LA CONVENTION EUROPÉENNE
LE SECRÉTARIAT

Brussels, 27 September 2002

Working Group II

Working document 19

"Working group II "Incorporation of the Charter/ accession to the ECHR"

du :	**The Secretariat**
au :	**Working Group II**
Objet:	**Hearing of Judge Mr. Vassilios Skouris - 17 September 2002**

The members of the Group will find attached speaking points of Judge V. Skouris for the hearing of 17 September 2002.

SPEAKING NOTE

of Judge Vassilios Skouris

Hearing of 17 September 2002

INTRODUCTION

1. The Court of Justice attaches great importance to respect for fundamental rights within the Community legal order and follows the work of your Group with great interest. That is why I am happy to have an opportunity of answering your questions today.

2. However, I have to point out that, even though there have been some discussions within the Court on certain questions covered by your Group in its work, those discussions have not yet given rise to an official position on the part of the Court. Consequently my replies to your questions must be taken as representing my own views, not necessarily those of the Court.

3. In dealing with the written questions that have been submitted to me, I have decided to arrange them in the following three groups:

- a first group concerns the impact of the integration of the Charter of fundamental rights of the European Union into the (future) Treaty;
- a second group concerns the consequences if the EC (i.e. the EU) decides to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or, on the other hand, decides not to accede;

- a third group concerns a possible improvement in judicial protection so as to give full respect for fundamental rights within the Community legal order irrespective of the outcome of the discussions on integrating the Charter into the Treaty or whether the EU accedes to the ECHR.

I. THE EFFECTS OF INTEGRATING THE CHARTER INTO THE (FUTURE) TREATY

The written questions in this area that have been submitted to me concern the following three points:

(a) the impact of the integration of the Charter into the Treaty on the allocation of powers between the EU and the Member States (Mr van der Linde, first part of the second question);

(b) the impact of the integration of the Charter on the current wording of Article 230. Should a right of action be provided for individuals (natural persons or NGOs) against a regulatory act that infringes a fundamental right? (Mr Ben Fayot, second question);

(c) the impact of the integration of the Charter on court rulings in the context of the third pillar in cases brought by individuals (Mr Ben Fayot, third question).

(a) I do not believe that the integration of the Charter into the Treaty will alter the allocation of powers between the EU and the Member States if an appropriate amendment is also introduced into the horizontal clauses in Articles 51(2) and 52 (2) of the Charter.

On this point I refer to the views put forward by Mr Vitorino in Working Document No 9 of 18 July 2002 (see Working Document No 9, 1-3 and 5-6).

(b) My observations on this point break down into the following two classes:

- regarding the law as it stands: the Court of Justice in its judgment of 25 July 2002 in Case C-50/00 P *Unión de Pequeños Agricultores* ruled that the current arrangements for judicial review of the lawfulness of the acts of the institutions are in accordance with the general principles of law, which include fundamental rights. However, it also indicated that, while it is admittedly possible to envisage a system of judicial review of the legality of Community measures different

from that established by the founding Treaty, it is for the legislature to introduce any reform of this nature;

-regarding the reforms that might be introduced: I have to observe that, as our legal cultures and traditions show, historically all recognition and embodiment of a substantive right has always been accompanied by a procedural counterpart, i.e. a remedy to protect that right. It is therefore reasonable to foresee that the integration of the Charter into the Treaty will produce the same effect and bring about a change in the current rules. The risk of increasing the number of cases brought before the Court cannot form a criterion for determining whether to change those rules. In any event this risk would exist even if the current rules were maintained despite the integration of the Charter into the Treaty. If individuals do not enjoy a direct right of action against acts of the Community, it is very likely that there will be a considerable increase in the number of references made for preliminary rulings on the validity of those acts.

I will now consider the approach we should take here.

It has often been suggested that a Community *Verfassungsbeschwerde* should be introduced. I do not feel this is the best solution. First, in practice it is difficult to draw a clear distinction between grounds of action relating to the protection of fundamental rights and other grounds of action for challenging the lawfulness of a Community act. Second, determining the court with jurisdiction to take cognisance of a Community *Verfassungsbeschwerde* would remain an issue. With any jurisdiction other than the Court of Justice, there would be reason to fear a conflict of jurisdiction. If the Court of Justice were to have jurisdiction, the introduction of a new remedy would complicate and lengthen the procedure before it.

