



TEPSA BRIEF

Obstacles to overcome in EU's accession to the European Convention of Human Rights

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The entry into force of the Lisbon Treaty entailed many evolutions for the EU's functioning, both politically and legally. As much as any other field, this is the case for Human Rights, where despite the failure of the European Constitutional Treaty, major steps have been taken in the definition of the EU as a community of rights. This can be seen most notably through the establishment of a legally binding EU Charter of Fundamental Rights now present in Article 6 TEU. Yet along with this, the treaty commits the EU to accede to the European Convention of Human Rights (ECHR) – as stipulated in Article 6(2). This evolution is the result of a long process that started in the 1970's reaching its conclusion only now, with the entry into force of the Treaty of Lisbon. However, while there is a political consensus concerning the necessity of the accession, numerous legal, institutional and technical challenges need to be clarified.

A start-up phase of thirty years

- ▶ 17th of March 2010: the European Commission proposed its directives for the negotiation process.
- ▶ 10th of May: the EP published a report on the institutional aspects of the accession.
- ▶ 26th of May: the Committee of Ministers of the Council of Europe gave an occasional mandate to its director committee of Human Rights to elaborate with the EU a legal instrument for accession.
- ▶ 4th of June: EU Member States Ministers of Justice gave an official mandate to the European Commission to conduct the negotiations.
- ▶ 7th of July: the official negotiations between the Council of Europe and the EU starts, symbolized by the meeting between General Secretary of the Council of Europe Thorbjørn Jagland and Vice President of the European Commission and Commissioner for Human Rights Viviane Reding.

Now the EU draws close to accession, it enters the final phase of a process that began in 1979 when a memorandum for the accession of the European Community to the European Court of Human Rights (ECtHR) was published by the European Commission. By 1982, and again in 1984, the European Parliament had asked the Commission to start formal negotiations on the accession. Yet, only in 1990, forty years after the signature of the ECHR, the European Commission sent a communication to the Council of Ministers requesting a mandate to negotiate the technicalities of accession. This request itself ultimately was unheeded for another three years until 1993 when an ad hoc group was created to deal with this question. Despite this move, no consensus was achieved regarding two main issues: the competence of the European Community to accede to the Convention and the respect of the principle of autonomy of the EU's legal order. On the first point, the European Court of Justice stated in its opinion 1/94, published in March 1996, that the accession was not compatible to the Treaty establishing European Community. It was mentioned that, as the constitutional changes would be too significant, such

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a process would demand the modification of the Treaty itself. However, neither the Amsterdam Treaty nor the Nice Treaty brought these modifications. The article was included in the Constitutional Treaty and later in the Lisbon Treaty where the latter's ratification has given the legal mandate required to conclude the accession process.

Article 6(2) of the Lisbon Treaty states that "the EU shall accede" to the European Convention on Human Rights. Not only does this mean that the EU has the competence to accede, but also that it is obliged to do so since the use of the imperative makes accession unavoidable. At the same time, the EU accession is foreseen by Article 59 of the European Convention on Human Rights as amended by Protocol 14. Thus, the accession is also made possible thanks to the delayed entry into force of Protocol 14 adopted in 2004 on reforms of the Court's procedure and the effectiveness of the European Court of Human Rights, that entered into force on June 2010 after the signature of the Russian Parliament.

At this point, with the principal question resolved, there are still other outstanding issues. Indeed, some institutional modifications have to be made in order to make accession possible from a judicial and technical point of view. According to Article 218 TFEU and Article 101 of the explicative report joint to the Protocol 14, it is necessary to frame an Accession Agreement that will be concluded between the members of the Convention. At EU level, the agreement will have to be negotiated, approved by the European Parliament, adopted with unanimity within the Council of Ministers and finally ratified by all the EU Member States according to their own constitutional procedures. Once this procedure is complete, it will have to be ratified by the twenty additional Member States of the Council of Europe.

The necessity of accession

It could seem paradoxical that the accession will be achieved only now when, with the entry into force of the Lisbon Treaty, the protection of Human Rights at EU level is stronger than the one afforded by the Convention. However, neither the progress made by case law, nor the broadening of the EU competences or the binding force of EU's Charter of Fundamental Rights, would constitute arguments against the EU accession to ECHR, since the two levels of protection are not alternative but complementary. There are three main reasons that explain why the accession is indeed necessary.

First of all, the EU accession to ECHR constitutes a very important step, both politically and symbolically. It is a strong signal from the EU to reaffirm its involvement in the protection of Human Rights inside as well as outside its borders. In this sense, it is a signal addressed both to EU citizens as well as the International community. Indeed as Viviane Reding pointed out "accession will guarantee that any person claiming to be a victim of a violation of the Convention by an institution or body of the Union can bring a complaint against the Union before the Strasbourg Court." Moreover, it can be said that by submitting itself to external control in the field of Human Rights protection, the accession will reinforce the EU's legitimacy and its credibility in the field of Human Rights protection: a necessary move, especially when one looks at the political conditionality the EU imposes to its partners.

