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**The EU's accession to the European
Convention on Human Rights:
Towards a stronger and more coherent
protection of human rights in Europe**

*Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort*

Hearing of the European Parliament's Constitutional Affairs
Committee

Brussels, 18 March 2010

It is a great pleasure to attend this hearing just one day after the European Commission recommended to Member States the opening of negotiations on the accession of the European Union to the European Convention on Human Rights.

The accession of the EU to the Convention will complete the EU system of protecting fundamental rights.

The constitutional significance of this accession was already noted by the European Court of Justice in 1994. Now the EU has the competence it lacked back at that time. What is more, **the Lisbon Treaty makes it clear that accession is not only an option, it is the destination.**

Accession to the Convention is one out of four key components of an ambitious and comprehensive fundamental rights policy at the level of the European Union. Let me briefly mention the other three components:

First, with the entry into force of the Lisbon Treaty, the EU's Charter of Fundamental Rights is legally binding. The Charter **represents the most modern codification of fundamental rights in the world.** This legally binding Charter for 27 countries represents a major step forward in terms of our political commitment to fundamental rights. It entrenches all the rights found in the Convention. The meaning and scope of these rights are the same as those laid down by the Convention.

The Charter, however, goes further. It also enshrines other rights and principles, including economic and social rights that come from the common constitutional traditions of the EU Member States, the case law of the European Court of Justice and other international instruments. In the Charter, we also find the so-called "third generation" fundamental rights, such as data protection, guarantees on bioethics and on good administration. **Article 53 of the Charter makes it clear that the level of protection provided by the Charter must be at least as high as that of the Convention.** Often, it will go beyond.

Second, the promotion of fundamental rights is one of the priorities of the Stockholm programme setting the strategic guidelines for developing an area of freedom, security and justice in Europe. I am working on a Communication to set out the new approach of the Commission to fundamental rights. We aim to adopt this communication in the summer.

Third, the very creation of a new "Justice, Fundamental Rights and Citizenship" portfolio shows the importance that President Barroso attaches to strengthening this area of the Commission's action.

The EU's accession to the Convention is of a high political and legal significance.

From the perspective of the citizens, 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 under the same conditions as those applying to complaints brought against Member States.

In political terms, accession means that the European Union reaffirms the pivotal role played by the Convention system for the protection of human rights in Europe, beyond the borders of the 27 Member States. By acceding to the Convention, the European Union itself puts its weight behind the Strasbourg system of external judicial control in the area of fundamental rights by integrating its legal order fully and formally to that control system. This will enhance the credibility both internally and externally of the EU's strong commitment to fundamental rights.

In legal terms, accession will be important in three respects:

First, it complements the introduction of a legally binding Charter of Fundamental rights. Accession to the Convention will ensure that the case-law of both Courts – the Court in Strasbourg and our own "Constitutional Court" in Luxembourg – evolves in step. It is therefore an opportunity to develop a coherent system of fundamental rights protection throughout the continent, with a strong promise for a Europe truly united by law and values.

Second, accession opens the way for the Strasbourg Court to attribute acts adopted by the institutions or bodies of the Union directly to the Union instead of attributing them – albeit implicitly – to 27 Member States collectively. The Union's specificity as a distinct legal entity vested with autonomous powers will then be adequately reflected in proceedings before the Strasbourg Court.

Third, the Union will have at its disposal all rights that the Convention gives to the Contracting Parties to defend the human rights conformity of its acts before the Strasbourg Court. The Union will also be able to be represented in the Strasbourg Court with an EU judge.

Protocol Nr. 8 to the Lisbon Treaty requires a certain number of substantive guarantees necessary in an agreement relating to the accession so that the specific characteristics of EU law will be preserved. The Recommendation to the Council, which the European Commission adopted, yesterday takes full account of these requirements. Just to mention two of them that are also reflected in the draft report of the Honourable Member of Parliament Mr Ramón Jauregui:

It is clear that the Union's competences and the powers of its institutions as defined in the Treaties may not be affected by the accession. A provision in the accession agreement will reaffirm this. Likewise the accession of the European Union may not affect either the situation of individual Member States in relation to the ECHR, to the Protocols thereto and to reservations. The negotiations should therefore ensure that the Accession Agreement creates obligations under the substantive provisions of the Convention only with regard to acts and measures adopted by institutions or bodies of the Union.

I would also like to address the issue of an accession of the EU to the Protocols to the Convention which is also mentioned in the draft report presented by Mr Jauregui.

As you know, four of the Protocols to the Convention have not been ratified by all Member States. As a matter of fundamental rights policy, the Commission is deeply convinced that any of these Protocols may be of potential relevance as regards the exercise of the Union's powers. Certain guarantees enshrined in these Protocols are also reflected in the Charter. An accession of the EU also to these Protocols is therefore highly desirable as matter of principle.

