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MODERN PROBLEMS OF THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF 1950

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Abstract. *This article examines the challenging aspects, problems of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. It contains an overview of the legal framework for the EU's accession to the Convention and the changes made to the Convention and EU legislation, which have already contributed and will contribute to the accession practically. The article also defines the basic political, legal and institutional obstacles encountered in the ongoing negotiations on an agreement on the EU's accession to the European Convention on Human Rights and Fundamental Freedoms.*

The accession to the ECHR did not modify either the autonomy of EU law or the CJEU's monopoly on scrutinizing the validity of the acts of the Union but it introduced additional external monitoring in relation to fundamental rights, as occurs with national Supreme Courts. Neither does the accession result in any modification of the interesting case law of the CJEU, built up in the 1970s as Article 6(3) of the EU Treaty expressly provides that both the fundamental rights guaranteed by the ECHR and those which are the result of Member States' common constitutional traditions 'shall constitute general principles of the Union's law'. The case law of the CJEU in the subject area has been highly consistent since the Treaty of Lisbon came into force and there is a new legal framework which new features include the legally binding nature of the Charter of fundamental rights and external judicial scrutiny by the ECtHR, introduction of which makes it necessary to make the following legal adjustments, both within the scope of the ECHR and within the EU itself the main of which is entering into force the relevant Accession Agreement between the 47 states who are signatories of the ECHR and the EU.

In fact, the EU accedes to the ECHR, the Additional Protocol and Protocol 6 to the Convention. The status which the EU will have within the ECHR, as a High Contracting Party which is not a State, is fully regulated in the Draft Accession Agreement so that, despite the fact that a large part of the provisions will also be included in the text of the ECHR, the future Agreement will retain its specific relevance as such within the system of the ECHR.

The Jáuregui Report defined the institutional issues which should regulate the future Accession Agreement. It argued that the EU should have three basic rights: the right to submit a list of three candidates for the post of judge, one of whom is elected by the Parliamentary Assembly of the Council of Europe on behalf of the Union and participates in the work of the Court on a footing of equality with the other judges; the right to attend via the European Commission with voting rights on behalf of the EU, meetings of the Committee of Ministers when it performs its task of monitoring the execution of judgments of the European Court of Human Rights; the right of the European Parliament to appoint/send a certain number of representatives to the Parliamentary Assembly of the Council of Europe when the latter elects judges to the European Court of Human Rights.

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The entry into force of Protocol 14 in June 2010 had notably aided the negotiations, having added to article 59 of the ECHR a new paragraph which made possible the accession of the EU to the Convention.

Signing and ratification of the Agreement on the accession of the EU to the ECHR by the member-states will result to the creation of a legal instrument which will lead to an international organization of a supranational nature (with its own specific legal system and jurisdiction) joining another international organization with human rights jurisdiction in which its 28 Member States (together with another 20 non-Member States) are already members and whose jurisdiction was designed to hear claims filed against said States.

Key words: *European Union, European convention for the protection of human rights and fundamental freedoms, accession, European Court of Justice (CJEU), European Court on human rights (ECtHR), a draft agreement on the accession, human rights*

The formulation of the problem. The accession of the European Union (EU) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) constitutes a major step in the development of human rights in Europe. Discussed since the late 1970s, the accession became a legal obligation under the Treaty of Lisbon (the 'TL'), which entered into force on 1 December 2009 (Article 6, paragraph 2). The legal basis for the accession of the EU is provided for by Article 59, paragraph 2 ECHR («the European Union may accede to this Convention»), as amended by Protocol No. 14 to the ECHR which entered into force on 1 June 2010.

Nowadays it is completely impossible to understand adequately the material scope of the protection of fundamental rights in a specific national legal system without placing it in the context of the international courts entrusted with protecting these rights. This phenomenon is not exclusive to Europe: the Inter-American Court of Human Rights is in fact a classic example which allows us to understand adequately the intense interaction existing in the field of human rights between national jurisdictions and international courts with jurisdiction in this area[1]. In any event, with respect to Europe, the European Court of Human Rights (ECtHR) has, without any doubt whatsoever, become an international court of a constitutional nature[2]; as a specialized international court of a regional nature which, through external judicial scrutiny of human rights issues, sets the rules for other national courts (whether constitutional or ordinary) with jurisdiction in the area (appeals on constitutional grounds or ordinary jurisdiction).

