

Indivisibility the European Way – A Signal to the World?

Social Human Rights in the European
Charter of Fundamental Rights



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The HUMAN RIGHTS FORUM is an action-oriented, issue-focused working group incorporating more than 40 non-governmental human-rights organisations dedicated to establishing improved, comprehensive human-rights safeguards in Germany and worldwide.

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Preface

In 1996, the Committee of Sages convened by the European Union presented a report entitled 'For a Europe of Political and Social Fundamental Rights' which clearly states that the European Union should regard itself not as a mere economic community but – just as importantly – as a community of values. In this context, the Committee laid particular stress on the implementation of social fundamental rights.

Involving the European public more generally in the debate about political and social fundamental rights within the European Union formed one of the focal points in the deliberations of the Committee of Sages. Based on the Committee's report, non-governmental organisations in several European countries mounted a campaign promoting a Europe of political and social rights in the following year. In Germany, that campaign was implemented by the HUMAN RIGHTS FORUM with the support of large segments of the civil society¹. One of the core demands of the campaign in Germany was to strengthen fundamental-rights safeguards within the EU by establishing a BILL OF RIGHTS that should be both binding and actionable.

This idea has now materialised in the form of the Charter of Fundamental Rights. Its development was actively observed and influenced by the member organisations of the HUMAN RIGHTS FORUM. Now, one year after its solemn adoption at Nice, the Charter of Fundamental Rights has receded from the stage, although its establishment marked no more than the beginning of the dispute about the implementation of human rights within the EU, and about the EU's responsibility for

¹ The congress which marked the end of the campaign on December 2/3, 1997 was attended by 230 representatives of different societal organisations. For a documentation of the results of the congress, see HUMAN RIGHTS FORUM, Documentation n. 8, 'For a Europe of Political and Social Rights', 1997.

human-rights infringements worldwide. In particular, this holds true for social human rights, which are routinely challenged and infringed every day.

We hope that this publication contains the beginnings of a political programme based on the European Charter of Fundamental Rights, which proposes a number of steps to strengthen social human rights on the international plane. This includes establishing social human rights as actionable within the EU, modelling European integration and globalisation according to human-rights criteria, and avowing the EU's responsibility for respecting, protecting, and safeguarding social human rights worldwide.

We owe a debt of gratitude and respect to our authors, who have invested a great deal of time and energy in the ongoing development of safeguards for social human rights. Furthermore, the editors would like to thank their colleagues from the HUMAN RIGHTS FORUM for their excellent co-operation.

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Social Rights in the European Charter of Fundamental Rights

Markus Engels

*T*he European Charter of Fundamental Rights is an indispensable complement to existing national and European fundamental-rights safeguards. By far most of the laws passed by the German Federal Diet today translate European into German law. Without a codified and efficiently controlled catalogue of fundamental rights, the legitimacy of EU legislation will become increasingly questionable. By the same token, the recently-presented Charter must be made legally binding, a status which was not conferred on it by its 'solemn proclamation' by the European Council, the European Parliament, and the Commission on December 7, 2000 in Nice.

Another important factor in judging the substance of the Charter is that, because of the convention model selected, its origins were comparatively democratic, with civil society being largely involved. Thus, almost three out of four members of the Convention on Fundamental Rights were parliamentarians, not heads of state and/or their official representatives.² Compared to the standard composition of inter-governmental conferences, this process is nothing less than revolutionary as it strengthens the position of parliamentarism – an important political signal in view of the fact that the executive is on the advance elsewhere in Europe.

In addition, the process of developing the Charter was rendered transparent because all meetings of the Convention in

Charter is an indispensable complement to existing safeguards

Civil society has been largely involved

² The Convention consisted of 30 delegates from national parliaments, 16 MEPs, the personal representatives of 15 heads of state or government, and one Commission representative.

Brussels were open to the public, Convention documents and civil-society applications were published on the internet, and national hearings as well as a European hearing were held on the issue. Because of this transparency, the subject was relatively widely covered in the press, and a detailed scientific debate about the Charter was conducted in journals as well as at lectures and information events.

The Charter represents a political compromise

Nevertheless, the Charter – like any other legal document – represents a political compromise which was reached only after tenacious negotiations. And there is still the question of how this compromise and particularly the social fundamental rights contained in it should be judged.

It took an extremely great deal of trouble to get social fundamental rights laid down in the Charter in the first place. A number of delegates attempted to the very last to keep the right to industrial action, for instance, out of the Charter. It is mainly thanks to the dedication of certain Convention delegates that these attempts failed; they include, among others, Jürgen Meyer, Guy Braibant, Ieke van den Burg, and Johannes Voggenhuber.

In the highly controversial debate about social rights that was conducted in the Convention, it was no use at all to point out that the Cologne Mandate issued by the heads of state and government as early as June 1999³ expressly required social rights to be included in the Charter. For, while the Cologne Mandate explicitly referred to the European Council's Social Charter for Europe as an important building block of the Fundamental Rights Charter, it was stated just as clearly that the latter should contain no definite goals but individual rights

³ The project of the Charter as such arose from an initiative mounted by the Federal Government when Germany held the presidency of the EU Council in the first half of 1999, which led to the Cologne Mandate to develop the Charter.

only.⁴ On the other hand, the Social Charter – in the version that is currently in force in most EU member states – teems with specific goals. Therefore, the basis for incorporating social fundamental rights was not as sound as it may appear from a superficial glance at the Cologne Mandate.

My personal judgment of the social fundamental rights contained in the Charter is largely positive, although I could have envisaged a markedly wider scope.⁵ The reasons for my positive overall assessment are these:

● Quite a number of rights relating to social matters are scattered throughout the Charter. This explicitly confirms that human rights are indivisible and mutually interdependent, for it is clear that it is hardly ever possible to distinguish unambiguously between social and political fundamental rights.

Human rights are indivisible

● Moreover, the concept of solidarity appears in the very preamble of the Charter. This is indeed a novelty, for it is the first international human-rights document to place the principle of 'solidarity' on an equal footing with the dignity of man, freedom, and equality. Besides, the Charter chapter which covers classic social rights is headed 'Solidarity' as well. The compilation of rights in this chapter is more or less comprehensive, and the wording of most of them is adequate for immediate application.

'Solidarity' on an equal footing

● To pacify all those who believe that some passages have not been worded strongly enough, or that certain rights are missing from the Charter, permit me to point out that Art. 53 represents a 'safety net', for it defines a minimum level of protection by stating that none of the provisions of the Charter may be used to lower the standard of protection afforded by international

International human rights treaties recognised part and parcel of the Charter

⁴ In the event, specific goals were included in the Charter after all, including, for instance, certain environmental-protection and consumer-protection provisions.

⁵ To see what else has been demanded, look up the amendment applications tabled by the Convention members I have named above.

The Charter should be interpreted in an expansive spirit

law or by national constitutions.⁶ This virtually makes all international human-rights treaties recognised by the EU member states part and parcel of the Charter. At the same time, the UN Convention on Economic, Social, and Cultural Rights is incorporated in this minimum level of protection, and the revised version of the European Social Charter will be similarly included as soon as it has been ratified by all EU member states.

In my opinion, social rights have been given adequate consideration in the Charter. For this reason, we will probably be mainly concerned with two things in the future:

First, care should be taken to interpret the Charter in a spirit that is *not defensive but expansive*. After all, the existing body of social rights in conjunction with Art. 53 and the postulate of the inviolability of human dignity justify an extremely progressive interpretation of the Charter, which would be nipped in the bud by insisting on a defensive interpretation.

The Charter must become legally binding

Second, it is still essential for the Charter to become legally binding in its current format. Once this has been accomplished, the Charter will be the first legally-binding international document to recognise the indivisibility and mutual interdependence of human rights not only in the form of a general avowal but in the form of comprehensible substantive law. This may mark a large step forward beyond existing international human-rights regimes, in which social fundamental rights are generally separated from civil and political rights, and the processes instituted to monitor social rights tend to be rather weak.⁷ Once the Charter has become legally binding, compliance with social

fundamental rights would be monitored by a powerful watchdog in the future – the European Court of Justice. By the same token, we would finally have a systematic international administration of justice in the field of social rights, something which has been lacking so far.

My conclusion is: The development of the European Charter of Fundamental Rights marks a first important step towards reinforcing democracy and the rule of law in Europe – but there are other steps that must follow.

Important step towards reinforcing democracy in Europe

⁶ Some Scandinavian countries have expressed concern that the Charter might be used to lower elevated national social standards. These fears are baseless because the Charter is binding only for EU organs and national governments enforcing European legislation.

⁷ Thus, for instance, the process instituted to monitor compliance with the UN Civil Rights Pact is much more efficacious than that of the UN Social-rights Pact, and the process safeguarding the European Human Rights Convention is much more powerful than the one protecting the European Social Charter.

On the Legal Significance of the Current Status of the European Charter of Fundamental Rights

Klaus Lörcher

Not yet legally
binding

As long as the European Charter of Fundamental Rights has not been incorporated in the EU treaties, it will not be legally binding. And while it is not legally binding, its efficiency will be greatly limited, and its effect on the processes of Europeanisation and globalisation will be rather modest. For this reason, an intensive debate is currently going on about the question of whether the Charter of Fundamental Rights does have (any) legal significance.

The Academic Opinion

As far as statements have become known at all so far, legal scholars do not dispute that the Charter of Fundamental Rights does have some legal significance, but they differ with regard to their constructions and the reasons quoted by them.

*'This being so, this Court's decisions will henceforth be informed by the rights guaranteed therein ...'*⁸

The fact that those lawyers who have made statements about this issue have been giving different reasons seems to indicate that there is still some basic uncertainty about the construction of the matter, and the effects of the Charter in real life appear rather doubtful because of this. On the one hand, 'shared constitutional traditions' are quoted as forming a poten-

8 *Pernice*, Ein erster wichtiger Schritt – Die Grundrechtecharta befördert den EU-Verfassungsprozess – ein späteres Referendum wünschenswert? (A First Important Step – The Charter of Fundamental Rights Furthers the EU Constitutional Process – Desirable to Have a Referendum Later?), FR, n. 292 of December 15, 2000, p.6.

tial basis for the European Court of Justice in its appreciation of the Charter:

'Both the European Court of Justice and the European Court of the First Instance will have no alternative but to *fall back on* the consensus codified in the Charter in fulfilling their mission under Art. 6 II EU of identifying constitutional traditions shared by member states. However, the courts are free to go beyond the level of protection prescribed by the Charter if more far-reaching constitutional traditions can be demonstrated. Fundamental-rights safeguards will in no way be weakened by the Charter.'⁹

This is a detour which gives rise to several additional problems: If we were to assume that all constitutional traditions owe allegiance to the European Convention on Human Rights (ECHR) and the European Social Charter (ESC) (because these two conventions of the European Council have been ratified by all 15 EU member states), this would harmonise perfectly with previous rulings of the European Court of Justice on the significance of international treaties in the interpretation of EC law. If, however, we are to interpret the term 'shared constitutional traditions' as meaning that the first objective should be to determine whether a specific provision of the Charter of Fundamental Rights belongs in that category, this would be entirely unhelpful. Still, it appears likely that the reasoning behind the above statement is that provisions in the Charter of Fundamental Rights should reflect a shared constitutional tradition. If this were indeed so, the European Court of Justice would have to apply the entire Charter of Fundamental Rights which, however, was probably not the author's meaning at all.¹⁰

Safeguards
will not be
weakened

9 *Hilf*, Die Charta der Grundrechte der Europäischen Union (The EU Charter of Fundamental Rights), special supplement, NJW, EuZW, NVwZ and JuS, undated [2000], p.5.

