

## OPINION OF THE CAHDI

### ON RECOMMENDATION 2060 (2015) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – “THE IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE COUNCIL OF EUROPE AND THE EUROPEAN UNION”

1. On 11-12 February 2015, the Ministers’ Deputies communicated Recommendation 2060 (2015) of the Parliamentary Assembly of the Council of Europe (see Appendix I) to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments by 23 March 2015. The Ministers’ Deputies also communicated this Recommendation to the Steering Committee for Human Rights (CDDH).
2. The CAHDI examined the abovementioned recommendation at its 49<sup>th</sup> meeting (Strasbourg, 19-20 March 2015) and made the following comments which concerned aspects of the recommendation which were of particular relevance to the terms of reference of the CAHDI.
3. From the outset, the CAHDI recalled its opinion on *Recommendation 2027 (2013) of the Parliamentary Assembly of the Council of Europe – “European Union and Council of Europe human rights agendas: synergies not duplication!”* (see Appendix II) adopted in November 2013 through a written consultation. This opinion of 2013 contained comments which were of relevance for the present Recommendation.
4. The CAHDI reiterated that the Memorandum of Understanding concluded in 2007 between the Council of Europe and the European Union (hereinafter the “EU”) remained the relevant applicable framework for the cooperation between both organisations and notably with regard to the protection and promotion of human rights. It recalled that the EU recognised in this Memorandum the role of the Council of Europe as the Europe-wide reference source of human rights, both with respect to the relevant norms developed by the Council of Europe as to the decisions and conclusions of its monitoring structures which the EU undertook to take into account where relevant.
5. Pursuant to this Memorandum, the Council of Europe and the EU had agreed that *“legal cooperation should be further developed [...] with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions”*<sup>1</sup>. To this end, the CAHDI noted that regular, institutionalised dialogue with the EU institutions was already well-established in the practice of the Council of Europe and aimed at avoiding unnecessary duplication of norms in the area of shared values: human rights, democracy and the rule of law. This cooperation took the form of both high-level political contacts and joint activities. The CAHDI welcomed notably the long cooperation experience between both organisations in the area of criminal matters through the regular meetings between the EU’s Troika of the Article 36 Committee (CATS) and the Council of Europe. The CAHDI further noted that cooperation was subject to regular review by the Committee of Ministers, in particular on the occasion of the annual Ministerial Sessions. The latest Session held in Vienna on 5-6 May 2014<sup>2</sup> highlighted that *“since the signing of the Memorandum of Understanding, there has been an unprecedented qualitative change in*

<sup>1</sup> Paragraph 24 of the Memorandum of Understanding.

<sup>2</sup> 124<sup>th</sup> Session of the Committee of Ministers (Vienna, 5-6 May 2014).

*mutual relations, which have been transformed into a true, strategic partnership in the areas of political dialogue, legal cooperation and concrete cooperation activities, as illustrated by the continuous high-level consultations with EU representatives*<sup>3</sup>. Mention was made in particular for illustrative purposes to the adoption by the Foreign Affairs Council of the EU of the *EU Priorities for cooperation with the Council of Europe* which included “political dialogue” as a main feature of the cooperation, together with its legal and assistance dimensions.

6. Regarding more specifically the active cooperation with the EU in the implementation of the new “Framework to strengthen the rule of law” in EU member States, the CAHDI recalled that according to the Statute of the Council of Europe, the principle of the rule of law formed the basis of all genuine democracy and had therefore been one of the three pillars of the Council of Europe since its creation. This organisation therefore had a long established experience in dealing with rule of law issues and could consequently provide valuable input to the EU in implementing this new framework. The CAHDI recommended that any initiative pertaining to the area of cooperation between the Council of Europe and the EU took into account the principles for cooperation under the Memorandum of Understanding of 2007, in particular the concern to avoid duplication and promote complementarity in view of ensuring their added value.

7. With regard to the accession of the EU to Council of Europe conventions, the CAHDI noted that the EU was already party to ten Council of Europe conventions<sup>4</sup>, that it had signed but not yet ratified four other conventions, that it could become party to twenty three more conventions and that it could be invited to accede to twelve other conventions after their entry into force. The CAHDI therefore welcomed the existing active participation of the EU to Council of Europe conventions and noted with satisfaction the encouraging prospects for future participation. To facilitate these future accessions, the CAHDI agreed however with the analysis of the Secretary General in his *Report on the review of Council of Europe conventions*<sup>5</sup> according to which “*this accession, alongside with or instead of its member States, may, in fact, have a number of implications on the functioning of the conventions concerned [...] and the co-ordination of the action by the EU and its member States when taking positions and/or expressing a vote*”<sup>6</sup>. In this regard, the CAHDI therefore reiterated that it stood ready to assist the Committee of Ministers with respect to the examination of legal issues raised by the participation of the EU in Council of Europe conventions such as those identified in paragraph 77 of the Secretary General’s abovementioned report (adaptation of final and interpretation clauses, modalities of EU participation in follow-up mechanisms, financial participation).

