

**NOTE**

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<b>from :</b>	<b>Secretariat</b>
<b>to :</b>	<b>Working Group on "Incorporation of the Charter/Accession to the ECHR"</b>
<b>Subject :</b>	<b>Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR</b>

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As requested by the Chairman of the Working Group on "Incorporation of the Charter/Accession to the ECHR", the Secretariat is forwarding herewith a discussion paper examining in detail the various issues already raised in CONV 72/02, which the Group will be required to consider.

The paper is divided into three sections:

- The first section gives a brief description of the background and current legal situation with regard to the protection of fundamental rights in the Community legal system, the current status of the Charter and the question of Community accession to the European Convention on Human Rights (ECHR).
- The second section presents an analysis, together with questions to guide the Working Group's discussions, of the various options and modalities for possible incorporation of the Charter into the Treaties and of the consequences thereof. In this context it also addresses the question of actions before the Community courts.
- The third section contains an analysis and questions relating to the modalities and consequences of possible accession of the Community or the Union to the ECHR.

## Discussion paper

**Subject: Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR**

### **I. Background and current situation**

#### **1. Fundamental rights in the Community legal system**

For some 30 years the case-law of the Court of Justice has acknowledged that fundamental rights form part of Community law as general principles of this law <sup>1</sup>. In the absence of a written catalogue specific to the Union, the Court has derived the content of these laws through case-law, taking as a basis various sources, especially the constitutional traditions common to the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which has been ratified by all the Member States. For several years, the Court of Justice has noted that the ECHR has "special significance" in this respect, and refers explicitly to the case-law of the European Court of Human Rights <sup>2</sup>. It has also stated that not only the institutions of the Union but also the States, where they act within the scope of Community law, are required to respect fundamental rights under the supervision of the Court <sup>3</sup>.

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<sup>1</sup> The first references are in Case 29/69, *Stauder*, ECR 1969, 419, and Case 11/70, ECR 1970, 1125.

<sup>2</sup> See, for example, Judgments C-309/96, *Annibaldi*, ECR 1997, I-7493; C-185/95 *P Baustahlgewebe*, ECR 1998, I-8417; and for references to Strasbourg case-law, Judgments C-74/95 et al, X, ECR 1996, I-6609; C-368/95, *Familiapress*, ECR 1997, I-3689; C-7/98, *Krombach*, ECR 2000, I-1935.

<sup>3</sup> Judgments of 13 July 1989, Case 5/88, *Wachauf*, ECR 1989, 2609, and of 18 June 1991, C-260/89, *ERT*, ECR 1991, I-2925; for recent confirmation see Judgment of 13 April 2000, C-292/97, *Karsson*, ECR 2000, I-2737, para. 37. See also, testifying to the Court's effort to restrict the scope of Community fundamental rights to the Member States, the judgments in Case C-299/95, *Kremzow*, ECR 1997, I-2629; C-309/96, *Annibaldi*, ECR 1997, I-7493.

The Treaty of Maastricht included a provision in the Treaty on European Union – current Article 6(2) of that Treaty – which confirmed this case-law *acquis*. The Treaty of Amsterdam adds to it the provision of Article 6(1) enshrining the founding principles of the Union, including respect for human rights and fundamental freedoms; it also stipulates that respect for such principles is a condition for accession to the Union (Article 49 TEU) and establishes the possibility for the Union to impose sanctions on one of its Member States in the event of a serious and persistent breach of those principles (Article 7 TEU).

## 2. The current status of the Charter of Fundamental Rights of the European Union

Following the conclusions of the Cologne and Tampere Councils in 1999, the Charter of Fundamental Rights of the European Union (hereinafter "Charter") was drawn up during 2000 by a Convention and then approved by the Biarritz European Council. It should also be pointed out that explanations regarding the text of the Charter were drawn up by the Praesidium of that Convention; it was specified that these explanations had no legal value but were intended to clarify the provisions of the Charter <sup>1</sup>. The Charter was signed and solemnly proclaimed by the Council, the European Parliament and the Commission on 7 December 2000 and published in the Official Journal <sup>2</sup>.

The Nice IGC did not give a ruling on its incorporation into the Treaties. Nice Declaration No 23 states that the debate on the future of the Union and the new IGC to be convened in 2004 will relate inter alia to "the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne". The Laeken Declaration states that "thought would [also] have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty."

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<sup>1</sup> See CHARTE 4473/00 CONVENT 49 of 11 October 2000, accessible via <http://ue.eu.int/df>.

<sup>2</sup> C 364 of 18 December 2000.

Since the solemn declaration, a series of Advocates-General at the Court of Justice have referred to the Charter, using it – despite its lack of any formally binding force, which they take care to note – as a source for identifying Community fundamental rights <sup>1</sup>. More recently, the Court of First Instance invoked on two occasions articles of the Charter as "confirmation" of the constitutional traditions common to the Member States <sup>2</sup>. On the other hand, the Court of Justice has refrained to date from mentioning the Charter.

Furthermore, the Commission decided in March 2001 that any proposal for a legislative act and any regulatory act that it was preparing to adopt would be the subject, at the time of its drafting according to the usual procedures, of a prior compatibility check with the Charter; in addition, a new "model recital", testifying to this compatibility check, is now inserted into its legislative proposals or regulatory acts which have a specific connection with fundamental rights. Such recitals referring to the Charter have in the meantime been included in certain acts adopted by the legislator <sup>3</sup>.