However, at the same time the European continent has experienced an interesting phenomenon of legal convergence in human rights in another international process, in principle one which has no competence in this area. Thus, together with the process of the Council of Europe itself – based on the cooperation which commenced with the Statute of London of 1949 [19] and which is exemplified by the ECHR, the parallel process of the construction of the EU has taken place, based on the model of integration. However, although in principle EU law does not concern human rights at all, as the Member States notably increased the degree of jurisdiction which they attributed to the Union through the successive reforms of the founding treaties (the Single European Act, Maastricht, Amsterdam, Nice etc.) it became increasingly clear that it would be

[1] A particularly useful general work to enable the reader to understand better the valuable work of this court is von BOGDANDI, A.FIX-FIERRO, H.MORALES ANTONIZZI, M.FERRER McGREGOR, E. (Eds.), Construcción y papel de los derechos fundamentales – Hacia un Ius constitutionale commune en América Latina, Mexico, 2011.

[2] See, for example, COHEN-JONATHAN, G.: 'La fonction quasi constitutionnelle de la Cour européenne des droits de l'homme', in Renouveau droit constitutionnel-Mélanges en l'honneur de L. Favoreu, 2007, pp. 1127-1153; WALTER, Ch.: 'Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozess', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1999, p. 961.

difficult for them to accept the consequences (both legal and political) of belonging to a supranational organization with such a degree of jurisdiction in matters connected to the traditional concept of sovereignty without the adequate protection of fundamental rights. In fact, both processes, although very different in the way they are conceived and their methods of working, have found, through human rights, an interesting point of connection between their respective legal systems and even a progressive process of convergence. Until now this has been based not so much on specific legal texts but rather a sort of legal dialogue.

In other words, there has been a productive judicial interaction between the ECtHR and the Court of Justice of the European Union (CJEU)[3] which has paved the way to the 'TL' of 2007 [21] finally laying down a new ad hoc legal framework which would give legal form to this convergence through an international treaty. Specifically, this international treaty will allow the EU to accede to the ECHR. However, accession will not be as straightforward as one may expect on the basis of the wording of Article 6 of the European Union Treaty (the 'EU Treaty') [5]. That is why the *aim of this study is* to make an overview of the legal framework for the EU's accession to the ECHR and the changes made to the ECHR and EU legislation, which have already contributed and will contribute to the accession practically and define the basic political, legal and institutional obstacles encountered in the ongoing negotiations on an agreement on the EU's accession to the European Convention on Human Rights and Fundamental Freedoms as a legal instrument, which actually leads to the accession of an international organization of supranational character (with its own particular legal system and jurisdiction) (EU) to an international organization with jurisdiction over human rights (Council of Europe) which in fact changes current powers and organizational mechanism of functioning of certain institutions of both organization.

Analysis of recent research and publications. Some challenging aspects of the accession of the EU to ECHR were discussed and described by the following scientists: S. Douglas-Scott («The European Union and Human Rights after the Treaty of Lisbon»), Gr. De Burca («After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?»), P. Jacque («The Convention and the European Communities»), J. Polakiewicz («EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?»), J. M. y Peres de Nanclares («The accession of the European Union to the ECHR: More than just a legal issue»), H. C. Kruger («Reflections Concerning Accession of the European Communities to the European Convention on Human Rights»), P. P. Craig («EU Accession to the ECHR: Competence, Procedure and Substance»), R. Jáuregui («On EU accession to European Convention on Human Rights»), W. Weiss («Human Rights in the EU: Rethinking the Role of the European Convention of Human Rights after Lisbon»), W. Sadurski («Solange, chapter 3»: Constitutional Courts in Central Europe – Democracy – European Union»), etc.