8. To the extent that the accession of the EU to the European Convention on Human Rights (hereinafter the “ECHR”) became a legal obligation under the Treaty of Lisbon which entered into force on 1 December 2009, the CAHDI could only reaffirm the importance of this accession and encourage, following the Opinion 2/13 of the European Union Court of Justice, the finalisation of the process at the earliest opportunity. It recalled that it had closely followed the negotiations aimed at this accession through the participation of an observer of the CAHDI to the meetings of the CDDH and the informal working group 47+1 in charge of finalising the draft agreement on the accession of the EU to the ECHR as well as its draft explanatory report. The CAHDI also underlined that the Memorandum of Understanding, signed by both organisations, stipulated that

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<sup>3</sup> *Summary Report on the Cooperation with the European Union*, document CM(2014)38 of 30 April 2014.

<sup>4</sup> European Agreement on the Exchange of Therapeutic Substances of Human Origin (ETS No. 026) as completed by its Additional Protocol (ETS No. 109), Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and other Medical Institutions for Purposes of Diagnosis or Treatment (ETS No. 033) as completed by its Additional Protocol (ETS No. 110), European Agreement on the Exchange of Blood-grouping Reagents (ETS No. 039) as completed by its Additional Protocol (ETS No. 111), Convention on the Elaboration of a European Pharmacopoeia (ETS No. 050) as amended by its Protocol (ETS No. 134), European Agreement on the Exchange of Tissue-typing Reagents (ETS No. 84) as completed by its Additional Protocol (ETS No. 89), European Convention for the Protection of Animals kept for Farming Purposes (ETS No. 087), Convention on the Conservation of European Wildlife and Natural Habitats (ETS No. 104), European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (ETS No. 123), Protocol to ETS 123 on the Protection of Animals used for Experimental and Scientific Purposes (ETS No. 170), Convention on information and legal co-operation concerning « information Society Services » (ETS No. 180).

<sup>5</sup> *Report by the Secretary General on the review of Council of Europe conventions*, 16 May 2012, document SG/Inf(2012)12.

<sup>6</sup> Paragraph 74 of *Report by the Secretary General on the review of Council of Europe conventions*

“early accession of the [EU] to the [ECHR] would contribute greatly to coherence in the field of human rights in Europe”<sup>7</sup> and stood therefore ready to provide its expertise in the perspective of creating a unique European legal area concerning the protection of fundamental rights.

9. Regarding the Council of Europe monitoring mechanisms and bodies, the CAHDI noted that over almost sixty five years, the Council of Europe had developed a considerable *acquis* encompassing not only standards on human rights, rule of law and democracy but also active European monitoring of these standards. These mechanisms are either treaty-based monitoring mechanisms (independent monitoring mechanisms or conventional committees) or monitoring mechanisms carried out directly by Council of Europe bodies such as the Committee of Ministers. In this regard, the CAHDI welcomed the continuous efforts of the Committee of Ministers to guarantee the long term efficiency of the European Convention on Human Rights system notably through its periodic supervision of the execution of judgments, which had become more effective and transparent since the “Interlaken – Izmir – Brighton process”. The CAHDI furthermore indicated that it looked forward to the High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility” (Brussels, 26-27 March 2015). The CAHDI also took note of the recent report of the Secretary General of the Council of Europe on the “State of democracy, human rights and the rule of law in Europe” issued in 2014 which highlighted a number of challenges identified by the Council of Europe monitoring mechanisms. It underlined in particular the essential function of these mechanisms aimed at helping member States to identify and remedy shortcomings in their compliance with Council of Europe standards and proposed solutions to improve and enhance them.

10. Regarding more specifically the participation of the EU in these monitoring mechanisms, the CAHDI noted that pending completion of the accession process of the EU to the ECHR, contacts had intensified with a view to furthering synergies between the EU and Council of Europe monitoring and advisory bodies, and between Council of Europe standards and EU legislation. As highlighted by the Committee of Ministers at its 124<sup>th</sup> Session in May 2014, synergies between both organisations had notably been established in the framework of the negotiations for the modernisation of the *Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108). The EU participated in a bid to ensure a high level of data protection and consistency between EU data protection rules and the rules of the Council of Europe amended instrument, with a view to acceding to such a modernised instrument. Furthermore, the CAHDI also welcomed the good cooperation with regard to the collection and analysis of data on the functioning of judicial systems in the EU carried out by the Secretariat of the European Commission for the Efficiency of Justice (CEPEJ) as well as the ongoing discussions on the possible accession of the EU to the *European Social Charter* (revised) and the full participation in the Group of States against corruption (GRECO).

