

CONV 223/02

WG II 8

NOTE

from :	Secretariat
to :	Working Group II
Subject :	Summary of the meeting held on 23 July 2002 chaired by Commissioner Antonio VITORINO

The third meeting of Working Group II (Charter) was held on 23 July 2002 between 10.00 and 12.15 and between 15.00 and 18.00 under the chairmanship of Commissioner Antonio Vitorino.

I. Modalities and consequences of incorporation into the Treaties of the Charter

- *The question of "replication" in the Charter*
- *The examination of certain technical adjustments in the provisions of the Charter*

1. The Chairman presented the agenda, explaining that the subjects to be discussed were covered by CONV 116/02 and explored further in the working document (WD 09). He said it was evident from those documents that if the Group opted for the incorporation of the full body of the articles of the Charter into a new basic Treaty (option (f)), then at this stage two technical adjustments would be necessary, concerning Articles 51(2) and 52(2) of the Charter, as explained in working document No 9. The aim of those adjustments would be not to change but to safeguard and clarify the meaning and scope of those Articles.

2. Regarding the question of the "replication" of the rights which already appeared in the EC Treaty and were repeated by the Charter, the Chairman raised two issues: the concern for legal certainty which had led to the drafting of Article 52(2) of the Charter, and which had to be guaranteed whatever option the Group chose; and the presentation and intelligibility of the new Treaty, which was a question which would notably arise in relation to the combination in any new basic Treaty of the articles of the Charter and those of the EC Treaty on the citizenship of the Union.
3. All the members of the Group welcomed the Chairman's working document No 9 and were particularly pleased with the proposal for the editorial clarification of Article 51(2). There was consensus on the principle that the incorporation of the Charter should not lead to any "inadvertent" extension of the competences of the Union; if the Convention wanted to propose extensions of competences it should do so by means of clear provisions in other parts of the Treaty.
4. So as to be certain of achieving this aim, several members asked that the Group should also examine the possible clarification of the second sentence of Article 51(1) of the Charter, concerning the obligation on those to whom the Charter was addressed to "promote the application thereof"; other members felt that the current wording of this clause already indicated sufficiently precisely that this obligation existed for the Union only within the framework of its competences.
5. Regarding the "replication" of rights which already appeared in the EC Treaty and were repeated in the Charter, all the members of the Group stressed the need for proper coordination in the interests of legal certainty, so that none of the current legal aspects of those rights, including any limitations on them, would be lost if the Charter were to be incorporated. It was generally recognised that Article 52(2) of the Charter would serve to guarantee this principle of legal coordination, but it was difficult at this stage to foresee what precise form any editorial adjustments to the clause might take, since this would depend on the future structure of the Treaties.

6. In this context it was argued that it would be difficult to incorporate the Charter by means of option (f), while retaining a referral clause such as the current Article 52(2), since this clause would result in the subordination of the Charter to the EC Treaty. However, this argument was challenged by several other members, who proposed that the relationship between the Charter and the EC Treaty should be characterised rather by a principle of "compatibility" or "specification" or "explanation" (of the rights of the Charter by the articles of the EC Treaty); appropriate legal solutions to ensure those principles could be designed, once the future structure of the Treaties was known.
7. For some members, an essential question in this area was whether a hierarchy would be established between a new basic Treaty and the rest of current primary law. The Chairman remarked that the idea of a basic Treaty did not necessarily presuppose the establishment of such a hierarchy, and the Group did not have a mandate to prejudge the Convention's approach to this question.
8. Members of the Group generally recognised that the "replication" between the Charter and the current EC Treaty should be accepted, given that the provisions of that Treaty also included legal bases which had to be preserved, and that a number of rights, particularly the freedom of establishment or of movement, which were enshrined in the EC Treaty in a very detailed fashion, could not be reproduced in full in the Charter.
9. Several members of the Group commented that the definition of citizenship (Article 17 of the TEC) and a provision on its future development (Article 22 of the TEC) should be incorporated into a future basic treaty, whereas the details of the rights of citizens could continue to appear in the second part of primary law. These members felt that this approach, and the combination of those articles with the articles of the Charter (incorporated into the basic treaty in accordance with option (f)) would not raise problems of a political nature. Various possibilities were suggested regarding the place to be set aside for the above two provisions in a basic treaty: either in a chapter of the treaty on democracy or the democratic system, or in the framework of the Charter's articles on citizenship.

