



COMMISSION OF THE EUROPEAN COMMUNITIES

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on the Charter of Fundamental Rights of the European Union

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1. INTRODUCTION

1. The preparation of the draft Charter of Fundamental Rights is now at a crucial stage. The Feira European Council concluded that:

"The Convention is urged to continue its work in accordance with the timetable laid down in the mandate from the Cologne European Council so that a draft document is presented in advance of the European Council in October 2000"

2. After months of intensive work the Convention has produced a new preliminary draft of the Charter.¹
3. The preliminary draft has been drawn up using the approach adopted by the Convention when it began its work, which involved preparing the draft for submission to the European Council **as if it was subsequently to be incorporated into the Community Treaties** with mandatory legal force. At the instigation of its President, Roman Herzog, the Convention concluded that this was the only approach that could leave the European Council the choice it will have to make in due course, in accordance with the Cologne mandate, about whether the Charter should take the form of a declaration or be incorporated in the Treaties with mandatory legal force.
4. The work done by the Convention in the last few months involved giving each member of the Convention the possibility of submitting **written amendments** to previous texts. Over a thousand amendments were submitted, reflecting the full range of feelings within the Convention. The preliminary draft is a compromise drawn up by the Praesidium. It is intended to take account of all the points of view and feelings expressed by the Convention.
5. **With a view to concluding the Convention's work and forwarding the draft Charter to the Biarritz European Council**, the Praesidium asked the members of the Convention to submit any comments on the preliminary draft text they considered helpful by 1 September. It also established the agenda for the Convention's two final meetings:
 - 11 - 12 September the members of the Convention will meet in groups and on 13 September they will inform the Convention of their positions regarding the preliminary draft;
 - the meeting of 25 - 26 September is intended to pull together the group's points of view and to enable the President of the Convention, in line with the Cologne

¹ The draft is contained in the document CHARTE 4422/00, CONVENT 45 of 28 July 2000: *Complete text of the Charter proposed by the Praesidium* » .

conclusions, to establish a consensus within the Convention and forward the draft to the Heads of State or Government.

6. The purpose of this communication is therefore:

- **to set out the Commission's position concerning the content of the preliminary draft, with the aim of furthering the development of consensus within the Convention, and**
- **to highlight the political and institutional questions the Commission believes to be of particular importance, especially with regard to the nature of the Charter.**

2. THE OBJECTIVES OF THE CHARTER

7. The Cologne European Council set the main objective of the Charter of Fundamental Rights of the Union: **to make their overriding importance and relevance more visible to the Union's citizens.**

Consequently, the European Council mandated the Convention to draw up the Charter, a task of revelation rather than creation, of compilation rather than innovation.

8. However, the Cologne conclusions were reached at a historic time for European integration. There is a need for a Charter of Fundamental Rights because the European Union has entered a new, more resolutely political phase of integration. The Charter is a major milestone for Europe as a political force, which is evolving into an integrated area of freedom, security and justice, simply as a consequence of citizenship. It is an indispensable instrument of political and moral legitimacy, both for the citizens of Europe in relation to politicians, administrations and national powers and for economic and social operators. It is an expression of the common values that are at the very core of our democratic societies.
9. The Charter should be the best possible combination of pragmatism and ambition. It should **add real value** to the abundance of existing legal or political texts dealing with human rights in Europe.

The Charter is **pragmatic**, in that it must not give way to the temptation to innovate at all costs and must remain within the framework of the Cologne mandate.

Nevertheless, its added value is **ambitious**. It has been produced by:

- codifying material from various sources of inspiration: the European Convention on Human Rights, common constitutional traditions, the European Social Charter, the Community Charter of the Fundamental Social Rights of Workers, primary and secondary Community legislation, international conventions (Council of Europe, UN, ILO) and rulings by the Court of Justice and the European Court of Human Rights;
- incorporating in the Charter, alongside the classic civil and political rights and the rights of citizens deriving from the Treaties, fundamental economic and

social rights, "insofar as they do not merely establish objectives for action by the Union";

- enshrining certain "new" rights which already exist but have not yet been explicitly protected as fundamental rights, notwithstanding the values they are intended to protect, such as the protection of personal data and the principles of bioethics or the right to good administration.

10. As well as raising the profile of fundamental rights, it must be pointed out that the Charter provides significant **legal certainty**. This will make it possible to improve the current level of protection of fundamental rights in the Union, by moving beyond the current system, which is basically in the hands of the courts.

