

**WG II**

**Working document 28**

**Note for the Members of Working Group II**

**Subject: Reactions of Working Group members to Document WD II 27 (consolidated and updated Explanations on the Charter)**



Prof. Dr. Jürgen Meyer

Delegierter des Deutschen Bundestags  
im Verfassungskonvent der Europäischen Union

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10. Juni 2003

— Herrn  
Clemens Ladenburger  
Sekretariat des Europäischen Konvents  
Per email  
[clemens.ladenburger@consilium.eu.int](mailto:clemens.ladenburger@consilium.eu.int)

Sehr geehrter Herr Ladenburger,

vielen Dank für Ihr Schreiben vom 3. Juni 2003 und die Vorschläge zur Anpassung der Erläuterungen zum Chartatext.

Für überzeugend halte ich die Überarbeitung der Erläuterungen mit Blick auf die im Europäischen Konvent bereits erzielten Integrationsfortschritte. Ebenso entsprechen die sprachlichen Klarstellungen und die Anpassung der Referenzen zur Rechtsprechung des EuGH dem von der Arbeitsgruppe II verfolgten Ziel, die Erläuterung als Interpretationshilfe für die Chartabestimmungen zu aktualisieren.

Nicht akzeptabel ist für mich als Mitglied des ersten und des zweiten Konvents allerdings die veränderte Formulierung zum rechtlichen Status der Erläuterungen. Die im Grundrechtekonvent gefundene Formel war Teil des schwierigen Endkompromisses und sollte von zweiten Konvent schon aus Respekt vor der Erarbeitung der Grundrechtecharta nicht wieder aufgeschnürt werden.

Darüber hinaus hat es zu keiner Zeit unter den Delegierten des Europäischen Konvents eine mehrheitlich getragene Zustimmung zu einer Veränderung der Eingangsformel der Erläuterungen gegeben. Ausserdem waren die Erklärungen inhaltlich nicht Gegenstand der Beratungen im ersten oder zweiten Konvent.

Ich halte es nicht für wünschenswert, die von vielen Delegierten politisch nicht gewollte Andeutung einer Aufwertung der Erläuterungen durch die technische Überarbeitung in den Text aufzunehmen. Dies gilt umsomehr mit Blick auf eine eventuelle spätere Erklärung der Regierungskonferenz zu den Charta-Erläuterungen.

Mit freundlichen Grüßen

A handwritten signature in black ink, appearing to read 'Jürgen Meyer'.

(Meyer)

À l'attention du Commissaire

M. Antonio VITORINO

President GT II

Monsieur le Commissaire,

faisant suite à la note WGII 27 du 3 juin dernier, je tiens à vous féliciter vivement pour le soin avec lequel le travail a été fait. Personnellement, je ne partage pas la thèse, soutenue à la page 63 de la version française, concernant la distinction nette qu'il y aurait entre "droits" et "principes". Je crois, au contraire, qu'il s'agit d'une distinction partiellement dépassée, pas seulement par la doctrine, mais aussi par la jurisprudence constitutionnelle (cfr. par exemple, l'arrêt de la Cour Constitutionnelle italienne n. 309 du 16 juillet 1999 en matière de droit à la santé).

Néanmoins, je reconnais que mon opinion n'est pas importante, puis qu'il s'agit d'un travail confié exclusivement à la responsabilité des fonctionnaires-juristes et qui n'est pas soumis à la discussion et à l'approbation de la Convention. Pour cette raison, aucun renvoi et aucune mention à ce précieux travail ne peuvent être faits dans le traité constitutionnel ou, en général, dans des actes ayant une valeur juridique contraignant pour les institutions de l'Union et/ou des Etats membres.

Meilleures salutations.

Elena PACIOTTI

On. Elena PACIOTTI

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**Commissioner Antonio Vitorino  
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10 June 2003

### **Technical Explanations to the Charter of Fundamental Rights**

Thank you for your note of 3 June (WG II 27) consulting Members of Working Group about your proposed changes to the original texts of the technical Explanations to the Charter of Fundamental Rights. I attach a note detailing some specific concerns. They are relatively few in number and this reflects, if I may say so, the typically thorough and sensitive work which has been done by you and the Secretariat

As you know, the Explanations have always been a key element in my Government's consideration of the Charter. Given the tightness of the deadline, compounded by all our other tasks and absences due to the Convention I hope you will understand it if I find that I need to revert to you later on this topic after I have completed necessary further consultation with my Ministerial colleagues.