Key findings. The TL a new provision on fundamental rights (Article 6 of the EU Treaty)[4] which, while making the Charter of Fundamental Rights of the European Union (the 'Charter')

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[3] The study of this interaction goes beyond the remit of this paper, having been specifically dealt with in our previous work 'Viejos y nuevos problemas en el espacio europeo de los derechos humanos: Reflexiones a propósito de la necesaria cooperación judicial efectiva entre el TJUE y el TEDH', in Estudios de Derecho Internacional y Derecho Europeo en homenaje al profesor Manuel Pérez González, Tirant lo Blanch, Valencia, 2012, vol I, pp. 791-820, particularly pp. 810-818.

[4] See, for example, DOUGLAS-SCOTT, S.: 'The European Union and Human Rights after the Treaty of Lisbon', Human Rights Law Review 2011, pp. 645-682; LIÑÁN NOGUERAS, D.J. and MARTÍN RODRÍGUEZ, P.J.: 'Reflexiones sobre los derechos fundamentales de la Unión Europea a la luz del Tratado de Lisboa', in Derecho Internacional y Comunitario ante los retos de nuestro tiempo. Homenaje a la profesora Victoria Abellán Honrubia, Marcial Pons, Madrid, 2009, vol. 2, p. 1053; WEISS, W.: 'Human Rights in the EU: Rethinking the Role of the European Convention of Human Rights after Lisbon'. European Constitutional Law Review2011, p. 6495.

[3] legally binding (Article 6 (1)), for the first time also attributed to the Union competence to adhere to the ECHR (Article 6 (2) [1]. Thus, inter alia, it brings to an end a debate concerning accession[5] which started in 1979 with the Memorandum which the Commission addressed to the Council in relation to this question[6] and which, since the declaration of the CJEU in this regard, required a reform of the treaties in order to take shape[7].

In short, accession to the ECHR did not, in the first place, modify at all either the autonomy of EU law or the CJEU's monopoly on scrutinising the validity of the acts of the Union; all that it did was introduce additional external monitoring in relation to fundamental rights, as occurs with national Supreme Courts. Secondly, neither does it result in any modification of the interesting case law of the CJEU, built up in the 1970s as a consequence of the judicial dialogue which took place with the national constitutional courts in the light of the Solange case law [23]. Thus, Article 6(3) of the EU Treaty expressly provides that both the fundamental rights guaranteed by the ECHR and those which are the result of Member States' common constitutional traditions 'shall constitute general principles of the Union's law'[13].

Thirdly, the EU Charter of Fundamental Rights declares, in line with the well-known CJEU judgment in *Internationale Handelsgesellschaft*[8], that '[i]nsofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection' (Article 52.3) [3].

The fourth and final point is that the case law of the CJEU in this subject area has been highly consistent since the Treaty of Lisbon came into force[9]. In short, there is a new legal framework whose new features include the legally binding nature of the Charter and external judicial scrutiny by the ECtHR, but which largely contains the previous case law. However, the introduction of this external judicial scrutiny makes it necessary to make more than a few legal adjustments, both within the scope of the ECHR and within the EU itself [13].

Accordingly, to make possible the accession of the EU to the ECHR, the first thing that is required is to enter into the relevant Accession Agreement between the 47 states who are signatories of the ECHR and the EU, whose negotiation is proving to be far from easy with respect to either of its two facets [13]. As a result the Steering Committee for Human Rights (CDDH) on 11 July 2011 presented a draft Agreement on the accession of the EU to the ECHR, draft rules to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments of the ECtHR and of the terms of friendly settlements, as well as the Explanatory Report of the draft agreement[10].

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[5] See COHEN-JONATHAN, G.: 'Le problème de l'adhésion des Communatées européennes à la Convention européenne des droits de l'homme', in Mélanges en l'honneur de P. H. Teitgen, Pedonne, París, 1984, p. 84; GOLSONG, H.: 'Grundrechtsschutz im Rahmen der Europäischen Gemeinschaften', Grundrechte-Zeitschrift 1978, p. 346; JACQUÉ, P.: 'The Convention and the European Communities', in MACDONALD, MATSCHER, PETZOLD (Eds.), The European System for the Protection of Human Rights, Nijhoff, 1993, p. 889; SCHERMERS, H. G.: 'The European Communities bound by Fundamental Human Rights', Common Market Law Review 1990, p. 248.

[6] COM (79) 210 final.

