

Accession of the European Union to the European Convention on Human Rights

by Simone White

Accession of the European Union (EU) to the Council of Europe European Convention on Human Rights and Fundamental Freedoms (ECHR) will bestow many benefits and will also open up the way for closer cooperation between the two supra-national agencies. To explore this, on 16 May 2011 a one-day conference entitled “It takes two to tango: the Council of Europe and the European Union” took place at the Institute of Advanced Legal Studies. Its general theme was the rapprochement between the European Union and the Council of Europe, and in particular the EU accession to ECHR, the EU accession to the Group of States Against Corruption (GRECO) and closer cooperation in the area of money laundering (EU and MONEYVAL, also taking into account the efforts of the Financial Action Task Forces). The proceeds of this seminar are due to be published by JUSTICE in December 2011, in a special issue. The purpose of this introduction is to recall the historical development of the relationship between the EU and ECHR.

Three periods can be distinguished in the EU/ECHR relationship, and these are outlined in part one of this paper. In the first period, starting in the 1950s, the ECHR and the EU were two totally distinct systems. In the second period, from the 1970s onward, Convention rights began to be recognised as a general principle of EC/EU law and the case began to be made for accession. Finally, in the third stage, as a result of EU political union, EU accession to ECHR was actively sought, culminating in the adoption of Article 6 of the Treaty of Lisbon. Part two of this paper focuses on this third stage, looking at some of the legal and technical issues that have arisen. What makes this development exciting is the political impetus behind it – making it possible to resolve complex issues of law and cooperation within the European space. This could be a useful blueprint for the future of cooperation between organisations in other regions of the world.



(l to r) Wolfgang Rau, Executive Secretary, GRECO, Council of Europe; Lord Tomlinson (chair); Livia Stoica Becht, MONEYVAL, Council of Europe; Dr Vasil Kirov, Head of Unit Investigations at OLAF (European Anti-Fraud Office) and previously chairman of MONEYVAL.

The other speakers at the seminar were: Dr Simone White, OLAF and Hon Research Fellow at the Institute of Advanced Legal Studies, University of London (conference organiser); Caroline Ten Dam, Legal Service, European Commission; and Dr Tobias Lock, DADD-Clifford Chance Lecturer in German law, University College London.

PART 1: FROM BENIGN NEGLECT TO MAKING THE CASE FOR ACCESSION

Stage 1: ECHR and EU as completely separate legal spheres

In 1951, 21 countries formed the Council of Europe and ratified the European Convention on human rights, promising to protect basic human rights and fundamental freedoms. The same year, six of those countries (the Netherlands, Belgium, Luxembourg, France, Germany and Italy) signed the Treaty of Paris creating the Economic Steel and Coal Community (ECSC). In 1957 those same six countries signed two further treaties in Rome, creating the European Atomic Committee (EURATOM) and the European Economic Community (EEC).

The three EC treaties contained no express provisions concerning the protection of human rights in the conduct of Community affairs. It is true that some articles of the EEC Treaty touched upon some aspects of human rights. Article 7 EEC dealt with freedom from discrimination on the basis of nationality in relation to the free movement of workers, and Article 119 EEC dealt with freedom from discrimination in the workplace. However both these articles dealt with rights in the economic sphere and not general rights. These economic rights overlap with general human rights (see Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337).

At the early stage, the EC was seen as a legal system having little to do with human rights; it was sufficient for the Member States to be party to ECHR. This was to change gradually, as we shall see.

Stage 2: Convention rights as a general principle of EC law

Initially, the European Court of Justice (ECJ) was reluctant to acknowledge certain ECHR rights as part of the EC legal order (Case 1/58 *Stork v High Authority* [1959] ECR 17; Cases 36, 37,38 and 40/59 *Geitling v High Authority* [1960] ECR 423; Case 40/64 *Sgarlatta and others v Commission* [1965] ECR 215). However things began to change with the *Stauder* case in 1969 (Case C29/69 *Stauder v City of Ulm* [1969] ECR 419). In 1970, respect for fundamental rights as such was recognised by the then European Court of Justice as forming “an integral part of the general principles of law protected by the Court of Justice.” In Case 4/73 *Nold v Commission* [1974] ECR 491, the court added that the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework and objectives of the Community. This was a clear recognition that fundamental rights had a role to play in the EC legal order.

