SUBSTANTIVE AND PROCEDURAL ISSUES RAISED BY THE ACCESSION OF THE EU TO THE ECHR

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1. INTRODUCTION

Accession of the European Union (EU) to the European Convention on Human Rights (ECHR), i.e. the definition of a formal link between two different “supranational” legal orders facilitating European integration, respectively aiming to establish a common market and a catalogue of fundamental rights, has been the object of a lively debate for at least thirty years. First suggested by the European Commission in a Memorandum dating from 1979 and strongly supported by the European Parliament, accession was controversially rejected by the European Court of Justice (ECJ) in its famous Opinion 2/94, based on the absence of explicit and implicit power within primary EU rules and in light of the constitutional significance of the changes brought about by accession. Provided for in the rejected Constitution for Europe,

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2 It is nevertheless interesting to note that, according to the rejected thesis of Pierre Pescatore, the EC/EU might be bound by treaties concluded by Member States in matters over which they retain competence, including the ECHR outside accession (PESCATORE, L’ordre juridique des Communautés européennes: étude des sources du droit communautaire, Liège, 1975, p. 149).


accession has definitely been included in the text of the Treaty on European Union (TEU) revised by the Lisbon Treaty (Article 6(2) TEU) together with the explicit recognition of the legal personality of the Union (Article 7 TEU), thus removing legal obstacles existing within the EU legal order. Based on these premises, on 17 March 2010 the Commission proposed negotiation directives for the EU’s accession to the Convention and on 4 June 2010 EU Justice Ministers gave the Commission the mandate to conduct negotiations on their behalf. From the side of the Council of Europe, obstacles to the accession have been removed by Article 17 of Protocol No. 14, which amended Article 59 ECHR by adding a second paragraph, explicitly providing for the possibility of the EU acceding to the ECHR. As a consequence, on 26 May 2010 the Committee of Ministers of the Council of Europe gave an ad hoc mandate to its Steering Committee for Human Rights in order to elaborate with the EU the necessary legal instrument for the EU’s accession to the ECHR. Finally, the process will require the unanimous consensus not only of all the Member States of the EU, given the requested unanimous approval of the accession instrument by the Council, but also by all the States Parties to the ECHR, required to ratify the instrument at issue.

2. THE RELATIONSHIP BETWEEN EU LAW AND THE ECHR AFTER ACCESSION: SUBSTANTIVE ASPECTS

The main argument usually adduced to support the accession of the EU to the ECHR relies upon the necessity of coherence in the protection of fundamental

