

COMMISSION OF THE EUROPEAN COMMUNITIES

SEC(90) 2087 final

Brussels, 19 November 1990

Commission Communication on
Community accession to the European Convention for the
Protection of Human Rights and Fundamental Freedoms
and some of its Protocols

Commission Communication on
Community accession to the European Convention for the
Protection of Human Rights and Fundamental Freedoms
and some of its Protocols

1. There is a conspicuous gap in the Community legal system. All legal acts of the Community Member States are subject to review by the Commission of Human Rights and the Court of Human Rights, which were set up by the European Convention on Human rights (ECHR) of 1950, to ensure that human rights are respected. The Community, however, while proclaiming its commitment to respecting democratic values and human rights, is not subject to this control mechanism and the acts promulgated by its institutions enjoy a sort of "immunity" from the Convention.

This gap can be filled by having the Community accede to the ECHR. Accession in no way precludes the conferring of any additional fundamental rights which may be considered appropriate in connection with plans for European citizenship.

Although it is drawing up its own catalogue of rights and obligations of European citizens, which will refer to the ECHR but will have broader scope, the Community will have to have its acts reviewed by the Strasbourg Commission and Court.

The idea of accession to the ECHR is a response to a long-felt need to ensure full respect for human rights in the interpretation and application of Community law.

On 4 April 1979 the Commission sent the Council a memorandum designed to stimulate in-depth discussion with all the authorities concerned on the question of accession to the ECHR. The Economic and Social Committee endorsed the memorandum in 1980; Parliament delivered a favourable opinion in 1982 and confirmed this opinion in 1989 and again in 1990.

At a meeting on 21 and 22 April 1986 the Council discussed whether the Community should accede to the ECHR as proposed by the Commission in its memorandum of April 1979, supplemented by a working document of 9 April 1986. At the end of the exchange of views the Presidency agreed to reflect on what action should be taken on this dossier in the light of the various arguments put forward.

2. The Commission argued in favour of subjecting the legal acts of the institutions to the review mechanisms set up by the 1950 Convention (Commission of Human Rights and Court of Human Rights). The Community would thus be subject to the same review mechanisms as all its Member States, so that respect for fundamental rights would be guaranteed in its acts in the same way as in the acts of its Member States. This seems all the more desirable in that the Community legal system, which has primacy over national law and has direct effect, constitutes a separate legal system from that of national law.

- 2 -

In this context acknowledgement of the priority role of the ECHR in protecting fundamental rights should be seen as a key factor in providing this protection with due regard for the principle of subsidiarity.

The time has come to make a formal request for Community accession to the ECHR, given the new developments over the last four years both at political level and in the more technical aspects.

3. Recent political developments have given human rights such a high profile that it is becoming increasingly difficult to separate the issue from Community activities:

- (a) The third paragraph of the preamble to the Single Act says that the Community Member States are "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice".¹

These undertakings are given shape in Community acts concerning freedom of movement for persons and protection of the environment and consumers.

Moreover, there are references to respect for human rights and fundamental rights not only in the preambles to agreements with third countries but also, more recently, in the substantive part of the agreements themselves.

- (b) The development of Community activities with a view to achieving the objectives of the Single Market makes it increasingly necessary for Community activities to be subject to the review mechanisms of the Convention in the same way as the Member States' activities.

Thus, no matter how closely the Luxembourg Court monitors human rights, it is not the same as scrutiny by the Strasbourg Court, which is outside the Community legal system and to which the constitutional courts and the supreme courts of the Member States are subject.

The fact that the Community has not acceded to the Convention raises a special problem when a Member State enforces a Community legal act. As has already been pointed out, the Community is responsible for the contested act and is not subject to the review mechanism of the Strasbourg Convention.

The legal arguments in favour of accession and the replies to the criticisms made against it can be summed up as follows:

¹ The Court of Justice referred to this paragraph in the preamble to the judgment delivered in Case 249/86 Commission v Federal Republic of Germany: Judgment of 18 May 1989.