Secondly, despite the evolution of its case law, and the broadening of the EU competences, there are still important deficiencies in terms of Human Right protection at EU level. For instance in the Area of Freedom, Security and Justice, the competences of the European Court of Justice have not been extended to verifying the validity and proportionality of actions taken by law enforcement services. In a similar fashion, the ECJ does not have the competence to give its opinion concerning the means by which Member States ensure public order, safety and internal security. Furthermore, concerning the CFSP, according to Article 275 TFEU, the ECJ is precluded from expressing its opinion regarding the respect of fundamental rights in the framework of the



EU's external action. This means for instance that the ECJ has no competences to give an opinion concerning the respect of fundamental rights in the framework of a peace keeping mission in which the EU could take part. However the ECtHR is applicable to all questions concerning members of the Convention. The consequence is that the ECJ could be in the position to pronounce itself on EU external action. Thus, the accession significantly broadens the field of the jurisdictional control concerning the Fundamental Rights.

Finally, the EU accession to ECHR is a crucial element in order to ensure the coherence of the European system of protection of Human Rights. Notably, it will avoid risks of divergence and contradiction within case law where, despite significant cooperation, differing interpretations still produce discrepancies between the two legal frameworks. This is even more the case after the newly binding character of the EU's Charter of Fundamental Rights with the Lisbon Treaty. The Charter is more modern and complete than the Convention due to the fact that it deals with issues that were unknown fifty or sixty years ago. The EU accession to ECHR will therefore ensure that a complementary relationship, rather than one of competition, will prevail between the two courts. In the end, it will avoid the possibility that the ECtHR renders a judgment only against a Member State where a human rights violation stems from an act of Union law.² Indeed, the EU accession to ECHR will end the abnormal situation in which there is a divergence in treatment that exists between the Member States and the EU.

Obstacles still to overcome

Despite its necessity, the EU accession to ECHR has raised a lot of legal, institutional and technical questions that have to be resolved in the current negotiations. The challenge is to take into account fully the specificities of the EU. The first of these challenges relates to the possibility of the accession in the respect of the autonomy of the EU legal order. Two main aspects have to be highlighted: the issue of the competencies and the interpretative autonomy of the EU law.

In Article 6(2) TEU, as well as Article 2 of Protocol 8 attached to the Treaty of Lisbon, it is mentioned that the accession "shall not modify the EU competencies" as defined by the Treaties. These statements reveal the concern that the European Court of Human Rights could express itself on the distribution of competencies between EU and Member States. In reality, it could be sometimes difficult, especially for an individual, to know whether the EU or the Member States is responsible in case of a breach in Human Rights. It is even more complicated if we take into account that sometimes the transposition of EU law in national law can be done within a margin afforded to the Member States. In order to avoid unclarity, there seems to be a consensus on the necessity to create a mechanism that takes into account the co-responsibility of the EU and the Member States. A "co-defendant mechanism" allowing the joint participation of the EU and the Member States in the procedure, is already foreseen in Law of the Sea Convention. Such a mechanism would allow the EU to join as co-respondent in cases brought against Member States.

Another important issue is the preservation of the monopoly of the ECJ in the interpretation of the EU Treaties. For now, it seems possible that the European Court of Human Rights might have to interpret EC law in order to determine its conformity with the Convention in cases where there is no interpretation given by the ECJ before the case arrives in Strasbourg. On this particular point, the ECJ calls for a mechanism that would be able to ensure that the question of the validity of a Union act can be brought effectively before the ECJ before the ECtHR rules on the compatibility of that act with the Convention. An example of what such a mechanism could look like has been developed by former ECJ judge Christiaan Timmermans. He has suggested

² see ECHR, case *Bosphorus Airways c. Ireland* req. n° 45036/98, 30.06.2005.



that the European Commission could ask the ECJ to rule on the compatibility of an EU act with the Fundamental Rights when a complaint has not been rejected by Strasbourg. However, this somewhat severe mechanism could prove unnecessary taking into account already established procedures under the preliminary rulings system, and the fact that, in any case, the European Court of Human Rights does not wish to substitute national or EU level courts by giving an interpretation of national or EU law. As some scholars have pointed out, in the field of international relations, national interpretation of the law is only a fact. Therefore, the European Court of Human Rights can only pronounce itself on the compatibility of the law with the Convention, an obligation that has been recalled in the conclusions of the Interlaken conference.

