

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Brussels, 5 July 2000

CHARTE 4403/00

CONTRIB 260

COVER NOTE

Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter a submission by the European Study Group.^{1 2}

¹ This text has been submitted in English language only.

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The draft Charter Of Fundamental Rights Of the European Union

Comments by the Member Companies of the European Study Group

London, 30th June 2000

DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

COMMENTS BY MEMBER COMPANIES OF THE EUROPEAN STUDY GROUP

The European Study Group is an Association of private sector employers, all of whom are substantial employers in the Member States of the European Union and who, in total, employ over two million people worldwide. The majority, but by no means all, of the Member Companies are FTSE 100 companies based in the United Kingdom.

As leading EU based employers, we are conscious of our social responsibilities. We are also aware that we must operate in a highly competitive global economy. If we fail to continue to act competitively, we put at risk the interests of our employees, our suppliers, our customers and our shareholders.

The Member Companies of the European Study Group welcome the notion of a Charter in principle as it would:–

- raise the status, profile and visibility of human rights within the EU.
- present an opportunity for more open and positive communication between the EU institutions and the ‘ordinary’ people of Europe.
- help strengthen the culture of rights and responsibilities, if properly constructed and presented. make a positive contribution to the citizens of Europe’s understanding of the purpose and values inherent in EU citizenship.
- provide clear indicators to citizens of candidate Member States of their rights and responsibilities as EU citizens.

Ideally the structure and the content would be:

- | | |
|------------|---|
| Structure: | - clear and simple |
| | - consistent and compatible with existing constitutions and legislative frameworks |
| | - practical |
| | - present a clear statement of common values and responsibilities |
| Content: | - based on established rights and not political aspirations |
| | - robust and acceptable to all EU countries |
| | - properly balanced and representative of all groups across the spectrum of society within the EU |
| | - respectful of existing cultures |
| | - encouraging and not restrictive |
| | - able to deliver trust |
| | - reasonably deliverable within the overall constraints of other EU objectives |

From the documentation available, the subject of a Charter appears to have generated much controversial debate. Whilst the legal, political and social significance is clearly great, **it is felt that the process of the evolution of the Charter is almost as important as the end product.**

Because of the expectations that appear to have been raised and because of issues like the relationship of the European Union and its institutions, (particularly with regard to the European Convention of Human Rights) clearly being put back onto the political agenda, we have a number of observations to make and some concerns about which we would welcome clarity. These are outlined below under the headings of purpose, legal certainty, content, implementation plan and detailed observations.

Purpose

The Cologne European Council in June 1999 adopted the decision that:- ‘

the protection of fundamental rights is a founding principle of the Union and an indispensable pre-requisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. There appears to be a need at the present stage of the Union’s development to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union’s citizens.

The European Council believes that this Charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of community law ...’

We support these basic principles, as defined at the Cologne European Council. However, the present draft Charter still begs confusion despite:

- the Council proposing that the Charter should be a political declaration or a proclamation of existing rights enjoyed by EU citizens under current Treaties, rather than a Legal Charter;

and

- the drafting committee being given a mandate to restate present rights with no authority to fill any loopholes or gaps.

Legal Certainty

The European Court of Human Rights (in Strasbourg) was set up by the Council of Europe, under the European Convention of Human Rights in 1950, for jurisdiction over the European Convention of Human Rights (ECHR). All Member States recognise the jurisdiction of this court in human rights cases but are not bound by its decisions.

The ECJ in Luxembourg is the supreme custodian of EU enacted laws and its decisions take precedence over laws or judicial decisions made in Member States. Respect for fundamental rights forms an integral part of the general principles of Community law. For some time now the ECJ has

played a key role in identifying and articulating these rights. It has begun to take into account case law from the Strasbourg Court.