Nor do I feel it is desirable to resolve this difficulty by granting individuals the right to challenge rules simply because there is no appropriate remedy at national level. As the Court of Justice has pointed out in its judgment in *Unión de Pequeños Agricultores*, at paragraph 43, a major stumbling block with that approach is that it requires the Court to be judge and interpreter of national procedural rules, which would go beyond its jurisdiction when reviewing the legality of Community measures.

Lastly, I would like to point out (and here I am replying more or less directly to the second question put by Mr Ben Fayot) that, if Article 230 were to be amended to allow individuals a direct right of action to challenge a Community rule, it would be impossible to restrict the initiation of actions

solely to cases where there has been an infringement of a fundamental right. This is so because, as I have already pointed out, the experience with Germany has shown that it is impossible in practice to distinguish the grounds for that action for annulment from the other grounds available under Article 230. It follows that any amendment to Article 230 would have to allow individuals a direct right of action before the Court of Justice to challenge a provision on all of the grounds made available in Article 230, obviously including the ground of infringement of a fundamental right.

(c) I can be relatively brief regarding the last point, the impact the integration of the Charter would have on the review by the Court of Justice of decisions adopted within the context of the third pillar. Although it is desirable that there should be uniform conditions for the Court in carrying out a judicial review of the acts of the institutions irrespective of the field in which they have been adopted, it is not appropriate for a Member of the Court to put forward suggestions to the constituant on this issue. In any event, it is difficult to accept that, if the Charter becomes binding law or if the EU accedes to the ECHR, it will be possible to maintain the restricted judicial review provided for within the context of the third pillar.

II. THE CONSEQUENCES IF THE EU DECIDES TO ACCEDE TO THE ECHR OR OTHERWISE

The questions that have been put to me on this issue involve the following four points:

(a) the impact of an accession to the ECHR on the allocation of powers between the EU and the Member States (Mr van der Linden, first part of the second question);

(b) whether the accession would involve a conflict with the autonomy of Community law (Mr Vitorino, third question) and what its consequences would be for the current role of the Court of Justice (Mr van der Linden, first and third questions, Mr Ben Fayot, first question);

(c) whether a " functional accession" would create difficulties (Mr van der Linden, fourth question);

(d) whether a problem would be created by double standards of protection of fundamental rights if the EU did not accede to the ECHR (Mr van der Linden, fifth question).

(a) In keeping with what I have already said on the integration of the Charter into the Treaty, I do not think that the allocation of powers between the EU and the Member States will be affected if the EU accedes to the ECHR provided that the legal basis to be introduced into the Treaty is restricted solely to resolving the issue of the accession to the ECHR, for example by amending Article 303 of the EC Treaty.

(b) There will not in general be a conflict involving the autonomy of the Community legal order if the EU accedes to the ECHR. All the rules of Community law, with the exception of those of the ECHR, will continue to be adopted by the Community institutions and applied by the EU administration or the authorities of the Member States. Moreover, the application and interpretation of those rules will remain within the jurisdiction of the national courts and the Court of Justice, as is laid down in the Treaty as it stands. However, with respect to the matters covered by the ECHR, accession will represent a limitation to the autonomy of Community law. Regarding the Court of Justice in particular, it will effectively lose its sole right to deliver a final ruling on the legality of Community acts where a violation of a right guaranteed by the ECHR is at issue. In my view, there is nothing shocking in this: the position is the same when the constitutional courts or supreme courts of Member States test the constitutionality or legality of acts within their domestic legal systems.

Moreover, I do not feel that, as has been argued in some quarters, settling disputes involving the validity of a Community act for infringement of a fundamental right would allow the European Court of Human Rights to determine other issues of Community law, particularly those involving the allocation of powers between the Union and the Member States. In any case, technical solutions have been proposed (see CONV 116/02 of 18 June 2002, p. 22, footnote 2) to avoid such a situation, if fears exist that this might be the outcome (a mechanism allowing the EU to intervene on behalf of a Member State and vice versa, acting as joint defendant with joint and several liability, and a declaration to be lodged emphasising that only the EU and the Member States are entitled to determine the allocation of powers in accordance with their own internal procedures).

I should point out that the prospects of an external control, carried out by the European Court of Human Rights in cases where national and Community remedies have been exhausted, can only intensify the European Court of Justice's own control of fundamental rights. The risk of conflicts between decisions of the Court of Justice and of the European Court of Human Rights must not be over-estimated. The Court of Justice has always paid close attention to the decisions of the European Court of Human Rights and will naturally continue to do so; my view is that this makes

the risk very small. When new issues arise that are not covered by the case-law of the European Court of Human Rights, the Court of Justice will have to settle them appropriately itself.

