COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 27 November 2003

Restricted
CDL-DI (2003) 1-rev
Or. Eng.

Opinion no. 256/2003

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

IMPLICATIONS OF A LEGALLY-BINDING EU CHARTER OF FUNDAMENTAL RIGHTS ON HUMAN RIGHTS PROTECTION IN EUROPE

On the basis of comments by

Mr Giorgio Malinverni (Member, Switzerland)
Mr Pieter Van Dijk (Member, the Netherlands)
Mr Hans-Heinrich Vogel (Substitute Member, Sweden)

I. Introduction

1. By a letter of 22 September 2003, the President of the Parliamentary Assembly of the Council of Europe requested the Venice Commission, on the basis of paragraph 5 of the Assembly's Resolution 1339(2003), to prepare an opinion on the implications of the incorporation of the EU Charter of Fundamental Rights in regard to the European Convention on Human Rights and the prospects for the European Union's accession to this instrument.

2. Messrs. Giorgio Malinverni, Pieter Van Dijk and Hans-Heinrich Vogel were appointed as Rapporteurs. They submitted their comments (CDL (2003)58, CDL (2003)59 and CDL (2003)69 respectively) and held a meeting in Strasbourg on 19 September 2003.

3. A draft opinion was subsequently discussed within the Sub-Commission on International Law on 16 October 2003, and within the Plenary Commission on 17 October 2003 in Venice. A further meeting was held in London, on 8 November 2003, which was attended by the Rapporteurs as well as by Messrs Antonio La Pergola, Jeffrey Jowell and Luan Omari.

4. The present opinion was adopted by the Commission at its … Plenary Session (….).

II. Background

5. The Presidents of the European Parliament, the European Council and the European Commission signed and proclaimed the Charter of Fundamental Rights of the European Union (hereinafter "the Charter") on behalf of their institutions on 7 December 2000 in Nice. Although the development of human rights protection within the EU legal order was a long standing one, the proclamation of the Charter highlighted the importance of this issue. It also accentuated the equally long-standing discussion over EU institutions' participation in the supervisory mechanism of the ECHR, the increasing scope of review by the European Court of Human Rights (hereinafter "the Strasbourg Court") of EC law and acts, and the growing need for a coherent human rights protection at the European level[1].

III. Human Rights protection within the Community legal order

6. Initially, protection of fundamental rights was not a matter of specific concern for the European Communities. Aimed at an economic rather than political integration, the Community institutions dealt with areas that were not likely to provoke violations of human rights.

7. The question of an impact of the Community on fundamental rights did, however, already then arise, and the Court of Justice of the European Communities (hereinafter: "the ECJ" or "the Luxembourg Court[2]") accordingly, gradually developed a specific community mechanism of protection of such rights.

[1] It is recalled that under the terms of the EEA Agreements, EFTA countries take on the *acquis communautaire*, which also comprises the relevant rulings of the ECJ, and have to implement new EU legislation as it comes into force. The considerations contained in the present opinion therefore also concern the supra-national organs established under the EEA (Surveillance Authority and the EFTA Court) in so far as they deal with human rights issues.

[2] In this opinion, the term "Luxembourg Court" also comprises, whenever relevant, the Court of First Instance.

8. As early as in 1962, the ECJ affirmed[3], in the Van Gend and Loos case, that community law also created *rights the individuals could directly rely on*[4], and only a few years later, in the Stauder case, it claimed to protect the *fundamental rights enshrined in the general principles of Community law*[5] .

9. In the early 70s, the ECJ stated that, in safeguarding fundamental rights, it would be inspired by the constitutional traditions common to the Member States[6] and by the guidelines provided by international treaties and *conventions on the protection of human rights* on which the Member States have collaborated or to which they are signatories[7]. It also stressed that such protection of fundamental rights had to be *ensured within the framework of the structures and objectives of the Community*.

10. In 1975, the ECJ for the first time explicitly referred to specific provisions of the European Convention on Human Rights (hereinafter "the ECHR")[8] and later recognized the *special significance* of the ECHR among international treaties on the protection of human rights[9] .

11. Thereafter, the EU's competences and activities expanded, particularly in the third pillar areas, and the community institutions' capacity of affecting fundamental rights equally increased. Indeed, the EU recognised its important role in promoting and protecting human rights[10]. Human rights were referred to in the preamble to the Single European Act in 1987. Articles 2 as well as 6 (2) of the Treaty of Amsterdam of 1997[11] reiterated the commitment to

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[3] Community primary law contained only a few specific provisions on the respect for fundamental rights: prohibition of discrimination on the grounds of nationality, free movement of workers and rights of establishment for nationals of member States, equal pay without discrimination on grounds of sex and improved working conditions and a better standard of living for workers.

[4] Van Gend en Loos v. the Netherlands, case 26/62 [1963] ECR1.

[5] Stauder v. City of Ulm, case 29/69 [1969] ECR 419

[6] Internationale Handelgesellschaft [1970] ECR 1125

[7] Nold KG v. Commission, case 4/73 [1974] ECR 491. No specific reference was made to the European Convention on Human Rights.