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<sup>1</sup> See conclusions of Advocate-General Alber in C-340/99, *TNT Traco*, Advocate-General Tizzano in C-173/99, *BECTU*, Advocate-General Mischo in C-122 and 125/99 P, *D v. Council*, and in C-20/00 and 64/00, *Booker and Hydro v. the Scottish Ministers*, Advocate-General Stix-Hackl in C-49/00 *Commission v. Italy*, in C-131/00, *Nilsson*, and in C-459/99, *MRAX*; Advocate-General Jacobs in C-377/98, *Netherlands v. Parliament and Council*, in C-270/99 P, *Z v. Parliament* and in C-50/00 P, *Union de Pequeños Agricultores*, Advocate-General Geelhoed in C-413/99, *Baumbast and R*, and in C-313/99, *Mulligan et al*, Advocate-General Léger in C-353/99 P, *Council v. Hautala et al*, and in C-309/99, *Wouters* – all not yet published in the ECR. The wording of Advocate-General Léger in the abovementioned Hautala case should be noted "As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law."

<sup>2</sup> See Judgments of 30 January 2002, T-54/99, *max-mobil*, and of 3 May 2002, T-177/01, *Jégo-Quéré*, neither of which has yet been published in the ECR.

<sup>3</sup> See recital No 2 of Regulation 1049/2002 on access to documents of the institutions, and recital No 18 of Council Decision 2002/187 setting up Eurojust [OJ references].

3. The question of accession of the Community to the ECHR:

The Commission had already proposed in 1979 that the Community should accede to the ECHR; it reiterated this proposal in 1990 and in 1993 <sup>1</sup>. The European Parliament endorsed this on several occasions <sup>2</sup>. Having received from the Council a request for an Opinion pursuant to Article 300(6) of the EC Treaty, the Court of Justice, in its Opinion 2/94 delivered in 1996 <sup>3</sup>, noted that the Community was not competent to accede to the ECHR, since no Treaty provision conferred upon the institutions, in general, the power to lay down rules or to conclude international conventions on human rights, and that accession to the ECHR, which "would be of constitutional significance", would go beyond the limits of Article 235 (now Article 308) of the EC Treaty. According to this Opinion of the Court – which does not comment on whether accession to the ECHR would be compatible with the Treaty and in particular with the principle of the autonomy of Community law and the powers of the Court – such accession could be effected only by way of Treaty amendment.

The Amsterdam and Nice IGCs, to which initiatives along these lines were referred, did not insert a provision into the Treaty which would allow for the Community's accession to the ECHR.

The Laeken Declaration states that "thought would ... have to be given ... to whether the European Community should accede to the European Convention on Human Rights".

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<sup>1</sup> See Supplement 2/79 to the Bulletin of the EC; SEC(90)2087 final, and SEC(1993) 1679 final.

<sup>2</sup> See for example the Resolution of 18 January 1994, OJ C 44, p. 32 and also that of 16 March 2000 (A5-0064/2000).

<sup>3</sup> Opinion of the Court of 28 March 1996, ECR 1996, I-1759.

## **II. Modalities and consequences of possible incorporation of the Charter into the Treaties**

### *Preliminary remark: The content of the Charter*

In line with the Working Group's mandate the present paper, when referring to the "Charter", takes as a basis the Charter as adopted by the earlier Convention and solemnly proclaimed by the three institutions. Consequently, the proposals put forward since then for amending the Charter by deleting certain rights or by adding others are not examined here; this does not, of course, rule out the possibility of such proposals being made later, during the political debate by the Plenary of the Convention. Likewise, the "technical" criticisms or proposals for "drafting improvements" made by certain legal experts, referring for example to the lack of precision of certain articles of the Charter, will not be discussed either.

As regards the content of the Charter, here reflections will instead be limited to examining whether discussions conducted since 2000 on the technique of incorporation and, in particular, the future structure of the Treaties, have revealed any need for a technical amendment of the text of the Charter which does not affect its substance. With this in mind, three points should be noted:

- the question of what is to happen to the preamble to the Charter, if it were decided to incorporate the body of the Charter into the EU Treaty or into a new basic Treaty (see 3 below);
- the question if and to what extent certain purely technical adjustments need to be made in the provisions of the Charter in order to ensure consistency between the Charter and the existing Treaties (see 5 below);

- without looking at it in detail here, the possible need for an adjustment of a purely drafting nature to the references in the Charter to "Treaties" or to "Community Treaties", to the "Treaty on European Union", "Treaty establishing the European Community" or to "Community law", in the event of the current structure and/or title of these Treaties being modified in the course of their simplification <sup>1</sup>.

#### 1. Possible techniques for incorporation of the Charter

If the Convention inclines towards incorporation <sup>2</sup> of the Charter into the Treaties, several options arise as regards the technique for such incorporation:

- (a) The Charter could be "attached" to the Treaties in the form of a "Solemn Declaration".
- (b) The EU Treaty or a new basic Treaty could refer to the Charter according to the model of Article 6(2) of the existing EU Treaty. It would therefore be merely an *indirect* <sup>3</sup> reference to the Charter as a source of inspiration for the case-law definition of fundamental rights.
- (c) The EU Treaty or a new basic Treaty could make a *direct* reference to the Charter <sup>4</sup>.
- (d) A direct or indirect reference to the Charter could be made in the preamble to a new basic Treaty.

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<sup>1</sup> These references are to be found in the preamble to the Charter and in Articles 16, 18, 21(2), 27, 28, 30, 34, 36, 45, 51 and 52. Similarly, only where the body of the articles of the Charter were inserted into the EU Treaty itself or in a new basic Treaty (option (f) below), could a drafting adjustment of Article 51(2) of the Charter become necessary in order to make it clear that the Charter does not alter the powers and tasks as defined by *the other provisions* of the Treaties (and Article 52(2) of the Charter could be subject to a similar adjustment to make it clear that this Article relates to the rights of the Charter which are based on other provisions of the Treaties).

<sup>2</sup> The term "incorporation" is used here in the broad sense covering several forms and degrees of acknowledgement of the legal value of the Charter in the Treaties or in connection with them.

<sup>3</sup> The indirect nature is currently expressed in the text of Article 6(2) TEU by the terms "... fundamental rights, *as guaranteed ... as general principles ...*"). As to whether the reference to the Charter should be added to or replace the two current references, see section 2 below.