In the current Treaties, Article 6 of the Treaty on European Union is the point of reference for questions related to fundamental rights. Its first paragraph sets out the general principles on which the Union is based and which, if seriously and persistently breached, can lead to the imposition of the penalties set out in Article 7 of the Union Treaty. Paragraph 2 lists the sources of fundamental rights respected by the Union, at least one of which (constitutional traditions common to the Member States) it is difficult to challenge by way of legal action. Leaving aside its ultimate legal nature, the adoption of the Charter sets out clearly and concisely the fundamental rights covered by Article 6(2). This could also clarify the principles set out under Article 6(1) and the provisions referring to it (Articles 7 and 49 of the Union Treaty).

11. **The Charter applies to the institutions and bodies of the Union, and to the Member States solely where they implement Union law.** It will therefore be possible to assess all measures taken in this field on the basis of the rights and freedoms set out in the Charter. This means that, in terms of the protection of fundamental rights, the Charter is an instrument for controlling the exercise of powers devolved by the Treaties to the Union's institutions and bodies
12. With the Union now developing a real common foreign and security policy, in which respect for fundamental rights will play a key role, the adoption of a catalogue of rights will make it possible to give **a clear response** to those who accuse the Union of employing **one set of standards at external level and another internally**. The Charter will provide the Union with a clear catalogue of rights that it will have to respect when implementing both internal and external policies.
13. There is no way to avoid addressing the possible repercussions of the adoption of the Charter on the enlargement of the Union. **First and foremost, it will be necessary to dispel all fears about the impact of the Charter on enlargement.** The Charter imposes no additional conditions on applicant countries. The acceptance of the established body of EU law, for example, on the protection of personal data, already involves the acceptance of and respect for the rules and principles contained in the Charter. In fact, the Charter sets out clear rules regarding fundamental rights, thereby providing the applicant countries and citizens in general with legal certainty. In doing so, it demonstrates that it is an extremely important milestone in the development of Europe as a political force.

14. To ensure that the Charter is a success, it is advisable not simply to highlight its objectives and added value, but also to point out clearly that it will not have certain effects which may have caused alarm in some quarters:

- a) **The Charter will not be a vehicle to extend or reduce the powers of the Union and the Community**, as established by the Union Treaty and EC Treaty. The Charter is neutral with regard to the division of powers. Changes in any powers would be a matter for the Intergovernmental Conference, not for the Convention.

The Charter's neutrality on the subject of the powers of the Union and the Community is also a consequence of the very nature of fundamental rights. As they protect the individual from abuses of public power, the main purpose of fundamental rights is to allow for the control of existing powers at a given political level, whatever level that may be.

Since fundamental rights are also the values which guide the actions of the Community and the Union, it is clear that such action must be carried out within the framework of the powers of the Community and the Union and with respect for the principle of subsidiarity. This applies particularly to rights requiring implementing measures, such as social rights and principles.

- b) **The Charter will not require, as has been shown by the discussions within the Convention, any amendments to the Member States' constitutions.** As regards the respect for fundamental rights at national level, in its field of application it will clearly not replace national constitutions; in fact, it will basically group together rights already existing in different documents and in the Treaties.
- c) **The Charter will have no impact on forms of court action or the court structure put in place by the Treaties**, as it does not provide for new channels of access to Community courts. The right to a court hearing, be it a national or Community court, will be exercised using existing legal channels:
- by bringing an action before the Court of Justice, on the basis of Articles 230, 232 and 235/288 of the EC Treaty, as long as the conditions of admissibility are duly satisfied, or
 - by bringing an action before a national court which may give rise to a request for a preliminary ruling under Article 234 of the EC Treaty.
- d) **The Charter neither requires nor precludes accession to the European Convention on Human Rights.** The development of the Charter has once again highlighted the question of the Community or the Union signing up to the ECHR. In view of the mandate given to the Convention by the Cologne European Council, the Convention has admitted ever since its work began that this matter does not concern it.

However, the existence of a Charter does not diminish the interest in joining, as accession would effectively establish external supervision of fundamental rights at Union level. Moreover, accession to the ECHR would in no way lessen the importance of drawing up a European Union Charter. The question

has also become topical following a recent ruling by the European Court of Human Rights in Strasbourg on a piece of primary Community legislation (Application No 24 833/94, *Matthews v United Kingdom*, judgment on 18 February 1999).

3. THE CONTENT OF THE PRELIMINARY DRAFT

15. The preliminary draft has given rise to a number of observations, which are set out below.

3.1. Structure

16. The preliminary draft consists of 52 Articles and an introductory preamble. Apart from the general provisions at the end of the document (Articles 49 to 52), the Articles are grouped around six fundamental values: dignity (Articles 1 to 5), freedoms (Articles 6 to 19); equality (Articles 20 to 24); solidarity (Articles 25 to 36); citizenship (Articles 37 to 44) and justice (Articles 45 to 48).
17. The preliminary draft is accompanied by an explanatory memorandum (CONVENT 46, annexed to this Communication), which lists the sources that provide the basis for the Charter's Articles (including Community Treaties, the Rome Convention on the Protection of Human Rights and Fundamental Freedoms, other international conventions and rulings by the Court of Justice). The Commission believes that this explanatory memorandum could be of help with further interpretation of the Charter.