10 See below (footnote 17).

Charter as part
of the European
code of law

Advocate General Alber and Judge Widmaier have taken a less circuitous route. As they refer to 'safeguarding the law', it follows that they regard the Charter of Fundamental Rights as part of the European Community's code of law.

*'... In safeguarding the law in conformance with Art. 220 ECT, the Court might give consideration to the Charter without any need for previous treaty changes.'*¹¹

Shared
constitutional
traditions
of the member
states

Another argument along similar lines which, however, aims for a rather more direct binding effect, says that the Charter of Fundamental Rights reflects 'shared constitutional traditions', and, consequently, is to be regarded as one of the fundamental rights to be respected in conformance with Art. 6 Par. 2 EU. Among the reasons quoted for this is the preamble of the Charter of Fundamental Rights (5th consideration), according to which the Charter reaffirms rights 'mainly derived from shared constitutional traditions'. On the other hand, Art. 6 Par. 2 EU is held to imply that the Union respects fundamental rights derived from 'the shared constitutional traditions of the member states', among other sources. It is this harmony which, according to this line of reasoning, establishes that the Charter of Fundamental Rights is binding for the entire body of EU law, even though the Charter has not been expressly included in Art. 6 Par. 2 EU.

While these arguments are indeed hopeful approaches, they are unlikely to convince the general public, to say nothing of the critics. After all, it is not intended for the Charter of Fundamental Rights to become binding, to become 'law' at the present time. It is probably for this reason that such views are not being postulated too aggressively. Mr Zuleeg, a former European Court judge, is even more restrained in his comments:

¹¹ Alber/Widmaier, Die EU-Charta der Grundrechte und ihre Auswirkungen auf die Rechtsprechung – Zu den Beziehungen zwischen EuGH und EGMR (The EU Charter of Fundamental Rights and Its Effects on Jurisdiction – On the Relations Between the ECJ and the ECHR), EuGRZ 2000, p. 510.

*'It is, after all, possible for the European Court of Justice to enhance the effect of the Charter by using it in addition to the legal sources it has used so far. There is talk that the Court may be assisted in its interpretation by the Charter. Curiously enough, social fundamental rights are easier to integrate in the Charter than in a binding catalogue for in this instance, the issue of justitiability would not play a major role.'*¹²

What ultimately emerges from this is a great deal of faith in the European Court of Justice, allied with a great deal of hope. Will it come true?

Some First Comments from the European Court of Justice

General Comments by Judges

Ms Colneric, a judge at the European Court of Justice, has a rather detached attitude, at least at first glance:

*'I do not assume that a Charter that is not legally binding will raise many more questions in the national courts.'*¹³

The president was even more restrained:

*'It is impossible to assess the Charter's influence on our future rulings at this time, for it depends, among other things, on whether the Charter is at least mentioned in the EU Treaty.'*¹⁴

It is well known that the Charter of Fundamental Rights was neither included in the treaties establishing the European Union nor even mentioned, so its influence appears rather slight.

¹² Zuleeg, Zum Verhältnis nationaler und europäischer Grundrechte – Funktion einer EU-Charta der Grundrechte (National Vs. European Fundamental Rights – The Function of an EU Charter of Fundamental Rights), EuGRZ 2000, pp. 511, 514, referencing Weber NJW 2000, pp. 537, 538.

¹³ Colneric, Die Charta macht nur Bestehendes sichtbar (The Charter merely Brings Existing Things to View) (Interview), HB n. 224 of November 20, 2000, p.4.

¹⁴ Rodriguez Iglesias, Die Richter passen auf die EU auf (Judges Watch over the EU) (Interview), taz of November 30, 2000, p.11.

Court assisted in
the interpretation
by the Charter

Charter neither
included in the
treaties nor even
mentioned

Measure of legal
significance
accorded to the
Charter

However, pressure to prevent total invalidity might give rise to more concrete approaches. Advocate General Tizzano's recently published conclusions seem to tend in that direction, for a measure of legal significance is now accorded to the Charter of Fundamental Rights together with the other human-rights instruments:

'... in proceedings concerned with the nature and the scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definite confirmation of the fact that the right to paid annual leave constitutes a fundamental right.'¹⁵

The case referred to here was about whether or not persons in termed employment not exceeding 13 weeks are legally entitled to annual leave. There is a British regulation denying this claim, which was implemented on the basis of the 93/104/EC Working Time Directive. Citing the fundamental social right to leave, the Advocate General uses this argumentation that such denial is not conformable with the Directive and its fundamental-rights undertakings.¹⁶

Even if, to be realistic, we cannot fail to recognise that all the other arguments (wording, meaning, purpose, the former Art. 118a ECT) similarly favour this conclusion, the very fact that the

¹⁵ Advocate General Tizzano Opinion delivered on February 8, 2001, Case C-173/99 – Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) – Par. 28).

¹⁶ 'Entitlement to leave, as we have seen, is in the nature of a fundamental right and, as such, is also upheld by the Directive. ...' *Ibid.*, Par. 36.

Charter has been studied in detail and commented on in general terms only a few weeks after its adoption is of considerable significance by itself.

What is more, this approach has been pursued further in the meantime:

- Thus, referring to his own summing-up in the BETCU case, Advocate General Tizzano raised a question of fundamental importance in a similar case (to which, by the way, his answer was No in this instance): Whether or not the saving clauses contained in Art. 3 of the Working Time Directive 93/104/EC are conformable with the fundamental social right to annual leave.¹⁷

- Similarly, in a legal opinion relating to disciplinary measures against an employee of the European Parliament, Advocate General Jacobs referred to the 'right to good administration' laid down in Art. 41 of the Charter of Fundamental Rights.¹⁸

The fact of this 'confirmation and affirmation' is now used by some as a basis for concluding that the Charter is legally binding in an indirect or 'soft' sense.¹⁹

In the first case, in which Advocate General Alber based his summing-up on the issue of whether the universal postal service should be exempt from competition law on the Charter of

¹⁷ Of June 8, 2001 – Rs. C-133/00 – J.R. Bowden and Others vs. Tuffnells Parcels Express Ltd, Rn. 27: 'None of the parties, however, has mentioned a problem which could in theory have been raised, namely the possibility that the exclusion at issue is illegal because it limits a fundamental social right, namely the right to paid annual leave. (10) Nor has it been mentioned by the national court which, as we have seen, refers disapprovingly to the lack of any reason justifying the difference of treatment which places workers in the excluded sectors in a less favourable position than those engaged in the same activities in other sectors. ...' (Emphasis added; footnote 10 refers to Tizzano's own summing-up of February 8, 2001).

¹⁸ Of March 22, 2001 – Rs. C-270/99 P – Z. vs. the European Parliament, RN 40. '...More over the Charter of fundamental rights of the European Union, (20) while itself not legally binding, proclaims a generally recognised principle in stating in Article 41 (1) that 'Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions and bodies of the Union.' (Emphasis added).

¹⁹ Callies, Die Charta der Grundrechte der Europäischen Union – Fragen der Konzeption, Kompetenz und Verbindlichkeit, EuZW 2001, pp. 261, 267.

Charter will play an important role in the interpretation of Community Law

Human Rights,²⁰ the European Court of Justice did not follow his argument.²¹

Conclusion

Although it is certainly difficult to quote valid reasons why the Charter of Fundamental Rights should be immediately binding, efforts are obviously being undertaken to accord it 'indirectly' binding status at the least. What this means in actual detail certainly needs further clarification. At all events, however, it is likely that the Charter of Fundamental Rights will play an important role in the interpretation of primary and particularly secondary Community Law.

20 Of February 1, 2001 Rs. C-340/99 – TNT Traco SpA vs. Poste Italiane SpA (formerly Ente Poste Italiane) etAl., Rn. 94. 'According to Art. 90 Par. 2 ECT, enterprises entrusted with services of general economic interest shall be subject to the provisions of the Treaty only inasmuch as they are not legally or actually hindered in complying with the special duties entrusted to them. The fact that this exemption symbolises one of the fundamental values of Community Law is emphasised by the recently-created Art. 16 EC as well as by Art. 36 of the Charter of Fundamental Rights of the European Union.' (Emphasis added.)
21 European Court of Justice, 6th Chamber ruling of May 17, 2001 – Rs. C-340/99 – TNT Draco SpA vs. Poste Italiane SpA, formerly Ente Poste Italiane, etc. Rn. 53. 'Secondly, an enterprise such as Poste Italiane, which according to the regulations in force in an EU member state is entrusted with ensuring universal postal services – which implies an obligation to collect, convey, and deliver mail throughout the territory of the member state in question, without regard to the profitability of such services in specific areas – is to be regarded as an enterprise entrusted with services of general economic interest within the meaning of Art. 90 Par. 2 ECT.' Throughout this ruling, no reference is made either to Art. 36 EU or – more astonishingly even – to Art. 16 EC (services of general economic interest); the latter may possibly be due to the fact that, formally speaking, Art. 16 had not yet been incorporated in the EC Treaty when the relevant dispute originally arose (on Art. 16 EC, cf. Ross, Article 16 E.C. and services of general interest: from derogation to obligation?, European Law Review, February 2000, pp.22ff.).

