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(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

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A. Background

1. The Presidents of the European Parliament, the Council and the Commission signed and proclaimed the Charter of Fundamental Rights (hereinafter "the Charter") on behalf of their institutions on 7 December 2000 in Nice. Although the issue 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 and 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 coherent human rights protection at the European level.

B. Human Rights protection within the Community legal order

2. Protection of fundamental rights had not, initially, been a matter of specific concern for the European Communities. Aimed at an economic rather than political integration, the Community institutions had no powers to deal with areas likely to provoke violations of human rights.

3. However, as early as 1962, in *Van Gend & Loos* case, the Court of Justice of the European Communities (hereinafter: "the ECJ" or "the Luxembourg Court")[1] affirmed, without directly referring to fundamental rights, that the community law also created rights the individuals could directly rely on[2]. A few years later, in the famous *Stauder* case, the ECJ stated that there were "*fundamental rights enshrined in the general principles of Community law and protected by the Court of Justice*"[3].

4. In the early 70s, in a number of very well-known cases, starting with the *Internationale Handelgesellschaft*[4] and *Nold*[5] cases, the ECJ affirmed that its protection of fundamental rights was inspired by the constitutional traditions common to the Member States[6] and 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 "*must be ensured within the framework of the structures and objectives of the Community*"[8].

5. In 1975, *in Rutili*[9] and *Prais*[10] cases, the ECJ for the first time explicitly referred to specific provisions of the European Convention on Human Rights (hereinafter: ECHR), and in *Hauer*[11]

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[1] In this text these terms are used so as to cover, when relevant, both European courts – the Court of First Instance and the Court of Justice.

[2] Case 26/62, [1963] ECR 1963.

[3] Case 29/69, [1969] ECR 419.

[4] Case 11/70, [1970] ECR 1125

[5] Case 4/73, [1974], ECR 1974.

[6] It is to be noted that this link between EC law and the national law of the Member States as a source of inspiration, the *Algera*-formula, was established as early as 1957 (see case 7/56, Judgment of 12.07.1957, Algera and others v. Common Assembly, Rec.1957 p. 81).

[7] Cf. footnote 4.

[8] Cf. footnote 4.

[9] Case 36/75, [1975] ECR 1219.

case, it recognized the special significance of the ECHR among international treaties on the protection of human rights[12].

6. Today, it is widely acknowledged that a specific Community human rights protection mechanism has been built up through the ECJ's praetorian case-law, and that the ECHR provisions have strongly influenced this process. This strengthening of the legal position of the individual by the ECJ may be said to be one of the Court's great achievements.

7. As regards the question of the legal basis for the ECJ's human rights case-law, it must be observed that the primary law of the European Communities contained only a few specific provisions on the respect for fundamental rights. The first reference to the concept of human rights was introduced in the preamble to the Single European Act in 1987, but without granting jurisdiction over the matter to the ECJ. Articles 2 and 6 (2) of the Treaty of Amsterdam (and its predecessor Article F.2 of the Treaty on European Union of 1993) confirm the respect for and reinforce the protection of human rights within the Community legal system. Article 46 (d) 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.

8. The ECJ's case-law is also part of the *acquis communautaire*, which as a precondition to accession was accepted by the then new Member States Austria, Finland and Sweden in 1994 in Article 2 of the Act concerning the conditions of accession to the Treaties on which the European Union is founded. It will consequently also be accepted by the future new member States of the EU.

9. The interpretation and application of the ECHR by two Courts above the State level – the ECJ and the Strasbourg Court[13] - has led to important advancements in human rights law at the European level. The readiness of the community judges when dealing with the protection of fundamental rights, to be inspired by not only the ECHR provisions but also the Strasbourg Court's case-law permitted the relatively "peaceful" co-existence of the two human rights protection mechanisms.

10. Nevertheless, due to the intrinsic differences between the two systems, the development has not been a strictly parallel one. There have been certain divergences between the two courts' case-law on the interpretation and application of human rights. The risks connected with the co-existence of these two mechanisms risk growing in the light of a legally binding EU Charter on fundamental rights (see infra, paras. 44-55).

C. Divergences between the ECJ and the Strasbourg Court's case-law on the interpretation and application of human rights

11. A detailed analysis of this issue exceeds the scope and purpose of the present opinion. Generally speaking, the ECJ has opted for either a larger or a more restricted scope of protection of fundamental rights than the Strasbourg Court.