Taking this into account, before there is any further debate on content and interpretation of the Charter, it is suggested that its actual purpose and scope should be categorically and explicitly stated, i.e.

is it to be:

- a) a 'showcase of existing rights' materialising the governing principles of the Union?

or, is it to be:

- b) an opportunity to rewrite or update existing laws or indeed produce a whole new set of rights that are justiciable in the European Court of Justice (ECJ) and which confer direct and tangible rights/benefits for individuals?

Many would question the purpose of legislating twice for the same objective, even if that is thought acceptable as a legal matter. The avowed intention of the Cologne declaration is that this exercise does not unintentionally result in new laws which all the stakeholders in the EU have not had an opportunity to scrutinise properly. The Member Companies of the European Study Group are firmly of the view that the Charter should be a 'showcase of existing rights'.

Rights have no value without remedies and the clearer and simpler the processes that accompany those remedies, that avoid duplication of jurisdiction and improve the fairness and efficiency of the system, the greater the impact will be. In practical terms, individuals will measure the success of the Charter by what it actually does for them, so clarity is essential.

Content

The Cologne Council indicated that the Charter would include:-

- rights guaranteed by the ECHR
- rights derived from the constitutional traditions of Member States and reflected in case law
- rights exclusive to Union citizens under the Treaties
- economic and social rights, as contained in the European Social Charter, etc.

The present draft Charter goes a long way towards achieving these aims by creating a broad spectrum of rights and freedoms but the list as it stands calls into question EU competence in certain areas.

Under the Social Chapter subjects such as pay, the right of association, the right to strike and the right to impose lock-out, are formally excluded from legislative procedures. These, along with educational and welfare provision, currently remain the firm responsibility of the Member States.

The Charter will lose its legitimacy if it is used to bypass the existing decision-making processes to give additional competencies and create new rights in these areas. It will also prove to be more difficult to gain consensus on content if policy objectives or political aspirations are translated into rights.

The position of the Member Companies of the European Study Group is that the Charter should be a clear statement of standards that EU citizens enjoy, which would not impose any new legal obligations on Member States. 5

Implementation Plan

The Charter requires a detailed implementation plan to effectively convey the importance of fundamental rights for the citizens of the European Union, and to emphasise the democratic legitimacy of the Charter to the EU's citizens. The debate so far has been somewhat anodyne and is far removed from the awareness of the general public; unless the Charter is properly explained, it can easily be misrepresented by the malicious or hijacked by the mischievous for ulterior political purposes. In either circumstance, the Charter would run the risk of failing in its mission.

Critical to the execution of a successful plan for the Charter's implementation, is that its objectives should be clearly defined, it should be easily understood, and it should deal only with truly fundamental issues; non-core messages will only serve to over-burden the Charter, complicate the objectives, detract from the accurate communication of the Charter's purpose and confuse the focus of the exercise. Whether or not the document should be put to the citizens of all individual Member States for ratification by national vote, conducted by popular referendum,¹ should be considered as part of the overall plan to gain full democratic legitimacy for the Charter at Member State level.

This is a key consideration, given the fact that some Member States intend to put the matter to referendum, and that the absence of a common EU line might become divisive. The sensitivity of properly communicating the importance of EU citizenship and awareness of its purpose and values should not be underestimated. We refer especially to the poor electoral turn-out to the 1999 European Parliament elections, and the question mark which this has posed concerning the democratic deficit which exists between the institutions of the EU and its citizens. In this connection, a proper implementation and communications plan should be budgeted for, as a quintessential element of the strategy for this exercise.

¹ Ireland and Denmark have indicated that a national referendum might be sought. It is important that the Citizens of the EU all feel that they have ownership, and buy into the exercise. The citizens of Member State "X" (which is to the contrary not planning any referendum) might very well feel aggrieved and question the democratic legitimacy of such a document if they know that the citizens of Member State "Y" are going to hold a referendum, whilst they (the citizens of state "X") are being denied this opportunity. This could detract from the whole purpose and value of the exercise, by undermining its perceived democratic legitimacy. However, this does call into question why a referendum is being called by some Member States if the Charter is merely a restatement of rights which are already in existence.

