

# Accession by the European Union to the European Convention on Human Rights

## Answers to frequently asked questions

### *INTRODUCTION*

This document was prepared under the responsibility of the Secretariat of the Council of Europe with a view to providing some first answers to frequently asked questions concerning the consequences of accession by the European Union (“the EU”) to the European Convention on Human Rights (“the ECHR”). The precise modalities of accession will be the subject of negotiations between all member States of the Council of Europe and the European Union itself. Any views expressed do not necessarily reflect the official point of view of the Council of Europe. They are preliminary and without prejudice to the outcome of such negotiations. The content of this paper is to a large extent based on earlier preliminary work carried out within the Council of Europe.<sup>1</sup> Specific questions concerning the interpretation or application of EU law or other internal matters of the EU are not discussed here.

### *QUESTIONS AND ANSWERS*

#### **What is the European Convention on Human Rights (“ECHR”)?**

- The European Convention on Human Rights is an **international treaty** signed and ratified by the **47 member States of the Council of Europe**.<sup>2</sup> It enshrines basic human rights and fundamental freedoms of everyone within the jurisdiction of any member State. These include the right to life, to protection against torture and inhuman treatment, to freedom and safety, to a fair trial, to respect for private and family life, freedom of expression (including freedom of the press), thought, conscience and religion and to freedom of peaceful assembly and association.
- The **European Court of Human Rights** delivers **binding judgments** on alleged violations of the Convention. It is directly accessible to individual applicants and its jurisdiction is compulsory for all Parties to the Convention. The Court sits on a permanent basis in Strasbourg. All the member States of the European Union are Parties to the Convention as are the EU candidate countries. Judgments of the Court finding a violation must be executed by the taking of all necessary measures (e.g. legislative reform to prevent similar violations and, as appropriate, individual measures to erase the consequences of the violation for the individuals concerned). The Committee of Ministers of the Council of Europe supervises this execution.

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<sup>1</sup>For more information on the technical and legal aspects of EU accession, see especially the study prepared by the Council of Europe’s Steering Committee for Human Rights (CDDH) in 2002: *Study of Technical and Legal Issues of Possible EC/EU Accession to the European Convention on Human Rights*, Report adopted by the CDDH at its 53rd meeting (25-28 June 2002), Doc. CDDH(2002)010 Addendum2.

- In its almost 60 years of operation and thanks to the important body of case-law developed by the European Court of Human Rights and national courts, the European Convention on Human Rights and its Protocols have become the **most important European human rights protection standards**, enshrining common human rights and fundamental freedoms for all European countries.

### **What is the current status of the ECHR and the Strasbourg case-law in EU law?**

- As EU law stands at present, the **Union and its institutions are not directly bound by the ECHR** as such, still less by the case-law of the European Court of Human Rights. However, Article 6 § 3 of the Treaty on European Union refers to the ECHR as part of the general principles of Community law. This is reflected in the case-law of the Community's Courts, the European Court of Justice (ECJ) and the Court of First Instance (CFI). They regularly refer to the ECHR and the Strasbourg case-law in their judgments but apply them indirectly, as part of the general principles of the Union's law.
- The present situation is that the rights enshrined in the ECHR are not legally binding on the EU and its institutions (Commission, Council, European Parliament, Court of Justice etc.). However, these rights do apply to the EU member States, even when the latter are applying or implementing EU law. This creates an imbalance which can lead to **uncertainty** and confusion about who, ultimately, is responsible for any breaches of ECHR rights.
- Until recently, the European Union did not have the necessary competence to become a Party (accede) to the ECHR. This has now changed with the entry into force of the Lisbon Treaty, on 1 December 2009. The Lisbon Treaty provides such competence and also **commits the Union to accede to the ECHR**.<sup>3</sup>

### **Why is EU accession to the ECHR so important?<sup>4</sup>**

- Accession will further **strengthen the protection of human rights** by submitting the Union's legal system to independent external control. Any individual will be able to bring a complaint about infringement of ECHR rights by the EU before the European Court of Human Rights. The EU would thus be in the same situation as the member States.
- Accession is the best means of achieving a **coherent system of fundamental rights' protection** across Europe. As the Union reaffirms its own values through its Charter of Fundamental Rights, its accession to the ECHR will give a strong political signal of coherence between the EU and "greater Europe".