However, at the present stage, Member States are still divided on the issue of an accession of the EU to the Protocols that have not been ratified by all of them. The Commission proposes therefore a two-stage approach, in the interest of a swift agreement on the negotiation directives:

At the first stage, the EU should be granted the right to accede to any of the existing and future Protocols to the Convention. At a later stage, it can then be decided to which Protocols the Union will accede in addition to the Convention itself.

Mr Chairman, Ladies and Gentlemen,

The European Commission is seeking a smooth insertion of the European Union into the system of the Convention. The accession should therefore preserve the substantive and procedural features of that system also with respect to the Union as a new Contracting Party. However, the accession must meet two requirements: First, the specific characteristics of the law of the European Union must be preserved. And secondly, it is important to deal with the specific situation of the Union as a distinct legal entity vested with autonomous powers becoming a Contracting Party – side by side with its Member States – to a mechanism that has initially been designed for states.

Among the technical and procedural modifications to the Convention that are strictly necessary with regard to these requirements I would just like to mention the co-defendant mechanism, which was proposed by the Commission yesterday. I am glad to see that the co-defendant mechanism is also recommended in the draft report presented by Mr Jauregui.

It is indeed essential that the European Union receives the right to join the proceedings as a co-respondent in cases brought against a Member State. This is of particular importance where the alleged violation of the Convention concerns an act which the Member State has adopted in compliance with an obligation under Union law and where the Member State concerned could only have avoided that alleged violation by disregarding its obligation under Union law.

First, only by acquiring the full status of party to the proceedings, the Union will benefit from the full panoply of party rights that will enable it to defend the conformity with the Convention of the provision of Union law at issue, including that of requesting referral of the case to the Grand Chamber of the Strasbourg Court.

Second, after having joined as co-respondent, the Union will be equally bound by a judgment of the Strasbourg Court finding a violation of the Convention and, hence, be under an obligation to execute such a judgment. The EU may be obliged to abolish or amend the provision of the Union law. Without a co-defendant mechanism, the Strasbourg Court could render a judgment only against the Member State, even where a human rights violation stems from an act of Union law. However, the Member State would then be unable to execute such judgment since it is obviously not in a position to abolish or amend the act of Union law at issue.

The Strasbourg Court should in principle not interpret Union law. Because of this **principle of autonomous interpretation of Union law**, the Union should be given the right to join the proceedings in **any** case brought against a Member State and not only in cases where the act which allegedly violates the Convention is determined by Union law. It will then be for the EU's internal rules to determine the types of cases in which the Union will join the proceedings as a co-defendant.

The introduction of a co-defendant mechanism is thus a very limited change to the Convention. It is technical and procedural in nature and does not lead to a distortion of the proper functioning of the Convention but rather ensures a smooth and proper insertion of the EU into the Convention system.

From an institutional point of view, I would like to stress the Commission's position that representatives of the European Union should participate in the bodies of the Convention on an equal footing with representatives of other Contracting Parties.

This regards above all the Strasbourg Court itself. The presence in the Strasbourg Court of a judge elected for each Contracting Party is one of the founding principles of the Convention. This principle ensures that each legal system is represented within the Court. It is also a reflection of the *collective guarantee system* established by the Convention in which each Contracting Party is required to participate.

Furthermore, it reinforces the legitimacy of decisions adopted by the Court. The principle of the presence in the Court of a judge elected for the Union is therefore of the highest interest to the Union, as Union law is a separate, autonomous and highly specialised legal order. One of the main benefits of accession is to ensure that the Union's legal system is adequately represented within the Court and that this Court has the necessary expertise to take full account of the specificities of Union law.

The Commission is therefore strongly in favour of having a permanent full-time judge elected for the Union, who enjoys the same status and has the same duties as his peers and who intervenes potentially in all cases.

As for the method of electing the Union judge, the normal procedure provided for in the Convention should apply. This means that the Parliamentary Assembly of the Council of Europe elects that judge from a list of three candidates presented by the European Union. An appropriate number of members of the European Parliament should be allowed to participate in sessions of the Parliamentary Assembly when it elects the judges of the Strasbourg Court.

As to this point, the position of the Commission is once more fully in line with that expressed in Mr Jauregui's draft report.

I am happy that such constructive spirit of cooperation exists also with regard to the Spanish Presidency of the Council. Indeed, the Spanish Government gives high priority to this dossier in order to reach an agreement on the negotiating directives under its Presidency. I'm therefore confident that we will be able to start the negotiations on accession very soon.

Mr Chairman, Ladies and Gentlemen: **Protecting fundamental rights is about upholding human dignity and the full enjoyment of rights.** In view of the strength of the EU Charter – which is in many instances more ambitious than the Convention – the European Union will not find it difficult to meet the standards required by the Convention. The accession of the European Union to the Convention is an incentive to develop the policies that strengthen the effectiveness of the fundamental rights that people enjoy in Europe.

Thank you very much!