Detailed Observations

Articles 1 to 30

These proposals cover Civil, Political and Citizens' Rights matters on which we offer no specific comment at this time. We consider that as employers, generators of wealth and creators of jobs, our primary area of expertise, in which we are likely to be of most assistance to the work of the Præsidium, is in respect of the proposals for Articles 31 to 50 contained in Convent 34.

Article 31. Social rights and principles

It is important to carry out a full economic impact assessment of the implications of this Article and the subsequent articles dealing with Social and Economic issues. The economic impact assessment should consider the impact of this Article and the following Articles 32-50 (whether legally binding or declaratory) on job creation in the European Union, the impact on Member State public expenditure to implement these requirements, anticipated fiscal measures to pay for these costs, and the consequent impact on the competitiveness of European business in the global market, benchmarked against international companies of other jurisdictions.

Article 32. Freedom to chose an occupation

Should this Article not be balanced by the right of the individual to choose not to engage in an occupation, and also the right of the employer to refuse or to terminate employment in accordance with the national law of the relevant Member State jurisdiction?

Article 33. Workers' right to information and consultation within the undertaking

The Cologne principles state that "In drawing up the Charter, account should be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union". Does not the proposal to include this Article conflict with the Cologne principles? This Article deals with a policy proposal that is already under consideration for action by the EU's institutions. The question of employee communications is under discussion by the Council in the context of the Commission's Proposal for a Council Directive establishing a general framework for informing and consulting employees in the European Community, (COM (1998) 612 final). In this context, it should be noted that the questions of subsidiarity, proportionality and economic impact of the Commission's proposal have yet to be examined in detail by the Council.

Article 34. Rights of collective bargaining and action

Does not the proposal to include this Article conflict with the Cologne principles, in that it is a statement of aspirational policy? This is a subject that should be dealt with in accordance with the principle of subsidiarity and is not a matter for determination at EU level. The Charter will be promoted as being something of real significance to the citizens of the EU; it would therefore be counter-productive to attempt to cover political aspirations or statements concerning areas of policy in this document which are already adequately dealt with by alternative processes which respect the principle of subsidiarity where this is appropriate. Would the EU's citizens understand or respect the Charter if it contained promises upon which the EU's institutions cannot deliver?

Article 35. Right to rest periods and annual leave

Article 36. Safe and healthy working conditions

Article 37. Protection of young people

There are alternative processes in the EU Treaties available to examine the merits of these various propositions and to seek to achieve these objectives, if found to be justified having regard to their economic impact. In accordance with the Cologne principles, these subjects should accordingly be dealt with separately under the Commission's respective action programmes for the policy areas concerned, and not by the Charter.

Article 38. Right to protection in cases of termination of employment

Whilst the Member Companies of the European Study Group are sympathetic to the notion of protection against unfair or wrongful termination of employment, we are clear that there is currently no right at European Union level to such protection. Such protection that exists at national level should remain at national level. In addition, it should be noted that all employers have a right to refuse or terminate employment in accordance with the national law of the Member State concerned.

Article 39. Right to reconcile family and professional life

Although important, this is not a fundamental right. Member State competence is established already in this area. In accordance with the principle of subsidiarity and the Cologne principles, this subject should be dealt with under the respective national social programmes and not by the Charter. At the level of the workplace, the influence of the new economy is in any case already promoting company-based programmes that support work/life balance for employees. The indications are that the number and influence of these programmes will grow in the coming years, particularly in the context of growth in part-time employment and the rise in the number of women at work.

Article 40. Right of migrant workers to equal treatment

This subject is properly a matter for public policy within the Member States. It is not a fundamental right and as such is inappropriate for inclusion in the Charter. Also, the Cologne principles point to national action programmes and not the Charter as the correct context for this issue.

Article 41. Social security and social assistance

The sentiments and aspirations expressed in this article command wide support, but they are misplaced in a Charter of fundamental rights. The accompanying 'statement of reasons' acknowledges that social security and social assistance are implemented in national legislation. As economic and social issues they fall within the policy of each Member State under the principle of subsidiarity.

