

OPINION 2/94 OF THE COURT  
28 March 1996

(Accession by the [Union] to the European Convention for the Protection of Human Rights and Fundamental Freedoms)

The Court of Justice has received a request for an Opinion, lodged at the Registry of the Court on 26 April 1994, from the Council of the European Union pursuant to [ex-]Article 228(6) of the EC Treaty, which provides:

'The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with [ex-]Article N of the Treaty on European Union.'

**Summary**

**I – The request for an Opinion**

1. The Council, represented by J.-C. Piris, Director-General of the Legal Service, J.-P. Jacqué, Director in the Legal Service, and A. Lo Monaco, of its Legal Service, acting as Agents, requests the Opinion of the Court on the following question:

'Would the accession of the European [Union] to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter "the Convention") be compatible with the Treaty [on the Functioning of the European Union]?'

2. According to the Council, no decision on the principle of opening negotiations can be taken until the Court has considered whether the envisaged accession is compatible with the Treaty.

In its oral observations, the Council, whilst recognizing that the text of the envisaged agreement does not yet exist, submits that the request is admissible. The Council has not committed a misuse of procedure but is confronted by fundamental issues concerning legal and institutional

order. Furthermore, the convention to which the [Union] would accede is known and the legal issues to which accession gives rise are sufficiently clear for the Court to be able to give an Opinion.

3. The Council, setting out the aim and objectives of the agreement envisaged, states its position on the scope of accession, [Union] participation in control bodies and the modifications which would have to be made to the Convention and the Protocols.
4. With regard to the scope of accession, the Council states that each [Union] will have to adhere to the Convention within the framework of its powers and within the limits of the scope of its law. Accession should cover the Convention and the Protocols which have come into force and been ratified by all the Member States of the [Union]. Such accession should not have any effect on the reservations entered by the Member States, parties to the Convention, which will continue to apply in the areas falling within national jurisdiction. The [Union] would agree to submit to the machinery for individual petitions and inter-State applications; actions between the [Union] and its Member States would, however, have to be excluded in recognition of the monopoly conferred in such matters by [Article 344 TFEU] on the Court of Justice.
5. With regard to [Union] participation in control bodies, in particular the future single Court of Human Rights, there are various possible solutions: no [Union] judge, appointment of a permanent judge with the same status as the other judges, or the appointment of a judge with special status, entitled to vote only in cases concerning [Union] law. That judge would not be a member of the Court of Justice at the same time. The procedure for appointing the judge would be governed by the Convention on the understanding that the appointment of candidates proposed by the [Union] would be an internal [Union] matter. [Union] participation in the Committee of Ministers would not be envisaged; the Committee would moreover no longer have any function in the future judicial framework.
6. It would be necessary to amend the Convention and the Protocols which are currently open to accession only by Member States of the Council of Europe. The [Union] does not propose to join the Council of Europe. It would similarly be necessary to modify the technical provisions providing for the Member States of the Council of Europe to intervene in the control machinery of the Convention. In the event of accession, the [Union] would be bound only within the limits of its powers. There

would have to be machinery enabling the [Union] and the Member States to determine the division of competence before the Convention authorities.

7. In reviewing the conformity of accession with the Treaty, the Council considers the [Union]'s competence to conclude the agreement envisaged and the compatibility of the system of courts under the Convention with [the second sentence of Article 19(1) TEU] and [Article 344 TFEU].
8. The Council recognizes that the Treaty confers no specific powers on the [Union] in the field of human rights. Such rights are protected by way of general principles of [Union] law. The need for such protection, reaffirmed by the case-law, is now enshrined in [Articles 2, 4(2), 6(3) TEU and 311 first paragraph TFEU]. The Council considers that the protection of human rights flows from a horizontal principle forming an integral part of the [Union]'s objectives. In the absence of a specific article, [the first sentence of Article 352(1) TFEU] would serve as the basis of accession provided that the conditions of that article's application are fulfilled.
9. The Council also raises the question whether accession of the [Union] to the Convention, in particular to the system of courts, calls in question the exclusive jurisdiction conferred on the Court of Justice by [the second sentence of Article 19(1) TEU] and [Article 344 TFEU] and the autonomy of the [Union] legal order.
10. The Council emphasizes that judgments of the European Court of Human Rights have no direct effect: that court cannot repeal or amend a provision of national law but can only impose on a contracting party an obligation to bring about a certain result. The Court of Justice would, however, have to apply judgments of the Court of Human Rights in its own decisions. The requirement that in order for individual petitions to be admissible domestic remedies must first have been exhausted would mean that the [Union]'s internal courts, in particular the Court of Justice, would rule on the compatibility of a [Union] act with the Convention. In Opinion 1/91 [1991] ECR I-6079, the Court accepted the [Union]'s submission to judicial machinery created by an international agreement provided that the court simply interpreted and applied the agreement and did not challenge the autonomy of the [Union] legal order. The Council raises the question whether that statement applies only where the judgments of that court concern solely the international agreement or

