

Working Group II

Working document 15

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

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Subject: Proposals for Accession of the EU to the European Convention on Human Rights

Intervention in favour of an accession of the EC/EU to the ECHR.

(1 enclosure)

This paper - presented as a **working document** to the members of Working Group 2 - deals with one of the two main issues with which our working group is entrusted, i.e. the accession of the European Communities/European Union to the European Convention on Human Rights (ECHR)¹.

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An accession of the EC/EU to the ECHR has been advocated for over 20 years. The proposal is endorsed i. a. by the European Parliament, the European Commission, the Parliamentary Assembly of the Council of Europe, most member States of the European Union and of the Council of Europe, by the "Comité des Sages" (in its human rights agenda for the European Union for the year 2000) as well as by members of national parliaments, numerous other politicians, lawyers in member states and human rights NGO:s. The purpose of accession is not to confer general competence on the

European Union in the field of human rights, but merely to commit the EU to the human rights standards to which its member States are bound and to submit EU institutions to the same external scrutiny by the Strasbourg Court as all national authorities. An accession, as such, would not affect the current distribution of competencies between the Union and its member States.

The fundamental political and legal arguments in favour of accession remain:

- Accession would strengthen the protection of European citizens who are presently denied the right to bring applications against the institutions of the European Union before the Strasbourg Court.
- It is essential to avoid a situation in which there are alternative, competing and conflicting systems of human rights protection within the European Union and in greater Europe.
- Dual protection systems would weaken the overall protection offered and undermine legal certainty in the human rights field in Europe. Divergent catalogues would be applied by the European Court of Human Rights and the Court of Justice, each acting within its own context. The risk of divergent praxis is not just theoretical. It has already occurred and will continue to pose problems².
- Acts by some EU bodies remain outside any effective judicial control³ and yet the Strasbourg Court will continue to hold member states responsible⁴.
- The credibility of the Community in the eyes of third countries would be considerably enhanced if we were prepared to arrange for an independent body to subject respect for human rights to a critical review.
- Accession would have the advantage of enabling the Community institutions to play a full role in proceedings before the European Court of Human Rights that concern Community law.

¹ The question of the Union's legal personality is under consideration in Working group 3. This paper remains neutral on that particular issue even though the present contribution alternately uses the expressions European Community (EC) or the European Union (EU).

² Reference can be made to the question whether a person's right to respect for his or her home (Article 8 of the ECHR) covers also business premises, the precise scope of the right to remain silent and not to contribute to incriminating oneself (Article 6 of the ECHR) or to the judgments given with respect to the prohibition to disseminate in Ireland information regarding abortions lawfully carried out in the United Kingdom (Art 10 ECHR). Such differences of approach can be explained by the simple fact that one court has primarily the responsibility to ensure the efficient operation of the internal market, while the other is charged with protecting fundamental rights.

³ The Luxemburg Court is not competent to review the operational activities of Europol or other bodies set up by conventions adopted under Title VI of the EU Treaty.

⁴ See for instance *Cantoni v. France* (1996) or *T.I v. UK* (appl. 43844; 7 March 2000). NB also the pending case of *Senator Lines* (Appl. 56672/00).

- Accession would prevent the creation of new dividing lines on the European continent. The human rights acquis of the Council of Europe and the common standards defended by the member States of the Council of Europe (44 member States) and of the European Union are the same. An accession is not in contradiction with the right of the EU and its member states to offer higher levels of human rights protection in certain areas. On the other hand, a dual system of rights poses a risk not only to the fundamental principle of universality of human rights but also the inherent danger of the re-emergence of a "Europe à deux vitesses" in an area - common human rights standards - where such divisions must not exist.

- Special arrangements between the two Courts have been discussed but is not a valid option for a future with unknown developments. Accession therefore remains the most effective way to ensure the necessary coherence between the ECHR and Community law - provided that it is regulated in a manner consistent with existing Community competence.

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Many of the legal and technical problems of an accession have been considered and can be overcome⁵ but in the light of hesitations expressed against accession, the following issues seem to require particular comments, in some cases further exploration:

1. Lacking competence.

In its opinion 2/94, the ECJ stated that according to the then existing Community law the Community lacked competence to accede to the ECHR. This is till the case but in the preparations for the Nice Intergovernmental Conference Finland, supported by several other EU partners, took the initiative⁶ to propose a modification to article 303 of the Treaty on the European Community which would allow for the EC to accede to the ECHR. The proposal was and remains a quite simple amendment to article 303 as follows: "The Community shall establish all appropriate forms of cooperation with the Council of Europe. The Community shall have the competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November, 1950".