10. Concluding this discussion, the Chairman invited members of the Group to submit written suggestions, if they so wished, concerning possible drafting adjustments to the horizontal articles of the Charter.
- II. Hearings of Mr Schoo, Director, Legal Service of the European Parliament, Mr Piris, Jurisconsult, Director-General of the Council Legal Service, and Mr Petite, Director-General of the Legal Service of the European Commission
11. The introductory presentations by the three experts ¹, which will be distributed to members of the Group as working documents, dealt *inter alia*, with the following main themes:
- The Charter and the competences of the Union: The three experts confirmed the existing distinction between the limited competences of the Union on the one hand, and the fundamental rights to be respected by its institutions on the other. However, according to Mr Piris, the current wording of the second sentence of Article 51(1) of the Charter, which stipulated an obligation to "promote..", could give rise to ambiguities of interpretation as regards the rights in the Charter relating to areas in which the Union did not have legislative competence. Mr Piris therefore recommended that certain minimal technical amendments should be made to Article 51 of the Charter so as to avoid any uncertainty about the principle that the Charter did not extend the competences of the Union. Mr Schoo and Mr Petite believed that this principle emerged sufficiently clearly from the current Article 51, but that a technical adjustment would be necessary to Article 51(2) of the Charter, if the Charter were to be incorporated using option (f). Mr Petite explained that in practice the Commission was already careful to ensure that the Charter was not used to justify competences for the Union.
 - The Charter and the EC Treaty: According to Mr Piris, the fact that articles in the Charter repeated rights already enshrined in the EC Treaty but without expressly reproducing all the conditions and limits laid down in the Treaty would jeopardise the full understanding of those rights by citizens. He therefore recommended that either all the conditions and limits in the current EC Treaty should be copied over into the Charter, or that the Charter should include references to the relevant articles of the EC Treaty.

¹ Mr Piris indicated that he was speaking purely in his personal capacity.

Mr Petite explained that the previous Convention had had to make an "aesthetic" choice between two possible courses, either repeating the limits on the rights in each of the articles of the Charter, or stipulating them once and for all by means of the referral to the conditions and limits of the Treaty found in Article 52(2) of the Charter. Legally, the result – namely to make applicable the conditions and limits of the Treaty – was identical either way. Mr Petite concluded, as did Mr Schoo, that Article 52(2) satisfactorily regulated relations between the Charter and the EC Treaty. However he recognised that, if the Charter were to be incorporated by means of option (f), and depending on the new structure for the Treaties, a technical adjustment to Article 52(2) might be necessary to clarify to which legal text the clause referred. Mr Piris also recognised the necessity for Article 52(2), because in its absence the Charter would lead to a drastic modification to the EC Treaty on certain points; he then remarked that, if the Charter were to be incorporated into the Treaty, legal certainty and clarity would argue either for its deletion, provided that the conditions and limits laid down by the EC Treaty were included in the Charter, or for its clarification by an explicit reference to compliance with the conditions and limits laid down by the provisions of other parts of the Treaties.

- The Charter and the European Convention on Human Rights (ECHR): Mr Petite and Mr Schoo said that the Charter had found a satisfactory compromise by reconciling several premises, given that the ECHR was only a minimum standard and that there was a need to reflect and preserve in the Charter those advances which had already been made in Community law and case-law (these two points were also mentioned by Mr Piris), but also that the harmonious development of the two European legal systems and their two Courts should be ensured , while respecting the principle of the autonomy of Community law.

While recognising that there was no legal necessity to amend the Charter if incorporated, if it was understood that the Charter offered more protection on some points than the ECHR, Mr Piris felt that legal uncertainty could result from the fact that the articles of the Charter had not reproduced the limits laid down in the ECHR, and that since Article 52(3) was not completely clear on this subject it would be for the Court of Justice to say whether those limits were applicable. According to Mr Petite, it was evident that the reference in Article 52(3) to the "meaning and scope" as conferred by the ECHR also included the ECHR's clauses on limits, and that the Court of Justice could not mistake this. With Mr Schoo, he did not see any legal uncertainty here.

- The importance of the horizontal clauses of the Charter: The three experts agreed on the essential role of the horizontal clauses of the Charter and on the need to retain them. Mr Piris and Mr Petite indicated that (in the case of incorporation according to option (f)), some adjustments which were purely a matter of legal form should be made to those clauses, but would in no way modify the substantive contents of the Charter.
- Accession by the EC/EU to the ECHR: The three experts were in favour of accession by the EC/EU to the ECHR, from a legal point of view. They all said that this would be the ideal solution to guarantee the harmonious development of the case-law of the two European Courts. In particular, the absence of a means for citizens to appeal to the Strasbourg Court against acts by the institutions constituted an anomaly (Mr Piris); accession would be of benefit even after the incorporation of the Charter, since it would establish an external control to which all the Member States were already subject (Mr Schoo and Mr Piris); the principle of the autonomy of Community law did not present an obstacle to accession (Mr Schoo and Mr Petite); and legal problems were currently posed for the EC/EU since the Court of Strasbourg was called on to take decisions on Union law without the Union being able to defend itself (Mr Petite). Mr Piris raised the possibility of "functional accession" if accession pure and simple would lead to political problems. Mr Petite stressed that one risk, feared by some, namely that accession could lead to an increase in the Union's competences as regards human rights, could easily be countered by technical clauses clarifying that accession would not have this concomitant effect.