[8] Rutili v.Minister of the Interior, case 36/75 [1975] ECR 1219 and Prais v. Council, case 130/75 [1976] ECR 1589.

[9] Hauer v. Land Rheinland-Pfalz, case 44/79 [1979] ECR 3727.

[10] The EU insists that States seeking admission to it must satisfy strict human rights requirements, including ratification of the ECHR. It has also developed the practice of including human rights aspects in its international agreements (by means of so-called 'human rights clauses'), unilateral trade preference schemes (via 'special incentive arrangements' or 'conditionality requirements') and technical or financial assistance programmes ('human rights clauses' and the 'European Initiative for democracy and the protection of human rights').

[11] Article 6 of the Treaty on European Union reads, insofar as relevant, as follows:

"1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

See also Article F.2 of the Maastricht Treaty.

respect for and reinforced the protection of human rights within the Community legal system[12]. The Amsterdam Treaty also required the ECJ, insofar as it had jurisdiction, to apply human rights standards to act of Community institutions[13].

12. As a consequence of the increasing impact of the EC's areas of activities on human rights, the ECJ's jurisdiction came to overlap partly with that of the Strasbourg Court.

13. The ECJ protects fundamental rights within the Community sphere as part of the unwritten general principles of Community law, and indeed turns to the Strasbourg Court as a source of generally accepted principles of human rights law against which to interpret community law. Its rulings on human rights matters substantially follow both the ECHR and the Strasbourg Court's case-law, which permits the harmonious coexistence of the two human rights protection mechanisms.

14. There are, however, occasions on which the conclusions reached by the two courts in *prima facie* similar cases, are considered by some to be divergent[14]. The examples more often referred to in doctrine relate to the individual's right not to incriminate him/herself[15], the permissibility of searches of business premises[16] and the right to reply to the Advocate General's conclusions[17].

15. Today, it is widely acknowledged that a specific Community human rights protection mechanism has been built up through the ECJ's praetorian case-law. . This result is all the more remarkable since doubts had arisen about the ECJ's keenness to deal with human rights issues[18].

IV. Extension of the Strasbourg Court's competence to matters of community law

[12] Article 7 of the Treaty on European Union gives the Union the power to act against a Member state that seriously and persistently violates the principles of Article 6 (1) of the Treaty.

[13] Article 46 (d) of the Treaty on European Union defines the scope of the jurisdiction of the ECJ in connection with Article 6 (2) with regard to actions of the Community institutions under the Treaties.

[14] An assessment of the extent and nature of the divergences in the case-law of the Strasbourg and Luxembourg courts has been the object of numerous contributions such as :

[15] Orkem SA v. Commission, case C-374/87 [1989] ECR 3283, compared to Funke v. France judgment of 25.2.1993, Series A no. 256-A.

[16] Hoechst AG v. Commission, case T-10/89 [1992] ECR 11-629

[17] Emesa Sugar C-17/98 [2000], order of the Court of 4.2.2000, compared to, e.g., Lobo Machado v. Portugal judgment of 20.2.1996, ECHR 1996-I, Vermuelen v. Belgium judgment of 20.2.1996, ECHR 1996-I.

[18] Moreover, the exercise of its jurisdiction in these questions has been viewed with a critical eye by certain national judges. Suffice it to recall that the German Verfassungericht in Karlsruhe and the Italian Corte Costituzionale have reserved themselves the competence to control whether Community law infringes upon principles and rights held inviolable under the national constitution. Both courts have, however, consistently refrained from reviewing Community acts on these or any other grounds. And the reason for their self-restraint is not far to seek. As the case law of the ECJ shows, there is within the EC-EU an effective, high level of judicial protection for the individual, which in the case we are considering makes up for the continued absence of a binding and democratically adopted bill of rights. The two courts mentioned above have thus declared their readiness not to exercise their competence "as long as" the guarantee afforded to human and fundamental rights by the Luxembourg judges is equivalent, in substance, to that provided for in their legal systems, and confided to the national organs of constitutional justice (cf. the German Constitutional Court's "Solange" case).

16. Protection of human rights by the ECJ presents certain limits. In the first place, it is necessary that the rights in question be considered to be part of Community Law and protected areas must fall within the jurisdiction of the ECJ. Further, the latter is not obliged to rule on whether human rights have been violated, even if one of the parties to the proceedings has raised the issue. Last but not least, EU citizens have a limited *locus standi* before the ECJ.

17. Faced with these limits, EU citizens who deemed themselves victims of violation of their rights under the ECHR by Community institutions have increasingly turned to the Strasbourg Court, which has developed its case-law, and progressively expanded its jurisdiction according to the legal nature of the Community act at the origin of the alleged violation.

18. In its early case-law, the former European Commission of Human Rights (hereinafter "the Human Rights Commission") rejected as inadmissible *ratione personae* the complaints directed against the Community as such, and concerning EC primary law, on the ground that the EC was not a party to the ECHR. In the *CFDT c. European Community* case,[19] the Human Rights Commission considered that EC member States could not be held responsible for decisions of the Council of Ministers to the extent that, in participating in the adoption of such decisions, they had not exercised their "jurisdiction" in the sense of Article 1 ECHR.