The Impact of the European Charter of Fundamental Rights on International and European Human Rights Regimes

Markus Zöckler

Having started out as an economic community pure and simple, the European Community now finds itself at the threshold of a profound process of integration in internal and external policy. Whereas the Treaties of Rome focused on the establishment of common markets, forming an economic constitution in which fundamental rights had no room, it was soon found that economic integration assisted by universal European law could succeed only if all due consideration was given to the member states' demand that their national fundamental rights be properly respected. The European Court of Justice was able to safeguard the priority and consistency of Community law and, consequently, the integration of the economy only because it integrated, acting in concert with national constitutional courts, both fundamental rights and international human rights in the universal European code of law as values of fundamental importance, and because the organs of the Community followed suit by declaring voluntary undertakings in this regard. Now that the catalogue of fundamental rights has been fleshed out by the convention set up after the Cologne Summit, a new dimension will be added to the evolution of fundamental rights in Europe as soon as the Charter is adopted into the Community's constitutional law: For the first time ever, parliamentarians from member states and the European Parliament have succeeded in reaching a consensus on shared fundamental rights, and recommended their use as a foundation of values for further European integration.

New dimension of fundamental rights in Europe

The explicit avowal of fundamental rights and fundamental values by the European Community may serve to intensify the exchange between the community's code of fundamental rights and existing European and international human-rights regimes. There are three approaches towards such a dynamic interaction between human-rights regimes that particularly deserves mention at this point: Firstly, the Charter catalogue frequently overlaps existing human-rights documents, which renders it substantially amenable to co-operation and exchange with other human-rights watchdogs, including, for example, the European Council's institutions relating to the European Human Rights Conference and the Economic and Social Council, the human-rights bodies of the United Nations, and the various ILO departments concerned (see Ch. I). Secondly, the Charter itself as well as a number of general community-law norms unambiguously demand that the rights laid down in the Charter conform with existing (and future) human-rights regimes (see Ch. II). Finally, not only would Europe's specific identity be reinforced if the Community's foreign-trade policy were to be informed by social human rights; this would also represent a major contribution towards promoting and codifying social law within the global economic order (see Ch. III).

1- Open Norms and Flexible Exchanges Between Human Rights Regimes

Viewed from a strictly positivist angle, incorporating the Charter in the law of the Community would have no legal impact on other European or universal human-rights treaties. The Charter applies solely and exclusively to the European Union and its member states within the realm covered by the community law; its adoption is in no way tantamount to an accession by the Community to other human-rights treaties, and existing obligations of the member states in the field of human rights are not affected by it.

However, a closer look reveals that the ways in which the Charter and other European and international human-rights regimes interact are many and varied, and this interaction might engender a fertile process of mutual exchange, particularly with regard to economic, social, and cultural rights. After all, the social rights laid down in the Charter were not invented in a legal vacuum but were expressly recognised before in numerous other international-law agreements, a fact that is clearly documented even by the scarce synopses added to each Charter article by way of explanation. Traces of the social rights laid down in the Charter can be found in EC Directives and regulations, the Community Charter on the Social Fundamental Rights of Employees, and the European Social Charter. Much more importantly, such evidence can also be found in universal human-rights treaties including the United Nations' Covenant on Economic, Social, and Cultural Rights as well as a number of conventions of the International Labour Organisation. It is precisely because the Charter's social rights have previously been embodied in other human-rights regimes in much the same format and with much the same content that looking beyond the rim of one's own plate may reveal helpful ideas and inspirations for interpreting and developing these rights, and for casting them in more concrete political terms.

To regard legal maxims laid down in treaties as near-static definitions would be a gross misinterpretation of the way in which international law and particularly international human rights work. After all, the development of social rights in particular is an ongoing process, and their implementation is embedded in the changing context of societal and economic environments and concepts of social justice. This is why human-rights norms are subject to changes initiated by their practical application as well as by their ongoing interpretation by watchdogs and other organs. A particularly lively exchange is going on in the field of fundamental and human rights between a multitude of controlling organs at global, regional, and

national level, both vertically and horizontally. A legal purist would require these systems of norms to be segregated cleanly without attempting to range them in a vertical hierarchy. *De facto*, however, there can be no doubt that doctrines, ideas, and human-rights interpretations do migrate from one human-rights regime to the other. Without conforming to any formal limitations, such lively exchanges occur wherever human rights have acquired clear contours through intensive use in the field and in the courts. In this context, permit me to remind you of two items from the German code of fundamental rights that were nothing less than export hits: The principle of commensurability and the third-party effect of fundamental rights, two principles which have not only been incorporated in the Community's legal order but are being increasingly implemented in virtually all human-rights regimes.

Thus, although the EU Charter of Fundamental Rights cannot be binding outside the Union and its member states in their respective sovereign territories, there is even now a lively exchange between it and other international, regional, and national codes. It frequently happens that recognised norms are used as models in the creation or reform of legal codes. Thus, the Universal Declaration of Human Rights was one the instruments that influenced the deliberations on the German Basic Law; constitutional reforms in Eastern Europe were informed by the Universal Code of Human Rights, the European Human Rights Conference, the Economic and Social Charter, and Western constitutions; and the EHRC inspired not only the Civil Covenant but – more importantly – the American Human Rights Convention. Similarly, the European Charter of Fundamental Rights borrowed from all these instruments.

Because fundamental-rights maxims are open with regard to their substance, it is permissible to compare and relate them to other regimes which already contain concrete formulations of similar maxims. Far from being a process of static reception by the European Community, this is a dialogue-based exchange.

Once the Charter of Fundamental Rights has been formulated explicitly and integrated in the Constitution of the Community, an important condition will have been met for the European Community to be taken more seriously in this dialogue between regimes.

II – The Normative Embodiment of the Charter of Fundamental Rights Among the Member States' Obligations in the Field of Human Rights

Even though the Charter formally belongs to the internal law of the Community, the way in which the rights laid down in it are framed in detail is closely related to the obligations undertaken by the Communities' member states in other international human-rights treaties. Even before the Charter could be embodied in the law of the Community, the European Court of Justice based its rulings in the field of fundamental rights not only on national constitutional regimes but on all human-rights treaties signed or negotiated by member states. These include not only the European Convention of Human Rights but also the European Social Charter, all human-rights treaties including the Covenant on Economic, Social, and Cultural Rights, and the conventions of the International Labour Organisation, which the court repeatedly referred to in its rulings.

The underlying reason for all this respect for European and international human-rights treaties shown by the law of the Community is striking: By recognising the human-rights obligations of its member states, the Community aims to avoid normative conflicts between national and European policies to implement these human rights before such conflicts have a chance to develop, thus ultimately securing a territory of consistent legislation based on identical cornerstones. This idea is expressed in exemplary fashion by Art. 307 (formerly 234) of the EC Treaty, in which the Community is expressly called upon to respect the older treaties of its member states, human-rights

Competences are transferred to the Community, human-rights duties are converted into obligations

Lively exchange between international, regional and national codes

conventions included. Especially the transfer of sovereignty from member states to the European Community should be no reason for relieving member states of their human-rights obligations for lack of regulatory competence. As competences are transferred to the Community, obligations accruing to member states from human-rights duties are converted into obligations to encourage the Community actively to comply with these treaties. Thus, the European Human Rights Commission – like the German Federal Constitutional Court – has stated expressly that conferring competences on the European Community does not constitute an infringement of EHRC regulations only if the Community itself is a position to offer comparable human-rights safeguards. *Mutatis mutandis*, this argument equally applies to any and all human-rights treaties signed by member states. For this reason, Art. 53 of the Charter explicitly recognises the European Community's obligation to conform to existing human-rights regimes. With regard to the EHRC, the Charter explicitly emphasises that its own level of protection should always be higher than before (Art. 53 Par. 3 Cl. 2).

Community
obligated to
recognise and
implement
social rights

Because of this adherence to existing human-rights obligations undertaken by the Community and its member states, it is indispensable that the interpretation and implementation of the Charter should be largely informed by the need to translate such human-rights regimes into concrete formulations and implementation measures. Particularly whenever disputes arise between member states and the Community with regard to, for example, the concrete design of the single market, questions relating to the adequate implementation of social rights may acquire crucial importance. Thus, social-policy arguments are advanced by member states to substantiate a variety of market-freedom restrictions and competition-law measures. As both the Community and its member states are obligated to recognise and implement social rights, exemptions from and restrictions of free competition are easily justified by invoking guaranteed fundamental rights. The fact that the law of the

Community recognises social fundamental rights tends therefore to protect member states, provided their social-policy activities aim at the active implementation of social human rights. As the extent to which social fundamental rights are recognised in the member states' constitutions appears rather inhomogeneous, international social rights and their interpretation in international control regimes furnish ideal landmarks for formulating these rights in concrete terms at Community level. Similar dynamic references to international human rights appear possible in the field of labour and social legislation whenever the Community uses its own competences – which admittedly are rather limited as yet – to issue norms that are binding to its member states. Once again, international social rights and treaty obligations previously accepted by member states furnish more promising guidelines than inconsistent constitutional traditions which are anything but 'shared' because of this inconsistency.

While the fact that human-rights norms are substantially open paves the way and even suggests exchanges between various regimes, the Charter expressly demands such reciprocity between human-rights regimes. Questions about social rights will form a central issue in the dispute about the social design of economic integration being carried out in the arena between member states and the Community. This being so, it appears likely that the normative standards set in international human-rights treaties will play a major role in the concretisation of the Charter of Fundamental Rights.

Human-rights
treaties will play
a major role

III – Social Human Rights in the Community's External Relations

Much of the debate about the European Charter of Fundamental Rights was dominated by internal disputes which were often no more than indirectly related to the recognition and implementation of fundamental rights. The dispute about the

scope of the Charter and the fear of allowing the Community to acquire additional competences on the sly are two of the main reasons why the inclusion of social rights in the Charter was treated with such reserve. However, people tend to overlook the fact that the fundamental rights laid down in the Charter also play a crucial role in the Community's external relations.

As in internal law, any enlargement of the Community's competences in external relations implies its assumption of the human-rights responsibilities of its member states, particularly in foreign-trade policy and similar areas. Within the realm of its various competences, the Union is obligated to achieve the full implementation of social human rights 'through international assistance and co-operation' (cf., for instance, Art. 2 Par. 1 of the UN Social Covenant). However, the implementation of economic, social, and cultural rights has an impact not only on refugee and asylum policies, the adoption of new member states, and bilateral as well as multilateral trade and development policies, but also particularly on the way in which the Union co-operates in international economic, trade, and financial organisations such as, for instance, the WTO, the World Bank, and the IMF. These institutions in particular bear considerable responsibility for the design of a socially equitable world economic order.