also where those judgments may cover the compatibility of [Union] law with the agreement.

## II – Procedure

1. In accordance with Article 107(1) of the Rules of Procedure of the Court of Justice, the request for the Opinion was served on the Commission and the Member States. Written observations were submitted by the Belgian Government, represented by J. Devadher, Director of Administration at the Ministry of Foreign Affairs, Foreign Trade and Development, acting as Agent; the Danish Government, represented by L. Mikaelson, Ambassador, and P. Biering, Head of Department, Legal Advisers at the Ministry of Foreign Affairs, acting as Agents; the German Government, represented by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and A. Dietrich, Regierungsdirektor at the Federal Ministry of Justice, acting as Agents; the Greek Government, represented by V. Rotis, Honorary President of the Council of State, S. Zissimopoulos, Legal Adviser to the Permanent Representation of the Greek Republic, and N. Dafniou, secretary to the Special Service for [Union] Legal Affairs of the Ministry of Foreign Affairs, acting as Agents; the Spanish Government, represented by A. Navarro Gonzalez, Director-General for [Union] Legal and Institutional Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, of the Department of [Union] Legal Affairs, acting as Agents; the French Government, represented by E. Belliard, Deputy Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, C. de Salins, Head of Section in that directorate, and C. Chavance, Foreign Affairs Secretary in the same directorate, acting as Agents; the Netherlands Government, represented by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; the Portuguese Government, represented by L. Fernandes, Director of the Legal Service Directorate of the Directorate-General of [Union] Affairs of the Ministry of Foreign Affairs, and M. L. Duarte, Consultant in the same directorate, acting as Agents; the United Kingdom, represented by J. Collins, of the Treasury Solicitor's Department, acting as Agent, and S. Richards and D. Anderson, Barristers; and the Commission, represented by J. Amphoux, Principal Legal Adviser, J. Pipkorn, Legal Adviser, and R. Gosalbo- Bono, of the Legal Service, acting as Agents.
2. After the accession of the Republic of Austria, the Republic of Finland

and the Kingdom of Sweden to the European Union, the request for an Opinion was also served on those Member States. Written observations were submitted by the Austrian Government, represented by K. Berchtold, university lecturer, acting as Agent, and by the Finnish Government, represented by H. Rotkirch, Head of Service at the Ministry of Foreign Affairs, acting as Agent.

3. At its request, the European Parliament, represented by G. Garzón Clariana, jurisconsult, and E. Perillo, of the Legal Service, acting as Agents, was granted leave to submit observations.
4. At the hearing on 7 November 1995 the Court heard the oral observations of the Belgian Government, represented by J. Devadé; the Danish Government, represented by L. Mikaelson and P. Biering; the German Government, represented by A. Dietrich; the Greek Government, represented by A. Samoni-Rantou, Special Deputy Legal Adviser to the Special Service for [Union] Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, and N. Dafniou; the Spanish Government, represented by R. Silva de Lapuerta; the French Government, represented by J.-F. Dobelle, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and C. Chavance; Ireland, represented by D. Gleeson SC, acting as Agent, and M. Buckley; the Italian Government, represented by Professor U. Leanza, Head of the Department for Contentious Diplomatic Affairs, Treaties and Legislative Matters at the Ministry of Foreign Affairs, acting as Agent; the Netherlands Government, represented by M. Fiestra, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; the Portuguese Government, represented by L. Fernandes and M. L. Duarte; the Finnish Government, represented by H. Rotkirch; the Swedish Government, represented by L. Nordling, Adviser in the Legal Directorate for European Affairs of the Ministry of Foreign Affairs; the United Kingdom, represented by J. E. Collins and by S. Richards and D. Anderson; the Council of the European Union, represented by J.-C. Piris, J.-P. Jacqué and A. Lo Monaco; the Commission, represented by J. Pipkorn and R. Gosalbo-Bono; and the European Parliament, represented by G. Garzon Clariana and E. Perillo.

