

EUROPEAN PARLIAMENT



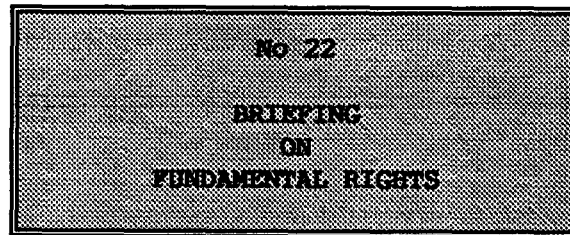
SECRETARIAT WORKING PARTY

TASK-FORCE
ON THE
" INTERGOVERNMENTAL CONFERENCE "

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These Briefings have been drafted by the Parliament Secretariat Task Force on the Intergovernmental Conference. Their purpose is to gather together, in an organized, summary form, the proposals and suggestions which the authorities in the Member States, the Union's institutions and specialist commentators have put forward on the issues likely to be on the IGC/96 agenda.

Briefings will be updated as negotiations proceed.

Already out:

- 1 The Court of Justice
- 2 The Commission
- 3 The Court of Auditors, ESC and COR
- 4 Differentiated integration
- 5 The common foreign and security policy
- 6 The role of the national parliaments
- 7 The hierarchy of Community acts
- 8 The codecision procedure
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- 10 European citizenship
- 11 WEU, security and defence
- 12 Public services
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- 14 The European Parliament
- 15 The European Council
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**BRIEFING ON
FUNDAMENTAL RIGHTS**

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**BRIEFING ON
FUNDAMENTAL RIGHTS**

I. CURRENT STATE OF COMMUNITY LAW

1. The protection of fundamental rights is enshrined in Article F(2) of the Treaty on European Union, which stipulates that:

'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

As far as the adoption and entry into force of the Maastricht Treaty are concerned, this provision marks the successful conclusion of a long process of strengthening the protection of fundamental rights and fundamental freedoms in the European Community. It gives tangible expression to the work of the Court of Justice in this field¹ by incorporating their substance in the corpus of primary Community law. It should be pointed out that this development in case law was previously consolidated by the adoption by the Council, European Parliament and Commission of the Joint Declaration of 5 April 1977² and the reference to fundamental rights incorporated in the preamble to the Single European Act³.

2. What is the significance of this provision? According to legal commentators, a distinction has to be made. The Union will admittedly be required to respect fundamental rights as defined by this provision, but only 'as general principles of Community law'. This phrase has double legal significance:

- on the one hand, 'the fact that primary law refers to fundamental freedoms does not confer on those rights the same legal value as primary law'⁴;

¹ See CJEC, 14 May 1974, Nold; Case 4/73, ECR 491
CJEC, 28 October 1975, Rutili; Case 36/75, ECR 1219

² OJ C 103, 27.4.1977

³ Which reads as follows:

'Determined to work together to promote democracy on the basis of fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice'

⁴ see D. Simon, commentary on Article F of the TEU, in: V. Constantinesco, R. Kovar and D. Simon, 'Traité sur l'Union européenne, Commentaire article par article', p. 86, No. 11

- on the other hand, in terms of legal hierarchy, Article F does not incorporate fundamental rights in a kind of constitutional law of the European Union, 'but confirms the status conferred on them by the case law of the Court of Justice, namely as unwritten sources of Community law, occupying an intermediate position between primary and secondary law'⁵.
3. Respect for fundamental rights is also an aspect of the provisions relating to the second and third pillars of the TEU. Article J.1(2) includes respect for such rights among the objectives of the CFSP and Article K.2(1) stipulates that 'the matters referred to in Article K.1 shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ...'. However, it is quite clear that the impact of these articles will remain limited so long as the provisions of these two pillars remain outside the judicial control of the Court of Justice.
 4. To come back to the 'Community pillar', it must be recognized that, although the inclusion of Article F(2) in the Treaty on European Union is a step forward, the provision itself has certain deficiencies, as illustrated by the following two examples:
 - the added reference - as a complement to the fundamental rights guaranteed by the European Convention signed in Rome on 4 November 1950 - to fundamental rights 'as they result from the constitutional traditions common to the Member States' makes it impossible to identify clearly the substance of the rights in question⁶;
 - in less technical terms, Article F(2), does not have the same symbolic value as a charter of fundamental rights⁷.
 5. These criticisms fit in with the remarks already made on the subject of the legal scope of Article F(2). Combined, they lead to the conclusion drawn by commentators that it would, in any case, have been 'desirable for the protection of fundamental rights to be the object of a genuine material and/or formal constitutionalization'⁸. This gives us an idea of the scale of the task still to be performed by those responsible for preparing the 1996 Intergovernmental Conference.