However, legal obligations are by no means the only reason why the Union should dedicate itself to the implementation of social rights on the international plane; another reason of at least equal importance is the need to safeguard and secure a genuine identity for Europe through co-operating in the design of a global economic and social order. The EU Charter of Fundamental Rights especially and repeatedly emphasises the fact that the European Union might acquire an identity in this way. Such an identity, however, must not only be credible for the citizens of the Union, it should also appear coherent towards outsiders, for identity is formed in a process of communication

between one's own perception of oneself and that of outsiders. If Europe believes that on its own premises, social rights form an essential element of its societal and political order, and that its own identity is partly characterised by a market economy designed along social lines and a responsible welfare state, Europe has no alternative but to concede the same to other nations and communities and, more importantly, to support these nations and communities to the best of its abilities in their efforts to implement social rights. Unlike the political culture of the United States with its powerful liberalist streak, the exercise of social responsibility by the state forms one of the foundation stones of Europe's specific culture of human rights.

For the Union to commit itself deeply in its trade and development policies to the implementation of social rights on the international plane is far more than a mere strategy to polish its image, and more than a mere tenet of political honesty. In a globalising economy featuring open markets for goods, services, and capital, it will only be possible to foster the European model of a state guided by social responsibility future if global framework conditions permit this. In a neo-liberalist global economic order with a bias on deregulation, privatisation, and the retreat of the state, in which the 'invisible hand' of free competition is all-important, even the Union and its member states would sooner or later run into serious trouble in attempting to ensure that economic and societal processes are guided in a manner that is conformable with social principles. It is, therefore, in the best interest of the Union to advocate respect for social human rights as the structures of a global economic order are being developed by the IMF, the WTO, and the World Bank. As its member states called upon the European Union to observe the rights of man, it is now the duty of the Union to support social awareness and the control of globalisation at the next-higher political level. In this regard, interlinking political *and* social rights in the European Charter

As its member states called upon the European Union to observe the rights of man, it is now the duty of the Union to support social awareness and the control of globalisation

The WTO, the World Bank, and the IMF bear considerable responsibility for socially equitable world economic order

of Fundamental Rights has set an important signal, indicating to the world that economic and monetary integration in Europe has found its indispensable complement in the preservation of shared social rights and values.

Outlook

That the scope and content of some of the rights included in the Charter were debated so vociferously is, I believe, proof positive that the explicit formulation of such a catalogue was a matter of some urgency. Indeed, the copious edicts issued by the European Court of Justice, the wealth of declarations promulgated by the Community's organs, and the diverse European and international human rights treaties had to be amalgamated in one central document, not to create something novel but to reaffirm a consensus about previously-recognised principles, as the preamble of the Charter expressly emphasises. The reason for the nervousness of the debate probably lies in the fact that many of those who were embroiled in it were fighting not so much over fundamental rights but rather over the preservation of established political structures. This being so, it is all the more necessary to recall the fact that by adopting the Charter, the Community has not moved a single step closer to the nightmare of a European State, and that the Charter itself will never serve as a basis for re-organising the distribution of competences among the EC and its member countries and their respective federal states. Actually, the fundamental-rights safeguards of the European Community had been revolutionised when the human-rights obligations of the EC member states, and particularly the economic and social rights included in them, were expressly recognised by the European Court of Justice as universal legal maxims in Community law, *and* when this development was later welcomed by all Community organs and member states. This being so, the debate about the Charter

of Fundamental Rights is more than a mere clarification of the fundamental-rights safeguards accepted by the Union, fragmentary though it may seem in many respects. Rather, developing the Charter represents a collective process of reassurance about the true foundations of the European human-rights ideal. By recognising social human rights, and by avowing the equality and indivisibility of all human rights, Europe has created a landmark which may ultimately form the basis of its internal and external identity, provided that efforts are maintained to imbue it with life in the political reality of the future. Once this has been achieved, integrating the Charter in the Union's constitutional law will indeed be nothing more than a purely formal act of clarification.

By recognising social human rights, equality and indivisibility, Europe has created a landmark for its own identity

Social Fundamental Rights – the Crash Barrier of European Competition Law?

Katharina Erdmenger

European Competition Law vs. Social Fundamental Rights

Reading the title of this paper, some may well ask themselves what possible connection could exist between European Competition Law and the social fundamental rights laid down in the EU Fundamental Rights Charter.

Charter of Fundamental Rights may help to emphasise that social rights do have a significance

The connection results from the fact that we as citizens of the EU need to ask ourselves today how we can keep Competition Law – meaning the economic freedoms afforded by the EU single market – from encroaching on the social rights to which the citizens of the EU member states are entitled. The question is this: What should be given societal and legal preference, the European single market with its business freedoms or government-guaranteed provisions and social security for the EU citizens. In particular, we need to define whether or not the writ of European Competition Law, which was originally designed for the European single market, should be extended to cover transboundary concerns and, consequently, a multitude of walks of life. In this debate, the Charter of Fundamental Rights may become an important factor, for it may help to emphasise that social rights do have a significance of their own in contrast to the interests of the single market.

Let us take a brief look at the structure of the EU's legal order today to exemplify how the difficulty of distinguishing between social rights and the single market originally arose: The core of today's EU is still formed by the European single market, i.e. a

free economic area comprising all 15 member states. The single market permits trading and dealing across member state borders as if these boundaries did not exist. The entire single market is based on the so-called 'four freedoms' guaranteed by the EU Treaty, meaning the freedom of movement of goods, services, capital, and persons. Thanks to these 'four freedoms', a businessman from Germany, for instance, is perfectly free to open a shoe factory in Italy, hire employees from France and Belgium to work there, and export the output to any other EU member country without let or hindrance. From the structural point of view, it does not matter whether you transport goods from Munich to Hamburg or from Milan to Hamburg, as long as it is done within the single market. Last but not least, the single market enables everyone to travel freely within the EU.

The single market permits trading and dealing across borders

To ensure that the single market works properly, an important legal instrument of enforcement has been created on the basis of the EU Treaty – European Competition Law, which has two major components: On the one hand, it prohibits the formation of monopolies and cartels, and on the other, it forbids government subsidies to individual enterprises ('subsidy ban'). Both these prohibitions are based on the same straightforward consideration: Within the European single market, all enterprises should be subject to the same conditions and compete fairly against one another. For this reason, it is not allowed for enterprises to nobble competition by forming cartels amongst themselves nor are EU member states allowed to do so by granting subsidies to individual enterprises in order to improve their competitive situation. In other words: Both these bans aim to guarantee unbiased and undistorted competition among enterprises located in the various states belonging to the European single market.

The formation of monopolies and cartels prohibited

To enforce these two bans, far-reaching competences have been settled on the European Commission and the European Court of Justice. Thus, any member state wishing to pay sub-

sidies to specific enterprises must apply for approval to the European Commission. Alternatively, individual enterprises may apply to the European Commission directly: If an enterprise has reason to assume that a competitor has been granted undue advantages by a government, which are denied to the enterprise itself, it may either lodge a complaint with the Commission or institute legal proceedings, going through successive levels of appeal up to the European Court of Justice. In such cases, the Commission and/or the Court will decide whether such assistance is lawful or not. *Mutatis mutandis*, the same holds true for the prohibition of cartels: If two or more enterprises wish to merge, they must apply to the European Commission for permission, which may be either granted or refused.

Tendency to
classify social
services as
commercial
services

Basically, both Competition Law and the subsidy ban apply only to commercial enterprises pursuing the goal of profit maximisation. On the other hand, certain current developments, on the national and European plane may lead to social services being classed as commercial services. What is more, there is a tendency on the national as well as on the European plane to classify social services as commercial services enjoying the freedoms of the single market. In Germany, for instance, there has been competition among various providers of social services, such as homecare services, old peoples' homes, or transport services ever since the introduction of the statutory nursing insurance and the reform of the Federal Social Assistance Act. The fact that service providers do compete, establishing some sort of 'market' in these sectors, makes it easier for people to define providers of social services as commercial enterprises. To be sure, these people frequently fail to see that they are looking at a social market regulated by law that is dominated by closed-cycle funding systems, with hardly any of the services provided actually being paid for in cash.

At all events, the transboundary provision of social benefits and social services is part of everyday life within the EU, par-

ticularly in its border regions. Once again, there are some to whom this suggests that social services should indeed be regarded as freely exchangeable commodities that are subject to the rules of the EU single market. While one might object that governmental social systems providing and funding social services in EU member states do not fall within the jurisdiction of the European Union, this fundamental segregation of competences is inadequate to clear the matter up entirely. This is because the core question of whether social services should be regarded as commercial services which, according to the rules, would be regulated by European Competition Law, will not now be decided by an unambiguous political ruling in favour of the Europe-wide liberalisation of social services but by case law and precedent. This case law, in turn, will evolve from individual rulings handed down by the European Court of Justice and the European Commission within the framework of their Competition-law competences described above.

It is conceivable, for instance, that private a provider of social services might lodge a complaint with the European Commission against a non-profit-making competitor, interpreting the other's commonweal structure as a kind of governmental assistance – which is banned. This interpretation is admissible because tax breaks by themselves are regarded as governmental subsidies. Such a private competitor of a non-profit-making provider might argue before the European Commission that, in his opinion, these tax breaks were indeed advantages granted to the commonweal provider without good and sufficient reason. In such a case, a private competitor would probably argue that the services provided by him were just the same as those of the commonweal enterprise, and that the conditions applying to both parties should be exactly the same for that reason.

There is no clue as yet as to how the European Commission would decide in such a case, although the Commission's communication on 'provisions for elementary requirements' does

Transboundary
provision of
social benefits
is a reality

Not only
competition
but also
commonweal

contain a few hints. The paper lists a number of principles which the European Commission intends to use in future decisions in which not only the interests of competition but also commonweal aspects are involved. On the other hand, these principles contain a number of indeterminate legal terms and may therefore be interpreted with considerable latitude.

The European Charter of Fundamental Rights as a 'Crash Barrier'

In such cases, the Charter of Fundamental Rights may function as a 'crash barrier'. At the moment, no other instrument but the European Competition Law is available to the Commission or the European Court of Justice in trials involving not only the freedom of competition but other legal assets as well. Nor are the above-mentioned principles of the Commission anything more than aids in the interpretation of Competition Law.

Competition Law serves to implement the single market's interest in protection or, in other words, to guarantee a free market without governmental interference. However, there is so far no law at the European level to protect the interests of the individuals concerned. To this day, it is not clear which of the two should take precedence, the implementation of the single market or the general interest in the stability of social structures which ensure that every individual can claim his or her social rights.