<sup>4</sup> Example: "The Union respects the rights, freedoms and principles enshrined in the Charter of Fundamental Rights of the European Union".

- (e) The Charter could become a new Protocol annexed to the Treaties or to a new basic Treaty.
- (f) The full body of the 54 articles of the Charter could be inserted into a title or chapter of the EU Treaty, or into a new basic Treaty, of which it would for example form the first title or chapter.

There are also various possibilities for combining options (a) to (e) (for example, "attaching" the Charter as a solemn declaration *and* reference in current Article 6(2) of the EU Treaty; Protocol annexed to the Treaties or to the new basic Treaty *and* direct reference to this Protocol in an article of the TEU/the new basic Treaty).

Several factors will influence the choice made from the techniques referred to above. Firstly, the general question whether the Convention prefers to retain the current structure of the Treaties or propose a new basic Treaty will obviously play a major role, even if each of the above techniques is in principle conceivable in both scenarios <sup>1</sup>.

Secondly, the precise legal value of the Charter would also vary according to the option chosen: It would be least pronounced under option (a), which would admittedly increase the symbolic and political value of the Charter without, however, clarifying or reinforcing its current legal status. Option (b) would go a little further than the previous option but nevertheless would merely formally acknowledge the Charter's status as a source of inspiration – although undoubtedly a distinguished source – for the case-law definition of fundamental rights as general principles of law. Such status appears already to be accepted in practice (see above). It is only by virtue of options (c), (e) and (f) that the Charter would acquire the status of a fully binding text, following the example of the catalogues of fundamental rights in national constitutions. On the other hand, the legal effect of a reference in a new preamble (option (d)) would seem rather uncertain, particularly in the light of Court of Justice case-law which grants preambles and recitals of Community acts a legal value

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<sup>1</sup> Consideration is not given here to whether, if the Convention were to propose a new basic Treaty (into which the Charter would be incorporated), there should or should not be a hierarchical distinction between this Treaty and a "Part Two" of the existing primary law. This question goes beyond the subject of the Charter and should be examined by the Convention in the general context of the future structure of the Treaties.



which is only very limited and subordinate to that of the enacting terms of the act. Furthermore, if the technique of merely referring to the Charter (options (b), (c) or (d)) without incorporating the latter into a Protocol were preferred, this should lead to consideration of how the Charter could be amended in future (whereas under options (e) and (f) it would be the common arrangements for revision of the Treaties which would automatically apply).

Finally, the choice between the abovementioned options could also be informed by the preferences of the Convention members regarding the political presentation and legibility of the rights of the Charter, and of the outcome of the Convention as a whole, in the eyes of the citizen.

*Which of the techniques mentioned above is (are) deemed preferable?*

## 2. The question of the current Article 6(2) of the EU Treaty

If the Charter is incorporated into the Treaties (irrespective of the technique chosen) the question arises whether or not a reference should be kept, as currently in Article 6(2) of the EU Treaty, to the two outside sources of legal inspiration – the constitutional traditions common to the Member States and the ECHR. There are valid arguments on both sides here. For example, retaining such a clause – even if it were worded differently – <sup>1</sup> could be justified on the grounds that it makes it clear that the Charter will not prevent the Court of Justice from continuing to draw on these additional sources, which may also develop over time. The argument is also put forward that to retain a reference to the ECHR in the Treaty would be a desirable addition, from the point of view of legal certainty, to the reference to the ECHR in Article 52(3) of the Charter. Furthermore, deletion of current Article 6(2) TEU could be defended on the grounds that the Charter now constitutes the most

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<sup>1</sup> In the case of options (a) and (b), the expression "and as they are recognised in the Charter ..." could be added to Article 6(2). In the case of option (c), (d) or (e), a second sentence reading as follows could be added to the sentence suggested in footnote 4 on page 7 above: "The Union shall also observe fundamental rights as guaranteed ..." (followed by the current content of Article 6(2) TEU). While option (f) sits less easily with retaining a provision such as Article 6(2) TEU, it would not be out of the question, for example, to add such a provision to the new heading, just after the last article of the Charter, or to insert a reference of the type "notwithstanding ...." in the latter's horizontal provisions.

authentic expression of the body of acquired fundamental rights specific to the European Union. According to that view, a "concurrent" reference to the other two sources would scarcely be comprehensible, since the Charter has already incorporated the rights in the ECHR and crystallises most fully the traditions common to the Member States<sup>1</sup>; nor would such a reference be necessary since, as in other constitutional legal systems, a written catalogue of fundamental rights would not be understood as "exhaustive" and preventing the development, through case-law, of new rights when the times so demand.

*Should incorporation of the Charter into the Treaties lead to deletion of the reference to the two outside sources represented by the constitutional traditions common to the Member States and the ECHR (see the current Article 6(2) of the EU Treaty)? Or should such a reference be kept? In the affirmative, how should it be reworded in the light of incorporation of the Charter?*

### 3. The question of the preamble to the Charter

The articles of the Charter are preceded by a preamble, certain aspects of which played an important role in achieving the final compromise in the previous Convention. If the European Convention were to choose option (e) above, the question would arise of what should become of the preamble. It would then be conceivable to use the preamble to the Charter as the basis for drafting the preamble to a new basic Treaty or, alternatively, to incorporate its different aspects into a reformulated preamble to the EU Treaty. This question does not arise in relation to the other options, which would leave the preamble to the Charter attached to the Charter text.

*What should be done with the preamble to the Charter if the Charter is incorporated into the Treaties?*

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<sup>1</sup> For this view, see judgment of the CFI of 31 January 2002, *max. mobil*, mentioned above.