[7] CJEU judgment of 28 March 1996 (2/94, ECR., p. 1759).

[8] CJEU judgment of 17 December 1970 Internationale Handelsgesellaschaft (11/70, ECR., p. 1125).

[9] See, for example, judgment of 19 January 2010, Seda Kücükdeveci (C-55/07, pending publication in ECR); judgment of 9 March 2010, Commission v. Germany (C-518/07, pending publication in the ECR); judgment of 14 September 2010, Akzo Nobel Chemicals v. Commission (C-550/07P, pending publication in the ECR).

[10] These documents may be consulted, for example, at CDDH-EU (2011) 16 - 19 July 2011 or CDDH (2011) 009 of 14 October 2011.

In fact, the scope of the technical-legal problems was quite well defined. In this regard, the entry into force of Protocol 14 in June 2010 had notably aided the negotiations, having added to article 59 of the ECHR a new paragraph which made possible the accession of the EU to the Convention [8].

The very different issues that may arise in relation to the draft Accession Agreement may be structured, without claiming to cover everything, into the following four large groups: (1) general issues; (2) institutional issues; (3) jurisdictional issues and, finally, (4) the financial dimension [13].

Starting with the general issues academics had discussed whether the Union would only accede to the ECHR or to both the ECHR and its Protocols (all or part of them[11]). In this regard, on the basis of the amendment made by the above-mentioned Protocol 14 to Article 59 of the ECHR, the Draft Agreement provided that the EU would accede to the ECHR, the Additional Protocol and Protocol 6 [8]; with respect to the rest of the Protocols, the possibility of the EU doing so in the future was expressly included (Article 1 of the Draft Agreement, future Article 59 (2) of the ECHR) [10].

In addition, the status which the EU will have within the ECHR, as a High Contracting Party which is not a State, is fully regulated in the Draft Accession Agreement so that, despite the fact that a large part of the provisions will also be included in the text of the ECHR, the future Agreement will retain its specific relevance as such within the system of the ECHR [8].

Another significant amendment which has been made to the ECHR is the inclusion in article 59 of a clause for the interpretation of expressions 'State', 'High Contracting Party', 'national law', 'country, 'administration of the State' etc [10]. These terms must be deemed to refer to the EU despite the fact that it is an international organisation and not a state entity[12]. In addition, the EU is treated in a similar manner to States.

The Agreement will come into force when all of the High Contracting Parties of the ECHR and the European Union have given their consent (Article 10 of the Draft Agreement) and, as it is easy to imagine, this will take some time. From this moment on all States who join the Council of Europe and accede to the ECHR will therefore be linked both by the ECHR and, in accordance with Article 59.2 b) of the ECHR, by this Accession Agreement as well.

The Report which the European Parliament prepared regarding the access of the EU to the ECHR (the Jáuregui Report) [18] defined very clearly the institutional issues which should regulate the future Accession Agreement. This report argued that the EU should have three basic rights. First, the 'right to submit a list of three candidates for the post of judge, one of whom is elected by the Parliamentary Assembly of the Council of Europe on behalf of the Union and participates in the work of the Court on a footing of equality with the other judges'. Secondly, the Report advocated 'the right to attend via the European Commission with voting rights on behalf of the EU, meetings of the Committee of Ministers when it performs its task of monitoring the execution of judgments of the European Court of Human Rights.' And thirdly, the Report reiterated the 'right of the European Parliament to appoint/send a certain number of representatives to the Parliamentary Assembly of the Council of Europe when the latter elects judges to the Eu-

[11] See, for example, PASTOR RIDRUEJO, J. A.: 'Sobre la adhesión de la Unión Europea a la Convención de Roma', Cuadernos Europeos de Deusto 2010, no. 43, pp. 43-51.

[12] In the ECHR and the two Protocols to which the EU will accede there are about thirty provisions which, in one way or another, currently refer to the terms 'State' (Arts 10.1, 17, 56, 57 ECHR, Arts. 1 and 2 of the Protocol no. 1), 'national law' or 'national laws' (Arts 7.1, 12, 41, 52 ECHR), 'national authority' (Article 13 ECHR), 'territory' (Articles 5.1, 56, 58.4, 57 ECHR), 'administration of the State' (Articles 11.2 ECHR), 'national security' (Articles 6.1, 8.2, 10.2 ECHR) or 'territorial integrity' (Article 10.2 ECHR).

ropean Court of Human Rights[13].' And these have indeed been the main issues in the negotiations[14] [13].

