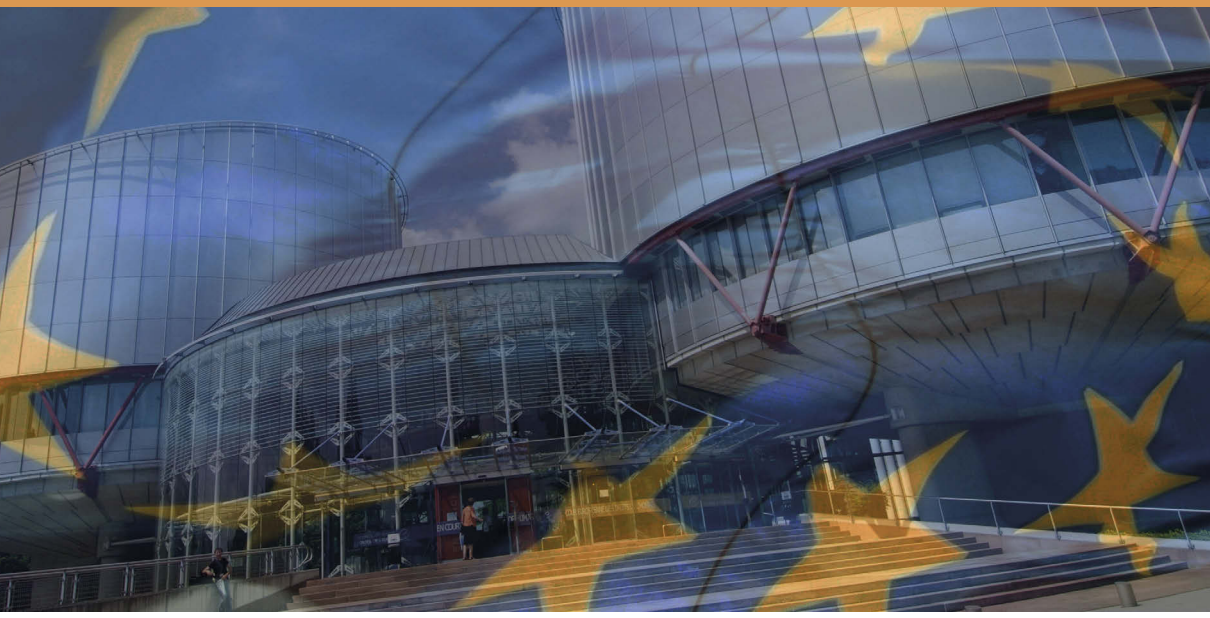
The accession of the European Union to the European Convention on Human Rights



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Terminology

For ease of reading, the following simplified terminology is used:

The terms "**Convention**" and "**European Convention on Human Rights**" refer to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 14.

The term "**Court**" refers to the European Court of Human Rights.

The abbreviation "**ECtHR**" refers to the European Court of Human Rights in the footnotes and in references to judgments.

The term "**European Union**" and the abbreviation "**EU**" refer, as the case may be, to the European Union or to the various European Communities which preceded it.

The term "**EU law**" refers, as the case may be, to law resulting from the Treaty of Lisbon or to law resulting from the treaties in their version prior to the Treaty of Lisbon, including so-called "Community law".

The abbreviations "**TEU**" and "**TFEU**" refer respectively to the Treaty on European Union and the Treaty on the Functioning of the European Union in the versions resulting from the Treaty of Lisbon.

The term "**Charter**" refers to the Charter of Fundamental Rights of the European Union.

The term "**Court of Justice of the European Union**" and the abbreviation "**CJEU**" refer, as the case may be, to the Court of Justice of the European Union or its predecessor, the Court of Justice of the European Communities.

The term "**Contracting Party**" currently refers to states bound by the Convention. Upon accession, the European Union, which is not a state, will join them. In anticipation of this change, the term "Contracting Parties" has therefore been preferred to "Contracting States".

The term "**accession treaty**" refers to the draft agreement on accession of the EU to the Convention, as adopted by the negotiators on 5 April 2013.

The term "**accession**" refers to the accession of the European Union not only to the Convention but also to the Protocol and Protocol No. 6, because the accession treaty will cover the accession of the European Union to these three instruments.

The term "**2002 study**" refers to the "Study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights", adopted on 28 June 2002 by the Council of Europe's Steering Committee for Human Rights (CDDH).

The term "**Working Group II**" refers to the working group "Incorporation of the Charter/ accession to the ECHR" set up by the "European Convention on the Future of Europe".[1]

Provisions of the Convention are referred to by the number of the article; provisions of the EU treaties are referred to by the number of the article followed by the abbreviation of the relevant treaty (TEU or TFEU).

