2002 in Case T-177/01 *Jégo-Quéré et Cie SA v. Commission*, not yet published.

²⁵ Commission communication of 11 October 2000 (COM(2000) 644 final).

ACCESSION OF THE EU TO THE ECHR

The question of possible EU accession to the ECHR has been on the table for over twenty years, since the first Commission proposal to that effect. It has hitherto encountered obstacles of a legal nature (the present TEC does not permit accession: see Opinion 2/94 of the ECJ, of 28 March 1996 ¹) and a political nature (ensuring increase in EC competence, fears regarding the autonomy of its judicial system, problems posed by the arrangements for full EC participation in an institutional system designed for States, etc).

The fact that no solution has been found to this problem has so far been of limited practical significance, given the protection afforded to the rights of Union citizens (through the case-law of the ECJ or indirectly through that of the European Court of Human Rights). The potential for conflict between the two European courts in Luxembourg and Strasbourg is at present low-level. However, it would increase if the Charter were to be incorporated into the Treaty. In addition, the question has considerable symbolic importance in the political terms. It is anomalous that citizens cannot complain to the European Court of Human Rights regarding a possible breach of the European Convention on Human Rights by an EC institution. This anomaly will become painfully obvious and will increase the risks of disparities between the case-law of the two European Courts of Justice if it is decided to incorporate the Charter into the Treaty.

¹ [1996] ECRI-1759.

There are two main ways of putting an end to this anomaly². The solution has so far been sought in the form of straightforward EU accession, on the same basis and hence with the same rights as a State Party to the European Convention on Human Rights. Consideration could be given to another option, involving functional accession of the EC or the EU to the Convention. In accordance with the principle of subsidiarity, provision would be made for accession to be merely functional, i.e. only insofar as it proves necessary in order to deal with the questions I have just raised, avoiding some of the political obstacles mentioned above which would ensue if the EU were to accede on the same basis as a State.

² The reasons why the other options that have sometimes been mentioned would be inappropriate (requests for preliminary rulings from the ECJ to the European Court of Human Rights, creation of a special EU court or special chamber at the ECJ, etc.) would exceed the bounds of this brief summary.

A. FIRST OPTION: ACCESSION OF THE EC/EU TO THE ECHR ON THE SAME BASIS AS A STATE

MEANS

- Would require a revision of the Treaty (ECJ Opinion 2/94, 28.3.1996) and a revision of the European Convention on Human Rights, followed by negotiation of an agreement between the EU/EC and the Council of Europe.

MAIN CONSEQUENCES

- (1) Would permit citizens to seize the European Court of Human Rights in Strasbourg if they considered that an act of an EU (EC) institution had been adopted in breach of the provisions of the European Convention on Human Rights (under conditions similar to those existing at present for the States Parties: exhaustion of domestic remedies including appeals to the Court of Justice or the Court of First Instance etc.),
- (2) Would permit the EU (EC) institutions whose acts have been called into question to defend their legality before the European Court of Human Rights in Strasbourg.
- (3) Would resolve the problem posed by possible incompatibilities between the text of the Charter and that of the European Convention on Human Rights, as well as the problem of conflicts possibly arising between the case law of the two Courts, the ECJ in Luxembourg and the ECHR in Strasbourg, the risk of which could well increase if the EU Charter of Fundamental Rights were to be given binding legal force.

RELATED CONSEQUENCES

- (4) Would put the EU (or the EC) on the same level as the States Parties to the ECHR and therefore give them the same rights and obligations vis-à-vis the ECHR; thus the effect of revising the EU (EC) Treaty to allow accession to the ECHR on the same basis as a State would be to extend EU (EC) competence to all areas of fundamental rights, as it would be able to participate in revising the European Convention on Human Rights on the same basis as a State.
- (5) By aligning the EU-EC with the States Parties, the effect of revising the European Convention on Human Rights would be to enable the EU (EC) institutions to participate on an equal footing in the Strasbourg institutional system: participation in the Council of Ministers, voting rights, election of judges, etc.

B. SECOND OPTION: FUNCTIONAL ACCESSION OF THE EU/EC TO THE ECHR

MEANS

- After the introduction of an enabling article into the EU or EC Treaty and appropriate revision of the ECHR, would involve the conclusion of a Protocol annexed to the European Convention on Human Rights which would have effects identical to those of a straightforward accession for points 1, 2 and 3 above.