In term of institutional issues, the question of the participation of the EU in the system of control of Strasbourg will necessitate some arrangements. Three main issues have to be highlighted. First, as is the case for other parties of the Convention, the EU will have to elect a judge that will take part in the activities of the European Court of Human Rights. There appears to be a consensus on this point. Like other judges from the ECtHR, the EU judge will be independent and will guarantee the representation of the particular culture of EU law within the Court. Moreover, the Strasbourg judges are normally elected by the Parliamentary Assembly of the Council of Europe after having been nominated at national level. The first list of the three main judges could be jointly presented by the European Council and the European Parliament, where some MEPs could join the PACE for the final election. Last, but not least, the EU has to be represented in the Committee of Ministers of the Council of Europe which is in charge of the execution of the decisions made by the Court. The EU could be represented by the European Commission and, in order to counter the reticence from non-EU parties, the latter could have a consultant role concerning the affairs for which it is not directly concerned.

Finally, the question of the accession of the EU to the additional protocols is to be discussed. While the Lisbon Treaty only refers to the ECHR, the Convention has been enriched over the years by a number of additional protocols. Yet, not all protocols are necessarily ratified by all the contracting parties of the Convention nor by all the EU Member States. Thus, the fear has been expressed by certain EU Member States that the EU could accede to additional protocols they did not ratify. However, this fear supposes an analogy which is not necessary. If the EU signs protocols that are not signed by all the EU Member States, they will only be bound to the extent that they apply the EU law. Moreover, for the EU not to sign some of the protocols would signify a regression in comparison with the rights that are protected by EU's Charter of Fundamental Rights. In order to avoid this gap, the best solution would be that the EU accedes to all Protocols referring to the rights guaranteed by the ECHR. This solution has been supported by the European Parliament and the European Commission.

The outcome of the negotiations

All the technicalities covered are currently being discussed and negotiated. The timetable for the negotiation was originally fixed to one year, but, given the complexity of the issues, there is little chance that this deadline will be respected. Moreover, the outcome of the negotiations will probably be subject to an opinion from the European Court of Justice in application to the Article 218(11) TFEU according to which a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice to verify whether an envisaged agreement is compatible with the Treaties. If the opinion of the Court is adverse, the envisaged agreement may not enter into force unless it is amended or the Treaties are revised. Some Member States already expressed their wish to ask an opinion of the ECJ which could prolong the accession period.

Taking into account that the EU specificities have to be respected, the best and simplest solution would lie in assimilation of the EU as any other contracting party. All the arguments according



to which the EU does not have to be treated in the same way as other parties simply because it is not a state have no value here as the effect of EU law is the same as that of a state. The future results of the negotiations and the choices made will have to be analyzed. The negotiations will shed light on the process through which the EU is to be represented in an international system as a new legal entity, and analysis will provide valuable insights into the nature of future evolutions in this area.

Find out more:

- ▶ Council of Europe's website. "EU accession to the European Convention on Human Rights", updated in September 2010.
http://www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp
- ▶ European Parliament's Report on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2009/2241(INI)). May 2010
<http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=A7-0144/2010>
- ▶ Speech. Viviane Reding Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship Next steps for Justice, Fundamental Rights and Citizenship in the EU European Policy Centre Briefing Brussels, 18 March 2010, Brussels
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/108&format=HTML&aged=0&language=EN&guiLanguage=en>
- ▶ Discussion of the Court of Justice of the European Union on certain aspects of the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Rights, 05.05.2010
http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf
- ▶ Christiaan Timmermans, Former Judge for the European Court of Justice. Audition organized by the European Parliament's Committee on Constitutional Affairs, Brussels, 18 March 2010
<http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71235/20100324ATT71235EN.pdf>
- ▶ EuroNews, Interview with Jean Paul Costa, 29.10.2010
<http://www.euronews.net/2010/10/29/human-rights-judging-the-top-judge/>
- ▶ Olivier De Schutter « L'adhésion de l'UE à la Convention européenne des droits de l'homme : feuille de route des négociations », Faculté de droit de l'université catholique de Louvain, 10 April 2010
<http://www.europarl.europa.eu/document/activities/cont/201004/20100427ATT73610/20100427ATT73610FR.pdf>
- ▶ Jean Paul Jacqué, « L'adhésion de l'UE à la Convention européenne des droits de l'homme, note à l'attention de la Commission institutionnelle en vue de l'audition du 18 mars 2010 ».
[http://www.aedh.eu/plugins/fckeditor/userfiles/file/D%C3%A9mocratie%20et%20citoyennet%C3%A9/UE-CEDH%20JP%20Jacqu%C3%A9%20\(mars%202010\).pdf](http://www.aedh.eu/plugins/fckeditor/userfiles/file/D%C3%A9mocratie%20et%20citoyennet%C3%A9/UE-CEDH%20JP%20Jacqu%C3%A9%20(mars%202010).pdf)