- 3 -

- (1) The legal acts of the institutions could be made subject to the review mechanisms set up by the 1950 Convention, which would enable the Strasbourg Court to review judgments of the Luxembourg Court for compliance with the Convention in the same way as it does judgments of the constitutional courts and supreme courts of the Member States.
- (2) Accession would afford citizens better protection of their fundamental rights against Community measures, particularly when these measures are implemented by national authorities, without unduly extending the time involved, since an application, which does not have suspensory effect, would be lodged at the initiative of an individual and in his own interest.
- (3) Accession would concern only the areas covered by Community law. It would affect the legal systems of the Member States only as regards this scope and would therefore not mean giving the Community general powers in the area of human rights.
- (4) Community accession to the ECHR is a complementary rather than an alternative measure to the production of a catalogue of fundamental rights specific to the Community, in connection with the current work on European citizenship.

These arguments and the objections which have been raised to accession are expanded in Annex II.

- (c) Moreover, the ECHR and the rights and values which the contracting parties to this Convention undertake to protect and promote become a common reference, both for the countries of Western Europe and for those of Eastern and Central Europe. Hungary's accession to the Council of Europe and the requests for accession by Poland, Yugoslavia and Czechoslovakia, prior to accession to the Convention itself, are proof of this.

At a time when public opinion is becoming increasingly aware of the human rights issue, as can clearly be seen at the level of the CSCE, it is hard to imagine the Community sitting on the sidelines, particularly as the Community will be taking an active part in the development of the CSCE, which must include the development of pluralist democracy, the rule of law, human rights, better protection of minorities, and human contacts.

The Dublin European Council on 28 April 1990 asked the Community and its Member States to assume a leading role in all proceedings and discussions within the CSCE process and in efforts to establish new political structures or new agreements based on the principles of the Helsinki Final Act.

(d) In this connection it is important for the Community as such to demonstrate in a solemn and tangible way for the citizens of Europe its attachment to the principles contained in the Convention.

- 4. Accession to the Convention and its procedures should be the subject of an additional Protocol to be negotiated with the competent organs of the Council of Europe.

In view of the autonomy of the Community legal system in relation to national legal systems, it is important for the Community to have the same rights and obligations within the organs of the Convention as the Member States of the Council of Europe.

For this, the Community must ask to be represented within the Community of Human Rights and the Court of Human Rights on the same terms as the Member States. Ad hoc solutions could be sought for Community participation in the interventions of the Committee of Ministers of the Council of Europe.

The solutions to be envisaged are set out in point 6 of Annex II.

- 5. The Commission considers that on the basis of the arguments set out above and given all the legitimate interests at stake and the lack of major legal obstacles, the Community should accede to the ECHR.

The Member States, as members of the Council of Europe, should lend their full support in that body to the Community during the accession negotiations.

In view of the political nature of the matter, it should be discussed at the appropriate level and with the necessary priority.

- 6. The Commission accordingly requests that the Council:
 - (I) approve the request for the Community's accession to the ECHR;
 - (II) authorize the Commission to negotiate the details of this accession in accordance with the directives set out in Annex I, the aim being to make the necessary adjustments to the Convention to make possible this accession (notably to provide for Community representation in the Commission of Human Rights and the Court of Human Rights).

ANNEX INegotiating directives

1. The purpose of the negotiations is to draw up an additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, enabling the Community to become a party to the Convention and some of its Protocols.
2. In order to ensure that the Community participates fully in the organs of the Convention, the Community will have to be represented as such in the Commission of Human Rights and the Court of Human Rights. An ad hoc solution will have to be envisaged for its representation in the Committee of Ministers.
3. The negotiating directives will be defined, where necessary, by the usual procedures.

ANNEX II

Community accession to the European Convention
for the Protection of Human Rights and Fundamental Freedoms (ECHR)

1. In its Memorandum of 1979 (Bulletin Supplement 2/79) the Commission argued in favour of having the legal acts of the institutions made subject to the review mechanisms set up by the 1950 Convention (Commission of Human Rights and Court of Human Rights). The Community would thus be subject to the same review mechanism as all its Member States.