Any change to the balance between institutions is always a delicate question in any negotiation. Unsurprisingly, the presence of a block of 29 possible votes (28 Member States and the EU) is seen by some non-EU Member States as causing a risk of internal imbalance within the Council of Ministers in favour of the Union. As we might expect, this situation mainly refers to the tasks of monitoring compliance with judgments and friendly settlements (Articles 39 and 46 of ECHR) and the issuing of reports and recommendations (Article 47 of ECHR)[15] in which the majority required to reach an agreement is two thirds; in these cases, the 28+1 group would have a possible minority blocking vote which is in fact very close to the majority required (28 of the required 32 votes) [8].

It may also affect other aspects such as agreements to reduce temporarily the number of judges of the Court (Article 26 of ECHR) [12]. In this regard, the Draft Accession Agreement provides that when the Committee of Ministers supervises the compliance of obligations by the EU (whether on its own or jointly with one or more Member States) the EU and its Member States must state their positions and define the vote in a coordinated manner because it is a requirement which arises from the founding treaties (Article 7.2.a) [12]. And it adds that in order to be able to ensure that the Committee of Ministers can effectively carry out its functions in these circumstances, it will have to amend its internal rules (Article 7.2. a in fine).

It appears completely logical that, once the EU has acceded to the ECHR, it should have the power to appoint to the ECtHR a judge in the same way as the rest of the High Contracting Parties. This therefore means that, in accordance with article 6 of the Draft Accession Agreement, a delegation of the European Parliament must be able to participate, with the right to vote, in the meetings of the Parliamentary Assembly of the Council of Europe in which the judges of the ECtHR are also elected (Article 22). And, if this is the case, it appears clear that, in line with the regulations laid down in this regard in the Statute of the Council of Europe (Article 26), the number of members of that delegation must be identical to that corresponding to the High Contracting Parties with the greatest number of representatives.

Turning to the field of jurisdictional issues, it is crystal clear that the most delicate question of the Accession Agreement is the new procedures which will have to be introduced into the ECHR to allow the EU to be party to proceedings when there is a claim against it for a possible breach of a right contained in the ECHR for one of its own acts; or where there is a claim against one or more EU Member States in which the alleged breach of a right contained in the ECHR is the result of an act of that or those Member States in application of the EU law [13].

Once the EU has acceded to the ECHR, claims could be made against an EU Member Sate as the result of an act which, in fact, was obligatory under EU law. In such cases parties should design some sort of formula to enable the EU to also be a party to such proceedings. This would occur when, in certain circumstances, there was a claim against the EU as the result of certain legal acts in which the presence of Member States was also recommendable, for example because a rule of primary law gave rise to the dispute regarding the compatibility with the fundamental rights protected by the ECHR.

[13] Report on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, A7-0144/2010, 6 May 2010, para 7.

[14] See, for example, JACQUÉ, J. P.: 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', Common Market Law Review 2011, pp. 995-1023; TULKENS, F.: 'L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme. Pour et vers une organisation harmonieuse', Revue Trimestrielle de Droit Européen 2011, p. 27.

[15] In this context, the functions entrusted to the Council of Ministers pursuant to the Statute of London with respect to the Council of Europe are not affected (statutory functions).

Thus, according to the provisions of the Draft Agreement, three possible situations could exist. First, a claim may be solely addressed to one or more EU Member States and not against the EU, in which case the latter could intervene as a co-respondent. This situation would basically arise when the affected Member States are obliged by a rule of EU law to adopt an act or not to act without having any discretion in relation thereto [17]. Secondly, the claim may be solely against the EU, in which case the Member States may intervene as co-respondents. This situation would clearly exist when a rule of EU primary law is affected by the possible violation of a fundamental right contained in the ECHR. Given the nature of the rule of EU law affected and the mechanisms for the reform thereof laid down in the founding treaties, it would appear perfectly reasonable for Member States to also be co-respondents [17].