19. As to the national acts of implementation of Community law, the Strasbourg organs have generally accepted to review their compatibility with the ECHR[20], while paying due regard to the issue of the margin of appreciation in the implementation left to the member States. However, in the well-known *M & Co* case[21] concerning the purely formal execution of community law (an *exequatur*), the Human Rights Commission, although recognising in principle the responsibility of the member States for acts performed in execution of Community acts, held that respect for human rights by the EC Institutions was sufficiently guaranteed and did not require a review by the national authorities for their conformity with the ECHR. It considered that it would be contrary to the very idea of transferring powers to an international organisation to hold the member States responsible for examining, in each individual case before issuing a writ of execution for a judgment of the ECJ, whether Article 6 ECHR was respected in the underlying proceedings. However, such a transfer was only compatible with the ECHR if the organisation afforded an "equivalent protection" of fundamental rights. This case-law was subsequently reaffirmed by the Court in the *Cantoni* case[22].

20. In 1999, with the *Matthews* case[23], the Strasbourg Court clearly established its competence to control primary Community law[24], over which the ECJ has no jurisdiction.

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[19] Application 8030/77, decision of 10/07/1978, DR 13.

[20] The ECJ has also examined the compatibility of national acts implementing EC law with human rights standards. In two cases , the ECJ found that the member States in question had violated human rights norms even though their action had been based on EC Council Regulations. It did not extend its examination as to whether the Community itself shared responsibility for such violation. See the Kent Kirk case 63/83, [1984], ECR 2689 and the Wachauf case 5/88, [1989], ECR 2609.

[21] Application 13258/87, decision of 9/02/1990, DR 64.

[22] Judgment of 15/11/1996, ECHR 1996-V.

[23] Judgment of 18/02/1999, ECHR 1999-I

The UK was held responsible for a violation of Article 3 of the First protocol to the ECHR for the exclusion of Gibraltar from the scope of application of the Act of 20 September 1976 concerning the election of the representatives to the European Parliament by direct universal suffrage, which was signed by the respective foreign ministers. The text was attached to the Council of Ministers' decision to recommend a treaty concerning the election of the members of the European Parliament. In its judgment, the Strasbourg Court established the responsibility of a member State of the EU for concluding an international treaty incompatible with the ECHR. One of the elements for the Court's position was the fact that the application could not have been submitted to the ECJ since it concerned primary Community law[26].

21. The Strasbourg Court has overcome the delicate issue of the separate legal personality of the Community by applying the so-called doctrine of the "useful effect" of the Convention. It has taken the position that it would not be possible to maintain an effective and unique control of respect for the ECHR by all Contracting Parties, if it were not possible for it to exercise supervision over State acts also in the field of transferred powers. Indeed, the transfer of sovereignty should not have as an effect that the transferred competences could not be supervised for respecting fundamental human rights. According to the theory of successive treaties, the Community member States should be held responsible for violations of the ECHR resulting from the Community institutions' actions.

22. In conclusion, recent developments seem to indicate that not only the implementation of secondary Community law but also the implementation of primary law would be subject to the Strasbourg Court's review, assuming that the Court would also apply the *Matthews* case-law to a "normal" Community act. Such extension of the competence of the Strasbourg Court entrusted with ensuring respect for and implementation of the rights guaranteed by the ECHR has often been designated by doctrine as "de facto", "indirect" or "forced" Community accession to the ECHR. This approach present certain important shortcomings, which will be analysed hereinafter (see paras 64 and 66 below).

23. Several cases raising interesting and novel issues of Community law are currently pending before the Strasbourg Court. It is thus possible that the latter will extend its competence to review Community acts for their conformity with the ECHR even further[27].

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[24] The term "primary law" covers the Treaties founding the EC/EU and other treaties and instruments of equal rank, as distinguished from "secondary law", i.e. Community acts adopted on the basis of these Treaties and instruments.

[26] The Court stated that "*Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a "normal" act of the Community, but it is a treaty within the Community legal order. The Maastricht treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible* ratione materiae *under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty*" (ECHR 18 February 1999, para. 33).

[27] The case of Bosphorus Airways v. Ireland (Application no. 45036/98) raises the issue of responsibility of a member State for an infringement of human rights resulting from secondary Community law that was upheld by the ECJ. It concerns an application brought by an airline company over the seizure of its property executed on the basis of a judgment of the ECJ whereby the latter had considered that an EC Council Regulation was applicable. It is to be noted that whilst the judgment of the ECJ does not mention the ECHR, Advocate General Jacobs, who reached the same conclusion as the Court, expressly stated that in reaching its conclusion that the decision to impound the aircraft pursuant to an EC Council regulation did not strike an unfair balance between the demands of the general interest and the requirement of the protection of the individual's fundamental rights, he has applied the Strasbourg Court's criteria. Another case (Senator Lines v. the 15 EU member States, Application No.) raises the issue of individual and collective responsibility of EU member states for human rights violations resulting from a Community act. It concerns a fine imposed by the Commission, and

V. The Charter of Fundamental Rights

24. As an additional step towards a comprehensive human rights dimension of the European Union, it was decided to elaborate a Charter of fundamental rights of the European Union[28].