⁵ see D. Simon, commentary on Article F of the TEU, in: V. Constantinesco, R. Kovar and D. Simon, 'Traité sur l'Union européenne, Commentaire article par article', p. 86, No. 11

⁶ Institut für Europäische Politik, J. MONAR et R. BIEBER, 'Die Unionsbürgerschaft', June 1995, p. 106

⁷ Institut für Europäische Politik, J. MONAR et R. BIEBER, 'Die Unionsbürgerschaft', June 1995, p. 106

⁸ D. Simon, op cit., p. 86, No. 11

II. POSITIONS WITH A VIEW TO THE 1996 INTERGOVERNMENTAL CONFERENCE

A. POSITIONS OF THE INSTITUTIONS

1. European Parliament

- In the space of two months - January and February 1994 - Parliament adopted its position on the subject:

- in its resolution of 18 January 1994, adopted as part of the Bontempi report (A3-0421/93), it expressed its agreement that 'the Commission should receive authorization from the Council to negotiate with the Council of Europe' on arrangements for accession to the European Convention on Human Rights of 4 November 1950⁹;
- Parliament's draft Constitution of the European Union - adopted within its resolution of 10 February 1994 (Doc. A3-0064/94) - included an Article 7 which stipulated that:

'In areas where Union law applies, the Union and the Member States shall ensure respect for the rights set out in Title VIII. The Union shall respect fundamental rights as guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms, by the other applicable international instruments and as they derive from the constitutional principles shared by the Member States.'

Title VIII lists the human rights to be guaranteed by the Union.

- The resolution adopted on 17 May 1995 as part of the Bourlanges-Martin report (A4-0102/95) refers in paragraph 7 to the principle of accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, but also calls for:

'inclusion of an explicit reference in the Treaty to the principle of equal treatment irrespective of race, sex, age, handicap or religion (including mentioning the fundamental social rights of workers set out in the Charter, enlarging upon them and extending them to all citizens of the Union)'

and emphasized that:

'the Treaty should contain a clear rejection of racism, xenophobia, sexism, anti-semitism and all forms of discrimination and guarantee adequate legal protection against discrimination for all individuals resident within the EU'.

⁹ see paragraph 9

2. Commission

The Commission was at the origin of the initiatives aimed at Community accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰. It has always argued in favour of Community accession while considering that this would not be incompatible with the establishment of a specific catalogue of fundamental rights for citizens of the European Union¹¹. In its report on the operation of the TEU (SEC(95)0731 of 10 May 1995), the Commission, taking as a basis the present provisions on European citizenship, points to the need for a fundamental text summarizing the rights and duties of citizens. The passage in question, which is significant in several respects (eg. the absence of any specific reference to the European Convention on Human Rights of 4 November 1950) reads:

'The Treaty makes citizenship an evolving concept, and the Commission recommends developing it to the full. Moreover, although the task of building Europe is centred on democracy and human rights, citizens of the Union have at this stage no fundamental text which they can invoke as a summary of their rights and duties. The Commission thinks this gap should be filled, more especially since such an instrument would constitute a powerful means of promoting equal opportunities and combating racism and xenophobia'¹².

3. Court of Justice

- The Court of Justice considers the question of inserting a catalogue of fundamental rights into the Treaty as an introduction to the problem which would then arise with regard to the current wording of Article 173 of the EC Treaty:

'20. ... if a catalogue of fundamental rights were to be introduced into the text of the Treaty, the question would arise as to the mechanism for reviewing observance of those rights in legislative and administrative measures adopted in the framework of Community law.