#### 4. The question of "replication" in the Charter

In order to draw up a full catalogue of the fundamental rights of the Union, the Charter, in a number of its articles, simply restates rights already expressly enshrined in the EC Treaty, often, however, in the interests of readability, shortening the wording as compared with the corresponding articles of the Treaty. These relate to rights to freedom of movement <sup>1</sup>, almost all the rights in the "citizenship" section of the Charter (right to vote, access to documents, right of petition, etc.) <sup>2</sup> and the clauses relating to non-discrimination on grounds of nationality and equality between the sexes <sup>3</sup>. Since the previous Convention had no brief to amend the Treaties, but only to draft a Charter which could be added to them, it formulated a referral clause (Article 52(2) of the Charter <sup>4</sup>) to make it clear that, with regard to those rights, the legal situation as defined in the Treaties was unaffected by the Charter. That clause also made it possible to avoid the repetition, in each Charter article in question, of formulae to the effect that these rights are exercised under the conditions and within the limits provided for in the corresponding article of the Treaty and of secondary legislation <sup>5</sup>.

If the option of integrating the body of the Charter into a new basic Treaty or a protocol annexed thereto (options (e) and (f)) were to be considered, some have suggested that the question would then arise whether the "replications" mentioned above between some of the Charter articles and the same rights recognised in the Treaties should be eliminated, either by deleting either the Charter articles in question or the corresponding articles from the current Treaties (which would then become the "second part" of primary legislation). However, others have commented that this

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<sup>1</sup> Articles 15(2) and 45 of the Charter.

<sup>2</sup> Articles 39, 40, 41(4), 42 – 46 of the Charter.

<sup>3</sup> Articles 21(2) and 23 of the Charter.

<sup>4</sup> 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."

<sup>5</sup> On this point, see also the explanations of the Praesidium (cited in footnote 1 on page 3) relating to this Article ("Paragraph 2 specifies that where a right results from the Treaties it is subject to the conditions and limits laid down by them. The Charter does not alter the system of rights conferred by the Treaties.")

problem is more apparent than real or that in any event it would arise only in relation to a very limited number of rights <sup>1</sup>. This question will have to be examined in greater detail if the occasion arises.

*If the corpus of the articles of the Charter were to be incorporated into the new basic treaty or a protocol annexed thereto (option e), how should the "replication" arising from the fact that some articles of the Charter repeat rights already enshrined in the EC Treaty be dealt with?*

## 5. Examination of certain technical adjustments in the provisions of the Charter

Some observers have suggested that, if the Charter is incorporated, certain technical adjustments to its wording would be needed. Other observers have challenged the need for these changes, taking the view that the general provisions of the Charter (Articles 51 to 54) are sufficient to clarify the points dealt with.

On the one hand, the criticism has been levelled that some articles of the Charter repeat rights enshrined in the EC Treaty without specifying in each article that those rights are exercised under the conditions and within the limits laid down by the Treaty, which would lead to legal uncertainty <sup>2</sup>. Others hold that the horizontal provision of Article 52(2) of the Charter was designed to clarify this issue for all the articles of the Charter, while avoiding the cumbersome repetition, in each article in question, of references to the Treaty. On the other hand, it has been held that some provisions of the Charter took over those of the TEC, but with changes to them. In this connection

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<sup>1</sup> We are thinking here in particular of the following Charter articles: Articles 39 and 40 (Right to vote and to stand as a candidate at municipal elections and elections to the European Parliament) – see Articles 19 and 190(1) TEC); 42 (access to documents – see Article 255 TEC); 43 (Ombudsman – see Articles 21 and 195 TEC), 44 (petition – Articles 21 and 194 TEC), 45(1) (freedom of movement for citizens – Article 18 TEC) and 46 (diplomatic protection – Article 20 TEC). On the other hand, in the context of equality between the sexes and freedom of movement for workers and the self-employed, it seems perfectly appropriate for the more succinct Charter text and the more detailed text in the current Treaties to exist side by side.

<sup>2</sup> In this connection mention has been made of Articles 39, 40, 42, 43 and 44 of the Charter.

reference is made to Article 21(1) of the Charter, on non-discrimination, which some claim modifies Article 13 of the EC Treaty; others point out, however, that there is no incompatibility between these two provisions, as they are different in nature and scope <sup>1</sup>.

*In the event of incorporation of the Charter being integrated into the Treaties, would certain technical adjustments to some of its provisions be necessary? Would Article 52(2) of the Charter be sufficient or would it be necessary to make repeated reference to the conditions and limits laid down in the Treaty in each Article concerned in the Charter?*

## 6. Treaty provisions concerning the Court of Justice

In this connection, there are three distinct issues, only the first of which arises directly as a consequence of the possible incorporation of the Charter, while the other two exist independently of it in principle even though a link has often been established:

### (a) Amendment of Article 46(d) of the TEU

Depending on the option chosen for the incorporation of the Charter into the Treaties (see above), a change to the wording of Article 46(d) of the EU Treaty could prove necessary in order to ensure that the Charter is included among the provisions over which the Court has jurisdiction.

At the same time, it appears that the words "with regard to action of the institutions" in the current Article 46(d) should be deleted. As noted earlier, since the 1980s the Court of Justice has monitored compliance with fundamental rights not only by the action of the institutions, but also by that of the authorities of the Member States where they act within the scope of Community law. The significance of inserting the above terms into Article 46 of the EU Treaty by means of the

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<sup>1</sup> Thus, while Article 13 TEC creates a legal basis to combat discrimination by adopting legislative provisions applying between individuals, Article 21(1) of the Charter contains a directly applicable ban on discrimination comparable to Article 14 ECHR and Protocol No 12 thereto, but binding only on the institutions and bodies of the Union and on the Member States solely when implementing Union law.

Amsterdam Treaty in relation to that well established case-law was never very clear; nevertheless, the Court confirmed its established case-law following the entry into force of the Amsterdam Treaty. In any event, the earlier Convention was at pains to define its scope explicitly, in Article 51(1) of the Charter <sup>1</sup>, by codifying earlier case-law; the current wording of Article 46(d), which could be interpreted differently with the Charter, should then give way to this definition.