25. The Charter was obviously inspired by the ECHR; there exist however significant differences between the two instruments, relating to both the wording and the scope of the rights guaranteed[29].

26. Under six major headings (dignity, freedoms, equality, solidarity, citizens' rights and justice), the Charter contains, like the ECHR, civil and political rights but also, unlike the ECHR, economic and social rights as well as the right to good administration, bioethics, and certain "third generation" rights such as those to environmental and consumer protection. In addition, the Charter covers the political rights of Union citizens.

27. In respect of the rights which are also listed in the ECHR, the Charter has taken as an example the text of the latter, but has often modified it with a view to rendering it simpler, more up-to-date, and at times broader. Possibilities for limitations to the rights guaranteed by the Charter are not enumerated right-by-right, like in the ECHR, but are contained in a general provision (Article 52 of the Charter) [30], without a limitative enumeration of the grounds for limitation. Further, certain rights guaranteed by the Charter are not listed in the ECHR, but have been recognised by the case-law of the European Court as being encompassed by it.

28. On account of these differences, the scope of the protection to be afforded by the Charter is not entirely equal to the one afforded by the ECHR. A broader guarantee is of course to be welcomed, and indeed Article 53 of the ECHR provides that:

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maintained by the ECJ. However, a hearing on the admissibility and merits of this case; which had recently been scheduled by the Strasbourg Court, was cancelled following the Court of First Instance's decision annulling the fines imposed by the Commission on the company (Joined Cases T-191/98, T-212/98, T-213/98 and T-214/98, 30 September 2003)

[28] The full text of the Charter may be found at: http://europa.eu.int/comm/justice_home/unit/charte

[29] The "Explanations relating to the text of the Charter of Fundamental Rights" (hereinafter "the Explanations"), endorsed by the Praesidium on 18 July 2003 state the basis for each Charter article and in particular its relationship, where there is one, with the ECHR. As was stressed by the European Convention Working group II on "Incorporation of the Charter/accession to the ECHR", although they are not legally binding the Explanations are intended to be a valuable tool of interpretation to clarify the provisions of the Charter (p. 10)

[30] Article 52 of the Charter provides as follows:

"1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

2. 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.

3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

> "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or any under other agreement to which it is a Party".

29. In order to ensure that the EU citizens will not be afforded a lower degree of guarantee under the Charter, two "horizontal" provisions have been inserted therein, aiming at avoiding a situation where the Charter imposes more limitations on fundamental rights than the ECHR and at preserving the level of protection which is already ensured by international law, including EU, law and by national Constitutions.

30. Article 52 § 3 of the Charter reads as follows: "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

31. Article 53 of the Charter ("the standstill clause") reads as follows:"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

32. The ECHR is thus recognized as also the minimum standard of human rights protection within the EU. As a consequence, it remains a necessity for the ECJ to take its interpretation by the Strasbourg Court[31] into consideration.

33. The Charter, initially a mere declaration of principles, is likely to be made legally binding. In what manner and in what form (certain textual amendments being under examination) is still unclear: some concrete responses may be given by the Summit of Heads of State and Governments of 12-13 December 2003.

34. In the meantime, despite its non legally-binding nature, the Charter has already had a concrete impact. The recent Council of Ministers' decision setting up Eurojust with a view to reinforcing the fight against serious crime[32] acknowledges, in its preamble, the role of the Charter as an "instrument codifying the fundamental rights recognized by Article 6.2 of the Treaty of Amsterdam", while in its Decision on the terms of reference of hearing officers in one set of competition proceedings, the European Commission expressly refers to it[33].

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[31] Despite the absence of an explicit reference to the case-law in the text of Articles 52 and 53, the need to take it into consideration in order to determine the content of the rights and the limitations thereof is obvious and follows from Article 32 ECHR.. A reference to the Court's case-law is contained in the Preamble to the Charter, as well as in the explanations thereto.

[32] Council Decision 2002/187/JHA of 28/2/2002, OJ, L 63, 6/3/2002, p. 1.

[33] "*The Commission must ensure that that right (of the parties concerned and of third parties to be heard before a final decision affecting their interests is taken) is guaranteed in its competition proceedings, having regard in particular to the Charter of Fundamental Rights*".

35. The role of the Charter as a human rights codification instrument is also referred to in several opinions of Advocates General[34] and in two judgments of the Court of First Instance[35].

36. The Strasbourg Court has referred to the Charter in its *Goodwin* judgment[36].

37. The change in the nature of the Charter is certainly going to boost its effects on the European scenario of human rights protection.

VI. Coexistence of two binding instruments of human rights protection in EU member-States

38. Various international instruments of human rights protection harmoniously coexist in Europe[37]. To a large extent, some of them secure the same individual rights to the same categories of people. That holds true, especially, for the ECHR and the UN Covenant on Civil and Political Rights. While there has been a need for co-ordination between the two bodies which are responsible for their implementation[38] - the Human Rights Committee and the European Court of Human Rights respectively -, this coexistence does not amount to a negative result**,** and is instead perceived as increasing the level of protection of individual rights mainly because the Convention, unlike the Covenant, contains an express undertaking on the part of member States to abide by the final judgments of the Court[39].