It is suggested that the working group makes a recommendation to this effect in its report to the plenary.

2. Threat to the Community legal order.

The most frequent argument against accession is that it would threaten the autonomy of the Community legal order. The answer to that argument is the following: Community law as such is not opposed to the integration of the European Community into a treaty-based judicial mechanism.

⁵ See in this respect report by a working group of the Steering Committee on Human Rights of the Council of Europe (CDDH), doc GT-DH-EU (2002), approved by the CDDH at its 53rd meeting and subsequently approved by the Committee of Ministers at its meeting on 11 July 2002.

⁶ See doc no. CONFER 4775/00). Alternatively the accession should be made by the European Union if and when it gains legal personality.

The EC is already Party to Council of Europe "partial agreements" and conventions⁷. The European Union could make a general declaration of competence similar to the one made in respect of the UN Convention on the Law of the Sea⁸. The EC has agreed to submit the Community legal order to the compulsory dispute resolution mechanism of the WTO. Prominent representatives of EU institutions agree that there are other international conventions to which the European Union may well have reason to accede in the future. In this context one could also note that the EU urges third states to accept the Rome Statute of the International Criminal Court. Therefore, in the central sphere of human rights one cannot continue to argue that the Community legal order should remain exempt from external control.

It is suggested that these arguments be retained in the report of the working group concerning the issue of accession.

3. Uncertainty regarding ensuing obligations.

Yet another argument is that it is not quite clear what the accession entails as far as obligations for the European Union are concerned. As a starting point, it should be noted that the scope of EU accession would be limited to areas in respect of which the Union already has competence under the EU treaties.

For the sake of legal certainty, it could be stipulated in the accession treaty that the Convention and its protocols will be binding upon the European Union only in those areas in which it is competent. Such a treaty could also contain a provision enabling the ECJ to be consulted by the European Court of Human Rights in matters where questions of competence arise. As mentioned above the European Union could therefore make a general declaration of competence similar to the one made in respect of the UN Convention on the Law of the Sea. Alternatively, the EC/EU could also deal with this particular question in the form of an appropriately phrased reservation.

⁷ Per 20 January 2002 – the EC was a party to 7 Conventions of the Council of Europe, mainly in the medical/pharmaceutical and animal protection fields: ETS 26, 33, 39, 84, 87, 104, 123 as well as to Partial Agreements such as the European Pharmacopea and EURIMAGES. In addition, other CoE conventions have been drafted or modified to allow for EC accession if such was deemed appropriate.

⁸ This suggestion was made by Mr Petite, Director General of the Legal Service of the Commission, during his hearing before the Working Party, working document no. 13 of 2 August 2002, page 52.

It is suggested that also these arguments be retained in the report of the working group concerning the issue of accession.

4. An uneven application of the ECHR.

Reference has also been made to the fact that an "uneven application" of the Convention might result from the fact that the current members of the European Union have not ratified all ECHR protocols equally and that individual member States have made various reservations to the ECHR and its protocols. Regarding the ECHR protocols, the actual differences in ratification between the current EU members are not that great. All current EU member States have ratified Protocols Nos. 1 and 6 to the ECHR. Protocols Nos. 4 and 7 have been ratified by 12 and 9 EU member States respectively. Protocols No. 12 and 13 have only been opened for signature in 2000 and 2002 respectively and are therefore not yet largely ratified. A more detailed information is given in the attached tables. In this context, attention must also be paid and solutions found to such issues as the right of derogation and the "margin of appreciation" currently ensured to States Parties to the ECHR through the Convention and by the caselaw of the Court in Strasbourg.

It is suggested that also these arguments be retained in the report of the working group.

5. Requirements regarding remedies.

Attention has been directed to Art 13 of the ECHR which obliges parties to the convention to provide everyone - whose rights and freedoms as set forth in the Convention have been violated - with an effective remedy before a national authority. This is an area which requires attention. There may be a need for improvements in judicial protection within the EU. In a recent case, the ECJ has confirmed that it is possible to envisage a system of judicial review of legality of Community measures of general application different from that established by the founding Treaty. But the Court held that it is for the Member states, if necessary, to reform the system currently in force⁹.

6. An accession would be too complicated from a treaty point of view.

Some argue that an accession is also too complicated and cumbersome from the point of view of treaty law and that an amending Protocol to the ECHR must be ratified by all Council of Europe member States. The Council of Europe has suggested that instead of concluding an amending protocol between the current States Parties to the ECHR, it could be envisaged to prepare an accession treaty between all States Parties to the ECHR and the EC/EU. Such a procedure is already used within the European Union for the admission of new member States. Article 49 paragraph 2 of the EU Treaty provides that the conditions of admission and the adjustments to the

⁹ See in this respect: *Unión de Pequeños Agricultores v. Council*, case C-50/00P, § 45.