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[10] Case 130/75, [1976] ECR 1589.

[11] Case 44/79, [1979] ECR 1979.

[12] Other notable cases include case C-84/95 Bosphorus Hava Yollari Turism ve Ticaret AS v. Minister for Transport, Energy and communication [1996], ECR I – 3953; case C-404/92, X v. EC Commission [1994], ECR I 4737.

[13] This expression includes also the former European Commission on Human Rights's jurisprudence.

i. *Larger scope of application*

12. One of the areas where the ECJ has recognized a larger scope of protection is the right of access to a court in administrative matters. For example, in the *Marguerite Johnson* case, regarding the non-renewal of a contract of a reserve police officer on the basis of that officer's being of the female sex, the ECJ considered the principle of access to effective judicial protection as a general principle of Community law and referred specifically to Articles 6 and 13 of the ECHR[14]. By contrast, in the light of the relevant Strasbourg Court's jurisprudence, in particular the *Pellegrin* and *Frydlender* cases, disputes concerning police force officials would arguably be excluded from the field of application of Article 6.

13. As far as social rights are concerned, in the famous case *Commission v. Germany*, the ECJ expressly referred to Article 8 of the ECHR when it ruled that Germany had infringed the community rules on free movement of workers within the Community by adopting the legislation providing that migrant workers' family members could only be granted a residence permit if the workers accommodation was suitable[15].

14. The ECJ has also developed a very broad scope of protection with regard to the right to information. In the *Gerard van der Wal* case concerning access to European Commission's documents, the ECJ ruled that the respect for the national procedural rules would be sufficiently guaranteed if the Commission assured that the dissemination of the documents was not illegal[16]. The Strasbourg Court has instead considered that while Article 10.1 of the ECHR neither establishes the right for an individual to have access to information stored by the public administration nor obliges the public authorities to communicate such information, there exists a positive obligation of the State to communicate information in the field of environmental protection, in so far as it is necessary to ensure the effective respect for private and family life guaranteed by Article 8 ECHR[17].

ii. More restrictive interpretation of human rights

15. Some of the most quoted examples of open divergences come from EC competition policy and concern the rights of the defence in the course of administrative proceedings (Article 6 ECHR) and the issue of searches of business premises and the applicability of Article 8 ECHR.

16. In the *Orkem*[18] case, which concerned the powers of the Commission to demand information in the course of its investigation of possible offences against the Community competition laws, the Court of Justice held that neither a comparative analysis of national laws nor Article 6 ECHR enabled the conclusion to be reached that there was a general principle of Community law giving a legal person the right not to give evidence against itself in the case of

[14] Case 222/84, [1986], ECR 1651.

[15] Case 249/86, [1989] ECR 1263.

[16] Joined cases C-174/98, P&C-189/98 P, [2000] ECR I-2000. See also Heidi Hautala case C-353/99 P, [2001] ECR 2001.

[17] Guerra and others v. Italy, ECHR 1998-I. It is to be noted that in its report, the European Commission had affirmed instead the existence of a "right to receive information" in the field of environmental protection under Article 10 ECHR (Application 14967/89, ECHR 1998-I).

[18] Case C-374/87, [1989] ECR 3283.

infringements in the economic sphere, in particular in matters of competition law. This case-law clearly conflicts with the *Funke*[19] case, in which the Strasbourg Court expressly stated the contrary and the *John Murray* case where it affirmed that "*the /.../ privileges against self-incrimination"* should be recognised as a standard *"which lies at the heart of the notion of fair procedure under Article 6.1 ECHR*[20]*"*.

17. In *Hoechst AG* case, the ECJ considered that Article 8 ECHR did not extend to professional activities and thus upheld the legality of the European Commission's "dawn raids" on the company's business premises in search of evidence of anti-competition practices. By contrast, the Strasbourg Court considered, in a case concerning the search of a lawyer's office pursuant to a warrant drawn in very broad terms, that interpreting the words "home" and "private life" so as to include certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, which is to protect the individual from arbitrary interference by the public authorities[21]. However, it is to be noted that in a more recent case on this issue, the ECJ affirmed the obligation of the national courts to ensure that the coercive measure envisaged is not arbitrary in the light of the Strasbourg Court's case-law[22].