At the present time, the powers of the Commission of Human Rights and the Court of Human Rights affect only the Member States of the Council of Europe. They are free to accept the powers of the European Commission of Human Rights for individual claims and to agree to be bound by the judgments of the European Court of Human Rights. (All the Community Member States have done so.) Community acts are not covered by this mechanism.¹

The Community is not formally bound by the 1950 Convention. Under the Community legal system, the Convention is applied indirectly only as a source of inspiration to the Court of Justice of the European Communities when drawing up the general principles of law on which Community law is founded.² Neither the Commission of Human Rights nor the Court of Human Rights can exercise any control over Community activities, unless the Community accepts the review mechanism set up by the 1950 Convention.

2. It has been claimed that because there exists a large volume of case law of the Court of Justice of the European Communities on fundamental rights, the Community does not need to accede to the ECHR. Although this case law plays a very important part in protecting human rights in the Community, it can provide criteria for the protection of human rights only as and when relevant cases are brought before the Court of Justice of the European Communities. Moreover, it does not comply with the objective of the 1950 Convention, which is to subject the acts of the Member States of the Council of Europe to review outside their own legal systems.

1 Decision of the European Commission of Human Rights of 10 July 1978; CFDT v Community No 8030/77 DR 13, 231.

2 Case 4/73 Nold v Commission [1974] ECR 491, 508.

Thus, no matter how much attention the Luxembourg Court pays to respect for human rights, it is not the same as external scrutiny by the Strasbourg Court, to which even the constitutional courts and supreme courts of the Member States are subject. It has also been objected that Community accession to the Convention would mean that it would take longer for the individual concerned to obtain redress, since the application to the Strasbourg authorities would be in addition to the Community procedure. The application does not, however, have suspensory effect. It is lodged only in the interests of the individual, and on his own initiative.

3. From another point of view, it has been argued that consequent on accession the Community would have powers in the field of human rights and could monitor all the activities of the Member States in this respect. On the contrary, accession would affect only the Community's field of competence, where the Member States are already subject to scrutiny by the Court of Justice of the European Communities. Accession to the 1950 Convention would not mean any new obligations for them, but would afford their citizens better protection against any Community measures which might infringe fundamental rights.
4. It has also been contended that if the Community acceded to the Convention, the resulting transposition of the ECHR into Community law would give the Convention direct effect in the legal systems of the Member States, whereas a number of Member States, although submitting themselves to the review mechanisms of the Convention, have not in fact transposed it into domestic law.

However, in so far as the Court of Justice of the European Communities refers to the Convention as a source of the general principles of law on which the Community legal system is founded, some of the standards of protection conferred by the Convention have already been established by the Court as general principles of Community law. These standards therefore rank as Community law in the law of the Member States in the areas in which Community law is applicable. Community accession to the Convention would not change this situation in any way.

In any case, Community accession to the 1950 Convention would affect the legal systems of the Member States only as regards the scope of a Community legal act; it would have no bearing on the effects of the Convention in areas outside this scope. Developments in Community law and the corresponding case law of the Court of Justice of the European Communities have led to a much clearer definition of the dividing line.³

3 Joined Cases 60 and 61/84 Cinéthèque v. Fédération nationale des cinémas français [1985] ECR 2605, 2627; Case 12/86 Demirel v. Stadt Schwäb. Gmünd [1987] ECR 3747, 3754.

5. The fact that the Community has not acceded to the Convention raises a special problem when a Member State implements a Community legal Instrument:

- (I) the Community, which is responsible for the contested act, is not subject to the review mechanism of the Strasbourg Convention;
- (II) if the Member State, which is subject to the review mechanism, has been involved only to implement faithfully the strict obligations imposed on it by Community law, its action is outside the jurisdiction of the European Commission of Human Rights and the European Court of Human Rights.⁴

There is, therefore, a gap and an inconsistency in the protection of the rights of citizens and economic operators with respect to an Instrument of Community law.

Similarly, Member States are not released from their responsibility, in respect of the guarantees offered by the Convention, for the powers transferred to the Community, as the Commission of Human Rights has confirmed.⁵ It would therefore be normal for the Member States to remove a possible source of conflict by allowing direct action against the Community for acts emanating from the Community.