Thus, for instance, there is currently no mechanism to protect the interests of somebody who needs personal care and who not only wishes to purchase efficient nursing cheaply, but who also wishes to find an individualised, humane service that aims at other things besides profitability. Moreover, the social-rights guarantee also demands that such services should be available nationwide, for people can claim their social rights only if social services are offered everywhere at affordable prices. This, of course, necessitates certain framework condi-

There is currently
no mechanism
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somebody who
needs personal
care

tions. If, for instance, the supply of social services were solely to follow the rules of the market, there would be a definite danger of concentration processes being initiated similar to those with which we are abundantly familiar from other deregulated service markets. If this were to happen, there would be providers of excellent social services in conurbation centres, but there would be hardly any in the more sparsely settled regions, because it does not pay to maintain capacity reserves there. In such an event, it would no longer be possible to guarantee equal access to social services for all, and social rights could no longer be implemented.

To put it differently: When deciding in individual cases on whether or not a certain form of funding providers of social services is permissible under European Competition Law, other aspects should be considered beside the interests of the single market. To counterbalance these, the citizens' interest in receiving protection or, in this instance, in having equal and comprehensive access to social services, needs to be weighed as well. This may be facilitated by the Charter of Fundamental Rights, for it contains two articles which might become highly important in conjunction with access to social services.

Art. 34 guarantees the right to access to social security, while Art. 36 guarantees the right to access to 'services of general economic interest' – a term used in European law which could be equated – at least partially – with 'provisions for elementary requirements', which may include social services. From these two articles, it is quite clear that European organs, specifically the Commission and the European Court of Justice, may not interfere in the execution of their powers with the right of every individual to have access to comprehensive social services, which in this case means the enforcement of the subsidy ban.

Once the Charter has become legally binding, the Commission and the European Court of Justice will no longer be able to base their rulings in competition cases solely on the standards laid

Citizens' interest
in receiving
protection may
be facilitated by
the Charter

Comprehensive access to social services without consideration of profitability

down in the competition code. They will then need to weigh these standards against the individual interests codified in the Charter, because both legal assets will then be of equal rank within the hierarchy of European law norms. Giving binding status to the Charter will, therefore, ensure that the interests of the single market are no longer the only ones that weigh in the balance, but those of the individual as well.

For the same reason, decisions under Competition Law will have to be made dependent on whether or not structures that serve the implementation of individual rights are being encroached upon. With regard to social rights, this means that decisions relating to competition matters must never be allowed to limit access to social services. To ensure that anyone can claim his or her right to enjoy comprehensive access to social services, infrastructures providing such services must be allowed to evolve even without consideration of profitability. Now, if the interests of the single market and the above-mentioned access rights are truly weighed in the balance whenever decisions of social relevance must be taken in cases relating to Competition Law, it may be possible to counteract concentration processes among providers of social services which might ultimately lead to an attenuation of the structure of social services in out-of-the-way areas.

The social rights in the Charter form a 'crash barrier' for the law on competition

Seen in this light, the inclusion of social rights in the Charter has certainly helped to upgrade the social concerns of the citizens of Europe. By the same token, the fact that social rights have been included in the Charter may do much to enhance decisively not only the protection of these rights, but the respect accorded them within the EU. If competition interests and social concerns should clash again, it will no longer be merely about the implementation of unhindered competition but also about preserving access to social provisions and, by the same token, about social infrastructure policy. Thus, the social rights laid down in the Charter do indeed form a 'crash barrier' for the law on competition.

However, to permit this 'crash barrier' to perform its function to the full, the Charter must be made legally binding.

Employee Rights in the EU Charter of Fundamental Rights

Klaus Lörcher

This assessment of the Charter of Fundamental Rights from the employee point of view will be based on 'social fundamental rights' to which the 'Cologne Mandate' refers in the following terms:

'In developing said Charter, consideration shall be given to economic and social rights such as those laid down in the European Social Charter and in the Community Charter of Social Fundamental Rights for Employees (Art. 136 ECT), unless such rights merely serve to substantiate the objectives of Union action.'²²

Within the framework of this paper it will, however, be impossible to discuss all social fundamental rights. In keeping with our subject, we will therefore confine ourselves in the following to employment relations²³ and the relevant sections of the Charter.²⁴

General

From the wide range of general questions, we will pick out those that are of particular relevance with regard to employee rights without, however, dealing with them in greater depth.

Employee rights

22 Chairman's Conclusions, European Council of Cologne (of June 3/4, 1999), Appendix IV: 'Decision of the European Council to develop a Charter of Fundamental Rights of the European Union'.

23 The use of the term 'employment' was avoided to circumvent the impression that the definition of the term was that given in the German Labour Code; the fact that the word 'employee' is used throughout the text is based on the assumption that the view that this term cannot be ascribed to a specific nation has meanwhile gained currency (cf. ...).

24 Consequently, any issues of more far-ranging scope and effect will not be considered including, for instance, social security.

The Eligible Parties

The Charter is
much more
ambitious

Glancing at the development of social fundamental rights within the European Community (EC), we are bound to notice that a fundamental shift in orientation has taken place. While the 'Community Charter' of 1989 primarily addressed employee concerns, the Charter of Fundamental Rights is much more ambitious, especially in the field of social fundamental rights. While it does develop the 'employee characteristic' here and there, that characteristic is abandoned in the context of other rights (examples: persons with familial duties, people with handicaps).

As far as the above-mentioned restriction to gainful employment is concerned, we must emphasise right from the start that the definition of the term 'employee' under EC law is not modelled on national distinctions but autonomous. Consequently, the term may cover persons employed as civil servants as well as persons in freelance employment.

With all this, we should not forget that the group of eligible persons is subdivided into four sub-groups²⁵ that cut right across this definition:

- Citizens of the Union,
- Legal aliens,
- Illegal aliens, and
- Temporary visitors.

Basically, those who are eligible for employee rights mainly belong to the first two categories, although certain social fundamental rights are accorded even to the third group of persons.

²⁵ Cf. *Braibant*, La Charte des droits fondamentaux, Droit Social 2001, pp.69, 73 (Sect. B. a 1).

The Group of Obligated Parties

Looking at employee rights, we must remember that they resemble the rights laid down in the Charter of Fundamental Rights inasmuch as the circle of (potentially²⁶) obligated parties created by them is very small. Without these massive restrictions, there would never have been a chance of reaching a more or less general consensus on the content of the Charter of Fundamental Rights.

According to Art. 51,²⁷ Union organs and member states are equally bound by these rights, although member states are bound only with regard to the translation of EU law into domestic law. In concrete terms, this means that any and all EC labour-law regulations incorporating employee rights such as, for instance,

- all Treaty provisions in primary community law, and
- all regulations and directives in secondary community law must be interpreted in conformance with the Charter. The first major field in which this rule applies is the question of exemptions stated in the Directive itself²⁸ and in the translation of the Directive into national law to the extent that (new) exemptions are created.²⁹

The Level of Protection

Even at the present level of international protection, employee rights labour under a particular problem raised by the Charter of Fundamental Rights relative to the status of those rights within the framework of the UN, the International Labour

²⁶ Direct obligations conforming to the meaning of the law may arise only after the Charter of Fundamental Rights has been included in the EU Treaties.

²⁷ Unidentified articles always belong to the EU Charter of Fundamental Rights.

²⁸ Art. 1 Par. 3, Directive 93/104/EC (Working Time Directive): '... with the exception of road, air, sea, and rail transport, inland navigation, fishery on the high seas, other maritime activities, and the activities of trainee doctors.' (See above, footnote 17.)

²⁹ Art. 7, Directive 93/104/EC (Working Time Directive): (no) entitlement to annual leave for employees in termed employment not exceeding 13 weeks (see above, footnote 15).

EC labour-law
regulations must
be interpreted in
conformance
with the Charter

Organisation (ILO), and the European Council. Art. 53 (level of protection) contains the following general rule on this point:

'None of the provisions of this Charter shall be interpreted as restricting or infringing any of the human rights and fundamental freedoms recognised in any given field ... through the medium of international agreements to which ... all member states have acceded.'

In other words: If an 'agreement'³⁰ has been ratified by all member states, so that all member states have become 'parties'³¹, the level of protection defined in such agreements may not be undercut by the Charter of Fundamental Rights.

Restrictions

It is one of the characteristic features of the Charter of Fundamental Rights that none of the rights named therein has been specifically restricted in any way, as in the ILO Agreements, the European Human Rights Convention (EHRC), or the European Social Charter (ESC). Par. 1 of Art. 52 (scope of guaranteed rights) contains a general clause on restrictions:

'Any restrictions imposed on the exercise of rights and freedoms recognised in this Charter shall be covered by applicable laws and shall respect the essential content of these rights and freedoms. Following the principle of commensurability, restrictions may be imposed only if they are necessary and actually serve the commonweal goals recognised by the Union or, alternatively, the need to protect the rights and freedoms of others.'

Even today, most of the decisions handed down by the European Court of Human Rights (ECHR) on issues relating to the classical fundamental rights such as, for instance, the right to freedom of expression laid down in Art. 10 EHRC, are proof

³⁰ If the concrete designation and/or superscription of an instrument does not contain the term 'agreement' but uses 'covenant' or 'charter' instead, this is of no significance.

³¹ According to Art. 2 Par. 1.g of the Vienna Convention on the Law of Treaties, 'any state which has agreed to be bound by a treaty, and which has put that same treaty into force, is to be considered a "party" to it.'

positive that concrete legal disputes, assessments, and evaluations mostly revolve around such restrictions. This will probably be even more pronounced in cases relating to the Charter of Fundamental Rights, as general restrictions will have to be cast in more concrete terms for whatever fundamental right happens to be concerned.

As far as the commonweal goals recognised by the Union are concerned, it is especially Art. 2 EC³² that deserves mention with regard to employee rights. According to this article, the Community's policies and measures shall be designed to promote, among other things,

- a high level of employment,
- a high level of social security,
- the equality of men and women,
- improvements in the standard and quality of living, and
- economic and social cohesion as well as solidarity among member states.

These more far-ranging (social) objectives of the Community will set the standards for any restrictions, which in any case will have to be defined in more precise terms.

The Categorisation of Rights

To describe the employee rights laid down in the Charter of Fundamental Rights more closely, a variety of – partially overlapping – approaches suggest themselves. Without trying to advocate any gradation in the value of individual fundamental rights, it makes sense, particularly in view of the ongoing

³² The explanatory note says: 'This reference to the commonweal goals recognised by the Union covers not only the objectives enumerated in Art. 2 but also other interests protected by specific treaty provisions, such as Art. 30 and Art. 39 III EC.' From this, it follows that it is not primarily obvious whether the above reference addresses Art. 2 EU or/and Art. 2 EC. While it is true that the wording of Art. 2 EU ('The Union shall set itself the following objectives ...') suggests that it is the EU Treaty that is being addressed here, all following statements clearly refer to the EC Treaty, the conclusion being that at all events, the essential goals laid down in Art. 2 EC are of major importance for the European Community.