39. The coexistence of the ECHR and of a binding Charter is also to be seen as a positive element, as also being designed to improve the protection of the rights of the citizens of the EU. Their coexistence does however raise certain issues.

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[34] See for example, case C-279/99 P, Z v Parliament [2001] ECR I-9197; case C-112/00, Schmidberger v Austria, not yet published; case C-353/99 P, Council v Hautala et al [2001] ECR I-9565.

[35] Judgments of the Court of First Instance of 30 January 2002, in Case T-54/99, max-mobil not yet published, and of 3 May 2002, in Case T-177/01, Jégo-Quéré v Commission, not yet published.

[36] See ECHR 7 July 2002, Goodwin, para. 100.

[37] Amongst the instruments of the Council of Europe, it is worth mentioning: the ECHR; the European Social Charter; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the Framework Convention for the Protection of National Minorities; the European Charter for the Protection of National or Minority Languages. The following UN instruments are also worth mentioning: the UN International Bill of Human Rights; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment; the Convention on the Rights of the Child.

[38] Pursuant to Article 35 § 2 b ECHR, the Strasbourg Court shall not deal with any individual application "which has already been submitted to another procedure of international investigation or settlement" and does not contain any new facts. The ICCPR's Human Rights Committee is considered to constitute such a procedure (Applications No. 17512/90, dec. 6.7.1992, D.R. 73, p. 214; No. 8464/79, dec. 3.12.1979; No. 17230/90, dec 1991, unreported). It is arguable that the ECJ may be encompassed in the term "procedure of international investigation or settlement". The Strasbourg Court has, so far, never rejected an application under Article 35 § 2 for having been previously submitted to the ECJ. However, a modification of the ECHR on this point would probably be necessary. Should the EC/EU accede to the ECHR, the possibility of operation of Article 35 § 2 b) ECHR would certainly be excluded (see DG-II(2002)006, Study on the legal and technical questions of a possible accession of the EC/EU to the ECHR, § 48).

[39] See Article 46 § 1 ECHR.

40. When the Charter becomes binding, the extent and modalities of protection of fundamental rights of EU citizens – i.e. the applicable instrument and the competent jurisdiction - will depend on the subject of the case.

41. If the case does not concern EU law, the competent domestic courts will apply the ECHR and not the Charter, and the Strasbourg Court will be competent to review these judgments. If the case does concern EU law, either the affected private party will be in a position, in accordance with very restrictive conditions, to bring it before the Luxembourg Courts, which will apply the Charter and not directly the ECHR, or, if such access is not possible, the affected natural or legal person will be able to raise the issue before the competent domestic court, which may – and as a court of last instance must - in turn apply to the ECJ seeking an interpretation of EC law. In giving its preliminary ruling, the ECJ will apply the Charter. The domestic court, however, will have to apply both the Charter and the ECHR. In the light of its "extended" competence, the Strasbourg Court will arguably be competent to review both the judgment s of the domestic courts and those of the ECJ.

42. This superposition of legal instruments and *fora* would not constitute a threat to legal certainty if the guarantees afforded by either system were exactly the same.

43. Absolute consistency between the case-law of the Luxembourg and Strasbourg Courts, however, cannot be guaranteed, despite the admirable efforts of the Luxembourg Court. Certain differences have been signalled in the interpretation of the provisions of the ECHR by the two Courts[40]. Differences in the interpretation of the ECHR and the Charter (in spite of the latter's horizontal clauses) would seem to be inevitable.

44. Certain obvious explanations may be given for differences in interpretation. Experience shows in the first place that the risk of divergences exists even within one and the same court: it is thus bound to happen between two courts of different entities, different jurisdiction and different areas of competence, no matter how sincere the intentions and how great the efforts to coordinate.

45. More specifically, the ECJ is an appellate court, which the Strasbourg Court is not. In this respect, the extent of the supervision is not the same. The Strasbourg Court exercises a merely subsidiary role and therefore confines itself to assessing whether the national authorities correctly applied the relevant Convention standards to the specific situation. The ECJ instead is placed within – and not above - the legal system that it is called to supervise, and, like a national court, has a direct impact thereon.

46. Furthermore, the background against which to assess the scope of protection of fundamental rights is different: the Luxembourg Court decides human rights issues in the broader context of Community law and the purposes and functions of European integration, while the Strasbourg Court deals only with the human-rights issue, leaving it to the domestic court to decide the issue in its broader context.

47. In addition to these general grounds for possibl diverging interpretations of similar human-rights provisions by the Luxembourg Court and the Strasbourg Court, there are some which are more specifically linked to the legally-binding nature of the Charter. After the Charter becomes binding, the ECJ as well as the courts of the member-States will apply a catalogue of rights distinct from the ECHR within a distinct economic, political and legal context from the one in which operates the Strasbourg Court. Where the rights enshrined in

[40] See footnote 13 above

the two instruments are the same but are differently worded, different wording will – again, in spite of the horizontal clauses - tend to lead to different interpretations, particularly as regards possible limitations to guaranteed rights and the margin of appreciation left to the domestic authorities[41].