In that context, there are two general points about WG II 27 which I should like to make in this covering letter. First, as regards the identification of “principles” within the meaning of Article 52(5), it remains my Government’s view that it would be very desirable to offer a full list of the pure and hybrid principles that may be found in the Charter. Even if that is not possible we believe that the Explanations to Articles 21, 23, 25, 28, 30, 31, 32, 33 and 34(3) should mention the word principles or refer to 52(5). At the very least two examples of each type of principle under 52(3) should be offered. I propose that Articles 25 and 28 are given in the Explanation to 52(5) as examples of pure principles, and that the other example given of a hybrid principle is Article 21, not Article 33.

My second general point concerns the legal status of the Explanations. As you know, we have discussed this and I have also spoken to some other members of the Working Group. It seems to me that if the Convention is to choose legal incorporation of the Charter into the Constitution, we must ensure reference to the Explanations. In particular, I believe that we need a reference in the Constitution, recognising the interpretative status of the technical Explanations and indicating where they may be found. You say in your note that the Courts must have due regard to the Explanations when interpreting the law concerned. Specific provision is needed to ensure that outcome.

1. BARONESS SCOTLAND QC



## **AMENDED EXPLANATIONS: DETAILED COMMENTS FROM UK**

### **Art 14**

For the sake of avoidance of doubt it would be helpful to insert “or vocational and continuing training” in line 6 of the second paragraph after “which provide private education”.

### **Art 18**

It would be desirable to clarify still further that, in accordance with Article 52(2), this Article is subject to the conditions and limits in [III-162].

### **Art 21**

Replace sentence beginning “Such legislation” with “Such legislation may cover action of MS authorities (as well as relations between private individuals) in any area within the scope of EU law.”

### **Art 47**

An important linguistic point, already accepted in the provisions on the Court elsewhere in the Constitution, “the appeal system laid down by the Treaties” should be “the system of judicial review laid down by the Treaties”. Also, in the third sentence it would be more accurate here to say “general principle of Union law” rather than “right”.

### **Art 52 (which should be re-titled in the interests on accuracy, perhaps “Interpretation”)**

- In the second paragraph, “merely been restated” should be clarified: after “Paragraph 2 clarifies that” delete the remainder of the sentence and insert “that rights which were based on the TEC or TEU, and which are now found in other parts of this Constitution, remain subject to the conditions and limits now made in Parts I and III of this Constitution or Union acts made thereunder”.
- In the Explanation to 52(3) I propose that we should replace “Union legislation” with “Union law” and delete (ii) altogether.
- In the Explanation to 52(4) we consider that the last sentence should be withdrawn, leaving the substantive provision to speak for itself.



- In the Explanation to 52(5) it would be more accurate to say “principles may be implemented” (rather than “are” implemented); and in the following sentence to say that “they become significant for the Courts only when acts implementing the principles are interpreted or reviewed.”

### **Minor linguistic points**

- “have been drafted” (e.g. in line 4 of the Explanation to 51) reads oddly in English. “was drafted” would be preferable and this method could helpfully be employed throughout.
- there are some other minor points which we will pass on direct to the Secretariat.

Dear Mr Ladenburger

Many thanks to Mr Vitorino and yourself for excellent work in the paper concerning the Explanations of the Charter and on the revised Explanations themselves.

I want to record my entire satisfaction with the work that has been done. I have no amendment of substance to propose.

As I said to you last Thursday, however, it occurred to me in a conversation with Lady Scotland (to whom I am copying this) that an allusion to the Explanations in Part IV of the Treaty might be of value. My suggestion would be for an added Article IV-5 bis:

'The Explanations of the Charter annexed to the Constitution do not form part of it, and do not constitute binding law, but are recognised as a valuable [perhaps 'an authoritative'] tool of interpretation of the Articles of the Charter that comprise Part II of the Constitution.'

Yours sincerely

Neil MacCormick

Mr Antonio Vitorino,  
Praesidium of the European Convention,  
Brussels.

10 June 2003

Dear Antonio,

I am most grateful for your very helpful note of 3 June (WG II 27) concerning your proposed changes to the original texts of the Explanations to the Charter of Fundamental Rights.

The recognition in the Explanations that they are a valuable tool of interpretation of the Charter's provisions is important. As you are aware, they are an essential element in my Government's approach to incorporation of the Charter as a legally binding catalogue of fundamental rights.

The updating of the Explanations and the granting to them of appropriate legal recognition was a crucial element in the compromise reached at the Working Group. As you have acknowledged, it will be necessary for the Courts to have regard to and to take full account of the Explanations of the Charter provisions when interpreting any of its elements. Hence, when the text of the Explanations is finalised, it will be essential to ensure that they are given an explicit legal reference in an appropriate context in the Treaty. It is important that this matter be resolved at the Convention.

I fully support the amendments to the Explanations which you have proposed and we consider them to be both necessary and helpful. I wish to propose some additional amendments which would improve the text. I have also proposed a technical amendment to the Charter's Preamble and to Article 41 of the Charter (as reworded by you). These proposals are attached.