1. See below II.C. 6. Preliminary studies.

Foreword

The accession of the European Union to the European Convention on Human Rights denotes the process whereby the European Union will join the community of 47 European states which have entered into a legal undertaking to comply with the Convention and have agreed to supervision of their compliance by the European Court of Human Rights. The European Union will thus become the 48th Contracting Party to the Convention. Required under the Treaty of Lisbon, EU accession to the Convention is destined to be a landmark in European legal history because it will make it possible, at last, for individuals and undertakings to apply to the European Court of Human Rights for review of the acts of EU institutions, which unquestionably play an increasingly important role in our everyday lives.

After nearly three years of negotiations, a draft agreement on accession was adopted in Strasbourg on 5 April 2013.[2] This draft document, which is available on the Council of Europe website,[3] serves as a guiding thread for the analysis set out in this paper. Admittedly, it has so far only been adopted at the level of the negotiators. Before it can come into force, the agreement will have to pass numerous other hurdles, including consultation of the Court of Justice of the European Union, the European Court of Human Rights, the European Parliament and the Council of Europe's Parliamentary Assembly. Then it will have to be ratified by the Council of Europe and European Union member states. Nevertheless, the adoption of this draft by the negotiators marks a very important stage on the road to EU accession, since it is the outcome of a consensus between all the delegations involved in the talks. The draft thus has the backing of the governments of the 47 Council of Europe member states and the European Commission. It therefore provides, at this stage, a sufficiently solid and stable basis to warrant discussion of its contents.

Given the small size of this publication, however, the aim is not to conduct a comprehensive legal analysis of each of the provisions in the draft agreement but rather to give an overview, in the light of this draft, of the reasons for EU accession to the Convention, the means whereby this is to be achieved, and its effects. For ease of understanding, I have opted as far as possible for simple and accessible language, without, however, sacrificing the rigour which is necessary to treat a subject of sometimes fearsome complexity. This paper is therefore a compromise between writing for a general readership and an academic dissertation, between simplification and exhaustiveness. As with any compromise, it is likely that no one will be fully satisfied. I apologise to readers for this and ask them also to note that the views expressed are mine alone and do not necessarily reflect those of the institution to which I belong.

2. Doc. 47+1(2013)008rev2. This version, dated 10 June 2013 and reproduced in the appendix, includes minor revisions of the initial draft dated 5 April 2013.
3. www.coe.int.

Introduction

European Union accession: a matter of coherence

The idea of having the European Union accede to the European Convention on Human Rights can undoubtedly be counted among the great European legal projects. Officially envisaged by the European Commission as early as 1979 and delayed since then, sometimes for political and sometimes for legal reasons, it is now written into Article 59, paragraph 2, of the Convention and Article 6, paragraph 2, of the TEU, which requires the European Union to accede to the Convention.[4] Now that nearly all European states are Contracting Parties to the Convention and the European Union is seen increasingly as the missing link in the structure, this requirement is all the more pressing.

Despite the delays, however, the need for EU accession to the Convention has continued to assert itself, because it is an imperative which derives its strength from its simplicity. EU accession means quite simply making Europe coherent with its own legal and ethical ideas, those underlying its own conception of fundamental rights, which, for this reason, are restated, *inter alia*, in the preamble to the European Union's Charter of Fundamental Rights.

The coherence in question is firstly of a formal nature because, by acceding to the Convention, the European Union will at last be in the same position as its member states with regard to the external supervision exercised by the Court, and at the same time this will ensure greater coherence between the European Union's words and deeds relating to fundamental rights.

4. On EU accession to the Convention, see, among many others: Paul Craig, "EU Accession to the ECHR: Competence, Procedure and Substance", *Fordham International Law Journal*, Vol. 36, No. 1115, 2013; Olivier De Schutter, "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: feuille de route de la négociation", *Revue trimestrielle des droits de l'homme*, 2010, p. 535; Clemens Ladenburger, "Vers l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", *Revue trimestrielle de droit européen*, 2011, p. 20; Tobias Lock, "End of an Epic? The Draft Agreement on the EU's Accession to the ECHR", 31 *Yearbook of European Law* 162 (2012) ; Vassilios Skouris, "First Thoughts on the Forthcoming Accession of the European Union to the European Convention on Human Rights", in Dean Spielmann, Marialena Tsirli and Panayotis Voyatzis (eds.), *The European Convention on Human Rights, a Living Instrument* (Essays in Honour of Christos L. Rozakis), Brussels, Bruylant, 2011, p. 556; Françoise Tulkens, "La protection des droits fondamentaux en Europe et l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", *Revue critique trimestrielle de jurisprudence et de législation*, 2012, p. 14.