18. Remaining within the scope of Article 8, some divergences also exist regarding homosexuality issues. In the recent *Grant v. South-West Trains*[23] case concerning a refusal to grant travel concessions to an employee for an unmarried cohabiting same-sex partner where such concessions are available for spouses or unmarried opposite-sex cohabiting partners of such an employee, the ECJ found that stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 ECHR. Although the ECJ referred to the then existing Strasbourg case-law in that area, it failed to take into account the whole of the Strasbourg Court's case-law on Article 8, and in particular the so-called "positive obligations" theory which might have been of valuable assistance in that respect. Indeed, one year later, in *Salgueiro da Siva Mouta c. Portugal* case, the Strasbourg Court found that a decision granting custody of a minor to the mother that was exclusively motivated by the homosexual orientation of the father of the child violated Articles 8 and 14.

19. Finally, concerning the right to adversarial proceedings, in *Emesa Sugar*[24] the ECJ decided to depart from the case-law of the Strasbourg Court[25] as to the right of the parties in proceedings to have knowledge of and to comment on all evidence adduced or observations put before a tribunal. Contrary to that case-law, the ECJ considered that Article 6.1 did not support the assertion that the applicant should be entitled to submit written observations on opinions submitted to the Court by the Advocate General. It did so on the ground that the Advocate Generals are not entrusted with the defence of any particular interest but exercise a quasi-judicial capacity.

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[19] 25/2/1993, Series A 256-A.

[20] Application 18731/91, ECHR 1996.

[21] *Niemitz* case, 16/12/1992, Series A 251-B.

[22] Roquette Frères SA, case C-94/00, [2002] ECR I-2002.

[23] C-249/96 case. However, the ECJ recognized the right not to provide information capable of being used in order to establish, against the person providing it, the existence of an infringement of the competition rules as being part of the rights of the defence.

[24] Case C-17/98, [2000].

[25] *Cf.* Lobo Machado, ECHR 1996-I, 195; Vermeulen, ECHR 1996- I, 224; Nideröst-Huber, ECHR 1997-I, 101.

iii. Impact and effects of divergences on national courts

20. Divergences between two European Courts on the interpretation of fundamental rights raise an underlying problem, which the national courts within the European States, in particular the EU member States, will have to face. Whose interpretation of the requirements of the ECHR is to be given precedence – those of the ECJ or those of the Strasbourg Court? In practice, the answer to this question will depend on the concrete issue in question; within the sphere of Community law, the EU Member State's courts will be bound to apply Community law to the cases before them, including the ECJ's human rights case-law. However, on the basis of Article 1 ECHR, emanating from the Contracting States, they are also bound to secure the rights and freedoms set out in the Convention as interpreted by the Strasbourg Court.

21. Therefore, in case of two diverging case-laws on an issue falling within the field of Community law, a national court will find itself in a position of being obliged to act in a manner contrary either to the Convention or to the Community law. Such situation is undesirable and forges the need to establish an appropriate mechanism capable of reconciling potentially diverging judgments.

22. The issue of external control of the Community Institutions' actions remains open. In this respect, it must be noted that in two notable cases[26] in which the ECJ had extended its human rights case-law to cover also member state actions, it found that member states actions had violated human rights norms even though they were based on the EC Council Regulations; it has not gone beyond this to consider also whether the Community itself shares the responsibility for such violation.

23. Those examples confirm that there is a growing need for the EU to be subject to an external control as to the compatibility of its acts with the ECHR.

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

24. Faced with the limits of the ECJ's competence in the field of human rights protection, the EU citizens who deemed themselves victims of violation of their rights under the ECHR by Community institutions increasingly turned to the Strasbourg Court.

25. The extension of the latter's case-law concerning its jurisdiction to deal with such applications has developed very progressively and according to the legal nature of the Community act at the origin of the violation.

26. In its early case-law, the Strasbourg organs rejected as inadmissible *ratione personae* the complaints directed against the Community as such, and concerning EC primary law, on the ground that the EC is not party to the Convention. In the *CFDT c. European Community*[27] case, the former European Commission considered that the EC member States could not be held responsible to the extent that participating in the adoption of the European Council decisions, they had not exercised their "jurisdiction" in the sense of Article 1 ECHR[28].