### **III – History of respect for human rights by the [Union]**

1. Neither the [FEU] Treaty nor the ECSC or EAEC Treaties makes any specific reference to fundamental rights other than by resolving 'to preserve and strengthen peace and liberty' in the last recital in the preamble.
2. The Court of Justice has upheld the protection of fundamental rights by way of general principles of [Union] law, referring to common constitutional traditions and to international instruments, in particular the Convention.
3. Drawing on that case-law, the Single European Act refers in its preamble to respect for the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention and in the European Social Charter.
4. [Article 6(3)] of the Treaty on European Union states that the Union 'shall respect fundamental rights, as guaranteed by the European Convention ... and as they result from the constitutional traditions common to the Member States, as general principles of [Union] law'. The fifth indent of [Article 21(2)(a), (b), (c) and (h)] of that Treaty refers to respect for human rights and fundamental freedoms. Article K.2(l) of the Treaty [repealed] contains an express reference to compliance with the Convention in cooperation in the fields of justice and home affairs.
5. Reference to respect for fundamental rights has also been made in political declarations by the Member States and [Union] institutions. These include the Joint Declaration by the European Parliament, the Council and the Commission on fundamental rights of 5 April 1977 (*Treaty Series* 1995, p. 877); the Joint Declaration by the European Parliament, the Council, the representatives of the Member States, meeting within the Council, and the Commission against racism and xenophobia of 11 June 1986 (*Treaty Series* 1995, p. 889); the Resolution of the Council and the representatives of the governments of the Member States, meeting within the Council, of 29 May 1990 on the fight against racism and xenophobia (OJ 1990 C 157, p. 1), the Resolution of the Council and of the Member States, meeting in the Council, on human rights, democracy and development of 28 November 1991 (*Bulletin of the European [Union]*, No 11/1991, p. 130, point 2.3.1) and the Conclusions on the implementation of that resolution adopted by the Council and the Member States on 18 November 1992. Declarations by various European Councils may also be mentioned, such as the Declaration by the Heads of

State or Government of the Member States of the E[U] on the European identity of 14 December 1973 (*Bulletin of the European [Union]*, No 12/1973, point 2501), the Declaration by the European Council on democracy of 8 April 1978, the Declaration by the European Council on the international role of the [Union] of 2 and 3 December 1988 (*Bulletin of the European [Union]*, No 12/1988, point 1.1.10), the Declaration by the European Council on human rights of 29 June 1991 (*Bulletin of the European [Union]*, No 6/1991, Annex V) and the Statement by the European Union on human rights of 11 December 1993 on the occasion of the 45th anniversary of the Universal Declaration of Human Rights (*Bulletin of the European [Union]*, No 12/1993, point 1.4.12).

6. In a report of 4 February 1976, sent to the European Parliament and the Council, entitled 'Protection of fundamental rights in the creation and development of [Union] law' (*Bulletin of the European [Union]*, Supplement 5/76), the Commission ruled out the necessity of accession by the [Union] as such to the Convention.
7. Formal accession was first proposed by the Commission to the Council by the Memorandum on the accession of the European [Union] to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 April 1979 (*Bulletin of the European [Union]*, Supplement 2/79).
8. That proposal was renewed by the Commission's Communication on [Union] accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 19 November 1990.
9. On 26 October 1993, the Commission published a working document entitled 'Accession of the [Union] to the European Convention on Human Rights and the [Union] legal order', in which it considered in particular the questions as to the legal basis of accession and the monopoly of jurisdiction of the Court of Justice.
10. The European Parliament has on several occasions made statements in favour of accession, most recently by a resolution of 18 January 1994 on [Union] accession to the European Convention on Human Rights, adopted on the basis of a report of the Committee on Legal Affairs and Citizens' Rights (OJ 1994 C 44, p. 32).