Level of employment, social security, equality of men and women, quality of living, solidarity

The level of protection may not be undercut

Principle of commensurability

Interaction
between
individual and
collective
elements

globalisation, to look first at international developments (especially within the ILO), focusing on the 'core labour standards' that are recognised worldwide. The remaining employee rights expressly enumerated in the Charter of Fundamental Rights may be broken down into individual and collective rights, depending on the employment relationship in question. However, this is not intended to promote an individualist approach; rather, matters should be adjusted to reflect the interaction between the individual and collective elements of the social fundamental rights, particularly the freedom of association, and both should be implemented in recognition of the fact that they are mutually supportive and dependent.

Besides, it is an accepted fact that it is impossible to make a precise distinction between individual and collective elements. This, by the way, is corroborated by the Charter of Fundamental Rights, in which regulations covering fundamental collective rights relating to the freedom of association are contained in the chapter on 'freedom' which focuses rather more on individuals (the so-called first generation), while distinctive modes of action (collective bargaining and collective action inclusive of strikes) are described in the chapter on 'solidarity', which is more collectively orientated (the so-called second generation).

'Classic' Fundamental Employee Rights

General: The Core Labour Standards of the ILO

The 'ILO Declaration on Fundamental Rights and Principles at the Workplace'³³ was probably the ultimate document to mark the worldwide recognition of a 'body' of core labour standards. At the same time, a special framework was created for those ILO agreements that had been counted among 'core labour standards' before then. This was done to motivate those

³³ 'ILO Declaration on Fundamental Principles and Rights at Work and their Implementation' adopted by the International Labour Conference at its 86th meeting in Geneva on June 18, 1998.

states which had not yet ratified these agreements to implement the obligations imposed on them by the ILO Constitution as liberally as possible, then as now. In point of fact, we are looking at eight agreements from four distinct areas:

- Freedom of association (Agreements n. 87 and 98),
- Prohibition of forced labour (Agreements n. 29 and 105),
- Prohibition of child labour (Agreements n. 138 and 182), and
- Prohibition of discrimination (Agreements n. 100 and 111).

As far as the ratification and recognition of these rights is concerned, *all* EU member states have already ratified nearly all core labour standards. Agreement n. 182 (which deals with the worst forms of child labour³⁴) is the only one that has not yet been ratified by seven EU member states.³⁵ Even here, however, the process of ratification is expected to be completed shortly. According to Art. 53,³⁶ none of the subsequent provisions may be interpreted as offering a level of protection below that provided by the corresponding ILO Agreement.

Similarly, the (revised) ESC features certain areas of particular weight, i.e. so-called 'hardcore provisions'. To be sure, there is a slight shift of focus in this instance as the rights emphasised here include not only labour rights but also other social rights, such as social security and welfare, as well as the protection of migrants.³⁷ While the original ESC has been ratified by all mem-

Member states
have ratified
nearly all core
labour standards

³⁴ The Federal Cabinet has resolved to initiate the process of ratification (cf. the Labour Ministry press release of February 21, 2001); cf. also Döwll, *Kinderarbeit – Beseitigung der schlimmsten Formen (Child Labour – Abolishing its Worst Manifestations)*, AuA 2000, pp.492f.

³⁵ Belgium, France, Germany, Greece, the Netherlands, Austria, and Sweden.

³⁶ See above.

³⁷ According to Art. 20 Sub-par. 1. b ESC, these include

- Art. 1: The Right to Work,
 - Art. 5: The Right of Association,
 - Art. 6: The Right of Collective Bargaining,
 - Art. 12: The Right to Social Security,
 - Art. 13: The Right to Social Welfare,
 - Art. 16: The Right of Families to Social, Legal, and Economic Protection, and
 - Art. 19: The Right of Migrants and Their Families to Protection and Support.
- The revision of Art. 20 Sub-par. 1. b ESC, which is now Art. A Sub-par. 1. b has added the following:
- Art. 7: The Right of Children and Adolescents to Protection, and
 - Art. 20: The Right to Equal Opportunities and Equal Treatment in Employment without Gender Discrimination.

ber states, the revised version has meanwhile been ratified by four.³⁸

Finally, we need to glance at the UN International Covenant on Economic, Social, and Cultural Rights³⁹ as it has been ratified by all EU member states, although it allows no distinctions in weighting.

The Freedom of Association

In its essential elements, the Freedom of Association has been described in the seminal ILO Agreements of 1948 and 1949 (ILO Agreement n. 87 and 98⁴⁰). These elements were transferred largely intact to

- Art. 12⁴¹ (freedom of association), and
- Art. 28 (right to collective bargaining and collective action, strikes included).

Modifications
tend to limit the
rights of the
trade unions

From the trade union point of view this calls for further consideration. To begin with, a negative impression is created by the fact that a variety of modifications tending to limit the rights of the trade unions were introduced at the last minute.⁴²

Regarding the Freedom of Association (Art. 12), for instance, options to interpret the article in favour of greater trade union significance were restricted.⁴³ The changes introduced within

38 Sweden (29-05-1998), France (07-05-1999), Italy (05-07-1999), and Ireland (04-11-2000); further ratifications may be expected this year, not least because of the 40th anniversary of the signing of the ESC.

39 Cf. Däubler/Kittner/Lörcher, *Internationale Arbeits- und Sozialordnung* (International Labour and Social Order), 2nd edition, Cologne 1994, n. 130.

40 Cf. Däubler et al., footnote 39, n. 210 and 211.

41 Unidentified article specifications relate to the European Charter of Fundamental Rights.

42 The quotations that follow were taken from CONVENT 53 (Charte 4958/00 of 27-10-2000). This is where the Vice President of the Convention, M. Braibant, explained the changes that occurred between CONVENT 47 and CONVENT 50.

43 CONVENT 53, pp.2f.: 'A l'article 12 il s'agit plutôt d'une modification de forme pour répondre à certains objections qui nous avaient été faites notamment sur l'idée que le mot syndicat' revenait plus souvent que les autres. Personnellement je ne pense pas que cela avait beaucoup de signification mais pour donner satisfaction à ceux qui se plaignaient de cette inflation de vocabulaire, on a mis désormais: dans les domaines politiques, syndical et civique, ce qui implique (il s'agit de la liberté d'association) le droit de toute personne de fonder avec d'autres des syndicats et de s'y affilier pour la défense de ses intérêts.

the important aspect of collective bargaining and action inclusive of strikes (Art. 28) might prove more problematical; in this context,

- The hard rule 'at all levels' was replaced by the open 'at suitable levels',⁴⁴ and
- The right to strike was included in the existing frame of competences (among other things, Art. 137 Par. 6 excludes the right to strike from the Community's general competence to enact social laws under Art. 137 EC⁴⁵).⁴⁶

The Ban on Forced Labour

Although the 'ban on slavery and forced labour' of Art. 5 was mainly based on Art. 4 Par. 1 and 2 EHRC,⁴⁷ the international definition of forced labour was formulated as early as 1930 in ILO Agreement n. 29 (later supplemented in ILO Agreement n. 105⁴⁸

Forced labour
banned as early
as 1930

The Ban on Child Labour

Whereas the other fundamental rights at the workplace have been numbered among the 'core labour standards' for some time, outlawing child labour on the international plan made some progress only recently. Thus, ILO Agreement n. 138 of

Outlawing
child labour on
the international
plan

44 CONVENT 53 p.4: "Les articles 26 et 27 [now 27 and 28] ont été modifiés dans le même sens pour donner satisfaction à des demandes pressantes, au lieu de dire 'à tous les niveaux' nous avons dit dans les deux textes 'au niveau approprié'."

45 'This article shall not apply to wages and salaries, the of coalition, the right to strike, and the right to lock out.'

46 CONVENT 53 p. 4f.: "...à l'article 27 nous avons rédigé d'une manière nouvelle la phrase de manière à bien montrer que les droits qui sont exprimés là ne sont pas couverts par l'expression ancienne qui avait l'air de dire que le droit de grève qui avait fait son introduction comme vous vous en souvenez la dernière fois, était un droit reconnu au niveau européen par la législation européenne. C'est la différence avec la partie de la phrase, là il y a bien un droit qui est reconnu actuellement au niveau européen, le droit de négocier, de conclure des conventions collectives, en revanche, le droit de recours à des actions collectives, y compris la grève n'est pas reconnue juridiquement au niveau européen et nous avons voulu ici éviter toute ambiguïté."

47 Cf. the explanations on Art. 5, n. 1.

48 Cf. Däubler et al., *ibid.*, footnote 39, n. 214 and 215.

1973⁴⁹ was originally regarded as being rather more 'technical'. Later developments, however, saw to it that this aspect was included in the ILO Declaration of 1998.

This is followed up in Art. 32 Par. 1, although – as stated in explanation – there is some relation to fundamental ESC Provisions (Art. 7), the derivative provisions of the Community Charter (n. 20), and – last in line – the Directive on the Protection of Minors at Work.⁵⁰

The Ban on Discrimination

Based on ILO Agreement n. 111 (discrimination in employment) and n. 100 (equal pay)⁵¹, more far-reaching discrimination bans have been set up in Art. 21 Par. 1, representing a combination of the discrimination bans set out in Art. 13 EC and Art. 14 EHRC (and/or the 12th EHRC Supplementary Protocol).⁵²

Next to these general equality rights (for more information, see below), the ban on discrimination based on gender and nationality plays an eminent role in the law of the European Union, particularly in the field of labour legislation.

Thus, the equal treatment prescription laid down in Art. 23 (men and women) goes far beyond the original equal pay requirement contained in ILO Agreement n. 100. On the other hand, we should not forget that it was precisely this Agreement which, together with others, prompted the European Court of Justice in its Defrenne III ruling to declare that principle of 'equivalent' work was founded on Art. 141 EC (former Art. 119 ECT).⁵³ While Art. 21 Par. 2 bans discrimination based on Nationality which – as noted in the explanation – brings it into

Equal treatment prescription goes far beyond equal pay requirement

49 Cf. Däubler et al., *ibid.*, footnote 39, n. 214 and 215.

50 Cf. Däubler et al., *ibid.*, footnote 39, n. 447 (addition to the 2nd edition).

51 Cf. Däubler et al., *ibid.*, footnote 39, n. 217 and 218

52 Cf. the relevant explanatory work, which also references to Art. 11 of the (European Council) Agreement on Human Rights and Biomedical Science.