[26] Kent Kirk case 63/83, [1984], ECR 2689; Wachauf case 5/88, [1989], ECR 2609.

[27] Application 8030/77.

[28] See also Dalfino v. Belgium, Application 11574/85.

27. As to the national acts of implementation of Community law, the Strasbourg organs have generally accepted to review their compatibility with the ECHR, independently of the issue of the margin of appreciation in the implementation left to the member States. However, in the well-known *M & Co* case[29] concerning the purely formal execution of the community law, (an *exequatur*), the European Commission, although recognising in principle the responsibility of the Member states for acts performed in execution of Community acts, held that the respect of 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.

28. This case-law was subsequently reaffirmed in *Cantoni* case[30]. In that case, the Strasbourg Court implicitly affirmed the supremacy of the ECHR over Community law in a case of violation of human rights. If instead the Court had found a violation of the ECHR, the due implementation of the judgment would have exposed France to the risk of violating the community law.

29. In 1999, with *Matthews* case[31], the category of Community acts subject to the Strasbourg Court review has been enlarged to include also primary Community law over which the ECJ has no jurisdiction[32]. The UK was held responsible for a violation of Article 3 of the First protocol to the ECHR by a decision of the EU Council of Ministers to recommend a treaty concerning the election of the members of the European Parliament It was the first time that the Court established the responsibility of the States for concluding an international treaty incompatible with the ECHR. A decisive element for this decision was the fact that the application could not have been submitted to the ECJ.

30. The *Matthews* case revealed not only the gaps in protection under Community law but also the distorted nature of the remedy found by the Strasbourg Court to exist. The United Kingdom was found to be in violation of the Convention, but the violation of Article 3 of the First Protocol could only be remedied by all EU Members together.

31. To sum up, it may be said that through its recent jurisprudence, the Strasbourg judges have overcome a delicate issue of the separate legal personality of the Community by applying the so-called doctrine of the "useful effect" of the Convention. The Strasbourg Court affirmed that it would not be possible to maintain an effective and unique control of the respect for the ECHR by all Contracting Parties if it were not possible for it to exercise the control of the State acts also in the field of transferred powers. Indeed, the transfer of sovereignty should not have as an effect that the transferred competences avoid being made subject to the respect of fundamental human

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[29] Application 13258/87.

[30] ECHR 1996-V.

[31] ECHR 1999.

[32] 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).

rights. In the light of the theory of successive treaties, the Community member States should be held responsible for violations of the ECHR resulting from the Community institutions' actions.

32. A further significant step in the extension of the Strasbourg Court's competence to Community law could be reached with the *Bosphorus Airways*[33] case pending before the Strasbourg Court. The case concerns an application brought by an airline company over the seizure of its property executed on the basis of the ECJ judgment whereby it considered that an EC Council Regulation was applicable. If the complaint is considered well founded, Ireland will be held responsible for an infringement of human rights resulting from a Community primary law.

33. A similar result, with the difference that all EU member States could have been held responsible, individually and collectively, for human rights violations resulting from a Community primary law could have been reached in the *Senator Lines* case, which is also pending before the Strasbourg Court. It concerns a complaint against the fifteen EU Member States on a fine imposed by the Commission, and maintained by the ECJ. However, the hearing on the case has been cancelled following the Court of First Instance's recent decision which annulled the fines imposed by the Commission on the company[34].

34. At present, it seems that not only the national acts of implementation of Community law (derived acts) but also the Community law itself (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 body entrusted with ensuring the 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, with all the implied shortcomings. There is no EC representative sitting on the Strasbourg Court, and there is no means for the EC to participate in proceedings regarding Community acts. Nor is it legally satisfactory for the member States to respond on behalf of the Community itself. Indeed, the progressive transfer of competences from the member States to the EC institutions truly justifies the responsibility of the latter for the possible violations of the human rights guaranteed by the ECHR.

35. This is even more necessary in the view of the proclamation of the EU Charter on Fundamental Rights.

E. Legal status of the EU Charter

36. The EU Charter will undoubtedly have important implications on the future ECJ case-law in the field of human rights. At present, the issue of its future legal status remains uncertain. The "Draft Treaty establishing a Constitution for Europe" forsees the incorporation of the EU Charter into the text of the Convention. It is expected that the legal status of the Charter will be decided by the extraordinary Summit of Heads of State and Governments on 12 – 13 December 2003.