## IV - Admissibility of the request for an Opinion

- 1 Ireland and the United Kingdom, as well as the Danish and Swedish Governments, submit that the request for an Opinion is inadmissible or is, at any rate, premature. They argue that there is no agreement framed in sufficiently precise terms to enable the Court to examine the compatibility of accession with the Treaty. In the opinion of those Governments an agreement cannot be said to be envisaged at a stage where the Council has as yet not even adopted a decision in principle to open negotiations on the agreement.
- 2 [Article 218(11) TFEU] provides that the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the Treaty.
- 3 As the Court has stated, most recently in paragraph 16 of Opinion 3/94 of 13 December 1995 (not yet published in the ECR), the purpose of that provision is to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the [Union].
- 4 The Court also stated in that Opinion (at paragraph 17) that a possible decision of the Court to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty could not fail to provoke, not only in a [Union] context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries.

- 5 In order to avoid such complications, the Treaty has established the special procedure of a prior reference to the Court of Justice for the purpose of ascertaining, before the conclusion of the agreement, whether the latter is compatible with the Treaty.
- 6 That procedure is a special procedure of collaboration between the Court of Justice on the one hand and the other [Union] institutions and the Member States on the other whereby, at a stage prior to conclusion of an agreement which is capable of giving rise to a dispute concerning the legality of a [Union] act which concludes, implements or applies it, the Court is called upon to ensure, in accordance with [the second sentence of Article 19(1) TEU], that in the interpretation and application of the Treaty the law is observed.
- 7 As regards the existence of a draft agreement, there can be no doubt that, in this particular case, no negotiations had been commenced nor had the precise terms of the agreement for accession of the [Union] to the Convention been determined when the request for an Opinion was lodged. Nor will they be so when the Opinion is delivered.
- 8 In order to assess the extent to which the lack of firm information regarding the terms of the agreement affects the admissibility of the request, the purposes of the request must be distinguished.
- 9 As is clear from the observations submitted by the Governments of the Member States and by the [Union] institutions, accession by the [Union] to the Convention presents two main problems: (i) the competence of the [Union] to conclude such an agreement and (ii) its compatibility with the

provisions of the Treaty, in particular those relating to the jurisdiction of the Court.

- 10 As regards the question of competence, in paragraph 35 of Opinion 1/78 of 4 October 1979 ([1979] ECR 2871) the Court held that, where a question of competence has to be decided, it is in the interests of the [Union] institutions and of the States concerned, including non-member countries, to have that question clarified from the outset of negotiations and even before the main points of the agreement are negotiated.
- 11 The only condition which the Court referred to in that Opinion is that the purpose of the envisaged agreement be known before negotiations are commenced.
- 12 There can be no doubt that, as far as this request for an Opinion is concerned, the purpose of the envisaged agreement is known. Irrespective of the mechanism by which the [Union] might accede to the Convention, the general purpose and subject-matter of the Convention and the institutional significance of such accession for the [Union] are perfectly well known.
- 13 The admissibility of the request for an Opinion cannot be challenged on the ground that the Council has not yet adopted a decision to open negotiations and that no agreement is therefore envisaged within the meaning of [Article 218(11) TFEU].

- 14 While it is true that no such decision has yet been taken, accession by the [Union] to the Convention has been the subject of various Commission studies and proposals and was on the Council's agenda at the time when the request for an Opinion was lodged. The fact that the Council has set the [Article 218(11) TFEU] procedure in motion presupposes that it envisaged the possibility of negotiating and concluding such an agreement. The request for an Opinion thus appears to be prompted by the Council's legitimate concern to know the exact extent of its powers before taking any decision on the opening of negotiations.
- 15 Furthermore, in so far as the request for an Opinion concerns the question of [Union] competence, its import is sufficiently clear and a formal Council decision to open negotiations was not indispensable in order further to define its purpose.
- 16 Finally, if the [Article 218(11) TFEU] procedure is to be effective it must be possible for the question of competence to be referred to the Court not only as soon as negotiations are commenced (Opinion 1/78, paragraph 35) but also before negotiations have formally begun.
- 17 In those circumstances, the question of [Union] competence to proceed to accession having been raised as a preliminary issue within the Council, it is in the interests of the [Union], the Member States and other States party to the Convention to have that question settled before negotiations begin.
- 18 It follows that the request for an Opinion is admissible in so far as it concerns the competence of the [Union] to conclude an agreement of the kind envisaged.