At this stage, therefore, there was only indirect and potentially limiting reference by the ECJ to ECHR. It soon became clear that the ECJ could adopt interpretations that did not coincide exactly with that given by the Strasbourg

court – a major drawback in this “general principle” doctrine. In *Wachauf* (1989), the ECJ ruled that the requirements of the protection of fundamental rights in the Community legal order are also binding on the Member States when they implement Community rules. The ECJ later ruled that if national authorities restrict one of the fundamental freedoms under the EEC Treaty, the restriction should comply *inter alia* with the provisions of ECHR. We can see that from the 1970s onwards, the ECJ was in a difficult position. It could not ignore ECHR but it risked being criticised if it gave a restrictive interpretation of the Convention, especially in respect of a ruling directed at a Community institution. On the other hand, were it to give an extensive ruling in response to a request for a preliminary ruling, it might force the national courts to apply a higher standard than that to which they are bound on the basis of their direct obligations under the ECHR. In any case, Member States might have to follow an ECJ judgment which is at variance with ECHR. Another nagging issue was that anyone dissatisfied with the interpretation of human rights by the ECJ did not have access to the European Court of Human Rights (ECtHR), a situation that still continues today.

In the 1990s the ECtHR developed the doctrine of equivalent protection, which presumes that the EU legal order provides protection which is equivalent to that of the ECHR and considers claims against the EU inadmissible (*Bosphorus Hava Yollari Turizm v Ireland*; Appl no 45036/98, ECHR, 30 June 2005). At the same time, the ECtHR maintained the principle that Member States remain responsible for the activities of an international organisation, whether it has a separate legal personality making it responsible for violations or not.

The scope of application of the principle of equivalent protection was clarified in *Bosphorus*. By “equivalent protection” the ECHR meant “comparable”, not “identical” protection. For the purposes of evaluation, the ECtHR would take into consideration both the substantive guarantees offered and the mechanisms controlling their observance. In *Bosphorus*, the ECtHR did not find any manifest deficiencies to the protection of the applicant’s rights and the application was found inadmissible, which was viewed by one author as a “missed opportunity to establish a clear, coherent and uncompromising approach to the protection of human rights within the Community legal order” (see Peers, S (2006), “Limited responsibility of European Union Member States for actions within the scope of Community law, judgment of 30 June 2005, *Bosphorus Airways v Ireland*, Application no 4506/98”, *European Constitutional Law Review*, 2: 443-55). In his concurring opinion on *Bosphorus*, Judge Ress considered that the case revealed the importance of European Union’s accession to the ECHR, in order to make its control mechanism complete within the Community legal order.

There are arguments against survival of the doctrine of “equivalent protection” after accession. The doctrine

creates double standards, since the EU is subjected to less extensive review of its measures than contracting states; the doctrine is too abstract and there is no test of proportionality to legitimise its application. The ground for this doctrine, it is also argued, disappears after accession, the judgments of the EU courts becoming subject to control by the ECtHR. It has also been argued that the doctrine should be abandoned for its lack of clarity: Costello and Peers opine that it is not clear under what circumstances the acts of the EU Member States are exempted from full judicial review of the ECtHR (see Peers, S above; Costello, C (2006) "The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe", *Human Rights Review*, 6(1): 87-130, p 94).

On the other hand, Saltinyté has argued that pragmatic considerations impinge and that the ECtHR is unlikely to abandon the doctrine, in view of the time it would take for a case to reach the ECtHR after exhausting both EU and national legal remedies (see Saltinyté, L (2010), "European Union accession to the European Convention on Human Rights/ stronger protection of fundamental rights in Europe?" *Jurisprudence*, University Mykolas Romeris, Vilnius, Lithuania, <http://www.mruni.eu/Lt/mokslo-darbai/jurisprudencija>). It would be a more equitable and practical solution, she argues, if the ECtHR decided to maintain the doctrine – and perhaps even expand it with respect to the states which, during the term of their membership, have demonstrated a high standard of human rights protection. One could imagine that, in some areas, EU Member States may well prefer to apply the doctrine of equal protection to a more complex system of scrutiny. This might be true, for example, in European criminal law and in police cooperation. With the entry into force of the Treaty of Lisbon, the area of judicial and police cooperation in criminal matters has become subject to the jurisdiction of the Court of Justice of the European Union, except for the jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State, or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