*Should the reference to action of the institutions alone in Article 46 of the EU Treaty be deleted in the event of that article being adapted to a Charter incorporated into the Treaties?*

(b) competences of the Court in the field of justice and home affairs

While the provisions of the Treaty of Amsterdam introducing jurisdiction for the Court of Justice with regard to justice and home affairs reflect progress, many criticise the remaining limitations and the complexity of these rules in relation to the common arrangements of the EC Treaty <sup>2</sup>. Thus, Article 35 of the EU Treaty has led to extremely complex "variable geometry" arrangements with regard to the preliminary ruling procedure under the 3rd pillar. Article 35(5) of the EU Treaty completely rules out any jurisdiction of the Court over 3rd pillar matters in respect of national police or law and order measures. Provision is made for a similar exclusion, in accordance with Article 68(2) of the EC Treaty, even under the Community pillar, in respect of acts of the Community institutions against which national courts can offer no protection. Finally, the limitation of the right of preliminary referral provided for in Article 68(1) of the EC Treaty seems hard to justify since it obliges those concerned to go through all the national courts before they can be heard by the Community judge.

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<sup>1</sup> Article 51(1) of the Charter reads as follows: "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 these rights, observe the principles and promote the application thereof *in accordance with their respective powers.*" (Our italics).

<sup>2</sup> On these points, see also discussion paper CONV 69/02 on "Justice and Home Affairs".

It is clear that this problem goes beyond the issue of incorporating the Charter <sup>1</sup>. However, effective protection of fundamental rights is considered to be an essential aspect of the "area of freedom, security and justice", especially insofar as many actions of the Union in this area are particularly sensitive with regard to those rights. Moreover, any exemption from control by the Court of Justice would expose Union law and the acts of the institutions to appeal before the European Court of Human Rights.

*Could concern for the protection of fundamental rights give rise to a review of the current provisions relating to the Court of Justice in matters relating to justice and home affairs ?*

- (c) The question of liberalising the conditions for direct action before the Court or even introducing a "constitutional appeal" (Verfassungsbeschwerde", "recurso de amparo")

For some time, some legal scholars have criticised the conditions for direct appeal by individuals to the Community jurisdiction, as defined in Article 230(4) of the EC Treaty and interpreted by case-law <sup>2</sup>, as being too narrow or inadequate for guaranteeing the fundamental right to effective judicial protection (or: "right to seise a judge") against acts of the institutions. While this criticism was voiced independently of the Charter and prior to its drafting – the latter does not codify the right to appear before a judge, as developed by the Court of Justice on the basis of the ECHR since the 1980s <sup>3</sup> – it has been reiterated in connection with it. Some have even gone so far as to call for the introduction of a new special form of legal action enabling any individual to challenge directly any Community act, including those of a legislative nature, for violation of his or her fundamental rights, along the lines of procedures that exist in some Member States (Verfassungsbeschwerde", "recurso de amparo").

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<sup>1</sup> See the discussion paper on " Justice and Home Affairs".

<sup>2</sup> Article 230(4) TEC restricts actions for annulment to persons to whom a Community act is addressed and to persons to whom it is "of direct and individual" concern. Since the *Plaumann* judgment, Case 25/62, ECR 197, case-law has interpreted this phrase as ruling out, in principle, action against acts that are general in scope, even where they directly affect individuals, since the person bringing a case would not be individually concerned unless they are affected "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed."

<sup>3</sup> See in particular the judgments of the Court of Justice in Case 222/84 – *Johnston* –, ECR 1986, 1651, No 18; Case 222/86 – *Heylens* –, ECR 1987, 4097, No 14; C-97/91 – *Borelli* –, ECR 1992, I-6313, No 14.

Others claim that Community law possesses a comprehensive appeal system providing effective judicial protection, including for fundamental rights: individuals may, according to circumstances, either challenge a Community act directly, in accordance with Article 230(4) of the EC Treaty, or bring an action before a national court against measures implementing the Community act, the national court being in a position – or under an obligation, in the latter case – to make a preliminary referral to the Court (Article 234 of the EC Treaty) in order to check the validity of the Community act. It then lies with the Member States, under Article 10 of the EC Treaty, to contribute to this dual system of protection by making provision for legal remedies at national level that leave no gaps in this indirect control of the acts of the institutions <sup>1</sup>. It has also been observed that a new form of legal action based on the violation of fundamental rights would be difficult to distinguish from other legal actions since these rights may be adduced in nearly every dispute. Critics retort that the "detour" via the national court and the preliminary ruling procedure do not always provide sufficient guarantees, partly because referral to the Court of Justice may be slow and it is not in the hands of the applicant.

A specific case which has in the meantime been very broadly recognised as problematic is where Community law introduces a ban that is directly applicable without the need for a national implementing act. The only option for an individual wishing to assert his or her rights against such a ban is to appeal against the sanction which might be applied by national authorities in the event of violation of Community law. Many believe that it is unreasonable for an individual to be induced to commit an infringement in order to have a right of appeal because he has no right of direct legal action against the Community instrument in question. In a recent judgment <sup>2</sup> concerning precisely such a case, the Court of First Instance, departing from previous case-law, which it deemed too restrictive, admitted an action by an individual, invoking the right to seise a judge. Recent conclusions by Advocate-General Jacobs in case C-50/00 P <sup>3</sup> criticised in more general terms the interpretation of Article 230(4) of the EC Treaty by traditional case-law. It is therefore possible that a significant change may be in the making in case-law relating to the admissibility of direct legal actions by individuals.

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<sup>1</sup> See CFI judgment of 27 June 2000, T-172/98 et al., *Salamander et al.*, ECR 2000, II-2487, par. 74.

