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(OR. f)

CHARTE 4111/00

BODY 3

INFORMATION NOTE

Subject : Draft Charter of Fundamental Rights of the European Union
 – Horizontal questions

In preparation for the general debate on the Charter on 2 February, the Chairman has asked the Secretariat of the Body to set out in brief certain "horizontal" questions which the Body may have to look into. This paper is being sent to Members of the Body for information.

I. Political declaration or legal text

1. The mandate given by the Cologne European Council gave no indication as to what form the draft Charter resulting from the Body's proceedings should take. It simply stated that it would serve as a basis for an interinstitutional declaration and that its possible inclusion in the Treaties would be examined at a later stage.

2. The outcome of the Body's proceedings may be entirely different, depending on how much importance is attached to any one of the draft Charter's aims. It may take the form of a political declaration, in which case further discussions will be vital if the declaration is to be converted into a text capable of being incorporated into the Treaties. It may take the form of a legal text, but if so, special care will be needed to ensure that it is properly worded and in particular that it is consistent with the Treaties, since by definition it must be incorporated into the Treaties without amending them.
3. The choice between the two options is a political one, but it will have a significant bearing on the Body's future proceedings.

II. A Charter of Rights of the European Union

4. The Charter is intended to apply to the Union's institutions and not to activities of Member States which fall outside the scope of EC or EU legislation. This would be consistent with Court of Justice case-law, whereby Member States are bound to respect fundamental rights whenever they act within the scope of the Treaties for the purposes either of implementing Community (or EU) legislation or derogating from it (Judgment of 18 June 1991 in Case C-260/89, *Elliniki Radiophonia Tiléorassi AE*, ECR I-2925, par. 43).
5. The fact remains that the Charter cannot of itself impose obligations on Member States outside the scope of EU legislation in its broadest sense. One of the Charter's provisions should therefore make this clear.
6. The aim of the Charter is to establish a bill of rights, rather than to confer new powers on the Union to legislate in the field of fundamental rights. In its Opinion 2/94 of 28 March 1996 (ECR I-1759), the Court of Justice made a clear distinction between the obligation to respect fundamental rights and the power to legislate with regard to fundamental rights. The Charter must operate solely within the framework of existing powers. Should these be extended as a result of the Treaties being amended, the Charter would naturally apply to the new powers created.

7. The Charter applies to the institutions of the Union, and the Cologne European Council does not refer to the Community alone. The Charter should therefore be drafted in such a way as to apply within the framework not only of the Treaty on European Union but also of the EC Treaties. In other words, the Charter also applies to Titles V (CFSP) and VI (JHA) of the Treaty on European Union.

III. Holders of guaranteed rights

8. This is an extremely complex legal issue. If the terms of the European Convention on Human Rights are adopted, then this Convention applies to any person within the jurisdiction of a Contracting State. *Mutatis mutandis*, the Charter would thus apply to anyone within the jurisdiction of the Union.
9. A solution of this kind raises difficulties, particularly with regard to certain social rights which may not be applied systematically to workers from third countries and the scope of which is also likely to vary in accordance with the agreements concluded between the Union and the third countries. The same holds true, of course, with regard to freedom of movement.
10. Finally, rights linked to Community citizenship, which are political rights, may be granted solely to persons holding the nationality of one of the Member States. No discrimination based on nationality may occur in the enjoyment of such rights.
11. This distinction becomes further complicated with the inclusion of a general clause on non-discrimination which might conflict with the existence of specific rights reserved for EC nationals or persons treated as such.
12. This is a problem which can be solved. The European Court of Human Rights stated in its Chorfi judgment of 7 August 1996 that the preferential treatment granted to EC nationals in the matter of expulsion was dependent on a case being made on objective and reasonable grounds. It is thus possible to justify differing forms of treatment.

13. Under these circumstances, would it not be possible to work on the basis that the Charter should apply to any person falling within the scope of EU legislation, with a proviso covering the specific rights enjoyed by citizens of the Union? An example may be found in Article 25 of the European Parliament declaration which attempted to solve this problem, but which was not entirely successful in doing so.
14. Given the aim of incorporation into the Treaties, this is a significant problem which needs to be handled with great care. It should be noted that, strictly speaking, Article 13 TEC itself contains no general clause on non-discrimination, but does empower the Community to combat discrimination within the sphere of its competence. On the other hand, Article 6 TEU refers back to the European Convention on Human Rights and thus to Article 14 thereof which prohibits discrimination in the enjoyment of rights guaranteed under the said Convention. It should further be noted that an additional Protocol to the European Convention on Human Rights prohibiting discrimination of any kind is currently under negotiation within the Council of Europe.