What of the EC institutions respecting ECHR? Looking back to the 1970s, the Community itself, through a joint declaration of the Commission, Council of Ministers and Parliament (OJ 1977 C103/1) of 5 April 1977, echoed by the European Council on 7/8 April 1978, proclaimed its respect for fundamental human rights and postulated that their observance in the work of its institutions through the Community was not subject to the jurisdiction of the European Commission on Human Rights (see *D v Belgium and the European Communities, re the European School in Brussels* [1987] 2 CMLR 57). This did not resolve the issue of access to the ECtHR for acts by the EU institutions thought to be in violation of ECHR.

Stage 3: The case made for accession

It was also in the 1970s that the idea began to emerge that the European Community might as well accede to ECHR. In 1978, key commentators such as Professor Schermers spoke in favour of accession. But the idea was slow to find political backing. The Single European Act brought no major changes at Treaty level, although the European Courts of Justice continued to apply the "general principle" doctrine. In 1992, a political union was created by the Treaty of Maastricht. In Article F2 the ECHR was recognised as part of the Treaties, but still not granted legally binding status.

In 1996 the ECJ ruled that:

"No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field. Accession to the Convention would, however, entail a substantial change in the present Community system of the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought only by way of Treaty amendment" (Opinion 2/94 of the European Court of Justice of 28 March 1996 concerning the accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms).

The Treaty of Amsterdam in 1997 included a specific commitment to the protection of fundamental rights in Article 13, extending protection from discrimination beyond gender discrimination in Article 141 and on nationality (Art 7). This Treaty clarified that the jurisdiction of the ECJ under the Treaty of the European Community (TEC) applied to Article 6(2) TEU with regard to action of the EU institutions (Art 46(d) TEU). Amsterdam also gave the EU the power to impose penalties for the persistent breach of fundamental rights by a Member State.

Subsequently, during debates on the Treaty of Nice IGC, Finland proposed the following amendment to (then) Article 303EC:

"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" (see the European Convention (2002) Working Group II, Incorporation of the Charter/accession to the ECHR, Working Document 15, 12 September).

This was rejected. Article 6 of the Treaty of Nice did however confirm that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. Breaches of these principles can entail sanctions (Art 7) and prevent admission to the EU (Art 49 EU Treaty).

It was not until 2002, during the work leading to the proposed EU constitution, that the case for accession was forcefully made. Working Group II of the Convention on the Incorporation of the Charter and accession to the ECHR summarised the fundamental political and legal arguments in favour of accession. A Convention working document put it as follows.

1. Accession would strengthen the protection of European citizens who are presently denied the right to bring applications against the institutions of the EU and in greater Europe.
2. 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.
3. Dual protection systems would weaken the overall protection offered and undermine legal certainty in the human rights field of Europe. Divergent catalogues would be applied by the ECtHR 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 problems. Reference can be made to the question whether a person's right to respect his or her home (Art 8 ECHR) covers also business premises, the precise scope of the right to remain silent and not to contribute to incriminating oneself (Art 6 ECHR) or to the judgments given with respect to the prohibition to disseminate in Ireland information regarding abortions lawfully carried out in the UK (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.
4. Acts by some EU bodies remain outside the control of the ECtHR and yet the Strasbourg court will continue to hold Member States responsible (see for instance *Cantoni v France* (1996) or *TI v UK* (Appl 43844, 7 March 2000); *Senator Lines case* Appl 56672/00).
5. The credibility of the Community in the eyes of third countries would be considerably enhanced if the EU was prepared to arrange for an independent body to subject respect for human rights to a critical review.
6. Accession would have the advantage of enabling the Community institutions to play a full role in proceedings before the ECtHR that concern Community law.

7. Accession would prevent the creation of new dividing lines on the European continent. The human rights acquis of the CoE and the common standards defended by the MS of the CoE and of the EU are the same. An accession is not a 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 (European Convention (2002) Working Group II, Working Document 15, Incorporation of the Charter/Accession to the ECHR, document by Ingvar Sveznsson and Mrs Lena Hjelm-Wallén).