MAIN IDENTICAL CONSEQUENCES

- (1) EU citizens would be entitled to seize the European Court of Human Rights in Strasbourg if they considered that an act of an EU (EC) institution had been adopted in breach of the European Convention on Human Rights.
- (2) The EU (EC) institutions whose acts have been called into question would be able to defend their legality before the European Court of Human Rights in Strasbourg.
- (3) The questions raised above (possible incompatibilities between the Charter and the ECHR and possible conflicts between the case-law of the ECJ and that of the ECHR), would be settled in the same way.

LACK OF RELATED CONSEQUENCES

- (4) Functional accession would not in itself³ have any effect on EU (EC) competence.
- (5) Functional accession would not involve the EU (EC) institutions participating on an equal footing with the States Parties in the Strasbourg institutional system (participation in the Council of Ministers, voting rights under the same conditions as a State Party, election of a judge, having the same competences as the other judges⁴, participation in proceedings before the Strasbourg Court even when those institutions were not involved in a case, etc.).

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³ Naturally, extension of EU (EC) competence could perfectly well be provided for by the Convention/IGC, although as a separate issue and not as a natural consequence of the solution to the problem that concerns us here.

⁴ Article 29 of the Rules of Procedure of the ECHR, which provides for the possibility of designating "ad hoc judges" could be amended if deemed necessary, to allow the appointment of a judge for cases concerning Community/EU law. The possibility of a full-time EC/EU judge would not necessarily be excluded by functional accession.

Hearing of Michel Petite ¹
Convention Working Party
on the Charter of Fundamental Rights of the EU
and accession to the ECHR
(Brussels, 23 July 2002)

Your Convention Working Party has discussed all the aspects of the Charter in depth. I should like to return simply to the core questions that you have already gone into at length:

1. Would the Charter extend the powers of the Union?
2. The question of the application of the Charter to measures taken by the Member States;
3. The "direct effect" of rights under the Charter;
4. The relation between the Charter and its "three main sources":
 - the Charter and the rights already enshrined in the EC Treaty;
 - the Charter and the European Convention of Human Rights;
 - the Charter and the constitutional traditions common to the Member States.

My conclusion is that, if the Charter is incorporated in the Treaty, it is vital to preserve its "horizontal" provisions, with very minor drafting amendments.

¹ Director-General, Legal Service, European Commission.

1. Would the Charter extend the powers of the Union?

- The importing thing here is to bear in mind the distinction between the powers of the Union (which are limited) and the duty of the institutions to respect fundamental rights when they act. This duty applies equally to rights such as the right to strike or the freedom of religion that the institutions could well affect indirectly by their measures, even if they cannot legislate on them.²
- This traditional distinction is recognised in the Court of Justice Opinion 2/94 (on accession to the European Convention)³ and in the practice of the institutions;⁴ it is particularly clear in working paper No 3 by your Working Party's Chairman. On this basis, it seems perfectly suitable that the Charter was designed as a *full* catalogue of all the fundamental rights that the Union must respect in its action, and Article 51(2) of the Charter seems to me to state beyond a shadow of a doubt that the Charter creates no new powers and amends none of the powers conferred by the Treaties.⁵

² And there have been certain more recent extensions to the powers of the Union, in particular in the field of criminal law, introduced by the Union Treaty ("third pillar"). In particular, the double jeopardy rule in Article 50 of the Charter is already laid down in Articles 54 to 58 of the Schengen Convention, Article 7 of the Convention on the protection of the financial interests of the Communities and Article 10 of the Convention on the fight against corruption (Council Conventions under the EU Treaty). This example clearly illustrates how useful it was to include the essential guarantees in criminal matters which must be respected in third-pillar law in Articles 48–50 of the Charter.

³ See paras 27–35 of the Opinion.

⁴ See, for example, Case 130/75 *Vivien Prais v Council* [1976] ECR 1589, concerning a Council recruitment competition organised on a Jewish holiday, where the Court of Justice recognised freedom of religion as a Community fundamental right; Council Regulation (EC) No 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States (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...", and 4th recital: "Whereas such measures [i.e. those that Member States are obliged to take with a view to facilitating free movement of goods on their territory] must not affect the exercise of fundamental rights, including the right or freedom to strike"); and the mandate for the current negotiation of an agreement with the United States on legal judicial assistance in criminal matters which excludes extradition of persons running a serious risk of the death penalty.