37. The Charter was proclaimed almost three years ago. Despite its non legally-binding nature, it seems to have already caused a concrete impact. The recent Council Decision setting up Eurojust with a view to reinforcing the fight against serious crime[35] acknowledges in its

[33] Application 45036/98.

[34] Joined Cases T-191/98, T-212/98, T-213/98 and T-214/98, 30 September 2003.

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

preamble, the role of the Charter as an "instrument codifying the fundamental rights recognized by Article 6.2 of the ToA", while in its Decision on the terms of reference of hearing officers in one set of competition proceedings, the European Commission expressly referred to it[36].

38. The role of the Charter as a human rights codification instrument has also been referred to in many opinions of Advocates General[37] and in two judgments of the First Instance Tribunal[38].

39. The Strasbourg Court has referred to the Charter in its Goodwin judgment[39].

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

40. Various international instruments of human rights protection harmoniously coexist in Europe[40]. To a large extent, some of them secure the same individual rights to the same categories of people. Amongst the latter are 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 - the Human Rights Committee and the European (Commission and) Court of Human Rights respectively -[41], this coexistence does not amount to a negative feature, 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[42]

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[36] "*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*".

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

[38] 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.

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

[40] Amongst the instruments of the Council of Europe, it is worth mentioning: the Convention for the Protection of Human Rights and Fundamental Freedoms; 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.

[41] Pursuant to Article 35 § 2 b, the 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 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, however, the possibility of operation of Article 35 § 2 b) 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).

[42] See Article 46 § 1 ECHR.

41. The coexistence of the Convention and a binding Charter is also to be seen as a positive element, to the extent that it is designed to and is going to improve the protection of the rights of the citizens of the EU. Such coexistence does however raise certain issues and, as will be seen later, requires certain additional mechanisms.

42. Before the adoption of the Charter, the fact that EU member-States were all bound by the ECHR did not raise any particular problem. Indeed, the ECJ, despite not being bound by the ECHR, recognised that the latter was the source of the EU's unwritten fundamental rights and indeed applied it and largely drew inspiration from the case-law of the Strasbourg Court, with divergences in case-laws being only occasional (see paras 11-20 above).

43. The scenario, however, will change once the Charter becomes binding, as the ECJ will have to apply it, i.e. to apply a catalogue of rights distinct from the ECHR. As a consequence, 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. If the case does not concern EU law, the competent domestic courts will have to apply the ECHR and not the Charter, and the Strasbourg Court will be competent to review these decisions. If the case does concern EU law, either the affected individual will be in a position, in accordance with very restrictive criteria, to bring it before the Luxembourg Courts, which will apply the Charter and not the ECHR, or, if such access is not possible (and for the time being it is not foreseen to extend individual access to the Luxembourg Courts), the affected EU citizen will be able to raise the issue before the competent domestic courts, which might – and as a court of last instance must - in turn apply to the ECJ seeking an interpretation of EC law. The ECJ will apply the Charter. The domestic courts, 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 these decisions (see para. 31 above).

44. In the light of the foregoing, in order to safeguard legal certainty and avoid that similar human rights situations be decided differently, the need for the greatest coherence between the interpretation and the application of the two instruments by the two Courts becomes clear. The possibility of achieving such coherence is however less straightforward: once the Charter becomes binding, the risk of divergences between the two Courts will become high.

45. Indeed, while the Charter has been obviously inspired by the ECHR, there exist significant differences between the two instruments, relating to both the content and the wording of the rights guaranteed. Under six major headings (dignity, freedoms, equality, solidarity, citizens' rights and justice), the Charter[43] contains, like the ECHR, civil and political rights but also, unlike the ECHR, economic and social rights as well as those to good administration, social rights of workers and bioethics, including certain "third generation" rights such as those to environmental and consumer protection. In addition, the Charter covers the political rights of Union citizens.

46. In respect of the rights which are equally listed in the ECHR, the Charter has "borrowed" the text of the latter, but has often modified it with a view to rendering it simpler, more modern, and at times broader. 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) [44], without a limitative enumeration of the grounds for limitation. Further, certain rights

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

[44] 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

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.

