



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION

**ON THE LEGAL NATURE OF THE CHARTER OF FUNDAMENTAL RIGHTS OF
THE EUROPEAN UNION**

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THE CHARACTERISTICS OF THE DRAFT CHARTER

1. The challenge of preparing the draft Charter has been taken up: at the formal session of the Convention on 2 October 2000, the President of the Convention responsible for preparing it recorded that there was broad consensus on the draft and sent it to the President of the European Council.¹

The draft Charter offers great potential value added. By bringing together in a single instrument the rights hitherto scattered over a range of national and international instruments, it enshrines the very essence of the European *acquis* regarding fundamental rights.

2. This is a balanced text that makes ambitious innovations:

- all personal rights – civil, political, economic and social rights and the rights of citizens of the European Union – are brought together in a single instrument. It thus throws into the sharpest relief the principle of the indivisibility of rights. The draft Charter breaks with the distinction hitherto made in both European and international documents between civil and political rights on the one side and economic and social rights on the other, enumerating all rights around a few major principles: human dignity, fundamental freedoms, equality, solidarity, citizenship and justice:

- in respect for the principle of universalism, the rights set forth in the draft are generally given to all persons, irrespective of their nationality or residence. The position is different for the rights that are most directly bound up with citizenship of the Union, which are given only to citizens (such as participation in elections to the European Parliament or in local elections), and for certain rights that are related to a particular status (rights of children, certain social rights of workers, for example);

- the draft is decidedly contemporary in that it sets forth rights which, without being strictly new, such as data protection and rights linked to bioethics, are designed to meet the challenges of current and future development of information technologies and genetic engineering;

- the draft also meets the strong and legitimate contemporary demand for transparency and impartiality in the operation of the Community administration, incorporating the rights of access to administrative documents of the Community institutions and the right to sound administration that sum up the tenor of the decisions of the Court of Justice;

- the gender-neutral language used in the text also deserves highlighting. The draft is addressed to everybody, with no predominance of one gender over the other;

¹ Document CHARTE 4487/00 (CONVENT 50), 28 September 2000.

- in formal terms, it is drafted clearly and concisely and it will be easy for all those to whom it is addressed to understand. This was the first condition that had to be met in order to satisfy the demand from the Cologne European Council for 'a Charter of fundamental rights ... to make their overriding importance and relevance more visible to the Union's citizens'. It is also a condition for the enjoyment of all the benefits of certainty as to the law that the Charter must offer in areas where Union law applies.

3. In the light of the characteristics of the draft – which satisfies the requests made by the Commission in its Communication of 13 September² – the Commission representative was able to indicate his full approval of the draft Charter.

The Commission is convinced that the value added by the draft is real and that this value added is the basis for the future success of the Charter, irrespective of its ultimate legal nature.

THE NATURE AND EFFECTS OF THE CHARTER

4. The question of the nature of the Charter has been at the centre of the debate ever since the Cologne European Council decided to prepare a draft Charter. The Heads of State or Government decided to answer this question in two stages:

- first, the Charter should be solemnly proclaimed by the European Parliament, the Commission and the Council,

- then, *'It will then have to be considered whether and, if so, how the Charter should be integrated into the treaties.'*³

5. There have been a number of expressions of opinion on the question.

The European Parliament, in two resolutions passed on 16 March⁴ and 2 October 2000,⁵ resolutely supported a mandatory Charter incorporated in the Treaties. So did the Economic and Social Committee⁶ and the Committee of the Regions⁷ in opinions given at their September 2000 sessions.

The same call was made virtually unanimously by the representatives of civil society at the hearings organised by the Convention. It is unlikely that the expectations aroused in public opinion by the decision to prepare the Charter could be satisfied by mere proclamation by the Community institutions without incorporation of the Charter in the Treaties.

Many members of the Convention, belonging to different component groups and political trends, supported a Charter incorporated in the Treaties.

² Document COM (2000) 559.

³ Conclusions of the Presidency of the Cologne European Council, 3 and 4 June 1999, Annex IV.

⁴ Resolution A5-0064/2000 of the European Parliament on the elaboration of a Charter of Fundamental Rights of the European Union: minutes of the plenary session of 16 March 2000.