⁵ See also J.-P. Jacqu , La d marche initi e par le Conseil europ en de Cologne, *Revue universelle des droits de l'homme*, 2000, No 1/2, p. 6; J. Dutheil de la Roch re, "La Charte des droits fondamentaux et au-del ", conference organised by the Commission on 15 and 16 October 2001, pp. 15/16.

- If the Charter itself were incorporated into one of these Treaties (your option "f"), a drafting amendment could make clear that the Charter does not affect the system of powers as defined elsewhere in the Treaty.
- The Commission already interprets the Charter in this way: it systematically vets legislative proposals for conformity with the Charter, and in appropriate cases it mentions this in a recital and in the explanatory memorandum to the proposal.⁶ But we ensure that these references to the Charter in the recital and the explanatory memorandum do not specifically support a power to legislate but merely give an assurance that the proposed measure respects fundamental rights.
- Is this result contradicted by the famous formula of Article 51(1) of the Charter, which requires the institutions and the Member States, when they implement Union law, to "respect the rights, observe the principles and *promote* the application thereof"? The answer is clearly no; in particular because the full text goes on to say "... promote the application thereof in accordance with their respective powers". The Charter shows therefore clearly here that the Union is under an obligation to "promote" only where it has powers to act in the first place.

2. Application of the Charter to measures taken by the Member States

- Article 51(1) of the Charter provides that it is addressed to the institutions and bodies of the Union, "*and to the Member States, only when they are implementing Union law*". The excellent "Explanations" of the Presidium of the Charter specify that this Article merely reproduces the case-law of the Court on this point.⁷

The legitimate question here is how far a Charter, integrated into the Treaties, *would bind the Member States?*

⁶ Cf. SEC (2001) 380/3.

⁷ The "Explanations" established by the Presidium of the Charter Convention (Document CONVENT 49, Charter 4473/00, 11 October 2000), to which this statement refers several times, give useful and important indications for a good understanding of the Charter, even if they do have no legal value. The Advocates-General at the Court of Justice already quote them when interpreting the Charter. See, for example, the opinion of the Advocate-General Mischo of 21 February 2001 in Case C-122/99 P, *D v Council*, quoting the point made in the "Explanations" that Article 9 of the Charter neither prohibits nor imposes the granting of marriage status to unions between persons of the same sex and concluding that this confirms the difference between a marriage and a same-sex union and that the Community legislature (acting in this case under the Staff Regulations of Officials) would not therefore be bound by the Charter to treat the two situations on the same footing.

- The Commission, as guardian of the Treaties, is well placed to answer this, because it is already regularly confronted with these problems in handling answers to citizens' complaints, infringement proceedings and requests for preliminary rulings in the Court of Justice.
- The existing case-law of the Court has acknowledged that Community fundamental rights are applicable to measures taken by the Member States – and its review of respect for these rights – in two cases only:
 - 1) when the Member State *applies or implements* Community law (examples: administrative measures implementing a EC agricultural Regulation; transposing a Directive) – the "*Wachauf*" rule;⁸
 - 2) when the Member State acts on the basis of a provision of derogation of the EC Treaty (such as Articles 46 and 55) allowing it to restrict the fundamental freedoms of establishment and services on grounds of public policy, public security or public health – the rule in "*ERT*".⁹ The philosophy is that these derogations must themselves respect fundamental rights.
- To designate these two situations, the Court of Justice has sometimes used the admittedly rather general formula that the Member States must respect Community fundamental rights when they act "within the scope of Community law". But in practice, the Court does limit the application of this to the two situations. In particular, in *Annibaldi* (1997),¹⁰ it held that, to make Community fundamental rights applicable, it is not enough for a Member State to act in a field, like agriculture or the environment, where the Community has powers or which are connected in one way or another with Community law; the decisive element was that the measure in question was not a specific measure transposing or implementing a Community provision.

⁸ Judgment of 13 July 1989 in Case 5/88 [1989] ECR 2609.

⁹ Judgment of 18 June 1991 in Case C-260/89 [1991] ECR I-2925; also see judgment of 26 June 1997 in Case C-368/95 *Familiapress* [1997] ECR I-3689, concerning restrictions on free movement of goods (Article 30 of the EC Treaty).