47. On account of these differences, the protection to be afforded by the Charter is not entirely the same as the one afforded by the ECHR: it is at times broader, and at times narrower. A broader guarantee is of course welcome: indeed, Article 53 of the ECHR provides that:

> "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 any other agreement to which it is a Party".

48. In order to avoid a possibility that the EU citizens may be afforded a lower degree of guarantee under the Charter, two provisions (Article 52 § 3[45] and Article 53[46] - the "standstill clause") have been inserted therein. They aim 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 national and international, including EU, law and by national Constitutions.

49. The ECHR is thus going to become the minimum standard of human rights protection within the EU. As a consequence, its interpretation in the light of the case-law of the Court[47] will become a necessity for the ECJ. However, in actual practice, the risk of divergences in the case-law of the Luxembourg and Strasbourg Courts remains high. It is to be said at the outset that experience shows that a such a risk 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.

50. More specifically, the two Courts will have to apply two distinct instruments within two distinct economic, political and legal contexts. Where the rights enshrined in them are the same but are differently worded, different wording will tend to lead to different interpretations, particularly as regards possible limitations to guaranteed rights and the margin of appreciation left to the domestic authorities. In general, the Luxembourg Courts will likely take a more

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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.

[45] See footnote 44 above.

[46] Article 53 of the Charter reads: "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."

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

restrictive approach towards the rights and freedoms concerned, and a more lenient approach towards limitations[48].

51. In respect 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[49].

52. 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[50]), the ECJ will have to decide on these matters, on which there is not yet any clear-cut or fixed case-law of the Strasbourg Court, and the latter may on a later occasion differ in opinion.

53. More importantly, the Luxembourg Courts will have to decide 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 the context to the domestic court to decide.

54. Not only may this create legal uncertainty and result in lack of equal treatment for the private parties involved, it may also subject Member States of the EU to conflicting obligations in executing the judgments of the respective Courts. 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[51]. It may also occur that a State is faced with the need to choose between diverging case-law of the two Courts: a sort of "case-law shopping" which is certainly undesirable.

G. Accession of the European Community to the ECHR

55. Accession of the European Community (the Union) to the ECHR[52] appears to be the key to securing the necessary consistency in the interpretation and the application of the ECHR and the Charter, hence legal certainty[53].

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

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

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

[51] 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.

[52] 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).

[53] A more radical device to bring about legal uniformity would be the establishment of a super court: a European Court of Appeal, a *Tribunal des Conflits*, a *gemeinsamer Senat*. This court 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

56. In this scenario, in fact, all legislation and final acts involving human rights matters of both the Union Institutions and the Member States could 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.

57. Neither the adoption of the Charter nor its possible inclusion in a EU Constitutional Treaty stands in the way of accession or makes it less desirable. Indeed, if the Community and the European Union evolve into structures which are increasingly similar to those of a State, the Charter will have 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: similarly, acts imputable to the EU should be subject to the same **external control**.

58. It would indeed be inadmissible that States which are party to the ECHR be allowed, by means of transfers of competencies to a supra-national or international organization, to exclude matters normally covered by the ECHR from the guarantees enshrined therein, including that of external supervision by the Strasbourg Court.

59. 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.

60. 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, including EU States. They are indeed a founding principle of the Union[54]. 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.

61. 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 (certainly not all the ECJ's judgments); this, however, would not mean that it becomes hierarchically superior, but rather that it is a more specialised body, better equipped to deal with these matters and able to do so from a global perspective[55]. The Luxembourg Court would be left a due margin of appreciation[56] in view of the fact that it is better placed,

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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.

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

[55] 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.)

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

and better equipped[57], 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. The tasks of the two Courts would be complementary. 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 Courts would constitute remedies to be exhausted prior to applying to Strasbourg (Article 35 ECHR): they would bear primary responsibility in ensuring human rights protection in connection with EC acts.

62. At any rate, a system of preliminary rulings, by analogy with Article 234 of the EC Treaty, could be envisaged. A preliminary judgment would be binding for the requesting Court of Justice or Court of First Instance as far as those elements are concerned which they need to take into account for deciding the case before them. The Luxembourg Courts would then be in the position, when making application of the principle stated by the Strasbourg Court, to adapt it to the specific case. Such a system would serve to prevent a significant number of applications to the Strasbourg Court, given that a preliminary ruling could settle a number of potential applications.