- 19 However, the same is not true as regards the question of the compatibility of the agreement with the Treaty.
- 20 In order fully to answer the question whether accession by the [Union] to the Convention would be compatible with the rules of the Treaty, in particular with [the second sentence of Article 19(1) TEU] and [Article 344 TFEU] relating to the jurisdiction of the Court, the Court must have sufficient information regarding the arrangements by which the [Union] envisages submitting to the present and future judicial control machinery established by the Convention.
- 21 As it is, the Court has been given no detailed information as to the solutions that are envisaged to give effect in practice to such submission of the [Union] to the jurisdiction of an international court.
- 22 It follows that the Court is not in a position to give its opinion on the compatibility of [Union] accession to the Convention with the rules of the Treaty.

#### **Competence of the [Union] to accede to the Convention**

- 23 It follows from [Article 5 TEU], which states that the [Union] is to act within the limits of the powers conferred upon it by the Treaty and of

the objectives assigned to it therein, that it has only those powers which have been conferred upon it.

- 24 That principle of conferred powers must be respected in both the internal action and the international action of the [Union].
- 25 The [Union] acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them.
- 26 Thus, in the field of international relations, at issue in this request for an Opinion, it is settled case-law that the competence of the [Union] to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. The Court has held, in particular, that, whenever [Union] law has created for the institutions of the [Union] powers within its internal system for the purpose of attaining a specific objective, the [Union] is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect (see Opinion 2/91 of 19 March 1993 [1993] ECR I-1061, paragraph 7).
- 27 No Treaty provision confers on the [Union] institutions any general power to enact rules on human rights or to conclude international conventions in this field.
- 28 In the absence of express or implied powers for this purpose, it is

necessary to consider whether [the first sentence of Article 352(1) TFEU] may constitute a legal basis for accession.

- 29 [The first sentence of Article 352(1) TFEU] is designed to fill the gap where no specific provisions of the Treaty confer on the [Union] institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the [Union] to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.
- 30 That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of [Union] powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the [Union]. On any view, [the first sentence of Article 352(1) TFEU] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.
- 31 It is in the light of those considerations that the question whether accession by the [Union] to the Convention may be based on [the first sentence of Article 352(1) TFEU] must be examined.
- 32 It should first be noted that the importance of respect for human rights has been emphasized in various declarations of the Member States and of the [Union] institutions (cited in point III.5 of the first part of this Opinion). Reference is also made to respect for human rights in the preamble to the Single European Act and in the preamble to, and in [Article 6(3) TEU], [Article 21(2)(a), (b), (c) and (h)] and Article K.2(1) of the Treaty on European Union [repealed]. [Articles 2, 4(2), 6(3) TEU and

311 first paragraph TFEU] provides that the Union is to respect fundamental rights, as guaranteed, in particular, by the Convention. [Article 21(2)(b) TEU] provides that [Union] policy in the area of development cooperation is to contribute to the objective of respecting human rights and fundamental freedoms.

- 33 Furthermore, it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the Convention has special significance (see, in particular, the judgment in Case C-260/89 *ERT* [1991] ECR 1-2925, paragraph 41).
- 34 Respect for human rights is therefore a condition of the lawfulness of [Union] acts. Accession to the Convention would, however, entail a substantial change in the present [Union] system for the protection of human rights in that it would entail the entry of the [Union] into a distinct international institutional system as well as integration of all the provisions of the Convention into the [Union] legal order.
- 35 Such a modification of the system for the protection of human rights in the [Union], with equally fundamental institutional implications for the [Union] and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of [the first sentence of Article 352(1) TFEU]. It could be brought about only by way of Treaty amendment.

36 It must therefore be held that, as [Union] law now stands, the [Union] has no competence to accede to the Convention.

In conclusion,

THE COURT

composed of: G. C. Rodriguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch, Presidents of Chambers, G. F. Mancini, F. A. Schockweiler (Rapporteur), J. C. Moitinho de Almeida, P.J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann, H. Ragnemalm, L. Sevon and M. Wathelet, Judges,

after hearing the views of First Advocate General Tesauro and Advocates General Lenz, Jacobs, La Pergola, Cosmas, Leger, Elmer, Fennelly and Ruiz-Jarabo Colomer,

gives the following opinion:

**As [Union] law now stands, the [Union] has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.**

Rodriguez Iglesias  
Hirsch Mancini

Kakouris  
Schockweiler

Edward  
Moitinho de Almeida

Kapteyn

Gulmann Murray

Jann Ragnemalm

Sevon

Wathelet

Luxembourg, 28 March 1996.

R. Grass

G. C. Rodriguez Iglesias

Registrar

President