12. Other issues explored in one or other of the individual contributions included the following:

- Mr Petite explained the degree to which the Charter, when incorporated into the Treaties, would bind the Member States. He stressed that the wording of Article 51(1) of the Charter on this point would only reproduce current case-law on the application of Community fundamental rights to the acts of the Member States, and that the very cautious line followed to date by the Commission and the Court would therefore continue to apply after the Charter had been incorporated. As a result, the Charter would only cover a very narrow area amongst the vast range of legislative or administrative acts by the Member States. This also meant that the provisions of the Charter would only be invoked very exceptionally with "direct effect" before the national courts.
- Regarding the rights of the Charter found in sources other than the ECHR and the EC Treaty, Mr Petite observed that it would be difficult to draft a "referral clause" similar to those in Articles 52(2) and (3) of the Charter, as there was no single written reference text; in relation to those rights the Court had used a multitude of sources of inspiration which left it with a wide margin of discretion. It would be illusory to believe that the Court could define those rights with a meaning identical to that enshrined in each of the fifteen national constitutions. Mr Piris noted that some rights in the Charter had not yet been enshrined in the constitutions of all the Member States. On the other hand, Mr Petite commented that the Court of Justice had already in the past taken inspiration from international conventions, notwithstanding the fact that some Member States had entered reservations regarding them, and the fact that the Charter had been inspired by such instruments did not mean that it incorporated them as such into Union law.
- Mr Piris commented that some provisions of the Charter lacked precision, since although the Charter explicitly contained "rights", "freedoms" and "principles", it did not state which provisions of the Charter fell into each of these three categories, which could lead to risks of legal uncertainty and the creation of legitimate expectations.

- Mr Schoo explored the consequences of the incorporation of the Charter for legal remedies before the Court of Justice, proposing an adjustment to Article 46(d) of the current TEU concerning the Court's control – as already exercised – over the acts of the Member States when they are implementing Union law. In principle, the Court of Justice should exercise its role as constitutional court in relation to justice and home affairs in the same way as it does for classic Community law. Mr Schoo also wondered whether it would be necessary to amend the conditions for direct appeal by individuals (fourth paragraph of Article 230 of the TEC) to allow them easier access to the courts, without this leading to open public recourse.

13. In the Group's discussions with the experts, the following points were raised:

- The three experts confirmed that the reference in Article 52(2) of the Charter to the conditions and limits defined by the Treaties included the implementing provisions of secondary law, without these needing to be expressly mentioned.
- When questioned about the usefulness of retaining Article 6(2) of the current EU Treaty in the case of incorporation of the Charter and accession to the ECHR, the three experts stated that this was a political question; Mr Piris and Mr Petite felt that a reference to constitutional traditions common to the Member States could remain useful, while Mr Schoo commented that there would be some ambiguity in the system if Article 6(2) of the TEU was retained.
- Regarding the idea of a hierarchy between the basic treaty and the rest of primary law, the three experts pointed out that such a hierarchy had never been established amongst the elements currently making up primary law, that it did not arise automatically from the idea of a basic treaty, and that it could only result from a political choice which would have to be clearly expressed.
- Mr Petite and Mr Piris confirmed that if the Charter were to be incorporated, then the national reservations entered by the Member States with regard to international human rights conventions would remain applicable, as they had done to date, as regards the autonomous action of those States.

- Asked – as an example of the consequences of the Charter – about its effects on the recognition of single sex unions, Mr Schoo pointed out that this question had already arisen in Community law independently of the Charter, but said that Article 9 of the Charter confirmed the competence of the national legislator on this subject. The Chairman of the Group referred on the one hand to the judgment by the Court of Justice last year, handed down after the Charter had been proclaimed, and following the conclusions of the Advocate-General who had examined the Charter, in which the Court confirmed the different situation of marriages and such unions; and on the other hand to a very recent judgment by the European Court on Human Rights which contained a liberal reading of the right to marry concerning transsexual persons.

III. Other business:

14. One member of the Group wondered if it would perhaps be useful to have a Working Group on the judicial architecture of the Union. The Chairman indicated that this subject had been noted in his document setting out the mandate for the current Group and in CONV 116/02, but said that he would also bear it in mind in future discussions in the Praesidium.
