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Committee on Legal Affairs and Human Rights

Legal aspects of the accession of the European Union to the European Convention on Human Rights

Extract on the Minutes of the hearing on “Legal aspects of the accession of the European Union to the European Convention on Human Rights” held in a hybrid manner in Paris (Council of Europe Office) on 5 November 2021

Rapporteur : Mr Titus Corlăţean, Romania, SOC

Hearing with the participation of:

- Ms Tonje Meinich, Chairperson of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights, Norway;
- Mr Juan Fernando López Aguilar, Chair of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), European Parliament;
- Mr Giuliano Pisapia, Vice-Chair of the Constitutional Affairs Committee (AFCO), European Parliament.

The **rapporteur** reiterated the preliminary conclusions from the introductory memorandum underlining that the Assembly should play a role in the process of the European Union (“EU”) accession to the Convention. He then introduced the invited experts presenting them as persons directly involved in the negotiation process.

Ms Meinich recalled that the idea behind the process of EU accession was to enhance the coherence of human rights protection in Europe. She then made an overview of the current state of negotiations between the EU and the Council of Europe. After the Opinion 2/13 of the Court of Justice of European Union, the negotiations resumed last year in the same format as the “47+1 Group”. The group was tasked to revise the draft accession agreement and to address the objections raised in that opinion. It held one informal meeting and six negotiation meetings and kept regular exchanges of views with non-governmental organisations and national human rights institutions. Ms Meinich briefly referred to the principal legal issues pending before the group, such as the “co-respondent mechanism”, inter-state applications, requests for an advisory opinion under Protocol No. 16 to the Convention, the principle of mutual trust and the issues related to the EU Common Foreign and Security Policy, for which the CJEU had no jurisdiction. She indicated that the group had held an exchange of views with the Assembly’s secretariat on the issue of election of judges at the European Court of Human Rights), expressed hope that all pending issues could be resolved and welcomed the participation of the Assembly in the negotiation process.¹

Mr López Aguilar presented briefly the work of LIBE. He stressed that its members were involved in the adoption of EU legislation and that the EU was not only meant for creating the single market but also to protect the rule of law and human rights. He acknowledged the complexity of the legal questions to be resolved during the accession negotiation process and recalled that 20 member States of the Council of Europe were not members of the EU. After the draft accession agreement had been finalised in 2013, the European Parliament,

¹ The full text of the expert’s statements (only in English) is available at the committee secretariat.

which had a final say in the process, did not oppose its adoption. The accession process had stalled because of the CJEU's Opinion 2/13 and because no judicial dialogue between the CJEU and the Court had been reached at the previous round of negotiations. After Opinion 2/13 had been delivered, the European Parliament requested the European Commission to resume the process. According to Mr **López Aguilar**, all legal questions raised in the Opinion, including those concerning the “co-respondent mechanism”, the specificity of the Common Foreign and Security Policy and the EU's representation in the Assembly and the Court, could be resolved irrespective of their complexity. Much had already been said in academic papers. The European Parliament was following closely the new round of negotiations. Mr López Aguilar expressed hope that the new round of negotiations would be concluded with success before the end of the current term of office of the European Parliament, as the EU's accession to the Convention was necessary to continue building a civilisation based on human rights and the rule of law.

Mr Pisapia agreed with the previous speakers that the questions raised during the new round of negotiations could be solved, no matter their difficulty. However, he was concerned about the fact that neither the representatives of the Assembly nor of the European Parliament were invited to participate in the negotiation process. He emphasised that parliamentary bodies of the Council of Europe and the EU should play a crucial role in establishing a coherent system of human rights protection across Europe. Some questions, such as the “co-respondent mechanism”, could be solved in the accession agreement, while others might need more careful consideration and diplomacy. Some legal solutions might need changing the EU treaties, which would take a very long time and thus should be avoided. Nevertheless, Mr Pisapia was optimistic about the perspective of accession, which is a legal obligation enshrined in the Treaty on the European Union and going beyond political discretion. He also spoke about the need to resolve the conflict between the CJEU and the Court and hoped that the negotiation process could overcome all underlying problems.

The ensued discussion involved **Mr Katrougalos** (who asked about the perspective of the EU accession to the European Social Charter and proposed to establish mixed judicial chambers composed of judges from the CJEU and the Court to solve problems of conflicting case-law), **Ms Ævarsdóttir** (who asked if the experts knew cases, in which the Court had not been able to adjudicate because of the lack of jurisdiction and whether such cases could constitute another argument in favour of EU accession to the Convention), **Messrs Stylianidis** (who stressed the crucial role of complementarity between constitutional courts and the Court in ensuring European human rights protection standards and supported Mr Katrougalos's proposal to establish a mixed judicial chamber), **Stier** (who asked whether a breakthrough in the negotiation process could be beneficial to establishing a common European space for human rights protection), **Zingeris** (who asked whether anyone could determine, even if with approximation, the timeframe of the future accession), **Altunyalidiz** (who stressed that the EU accession to the Convention is a legal obligation stemming from Article 6 of the Treaty on the EU; supported this idea, while emphasising the need to preserve the unity of the Convention system, and recalled that the Assembly had always promoted the Convention and the EU accession to it), and **Efstathiou** (who wished to reflect on the subsidiarity principle in the context of EU accession and was concerned about the existence of two European courts dealing with human rights protection and the risk of achieving a higher level of human rights protection only within the EU).

Ms Meinich indicated that the negotiation process should be completed by 2023, according the Committee of Ministers' terms of references. However, the exact timing could not be reasonably predicted because the approval of the accession instruments would depend on the procedures before EU institutions and on a future opinion of the CJEU. The negotiation group had considered some ideas included in various academic papers and AFCO documents. Ms Meinich knew no individual cases in which the Court lacked jurisdiction and which would illustrate the need for rapid finalisation of the EU accession process; she stressed that, under the Convention, the Court could not receive applications against the EU. In the case of accession, the principle of subsidiarity would apply to the EU on an equal footing, but specific mechanisms should be put in place bearing in mind the specificities of the EU as an international organisation. For the same reason, the CJEU should be then regarded as a constitutional court like any constitutional court of a State Party to the Convention and its decisions would be subject to the Court's review.

Mr López Aguilar reiterated that despite the challenges the EU accession to the Convention was no longer merely an option, because of the legal obligation enshrined in Article 6 of the Treaty on the EU. Article 6 had been included in Title I of the Treaty on purpose, in order to underline that the EU was the only supranational organisation allowing its citizens to sue it before a supranational court. As regards the possibility of conflicting case law, Articles 51-54 of the Charter of Fundamental Rights regulated the relations between the CJEU and

the Court. Although EU accession to the Convention was a huge challenge, it should not be abandoned and a strong political message in its favour should be sent to relevant stakeholders.

The **rapporteur** summarised the principal arguments of the experts and concluded that some compromises should be made in order to privilege the protection of individuals' human rights over political interests of member States and international organisations. He promised to stay in touch with the chairs of LIBE and AFCO and stressed the role of the Committee in promoting the ratification of the accession agreement by member States of the Council of Europe. He was reluctant to reopen issues which had already been sorted out in the previous round of negotiations and recalled that the Lisbon Treaty had granted legal personality to the EU. He did not intend to examine the issue of the EU accession to the European Social Charter. He also recalled that the Committee on Political Affairs and Democracy was working on the issue of strategic cooperation between the EU and the Council of Europe.