

Working Group II

Working document 23

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

From: António Vitorino, President
To: Working Group II

Subject : Compromise proposals concerning drafting adjustments in the horizontal articles

Members of the Group will find herein compromise proposals by the Chairman for drafting adjustments in the horizontal articles of the Charter (in English and French), and accompanying explanatory notes.

Compromise proposals by the Chairman for adjustments in the horizontal articles:

In Article 51 (1):

"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 **and respecting the limits of the powers of the Union as conferred on it by other parts of [this Treaty / the Constitutional Treaty].**"

Article 51 (2):

"This Charter does not **extend the scope of application of Union law or** establish any new power or task for the Community or the Union or modify powers and tasks defined **by the other [Chapters / parts] of [this Treaty / the Constitutional Treaty].**"

Add to Article 52:

"52(4) Insofar as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

"52 (5) The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies of the Union, and by acts of Member States only when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

"52 (6) Full account shall be taken of national laws and practices as specified in this Charter."

Propositions de compromis du Président pour des adaptations dans les dispositions horizontales:

Article 51 (1):

"Les dispositions de la présente Charte s'adressent aux institutions et organes de l'Union dans le respect du principe de subsidiarité, ainsi qu'aux Etats membres uniquement lorsqu'ils mettent en oeuvre le droit de l'Union. En conséquence, ils respectent les droits, observent les principes et en promeuvent l'application, conformément à leurs compétences respectives **et dans le respect des limites des compétences de l'Union telles qu'elle lui sont conférées par les autres parties du [présent traité/traité constitutionnel].**"

Article 51 (2):

La présente Charte **n'étend pas le champ d'application du droit de l'Union, ni** ne crée aucune compétence ni aucune tâche nouvelle pour la Communauté et pour l'Union et ne modifie pas les compétences et tâches définies par **les autres chapitres du [présent traité/traité constitutionnel].**

Ajouter à l'article 52:

"52(4) Dans la mesure où la présente Charte reconnaît des droits fondamentaux tels qu'ils résultent des traditions constitutionnelles communes aux Etats membres, ces droits doivent être interprétés en harmonie avec les dites traditions."

"52 (5) Les dispositions de la présente Charte qui contiennent des principes peuvent être mises en œuvre par des actes législatifs et exécutifs pris par les institutions et organes de l'Union, et par des actes des Etats membres uniquement lorsqu'ils mettent en œuvre le droit de l'Union, dans l'exercice de leurs compétences respectives. Leur invocation devant le juge n'est admise que pour l'interprétation et le contrôle de la légalité de tels actes."

"52(6) Les législations et pratiques nationales doivent être pleinement prises en compte comme précisé dans la présente Charte."

Explanatory notes:

1. The present compromise proposals aim at taking due account of concerns raised and suggestions made in the discussions of the Group and in working documents, in particular documents n° 1 by Mr. McDonagh, n°s 4 and 16 by Baroness Scotland, and n° 14 by Mr. MacCormick. They have been drafted in the spirit of respecting fully the compromise reached by the previous Convention on the content of the Charter, while achieving greater clarity of certain elements of that compromise, which according to certain members of the Group would be desirable *in the event of a Charter becoming legally binding*.
2. The proposed adjustments to Article 51 (1) and (2) are designed to reflect the outcome of the Group's discussions on the relationship between the Charter and the allocation of competences between the Union and the Member States. The words "(this Charter) *does not extend the scope of application of Union law...*" merely confirm established case law¹.
3. The suggested paragraph 4 in Article 52 serves to ensure an interpretation of the Charter which is in harmony with the common constitutional traditions; this rule of interpretation is based on current Treaty language (Article 6 § 2 TEU) and takes due account of the approach to common constitutional traditions followed by the Court of Justice, as explained by Judge Skouris at the hearing of 17 September.
4. The proposal of a new Article 52 (5) confirms the distinction between rights and principles which has been an important element - already expressed in the Preamble and in Article 51 (1) - of the final compromise of the Charter. It attempts to encapsulate, in a clear legal definition, the understanding of the concept of "principles" which has marked the work of the previous Convention on this point and been mentioned in the discussions of the Working Group by members of that Convention. Principles are different from subjective rights in that they may call for implementation through legislative or executive acts; accordingly, they become significant for the Courts when such acts are interpreted or reviewed. This is consonant both with case law of the Court of Justice² and

¹ See the judgment of the Court of Justice C-249/96 Grant, 1998 ECR I-621, at par. 45, according to which the Community fundamental rights, while their respect must be ensured, "cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community."

² Cf. notably recent case law on the "precautionary principle" in Article 174 § 2 TEC: judgment of the CFI of 11 September 2002, T-13/99, Pfizer vs. Council, with numerous references to earlier case law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of

with the approach of the Member States' constitutional systems to "principles" particularly in the field of social law, as developed in the previous Convention by several eminent constitutional lawyers who were members of that Convention.

In addition, the proposed clause would maintain the line followed by the previous Convention to express the character of a "right" or a "principle" of individual Charter articles as best as possible in the wording of the respective articles and to leave it, on this basis and taking into account the valuable guidance provided by the "Praesidium's Explanations", for future jurisprudence to rule on the exact attribution of articles to the two categories.

5. Proposed Article 52 § 6 refers to the various articles in the Charter which, in the spirit of subsidiarity make reference to national laws and practices.

the Court of Justice C-265/85, Van den Berg, 1987 ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations, further references see Comm. Megret, tome 3, pp. 80 et seq.