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<sup>3</sup> "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

<sup>4</sup> The following views were fully shared by members of the EU Convention that prepared the Constitutional Treaty, see Final report of Working Group II, CONV 354/02 of 22 October 2002, pp. 10-11: "Incorporation of the Charter//accession to the ECHR", available on the page: <http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf>

- Accession will **close gaps in legal protection** by giving European citizens the same **protection vis-à-vis acts of the Union** as they presently enjoy vis-à-vis all member States of the Union.
- Accession will result in **all European legal systems being subject to the same supervision** in relation to the protection of human rights. Given the increasingly broad competences of the EU, it is ever more difficult to accept that it should be the only “legal space” left in Europe which is not subject in the same way as State parties to the Convention to external scrutiny by the European Court of Human Rights.
- Accession will **reassure citizens** that the EU, just like its member States, is not ‘above the law’ as far as human rights are concerned. This is a **question of credibility**, given that EU member States have transferred important competences to the Union and that ratification of the ECHR is a condition for EU membership.
- Accession of the EU to the ECHR is the best means of ensuring the **harmonious development of the case-law of the European Court of Justice and the European Court of Human Rights** in human rights matters. The ECJ will apply the EU Charter of Fundamental Rights, many provisions of which are based on, but not identical to, those of the ECHR. Combined with the increase in the EU’s powers, the Charter’s existence will inevitably mean that the ECJ will have to consider more cases involving fundamental rights than in the past. Without accession, this would increase the risk of contradictions in the case-law between the two Courts, in spite of all efforts to the contrary.
- Accession will **resolve the problems resulting from the fact that currently the EU cannot be party to proceedings before the European Court of Human Rights**. When the Court rules on alleged human rights violations resulting from the application or implementation of EU law by the member States, the EU is unable to defend itself properly before the Court. The EU is not bound by the Strasbourg judgment, even though the execution of the judgment may require the EU’s contribution.

**Will EU accession to the ECHR also mean that the EU will be bound by the Protocols to the ECHR setting out additional rights and freedoms?**

- Accession to the European Convention on Human Rights does **not** mean that the EU will be **automatically bound by all additional Protocols** to the Convention. There are currently six additional Protocols, which guarantee among others the right to peaceful enjoyment of one’s possessions and the right to vote (Protocol No. 1), the abolition of the death penalty (Protocol Nos. 6 and 13) and a general prohibition on discrimination (Protocol No. 12).
- All the Protocols are directly linked to the Convention and should ideally be ratified as an ensemble. However, taking into account the scope of EU competences, the EU will have to take **separate decisions** whether to become a Party to all or some of these Protocols or not. Such decisions may also be taken at a later date, after the EU has become a Party to the ECHR itself.

## What will be the future relationship, after accession, between the ECHR and the EU Charter of Fundamental Rights?

- Conferring primary law status on the EU Charter of Fundamental Rights, as the Lisbon Treaty did, and **accession** are **complementary steps** ensuring full respect of fundamental rights within the EU legal order. In this regard, the EU merely follows the same logic as the member States, most of which have their own written catalogue of fundamental rights and are also Parties to the ECHR.<sup>5</sup> The relationship between the Charter and the ECHR will be similar to that between the ECHR and a national constitutional bill of rights of a State Party to the ECHR.
- The Charter “reaffirms the rights as they result, in particular, from ... the European Convention for the Protection of Human Rights and Fundamental Freedoms, the social charters adopted by the Community and the Council of Europe and the case-law of ... the European Court of Human Rights.”<sup>6</sup> **The wording of many of the Charter’s rights is based on the wording of corresponding rights contained in the ECHR and its Protocols.** The meaning and scope of such rights will be determined by reference to the text of the ECHR and the **case-law** of the European Court of Human Rights.

## Which legal remedies will individuals have?

### A. Present situation

- Under the Convention **all individuals under the jurisdiction of a State Party** (not only nationals) claiming to be the **victim of a violation of their human rights by one of the Parties have the right to an effective remedy, often before an independent tribunal.** The European Court of Human Rights has a subsidiary role. It can only be petitioned after all existing national remedies have been exhausted.<sup>7</sup>
- **Decisions on the admissibility<sup>8</sup> and merits of individual applications are taken by Committees of three judges, Chambers of seven judges or a Grand Chamber of seventeen judges.** The judge elected in respect of a state Party to a dispute is an *ex officio* member of the Chamber or Grand Chamber. If the Court considers that an application is admissible and well-founded, it rules that there has been violation of the Convention. Under certain conditions, each Party may request that a case which has been examined by a Chamber is referred to the Grand Chamber. If such a referral does not occur, the judgment becomes final.
- **Since the EU is not a Party to the ECHR, applications cannot be brought directly against it.** The European Court of Human Rights may, however, hold member States responsible for the effects of EU law in their domestic legal orders.<sup>9</sup> In the Grand Chamber judgment *Bosphorus Airways v. Ireland* of 30 June 2005, the Court held that States parties remain responsible under

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<sup>5</sup> Ibid.

