

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

**Hearing organised by the Committee on Legal Affairs and Human Rights in Paris on 11 September 2007**

### **Note**

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#### ***Introduction***

This is a short written version, as requested, of my analysis. It assumes that the proposed EU "Reform Treaty", due to be agreed in October 2007, enters into force. That Treaty will have the consequence of providing a treaty basis for the European Union to accede to the ECHR, a basis which arguably does not exist under the present Treaties; indeed it will have the effect of not merely enabling, but *requiring* the European Union to accede to the ECHR. Moreover, while previous discussion has considered the issue of accession by the European Union/European Community, and has involved discussion of the EU's capacity to enter into treaties, the European Union will be the sole relevant organisation since, under the Reform Treaty, the European Community will be subsumed into the European Union and will cease to exist, while the EU will have unquestioned treaty-making capacity. In the rest of this note I refer only to the EU.

I am asked to consider in particular the implications of EU accession for the observance of human rights standards across Europe and the relationship between the European Court of Human Rights and the European Court of Justice.

#### ***The consequences of EU accession***

In my view EU accession, while widely regarded as valuable for political and symbolic reasons, will have rather limited concrete effects on the observance of human rights standards. The effects will be limited because the ECHR is already accepted as the fundamental standard of human rights protection in Europe: this has long been recognised, for example, in the EU Treaty itself, and in the EU's own policies including its enlargement policy. More recently it has been accepted in the case-law of the ECJ, which not only applies the ECHR as if it were already in force for the EU, but also closely follows the case-law of the European Court of Human Rights. The significance of the ECJ's case-law was strikingly recognised by the European Court of Human Rights itself in its judgment in the *Bosphorus Airways* case.

#### ***The legal effects of accession – gaps in the present system***

For legal, as opposed to political, purposes the main question must be whether the absence of EU accession leaves gaps in the system of human rights protection. The picture is of course complex: it must take account, for example, both the case where Member States implement EU law and the case where the EU institutions themselves are said to infringe the ECHR; a distinction must also be drawn between Treaty measures (and measures of equivalent status) and subordinate measures in the form of EU legislation or decisions. But the answer is briefly that the existing gaps are not great: they are most likely to arise in the limited areas where the ECJ does not have the requisite jurisdiction. It would be desirable, in any event, for the ECJ's jurisdiction to be extended to cover all cases in which the ECHR rights of individuals were affected by EU measures. Indeed the absence of a judicial remedy before the ECJ might itself be a violation of the ECHR. A possible beneficial effect of EU accession to the ECHR could therefore be the enlargement of the jurisdiction of the ECJ in such cases. That enlargement could be effected by Treaty amendment or in some areas by development of the ECJ's case-law – for example, by enlarging the individual's right of access to the EU Courts, in particular the Court of First Instance.

### ***The EU Charter of Fundamental Rights***

The system of protection of human rights in the EU will be made more complex by the EU Charter of Fundamental Rights, which will become legally binding (with certain limits) under the Reform Treaty, although not incorporated into the Treaties. The intention of the Charter is that those rights which correspond to ECHR rights should be interpreted consistently with ECHR rights. But the existence of two separate texts, with different formulations, will cause confusion. Further confusion may be caused if it is forgotten that the Charter binds EU Member States only where they are implementing EU law. There is also a risk of division between EU Member States and non-member States, the latter bound by the ECHR but not by the Charter. Measures should be taken, if possible, to limit the confusion and to ensure harmonious interpretation. The ECHR should remain the bedrock of human rights protection in Europe.

### ***The modalities of EU accession to the ECHR***

Negotiating the modalities of EU accession to the ECHR, and deciding what amendments are necessary to the Convention system and to the Convention text, may prove a difficult exercise. Substantive questions will arise about the scope of the Convention rights and their limitations, procedural questions about the relationship between the EU and its Member States in proceedings before the European Court of Human Rights, institutional questions about the place of the EU on the Court and in the Committee of Ministers. It is essential however that the Convention system should not become unduly complex and that nothing is done which would weaken the Convention system.