¹⁰ Judgment of 18 December 1997 in Case C-309/96 [1997] ECR I-7493.

- It is therefore important to understand that in practice the two situations referred to in the case law cover a very narrow field within the wide range of legislative and administrative measures taken by the Member States.
- This limitation is confirmed by the Charter itself, which in Article 51(1) uses the formula "when Member States implement Community law", sometimes also used by the Court of Justice,¹¹ and is more comprehensible and especially less susceptible of a broad interpretation.
- In the past the Commission has often been faced with requests to apply Community fundamental rights to the Member States. In most cases, it could immediately deny its power because it was obvious that the problem did not constitute any form of implementation of Community law (examples: the law on sects in France, the alleged violations of freedom of press in Austria or Italy, the religious freedom of Buddhist communities in Greece, the law of a Spanish autonomous Community concerning the use of a regional language).
- Some more recent cases were more delicate, because there was a certain link with Community law:
 - the alleged violation of fundamental rights by projects part-financed by the Structural Funds;
 - the issue of broadcasting licences to radio or television channels;
 - data recorded on a national identity card.

But in these cases the Commission took a very cautious line and concluded that Community scrutiny *did not apply*, the protection of the rights being therefore a matter to be governed by national powers. If the Charter is incorporated into the Treaties, therefore, one must think that the Commission and the Court of Justice will interpret Article 51(1) in the same way, applying it only in clear and specific cases of implementation of Community law by the Member States.

- The fear that the Charter could have an impact on broad fields of the Member States' national legislation and that the slightest indirect link with Community law or powers would suffice to make it applicable therefore strikes me as unfounded.

¹¹ For example in the judgment of 13 April 2000 in Case C-292/97 *Karlsson* [2000] ECR I-2737, para 37.

3. The question of "direct effect" of the Charter rights

- Certain members of the group have asked whether Charter rights, several of which are formulated as "positive duties", could have "direct effect" and be capable of being pleaded directly in the national courts. This concern relates particularly to the social Articles. I can understand their concern, but I do not believe it is warranted, for the same reasons as I mentioned a moment ago in connection with the application of the Charter to the Member States.
- The concept of "direct effect" in Community law refers to Treaty provisions which can be pleaded directly in the national courts, against national administrative authorities or even private individuals, without the need for secondary legislation to give effect to them (e.g. Article 141 of the EC Treaty on equal pay for men and women, or the four fundamental freedoms).
- But the fundamental rights under the Charter, according to Article 51(1), have limited scope: they are binding on the *institutions*, but they cannot normally be relied on in a national dispute against an administrative authority or against a private individual. The Charter, and particularly the social Articles, quite apart from the fact that it often provides for principles which are "to be observed" by the Community legislature without conferring subjective rights,¹² can therefore apply only *exceptionally* in the national context, namely when, as previously, there is a piece of Community legislation and a specific national measure implementing it.

4. The relationship between the Charter and its "three main sources"

a) The relationship between the Charter and the rights already enshrined in the EC Treaty

¹² It is clear from the Charter that a distinction is made between rights and principles [see last sentence of the preamble, and Article 51(1)]. It was also a major element for the compromise on the "social" chapter of the Charter. The approach followed in the Charter was to reflect this distinction when drafting the individual Articles. But the Convention instructed to write the Charter consciously chose not to formulate a horizontal clause distributing the Articles of the Charter into the two categories of "rights" and "principles", because it considered that the courts would be better placed to determine this case by case, having regard to developments in the academic writings. If it is now suggested that this decision should be reviewed, that is a political matter, and probably a very delicate one, rather than a legal matter.

- As you have already observed, the horizontal clause of Article 52(2) of the Charter is clear: those rights which are already enshrined in the EC Treaty and were simply reproduced in the Charter, such as citizens' rights (right to vote, to petition, to movement, etc), are governed legally by the relevant provisions of the EC Treaty. Article 52(2) is therefore a conventional referral clause.
- Admittedly, it would have been possible to restate that each of the relevant rights in the Charter applies "subject to the conditions and limits" laid down by the EC Treaty; to tell the truth, one could even have added "and the provisions for their implementation". That goes without saying, and the point is basically an aesthetic one. I quite understand the authors of the Charter, who wanted to avoid tedious repetitions. Legally, it boils down to exactly the same thing if we say it once and for all in Article 52(2).