<sup>6</sup> Charter’s preamble.

<sup>7</sup> Article 35 § 1 of the ECHR.

<sup>8</sup> In clear-cut cases, applications may also be declared inadmissible by a single judge.

<sup>9</sup> See *Cantoni v. France*, judgment of 15 November 1996; *Matthews v. the United Kingdom*, judgment of 18 February 1999; *T.I. v. the United Kingdom*, Decision of 7 March 2000.

the ECHR even if they merely execute or implement EC legislation. In some cases, however, EU protection of fundamental rights will be presumed equivalent.

## B. Situation after accession

- **In the event of accession, individual applications against the EU will be treated in the same way as applications against any other State Party to the ECHR**
- EU accession to the ECHR as such should **not in principle modify the existing system of judicial remedies under EU law**. Exhaustion of such remedies will be a precondition for bringing a case to Strasbourg.
- Individual applications brought directly against **EU acts** will have to be distinguished from those challenging **national measures** that apply or implement EU law.

### Direct actions:

- Whenever individuals **challenge EU measures directly** (legal acts or individual decisions) with the EU institutions as defendants, the case will first have to be brought before the **General Court and/or the Court of Justice**. It is only after the final ruling of the Court of Justice that the individual may bring a case before the Strasbourg Court on account of any possible violation of the ECHR.

### Indirect actions:

- Whenever individuals challenge a **national measure implementing or executing EU law**, they will first have to apply to the **ordinary national courts**. In accordance with EU law, national courts may (or in certain cases must) refer the matter to the ECJ in Luxembourg for a preliminary ruling on the validity or interpretation of EU law. After that preliminary ruling, the case returns to the national courts for decision. Following the final judgment by the national court, the case could then be brought before the Strasbourg Court.
- As **alleged violations of the ECHR may be the result of acts by both the EU and one of its member States** (e.g. cases in which a member State would have to answer in Strasbourg for an a national legal act whose purpose was simply to implement Union law), it may be desirable to provide for a mechanism allowing the Union and a member State to appear jointly as “**co-respondents**” before the Strasbourg Court.<sup>10</sup> Such an arrangement would have the advantage of ensuring that the final judgment will be directly enforceable against both defendants, without the Strasbourg Court having to make any ruling on the allocation of competences between the Union and the member State in question (which is an internal EU issue).

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<sup>10</sup> See the CDDH *Study of Technical and Legal Issues* (note 1), at §§ 57-62 and also the Final report of Working Group II, note 3.

### **Will EU accession not create even more work for the Strasbourg Court which already has to cope with a significant backlog of cases?**

- With the steep increase of the number of applications in recent years, the Strasbourg Court is facing a substantial backlog of cases. Both the Court and member States are alert to the problem and a number of measures have already been taken, including the **provision of additional financial resources and the adoption of Protocol No. 14**, which streamlines the Convention's control mechanism, and which entered into force on 1 June 2010. This problem is not related to the question of EU accession to the ECHR.
- In any case, the **additional workload** for the Strasbourg Court in the event of accession should be rather **limited** as the additional cases brought before the Strasbourg Court as a result of accession are expected to mainly concern the cases which have been brought before the ECJ by way of direct actions. Moreover, the ECJ has always sought to follow Strasbourg case-law carefully. Accession will only encourage it further to pursue this practice, since the EU will be directly bound by the ECHR. There should not, therefore, be an avalanche of EU cases going to the Strasbourg Court once accession has taken place.

### **After accession, will the EU remain free to maintain and develop its own legal order?**

- The ECHR contains **minimum standards**. Parties remain free to provide more extensive human rights protection and this would also be the case for the EU.<sup>11</sup>
- Judgments by the Strasbourg Court are essentially **declaratory judgments**. The Court cannot itself annul or amend national measures or court decisions. In the event of accession, it will be for the Union, like any other Party to the ECHR, to decide how best to comply with the Court's judgments, provided that the judgments are executed.
- The **principle of autonomy of EU law**, in the sense of the EU legal order existing apart from both national and international law, **is no obstacle to EU accession to the ECHR**. After accession, the Strasbourg Court will examine in concrete cases whether, as a result of EU law and acts, there has been a violation of the ECHR. In making that assessment, the Strasbourg Court will undoubtedly have regard to "specific characteristics of the Union and the Union law".<sup>12</sup>
- After accession, the **ECJ will remain the final authority on the interpretation of EU law**.

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<sup>11</sup> See Article 53 of the ECHR.