EU Treaties “shall be the subject of an agreement between the member States and the applicant State”.

It is suggested that this solution is also retained among the recommendations from the working group.

Enclosure.

The protocols, like the Convention itself, guarantee minimum standards which largely coincide with universal standards laid down in the International Covenant on Civil and Political Rights, to which all EU member States are Parties. Several rights guaranteed by the ECHR protocols have directly influenced the wording of corresponding articles contained in the EU Charter of Fundamental Rights.

An accession to the ECHR protocols could be gradual, starting with the Convention and Protocols No. 1 and 6, which have been ratified by all EU member States. As in the case of the Convention itself, the EU would accede to the protocols only to the extent of its existing competencies. The legal situation of member States which have not ratified a particular protocol would therefore remain unaffected in so far as their national law and practice are concerned.

In this context one should also observe reservations made by EU member States with respect to individual provisions of the Convention and its protocols concerning areas which are currently not within EU competence, such as administrative judicial procedure (Austria, Finland), legal aid (Ireland) or the legal status of members of the national armed forces (France, Portugal and Spain). However, these reservations would continue to apply with respect to national law and practice even if the EC/EU were to ratify the Convention without any reservations. Even if EU competencies were to extend, at a later stage, to areas such as armed forces, the EU would only be bound with respect to armed forces that would be under EU command and control. National armed forces would continue to be governed by national regulations, and these States' obligations under the ECHR in this respect would continue to be circumscribed by the reservations made. It would therefore seem appropriate to limit reservations by the EC/EU in the event of accession to matters specific to the EC/EU¹⁰.

¹⁰ This was the position taken by the Commission back in 1979, see the Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 April 1979, EC Bulletin Supplement 2/79, § 29.

CHARTS OF SIGNATURES AND RATIFICATIONS OF THE E.C.H.R. ⁽¹¹⁾
AND OF ITS PROTOCOLS ⁽¹²⁾

(Status as of 27 August 2002)

I. States members of the European Union :

| | ECHR | Prot. 1 | Prot. 4 | Prot. 6 | Prot. 7 | Prot. 12 | Prot. 13 |
|--------------------------|-------------|----------------|----------------|----------------|----------------|-----------------|-----------------|
| STATES : | | | | | | | |
| I. <u>Austria</u> | R | R | R | R | R | S | S |
| Belgium | R | R | R | R | - | S | S |
| Denmark | R | R | R | R | R | - | S |
| Finland | R | R | R | R | R | S | S |
| France | R | R | R | R | R | - | S |
| Germany | R | R | R | R | S | S | S |
| Greece | R | R | - | R | R | S | S |
| Ireland | R | R | R | R | R | S | R |

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

¹² Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 9)
Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (ETS No. 46)
Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (ETS No. 114)
Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117)
Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177)

Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the abolition of the death penalty in all circumstances (ETS No. 187)

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|-----------------------|---|---|---|---|---|---|---|
| Italy | R | R | R | R | R | S | S |
| Luxembourg | R | R | R | R | R | S | S |
| Netherlands | R | R | R | R | S | S | S |
| Portugal | R | R | R | R | S | S | S |
| Spain | R | R | S | R | S | - | S |
| Sweden | R | R | R | R | R | - | S |
| United Kingdom | R | R | S | R | - | - | S |

II. States candidates to the European Union membership:

| | ECHR | Prot. 1 | Prot. 4 | Prot. 6 | Prot. 7 | Prot. 12 | Prot. 13 |
|----------------------------|-------------|----------------|----------------|----------------|----------------|-----------------|-----------------|
| STATES : | | | | | | | |
| II. <u>Bulgaria</u> | R | R | R | R | R | - | - |
| Cyprus | R | R | R | R | R | R | S |
| Czech Republic | R | R | R | R | R | S | S |
| Estonia | R | R | R | R | R | S | S |
| Hungary | R | R | R | R | R | S | S |
| Latvia | R | R | R | R | R | S | S |
| Lithuania | R | R | R | R | R | - | S |
| Malta | R | R | R | R | - | - | R |
| Poland | R | R | R | R | S | - | S |
| Romania | R | R | R | R | R | S | S |
| Slovakia | R | R | R | R | R | S | S |
| Slovenia | R | R | R | R | R | S | S |
| Turkey | R | R | S | - | S | S | - |

(R = Ratification ; S = Signature; - = No action)