Moreover, it is the technique used by numerous catalogues of fundamental rights in our national constitutions: the simplicity of the statement comes at a price, which is that the reader does not immediately see the full extent of the rights, including their conditions and limitations, without referring to other provisions of primary law.

- Nor do I see any *legal* incompatibility between the Articles of the Charter and the rights conferred by the Treaty. I will take the most commonly cited example of the relationship between Article 21(1) of the Charter and Article 13 of the Treaty, both relating to non-discrimination but formulated in different ways. The fact is that these two provisions have a very different scope and purpose: Article 13 of the Treaty creates a legal basis for legislative "anti-discrimination" measures applying as between private individuals. Article 21(1) of the Charter contains a directly applicable ban on discrimination, comparable with Article 14 of the Convention and with Protocol No 12 to it, but binding only on the Union institutions and bodies (and, of course, the Member States when they implement Union law). It is therefore logical that the Charter set forth all the non-discrimination criteria registered in Article 14 of the European Convention in order to fully respect the *acquis*. It is also understandable that, in the hope of providing total protection, the Charter added the criteria of Article 13 of the Treaty that are not in the European Convention.¹³

¹³ See also J. Dutheil de la Rochère, *op cit.*, p. 15.

For example, the institutions are banned from discriminating on the basis of language (Article 21 of the Charter), as they are under the current law,¹⁴ even though the Union has no power under Article 13 of the Treaty to legislate in these matters. It is difficult to see how this extremely simple situation could raise doubts as to the interpretation to be given to the legal basis of Article 13 of the EC Treaty.

- At the end of the day, I think it is very important for certainty as to the law to keep such a referral clause in Article 52(2), even if "full" incorporation of the Articles of the Charter in a new Basic Treaty (option "f") could entail a drafting change to make it clear to *which* legal text(s) the clause refers. The question whether or not the Charter, following incorporation into the Treaties, would have the same legal status as the Treaties is of no importance here as long as the "direction" of the referral is sufficiently clear.¹⁵

b) The Charter and the European Human Rights Convention

- Here the picture is a little more complex, as several premises have to be reconciled by the Charter:
 - first, since the Convention is a minimum standard (see Article 53), the Charter was free, like any national Constitution, to formulate rights differently, to grant better protection, in particular because of the developments in society since 1950;
 - second, there was the concern to ensure harmonious development between the two European legal orders and their two Courts;

¹⁴ If it is accepted as a starting point that the Union institutions are already required by the case law of the Court of Justice to adhere to ECHR standards *de facto* as if it formed part of Union law, then the institutions could not practise language-based discrimination, for example, without violating Article 14 of the ECHR. This does not, of course, preclude differences in treatment which are "justified on objective grounds" for the purposes of the case-law of the Strasbourg Court, such as the organisation of a recruitment competition for officials of a specific language to meet a specific need.

¹⁵ In relation both to Article 52(2) and to Article 51(2) of the Charter, the argument according that such referral clauses could not function if the Charter had a legal status equal to the Treaties (options "e" or "f") is erroneous. This point is illustrated by the fact that in the existing Treaties, there are already numerous referrals made by a part of the Treaties to others, even if all the Articles of the Treaties have identical legal status: thus, although Articles 21 and 194 and 195 of the EC Treaty on the right to petition and the right to refer a matter to the mediator are of identical legal status, it is clear that Article 21 is merely a referral clause and that the contents of the rights are actually defined by Articles 194 and 195.

