

Working Group II

Working document 18

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

Working document by Mr Esko Helle, supported by Mr Vytenis Andriukaitis and Mr Neil MacCormick.

Subject: Accession by the European Union to the European Convention on Human Rights

1 Introduction

1. Along the lines of the Laeken Declaration, the Convention is expected to consider the question whether the European Union ¹ should accede to the European Convention on Human Rights (hereafter "ECHR"). Technically, the question is whether the new basic treaty should contain a specific power-conferring provision (legal basis) authorising the accession by the Union to the ECHR. For the moment, the Union's founding Treaties do not contain such a legal basis and, the Court of Justice has held, the Union has no competence to accede to the ECHR. ²
2. By now, it is clear that an accession to the ECHR by the Union would not be an alternative to the granting of a legal status to the EU Charter of Fundamental Rights. These two initiatives pursue the same objective – the protection of human/fundamental rights – but with different means and functions and, hence, are to be regarded as complementary. ³

¹ The use of the term "Union" hereafter is in no way intended to prejudge the question whether it was the Union or the Community that acceded to the ECHR – a question that depends on, *inter alia*, whether the Union will be attributed single legal personality.

² See Opinion 2/94 [1996] ECR I-1759.

³ See CONV 116/02 p. 17 and the references therein.

3. The arguments for the accession by the Union to the European Convention are so well known that they hardly need to be repeated in detail. Suffice it to recall that the Union is taking over more and more legislative and other functions from the Member States who are all Contracting Parties to the ECHR concluded in 1950. In order to maintain the significance of the ECHR, it is therefore indispensable, from the point of view of the citizen in particular, that the Union accedes to the Convention.
4. The accession has however been purported to involve certain problems which concern, on the one hand, the position of the Union legal order and, on the other, the relationship between the Union and the Member States. These are, in particular, the effects of the accession upon the autonomy of Union law; the distribution of competence between the Union and the Member States; and the differences in the degree to which the Member States have signed up to the Protocols of the ECHR and/or made reservations to the Convention.
5. The purpose of this initiative is to express our support for the accession by the Union to the ECHR and to propose a text of a new legal basis to that effect. We will also briefly seek to show why we consider that the above mentioned problems relating to accession are more apparent than real – or, at least, not insuperable.

2. The Autonomy of Union Law

6. The claim that the Union's accession to the ECHR would adversely affect the autonomy of Union law is mainly based on the argument that, under the ECHR, the European Court of Justice would lose its monopoly to rule on the validity and interpretation of Union law. The Court of Justice would, the argument is, also lose its role as the sole arbiter in disputes amongst the Member States and between the Member States and the institutions.
7. We do not find these arguments convincing. In the first place, the relationship between the Court of Human Rights and the courts of the Contracting Parties to the ECHR may not be described as a hierarchical one: the Human Rights Court has no power to rule on the validity or interpretation of the laws of the Contracting Parties but can only establish violations of the Convention.⁴ In any case, the European Court of Justice has acknowledged that the Union's competence in the field of international relations necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.⁵ The European Court of Human Rights would by no means be the only international judicial body the decisions of which are binding on the Union and its institutions including the Court of Justice.⁶ In fact, the Human Rights Court, too, already now increasingly often rules, directly or indirectly, on acts of the Union. However, in the present situation where the Union is not party to the ECHR, there is a risk that the Union's institutions are not in a position to defend their actions before the Court, and it is the Member States that are being held responsible for acts or omissions on which they had little if any influence.⁷

⁴ Cf., *ibid.*, p. 20.

⁵ Opinion 1/91 [1991] I-6079, para. 40.

⁶ Currently such bodies exist under e.g. the WTO Agreement and the UN Convention on the Law of the Sea.

⁷ See CONV 116/02 p. 21 and the cases mentioned therein, and also the intervention of Michel Petite, WG II, WD 13, p. 51-52.