In the exercise of its present jurisdiction, the Court already examines whether fundamental rights have been respected by the legislative and executive authorities of the Communities and by the Member States when their actions fall within the field of Community law. In doing so, it draws on the constitutional traditions common to the Member States and on the international instruments relating to the protection of human rights in which the Member States have cooperated or to which they are parties, in particular the European Convention on Human Rights. The Court would not, therefore, be taking on a new role in reviewing respect for such fundamental rights as might be provided for in the Treaty. It may be asked,

¹⁰ See 1979 Memorandum, supplement 2/79 to the EC Bulletin; and a more recent initiative through its communication SEC(90)2087 final - C3-0022/93

¹¹ Position expressed during the debate on the Bontempi Report (A3-0421/93)

¹² SEC(95)0731 final, p.4

however, whether the right to bring an action for annulment under Article 173 of the EC Treaty (and the corresponding provisions of the other treaties) which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the Institutions'.

4. Council

The Council's report on the functioning of the Treaty on European Union remains extremely cautious about 'any long-term considerations concerning possible reforms'¹³. The Council states that 'care has been taken not to anticipate the discussions of the Reflection Group'¹⁴ and, as a result, 'no value judgments are offered other than those arising from a straightforward account of the facts'¹⁵. It is therefore hardly surprising that no mention is made of the issue of fundamental rights in the report.

B. Positions of the Member States

The main feature of the positions expressed by the Member States, insofar as these have been made official, is caution: in fact, five Member States have not yet stated their views. On the other hand, clearly defined positions have been adopted in a few Member States - by governments or political parties - ranging from accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms to the simple requirement that respect for human rights at Union level should comply with European 'standards'. The positions expressed are set out below under various headings.

1. In favour of accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950

- This category includes various political bodies in the Federal Republic of Germany and the Belgian Government:

- Discussion paper by the Executive Committee of the CDU/CSU parliamentary group (page 6):

(....) a people's Europe also requires the greatest possible standardization in Community law as regards fundamental rights. Although Article F(2) of the TEU guarantees a high level of consistency in the field of fundamental rights, the European Union should formally accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'.

- Belgian Government policy note (August 95): The Government is willing to consider EU accession to the ECHR and other conventions defining fundamental rights and freedoms, including the Social Charter.

¹³ No. 5082/95, 5 April 1995, p.2

¹⁴ Ibidem

¹⁵ Ibidem

2. In favour of annexing a catalogue of human rights and fundamental freedoms to the Treaty

- This section includes the positions of the Länder of the Federal Republic of Germany, the Bundestag FDP group, Spain, Italy, the Netherlands and Belgium.
- The regional (Länder) ministers and senators responsible for European affairs are proposing in the long term 'consideration of the question of including a list of fundamental rights in European law'¹⁶.

Their basic position on this subject is as follows:

'1. Fundamental rights

The Intergovernmental Conference could, in addition to the protection of basic rights at present afforded by the European Court of Justice, combine European citizenship with a few fundamental rights already guaranteed by the EC Treaty and add to it a number of specific rights, such as the right of Union citizens to receive information from the Union Institutions. A provision against racism and xenophobia could also be incorporated in Community law. In the long term, a catalogue of fundamental rights should be incorporated in Community law at an appropriate stage in the process of further European integration.'

- The Bundestag FDP Group has called for a commitment to drawing up a European Constitution, with 'a list of European civil rights and incorporation of the principle of subsidiarity'¹⁷.
- Spain:

Spain's position is set out in the document entitled 'The 1996 Intergovernmental Conference: bases for discussion'. This document emphasizes the link between Union citizenship and fundamental rights and mentions two practical alternatives:

'either the catalogue of rights contained in the existing chapter on 'Citizenship of the Union' (Articles 8 to 8E) should be substantially extended, to include, inter alia, a specific article condemning racism and xenophobia; or there should be a charter of fundamental rights of the citizens of the Union, including, with a view to future enlargements, all the rights considered as basic in the context of the acquis communautaire, which would thus receive protection from both the Union institutions and the Member States. The concept of 'democratic principles', referred to in Article F(1) as the foundation of the Union could also be further specified for

¹⁶ 'Note on the positions of the Member States of the European Union with respect to the 1996 Intergovernmental Conference', Document by the Task-Force on the Intergovernmental Conference, European Parliament, Doc. EN\DV\272\272034, p. 12

¹⁷ Ibidem, p. 16

eventualities such as a change of régime or violation of those principles.¹⁸

- Italy:

The position upheld in the Italian Government statement of 23 February 1995 on foreign policy guidelines comes out strongly in favour of a catalogue of fundamental rights, though in more cautious terms. This position is expressed as follows:

'the Italian government proposes ... that Treaty provisions be organized according to a new technical and legal system, in order to make them more readily comprehensible to the public, and that certain essential constitutional principles be spelt out explicitly, one such being the basic rights of European citizens, which must be properly protected and subject to review by the Luxembourg Court of Justice.'¹⁹

In its statement of 23 May 1995 on the IGC, the Italian Government suggests that a full catalogue of fundamental rights and freedoms be drawn up in the context of a people's Europe. It also suggests extending the instruments for the protection and enforcement of rights before the institutions, in particular, the IGC.