Article 42. Health protection

Health protection is a matter of public policy and not of fundamental rights under the Charter. To confuse the two, amounts to setting aside the Cologne principles, under which this subject is exclusively linked to public policy at the national level.

Article 43. The disabled

We note the Community has taken on new competence in this sphere under Article 13 of the Treaty, which has our full support. But we are unclear why it is necessary to repeat this as a fundamental right as it would appear to be already adequately provided for.

Article 44. Environmental protection

This provision describes an existing Community obligation. Whilst the objective is admirable, why does it have to be repeated as a fundamental right?

Article 45. Consumer protection

This is not a fundamental right. This is a statement of aspirational policy. It addresses important but non-fundamental areas of public policy relating to consumer affairs. There are alternative processes in the EU Treaties available to examine the merits of these various propositions and to seek to achieve these objectives, if found to be justified having regard to their respective economic impacts. In accordance with the Cologne principles, these subjects should accordingly be dealt with separately under the Commission's respective EU level action programmes for the policy areas concerned, and not by the Charter. Indeed, the competence to legislate under the Treaty in relation to health and safety matters lies exclusively with the Member States. Article 153 is a coordinating measure only. We doubt that it is necessary to repeat existing Treaty law, but if this is to be done, the repetition should be accurate.

Article 46. Scope

This Article states two admirable objectives which the Member Companies of the European Study Group fully support. The draft text of the Charter, as written, appears to contradict the provisions of Article 46 in a number and manner of ways. We hope the final text of the Charter will be in accordance with both Article 46 and the Cologne European Council mandate.

Article 47. Limitation of guaranteed rights

No specific comments.

Article 48. Conditions and limits defined by the Treaty

We support wholeheartedly the comments made in Article 48. (Also, see our comments on Article 46, above.)

Article 49. Level of protection

No specific comment.

Article 50. Prohibition of abuse of rights

No specific comment.

Summary

The Member Companies of the European Study Group welcome and endorse the notion of a Charter which delivers the benefits of visibility, good communications and positive ways of contributing to a strengthening of the culture of rights and responsibilities to be enjoyed by the present and future citizens of the European Union. However, we have certain important questions and concerns:

- **Clarity is required about the Charter's purpose and any enforcement measures that may be put in place to deliver the benefits that derive from it. Until these are clarified, employers cannot effectively consider the full implications of the draft Charter and therefore offer fully meaningful feedback.**
- **We need to know what the status of the Charter is to be. Is it to be a declaratory document or is it to be a legally binding Charter? Either way, we need to know what obligations and responsibilities will be placed on employers to conform and what remedies will it make available to individuals.**
- **Whatever status the final Charter has, Member Companies of the European Study Group would expect, at the very least, the usual intergovernmental procedures to be followed in adopting the Charter, but with the timescales for adoption extended to allow for detailed consideration of the issues and for effective consultation in the Member States.**
- **Once adopted, how is the Charter to be implemented and what opportunity will be given to the citizens of the European Union to have a say in its content and status? Will all Member States be encouraged or even required to hold a national referendum on its implementation?**
- **Finally, with regard to the proposals so far, the Member Companies of the European Study Group seriously question the legitimacy of including Articles 31–45 as these appear to extend the subject areas falling within the competency of the European Union. Therefore we would not expect these particular Articles to appear in the final draft of the Charter that is put forward for adoption.**

European Study Group
London, 30th June 2000

New .eu Domain

Changed Web and E-Mail Addresses

The introduction of the .eu domain also required the web and e-mail addresses of the European institutions to be adapted. Below please find a list of addresses found in the document at hand which have been changed after the document was created. The list shows the old and new address, a reference to the page where the address was found and the type of address: http: and https: for web addresses, mailto: for e-mail addresses etc.

Page: 1 **Old:** mailto:fundamental.rights@consilium.eu.int
Type: *mailto* **New:** mailto:fundamental.rights@consilium.europa.eu