<sup>2</sup> Judgment of 3 May 2002, T-177/01, *Jégo-Quéré v. Commission*.

<sup>3</sup> Conclusions of 21 March 2002 in C-50/00 P, *Unión de Pequeños Agricultores v. Council*; the conclusions also give a very full picture of discussions on this issue. The judgment of the Court is expected in the next few months.



*Should Article 230(4) of the EC Treaty be amended to extend the conditions of admissibility for direct actions by individuals? If so, how? Or would it be better to allow case-law to define the conditions of admissibility, taking into account the right to effective judicial protection?*

*Would it be appropriate to establish a new direct form of legal action to protect the fundamental rights of individuals, along the lines of certain national constitutional procedures? What consequences would an amendment to the Treaty on this issue have for the organisation and operation of the Community's judicial system?*

### **III. Modalities and consequences of possible accession by the Community/Union to the ECHR**

*Preliminary remark: complementarity between the Charter and the idea of accession to the ECHR*

Firstly, an observation made by many institutions and prominent persons must be borne in mind, namely that the elaboration of the Charter and the proposal for accession to the ECHR by the Community (or in future by the Union, once its legal personality has been recognised) are complementary and not alternative initiatives<sup>1</sup>: on the one hand, the existence of the Charter does not in any way detract from the assumed benefits of making the external control mechanism established by the ECHR applicable to the Union; and on the other, accession to the ECHR would not reduce the usefulness to the Union of having its own catalogue of fundamental rights, all the more so since the ECHR allows the contracting parties to go beyond the rights which it ensures (Article 53 of the ECHR), and since the manner in which the relationship between the ECHR and the Charter is expressed in the text of the latter has been judged satisfactory<sup>2</sup>.

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<sup>1</sup> On this subject, see the Commission communication of 11 October 2000 (COM(2000)644 final, paragraph 9); the speeches by Mr Wildhaber, President of the European Court of Human Rights ("The Council of Europe has always regarded those two options as complementary rather than as alternatives.") and by Mr Rodríguez Iglesias, President of the Court of Justice, on 31 January 2002; and the speech by Mr Krüger, Secretary-General of the Council of Europe, on 18 March 2002.

<sup>2</sup> See Mr Wildhaber in his speech mentioned above; also Mr Rodríguez Iglesias as above ("Thus, rather than competing with each other and creating a schism in the protection of fundamental rights in Europe, the Convention and the Charter should serve to enrich one another"), and the comments by the Council of Europe observers on the final draft of the Charter, CHARTE 4961/00 CONTRIB 356 of 13 November 2000, and by the Commission in the communication mentioned above.

## 1. The arguments for and against accession

Rather than rehearsing in detail the arguments exchanged in the course of a debate which has been going on for more than twenty years, this document will merely very briefly recall the main arguments<sup>1</sup>. The advocates of accession stress above all that it would increase the protection of fundamental rights, by extending to the actions of the Union's institutions the same external judicial control mechanism to which all the Member States are already subject. In their view, filling this gap in protection seems increasingly urgent given the steady transfer of competences from the Member States to the Union, and also to avoid contradictions as regards the commitments required from the candidate countries by the Union. The Union's accession would also be the best way to avoid "new divides in Europe" between two systems of protecting fundamental rights, by ensuring the harmonious development of the case-law of the two European Courts.

The main concern of the opponents of accession to the ECHR is that it would be incompatible with the principle of the autonomy of Community law, including the position of the Court of Justice as the sole arbiter of that law. This question will be examined in more detail below. Another argument which is sometimes put forward is that it would not be appropriate for the Union to be subject to control by judges who are not nationals of the Union, and who might lack comprehension of the special nature of European integration.

*In the light of the arguments on both sides, would accession to the ECHR have the effect of strengthening the authority and credibility of Union law and its jurisdiction, or of weakening it?*

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<sup>1</sup> See the arguments put forward by the various parties before the Court of Justice during the proceedings leading to Opinion 2/94, ECR [1996] I-1772 et seq.; see also the report on the Charter of Fundamental Rights by the House of Lords Select Committee on the European Union dated 24 May 2000, paragraphs 104 to 112 (summary of the evidence given on this subject to the Committee).

## 2. Modalities of accession

### (a) At Union level

In accordance with Opinion 2/94 of the Court of Justice, the Community's accession to the ECHR would require the insertion of a specific legal basis in the EC Treaty; this could be inserted, for example, in Article 303 of the EC Treaty. If the Convention were to recommend that the legal personality of the Union should be formally recognised and merged with that of the Community, this legal basis should allow accession by the Union <sup>1</sup>.

### (b) At Council of Europe level

Accession by the Community/Union to the ECHR would in any case also require an amendment to the ECHR, necessarily to its Article 59 which currently restricts the circle of contracting parties to the members of the Council of Europe (which may only be European *States*). It would also raise a number of other technical questions which could lead to adaptations of the Strasbourg system <sup>2</sup>.

## 3. The implications of accession for the principle of the autonomy of the Community legal order

Some believe that the Community's accession to the ECHR would jeopardise the principle of the autonomy of Community law. This is said to be so partly because the Court of Justice would then lose its monopoly in ruling on the validity of acts of Community law – which would from then on

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<sup>1</sup> In formulating the legal basis, one would need to determine whether this provision should mention only the case of accession to the ECHR or whether it should also cover the possibility of acceding to other international human rights conventions. Rules should also be laid down concerning the decision-making procedure to be applied to the signing and conclusion of the accession agreement.