3.2. Form

18. In keeping with the spirit of the Cologne Conclusions, which called for a Charter of Fundamental Rights of the Union to be drawn up to make their overriding importance and relevance more visible to the Union's citizens, the drafting has been characterised by a desire for conciseness and clarity.

3.3. The list of rights

19. In line with the Cologne conclusions and taking account of the principle of the indivisibility of fundamental rights, the preliminary draft includes the rights of liberty and equality, together with the procedural rights guaranteed by the Rome Convention and by the constitutional traditions of the Member States, the fundamental rights of citizens of the European Union and fundamental economic and social rights, grouping them on the basis of the abovementioned structure.
20. The Convention's work has resulted in the explicit inclusion of rights not on the list drawn up by the Praesidium of the Convention as a basis for discussion (CHARTER 4112/00): freedom of scientific research (Article 13); freedom to conduct a business (Article 16); the protection of intellectual property (Article 17); the right to good administration (Article 39); children's rights (Article 23); access to services of general economic interest (Article 34); protection in the event of unjustified dismissal (Article 28). Equality, which found a place in the Praesidium's draft solely in connection with bans on discrimination, is the subject of two specific Articles: one establishing the rule of equality before the law (Article 20) and the other dealing with the equality of men and women (Article 22). Reference is also made in the preamble to duties with regard to other persons.

21. Conversely, certain rights envisaged at the beginning have not been included:
- either because they were seen as simply setting policy objectives, which the Cologne conclusions prevent from being included in the Charter; this is the case as regards the right to work or right to an equitable wage; or
 - because, without being excluded from the list, they were already implicit in other provisions in the preliminary draft; this is the case, for example, of the right to strike, which is covered by Article 26 concerning the right of collective bargaining and action, or the right to a minimum income, which is covered by Article 32 dealing with social assistance.
22. Clearly, the most difficult task for the Convention was to decide which economic and social rights to include in the preliminary draft. This concerns Chapter IV Solidarity (Articles 25 to 36) and Articles 15 (freedom to choose an occupation and to seek work), 22 (equality between men and women) and 24 (integration of persons with disabilities). It is likely to be difficult to reach a consensus within the Convention on these rights.
23. For its part, the Commission believes that the rights contained in the preliminary draft, be they civic and political rights, rights of citizens and economic and social rights, do strike a good balance. True, it would have preferred some rights to be expressed more explicitly (such as the right to strike covered by Article 26 on the right of collective bargaining and action and freedom in trade union matters in Article 12 or the European dimension of the exercise of these rights) or more forcefully (in particular for the protection of the environment in Article 35). But the Commission still considers that the preliminary draft provides an adequate basis for securing a consensus within the Convention.
- 3.4. Holders of rights**
24. This initially appeared to be a complex question but was resolved pragmatically: a response was provided for each right contained in the preliminary draft. There is a broad consensus for this approach, which is fully supported by the Commission.
25. In accordance with the principle of the universality of rights, most of the rights listed in the preliminary draft are granted to everyone.

However, certain rights are granted to specific groups of people:

- children (Article 23);
- workers, in relation to some of the social rights;
- Union citizens: freedom to work, to seek work, to settle or provide services in any Member State (Article 15(2)); right to the same access to social security benefits and welfare assistance in another Member State (Article 32(2)); right to take part in elections to the European Parliament (Article 37) and municipal elections (Article 38); right to move and reside freely within the territory of the Member States (Article 43(1)) and diplomatic and consular protection (Article 44),

- Citizens of the Union and persons residing in the Union: right of access to institution documents (Article 40); right to refer cases to the Ombudsman (Article 41) and right to petition the European Parliament (Article 42).

It should be added that certain rights granted to Union citizens may also be accorded to nationals of third countries, such as freedom of movement (Article 43(2)).

Some provisions do not establish subjective rights that can be invoked by the individual directly but set out principles which can be enforced against Community or national authorities in the performance of their legislative or executive functions. This applies to entitlement to social security benefits and social services (Article 32(1)), access to services of general economic interest (Article 34), environmental protection (Article 35) and consumer protection (Article 36).

3.5. Scope and limits of the rights guaranteed

26. With certain exceptions, exercise of the rights may be restricted where other legitimate interests must be respected, either the public interest, for example in the fight against crime, or private interests where the rights or freedoms of others are involved.