⁵ Resolution B5-767/2000 of the European Parliament on the Charter of Fundamental Rights: minutes of the plenary session of 3 October 2000.

⁶ Economic and Social Committee Resolution 1005/2000, adopted on 20 September 2000.

⁷ Committee of the Regions Resolution 140/2000, adopted on 20 September 2000.

Lastly, the Commission, in its Communication of 13 September, undertook to present a Communication on the nature of the Charter.

6. The Commission had an opportunity to express an opinion on the nature of the Charter when answering an oral question in the European Parliament last December.⁸ It stated that the Convention, both during its proceedings and in its final outcome, should leave open the two options as to the Charter's final status, as envisaged by the Heads of State or Government – a legally mandatory instrument incorporated in the Treaties or a solemn political declaration.

The Commission also stated that the draft Charter should meet two fundamental objectives: visibility for the citizen and the certainty as to the law that the Charter must offer in areas where Union law applies.

7. It is in this spirit, notably at the instigation of the President of the Convention, Mr Herzog, that from the very outset the Convention's proceedings were directed towards producing a text "as if" it were to be incorporated in the Treaties, thus leaving the final choice to the European Council.
8. This "as if" doctrine clearly inspired the Convention. If a Charter had been prepared solely for presentation as a political declaration, the general provisions of the draft, which are the most important and the most difficult ones (Chapter VII), would have been superfluous.

The importance of these clauses must be emphasised: they are the guarantee of the Charter's future success.

They are the place where it is specified just what the Charter is – an instrument to verify respect for fundamental rights by the institutions and the Member States when they act under Union law. This is made clear by Article 51(?), which provides that the Charter is addressed to the Union institutions and bodies and to the Member States, when they give effect to Union law.

9. But these provisions also seek to offer an appropriate response to the highly important questions that will arise in the event of incorporation of the Charter in the Treaties.

The Commission considers that the draft Charter offers an acceptable response:

- **respect for the autonomy of Union law:** it is also important that the Charter be incorporated harmoniously into the Union legal system and that its underlying legal principles be respected. This applies in particular to the autonomy of the Community legal order in relation to international law and the national law of the Member States; the Charter is drafted in such a way as to respect that autonomy. In particular, the explicit recognition by the last sentence of Article 52(3) is perfectly satisfactory: there is nothing to preclude Union law from giving more extensive protection than the European Convention;

- **the relationship between the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms:** the risk of disparity between the rights and freedoms secured by the European Convention and those set

⁸ Oral question 0-0698/99 by Mr David Martin.

forth in the Charter, and the risk of the case-law of the Luxembourg and Strasbourg courts diverging, was carefully analysed while the draft Charter was being prepared. The solutions adopted by Article 52(3) of the draft are entirely satisfactory; there was the same broad consensus on them as on the other provisions of the draft, and the Council of Europe observers in the Convention also supported them: the rights set forth in the Charter correspond in their meaning and scope to rights already secured by the European Convention, without prejudice to the principle of the autonomy of Union law. The risk of the case-law of the European Court of Human Rights diverging from that of the Court of Justice of the European Communities should thereby be removed. If the draft Charter is silent on the question of Union accession to the European Convention, of course, it must be acknowledged that the question remains open. The existence of the Charter will not render the question of accession any less interesting, the effect being to introduce external monitoring of fundamental rights at Union level; by the same token accession to the Convention would not make the preparation of the Union Charter any less valuable;

- **the relationship between the Charter and the Union's powers, and respect for the principle of subsidiarity:** in no case will the Charter be a means of extending the Community's powers and the Union's tasks. And the subsidiarity principle must be respected. Article 51 of the draft is perfectly clear; this is borne out by paragraph 5 of the Preamble, stating, "just in case", how attentive the authors of the draft were to these points;