<sup>2</sup> These questions have recently been examined by an ad hoc working group within the Steering Committee for Human Rights of the Council of Europe; see the activity report by this group dated 2 April 2002 (GT-DH-EU (2002) 012).

also be monitored by the European Court of Human Rights. Also, the Court of Human Rights could also be called on to give an opinion on questions of the interpretation of Community law, for example in connection with checking the proportionality of Community acts, but also in the allocation of competences between the Union and the Member States or the exhaustion of domestic remedies. The Court of Justice would also lose its role as the sole arbiter in disputes amongst the Member States and between the Member States and the institutions, as such disputes could be brought before the Strasbourg Court by virtue of Article 33 of the ECHR. At the same time, all this would significantly weaken the political authority of the Court of Justice vis-à-vis the authorities of the Member States, including their supreme courts.

However, others contest this analysis and contend that accession would be perfectly compatible with the autonomy of Community law. They point out that the Strasbourg Court has no power to reverse or declare invalid the instruments of the contracting parties or judgments by their supreme courts, but can only note violations of the ECHR, the practical consequences of this for their domestic legal systems remaining within the competence of the institutions of the contracting parties. They also point out that domestic law is not taken into account by the Strasbourg Court except as a question of fact, and that in judging the proportionality of national acts the Court allows some leeway which would also make it possible to take account of the specific nature of Community law. The Strasbourg Court cannot therefore be described as a "superior" court in relation to the supreme courts of the contracting parties, but simply as a more specialised body which exercises subsidiary external control, with the Court of Justice having already admitted the possibility of subjecting the Union to such external control <sup>1</sup>. As for the risk of appeals between the Community and the Member States, or amongst the Member States, being taken to the Strasbourg Court, one might suppose that this would in any case be prohibited by Community law <sup>2</sup>; but a

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<sup>1</sup> See Opinion 1/91 of the Court of 14 December 1991, ECR [1991] I-6079, point 40: "The Community's competence in the field of international relations ..... necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions".

<sup>2</sup> Taking appeals between Member States to the Strasbourg Court would be contrary to Article 292 of the EC Treaty as regards the application of Community law (appeals concerning acts not related to Community law would of course remain possible). In the same way, it could be assumed that taking disputes between the Community/Union and the Member States before that Court would violate Article 10 of the EC Treaty, as this would diverge from the procedures laid down in Articles 226 and 230 of the EC Treaty respectively.

specific clarification at the time of any accession agreement, for example by means of a declaration in which the Community/Union and the Member States would renounce their right to bring appeals between the States to the Strasbourg Court, might seem desirable.

Finally, some suggest that the continuing non-participation of the Community/Union in the Strasbourg system would itself produce risks for the Community legal order in future. It does in fact happen that Member States are held indirectly responsible before the Strasbourg Court for claimed violations of the ECHR which result in reality from acts by the institutions of the Union. This responsibility is already recognised for acts of primary legislation not subject to the control of the Court of Justice<sup>1</sup> and for applications contesting a national act which only transposes a Community Directive word for word<sup>2</sup>; an application against the 15 Member States is currently pending before the Strasbourg Court alleging that a Commission Decision on competition, confirmed by the Court of Justice, violates the ECHR<sup>3</sup>. If accession does not take place, these observers fear that increasingly often the Strasbourg Court will rule indirectly on acts of the Community/Union, without the latter being able to defend itself and without its legal system being represented by a judge within the Court, and that the Member States, responsible for this defence in the place of the Community, might argue with the latter and amongst themselves about the conformity of Community acts in relation to the ECHR.

*Would accession to the ECHR harm the principle of the autonomy of the Community legal order and the role of the Court of Justice as the ultimate arbiter of that legal order? Or would it rather have positive consequences for that legal order?*

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<sup>1</sup> See judgment of the Strasbourg Court of 18 February 1999, *Matthews v. United Kingdom*, application 24833/94 concerning the 1976 Act on elections to the European Parliament, Annex II of which excludes Gibraltar from those elections.

<sup>2</sup> See judgment of the Strasbourg Court of 15 November 1996, *Cantoni v. France*, application 17862/91. See also judgment of 7 March 2000, *T. I. v. United Kingdom*, application 43844/98, concerning the Dublin Convention.

<sup>3</sup> *DSR Senator Lines v. the 15 Member States*, application 56672/00. The Court has not yet ruled on the admissibility of the application, which is contested by the 15 Member States who refer to the case-law of the former Commission of Human Rights (decision of 9 February 1990, *M & Co v. Germany*).

#### 4. Consequences for the system of allocating competences between the Community and the Member States

In this area, two issues need to be distinguished:

Firstly, since in accordance with Opinion 2/94 of the Court of Justice, accession to the ECHR would require the inclusion in the Treaty of a specific legal basis (on its form, see below), some have said that this could have the effect of recognising a general competence<sup>1</sup> for the Community/Union in the area of fundamental rights, including at internal level. This analysis is disputed by others: since the aim and effect of accession would only be to make the institutions subject to the fundamental rights of the ECHR and to external control by the Strasbourg Court, it is difficult to see why a legal basis in the Treaty restricted to this end would give rise to a general Union competence to legislate at internal level by prescribing fundamental rights binding the Member States in their own actions. However, one might consider clarifying this point in the legal basis permitting accession, if the need was felt. Others have suggested that this question be resolved by subjecting the action of the institutions to the Strasbourg system without providing for accession (this model is presented below).

Secondly, some have pointed out that accession could lead the Strasbourg Court to rule on the Union's system of allocating competences, since it could sometimes be difficult to decide whether an issue fell under the "jurisdiction" (Article 1 of the ECHR) of the Community/Union or that of a Member State. However technical solutions, to be determined when any accession agreement was drawn up, have been suggested to avoid this situation<sup>2</sup>.

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<sup>1</sup> It should be noted that while such general competence is lacking, the Community does in some areas adopt specific measures relating to fundamental rights, either on the basis of particular Articles of the Treaty (see, for example Articles 13 and 141 of the EC Treaty) or "annexed" to the exercise of the competences attributed to it (see, for example, Article 2 of Regulation No 2679/98 mentioned above (right to strike), or Regulations Nos 975/99 and 976/99 in connection with Community cooperation measures in third countries.