3. The Distribution of Competence between the Union and the Member States

8. It has been argued that accession by the Union to the ECHR would give rise to a shift of competence from the Member States to the Union in the field of fundamental human rights, in particular, as a result of the positive obligations deriving from the European Convention.
9. Again, we do not share this view. First, the obligations under the ECHR are predominantly *obligations to respect* the rights contained in the Convention and, thus, by nature entail restrictions on the exercise of competence by the Contracting Parties rather than positive obligations requiring them to take certain measures. Thus, in the event of accession to the Convention by the Union too, the status as a Contracting Party does not automatically imply any general competence in the field of fundamental human rights.
10. While it is true that complying with the obligations laid down by the ECHR may in *some circumstances* require positive action and, by implication, the requisite competence, the latter is inextricably linked to the substantive competence possessed by the entity in question. Human rights can be described as "horizontal" provisions that do not easily fit in the traditional division of competence according to the specific policy area. They are rights and principles that have to be taken account of in any field of law by the legislator as well as by the courts and administration. It is therefore clear that any positive obligations that might derive from the ECHR would only become relevant in cases where the Union already had the competence to act under some substantive provision of the Treaty. This means that the respective obligations of the Union and the Member States to exercise competence pursuant to the ECHR do not imply any zero-sum game in respect of the division of competence. In other words, both the Union and the Member States would be under an obligation to carry out the necessary measures under the Convention within their respective spheres of competence. The logic is analogous to that in Article 51.1., second sentence, of the EU Charter of Fundamental Rights.⁸
11. Furthermore, the European Union has already committed itself to respecting human rights – and the ECHR, in particular – as general principles of Union law. It is therefore plausible to suggest that accession to the ECHR would not entail any new obligations for the Union but only modify the nature of that commitment. This is, for the reasons stated above, equally true with the claim that the accession might change the distribution of competence between the Union and the Member States. An express provision to that effect might even be included in the legal basis conferring competence upon the Union to accede to the ECHR, along the lines of Article 51.2 of the EU Charter of Fundamental Rights.⁹

⁸ "They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

⁹ Art. 51.2. "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

4. The Legal Basis for the Accession of the European Union to the ECHR

12. In the light of the above considerations, we propose that the following provision would be included, at an appropriate location, in the new basic treaty:

Article ?

The Union shall seek to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950¹⁰, in accordance with the procedures set out in [the current Article 300 EC]¹¹. Accession to the Convention shall in no way modify the powers and tasks of the Union as defined by this Treaty.

5. Questions to be Addressed in Negotiations on Accession

13. There are also other legal questions which relate to the accession by the Union to the ECHR. These do not however pertain to the reform of the EU Treaties but to the amendment of the ECHR to cater for the Union's accession¹², and may therefore only be solved in the eventual negotiations on the accession. At that stage there, of course, needs to be a consensus among the Member States on the choice of various options that are available. Such questions include:
- to which Protocols of the Convention the Union should accede to and whether it should make reservations to the Convention or the Protocols;
 - the modalities of accession, e.g., whether the accession should be carried out by an amending protocol or an accession treaty;
 - the modalities of participation by the Union in the decision-making structures of the Convention, e.g., the representation of the EU in the Committee of Ministers, status and participation in the European Court of Human Rights of an EU judge;
 - the standing of the Union in proceedings before the European Court of Human Rights; the more specific technical implications for the procedure in the European Court of Justice

¹⁰ Another option to be considered would be the Union should be given competence to accede, in general, to international agreements for the protection and promotion of human rights, as proposed by Mr. Jacob Söderman, European Ombudsman in CONV 221/02 CONTRIB 76.

¹¹ A specific procedure reflecting the paramount importance and particular nature of the commitment to protect human rights should be added to Art. 300 EC. Another option would be to lay down the procedure in the provision authorising the accession.

¹² Since the ECHR is currently only open to accession by States, it is clear that the Convention would have to be amended upon the accession by the Union. See especially the Activity Report by the Working Group on the Legal and Technical Issues of a Possible EC/EU Accession to the European Convention on Human Rights, doc. GT-DH-EU (2002) 012, approved by the Steering Committee for Human Rights (CDDH) of the Council of Europe.