53 Ruling of June 15, 1978 – 149/77 – Defrenne III – EAS, Art. 119 EC Treaty, n. 3, Mn 28.

line with Art. 12 EC, nationals of non-member states have (no more than) a claim to working conditions corresponding to those of Union citizens (Art. 15 Par. 3).

Other Explicit Employee Rights

Individual Rights

The best way to order the multitude of individual rights, i.e. rights relating to individual employment relationships, is to arrange them in their sequence over time; thus, there are specific rights relating to an employment relationship

- when it begins (free placement services, right to have access to vocational training, free choice of employment),
- while it is active (right to equitable and adequate working conditions, right to access to in-service training), and
- at the end of an employment relationship (protection in the event of unjustified dismissal).

The right to free placement services (Art. 29) was recognised a long time since in Art. 1

Par. 3 ESC.⁵⁴ Nevertheless, it took a great deal of effort to get this free service codified in the EU framework. This will be of some importance with regard to all the EC's employment-policy activities.

From its content, this provision merges neatly with the general right to education as well as with the right to access to vocational training and in-service education (Art. 14 Par. 1). This right is based on Art. 10 ESC and Art. 15 of the Community Charter.

The right to work originally referred to in Art. 1 ESC has been whittled down to a 'right to do work' (Art. 15 Par. 1); seen in the context of social fundamental rights, this particular right

Right to vocational training, right to equitable working conditions, protection in dismissal

The right to work whittled down to a right to do work

54 The article's explanations refer to this as well as to Art. 13 of the Community Charter.

serves to defend employees against coercion on the job, a fact that is underlined by the reference made in the explanatory note to Art. 1 Par. 2 ESC.⁵⁵

What is remarkable about the right to equitable and adequate working conditions (Art. 31) is the rather all-encompassing right to 'healthy, safe, and humane working conditions' (Par. 1). While industrial safety and workplace health protection are of considerable importance in EC practice even now, the right to 'humane' working conditions represents a major novelty. As expressively mentioned in the explanatory note, this novelty is rooted in Art. 26 of the Revised European Social Charter (RESC). As mentioned above, the (current legal import of social fundamental rights and possibly even of the entire Charter of Fundamental Rights will be put to the test when the right to paid annual leave laid down in Par. 2 comes up for examination.

Finally, Art. 30 protects employees from unjustified dismissal. Following Art. 28 RESC, this right covered even more ground in its earlier stages; it was only at the end of the deliberations that its remit was restricted to 'community law and the legal maxims and practices of individual member states'.

Collective Rights

Right to information and consultation

Next to the right to collective bargaining and action, the right to information and consultation (Art. 23) forms the second collective right of major importance. Like others, its origins lie

⁵⁵ This example is frequently used by critics of the EU Charter of Fundamental Rights: "One case in point is that the right to work has been superseded by the 'right to do work'. The delicate distinction between the two has been explained in the following words in a comment on the relevant article: 'The wording abolishes the right to claim benefits.'" Klein, Grundrechtecharta der EU – Ein undemokratisches Verfahren (The EU Charter of Fundamental Rights – an Undemocratic Process), *Sozialistische Zeitung*, n. 23, 09-11-2000, p. 11. Unfortunately, the explanatory note on Art. 15 Par. 1 contains no such preference; it says: "The freedom of occupational choice embedded in Art. 15.1 has been recognised by the Court in its administration of justice (...). Furthermore, this paragraph follows Art 1.2 of the European Social Charter which was signed on 18-10-1961 and ratified by all member states, as well as n. 4 of the Community Charter of Social Fundamental Rights of Employees. The meaning of 'working conditions' is that given in Art. 140 EC."

in a variety of EC directives, the one relating to European Works Council not least among them. A general context is established by Art. 21 RESC which, in turn, formed part of the first ESC Supplementary Protocol as early as 1988.

This right, which provides neither involvement nor co-determination, is currently being fleshed out in the form of a Directive. The extent to which the involvement of employee representations can be enhanced in this process will form an important indicator for judging the practical significance of the Charter of Fundamental Rights.

Group Rights

Rights accorded to special groups of persons should always be seen in the context of the universal maxim of equality. This being so, nobody should be surprised that some of these rights are laid down in the chapter on 'equality' (Ch. III), while others appear in the chapter on 'solidarity' (Ch. IV).

The fact that no explicit rights have been included to protect handicapped persons, and that the sentence used instead, 'the Union recognises and respects their claim to measures of vocational integration' (Art. 26) is worded rather weakly, exemplifies the extent to which compromises had to be made as the Convention searched for solutions.

Because of this, you may well ask yourself why the novel approach of protecting persons with family duties (Art. 33 Par. 2) has been codified without such compromise. It would surely have been easier to stick to well-known elements, such as maternity protection, for instance.

That parental leave was included in the regulation shows, however, that a powerful will to follow up new developments was at work here.

Next to the above-mentioned ban on child labour (Art. 32 Par. 1), Art. 32 Par. 2 entitles adolescents who may legally work to working conditions conformable with their age.

A powerful will to follow up new developments

Other Fundamental Rights Relating to Employees

The 'dignity of man' origin and hub of everything

It is certainly not common practice to refer to 'universal' or 'classic' fundamental rights when discussing the rights of employees. However, classical fundamental rights furnish the necessary framework for the exercise of all employee rights, with the 'dignity of man' (Art. 1) certainly forming the origin and hub of everything.

Freedom Rights

Freedom rights, particularly those that relate to employment, are indispensable for each individual employee.

In an employment relationship, control and inspection measures may form a major source of conflict with respect to the privacy of an individual's personal and family life (Art. 7).

For the first time, the protection of personal data (Art 8) has been expressly included among fundamental rights. Virtually all employment rights connected with the 'right to informational self-determination' are constantly gaining in practical importance.

Freedom of thought, conscience, and religion

There are similar close links between the freedom of thought, conscience, and religion (Art. 10) and employment: Is it lawful for somebody to be dismissed because he or she refuses to do a (specific) job that is not conformable with his/her conscience?

The problems that may arise in an employment situation from matters relating to the freedom of expression and information (Art. 11) are virtual classics. There is a long list of precedents.

Equality Rights

The fundamental principle of equality before the law (Art. 20) forms the basis of all rules relating to employment relationships as well as to the relationships themselves.

As mentioned before, the ban on discrimination based on nationality (Art. 21 Par. 2) forms part of the general code of equality rights.

Ban on discrimination

Solidarity

Guaranteed access to services of general economic interest (Art. 36) is a regulation that was particularly strongly criticised, and only the dedication of the French representatives in particular could ensure its eventual inclusion. Essentially, its wording follows Art. 16 EC to ensure that it could be defended against attacks on its content. Because of the case pending at the European Court of Justice, it will once again be particularly interesting to see whether and to what extent the Court will draw any conclusions from this regulation.

Judicial Rights

The right to effective legal redress founded on Art. 6 and 13 EHRC and, more importantly, the right to obtain judgment 'within a reasonable term' (Art. 47 Par. 2) have never been scrutinised for their impact on labour law. However, the ECHR has often been concerned with the duration of trials before the (labour) courts in the light of Art. 6 EHRC.⁵⁶ The fact that the duration of trials before the European Court of Justice is on the increase is, therefore, certainly worth criticising.

The right to effective legal redress

At first, it was not assumed that the presumption of innocence (Art. 48 Par. 1) would have any labour-law impact. However, dismissing an employee who is merely suspected of having

⁵⁶ Cf. the most recent ruling of May 17, 2001 – Appeal n. 46407/99 – Stoldis vs. the State of Greece: While the judges in this case held that the – normally rather excessive – duration of 6 years, 1 month, and 18 days was (barely) reasonable, one major point in their assessment was that the plaintiff had himself enhanced the complexity of the case. The remainder of the ECHR's ruling is concerned with the inexplicable length of time between the pronouncement of the decision and the service of the decision of the next higher level of appeal.

committed a punishable offence without his or her guilt having actually been established in criminal proceedings, a process which is recognised in the Federal Republic,⁵⁷ may well give rise to the question of whether or not it is conformable with the presumption of innocence.

Outlook

While the substance of the Charter of Fundamental Rights was given a warm welcome by the Deutsche Gewerkschaftsbund,⁵⁸ the DGB still urges its incorporation in the EU Treaties. As long as the Charter remains noncommittal, however, much will depend on the outcome of test cases in which the employees' rights contained in the Charter are used aggressively in the political and particularly legal field so as to establish the limits within which the Charter of Fundamental Rights may acquire legal significance even now.

The next inter-governmental conference, which is scheduled for 2004, will have to ensure

- that the Charter of Fundamental Rights is (finally) included in the EU treaties, and
- that the Charter is changed for the better (but never for the worse) with regard to its treatment of employee concerns.

To ensure, that Charter is included in the EU treaties

⁵⁷ However, this regulation has no concrete effect at the moment because the law covering (individual) dismissals has no community-wide application as yet; thus, it still remains within the jurisdiction of the member states and, by the same token, outside the reach of the EU Charter of Fundamental Rights.

⁵⁸ 'The DGB's judgment of the draft Charter of Fundamental Rights is basically positive.' *Federal Executive of the Deutsche Gewerkschaftsbund (Ed.), ISA – Informationen zur Sozial- und Arbeitsmarktpolitik* (n. 2/2001): Die Charta der Grundrechte der Europäischen Union (The Charter of Fundamental Rights of the European Union), Düsseldorf, February 2, 2001, p.4.

Conclusions:

Social Human Rights in a Globalised World – The International Significance of the Charter of Fundamental Rights

Ute Hausmann

The European Charter of Fundamental Rights came very close to lacking a codification of the right to strike – something that appears unthinkable. This shows that the centuries-old struggle for the recognition of social human rights is far from over. Against this background, the European Charter of Fundamental Rights as it now stands should be welcomed without omitting to point out its weaknesses clearly. The recognition of the indivisibility of human rights that was finally achieved in the Charter of Fundamental Rights will remain without impact in the field if the rights embodied in the Charter cannot be given binding and actionable status, thus initiating the sustainable development of fundamental-rights safeguards in Europe, a development which would reach far beyond the confines of the continent. The papers contributed by our authors show that there are three levels at which action might be taken:

Recognition of the indivisibility of human rights finally achieved

- 1 Influencing developments in the international human-rights regime,
- 2 Shaping the process of globalisation so as to conform to human-rights criteria, and
- 3 Establishing firm ties between the EU's foreign policy and social human rights.