48. In addition, in respect of certain aspects of rights which are not expressly enshrined in the ECHR, it will not always be easy to determine whether and to what extent the same right or freedom is at issue[42].

49. Moreover, as a consequence of the extension of EU's powers to areas of significance for human rights (asylum, immigration, police and judicial co-operation in criminal matters[43]), the ECJ may have to decide on matters, on which there is not yet any clear-cut case-law of the Strasbourg Court, and the latter may on a later occasion differ in opinion.

50. The possibility of different interpretation of the scope of fundamental rights within the Eu area may create legal uncertainty and result in lack of equal treatment for the private parties involved.

51. Furthermore, national courts of EU member States may be faced, in interpreting and applying the ECHR and the Charter, with the dilemma of choosing which Court's interpretation to follow in a given case raising issues of both Community and human rights. Indeed, on the one hand they must apply EC law (hence the Charter and the ECJ's case-law, including on human rights matters), but on the other hand they are bound by the provisions of the ECHR (including the Strasbourg Court's case-law), which, under Articles 1, 32 and 64 ECHR, EU member States have committed themselves to securing.

52. Should the case-law of the ECJ afford a broader guarantee than the corresponding Strasbourg case-law, giving preference to the former would indeed not constitute a problem, as the ECHR only represent a *minimum* common standard, which Contracting States are free (and indeed welcome) to surpass (see para. 27 above). The same is not true, however, in an opposite scenario, i.e. should the ECJ interpret a Charter provision in a more restrictive manner than the Strasbourg Court would interpret the equivalent ECHR provision. Should this happen – and the horizontal clauses may not of themselves suffice to exclude any such possibility – there would be a real risk of lowering the level of human rights protection in respect of acts of the EU institutions unless there exists a mechanism of external supervision of human rights protection within the Union.

VII. Accession of the European Community to the ECHR

53. If States which are party to the ECHR would be allowed, by means of transfers of powers to a supra-national or international organization, to exclude matters also covered by the ECHR from the guarantees enshrined therein, including that of external supervision by the Strasbourg Court., the effectiveness of the system established by the ECHR might be endangered (see para. 20 above).

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[41] See Article 52 § 1 of the Charter which refers to "objectives of general interest recognised by the Union" as a general limitation ground.

[42] See, *e.g.*, Articles 8 (protection of personal data) and 13 (freedom of arts and sciences) of the Charter as compared to Articles 8 (right to respect of private and family life) and 10 (freedom of expression) of the ECHR .

[43] Titles IV of the EC Treaty and VI of the EU Treaty respectively.

54. Accession of the European Community (the Union[44]) to the ECHR[45] appears to be the key to securing the necessary consistency in the interpretation and the application of similar provisions of the ECHR and the Charter and thus to securing the effectiveness of the Strasbourg system.

55. In this scenario, in fact, all legislation and final acts involving human rights matters of both the Union and the Member States could ultimately be submitted to the Strasbourg Court for reviewing their conformity with the ECHR. This would include final judgments of the Court of First Instance and the Court of Justice. The Strasbourg Court would thus be in the position to ensure consistency in the interpretation of the ECHR in the whole of Europe, including in the EU legal space. Although the Charter has been endowed with safeguards against the risk of lowering the standards of human rights protection, it is of course not impossible that such a risk would come true in a given case: and the external supervision by the ECHR would be the only way to redress the situation if nevertheless such a lowering of standards would present itself in a given case.

56. Neither the adoption of the Charter nor its possible inclusion in a EU Constitutional Treaty stand in the way of accession or make it less desirable. Indeed, the Community and the European Union evolve into structures which are increasingly comparable to those of a federal State. In that respect, the Charter would play the same role as the catalogues of fundamental rights contained in the national constitutions. All acts imputable to the fifteen EU member-States are subject to the external supervision of the Strasbourg Court after local remedies have been exhausted: similarly, acts imputable to the EU should ultimately be subject to the same external control.

57. Two main conceptual obstacles have been raised in connection with EU accession to the ECHR: the autonomy of EC law and the monopoly of its interpretation by the ECJ. And yet, such accession needs not jeopardise these principles.

58. As regards the autonomy of EC law, it must not be forgotten that the human rights codified in the ECHR are the expression of fundamental values which are common to all European States, including EU States. They are indeed a founding principle of the Union[46]. And EU member States have all accepted supervision by the Strasbourg Court. After all, the concern of preserving the autonomy of EC law has so far not prevented the ECJ from turning to the Strasbourg Court as a source of interpretation of the fundamental rights of EU citizens.