Thus, accession was seen as being the most effective way to ensue the necessary coherence between the ECHR and Community law – provided that it is regulated in a manner consistent with existing Community competence. The final report of the Convention in 2002 claimed that accession would give a strong political signal of coherence between the European Union and the "greater Europe"; would give citizens an analogous protection vis-à-vis acts of the Union as they presently enjoy vis-à-vis the Member States; and would ensure harmonious development of the case law of the two courts, especially in view of the incorporation of the EU Charter of Fundamental Rights into the Treaties (Final Report of Working Group II, CONV 354/02, 22 October 2002, pp 11-12).

PART 2: PREPARING FOR ACCESSION

Since the entry into force of the Lisbon Treaty in 2009, a specific legal basis exists for the Union's accession of the ECHR. Article 6(2) TEU stipulates that the Union shall accede to the ECHR, and that such accession shall not affect the Union's competence. Article 6(3) TEU reaffirms that fundamental rights – as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member states – constitute general principles of the Union's law. The European Community/Union is already a party to a number of Council of Europe conventions.

The ECHR was originally drafted with state parties only in mind. However Protocol 14 to the ECHR, which entered into force on 1 June 2010, contains a provision which would allow the EU to accede to the Convention (amending Art 59 of the ECHR). The Interlaken Declaration (High Level Conference on the future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010) welcomed the entry into force of this Protocol but also called for measures to increase the efficiency of the ECtHR. Ways must be found to reduce the number of clearly inadmissible applications (see the principle of equivalence below, which leads to rulings of inadmissibility); and to ensure the full and rapid execution of the final judgments of the court and to supervise the

execution of the court's judgments. At present, after exhaustion of national and EU remedies, cases can take over 10 years to reach the ECtHR (see for example Case *Bosphorus Hava Yollari Turizm ve Ticaret Ananim Sirketi v Ireland*, Appl no 45036/98 Decision as to admissibility of 30 June 2005, (GC) 42 EHRR 1). The Declaration also stresses the need to simplify the procedure for amending Convention provisions of an organisational nature.

One may ask why accession took so long, only to become possible today. Accession to ECHR has been discussed for about 40 years and, from substantive and practical points of view, it could be said that the urgency to accede has diminished in the meanwhile, due to case law of the ECJ and legislative developments within the EU such as the adoption of the EU Charter of Fundamental Rights attached to the Lisbon Treaty.

In a report on the institutional aspects of accession, the European Parliament stressed the main arguments in favour of accession of the European Union to ECHR.

“Accession constitutes a move forward in the process of European integration and involves one further step towards political Union.

While the Union's system for the protection of fundamental rights will be supplemented and enhanced by the incorporation of the Charter of Fundamental Rights into its primary law, its accession to the ECHR will send a strong signal concerning the coherence between the Union and the countries belonging to the Council of Europe and its pan-European human rights system.

Accession will also enhance the credibility of the Union in the eyes of third countries which it regularly calls upon in its bilateral reports to respect the ECHR.

Accession to the ECHR will afford citizens protection against the action of the Union similar to that which they already enjoy against action by all the Member States.

This is all the more relevant because the Member States have transferred substantial powers to the Union, Legislative and case law harmonisation in the field of human rights of the rule of law of the EU and the ECHR will contribute to the harmonious development of the two European courts in the field of human rights, particularly because of the increased need for dialogue and cooperation, and thus will create an integral system, in which the two courts will function in synchrony.

Accession will also compensate to some extent for the fact that the scope of the Court of Justice of the European Union is somewhat constrained in the matters of foreign and security policy and police and security policy by providing useful external judicial supervision of all EU activities.

Accession will not in any way call into question the principle of the autonomy of the Union's law, as the Court of Justice of the European Union will remain the sole supreme court adjudicating on issues relating to EU law and the validity of

the Union's acts, as the European Court of Human Rights must be regarded not only as a superior authority but rather as a specialised court exercising external supervision over the Union's compliance with obligations under international law arising from its accession to the ECHR.

The relationship between the two European courts shall not be hierarchical but rather a relationship of specialisation – thus the Court of Justice of the European Union will have a status analogous to that currently enjoyed by the supreme courts of the Member States in relation to the European Court of Human Rights (European Parliament (2010), 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)), Committee on Constitutional Affairs, Rapporteur: Ramón Jáuregui Atondo, Rapporteur for the opinion of the Committee on civil liberties, justice and home affairs: Kinga Gál).”

