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NOTE

from :	Secretariat
to :	Working Group II
Subject :	Summary of the meeting held on 17.09.02 chaired by Commissioner António VITORINO

The fourth meeting of Working Group II (Charter/ECHR) was held on 17 September 2002 between 10.00 and 13.00 and between 14.30 and 18.30, and was chaired by Commissioner António Vitorino.

- I. Modalities and consequences of possible accession by the EC/EU to the ECHR
– First debate (*see CONV 116/02, Part III*)

All speakers expressed their support for accession by the European Union (given the Convention's general approach of enshrining a single legal personality for the Union) to the European Convention on Human Rights (ECHR) or, at the very least, emphasised the arguments in favour of such an accession. In particular, it was said that accession would guarantee citizens the same degree of protection of fundamental rights as they enjoy already vis-à-vis Member States, that the arguments for accession could be even stronger in the case of a binding Charter, as it would help to ensure the harmonious development of the case-law of the two European Courts, and that it would serve as a link between the "core" and the "wider" Europe by preserving the political importance of the Council of Europe in this area.

A majority of speakers stressed the fact that accession to the ECHR should not be an alternative to incorporation of the Charter into the Treaties, but rather a complementary step, adding to the protection afforded by the Charter and the Court of Justice, with the external control provided by the European Court. The situation would then be similar to that of the law of all the Member States, which guarantee fundamental rights on the one hand by their Constitutions, and which have subscribed, on the other, to the international minimum standard set by the ECHR.

Two matters which require particular attention in this respect were, however, raised. On the one hand, several members emphasised that accession to the ECHR should not lead to an extension in Union competence in the area of human rights. In this respect, a number of speakers were satisfied that a legal basis in the Treaty confined to authorising the Union to accede to the ECHR could not have this effect; others felt that thought should in any case be given to technical solutions to rule out such an effect entirely. On the other hand, it was emphasised that accession should be without prejudice to national positions arising from the fact that certain Member States had not ratified all the Protocols annexed to the ECHR or had entered reservations on it.

At the end of the general discussion (which continued after the hearing of Mr Fischbach – see below – at the beginning of the afternoon), the Chairman concluded by pointing out the need to see the several layers to the issue: the Convention's task would be confined to examining the incorporation into the Treaty of a constitutional authorisation for the Union to accede to the ECHR. At this stage, it should be clarified that that would not lead to an extension of competence. Furthermore, there was a need to ensure compatibility between accession and incorporation of the Charter as a binding text; for that purpose, it seemed necessary to maintain Article 52(3) in the Charter. However, the question of to which Additional Protocols to the ECHR the Union should accede and what possible reservations it would enter upon accession to the ECHR, would not be of a constitutional nature and should not be addressed by the Convention; it would instead be the Council which could take a decision by unanimity at the appropriate time on the basis of the authorisation. The national reservations entered by Member States would in any case remain intact in the event of accession, as they concerned the implementation of national law, while the effect of accession was confined to the field of Union law.

In this context, the Chairman was sceptical with regard to the "functional accession" model, which was mentioned by a Group member but rejected by others (such a model would involve the negotiation, between Member States and the States of the Council of Europe, of special protocols to the ECHR and to the EC/EU Treaty under which the Union institutions would be subject to control by the European Court without the EC/EU itself acceding to the ECHR with its own legal personality (see explanation in CONV 116/02, pp. 25 and 26). The Chairman emphasised that he saw no advantage in the model, which was not envisaged by the Member States' legal experts meeting in the Council of Europe's CDDH (Steering Committee for Human Rights). Such a model instead presented disadvantages, as highlighted by Judge Fischbach, resulting in particular from the Union's absence from the Strasbourg system.

2. Hearing of Mr March Fischbach, Judge, European Court of Human Rights

The Group heard Mr Marc Fischbach, Judge at the European Court of Human Rights, who spoke in a personal capacity. In response to questions put by Group members, Mr Fischbach made, *inter alia*, the following comments:

Mr Fischbach felt that EC/EU accession to the ECHR would not affect the autonomy of Union law. The European Court's remit was confined to giving rulings on compliance with obligations arising from the ECHR. The Court did not interpret the national law of the contracting States; neither, therefore, would it intervene in the interpretation of Union law, for which the Court of Justice would remain the supreme arbiter. As for acts of contracting States, in the event of infringement of the ECHR, the Court would neither have the competence to annul Union acts, nor to prescribe or suggest specific measures to remedy the infringement observed, as the choice of remedy should only be for the institutions of the Union. Furthermore, in accordance with the subsidiarity principle, the European Court took care, in the application of the ECHR to specific cases, to leave Contracting Parties appropriate leeway, which would also enable them to take into account the specific nature of Union law.