The Commission supports the insertion of a horizontal article applicable to almost all rights (Article 50(1)), an approach that has found widespread support within the Convention. Chosen in preference to the approach of explaining possible restrictions on each right, this strategy avoids cumbersome repetitions while giving all the guarantees needed to protect these rights effectively. The restrictions may affect only the exercise of the right; they do not challenge its substance. The appropriate national or Community legislative authorities must make provision for them, and they must be necessary to achieve objectives of general interest that are pursued by the Union, other legitimate interests in a democratic society or the need to protect the rights and freedoms of others. They must also be subject to the principle of proportionality.

27. Provision has been made for rights based on the Community Treaties to be exercised under the conditions and within the limits defined by those Treaties (Article 50(2)).

3.6. Level of protection

28. The Commission fully shares the desire expressed in Article 51 of the preliminary draft to prevent the interpretation of the Charter restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by the various laws and agreements in force in the Union.
29. The Commission also fully shares the desire to ensure that differing conceptions of fundamental rights do not develop in Europe, if, contrary to the frequently expressed hope of the Commission, the Union is not eventually allowed to accede to the Rome Convention. For this reason, it supports Article 50(3) of the preliminary draft, which is intended to ensure consistency in the interpretations of the provisions contained in the Rome Convention and the corresponding provisions in the Charter, while respecting the principle of the autonomy of Community law.

3.7. The authorities required to respect the Charter

30. The Commission fully supports the solution chosen in the preliminary draft (Article 49(1)) addressing the provisions of the Charter to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. This means that the Charter would apply uniformly to all the activities carried out by the institutions and bodies of the Union and by the national authorities under the three pillars of the Union. Of course, this would include the particularly sensitive areas of maintaining and developing the area of freedom, security and justice.

From a legal point of view, this solution is in line with the consistent case-law of the Court of Justice, which has pointed out on numerous occasions that Member States are required to respect fundamental rights when implementing Community law.

31. As pointed out above, the drawing up of the Charter in no way calls into question the powers of the Union or the principle of subsidiarity. The provisions on the subject in the preliminary draft (Article 49) and its preamble have a declaratory value which will help to clarify any misunderstandings on this point. Far from extending the powers of the Union, the Charter, as the sum of the common values recognised in the Union, will in fact be the instrument which explicitly ensures that these powers are exercised in the manner established by the Treaties.

4. THE LEGAL NATURE OF THE CHARTER

32. At current stage in the proceedings, attention should continue to be focused as a matter of priority on the content of the Charter until such time as the draft Charter has been finalised, for only if the Charter is sure to be an ambitious document will the question of its legal nature and its incorporation in the Treaty be a matter of any importance.

33. This question was raised by the Heads of State or Government themselves. The Cologne conclusions clearly state that, after the European Parliament, the Council and the Commission have jointly proclaimed the Charter:

"It will then have to be considered whether and, if so, how the Charter should be integrated into the treaties."

It was for this reason that the line taken by the Convention from the outset of its work was to produce a draft Charter with a content that would allow it to be incorporated in the Treaties.

34. The Commission also notes that the European Parliament stated its clear support for the idea of incorporating the Charter in the Treaties in its resolution adopted in March 2000, a view shared by the Governments of several Member States. The same is true of numerous non-governmental organisations.
35. For its part, the Commission believes that, as the drawing up of the Charter involves the national and Union legislative and executive powers as represented in the Convention, and as long as it remains ambitious, the Charter will have the effect of a proclamation, irrespective of the legal value formally conferred on it.

However, in view of the preliminary draft, the Commission believes that incorporating the Charter in the Treaties would remedy some of the shortcomings in the existing system of protection of fundamental rights in the Union. This system is characterised by indirect protection by means of general principles of Community law, this protection being basically in the hands of the courts, established by judgments on cases brought before them, and by protection which is not immediately evident to its direct beneficiaries.

36. As stated above, the conclusions of the Cologne European Council also raise the question of how the Charter should be incorporated into the Treaties. If the European Council were inclined to give the Charter mandatory force and incorporate it into the Treaties, this would obviously have serious repercussions on the present political dynamics of the Union. Thought would have to be given to the technical arrangements for incorporating the Charter into the Treaties in the future using the methods for the revision of the Treaties

37. For this reason, as soon as the draft Charter has been finalised and depending on the what it has developed into, the Commission will present a communication on the question of its legal nature.

5. CONCLUSIONS

38. In conclusion:

- a) in principle, the Commission supports the preliminary draft Charter as set out in document CONVENT 45 of 28 July; it realises, however, that, in view of the comments made by the members of the Convention, the preliminary draft may still be amended and therefore reserves the right to re-examine the text at a later stage;
- b) the Commission will present a communication on the legal nature of the Charter once the draft has been finalised by the Convention.