

Eventuality of the accession of EU to European Convention of the Protection of the Human Rights and Fundamental Freedoms and the Related Issues

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One of the ways how to achieve a really effective protection of human rights at the Community and Union level consists in the accession of the EC/EU to the European Convention on Human Rights and the submission of the Communities/Union to the Strasbourg control machinery, in other words, a linking of supranational entities with the system of human rights protection with a pan-European territorial scope.

Although the fact, that in the text of the Constitutional Treaty and later on in the Treaty of Lisbon appeared the provision of Article 6 (2), which declares: “The Union accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, the implementation of this norm in practise is not so clear and is unambiguous.

The solution of such a cardinal problem as the question of the possible accession of the Communities/Union to the European Convention of Human Rights belongs to the most complicated issues in the *acquis communautaire*. This problem also belongs in *acquis communautaire* to so called “evergreens”, if we take the numerous attempts of its sufficient solution into account¹.

The difficulties with the proper solution are caused by the fact that a lot of arguments in favour of the accession as well as against this step exist.

Some of the advantages can be briefly defined as follows:

- the accession will formalise the status of the Convention in the Community legal order;
- the accession will significantly strengthen the protection of the rights and freedoms of the individuals and their legal certainty;

¹ See, for instance Memorandum on the accession from April 1979, or the Opinion A 2/94 of European Court of Justice from March 1996, Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4th April, 1979, Bulletin of the European Communities, Supplement, 2/79

- the accession will precisely define the limits of the responsibility of the EC/EU institutions for their actions, which interfere in the areas dealing with the human rights;
- the accession will exclude different interpretations of terms in the field of human rights from the side of the two European judicial bodies – Luxembourg and Strasbourg Courts;
- the accession will increase the democratic legitimacy of the EC/EU and of its actions;
- the accession will ensure the development of the protection of human rights in the whole of Europe without dividing lines.

Besides, the respect to human rights will become the basis for the future construction of the whole of Europe.²

On the other side, the accession will necessarily be accompanied by a number of legal and other complications, especially taking the following into account:

- the submission of the Court of the Communities to the judicial body of another international organisation;
- the danger of a threat to the autonomy of the Community legal order;
- unclear relation between the European Convention on Human Rights and the Charter of Fundamental Rights of the EU;
- the eventuality of the delays caused by the accumulation of litigations and the prolonging of the whole length of the proceedings;

It is necessary to stress, that at the moment any of these problems wasn't yet satisfactorily solved neither by the *acquis communautaire*, nor by the *acquis* of the Convention.

The relevant act at the side of the Union is the Protocol relating to Article 6(2) of the TEC on the accession of the Union to the European Convention, which was annexed to the Treaty of Lisbon. This document, which contains two paragraphs only, envisaged the preparation of the agreement for solving merely 2 groups of issues: 1) Union's participation in the control bodies of the European Convention and 2) the mechanism necessary to ensure that the proceeding by non – Member States and individual applicants are correctly addressed to Member States and/or the Union as appropriate.

² Betten, L., Grief, N.: *EU Law and Human Rights*, „Longman“, London and New York, 1998, at 116.

On the side of the *acquis* of the Convention the relevant norm is the Protocol No 14 to the Convention, which is even briefer concerning the accession of the Union, while shortly declaring only in Article 59(2) that “European Union may accede to this Convention.” Although some further modifications were proposed in the Reflection paper of the Sekretariat in the Document DG – II (2001)02³, their incorporation into the Protocol No 14 wasn’t possible at the time of the drafting of this Protocol due to the still lacking of relevant competences on the side of the supranational entities and the absence of the legal personality of the Union.

Attention must also be paid to the fact, whether the European Convention, which was adopted more than a half a century ago, remains to be that very instrument which is capable of ensuring the proper protection of the individual’s rights in the framework of the EC/EU.

The final decision concerning the accession of the Union to the Convention will be conducted by political reasons and will be influenced to a great extent by the contractual conditions which the representatives of the Union will be able to achieve, while negotiating about the accession, including the satisfactory solution of all mentioned legal and political issues.