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[44] At the moment the Union is not an international legal person and, consequently, cannot conclude or accede to treaties

[45] Accession has been recommended by the Council of Europe's Parliamentary Assembly (Recommendation 1613(2003) of 26 June 2003; Resolution 1339 (2003) of 26 June 2003; Report on "The Council of Europe and the Convention on the future of Europe", 24 June 2003; Resolution 1314(2003) of 29 January 2003; Report on "Contribution of the Council of Europe to the Constitution-making process of the European Union", 21 January 2003; Recommendation 1479(2000) of 29 September 2000; Recommendation 1439(2000) of 25 January 2000; Resolution 1228 (2000) of 29 September 2000; Resolution 1210(2000) of 25 January 2000; Resolution 1068 (1995) of 27 September 1995; Report on the "Accession of the European Community to the European Convention on Human Rights", 14 September 1995, Doc. 7383), by the European Commission (Communication on the accession of the Community and the Community legal order to the European Convention on Human Rights", Commission Communication of 19.10.1990, SEC (90) 2087) and by the European Parliament (European Parliament Resolution A5-0064/2000 on the drafting of a EU Charter of fundamental rights (Plenary Session), 16 March 2000).

[46] See Article 6 § 2 of the Treaty on European Union.

59. As regards the establishment of a hierarchical link between the two Courts, the question is put in the wrong terms. The Strasbourg Court would indeed have the last word in the interpretation of the ECHR and thus be competent to review the ECJ's rulings in human rights matter that are covered by the ECHR (certainly not all the ECJ's judgments); this, however, would not mean that it becomes hierarchically superior, but rather complementary in that it is a more specialised body, better equipped to deal with these matters and able to do so from a global perspective[47].

60. The Luxembourg Court – as well as other EU institutions - would be left a due margin of appreciation[48] in view of the fact that it is better placed, and better equipped[49], to decide the need for the measures at issue. This would allow the ECJ to adapt the Strasbourg case-law to the specificity of the EC context, thus preserving fully its monopoly in the interpretation of EC law set out in Article 220 of the EC Treaty[50]. . Indeed, this mechanism of judicial co-operation is similar to the one that already exists between the Strasbourg Court and the highest national courts. The Luxembourg Court would constitute a remedy to be exhausted prior to applying to Strasbourg (Article 35 ECHR): it would bear primary responsibility in ensuring human rights protection in connection with EC acts[51].

61. There is thus no major conceptual obstacle to EC/EU accession to the ECHR, provided that the political will is there[52]. It would of course be necessary to make certain amendments to both the ECHR and the EU Treaties[53]. The Council of Europe is currently evaluating the relevant legal and technical matters[54]; the Venice Commission is ready to co-operate in these works, if so requested.

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[47] It is worth recalling that the ECJ has explicitly stated that: "The Community's competence in the field of international relations and its capacity to conclude international agreements 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" (see ECJ's opinion 1/91 of 14 December 1991 on the Draft agreement between the European Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area, Recital 40.)

[48] Including as regards the implementation of judgments of the Strasbourg Court.

[49] It is doubtful, for example, that the Strasbourg Court would have the technical skills for dealing with tax or customs cases, which may indeed involve human rights issues.

[50] This was indeed also stressed by the European Convention Working Group II on "Incorporation of the Charter/accession to the ECHR" in its Final report of 22 October 2002 (CONV 354/02), p. 12.

[51] Similarly, by application of the principle of subsidiarity, Member states remain the principal guardians of respect for human rights within their territory.

[52] Article I-7 of the Draft Constitution expresses the intention to accede to the ECHR. However, Article III-227 paragraph 9 *in fine* of the draft Constitution foresees the requirement of unanimity for Union accession to the ECHR, in derogation of the general qualified majority rule relating to entering into international agreements in general (see the opinion of the Committee on Legal Affairs and Human Rights on "The Council of Europe and the Convention on the Future of Europe, 23 June 2003, § 12; see the subsequent § 11 ii of Resolution 1339(2003) of 26 June 2003). The said Article also requires that the European Parliament be consulted before any agreement on accession is concluded.

[53] In its opinion of March 1996, the ECJ concluded that 'as Community law now stands, the Community has no competence to accede' to the ECHR (See Opinion No. 2/94 of 28 March 1996, in ECR (1996) I-1759, § 36).

[54] A "Study on the legal and technical questions of a possible accession of the EC/EU to the ECHR" has been prepared by the Steering Committee on Human Rights and adopted at its meeting on 25-28 June 2002 (see DG-II(2002)006).

62. Legal certainty in Europe, as has been shown before, would benefit from accession. As pointed out by the European Convention Working Group II on "Incorporation of the Charter/accession to the ECHR", "accession would be the ideal tool to ensure a harmonious development of the case-law of the two European Courts in human rights matters"[55].

63. Another significant advantage would be, as again stressed by the Working Group II, that the EU institutions would have the possibility of putting forward their own arguments and defence before the Strasbourg Court in cases involving questions of EC and EU law. A judge elected in respect of the EC/EU would sit as "national judge" on the Chamber or Grand Chamber deciding such cases. In order to overcome a likely raised objection that these cases would be decided partly by judges from non –EU countries, who may thus lack the necessary expertise and training in EC law, it is possible to envisage the setting up of a special Chamber within the Strasbourg Court, composed mostly or entirely of judges from EU member-States.

64. Further, accession would allow the specific experiences of the EU to be taken into consideration by the Strasbourg Court in its efforts to adapt the ECHR to the growing and ever evolving situation in the Council of Europe member states.