For those reasons I think that if the EU becomes a party to the ECHR it will be unnecessary to determine the respective roles of the Court of Justice and of the European Court of Human Rights or to regulate relations between the two courts, even if the Charter becomes binding law. The suggestion that the Court of Justice should refer such cases to the European Court of Human Rights would involve an unreasonable complication and slow down the procedure for the former court, the more so if the reference to the European Court of Human Rights were made in the context of a reference for a preliminary ruling to the Court of Justice.

(c) The remarks I have made concerning a pure and simple accession to the ECHR also apply to the hypothesis of a "functional accession" as advocated by Mr Piris in his intervention in your Group (Working document No 13, p. 37).

(d) Lastly, if the EU does not become a party to the ECHR, it is impossible to exclude that a double standard of protection will develop as a result of the different, or even conflicting, rulings given by the Court of Justice and the European Court of Human Rights. Even though such an occurrence will be relatively rare because, as I have explained, the Court of Justice follows the rulings of the European Court of Human Rights closely, it is impossible to exclude it entirely given the absence of an external control by the Court of Strasbourg.

III. IMPROVEMENT OF THE SYSTEM OF JUDICIAL PROTECTION

In this section I shall discuss the following two points:

(a) the approach of the Court of Justice to the constitutional traditions common to the Member States (Mr Vitorino, first question) and the issues that will arise if the Charter is integrated (amendment of Article 6(2) of the Treaty on European Union; introduction of a horizontal clause into the Charter for rights that are not based on the EC Treaty or the ECHR);

(b) the improvements that could be introduced into the judicial review to provide greater protection for fundamental rights in the context of the current three pillars of the European Union (Mr Vitorino, second question).

(a) According to the settled case-law of the Court of Justice, as most recently embodied in its judgment in Case C-50/00 P *Unión de Pequeños Agricultores* (paragraphs 38 and 39), fundamental rights form an integral part of the general principles of law that are upheld by the Court of Justice. In discerning those general principles of law, the Court is guided by the constitutional traditions that are common to the Member States. It should be borne in mind that common constitutional traditions do not form a direct source of Community law and the Court of Justice is not bound by them as such; they constitute a source of inspiration for it in discerning and defining the scope of the general principles of law that apply in the Community legal order. It follows that it is not the Court's duty to discern, and, as it were, mechanically transpose into the Community legal order, the lowest common denominator of constitutional traditions common to the Member States. The Court draws inspiration from those traditions in order to determine the level of protection appropriate within the Community legal order and for that very reason appreciates them more freely.

This approach has enabled the Court of Justice to provide a high level of protection for fundamental rights. It suffices to indicate at this point that, if the Court had determined to adopt the common denominator of the constitutional traditions common to all Member States, it could not have recognised and protected within the Community legal order the right to pursue a trade or business,[1] which, I understand, is recognised and protected only by the German Constitution.

However, the issue arises whether, if the Charter is integrated into the Treaty, it will still be necessary to refer to the common constitutional traditions and to the ECHR in order to discern the general principles of law, as is laid down in Article 6(2) of the Treaty on European Union.

My feeling is that, from the point when the EU develops a binding set of fundamental rights, it will no longer be necessary to refer to the general principles of law and consequently to the common constitutional traditions and the ECHR as a parallel or "concurrent and equivalent" source for fundamental rights; these will merely form a subsidiary and complementary source. Accordingly,

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[1] See Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 78 and Case C-200/96 *Metronome Musik* [1998] ECR I-1953, paragraph 21.

the Court of Justice would have recourse to the general principles of law only in order to make good any lacunae in the text of the Charter. In my view, a consequential amendment would have to be introduced into Article 6(2) of the Treaty on European Union.

(b) Regarding the improvements that might be desirable for the arrangements on judicial review for the full protection of legal protection of fundamental rights within the context of the current three pillars of the Union, I would refer, with regard to consideration of any amendment to Article 230, to the observations I have set out on this point in the first section of my talk.

In conclusion, I can only repeat my point that, although it is desirable to attain uniformity in the protection provided by the Court within the context of the current three pillars, it is not appropriate for a Member of the Court to put forward suggestions on this matter to the constituant .