6. It has also been claimed that some of the provisions of the 1950 Convention are suitable for application only by States and not by an organization such as the Community. As already pointed out in the 1979 Memorandum, the additional protocol to the Convention to be negotiated with the competent authorities of the Council of Europe should include the necessary adjustments to the provisions of the Convention to allow the Community to accede to the Convention and to submit to the review mechanism set up by the Convention. The full participation of the Community in the organs which ensure that the Convention is respected should also be organized. This participation raises a number of problems, particularly as regards the Committee of Ministers. These problems have already been discussed in the 1979 Memorandum. It would seem that they can be solved more easily today than in 1979 in view of the consolidation of the Community legal system and the bigger role played by the Community in international relations.

4. Decision of the European Commission of Human Rights of 9 February 1990 in C.M. and Co. v the Federal Republic of Germany Case No 13258/87. Enforcement of a fine imposed under Article 85 of the EEC Treaty

5. See abovementioned Decision.

- 4 -

As in the case of a State which is party to the Convention, it would seem quite appropriate to request that a Judge of the Court and a member of the Commission of Human Rights be appointed to represent the Community in accordance with the normal procedures of the Convention (Articles 39 and 21), to bring to the deliberations of these two organs their knowledge of Community law and their awareness of the requirements inherent in the Community legal system. An exception will have to be allowed to the rules in the 1950 Convention stipulating that the two organs cannot include more than one national per Member State (Articles 38 and 20 of the Convention). This should be acceptable in view of the fact that the Community legal system is independent of the systems in each of the Member States against which a complaint may be lodged before the Strasbourg bodies.

At the moment the situation is more difficult as regards Community participation in the Committee of Ministers. This political organ of the Council of Europe plays a dual role in the control procedures regarding human rights. It takes decisions in cases accepted by the Commission of Human Rights which are not referred to the Court (Article 32 of the Convention) and it supervises execution of the Court's judgments (Article 54 of the Convention).

The involvement of the Committee under Article 32 of the Convention does not seem to be necessary for the aims pursued by the accession of the Community to the Convention, since a higher degree of protection is offered by a judgment of the Court, and provision can be made for all the cases accepted by the Commission concerning the Community to be brought before the Court in accordance with Article 48.

On the other hand, the Committee should be able to play its role in supervising execution of judgments of the Court of Human Rights concerning the Community. Solutions ensuring full participation by the Community can, however, be envisaged when the enforcement of judgments is discussed.

There are therefore sufficient grounds for considering that satisfactory solutions could be negotiated as regards all the organs responsible for ensuring that the 1950 Convention is observed.

7. In its 1979 Memorandum the Commission suggested using Article 235 of the EEC Treaty, Article 203 of the Euratom Treaty and Article 95 of the ECSC Treaty as the legal basis for accession to the 1950 Convention, on the grounds that fundamental rights must be respected in all Community activities. Accession to the Convention is one way of achieving this horizontal objective for Community activities by introducing effective external control through the mechanism of the Strasbourg Convention.

It is not a case of giving the Community new powers, but of ensuring that fundamental rights are observed in the measures taken by the Community within the framework of its powers.

The preamble to the EEC Treaty and the preamble to the Single Act, in so far as it concerns Community action, offer the possibility of interpreting and specifying the objectives of the Community as the European Court of Justice has in fact done in its judgments.⁶ The Court has, for instance, already given practical effect to the part of the preamble to the Single Act relating to fundamental rights.⁷ The choice of Article 235 of the EEC Treaty, Article 203 of the Euratom Treaty and Article 95 of the ECSC Treaty as the legal basis for the act of accession to the Convention therefore seems fully justified.

- 8. The accession of the Community to the ECHR does not exclude the option of a catalogue of fundamental rights specific to the Community.⁸

All that is involved is the application of review mechanisms to acts of the Community institutions to ensure that the human rights guarantees contained in the Strasbourg Convention, which are generally considered perfectible standards, are observed.

The Commission has argued that the two approaches are complementary. Parliament also acknowledged this in the preamble to its declaration of fundamental rights and freedoms of 12 April 1989, where it referred to its favourable opinion on the suggestion for accession made by the Commission in its 1979 Memorandum.

6 Case 43/75 Defrenne v Sabena, [1976] ECR 455, 473.

7 Case 249/88 Commission v Federal Republic of Germany: Judgment of 18 May 1989.

8 A People's Europe, Communication from the Commission to Parliament. COM(88) 331 final of 24 June 1988.