But the coherence promised by accession is also substantive, related to the substance and effects of the fundamental rights to be protected. While much progress has already been made in this area, thanks in particular to a good level of co-operation between the two European Courts, Europe is not, for all that, immune from setbacks. With the increased prominence of fundamental rights in the European Union, reflected in the adoption and entry into force of the Charter, we are seeing the emergence of a kind of second focal point for European fundamental rights, alongside the Convention. This increased role of fundamental rights in the European Union is to be wholeheartedly welcomed, but at the same time care must be taken to ensure that it does not lead to a divide in this area, to a perception that there are now two "worlds" of fundamental rights based on two different types of fundamental rights in Europe, with the same rights possibly having a different substance depending on whether EU law applies or not. This is precisely what the Treaty of Lisbon seeks to prevent by requiring the European Union to accede to the Convention.

For the continent which saw the proclamation of the Declaration of the Rights of Man and of the Citizen, and for the Union itself, whose leaders have always supported the idea of the universality of human rights, not only on the international stage, but also in the recent Treaty of Lisbon (Article 21 of the TEU), such a divide would represent a legal and moral failure. Drawing on centuries of tradition, but also on the painful lessons of past barbarism, post-war Europe has always proclaimed the equal and inviolable dignity of all human beings and has vested them with elementary rights stemming from that dignity, known as human rights. To afford better protection to these values of civilisation, it established a single court, the European Court of Human Rights, to ensure equal application of those rights throughout the continent. If now, slowly but surely, Europe were to go against everything it stands for by being divided on fundamental rights, all the benefit of the work of several generations, and the European credibility gained from it, would be lost.

Yet centrifugal forces are clearly at work in this field, as regards both legislation and case law. For example, basing itself on the new Article 82, paragraph 2, of the TFEU, the European Union has recently set to work on producing directives on the rights of the defence in criminal proceedings.[5] Because of the overlap with Article 6 of the Convention, the drafting of these directives involves regular consultations between the institutions of the Union and the Council of Europe to ensure that the new directives do not afford a lower level of protection than the Convention. It must be acknowledged, however, that this exercise sometimes proves difficult in practice. First of all because of the constant risk that case law, which is supposed to be dynamic, will be "set in stone" by instruments of this kind. If in future the Court raises the level of protection in one of the fields covered by a new directive, what will we do? Secondly, and above all, because these consultations show that some member states appear to want to take advantage of this exercise to "rewrite" Article 6 so as to reduce the level of protection which it enjoys in the case law of the Court.

5. See below I.C.2.3.c. Sector-specific instruments – the example of the directives on procedural rights in criminal proceedings.

Another instance of centrifugal forces at work is the fact that some recent judgments of the CJEU, admittedly without disregarding the Convention and its case law in substance, nevertheless ignore them almost completely in favour of the Charter, whereas previously, even after the Charter came into force, cross references between Luxembourg and Strasbourg were legion and bore clear witness to the existence of a common heritage of fundamental rights shared by the "two Europes". Similarly, we are seeing the appearance of judgments which seem to promote a kind of division of responsibilities between EU law and the Convention, thus lending credence to the (mistaken) idea that the Convention is inapplicable to EU law or that its content is incompatible with it.

It may be that these fears derive from misunderstandings and are therefore unfounded. It is true that compliance with the Convention is not measured by the number of explicit references to it. The practice of national courts bears witness to this. It is also true that, as a court internal to the EU legal order, the CJEU can be equated with national courts. Nevertheless, the CJEU also has a particular responsibility in this area, which is distinct from that of national courts, in that it is the only court, together with the European Court of Human Rights, to lay down a standard of protection on a European scale. That standard does not solely concern the CJEU, but applies to all the EU member states and is superimposed on national standards and on the Convention. Consequently, the standard set by the CJEU is not "isolated": it permeates the member states' legal systems and, in so doing, has a far greater impact than national standards.

For this reason, the relationship between the Convention and EU law is not comparable with that which exists between the Convention and national laws, whose effects are confined to their own legal systems. EU law brings a second European standard for the protection of fundamental rights which is superimposed on the Convention's pan-European standard. Member states are therefore faced with two "layers" of European fundamental rights which are similar in some respects and dissimilar in others. In the face of this complexity, which is a source of confusion and legal uncertainty, it is important to ensure that this coexistence is not only harmonious and coherent, but also *intelligible*. In order to retain their "fundamental" nature, fundamental rights must at least be understood as such by their beneficiaries and by those who apply them. This is why the authors of the Charter, in their wisdom, wanted the two European standards to complement one another. They wanted the first to be the bedrock of the second, *and this to be clear.* For this to be clear, and for it to be understood, it also needs to be seen. Care must therefore be taken here not to create appearances which clash with legal reality.

Consequently, whether they are real or only apparent, such centrifugal tendencies need to be curbed. The most effective and most lasting way of achieving this is to join the two centres by having the European Union accede to the Convention, so as to create an unambiguous legal relationship between them. That would be a strong signal given to the world by Europe, a solemn affirmation that, above and beyond all the differences and specificities, which, incidentally, are legitimate, whether they are local, regional or systemic, Europe shares a common core of fundamental