The third possibility is where a claim is brought against both the EU and one or more Member States in a case in which the Union or those Member States are not the ones who have actually engaged in the act or omission in dispute but they are the ones who have established the legal basis for said act or omission. In such a case, it would also be possible to have recourse to the mechanism in question. In any event, it is worth bearing in mind that a co-respondent would have the status of a party to the proceedings and would not merely intervene therein as a third party (Article 36.2 ECHR) [17].

With respect to the requirement of the prior exhaustion of domestic remedies (Article 35 ECHR), another fairly significant difficulty arises, since it is perfectly possible to imagine situations arising where, within the EU, doubt is cast on the compliance of an act of the EU with the fundamental rights without there previously having been a reference for a preliminary ruling to the CJEU. Moreover, this preliminary issue could have been requested by the parties and the national court may have refused to refer the matter to the CJEU. Accordingly, it is not surprising that in these cases the ECtHR cannot exercise external scrutiny until the corresponding internal scrutiny by the CJEU has taken place.

The problem, which is not a minor one, is how to design such a cooperation mechanism between the two courts, since it would be very difficult to achieve without first amending EU primary law.

The negotiations regarding the accession of the EU to the ECHR have revealed both technical and political difficulties which will make the task ahead much more arduous. The obstacles referred to in the previous pages are not of a sufficient scale to frustrate the crystal clear mandate contained in Article 6 (2) of the EU Treaty. They do, however, suggest that the significant time required by the unavoidable requirements for the entry into force (ratification by the 47 High Contracting Parties to the ECHR and the EU) and the list of objections presented by certain Member States during the negotiations may excessively delay an operation which it seemed would be shorter and simpler. Nevertheless, it should not be forgotten that we are dealing with nothing less than the negotiation of a legal instrument which will lead to an international organization of a supranational nature (with its own specific legal system and jurisdiction) joining another international organization with human rights jurisdiction in which its 28 Member States (together with another 20 non-Member States) are already members and whose jurisdiction was designed to hear claims filed against said States. The fact that this operation should give rise to legal and political difficulties cannot, therefore, come as a great surprise.

Moreover, once accession has taken place there will also be a degree of risk that the CJEU may find its status as 'final arbiter' of the supranational legal order of the EU eroded. The CJEU may find itself doubly scrutinised: on the one hand, by the national constitutional courts, which are always ready, on the basis of the well-known judgment in Solange, to verify that the case law of the CJEU in this area continues to equate to the minimum standards required by their re-

spective constitutions (with the Fundamental Law of Bonn as the most visible benchmark); and now also by the ECtHR, whose function of external judicial scrutiny of the EU in the area of human rights will be increased and strengthened.

Ultimately, leaving on one side the obvious differences between them, the CJEU would be placed in a position which was fairly similar to that in which national constitutional courts found themselves as a result of the role of the CJEU as the final arbiter of the EU legal system. In any event, the EU's accession to the ECHR is more an opportunity than a risk. With respect to the EU, this opportunity exists both for its legal system and the CJEU; in the former case, because its (legal) legitimacy will be strengthened and, with respect to human rights issues, it will acquire a very similar position to that of national legal systems themselves; and in the latter case because it will be reinforced with respect to the constitutional courts in one of the areas in which it has always appeared vulnerable. But for the Convention and the ECtHR itself the presence of the EU as another High Contracting Party is also an opportunity. The system of the Convention could be consolidated as the supreme order in the European continent entrusted with the external scrutiny of compliance with fundamental rights both with respect to its 47 Member States and the most developed supranational international organisation in existence.