- **the relationship between the Charter and the national Constitutions:** it might have been feared that the Charter would make it necessary for Member States to amend their constitutions. This will manifestly not be the case, not just because of one of the general provisions of the draft but also because of the definition of the rights it sets forth. In any event, proper account has been taken of observations on the need to attain this objective, made throughout the Convention's proceedings, in particular by government representatives. At the end of the day it is clear that the Charter will not replace national Constitutions in the area within its scope – respect for fundamental rights at national level. And it is clear that the relationship between Union primary law, which would include the Charter if it is incorporated in the Treaties, and national law will remain unchanged;

- **a major advance in certainty as to the law:** at this time it seems clear to the Commission that the Charter will not endanger certainty as to the law relating to fundamental rights. Quite the contrary: it will increase it in no small measure. The Charter will offer a clear guide for the interpretation of fundamental rights by the Court of Justice which in the current situation has to use disparate, sometimes uncertain, sources of inspiration. It must also be stressed that the Charter makes no change to the redress procedures and court architecture provided for by the Treaties, since it opens up no new procedures for seeking redress in the Community courts.

10. Consequently, given the foregoing considerations, it is reasonable to assume that the Charter will produce all its effects, legal and others, whatever its nature. As the Commission said in the European Parliament on 3 October 2000,⁹ it is clear that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of

⁹ Oral question 0-0115/00 by Mr Giorgio Napolitano.

the European Council by the full range of sources of national and European legitimacy acting in concert.

Likewise, it is highly likely that the Court of Justice will seek inspiration in it, as it already does in other fundamental rights instruments. *It can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law.*

11. The Commission considers that the Charter, by reason of its content, its tight drafting and its high political and symbolic value, ought properly to be incorporated in the Treaties sooner or later. For the Commission, this incorporation is not a question to be addressed in theoretical or doctrinal terms. It must be addressed in terms of legal effectiveness and common sense. *It is therefore preferable, for the sake of visibility and certainty as to the law, for the Charter to be made mandatory in its own right and not just through its judicial interpretation.*

In practice, the real question is when and how it should be incorporated in the Treaties.

WHAT SHOULD BE DECIDED TODAY?

12. The Commission is aware of the importance attached to the Charter being able to have full effect in the future. It does not wish to overload an already heavy political agenda. It will be for the Heads of State or Government to take up that challenge. But the Commission's political assessment is that any decision on the matter must be based on clear criteria that have already been put forward:

- evaluation of the content of the Charter,
- greater certainty as to the law,
- visibility of rights for citizens,
- a firm foundation for the European venture in the values protected by fundamental rights.

Irrespective of all this, the Commission emphasises that the Heads of State or Government have a number of options regarding both the technicalities of incorporation in the Treaties and the timing.

Regarding timing, the European Council might consider entering the question on the agenda for the current Intergovernmental Conference. It could take a decision to that effect at the Biarritz meeting. But this question cannot be considered without regard for the scope of the proceedings as already defined by the European Council for the present Intergovernmental Conference or for the prospect of reorganising the Treaties as proposed by the Commission at that conference in its communication of 12 July 2000, 'A Basic Treaty for the European Union'.¹⁰

As the Commission sees it, there is a very close link between reorganisation of the Treaties and incorporation of the Charter in them. Consequently the Heads of State or Government should at the very least decide at Nice to launch some kind of process in this direction, clearly setting objectives and procedural and other details.

¹⁰ Document COM (2000) 434.

This is the only way forward that provided a basis for an effort to educate the citizen and give practical form to the technical details that will bring a sound result within reach.

Regarding the technical details, the European Council might in due course envisage, for example, straightforward incorporation of the articles of the Charter in the Treaty on European Union in a Title headed 'Fundamental Rights', or incorporation of the Charter in a Protocol annexed to the Treaties.

In any event, the question arises whether Article 6(2) of the Treaty on European Union can be kept in its present form. At the very least it must be generally obvious that, while leaving open the possibility of future developments, there can be no question of pretending to ignore the Charter as a solemn political declaration, in the light of Article 6(2). The Commission considers that this question should be discussed by the Intergovernmental Conference after the Biarritz European Council. The point would be to consider the possibility of amending this provision of the Treaty on European Union, bearing in mind the sequence determined by the conclusions of the Cologne European Council: proclamation of the Charter by the European Council at Nice, then incorporation in the Treaties.
