

THE EUROPEAN CONVENTION

THE SECRETARIAT

Brussels, 31 May 2002 (03.05)
(OR. fr)

CONV 72/02

NOTE

from : Mr António Vitorino

to : Members of the Convention

Subject : **Mandate of the Working Group on the Charter**

Please find attached a note on the above subject as an aid to the discussions of the Working Group on the Charter.

Working Group II: "Charter/ECHR"

Chairman: António Vitorino

If it is decided to incorporate the Charter of Fundamental Rights in the Treaty: how should this be done and what would be the consequences? What would be the implications of accession by the Community/Union to the European Convention on Human Rights?

Introduction

The purpose of this note is to give an initial summary of the substantive questions which should be dealt with by the Working Group on "Incorporation of the Charter/Accession to the European Convention on Human Rights (ECHR)". On the basis of this summary, I shall in due course put forward a detailed analysis of the questions mentioned in order to guide discussions within the Working Group.

There are two aspects to the Working Group's mandate:

- The procedures for and consequences of any incorporation of the Charter into the Treaties
- The consequences of any accession by the Community/Union to the European Convention on Human Rights (ECHR).

These aspects need to be addressed by the Working Group separately and in turn. I wish to state from the outset that the two aspects are complementary and not alternatives, since incorporation of the Charter in no way lessens the importance of any accession to the ECHR or vice versa.

Finally, in the case of both aspects, one point should be borne in mind regarding discussion in the Working Group: as it is the general wisdom that working groups should concentrate on more targeted matters and not duplicate the political debates of plenary meetings, the Working Group should not get involved in discussion of the major political questions (*whether* the Charter should be incorporated or *whether* there should be accession to the ECHR). It should rather focus on examining the more specific matters outlined below, on the assumption that the two questions will meet with a positive political response.

I. Procedures for and consequences of any incorporation of the Charter into the Treaties

1. Preliminary remark: the content of the Charter as an *acquis*

In my view, a wise initial position would be that the *content* of the Charter as negotiated by the earlier Convention constitutes a common *acquis* which should be maintained.

However, should the Convention advocate changing the current structure or designation of the Treaties, it might prove necessary to make certain adjustments to the Charter of a purely drafting nature or to hold a discussion on maintaining Article 52(2) ¹ of the Charter if the Convention wished to establish a hierarchical distinction between a new basic Treaty and the rest of existing primary law.

2. Examination of possible techniques for incorporation and certain related questions

One of the Working Group's key tasks will be to examine the various possible techniques for incorporating the Charter (incorporation of the Charter's articles into the EU Treaty or a new basic Treaty, Protocol annexed thereto, reference in an article such as the present Article 6(2) of the TEU, etc.). That examination will have to consider various aspects such as the precise legal effect and the political profile which are to be conferred on the Charter. It will also have to consider the general question of the future structure of the Treaties. The Working Group will also have to look at certain questions relating to the technique of incorporation, in particular what is to happen to the preamble to the Charter, whether to keep a reference – of the kind currently in Article 6(2) of the TEU – to common constitutional traditions and the ECHR – and the relationship between some of the Charter's articles and the provisions of the present EC Treaty which they repeat (in particular concerning citizens' rights).

3. The question of appeals to the Court of Justice

The Working Group may also have to address two topics which, although not arising directly from possible incorporation of the Charter, are nevertheless often raised in connection with the protection of fundamental rights within the Union:

¹ Article 52(2) reads as follows: "Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties."

- firstly, the Working Group will have to decide whether to amend the fourth paragraph of Article 230 of the EC Treaty in order to extend the scope of direct appeals by individuals to the Court of Justice, or indeed to introduce a new form of appeal for the protection of fundamental rights, or whether it considers it preferable to maintain the existing system and leave it to case-law to refine it.
- secondly, the Working Group will have to take note of the question of a possible extension of the Court of Justice's competence in JHA matters. It should be pointed out that problems in this area go beyond the issue of fundamental rights and affect the more general debate to be conducted in plenary on the future development of this policy. The Working Group should therefore avoid prejudging that debate; it could nevertheless usefully make a limited contribution by examining criticisms to the effect that the current provisions should be revised with regard to the protection of human rights.

II. Implications of any accession by the Community/Union to the ECHR

The Working Group's discussion of this aspect will depend to a greater extent on the questions raised by its members. I shall not, for my part, encourage the Working Group to rehearse again in detail all the familiar arguments *for* and *against* accession by the Community/Union to the ECHR. I shall concentrate rather on a technical examination of the extent to which accession can be reconciled with the principle of autonomy of Community law. If, however, members of the Working Group wish to raise other points sometimes made against accession, I am prepared to see that it looks for satisfactory answers.

Moreover, the Working Group should consider the form which might be taken by any legal basis for accession to the ECHR in the Treaties. It could also address the question of whether that legal basis could also explicitly enable accession to other international human-rights agreements.

In addition, the Working Group will be informed of ongoing discussions within the Council of Europe on the technical consequences of any accession by the EU/EC for the Strasbourg system. I will, however, recommend the Working Group not to deal with those issues – which would be a matter for possible negotiations between the Union and the Council of Europe – unless the latter regards some of them as important for accession.

Finally, if members of the Working Group so request, it may also examine the advantages and disadvantages of approaches sometimes suggested as alternatives to accession in order to ensure consistency between Union law and that of the ECHR, e.g. the introduction of a procedure whereby the Court of Justice can refer to or consult the European Court of Human Rights.