The relationship between the European Court of Human Rights and the Court of Justice of the EC could not therefore in the case of accession be qualified in terms of a "hierarchy" between the two European Courts, as each of the two Courts would only give rulings within its own jurisdiction, without impinging on that of the other; the European Court would simply act as a more specialised jurisdiction exercising additional external control only with regard to compliance with the ECHR. Its role would leave the authority and importance of the Court of Justice fully intact, just as it did not reduce those of the national constitutional and supreme courts, which were very respectful of fundamental rights and were also free to exceed the minimum standard set by the ECHR.

Mr Fischbach believed that Union accession to the ECHR, which would enable the Court of Justice to apply the ECHR directly, could also reinforce the Court of Justice's role in developing the protection of fundamental rights in Europe and lead to increased influence for the Court over the case-law of the European Court of Human Rights.

While it seemed important to define the role of the Court of Justice in a future constitutional treaty of the Union, Mr Fischbach saw no reason, even in the case of accession to the ECHR, to reserve an express place for the European Court in the treaty, since the European Court is an institution outside Union law.

Mr Fischbach was satisfied with the current wording of Article 52(3) of the Charter and emphasised the importance of the wording, on the basis of which the Council of Europe observers were able to express their satisfaction with the text of the Charter in the previous Convention. He confirmed his view that the legal principles arising from this clause were sufficiently clear. Implementation would not for all that be without some difficulties, but these were inherent in any effort to ensure harmonious development of the case-law of the two Courts and therefore existed before the Charter. They could, however, increase further with the gradual extension of Union competence to areas which were especially sensitive in terms of fundamental rights, particularly under the third pillar. In

the face of such difficulties, which could arise now, in particular when the Court of Justice had to give a ruling before European Court case-law was formed on a particular matter, Union accession to the ECHR would work as a "safety net", making it possible to minimise possible case-law discrepancies and correct the effects. This solution seemed all the more advisable since incorporation of the Charter into the Treaties would mean that the number of cases brought before the Court of Justice and affecting fundamental rights was likely to increase following accession, as would the number of cases brought before the European Court. Mr Fischbach felt, however, that this increase, and the practical difficulties it could create, should not make us lose sight of the fact that they were merely the consequence of strengthened protection of fundamental rights. This strengthening would – because it took place under external control – help lend greater credibility to the Union system.

Mr Fischbach believed that Union accession to the ECHR would not in any way alter the allocation of competence between the Union and its Member States. Considering the competences to be a fact, the Strasbourg system would accept that allocation as it stood, as an internal matter for the Union and its Member States; the European Court would not intervene, as it was exclusively a matter of Union law. To resolve specific cases brought before the European Court and in which it was not certain whether the Union or one of its Member States was responsible for an alleged infringement of the ECHR, Mr Fischbach referred to a "co-defender" mechanism developed by the Council of Europe's Steering Committee for Human Rights (CDDH) (see working document No 8 by Mr Vitorino). By virtue of this mechanism, a defendant Member State would be able to invite the Union to join the proceedings as "co-defendant" if it felt that the case involved the Union's responsibility, and *vice versa*. In the case of infringement of the ECHR, the European Court's ruling would be given in respect of the two defendants taken together, without ruling on the allocation of responsibility between the two. Similarly, when complying with the judgment, it would be for the Union and the Member States alone to determine the allocation of responsibility between the Union and the defendant State.

Mr Fischbach had reservations concerning suggestions to introduce a referral or consultation procedure between the European Court and the Court of Justice, either in the case of accession or as an alternative to it. Among the disadvantages of such approaches, he mentioned in particular the considerable extension of deadlines for rulings in pending cases and the resulting imbalance which would be created between the Union and Member States, where supreme courts were not able to consult the European Court. Mr Fischbach also confirmed that informal information meetings were also held regularly between the European Court and the Court of Justice, but that he felt it was neither necessary nor appropriate to introduce consultation between the Courts with the aim of enabling the two Courts to agree on or influence each other on the rulings to be given on pending cases.