- then, the importance of the principle of the autonomy of Community law;
 - and finally, the aim of reflecting and preserving in the Charter the "progress" already made in Community legislation and case law in relation to the standard of protection offered by the European Convention.
- The compromise found by the previous Convention met with a broad consensus and was also considered satisfactory by the representatives of the Council of Europe. This compromise is reflected in Article 52(3) of the Charter, which puts forward three principles:
 first: the European Convention represents in any case a minimum standard which must be respected in the interpretation of all the Articles of the Charter;
 second: those Articles of the Charter which were taken over from the Convention and therefore "correspond" to it have the same meaning and scope as in the European Convention. As the Explanations of the Presidium stress, the word "meaning" also naturally includes the limitations included in the various specific clauses of the Convention. Here again, out of a concern to avoid making the catalogue of rights difficult to read, the Charter preferred not to repeat all these individual clauses but to include them by reference in the horizontal clause of Article 52(3).¹⁶
 To me it is unthinkable that the Court of Justice might be misled on this point and deduce from the Charter, for example, that no limitation of the freedom of expression was possible in the interest of preventing crime or protecting the rights of others;
 third: Union law can go further than the European Convention. It goes without saying for the legislature. But it also applies to certain rights of the Charter itself, which go beyond the standard of the Convention because Community law is already ahead of it. Examples include: the right to a fair trial (Article 47 Charter),¹⁷ the double jeopardy rule (Article 50),¹⁸ or Article

¹⁶ The fact that Article 15 of the ECHR, allowing derogations from rights in the event of war or of other public dangers threatening the life of the nation, does not appear in the Charter is not problematic. The Charter does not bind the Member States in their autonomous action, and the ECHR does not therefore limit their possibilities of using the Article 15 derogation. A corresponding clause in the Charter might be thought superfluous, because national defence in the event of war and the maintenance of law and order are the responsibility of the Member States, and the Union institutions, to which the Charter is primarily addressed, have no power to take such measures or to prevent the Member States from doing so (Article 297 of the EC Treaty).

¹⁷ See the judgments of the Court of Justice in Case 222/84 *Johnston* [1986] ECR 1651, para 18 Case 222/86 *Heylens* [1987] ECR 4097, para 14 and C-97/91 *Borelli* [1992] ECR I-6313, para 14, which recognise the "right to a fair trial" whether the case is at civil law (Article 6 of the ECHR) or public law (as the opinion of Advocate General Ruiz-Jarobo Colomer stresses in Cases C-65 and 111/95 *The Queen v Secretary of State for the Home Department, ex parte Shingara and Radiom* [1997] ECR I-3343, para 75).

21 of the Charter, which combines the non-discrimination catalogues of both the Convention and Article 13 of the Treaty.

- Finally, the Presidium Explanations list the Charter rights which correspond, at the present time, to the European Convention. The Charter did not include this list in Article 52 itself, in order to avoid solidifying the situation and prejudging future developments in the Treaties, the secondary legislation and the case law. That seems reasonable to me; who, after all, wishes to anticipate the development of the European Convention and Union law 30 years hence?
- In light of all these elements, I really do not see how Article 52(3) could be repealed or how parts of it could be withdrawn or amended without calling into question the overall balanced solution that I have just described.

But then, of course, the question arises whether incorporating the Charter might lead to differences of case law between Strasbourg and Luxembourg: but it must be admitted that Luxembourg judgments, like judgments given by national constitutional courts, can already be contradicted by a judgment given in Strasbourg; historical instances already exist. On the other hand I know of no case where the Court of Justice disregarded an earlier judgment from Strasbourg. Having read Article 52(3) and the reference to the two Courts in the Preamble to the Charter, I think it unlikely that the Court of Justice will change its mind in the future, and the two Courts will feel that their cooperative approach has been upheld.

- Of course, Union accession to the Convention would be the ideal way of securing perfect consistency, because an applicant who felt that a Luxembourg judgment was not compatible with a Strasbourg decision could have the point checked directly; but that applies whether or not the Charter exists.

¹⁸ See the references to the Schengen Convention and other Conventions, *supra*.

c) The Charter and common constitutional traditions

- You have also considered the status of the rights of the Charter which are not based on the Treaty or the European Convention but on the common constitutional traditions of the Member States: is the Charter sufficiently clear on those rights, bearing in mind that it contains no referral provision comparable with those concerning the Articles coming from the Treaty and from the European Convention?¹⁹
- Could we also imagine a clause referring to the "common constitutional traditions" in the horizontal clauses of the Charter?
- We could think about it. But this clause would not be easy to draft, since there is no single written text of reference for the "common constitutional traditions" but a variety of sources of inspiration. The Court of Justice has admittedly used these sources, but with a wide margin of discretion; it is illusory to believe that it could define these rights with an identical meaning and scope to those of the Constitutions of the 15, one day 27, Member States; if it tried to do so, all it could produce would be a rather mediocre lowest common denominator.
- One last point: the Court of Justice regularly refers not only to the European Human Rights Convention and the common constitutional traditions but also to other sources, and in particular to other international conventions such as the European Social Charter,²⁰ the UN International Covenant on Civil and Political Rights²¹ and International Labour Organisation Conventions.²² According to its traditional formula, it "*draws inspiration from ... the guidelines supplied by*