- Netherlands:

The Dutch Government's position can be found in its 'Note on the enlargement of the European Union: the opportunities and obstacles', which was sent to both Chambers on 14 November 1994 and was debated in plenary on 15 February 1995. It is a cautious statement, insofar as the subject is discussed as a side issue to the question of enlargement of the European Union and is worded ambiguously. The government's position will apparently be 'guided, not only by the objective of safeguarding cultural values, but also by the democratic principles and fundamental rights set out in the Union Treaty', as well as four other aims listed in the note²⁰.

It is not clear whether this statement is referring to fundamental rights to be incorporated in the Treaty or simply those fundamental rights already included in the Treaty. These two alternatives would undoubtedly have fundamentally different implications.

- Belgium:

The government is willing to consider incorporating a list of fundamental rights and freedoms in the Treaty.

18 Ibidem, p. 44

19 see Task-Force note, op. cit., p.28

20 Ibidem, p. 31

3. A specific reference in the preamble to the new Treaty

- This is the position expressed by the Luxembourg Government, which 'would welcome a specific reference in the preamble to the new Treaty, to the protection of human rights and fundamental freedoms of European citizens, equality between men and women and the combating of racism and xenophobia' (see page 13 of the document).

4. Reference to the protection of fundamental rights, but without specifying the means of protection

- Austria

The protection of fundamental rights must meet 'European standards'. However, the means of guaranteeing this protection will need to be defined during the preparatory phase of the Conference. This is the Austrian government's basic position in the document entitled 'Leitlinien zu den voraussichtlichen Themen der Regierungskonferenz 1996'.

The document reads:

'The protection of fundamental rights and freedoms should be effectively guaranteed in accordance with European standards. The decision as to the most appropriate method for achieving this will need to be taken during preparations for the Intergovernmental Conference' (page 33, paragraph 14, 'Grund und Freiheitsrechte').

- Greece

As in the Dutch Government's statement, the Greek Government mentions fundamental rights in the context of another chapter, namely the common foreign and security policy. In the memorandum for the 1996 IGC, entitled 'Towards a citizens' Europe - Democracy and Development', respect for human rights is considered as a vital element of the 'multi-dimensional security system which the European Union must set up'. That is why any future new Member States must respect human rights in a context of constitutional democracy²¹. However, the document fails to specify what exactly is meant by 'context of constitutional democracy'.

- Finland

In its memorandum of 18 September 1995, the Finnish Government calls for protection of fundamental rights in the Union to be strengthened. This could be achieved through accession to the ECHR and the incorporation of certain fundamental rights in the Treaty (eg. the principle of equality). It would not be necessary to mention all fundamental rights, but simply to set out the principal rights in a clearer and more binding form (including a clause condemning racism and xenophobia).

²¹ Ibidem, p. 18

5. No clear position

To date, the following Member States have not expressed their views on the issue of protection of fundamental rights²². Admittedly a number of these Member States have not yet submitted any official document with a view to the 1996 Intergovernmental Conference. In some cases, statements by political leaders have appeared as 'positions with a view to the 1996 IGC'. The Member States which have not yet adopted a position on this subject are as follows:

- France (statements by political leaders - no official document);
- Ireland (White Paper on foreign policy and the 1996 Intergovernmental Conference currently being prepared);
- Portugal (no official document);
- Sweden (unlikely to adopt a position before the end of 1995);
- United Kingdom (the British Government memorandum of 2 March 1995 is limited in scope since it only refers to consideration of matters relating to European security at the 1996 Intergovernmental Conference).

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For further information on this note, please contact Mr Christos KARAMARCOS, DG II, Committee on Legal Affairs and Citizens' Rights, tel. 2051 (LUX) - 4036 (STR)

²² According to the information contained in the only currently existing summary, i.e. the Task-Force note quoted above. The document is dated 31 July 1995.