Mr Fischbach was asked about the suggestion to consider a "functional" accession (i.e. the negotiation, between the Member States and the States of the Council of Europe, of special protocols to the ECHR and to the EC/EU Treaty under which the Union institutions would be subject to control by the European Court *without the EC/EU itself acceding to the ECHR with its own legal personality*). He was unsure as to the advantages of the idea, feeling that it would be the source of disadvantages and complications, since it seemed so difficult to reconcile with the principles governing the Strasbourg system, particularly that of the collective guarantee. If the Union as such were not part of the system, there would be no Court judge elected on behalf of the Union and as a "representative" of Union law. However, in the Convention system, the presence of a "national" judge was essential, as it provided Court proceedings with expertise in the law challenged by the action. Such expertise was all the more crucial in the case of Union accession, in view of the specific nature of Community/Union law and the need to ensure harmonious development of this law with the ECHR. The absence in the Court of a judge elected on behalf of the Union could, therefore, cause a problem with regard to the authority and legitimacy of rulings against the Union. By the same token, in the case of "functional" accession, there would be no Union representation in the Committee of Ministers when it monitored compliance with rulings, even though such representation was necessary in order to exercise this function and, in the particular case of the Union, should also serve to inform the Committee on the Union's limited competences (see previous point).

3. Incorporation of the Charter into the Treaties:

- examination of certain technical adjustments to the horizontal provisions of the Charter

With regard to possible adjustments to Article 51(1) and (2), a consensus emerged in favour of recommending slight adjustments along the lines given in working document No 14 by Mr MacCormick and in the hearing of Mr Piris (see document No 13), in order to clarify beyond the slightest doubt that a Charter incorporated into the Treaties would not alter the allocation of competences between the Union and Member States.

By the same token, there was a consensus to keep a referral clause governing all Charter rights taken from the EC Treaty. The definitive wording of the referral clause, currently found in Article 52(2) of the Charter, could not be determined at this stage as it would depend on the architecture of the constitutional treaty to be drawn up by the Convention.

With regard to Article 52(3) of the Charter, it was requested that the meaning to be given to this provision and in particular the relationship between the first and second sentences be clarified in the final report. In this respect, some members of the Group, as well as the Chairman in his conclusion, indicated that if, in accordance with Article 52(3) of the Charter, the meaning and scope of the rights of the Charter corresponding to the rights of the ECHR were the same as those provided for in the Convention, the addition of the second sentence of Article 52(3) of the Charter was necessary to clarify that this Article did not prevent higher protection being afforded by Union legislation, as well as by the provisions of the Charter, which, although based on the ECHR, went further than it because the Union *acquis* was already an improvement on the ECHR (examples: Articles 47 and 50 of the Charter).

Lastly, it was requested that the Group seek to formulate an additional clause in Article 52 of the Charter which was currently lacking and which would govern those Articles of the Charter not taken from the Treaties or from the ECHR. It was thought that such a clause could be based on Court of Justice case-law relating to the constitutional traditions of Member States and also accentuate the distinction made in the Charter between rights and principles.

While, in response to that request, some members were generally prepared to examine ways of finding a formula concerning the relationship between the Charter and the constitutional traditions common to the Member States, a number of other speakers were not convinced of the existence of a lacuna in the horizontal provisions, pointing out in particular that the Charter was clearer than the source of constitutional traditions could ever be, that a referral clause would not be possible since there was no reference text, other than the Charter, which would summarise common constitutional traditions, and that it would be inadmissible to wish to change the meaning of the Charter by inserting an additional horizontal clause. The Chairman, concluding on this point, was open to seeking a solution. He stressed, however, that there was no room for conflict with the current practice of the Court, described by Judge Skouris, of basing itself freely on common constitutional traditions by rejecting the approach of the lowest common denominator. He added that it was also necessary to bear in mind fundamental rights based on other sources such as other legal instruments and that, while the difference between rights and principles was well established in the Charter, the previous Convention had decided not to stipulate in detail the legal consequences of the distinction but rather to leave it to case-law.

Some members requested that the Group's report also give a position on the usefulness of emphasising the importance of the explanations of the Praesidium in relation to the text of the Charter when it was incorporated.

4. Hearing of Mr Vassilios Skouris, Judge, Court of Justice of the EC

In his introductory presentation (see working document No 19) and in response to the questions put by the members of the Group, Mr Skouris – who spoke in a personal capacity, explaining that the Court had held some discussions on the matters concerning the Group but that no official position had yet been adopted – made, *inter alia*, the following comments:

Mr Skouris felt that incorporation of the Charter could not alter the allocation of competences between the Union and the Member States if care were taken to adjust properly the horizontal clauses of Articles 51(2) and 52(2) of the Charter as proposed in the Group.

