

**Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms**

1 The Stockholm Programme adopted by the European Council on 11 December 2009 envisages the ‘rapid’ accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the Convention’). Pursuant to that programme, the European Commission has recently submitted a draft decision to the Council of the European Union authorising the Commission to negotiate the accession of the Union to the Convention. That draft is currently the subject of in-depth study in the Council.<sup>1</sup> With a view to making a contribution to the efforts being made to bring to fruition the proposed accession, which raises complex legal questions, the Court of Justice has it in mind to submit the following reflections on a particular aspect linked to the way in which the Union’s judicial system functions.

**I.**

2 The Treaty of Lisbon, which entered into force on 1 December 2009, represents a major step in the development of the protection of fundamental rights in Europe. First, the Charter of Fundamental Rights of the European Union now has the status of a legally binding act, so that from now on the Court of Justice and the national courts have an instrument available which will be the principal basis on which they carry out their task of ensuring that in the interpretation and application of the law of the Union fundamental rights are observed. Second, the Treaty of Lisbon provides for the Union to accede to the Convention. By consolidating in this way the legal framework for the protection of fundamental rights at Union level, that protection, the first judicial foundations of which were laid more than forty years ago,<sup>2</sup> is reaffirmed and reinforced.

3 With respect more specifically to the Convention, the institutions and bodies of the Union have for a long time been seeking to ensure, under the supervision of the Court of Justice, that human rights as guaranteed by the Convention are observed, even in the absence of an express obligation to that effect. As its case-law bears witness, the Court of Justice regularly applies the Convention and refers in that connection, more and more precisely in recent years, to the case-law of the European Court of Human Rights. This has led the Court of Human Rights, because of the existence of equivalent protection of human rights in European Union law, to accept a presumption of compliance with the Convention in certain circumstances (the *Bosphorus* judgment).<sup>3</sup>

**II.**

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<sup>1</sup> The earlier stages are summarised in the Note from the Presidency to Coreper/Council, document 6582/10, of 17 February 2010, ‘Accession of the European Union to the European Convention on Human Rights’.

<sup>2</sup> Judgment of the Court of Justice in Case 29/69 *Stauder* [1969] ECR 419.

<sup>3</sup> Judgment of the European Court of Human Rights, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

- 4 Accession of the Union, as a regional integration organisation, is subject to specific conditions which are different from those laid down for the accession of a State. In accordance with Article 6 TEU, accession ‘shall not affect the Union’s competences as defined in the Treaties’,<sup>4</sup> and, as stated in a protocol which is annexed to the Treaties and therefore has the same value as them, the agreement on accession ‘shall make provision for preserving the specific characteristics of the Union and Union law’.<sup>5</sup>
- 5 The specific characteristics of the Union and its legal order include the feature that, as a general rule, action by the Union takes effect as against individuals only through the intermediary of national measures of implementation or application. Thus, in order to secure protection of their fundamental rights in the face of action by the Union, individuals usually have to approach the national authorities, in particular the courts of the Member States. If in a particular case an individual is not satisfied with the protection given him at national level, he may, after exhausting domestic remedies, lodge an application against the Member State concerned before the European Court of Human Rights. By doing so, individuals can – indirectly – challenge acts of the Union by challenging the national measures applying or implementing the law of the Union.
- 6 In view of the accession of the European Union to the Convention, this specific characteristic of the legal system of the Union must be seen in the context of the principles governing the functioning of the control mechanisms set up by the Convention, in particular the principle of subsidiarity. According to that principle, it is for the States which have ratified the Convention to guarantee that the rights enshrined in the Convention are observed at national level and for the European Court of Human Rights to verify that those States have in fact complied with their commitments. It is thus primarily for the national authorities and the national courts to prevent or, in default of prevention, examine and penalise breaches of the Convention.<sup>6</sup>
- 7 On the basis of that principle of subsidiarity and in order to ensure that it is put into practice in the context of preparing for accession, the Union must make sure, as regards acts of the Union which are susceptible to being the subject of applications to the European Court of Human Rights, that external review by the Convention institutions can be preceded by effective internal review by the courts of the Member States and/or of the Union.

### III.

- 8 In the judicial system of the European Union, as established by the Treaties, the Court of Justice has the task of ensuring that in the interpretation and application of the

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<sup>4</sup> Article 6(2) TEU.

<sup>5</sup> Article 1 of the Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the European Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (‘Protocol No 8’).

<sup>6</sup> See the Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference (Conference on the Future of the ECHR held in Interlaken in February 2010), 3 July 2009, p. 4, available on the ECHR website.

Treaties the law is observed,<sup>7</sup> and it alone has jurisdiction, as a result of its function of reviewing the lawfulness of the acts of the institutions, to declare if appropriate that an act of the Union is invalid. It is settled case-law that all national courts have jurisdiction to consider the validity of acts adopted by institutions of the Union, but national courts, whether or not there is a judicial remedy against their decisions in national law, do not have jurisdiction themselves to declare such acts invalid. To maintain uniformity in the application of European Union law and to guarantee the necessary coherence of the Union's system of judicial protection, it is therefore for the Court of Justice alone, in an appropriate case, to declare an act of the Union invalid.<sup>8</sup> That prerogative is an integral part of the competence of the Court of Justice, and hence of the 'powers' of the institutions of the Union, which, in accordance with Protocol No 8, must not be affected by accession.<sup>9</sup>

- 9 In order to preserve this characteristic of the Union's system of judicial protection, the possibility must be avoided of the European Court of Human Rights being called on to decide on the conformity of an act of the Union with the Convention without the Court of Justice first having had an opportunity to give a definitive ruling on the point.

#### IV.

- 10 With respect more particularly to the preliminary ruling procedure provided for in Article 267 TFEU, it may be pointed out in this connection that its method of operation, as a result of its decentralised nature which means that the national courts have general jurisdiction in respect of European Union law, has given altogether satisfactory results for more than half a century, even though the Union now consists of 27 Member States. However, it is not certain that a reference for a preliminary ruling will be made to the Court of Justice in every case in which the conformity of European Union action with fundamental rights could be challenged. While national courts may, and some of them must, make a reference to the Court of Justice for a preliminary ruling, for it to rule on the interpretation and, if need be, the validity of acts of the Union, it is not possible for the parties to set this procedure in motion. Moreover, it would be difficult to regard this procedure as a remedy which must be made use of as a necessary preliminary to bringing a case before the European Court of Human Rights in accordance with the rule of exhaustion of domestic remedies.
- 11 It is true that the system established by the Convention does not lay down, as a condition of admissibility of an application to the European Court of Human Rights, that in every case a court of supreme jurisdiction must first have been asked to rule on the alleged violation of fundamental rights by the act in question. However, what is at stake in the situation referred to is not the involvement of the Court of Justice as the supreme court of the European Union, but the arrangement of the judicial system of the Union in such a way that, where an act of the Union is challenged, it is a court of the Union before which proceedings can be brought in order to carry out an internal review before the external review takes place.

#### V.

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<sup>7</sup> Article 19(1), first subparagraph, TEU.

<sup>8</sup> See the judgment of the Court of Justice in Case 314/85 *Foto-Frost* [1987] ECR 4199.

<sup>9</sup> Article 2, first sentence, of Protocol No 8.

- 12 Consequently, in order to observe the principle of subsidiarity which is inherent in the Convention and at the same time to ensure the proper functioning of the judicial system of the Union, a mechanism must be available which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the Court of Justice before the European Court of Human Rights rules on the compatibility of that act with the Convention.

Luxembourg, 5 May 2010.