65. Accession would also allow for a satisfactory handling of issues arising from the due implementation of the Strasbourg Court's judgments in cases involving acts of the EU institutions. At present, in fact, a State may find itself in a situation where it is impossible for it to implement a judgment of the Strasbourg Court on account of the specificities of EC law[56].

66. Finally, it is worth underlining another important argument in favour of accession. As was pointed out by the Working group II, accession would give a "*strong political signal of the coherence between the UE and the "Greater Europe" reflected in the Council of Europe and its pan-European human rights system*"[57]. The existence of a legal space in Europe as important as the European Union (soon to be made up of 25 European States, probably more in the not-too-distant future) and not subject to the external supervision of the Strasbourg Court risks undermining the effectiveness of the ECHR mechanism. It creates a new dividing line between EU member-States and the other European States. Exemption from Strasbourg scrutiny may also weaken the credibility of the EU's commitment to human rights protection[58] and ultimately of the aims of the Charter itself. For these reasons, such exemption would certainly be unwarranted.

67. In order to articulate the cooperation between the Strasbourg and Luxembourg Courts**,** and to restrict the prolongation of proceedings as much as possible, a system of preliminary rulings, could be envisaged. A preliminary judgment would be binding for the requesting Court of Justice as far as the elements are concerned which it needs to take into account for deciding the case before it. The Luxembourg Court would then be in the position, when making application of the ruling given by the Strasbourg Court, to adapt it to the specific case. Such a system would at the same time serve to prevent a significant number of applications to the Strasbourg Court, given that a preliminary ruling could settle a number of

[55] See the Group's Final Report (see supra, footnote 47), p. 12.

[56] Due implementation of the judgment in the case of Matthews v. the UK (see para. 29 above) would require an amendment to EU law, which the UK alone is not empowered to do.

[57] Final report of Working group II, p. 11.

[58] There is a contradiction between making ratification of the ECHR a condition for EU membership and not subjecting the EU to the ECHR supervisory machinery.

pending cases and potential applications. In that respect, the argument that a system of preliminary rulings would unduly delay proceedings is not valid, if considered in a broader context of possible future cases.

68. With a view to avoiding too large a stream of requests for preliminary rulings, which would risk counteracting what the EU Charter as a whole is meant to achieve, the Luxembourg Court should not be under an obligation to ask for a preliminary ruling, but should be free to restrict such request to cases of great importance or legal uncertainty. In that respect it should apply the doctrine of "acte clair" and "acte éclairé" as developed in the Court of Justice's case-law with respect to the Article 234 procedure. It may be expected that the Strasbourg Court, in answering preliminary questions concerning the ECHR, will use its "living instrument"-doctrine as a basis and take the Charter into account[59]. The procedural details could be worked out in consultation between the Courts and inserted in their respective Rules of Procedure. Finally, a time-limit should be set for the Strasbourg Court, in order to avoid unacceptable delays in the already very protracted duration of the Luxembourg proceedings. Indeed, the latter will have to fulfil the requirement of a "reasonable time" of Article 6 of the ECHR.

69. A more radical device to bring about legal uniformity would be the establishment of an inter-court panel: a kind of *Tribunal des Conflits*, or *gemeinsamer Senat*. This panel would have jurisdiction to decide issues of interpretation of the ECHR which have been referred to it by any of the Courts involved. However, it is obvious that this would be a very costly and cumbersome solution, while it would without any valuable reason detract from the general jurisdiction of the Strasbourg Court in the area of the ECHR.

VIII. Interim (prior to EU accession to ECHR) means to reduce divergences in the case-law of the Strasbourg and Luxembourg Courts

70. While it is clear that EC/EU's accession to the ECHR represents the best solution to the threats to legal unity and security and, thus, effective legal protection which are posed by the coexistence of the ECHR and a binding Charter, it is obvious that the necessary amendments to the ECHR and the EU Treaties will require a certain amount of time. Pending accession, it would still be necessary to take certain measures in respect of the risk of jurisprudential divergences between the two Courts.

71. It would be possible to envisage, for example, subject to the necessary amendments of the treaties concerned, to give the Luxembourg Court the power to ask for an advisory opinion to the Strasbourg Court "on legal questions concerning the interpretation of the Convention and the protocols thereto"; a power that Article 47 ECHR currently confers upon the Committee of Ministers. Unlike the latter power, however, the Luxembourg Courts' requests would have precisely to deal with "questions relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto"[60]. As in the case of requests for preliminary rulings, discussed above, here too it would be left to the discretion of the Luxembourg Court to make such a request, while provision should be made for a timely answer to the request to avoid undue delay in the final determination of the merits of the case concerned.

[59] For an example of reference to the Charter in interpreting Article 12 of the Convention, see ECHR 7 July 2002, *Goodwin*, par. 100.

[60] See the restriction in the second paragraph of Article 47.

72. Finally, an informal but effective device for bringing about normative coherence in the interpretation of human rights norms (before and after accession) is the keeping of regular contacts and exchanges of views among the members of the domestic and the international courts, as well as between the two European Courts. At such meetings common human rights issues arising in cases before the various courts could be discussed. For that purpose, both the agendas of the meetings and the minutes of the discussion should be concrete and detailed.

IX. Summary and concluding observations