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СУЧАСНІ ПРОБЛЕМИ ПРИЄДНАННЯ ЄВРОПЕЙСЬКОГО СОЮЗУ ДО ЄВРОПЕЙСЬКОЇ КОНВЕНЦІЇ ЩОДО ЗАХИСТУ ПРАВ ЛЮДИНИ І ОСНОВОПОЛОЖНИХ СВОБОД 1950 РОКУ

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Анотація. *У статті розглядаються складні аспекти, проблеми приєднання Європейського Союзу до Європейської конвенції про захист прав людини та основоположних свобод (ЄКПЛ) 1950 року. Стаття містить огляд правової бази для приєднання ЄС до ЄКПЛ, а також змін, внесених у Конвенцію і законодавство ЄС, які вже сприяли і сприятимуть такому приєднанню практично. У статті також визначено основні політичні, правові та інституційні перешкоди, що виникли в ході поточних переговорів щодо укладання Угоди про приєднання ЄС до ЄКПЛ.*

Приєднання до ЄКПЛ не впливає а ні на автономію права ЄС, а ні на монополію Суду ЄС щодо оцінки правомірності актів Союзу, однак ним запроваджується додатковий всеохоплюючий моніторинг по відношенню до дотримання основоположних прав людини, який до приєднання здійснювався на рівні національних Верховних Судів. Так само приєднання не веде до модифікації відповідного прецедентного права Суду ЄС, що склалося у 1970-тих рр.., про що свідчать положення статті 6 (3) Договору про ЄС і прямо передбачають, що як основоположні права, гарантовані ЄКПЛ, так і ті, що є результатом загальних конституційних традицій держав-членів, «являють собою загальні принципи права Союзу». Прецедентне право Суду ЄС у цій сфері було вельми послідовним з набуття чинності Лісабонського договору, і є нова правова база, в основі якої лежать юридично обов'язковий характер Хартії основних прав ЄС і зовнішній судовий нагляд, здійснюваний ЄСПЛ. Проте їх впровадження передбачає необхідність внесення юридичних коригувань як у текст ЄКПЛ, так і в межах законодавства самого ЄС, серед яких основним є вступ в силу відповідного Договору про приєднання між 47 державами-членами, що підписали ЄКПЛ і мають членство у ЄС.

Фактично ЄС приєднується до ЄКПЛ, Додаткового протоколу і Протоколу № 6 до Конвенції. Статус, якого набуває ЄС в рамках ЄКПЛ (Висока договірна сторона, яка не є державою), повністю регламентовано Проектом Угоди про приєднання таким чином, що, не зважаючи на факт, що суттєву частину положень, як планується, буде включено до самої ЄКПЛ, майбутня Угода збереже свою специфічну актуальність як такої у структурі ЄКПЛ.

Звіт Жауреґ'ю вивчає інституційні питання, які регулюватиме майбутня Угода про приєднання. У ньому стверджується, що ЄС повинен мати три основні права: право подати список з трьох кандидатів на посаду судді, один з яких обирається Парламентською Асамблеєю Ради Європи від імені Союзу і бере участь у роботі суду на рівних правах з іншими суддями; право відвідувати в межах Європейської Комісії з правом голосу від імені ЄС засідання Комітету Міністрів, коли він виконує свою функцію щодо контролю за виконанням рішень Європейського Суду з прав людини (ЄСПЛ); право Європейського Парламенту призначати / посилати певну кількість представників у Парламентську Асамблею Ради Європи, коли остання обирає суддів в ЄСПЛ.

Вступ в силу Протоколу № 14 у червні 2010 року суттєво спростив переговори щодо приєднання, додавши до статті 59 ЄКПЛ новий пункт, який зробив саме приєднання ЄС до Конвенції можливим.

Підписання і ратифікація державами-членами Угоди про приєднання ЄС до ЄКПЛ призведе до створення правового інструменту, який веде до приєднання міжнародної організації наддержавної природи (з її особливою правовою системою і юрисдикцією) до іншої міжнародної організації з юрисдикцією у сфері прав людини, в якій її 28 держав-членів (разом із іншими 20 державами-нечленами) вже набули членства і чия юрисдикція поширюється на розгляд позовів, направлених проти цих держав.