<sup>2</sup> In particular, following the example of the solution found in the case of the Convention on the Law of the Sea, a mechanism is proposed allowing the Community/Union to attach itself to a Member State as a co-defendant, being jointly and severally liable, and *vice versa*, with the addition of a declaration underlining that it would be a matter solely for the Community/Union and the Member States to decide how to allocate competences according to their internal procedures.

*Would accession to the ECHR be neutral as regards the allocation of internal competences between the Union and its Member States? Would it be appropriate to devise a provision of the Treaty to clarify this neutrality, following the example of Article 51(2) of the Charter?*

*Is there a real risk that the Strasbourg Court would be caused to rule on the allocation of competences between the Union and the Member States? Would the proposed mechanisms make it possible to exclude this risk?*

## **5. Alternative ways of ensuring consistency between the law of the Union and that of the ECHR**

It is generally admitted that the informal contacts and exchanges existing between the two European Courts are very positive and considerably facilitate the harmonious development of their case-law. However, while many observers insist on the accession of the Community/Union as the ideal solution to ensure consistency, some have suggested developing alternative mechanisms for this purpose, of which the following are most frequently discussed:

### **(a) A mechanism for referral or consultation**

One suggestion is to set up a mechanism for referral or consultation, making it possible for the Luxembourg Court to put to the Strasbourg Court a question of interpretation of the ECHR.

Such proposals have been made both as a measure to accompany accession to the ECHR, and as an alternative to it. In the latter case, some have suggested that the reply or opinion delivered by the Strasbourg Court could be qualified as "non-binding" on the Court of Justice. Some also assert that this mechanism would be the best way to ensure consistency between the two sets of case-law, particularly in cases where the Court of Justice is called on to rule on human rights questions in the absence of any Strasbourg case-law, and might subsequently be contradicted by Strasbourg. For those who advocate combining a referral mechanism with accession, this would also make it possible to reduce the number of individual applications to the Strasbourg Court relating to the law of the Union.

However, several objections have been raised to these proposals. Above all, it has been pointed out that such a referral mechanism would, contrary to the right to effective judicial protection, considerably delay the resolution of the main proceedings (particularly in cases where this procedure was additional to a reference for a preliminary ruling to the Court of Justice by a national court). Also, the Court of Justice would risk being placed in uncomfortable situations in which no national constitutional court ever finds itself: since it could most probably only make use of this procedure in carefully selected cases, its choice *not to* make a referral for a preliminary ruling to the Strasbourg Court in any particular case might always be criticised later, particularly if the Strasbourg Court then took a different line from that taken in Luxembourg. If, as an alternative to accession, Strasbourg's opinions were to be made "non-binding", the Court of Justice would still hardly be able to deviate openly from such opinions, and yet its judgments would risk being subject to discussion of the extent to which the Strasbourg opinion had actually faithfully been followed.

Finally, some suggest that an opinion or referral procedure would mix the legal systems unduly, and would have more significant effects on the autonomy of Community law than "pure and simple" accession: the Strasbourg Court would intervene directly in pending disputes by giving interpretations which would be authoritative for the Court of Justice – either *de jure* or at least *de facto*; whereas any other national constitutional court may freely assess the fundamental rights of its own legal system, with the role of the Strasbourg Court being limited to controlling *ex post* compliance with obligations under international law stemming from the ECHR.

Technically, the establishment of such a procedure for referral or consultation would require not only a special protocol annexed to the EC/EU Treaties but also amendments to the ECHR, as it would constitute a derogation from the normal function of the Strasbourg Court.



(b) A joint chamber

Mention should also be made of an idea which is sometimes put forward, namely that if there is no accession, the Court of Justice and the Strasbourg Court could form a "joint chamber" or "panel" which could have cases referred to it by either jurisdiction when a need was felt to ensure a uniform interpretation of fundamental rights, and especially when one Court wanted to depart from the case-law of the other. Supporters of this idea point out that it would reflect a strict equality between the two Courts and would do least damage to their current operation. However, one might wonder whether this proposal does not conflict with the rule established by the Court of Justice, stemming from the principle of the autonomy of Community law, that judges at the Court of Justice must not sit simultaneously in other jurisdictions where they would have to interpret provisions identical to those of Community law but using different approaches, methods and concepts<sup>1</sup>.

(c) Creating a right of appeal to the Strasbourg Court without acceding to the ECHR

Finally, the suggestion has been made of submitting the actions of the institutions of the Union to the individual application mechanism of the Strasbourg Court, by means of a special protocol to the EC and EU Treaties and a protocol to the ECHR, without providing for the accession of the Community/Union to the ECHR. While this model aims to create a situation which is broadly similar to that of accession as regards the position of the two Courts and the protection of individuals, the main difference would be that the Community/Union would not participate in negotiations on amendments to the ECHR or its additional protocols. Some have commented that this model would raise problems of principle for the autonomy of Community law, as well as practical complications: in effect, the institutions would be subject to the Strasbourg appeal

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<sup>1</sup> See Opinion 1/91 of the Court of Justice of 14 December 1991, paragraph 52, concerning the first draft agreement on the European Economic Area and the "EEA Court" system proposed therein.

system, without Strasbourg law formally being part of Community law (even if it may be said that the material standards of the ECHR are *de facto* applied in the case-law of the Court of Justice mentioned above), and that the Community/Union and its law would not, within the Strasbourg system, be treated on an equal footing with the other signatories to the ECHR.

*Are the alternatives proposed to accession to the ECHR satisfactory? In particular, would it be appropriate to establish a mechanism for referral by the Court of Justice to the Strasbourg Court, either as an alternative or as a complementary measure to accession by the Community/Union to the ECHR? Or would it be preferable, if accession were to take place, to stick to the joint system (individual application to the Strasbourg Court following exhaustion of domestic remedies)?*

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