Yours sincerely,

**EXPLANATIONS OF THE TEXT OF THE CHARTER OF FUNDAMENTAL RIGHTS -**  
**AMENDMENTS PROPOSED BY MR BOBBY MCDONAGH**

Amendments are proposed below to the Charter's Preamble; to aspects of the Explanations; and to Article 41 of the Charter (as amended).

Proposed new wordings are in italics and bold lettering.

**AMENDMENT TO PREAMBLE**

**Fifth paragraph to read:**

“This Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, ***Parts I and III of the Constitution***, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights”.

**Reason:**

The references to the EC and EU Treaties have been deleted and not replaced with anything. It would be preferable to insert a reference to (*the other parts of the Constitution*) or (*Parts I and III of the Constitution*)

**AMENDMENTS TO EXPLANATIONS**

**ARTICLE 2.2**

In paragraph 2 of the Explanations after the words in quotes , viz: “The death penalty shall be abolished. No-one shall be condemned to such penalty or executed”, add – ***Article 1 of Protocol***

*No. 13 reiterates that provision.*

**Reason:**

The references to the death penalty in the Explanations could be updated in light of the fact that Protocol 13 to the ECHR will enter into force on 1 July 2003. The Protocol has been signed or ratified by all EU Member States and acceding States and it removes for States Parties thereto the possibility of retaining the death penalty in respect of acts committed in time of war or of imminent threat of war.

**ARTICLE 21**

The second paragraph should be replaced by the following – *There is no contradiction or incompatibility between paragraph 1 and Article (III-5) of the Constitution which has a different purpose and scope: Article (III-5) provides, without prejudice to the other provisions of the Constitution and within the limits of the powers conferred by it on the Union, a legal base for the adoption by the Union of legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities as well as relations between private individuals. In contrast, the provision in paragraph 1 does not create any power to enact anti-discrimination laws. It only addresses discrimination by the institutions, bodies and agencies of the Union themselves, when exercising powers conferred under other Articles of Parts I and III of the Constitution and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of the powers granted under Article (III-5) nor the interpretation given to that Article.*

**Reason:**

The explanation, when seeking to distinguish Article III – 5 of the Constitution from Article 21 of the Charter, gives an overly expansive definition of the Union's competence under the former.

**ARTICLE 52.5**

**Amend the first sentences of paragraph 5 to read:**

“Paragraph 5 clarifies the distinction between “rights” and “principles” set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51.1). *Where parts I and III of the Constitution provide a legal base for legislative action*, principles *may be* (delete are) implemented through legislative or executive acts; accordingly they become significant for the courts when such Acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities.”

**Amend the final sentence of paragraph 5** to change the examples / illustrations of principles recognised the Charter (given as Articles 26 and 37) to include **Article 28** (collective bargaining) as an example of a principle. This could be added or, if necessary to limit to two examples, substituted for Article 37.

**Reason:**

These amendments would bring greater clarity to the Explanations.

**AMENDMENT TO ARTICLE 41 OF THE CHARTER (AS AMENDED)**

**Article 41, paragraph 4** should be reworded as follows – “*Every person may write to the Institutions of the Union in one of the languages of the Treaty establishing the Constitution and must have an answer in the same language.*”

**Reason:**

This clarification, which has been agreed with the Secretariat, is designed to maintain the current status of the Irish language in accordance with the existing Treaty arrangements. A similar amendment has been agreed to Article I-8 of the Constitutional Treaty.

Manuel Lobo Antunes (9/06/03 15:37):

›1. On the documents transmitted, I have the following comments:

›a) on the Charter- article 42 (access to documents) could be completed with a reference to the text of nr 4 of the draft article 49-I, as to make clear that some limits could be imposed by law on the access to certain documents (vg documents emanated from Europol, Eurojust or the future Public Presecutor) for reasons of private or public interest;

›2. I can accept the text of the draft updated explanations.

›3. I continue to believe that the explanations should serve exclusively as a tool of interpretation of the Charter.

›Best Regards,

›Manuel Lobo Antunes

›Gov. Alternate

›Member of the WG on the Charter

Dear Mr. Vitorino,

I sincerely welcome your efforts to update the Explanations. I believe that the proposed amendments will clarify the important and complex issues of the scope, interpretation and application of the Charter. I completely agree with you that attention should be drawn in an appropriate manner to the Explanations and that they should be publicised more widely, so that courts and citizens can get access to this excellent tool for interpretation of the Charter. I also agree with your suggestion to use a more precise formula regarding the value of the Explanations. The courts should have due regard to the Explanations when interpreting the Charter.

Best regards,

Ingvar Svensson  
Member of Working Group II