63. In order to avoid 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 Courts 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. On the other hand, the Strasbourg Court should be granted discretionary power to decline to give an answer, if the issue raised has already been clarified, is pending before it in another case, or is not of sufficient importance for the uniform interpretation of the ECHR. 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[58]. 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.

64. There is thus no major conceptual obstacle to EC/EU accession to the ECHR, provided that the political will is there[59]. It would of course be necessary to make certain amendments to both the ECHR and the EU Treaties[60]. The Council of Europe is currently evaluating the

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[57] 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.

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

[59] Given that Article I-7 of the Draft Constitution expresses the intention to accede to the ECHR, it is surprising to note that 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).

[60] 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).

relevant legal and technical matters[61]; the Venice Commission is ready to co-operate in these works, if so requested.

65. Legal certainty in Europe would benefit from accession, as has been shown before. Another significant advantage would be 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 on the Chamber or Grand Chamber deciding such cases. In order to overcome a frequent objection that these cases would be decided by judges coming from non –EU countries, thus lacking 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 of EU member-States.

66. 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.

67. Finally, it is worth underlining another important argument in favour of accession: a political one. 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. Such exemption from Strasbourg scrutiny certainly also undermines the credibility of the EU's commitment to human rights protection[62] and ultimately of the aims of the Charter itself. For these reasons, such exemption would certainly be unwarranted.

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

68. While it is clear that EC/EU's accession to the ECHR represents the best solution to the threats to legal 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.

69. It would be possible to envisage, for example, subject to the necessary amendment of the ECHR, 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 as a matter of course precisely 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"[63].

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

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

70. 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 different international courts.

I. Summary and concluding observations

71. Fundamental rights have been the concern of the EC/EU institutions, and increasingly so. In its dealings with human rights matters, the ECJ has drawn inspiration not only from the ECHR, but also from the case-law of the Strasbourg Court. Certain divergences in case-law have nonetheless occurred.

72. On account of the gaps in the EU human rights protection mechanism, EU citizens have increasingly turned to the Strasbourg Court. The latter has progressively expanded its scope of competence ratione materiae; should this trend continue, it is possible that a de facto EC/EU accession to the ECHR will take place.

73. In the meantime, the EU has adopted a Charter for fundamental rights, which is likely to be included in the future Constitution of the European Union.

74. A legally binding EU Charter is going to improve the protection of the rights of the citizens of the European Union.

75. Its coexistence with the ECHR, however, is going to increase the risks of divergences in the interpretation of the scope of fundamental rights by the Strasbourg Court and the Luxembourg Court. Indeed, these two Courts will be applying two distinct instruments, in different perspectives and in respect of situations which are not yet covered by established, clear-cut case-law and thus legal protection of the Strasbourg Court. Such divergences constitute threats to legal certainty.

76. In order to ensure that the case-law of the Luxembourg Court is consistent with that of the Strasbourg Court, accession of the EC/EU to the ECHR appears the most appropriate and effective solution. Such accession would jeopardise neither the principle of autonomy of EC law nor the substance of the monopoly of its interpretation by the ECJ.

77. Aside from making a contribution towards legal certainty in human rights protection in the EU legal space and the strengthening of European common values and their effective enforcement, accession would allow the full representation of the EU in the Strasbourg Court and the satisfactory handling of the issues arising out of the due implementation of judgments in cases involving EC/EU issues.

78. Accession would reinforce the ECHR mechanism, avoid the creation of new dividing lines within Europe and give credibility to the EU's policies in the field of human rights.

79. In addition to accession, normative coherence between Luxembourg and Strasbourg would be enhanced by the creation of the possibility for the Luxembourg Courts to seek preliminary rulings of the Strasbourg Court concerning the interpretation of the ECHR and its Protocols.

80. Regular contacts and exchanges of views between the two Courts would certainly be highly profitable. The Venice Commission might well be an appropriate "neutral" convenor of such meetings.

81. Pending accession, it would be useful to introduce the possibility for the Luxembourg Courts to seek advisory opinions of the Strasbourg Court.

82. It is the Venice Commission's opinion that legal and material preparatory measures for accession of the EC/EU to the ECHR should be continued in order to ensure adequate and timely preparation for a time that the political momentum for accession exists. The Venice Commission is at the disposal of the organs of the Council of Europe and of the EU involved, to assist in this endeavour if requested.