Influences on Developments in the International Human Rights Regime

Whenever human rights are formulated, they automatically acquire a claim to universal validity, although in this particular case the immediately binding effect of the Charter of Funda-

Universal validity

mental Rights is limited to 'the organs and institutions of the Union as indicated by the principle of subsidiarity, and to the implementation of Union law by member states' (Art. 51). For this reason, further developments in the debate about the social human rights contained in the Charter of Fundamental Rights will probably be followed attentively in countries outside Europe by both proponents and opponents of enhanced social rights. Now that the indivisibility of human rights has been confirmed by the Charter, its impact on the development of the international human-rights regime will mainly depend on the extent to which binding and actionable rights can be derived from the Charter, and on the consent of the European Union to an international review of its policies under human-rights aspects.

Reaffirmation of the Principle of Indivisibility

Mechanisms
to monitor

By incorporating social human rights in the Charter of Fundamental Rights, the European Union has reaffirmed the indivisibility of human rights which it previously recognised by signing the Final Declaration of the World Conference on Human Rights in Vienna. The UN Committee on Economic, Social, and Cultural Rights had expressly called on the Convention to include social human rights in the Charter in conformance with the principle of indivisibility. Although there are powerful human-rights safeguards at both the national and regional level, social human rights are noticeably less well protected in Europe. A look at the mechanisms in place to monitor conformance with the European Convention on Human Rights and the European Social Charter shows this quite clearly. Nor can the shared constitutional traditions of the EU member states, the second cornerstone for the administration of fundamental rights within the EU next to regional agreements, be interpreted as implying an unambiguous avowal of the indivisibility of hu-

man rights. For, as Markus Zöckler has pointed out in his contribution, there is no shared constitutional tradition with regard to social human rights. Consequently, the manner in which indivisibility is confirmed in the Charter of Fundamental Rights would be difficult to trace either to the EHRC and the European Social Charter or to shared constitutional traditions. However, there are quite a number of rights scattered throughout the Charter which may be classed as social human rights, the clearest possible manifestation of the principle of indivisibility.

Legal Validity and Actionability as an International Signal

The fact that the EU has recognised the indivisibility of fundamental rights, though remarkable, is by no means spectacular in the international context as the rights created by the Charter of Fundamental Rights are neither binding nor individually actionable, two conditions which are indispensable to ensure the efficient protection of fundamental rights. As Markus Engels showed in his paper, the international importance of the Charter will grow as soon as it is made legally binding: 'Once this has been accomplished, the Charter will be the first legally-binding international document to recognise the indivisibility and mutual interdependence of human rights not only in the form of a general avowal but in the form of comprehensible substantive law.' The legal validity and actionability of all rights contained in the Charter will give social human rights equal status with civil and political rights, with regard to their formulation as well as to their respective enforcement instruments, to an extent that is without example on the international plane.

By ensuring that compliance with social human rights is monitored with equal intensity, the Charter of Fundamental Rights would acquire the character of a role model on the international plane, thus helping to support efforts to strengthen the instruments that monitor international agreements on so-

Rights are
neither binding
nor individually
actionable

Compliance
with social
human rights

cial human rights. Such assistance would extend to the addition of a protocol on complaints to the International Covenant on Economic, Social, and Cultural Rights, as well as to initiatives aiming at subjecting certain rights from the European Social Charter to the jurisdiction of the European Human Rights Court. What role the EU will play in efforts to strengthen social human rights in the international context will depend on developments within the EU as well as on the track record of the Charter of Fundamental Rights. Today, the position of the EU member states towards these initiatives is somewhat inconsistent. However, once experience has been gathered with regard to actionable social human rights within the EU, a common position is sure to develop.

Monitoring by International Human Rights Bodies

That the EU recognises international obligations in the field of human rights is expressly mentioned in the Charter of Fundamental Rights. Thus, Art. 53 definitely states that the level of protection afforded by international law and international agreements to which either the Union, the Community, or the collective of its member states have acceded, may not be undercut by EU provisions. However, this does not imply any automatic agreement by the EU to subject itself to the watchdog mechanisms of such agreements. The only way of calling the EU to account on the international plane is by member state action. In his contribution, Markus Zöckler showed that 'especially the transfer of sovereignty from member states to the European Community (...) should be no reason for relieving member states of their human-rights obligations for lack of regulatory competence. As competences are transferred to the Community, obligations accruing to member states from human-rights treaties are converted into obligations to encourage the Community actively to comply with these treaties.'

Obligations to encourage the Community to comply with these treaties

While the role played by governments in international organisations frequently comes up in reports under the International Covenant on Economic, Social, and Cultural Rights, no definite procedure has been established as yet.⁵⁹

Future objectives should extend beyond placing the EU under international obligations through its member states. Even though human-rights safeguards within the EU will be reinforced by the legal validity of the Charter of Fundamental Rights, the voluntary undertaking of the EU implied by the Charter is not adequate by itself. There must be ways and means of calling EU institutions to account before international human-rights bodies. The European Court of Justice has refused to sanction the EU's accession to the EHRC and the European Social Charter for formal reasons. From the political point of view, however, it is necessary for the EU to accede and, by the same token, submit to the European human-rights regime to ensure that people's rights within the EU are sustainably protected. On the international plane, such an accession would signal that even international organisations with powers as far-ranging as those of the EU can be called to account. For this reason, governments should do everything to facilitate the EU's accession.

Governments should do everything to facilitate the EU's accession

Shaping Globalisation in Conformance with Human Rights Criteria

Whatever practical relevance the Charter of Fundamental Rights may have depends on the way in which it is implemented and the rights embedded in it are operationalised. Considerations about ways and means of promoting the implementation of

⁵⁹ Cf. EED, BfW, FIAN: 'Compliance of Germany with its International Obligations under the International Covenant on Economic, Social and Cultural Rights. Special Focus: The Right to Adequate Food', Heidelberg, August 2001.

European
social policy as
important as
national social
policy

social human rights through EU policies must begin by a look at the concept of social human rights underlying the Charter. Following the so-called three-level model, civil and political as well as economic, social, and cultural rights are complemented by governmental obligations to respect, protect, and safeguard these rights. Nor is the imposition of social human rights rendered superfluous by the fact that the social-policy competences of the European Union are limited – quite the opposite, in fact. What Katharina Erdmenger has to say about the function of social human rights as a crash barrier in Competition Law shows quite clearly that obligating European social policy to respect social human rights is just as important for their implementation as national social policy.

As ever, the single market forms the core of the European integration process. The central instrument on which this market is based is Competition Law. Together with the effects of growing privatisation (e.g. in the fields of health care and water supply), implementing unlimited competition would initiate an accelerating process of rights (e.g. access to health services or water) being converted into commodities. Similar processes are going on even now not only on the European but also on the international plane, boosted by international institutions like the World Trade Organisation or the World Bank. Thanks to the Charter of Fundamental Rights, the European Union is now under an obligation to respect the right to access to social services. By the same token, the position of social human rights has been much improved whenever issues are weighed in the balance. According to the Charter of Fundamental Rights, Competition Law does not take precedence over the guarantee of social human rights, an unambiguous signal to the international community that human rights should be given preference over market requirements by other institutions.

Right to access
to social services

The Link Between EU Foreign Policy and Social Human Rights

By adopting the Charter of Fundamental Rights, the European Union has set a signal addressing its own foreign policy officials as well as those of other governments. The EU is now assuming responsibility for infringements of human rights worldwide through its common foreign policy, its influence on international institutions, and particularly its trade policy. Thus, the EU's agricultural subsidisation and export policies have a far-reaching effect on the range of options available to farmers in the countries of the South to feed themselves. However, these policies are never tested for compliance with human-rights criteria. Consequently, the European Union's recognition of the universality and indivisibility of human rights must be followed by steps to facilitate implementing social human rights in the Union's external relations. This involves

- Reviewing the impact of European subsidisation and export policies on the implementation of human rights in the countries of the South;
- Organising the EU's foreign policy to facilitate the implementation of social human rights;
- Publicly denouncing any infringement of human rights, social human rights included;
- Promoting the strengthening of international instruments protecting social human rights and being prepared to submit the EU's policies to review by these institutions; and
- Enhancing the influence of social human rights on globalisation and influencing the policies of international organisations accordingly.

The charter has
set a signal for
foreign policy.
The EU is assuming
responsibility for
infringements of
human rights
worldwide

Enhancing the
influence of
social human
rights on globalisation



Outlook

Inclusion of the Charter in the European Treaties

In the future, the true significance of the Charter of Fundamental Rights will be indicated by the extent to which the obligations resulting from it are taken seriously by the institutions of the EU and the governments of its member states, and initiatives are mounted to implement these rights. In this context, it is the part of trade unions, churches, and non-governmental organisations to demand that these rights be implemented, and to promote an expansive interpretation of the Charter of Fundamental Rights.

One essential prerequisite for the Charter of Fundamental Rights to fulfil its function properly is its inclusion in the European Treaties, which would make it legally binding. The demand that the Charter of Fundamental Rights together with the social human rights embedded in it should be made legally valid and actionable is significant not only because of its importance in European policy, but also because it represents a step to upgrade social human rights on the international plane. Upgrading social human rights vis-à-vis the European Union's Competition Law is a subject which civil-society organisations will have to place on the agenda of the debate about the shape of globalisation. The role played by the European Union in this process of globalisation is important. Frequently, the negative effects of European policies hit hardest at the poorest people living in the countries of the South. These people should have a voice to influence European policies, and they should be given options to do so.

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One year after its solemn proclamation at Nice, the Charter of Fundamental Rights has retired into the wings, although it only marks the beginning of the dispute about the implementation of human rights within the European Union, and about the Union's responsibility for human-rights infringements worldwide. This also holds true for social human rights, which are routinely challenged and infringed every day.

In this publication, the political programme proposed by the authors suggests what steps might have to be undertaken to strengthen social human rights on the international plane, based on the European Charter of Fundamental Rights. To this end, social human rights would have to be made actionable within the EU, European integration and globalisation would have to be shaped to conform to human-rights criteria, and the EU would have to assume responsibility for social human rights being respected, protected, and safeguarded worldwide.

***An International Human Rights Organisation Promoting
the Right to Adequate Food***

FIAN stands for Food First Information and Action Network. Founded in 1986, this human-rights organisation defends economic, social, and cultural human rights such as those laid down in the relevant UN 'social covenant'. FIAN enjoys UN advisor status and is thus in a position to influence the development of international law.

In concrete cases, FIAN will support those affected by infringements to the right of adequate food through international protest-letter and other campaigns as well as long-term case work by FIAN groups.