¹⁹ But note that Article 52(1) of the Charter contains a rule concerning *limitations* of fundamental rights which accurately restates the formula used in the case law of the Court of Justice. In particular, the requirement in Article 52(1) that "the meaning and scope of those rights" should always be respected is not a "Strasbourg import" but a longstanding feature of Luxembourg case law; cf., for recent confirmation, the judgment given on 13 April 2000 in Case C-292/97 *Karlsson* [2000] ECR I-2737, para 45 (judgment mentioned in the Presidium Explanations).

²⁰ Case 149/77 *Defrenne* [1978] ECR 1365, para 20; Case 24/86 *Blaizont* [1988] ECR 379, para 20.

²¹ Among numerous examples, see Case 374/87 *Orkem* [1989] ECR 3283, para 18; C-249/96 *Grant* [1998] ECR I-621, paras. 43-47.

²² Among numerous examples, Case 149/77 *Defrenne* [1978] ECR 1365, para 20; Case C-158/91 *Levy* [1993] ECR I-4287.

international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories" (Opinion 2/94, para. 33).

- What matters here is that the Court of Justice does not feel inhibited from seeking inspiration in such agreements solely because certain Member States expressed reservations against them. This is normal because its case law concerns only the fundamental rights to be respected in the application of Community law and therefore leaves intact the autonomous action of the Member States. The line of the Court of Justice is in addition without alternative, since certain Member States even expressed reservations with regard to the European Convention and its protocols; the Court of Justice never agreed to implement a version of the Convention "reduced" by the amount of all the national reservations made by all the Member States to this text, which would considerably reduce the protection offered by Community fundamental rights.
- The Charter proceeded in the same way as the Court of Justice: it was inspired for example by the Convention on the Rights of the Child or Article 2 of the Protocol to the European Convention on the Right to Education, despite the reservations entered by certain Member States against them. In taking over the rights of the European Convention, it certainly could not have incorporated all the national reservations expressed by each of the fifteen Member States with regard to each Article of the Convention. However, this means neither that the Charter incorporates all these instruments as they stand in Union law²³ nor that it impacts on existing national reservations; these preserve their current scope, which results from the autonomous action of the individual States.

5. Summary: essential to keep the horizontal provisions

- To summarise, I have set out to show that it is very important, not to say essential, to preserve the Charter's horizontal provisions, because they are central to its comprehension and its smooth incorporation into the primary legislation. And our experience at the Commission already shows us that without these clauses it would be difficult for us to explain to citizens who write to us why the Charter does not apply in their dispute with a national authority, or why it does not

²³ The New York Convention on the rights of the child contains 46 Articles, but Article 24 of the Charter is merely inspired by it to formulate, in three short paragraphs, the few most fundamental elements on which there was a consensus in the "Charter" Convention, without making any reference to the New York Convention, which could have been interpreted as incorporating the Convention in the Charter without more. The same applies to the relationship between Article 3(2) of the Charter and the Oviedo Convention on human rights and biomedicine.

replace their own Constitution.²⁴ These clauses could in theory remain the same under any mode of incorporation of the Charter which preserved it as a technically separate instrument (i.e. reference or protocol). If the Articles of the Charter were incorporated in a new Treaty or the Union Treaty, minor drafting changes would be needed in Article 51(2) and (2).

6. Accession to the European Convention

- Lastly, by way of codicil, I would like to add a few legal points on the subject of Union accession to the European Convention, without of course giving an opinion on the political question for or against accession.
- In my opinion, the principle of the autonomy of Community law is no legal obstacle to accession. The various arguments were well presented in CONV 116/02; in particular, review by the Strasbourg Court covers only respect for international law obligations, which the Court of Justice already admitted in Opinion 1/91 on the draft EEA agreement²⁵ (para 40: "The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created by such an agreement as regards the interpretation and application of its provisions").
- Here I would like rather to stress the problems which arise currently from the fact that the Union is not involved in the Strasbourg system. The Member States are increasingly frequently held indirectly liable in Strasbourg in cases which really concern the Union institutions. The argument is that States could not, by transferring sovereign powers to Brussels, escape their obligations under the Convention.