The Stockholm Programme requested that a “rapid” accession to the ECHR should be made (point 2.1) and invited the Commission to submit a proposal on the accession of the EU to the European Convention on Human Rights as a matter of urgency. This was seen as part of a plan to strengthen the European judicial area and to legitimise European criminal law.

At the time of writing, a draft agreement is under discussion. This agreement covers the object and scope of the agreement. It is anticipated that the EU will be entitled to make reservations to the Convention and to its Protocols in accordance with Article 57 of the Convention.

Of particular interest is the introduction of a co-respondent mechanism. It is not clear at this stage of the negotiations how this system will work in practice. The EU may be joined to proceedings as a co-respondent whenever a Member State is defending a breach of fundamental rights as a result of implementing EU law. A second scenario is one where there is a substantive link between an alleged violation and legal acts or measures of the European Union, then the ECtHR could decide to join parties to the proceedings, after a hearing. In either case, both the Member State and the EU could be found jointly responsible for a violation of ECHR.

The European Union and its Member States will have to adopt internal rules setting out the respective obligations in relation to the operation of the co-respondent mechanism. The Court of Justice of the European Union will have the opportunity to rule on the validity or conformity of the act of the EU with regard to fundamental rights, prior to a decision by the ECtHR. The Court of Justice will ensure that the ruling is delivered quickly, so that the proceedings before the ECtHR are not unduly delayed. The procedure of the ECtHR will take into account the proceedings before the Court of Justice.

It is anticipated that a judge from the Court of Justice of the European Union will be elected to serve in the ECtHR, although the modalities for election are still being discussed. The European Union shall likewise be invited to take part in the meetings of the Committee of Ministers of the Council of Europe. The European Union will also contribute to the expenditure related to the functioning of the Convention. This expenditure relates to the functioning of the ECtHR, the supervision of the judgments of the court, the functioning of the Committee of the Ministers, and the Parliamentary Assembly of the Council of Europe when performing their functions under the Convention. (For up to date information on negotiations, please see http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_meetings_en.asp (also http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue_documents_EN.asp).

The agreement on accession is subject to unanimous agreement by the European Council in accordance with Article 218(8) TFEU. It also has to be approved by all 47 existing parties to the ECHR. The Council also has to obtain the consent of the European Parliament for concluding the agreement. Article 218(10) TFEU provides for the European Parliament to be fully informed of all stages of negotiations (see White, S (2010), “The EU’s accession to the Convention on Human Rights : a new era of closer cooperation between the Council of Europe and the EU?” NJECL Vol 1, Issue 4, pp 433-46).

Negotiations have proceeded at a fair pace since 2010. Issues that seemed insurmountable at the onset – like the interplay of the Court of Justice of the European Union and of the European Court of Human Rights, the appointment of an EU judge to the ECtHR, the co-respondent mechanism – seem to be well on the way to resolution. It is clear that we now have tremendous political impetus to achieve accession, although of course there are a number of hurdles that need to be overcome.

Accession will pave the way for closer cooperation between the Council of Europe and the EU, and perhaps even in the long term for accession of the EU to the Council of Europe, as advocated in the 2006 *Juncker Report* (Council of Europe (2006), Council of Europe-European Union, *A sole ambition for the European continent*, report by Jean-Claude Juncker, Primer Minister of the Grand Duchy of Luxembourg, to the attention of the Heads of State of Government of the Member States of the Council of Europe, 11 April 2006). This could include coordinating legislative initiatives, establishing a joint platform for assessment of standards, seeking the complementarity of texts and, when appropriate, adopting each other’s standards. Cooperative activities should be intensified through the Venice Commission, the European Commission for the Efficiency of Justice (CEPEJ), GRECO, and Moneyval. Accession to these instruments should be encouraged in due course.

The report recommends the forging of closer inter-Parliamentary ties, taking the form of meetings between the conferences of the Presidents of the political groups in the EP and the Political Assembly of the Council of Europe, and regular and ad hoc meetings between the committee chairs of both assemblies (recommendation 11). It also advocates closer cooperation under the European Neighbourhood Policy (recommendation 7). This is a great opportunity for the two supra-national agencies to work more closely together and to draw on each other’s strengths. ^A

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The views contained in this article are not intended to represent those of the European Commission.