Conclusions

It is just the mentioned eventuality of delays caused by the accumulation of litigations, which is able to cause the greatest problems, if we take into account, that an applicant under the wording of Article 35 of the Convention would have to exhaust all domestic remedies (including a reference to Luxembourg Court in the cases of the preliminary rulings) before bringing his or her case to Strasbourg⁴. In this respect it is worth reminding that litigations last approximately 18 to 23 months before the European Court of Justice and even longer before the European Court of Human Rights⁵. Under such circumstances the way from Luxembourg to Strasbourg for the attainment of justice would not necessarily mean the straight route, but could be changed in the travelling roundabout. The proposed solution⁶ in the form of introduction of special procedure under which the ECJ would be authorised to request an interpretation of the Convention from the European Court of Human Rights the situation with the lengthiness of the procedure would hardly improve, besides it is capable to overload the EHCR.

³ Accession of the European Union to the European Convention on Human Rights, Reflection Paper prepared by Sekretariat, Strasbourg, 8.2.2001

⁴ For details see Accession of the European Union to the European Convention of Human Rights, Reflection paper prepared by the Sekretariat, Strasbourg, 8.2.2001, D 6-II /2001/, 02, at. 8

⁵ Bown, *The First Five Years of the Court of the First Instance and Appeals to the Court of Justice*, Assessment and statistics, ECML Rev., 1995, No 32, at. 743-749

⁶ *Supra* note 50

Regardless those controversial questions and the methods for their solution, there remains the question of effectiveness of that step as such. The eligibility of the accession was discussed for the first time in the late 1970`s, i.e. almost 30 years ago, in the time when neither the Charter, nor a mere coherent list of human rights protected at the EC level existed. The European Convention, in principle does not regulate the economic, social, cultural and modern rights, and less so the EU citizens` rights. On the other hand, the Charter within its factual effectiveness brings in a new standard of the protection of the entitlements of the individual, which considerably reaches beyond the *de minimis* standard envisaged by the Convention. Under these circumstances, the question of accession to the European Convention of Human Rights and Freedoms should definitely be considered in connection with the EU Charter of Fundamental Rights.

Under all circumstances, it is necessary to keep in mind that the importance of the accession of the Communities/Union to the European Convention, although it is a document which is less modern and embraces fewer categories of human rights, remains still very significant if we take into account that it brings the standard of protection of human rights *de minimis* in the pan-European region. The creation of the mechanism for the enforcement of the Charter of the EU in the form of special proceedings in this connection it seems to be a proper step for the construction of the highest standard of the protection of the individuals rights in the European Union area.

Nevertheless, should it be only accession to the Convention, without the Charter`s own specific control mechanism being created, the significance of the Charter would be rather political than legal. If both these steps were carried out simultaneously, i.e. the introduction of a control mechanism at the EU level and the accession to the Convention, then certainly an undesirable duplicity would appear. In the case of ensuring an effective control mechanism at the EU level, the accession to the Convention would be unnecessary, because the Charter itself cumulates nearly all the rights comprised in the Convention and besides its own norms that reach beyond the scope of the minimum standard guaranteed by the Convention.

It is apparent that a successful solving of this dilemma is actually a political issue rather than a legal one, namely on the future direction of the Union, especially about what level of human rights protection do the supranational entities intend to ensure and if those rights will create a real priority and basic value, as declared in the Preamble of the Charter and in Article Ia of the Treaty of Lisbon⁷.

⁷ Article I a of the Treaty of Lisbon provides: „The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to Member States in a society in which pluralism, non-

In this respect it is indisputable that should the Charter become an effective instrument for human rights protection (and not merely a declaration of objectives, values and principles), it requires certain modification to its material provisions, as well as the creation of its own mechanism of the judicial control. This judicial procedure may be designed alternatively. One option is a special proceeding for violation of the rights granted by the Charter as a new kind of action (incorporated into the text of the Treaty of Lisbon). Another possibility is the enlargement of the Charter itself, so that it will include provisions of a procedural character to regulate procedure for violation of rights protected by this catalogue of human rights at the Union level⁸. Such solution would be analogical to the European Convention of Human Rights, which also regulates procedural questions within this instrument of rights as such.

The absenting possibility of effective enforcement of the rights articulated by the Charter in all cases of their infringement, respectively hindering conditions for their enforcement in certain cases, do not ensure a sufficient level of individuals' rights protection, and consequently would even mean a weakening of the democratic dimension of the Union, which could be in future perceived as a key problem within the framework of the still deepening European integration.

discrimination, tolerance, justice, solidarity and equality between women and men prevail.“

⁸ For details see Siskova: *Dimenze ochrany lidskych prav v EU*, „ASPI“, Prague (CZ), 2003, at. 199-200