Ключові слова*: Європейський Союз, Європейська конвенція про захист прав людини та основоположних свобод (ЄКПЛ), приєднання, Суд ЄС, Європейський суд з прав людини (ЕСПЛ), проект угоди про приєднання, права людини.*

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СОВРЕМЕННЫЕ ПРОБЛЕМЫ ПРИСОЕДИНЕНИЯ ЕВРОПЕЙСКОГО СОЮЗА К ЕВРОПЕЙСКОЙ КОНВЕНЦИИ О ЗАЩИТЕ ПРАВ ЧЕЛОВЕКА И ОСНОВНЫХ СВОБОД 1950 ГОДА

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Аннотация. *Эта статья рассматривает сложные аспекты, проблемы присоединения Европейского Союза к Европейской конвенции о защите прав человека и основных свобод (ЕКПЧ) 1950 года. В статье делается обзор правовой базы присоединения Европейского Союза к ЕКПЧ и изменений, внесенных в Конвенцию и законодательство Европейского Союза, которые способствовали и будут способствовать присоединению практически. Статья также определяет основные политические, правовые и институциональные препятствия, возникшие в ходе продолжающихся переговоров по соглашению о присоединении Европейского Союза к ЕКПЧ.*

Присоединение к ЕКПЧ не влияет ни на автономию права ЕС, ни на монополию Суда ЕС по оценке правомерности актов Союза, однако им вводится дополнительный всеобъемлющий мониторинг по отношению к соблюдению основополагающих прав человека, который до присоединения осуществлялся на уровне национальных Верховных Судов государств-членов ЕС. Также присоединение не ведет к модификации соответствующего прецедентного права Суда ЕС, сложившегося в 1970-е годы, о чем свидетельствуют положения статьи 6 (3) Договора о ЕС и прямо предусматривают, что как основополагающие права, гарантированные ЕКПЧ, так и те, которые являются результатом общих конституционных традиций государств-членов, «представляют собой общие принципы права Союза». Прецедентное право Суда ЕС в этой сфере было весьма последовательным со вступления в силу Лиссабонского договора, и есть новая правовая база,

в основе которой лежат юридически обязательный характер Хартии основных прав ЕС и внешний судебный надзор, осуществляемый Европейским судом по правам человека (ЕСПЧ). Однако их внедрение предполагает необходимость внесения юридических корректировок как в текст ЕКПЧ, так и в законодательство самого ЕС, среди которых основным есть вступление в силу соответствующего Договора о присоединении между 47 государствами-членами, подписавшими ЕКПЧ и имеющими членство в ЕС.

Фактически ЕС присоединяется к ЕКПЧ, Дополнительному протоколу и Протоколу № 6 к Конвенции. Статус, который приобретает ЕС в рамках ЕКПЧ (Высокая договаривающаяся сторона, которая не является государством), полностью регламентирован Проектом Соглашения о присоединении таким образом, что, несмотря на факт, что существенную часть положений, как планируется, будет включено в саму ЕКПЧ, будущее Соглашение сохранит свою специфическую актуальность как такого в структуре ЕКПЧ.

Отчет Жаурегью изучает институциональные вопросы, регулируемые будущим Соглашением о присоединении. В нем утверждается, что ЕС должен иметь три основных права: право подать список из трех кандидатов на должность судьи, один из которых избирается Парламентской Ассамблеей Совета Европы от имени Союза и участвует в работе суда на равных правах с другими судьями; право посещать в пределах Европейской Комиссии с правом голоса от имени ЕС заседания Комитета Министров, когда он выполняет свою функцию по контролю за выполнением решений ЕСПЧ; право Европейского Парламента назначать / посылать определенное количество представителей в Парламентскую Ассамблею Совета Европы, когда последняя выбирает судей в ЕСПЧ.

Введение в силу Протокола № 14 в июне 2010 года существенно упростило переговоры о присоединении, добавив в статью 59 ЕКПЧ новый пункт, который сделал именно присоединение ЕС к Конвенции возможным.

Подписание и ратификация государствами-членами Соглашения о присоединении ЕС к ЕКПЧ приведет к созданию правового инструмента, который ведет к присоединению международной организации надгосударственной природы (с ее особой правовой системой и юрисдикцией) к другой международной организации с юрисдикцией в области прав человека, в которой ее 28 государств-членов (вместе с другими 20 государствами-нечленами) уже стали членами, и чья юрисдикция распространяется на рассмотрение исков, направленных против этих государств.

Ключевые слова: *Европейский Союз, Европейская конвенция о защите прав человека и основных свобод, присоединение, Суд ЕС, Европейський суд по правам человека (ЕСПЧ), проект соглашения о присоединении, права человека.*