IV. Relationship with international instruments for the protection of human rights and common constitutional traditions

15. The question of the relationship between the Charter and the European Convention on Human Rights is frequently raised. The drafting of the Charter has no direct impact on the question of the Community's accession to the European Convention on Human Rights. The problem of accession may arise, irrespective of whether the Community has a Charter or not. The Charter constitutes a bill of rights which the Union imposes on itself, just as each State party to the Convention has its own charter of fundamental rights. This does not dispense the Union from observing the Convention. Accession would establish an external check on the way in which the Community observes the Convention. According to the Court of Justice of the Communities, such accession will require a revision of the Treaty.

16. Article 6 TEU requires the Union to respect the Convention. Consequently, the Convention constitutes a minimum standard and the Charter cannot take a step backwards in relation to the Convention as interpreted by the European Court of Human Rights. This point is particularly important since there is always a risk of a private individual referring to the European Court of Human Rights a national measure implementing Community law and of that Community law being declared contrary to the Convention, although the Court of Justice of the Communities would perhaps not have delivered the same judgment (see ECHR, Judgment *Matthews v. United Kingdom* of 18 February 1999 concerning the European elections and Gibraltar).
17. The same consideration applies with regard to common constitutional traditions.
18. Under these circumstances, it would perhaps be useful to consider a clause that would establish that there is nothing in the Charter to restrict the protection offered by the European Convention on Human Rights and the common constitutional traditions and by other instruments which would have to be identified (United Nations Covenant, European Social Charter, etc.).

V. The question of limitation of guaranteed rights

19. Guaranteed rights are not guaranteed without limit. The European Convention authorises the limitations which are prescribed by law and are necessary in a democratic society. Other arrangements exist which preserve the actual core of the guaranteed right. It will probably be necessary to give thought to the limitation formula. For example, Article G (Part V) of the European Social Charter could be taken as a basis.

VI. The different categories of rights

20. The rights to be guaranteed are not of the same kind. There are rights which are clearly amenable to the law. Others require action by the European Union for them to be implemented, and the legislator has broad discretionary powers as regards such action.

21. Contrary to what certain parties claim, this distinction does not conceal any opposition between civil and political rights and social rights. Certain social rights, such as the right of association, may be amenable to the law, whilst others, such as the right to employment, are less so.
22. Consideration must therefore be given to each right to determine whether it is amenable to the law or whether it can be worded in such a way as to make it so. Could not certain rights be defined as political principles for Union action which need to be realised through action by the legislator? That is what was adopted in the Parliament declaration for the right to the environment (Article 24) or working conditions (Article 13).

VII. Judicial control

23. If the Charter is inserted into the Treaty, observance thereof will be ensured through the provisions on judicial control contained in the Treaties. The control will be effected by the Court of Justice either by direct referral thereto or via a preliminary ruling by the national judge. The system of control will differ according to the pillars.
24. Is there a contradiction between the right to a judge as set out in the European Convention on Human Rights and the system of the Treaties? The system of appeal provided for by the Treaties is a comprehensive system since, when referral cannot be made direct to the Court, the national courts may be called upon to rule on national acts implementing Community law.
25. Nevertheless, there are cases in which no national implementing act is necessary as the Community legislation simply lays down a prohibition. The only possibility remaining for the private individual is to appeal against the penalty which might be imposed upon him by the national courts in the event of an infringement of the Community legislation. Some thought it was not normal for a private individual to be induced to commit an infringement in order to be able to appeal, since he had no right to appeal directly against the Community act concerned. However, it is not clear whether the Court's case law on this matter has been established and the Court will shortly be required to state its position.

26. In its preparatory report for the last Intergovernmental Conference, the Court mentioned the idea of introducing a special appeal ("Verfassungsbeschwerde"; complaint of unconstitutionality). The Intergovernmental Conference did not adopt this suggestion.

CONCLUSION

27. This note is not exhaustive and simply presents certain horizontal problems without examining them in depth. On the basis of the Body's discussions, they will require a detailed legal examination.
