

EU accession to European Court of Human Rights back in view

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The EU's accession to the European Convention on Human Rights – which could give the European Court of Human Rights (ECtHR) jurisdiction over EU law – is back on the agenda, with a referral to the CJEU for its opinion expected in the “upcoming weeks”.

This will be of interest to industrial relations and employment law observers because it would allow cases to be brought against the European Commission (not just individual countries signed up to the Convention).

Trade unions are generally more likely to welcome ECtHR rulings on collective bargaining issues (*Demir & Baykara* and *Enerji*, for example) than they would with Court of Justice of the EU rulings.

There is the fundamental issue of compatibility between the EU treaties and the European Convention, which would have to be squared before accession could happen. In 2014, the CJEU ruled (in Opinion 2/13) that a previous draft accession agreement was not compatible with EU law, which then put the kibosh on accession for several years.

The main current obstacle to EU accession to the European Convention on Human Rights and ECtHR is over jurisdiction with the EU's Common Foreign and Security Policy (CFSP). A number of EU Member States, such as Italy, Poland and Denmark, are now calling for reform of the ECtHR over their concerns with how the Court's rulings on immigration matters are playing out, particularly with reference to Article 3 of the Convention.

Critics of the ECtHR argue that the Court takes an expansive interpretation of the Convention's rights – perhaps best exemplified in the case against Switzerland last year, where the Court concluded that Article 8 (right to respect for private and family life) was breached by Switzerland for failing to take adequate measures to mitigate the effects of climate change.

Nevertheless, a revised draft accession agreement is expected to be sent to the CJEU for its opinion “in the upcoming weeks”, according to an EU source.

NEXT STEPS

The 2009 Lisbon Treaty has a commitment that the EU would accede to the European Convention. Negotiations on an accession agreement took three years but came to nought with the CJEU's Opinion 2/13.

Formal negotiations resumed in October 2020, with a provisional agreement reached on revised draft accession terms in March 2023.

The revised agreement covers all of the issues raised by the CJEU in Opinion 2/13, except jurisdiction over EU's Common Foreign and Security Policy (CFSP). The EU says it has “committed to resolving this issue internally.”

Last week there was a ‘state of play’ meeting held by the Polish presidency of the EU Council of Ministers about the ongoing discussions in the relevant Council bodies, in relation to the preparation of the accession agreement.

There were discussions around questions related to the judicial review of EU acts in the common foreign and security policy area.

Member states delegates have asked for the Commission to request the Court of Justice's opinion on the compatibility of the draft accession package with the EU legal framework.

At the Council meeting, the Commission, represented by Justice Commissioner, Michael McGrath, informed the Council about the Commission's plans in this respect. Commissioner McGrath also visited the ECtHR earlier this week.

The request of a Court of Justice opinion on accession "could happen in the upcoming weeks", an EU source told IRN.

However, it would likely be 2027 until such an opinion surfaces. Any agreement would also have to clearly demarcate jurisdiction of both the CJEU and the ECtHR, to avoid territorial encroachment.