Mr Skouris said that *de lege lata* the Court had recently ruled that the current system of appeals procedures for scrutinising the legality of acts of the institutions complied with the general principles of law. He added that *de lege ferenda* a modification of the current system could be envisaged. Judge Skouris felt that the establishment of a Community "Verfassungsbeschwerde" (special constitutional appeal) would not be the most suitable solution; neither would it be desirable to allow individuals to challenge a regulatory act only when there was no appropriate appeals procedure at national level. If an amendment were to be considered, it would be in Article 230(4) TEC, the strictness of which had been criticised, rather than in Article 234 TEC, as the preliminary referral procedure was working satisfactorily. Judge Skouris also specified that while the European Ombudsman fulfilled an extremely respected role, he was not a judicial body and could hardly therefore take on a role of "filtering" by submitting individual cases to the Court of Justice. Lastly, Mr Skouris considered it desirable that the conditions for Court control be uniform with regard to acts of the institutions, irrespective of the subject concerned, and that it would not be easy to accept that, in the case of either a binding Charter or accession to the ECHR, the restricted judicial control provided for under the third pillar be maintained, while emphasising that it was not for him as a judge to give the constituent authority suggestions on the matter.

Mr Skouris confirmed that accession to the ECHR did not, generally speaking, conflict with the autonomy of Community law. It would come as no shock to him if, following accession, the Court of Justice lost its monopoly over ruling on infringement of the ECHR by a Community act. Mr Skouris regarded the interpretation sometimes given of Court Opinion No 2/94 as a misunderstanding; in reality, the Court would have no problem with the external control which accession to the ECHR would establish.

Mr Skouris did not believe that EC/EU accession to the ECHR would affect the allocation of competences between the EC/EU and its Member States if the legal basis established for that purpose was confined to governing only the problem of accession. He felt that the Strasbourg Court would not, following accession, be asked to rule on other matters of Community law such as those affecting the allocation of competences; he referred to the technical solutions proposed to avoid such a situation.

Mr Skouris considered it necessary not to overestimate the risk of possible contradiction between the decisions of the two European Courts, given that the Court of Justice had always been, and would continue to be, very watchful of the Strasbourg Court's case-law. For that reason, Mr Skouris would not advocate setting out the respective roles of the two Courts in the treaty nor regulating the relations between them, even in the case of incorporation of the Charter; in this connection, Mr Skouris was opposed to introducing a referral by the Court of Justice to the Strasbourg Court, as it would make the procedure before the Court disproportionately complicated and cumbersome.

Mr Skouris confirmed that the Court based itself on the constitutional traditions common to the Member States in order to identify the general principles of law with regard to fundamental rights. He emphasised that common constitutional traditions did not constitute a direct source of Community law and so did not bind the Court as such; they were more a source of inspiration. It was not, therefore, a question of the Court identifying and mechanically transposing the lowest common denominator of the constitutional traditions common to the Member States into Community law, but rather of it drawing inspiration from them in a broader sense to establish the level of protection appropriate to the Community's legal order. In the case of incorporation of the Charter, Mr Skouris felt that there should no longer be recourse to general principles, and consequently the common constitutional traditions, as a "concurrent and equivalent" source of fundamental rights, but rather purely as a subsidiary and complementary source, enabling the Court to use it solely for the purposes of making good any lacunae in the text of the Charter.

Mr Skouris felt that Article 52(3) of the Charter, incorporated into the Treaty, would confirm the current Court of Justice practice of following the interpretation given to the ECHR by the European Court of Human Rights, and should not lead to a change in that satisfactory practice of the Court of Justice. With regard to Article 52(2) of the Charter, Mr Skouris believed that it identified the principle according to which rights already enshrined in the EC Treaty and taken up by the Charter would be governed by the EC Treaty as *lex specialis* and that existing case-law concerning those rights would remain in force. When questioned in general terms about whether the Charter was clearly enough worded, Mr Skouris replied that while there was always room for improvement, he could live with the current text of the Charter and that, while the current situation would undoubtedly give the Court of Justice greater freedom, he personally would feel more comfortable working with a written regulatory framework of fundamental rights as provided by the Charter.