<sup>12</sup> Article 1 of Protocol No. 8 relating to Article 6 (2) of the Treaty on European Union on the Accession of the Union to the ECHR. In fact the Court already does so today, in cases touching upon EU law brought against individual EU member States (e.g. *Matthews v UK*, *Moustaquim v Belgium*, *Bosphorus v Ireland*).

### **What will be the relationship between the Strasbourg and Luxembourg Courts after accession?**

- The ECJ's position will be **analogous to that of national courts** in relation to the Strasbourg Court at present. The ECJ will remain the final authority on the interpretation of EU law; the Strasbourg Court will be the final authority on the interpretation of the ECHR. The ECJ should, for the purpose of any ECHR complaints against the EU, be regarded as a "domestic" court and individuals may need to turn to the ECJ before they can lodge an application to the European Court of Human Rights (see also the answers to the previous questions).
- The European Court of Human Rights cannot be regarded as a superior Court (in the way a national supreme court is superior to a national court of appeal) but rather as a **specialised human rights court** exercising **external control** over the international law obligations of the Union resulting from accession to the ECHR. There will not be a conflict or overlap between their roles any more than there is a between the roles of the supreme or constitutional court of any member State and the Strasbourg Court.
- The existence of a **European control mechanism**, operating outside the system whose legal measures it examines, **gives citizens an important external guarantee** that their rights will be effectively safeguarded in addition to the protection afforded by the EU.

### **Will an EU judge participate in the work of the Strasbourg Court?**

- The Strasbourg Court consists of a number of judges equal to that of the Parties to the ECHR.<sup>13</sup> Judges are elected by the Parliamentary Assembly from a list of three candidates submitted by the Contracting Party. EU representation on the Court would be in line with the EU's international legal personality and the autonomy of its legal system. A judge elected in respect of the EU will be able to **bring additional expertise on the EU legal system to the Strasbourg Court**.
- In theory, there are **different options** for the participation of a judge elected in respect of the EU: an *ad hoc* judge for cases involving EU law, a full-time judge participating only in EU cases, a full-time judge participating on an equal footing with other judges. According to the 2002 CDDH study, the option of a full-time judge fully integrated into the Court appears to be most in line with the spirit of the Convention. Each legal system should be represented on the Court by a judge with the necessary expertise of that system. Participation in the system of collective enforcement set up by the Convention entails duties but also certain prerogatives; it contributes to the legitimacy of the decisions taken by the Court.

### **Will the EU, after accession, participate in the supervision of the execution of the Court's judgments?**

- The 2002 CDDH study envisaged the possibility for the **EU being represented in the Committee of Ministers** of the Council of Europe when

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<sup>13</sup> Article 20 of the ECHR.

the latter supervises the execution of the judgments by the Strasbourg Court, possibly with restricted voting rights.<sup>14</sup> The absence of the EU in this mechanism might create uncertainty where both the EU and a member State could be responsible for a violation of the ECHR as it will be the Committee of Ministers which must examine whether all required measures (on EU and national level) have been taken to remedy that violation.

### **Which legal measures are necessary to prepare the EU's accession to the ECHR and when will it take place?**

- On the Council of Europe side, the entry into force of Protocol No. 14 to the ECHR has already created a **legal basis for EU accession**. This provision is in itself not sufficient to allow accession because its modalities remain to be negotiated by the EU and all Council of Europe member States. The 2002 CDDH study provides important guidelines for these negotiations.
- Some accession modalities will **require further technical amendments** to the ECHR and its additional protocols. Others may be settled in **complementary agreements** between the Council of Europe and the EU, the **Rules of the Court** or, possibly, in Committee of Ministers' resolutions. The CDDH accepted in principle that amendments to the ECHR could be brought about either through an **amending protocol** or by means of an **accession treaty** to be concluded between the EU and all States Parties to the Convention.
- Accession will only be legally possible if and when further amendments to the ECHR concerning the modalities of accession will have entered into force. The Lisbon Treaty requires that accession be agreed on by the EU Council and the European Parliament and be ratified by **all EU member States**. **In addition, all States Parties to the ECHR** will have to express their consent to be bound by the key accession modalities, which will require **formal consent** by their national Parliaments.
- From a political point of view, **the link between accession and incorporation** of the EU Charter, which has been so expediently established by the Laeken Declaration and the subsequent EU Convention and Intergovernmental Conference, must be maintained in order to ensure a **coherent application of human rights law all over Europe**. The period between entry into force of the Lisbon Treaty, on 1 December 2009, and effective accession should therefore be as short as possible. The legal texts setting out the modalities of EU accession should be finalised by 30 June 2011 at the latest.

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<sup>14</sup> In accordance with Article 46 § 2 of the ECHR.