²⁴ It seems that it is especially for this kind of political and symbolic reasons that Article 53 of the Charter stresses that it neither limits nor affects human rights recognised, in their respective fields of application, by international conventions and the Member States' constitutions. At the same time, the formula "in their respective fields of application" in Article 53 of the Charter makes it possible to exclude any interpretation of this clause jeopardising the principle of the primacy of Community law, because it follows precisely from the case-law of the Court relating to this principle that provisions of national law which conflict with a provision of Community law (including the Charter incorporated in the Treaties) in a given case in point *cannot be applied*. See J.-P. Jacqué, in *Revue universelle des droits de l'homme*, 2000, No 1/2, p. 49.

- This reasoning is already recognised by the Strasbourg Court for provisions of primary law²⁶ and for the indirect control of Directives.²⁷ Currently, in *Senator Lines*, a case pending in Strasbourg, the 15 Member States are required to defend themselves against an application which concerns exclusively a Commission competition Decision upheld by the Court of Justice.²⁸ Admittedly the Member States, and the Commission as "third party"(!), pleaded that the application was inadmissible, but it is not certain that the Strasbourg Court will in future refrain from any form of review. In all these cases, it is problematic that the Strasbourg Court has to rule indirectly on Union measures without the Union being able to defend itself and without its legal system being represented by a judge in the Court.
- Finally, some have expressed concern that accession to the European Convention might create new Union powers as regards fundamental rights, as the EC or the Union would be a contracting party and could therefore take part in negotiations for amendments to the Convention. This question is easily settled: the status of contracting party to the Convention does not inevitably mean that the Union would acquire general power as regards fundamental rights, including for legislation at internal level. The aim of EC or Union accession being only to submit the institutions to the fundamental rights of the Convention and to external review by the Strasbourg Court, it is not obvious how a legal basis in the Treaty confined to this end would create such a general power. In any case, techniques to clarify that a legal basis in the Treaties allowing accession does not have this side-effect are easy to devise. An example might be a statement – similar to that made in the context of the Convention on the Law of the Sea – clarifying that the powers of the EC/EU are limited.
- In any case, straightforward EU/EC accession to the Convention appears by far preferable to the alternatives that have sometimes been put forward.²⁹ In particular, only accession by the EU/EC as a contracting party to the Convention would give it the same rights as the other parties to participate in the legal system in Strasbourg (in particular to elect a full-time rather than just an

²⁵ [1991] ECR I-6079.

²⁶ See the judgment of the Strasbourg Court of 18.2.1999 in case 24833/94 *Matthews v The United Kingdom*, concerning the Act of 1976 concerning the elections to the European Parliament, from which Annex II excluded Gibraltar.

²⁷ See the judgment of the Strasbourg Court of 15.11.1996 in case 17862/91 *Cantoni v France*.

²⁸ Case 56672/00 *DSR Senator Lines v the 15 Member States*.

²⁹ Without being able to study the subject in greater detail here, it will be noted that the proposal to set up a procedure for reference or consultation of the Strasbourg Court of Justice by the Luxembourg Court is

ad hoc judge representing Community law, full rights of participation in procedures in the Court, participation in the Ministerial Committee when it supervises execution of judgments). This would reflect the fact that the Community (or the Union in future) has separate legal personality from the Member States and that it has developed its own legal order which must be represented in the judicial system of Strasbourg.³⁰ On the other hand, the hypothesis of a special status, with the EC/EU institutions subject to review by the Strasbourg Court without the Community or the Union acceding formally to the Convention as a contracting party, is questionable: would a such regime guarantee adequate representation and participation of the EU/EC in the Strasbourg system? And would it even be compatible with the nature of the review by the Strasbourg Court, which extends only to respect for international law obligations by the contracting parties?³¹

problematic for a number of reasons, in particular because it would considerably delay the resolution of disputes.

³⁰ It should be noted that recommendations in the recent study by the Council of Europe Human Rights Steering Committee (see working 08 paper of Mr Vitorino) follow the same lines.

³¹ Cf. Article 19 ECHR.