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<sup>7</sup> Paragraph 20 of the Memorandum of Understanding.

## APPENDIX I

### RECOMMENDATION 2060 (2015) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – “THE IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE COUNCIL OF EUROPE AND THE EUROPEAN UNION”<sup>8</sup>

1. The Parliamentary Assembly, referring to its Resolution 2029 (2015) on the implementation of the Memorandum of Understanding between the Council of Europe and the European Union, notes with satisfaction that co-operation has been strengthened and has become more structured, strategic and political over the past seven years.
2. The Assembly strongly welcomes the comprehensive programme agreement on the financing of European Union–Council of Europe Joint Programmes for the period 2014-2020, which has strengthened the co-ordination, impact and sustainability and of the co-operation programmes, in a spirit of shared responsibilities.
3. The Assembly stresses that the ultimate goal of the partnership between the two organisations, based on each other’s *acquis* and comparative advantages, is to pursue further the building of a common space for human rights protection and to ensure coherence of standards and the monitoring of their implementation in Europe. While welcoming the steps already taken in the right direction, the Assembly recommends that the Committee of Ministers:
  - 3.1. enhance the role of the Council of Europe as “the Europe-wide reference source for human rights” by further strengthening its monitoring bodies in the context of the ongoing reform of the Council of Europe;
  - 3.2. strengthen regular, institutionalised dialogue with European Union institutions, at all levels, especially on normative developments in the fields of human rights, justice, the rule of law and home affairs, and promote coherence of normative activities through consultations at an early stage.
4. With a view to ensuring in-depth legal co-operation, enhancing complementarity and coherence of legal standards and providing a unique framework for human rights, democracy and the rule of law in Europe, the Assembly asks the Committee of Ministers to:
  - 4.1. resume, without delay, negotiations on the accession of the European Union to the Convention in the light of Opinion 2/13 of the European Union Court of Justice and give high political priority to this issue, in line with political commitments undertaken by all parties involved, as reflected in the Lisbon Treaty;
  - 4.2. promote and facilitate European Union accession to other key Council of Europe conventions, monitoring mechanisms and bodies;
  - 4.3. further enhance coherence and complementarity with the European Union in the areas of freedom, security and justice, in line with the new European Union “Strategic Guidelines for Legislative and Operational Planning within the European Union’s Area of Freedom, Security and Justice” for the period 2015-2020;
  - 4.4. ensure active co-operation with the European Union in the implementation of the new “Framework to strengthen the rule of law” in European Union member States;
  - 4.5. continue developing appropriate synergies between Council of Europe monitoring mechanisms and bodies and any new evaluation mechanisms to be set up by the European Union;

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<sup>8</sup> *Assembly debate* on 27 January 2015 (4th Sitting) (see [Doc. 13655](#), report of the Committee on Political Affairs and Democracy, rapporteur: Ms Kerstin Lundgren). *Text adopted by the Assembly* on 27 January 2015 (4th Sitting).

4.6. actively contribute to future European Union colloquia on the state of human rights in Europe and bring in the perspective and expertise of the Council of Europe.

5. The Assembly asks the Committee of Ministers to raise public awareness about the partnership and synergies being developed by the two organisations in Europe, especially in the context of European Union accession to the European Convention on Human Rights.

6. The Assembly, while agreeing with the Committee of Ministers that the Memorandum of Understanding remains a sound basis to continue guiding and structuring relations between the Council of Europe and the European Union, wishes to reiterate that the current focus of the European Union on human rights, democracy and the rule of law should ultimately lead to the accession of the European Union to the Statute of the Council of Europe (ETS No. 1), as also recommended in 2006 by the Juncker report, "Council of Europe – European Union: 'A sole ambition for the European continent'".

## APPENDIX II

### OPINION OF THE CAHDI ON RECOMMENDATION 2027 (2013) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – “EUROPEAN UNION AND COUNCIL OF EUROPE HUMAN RIGHTS AGENDA: SYNERGIES NOT DUPLICATION!”

1. On 16 October 2013, the Ministers’ Deputies communicated Recommendation 2027 (2013) of the Parliamentary Assembly of the Council of Europe to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments by 29 November 2013. The Ministers’ Deputies have also communicated this Recommendation to the Steering Committee for Human Rights (CDDH).

2. The CAHDI examined the above-mentioned Recommendation by means of an electronic consultation and adopted the following comments which concern aspects of the recommendation which are of particular relevance to the mandate of the CAHDI (public international law).

3. In Recommendation 2027 (2013), the Assembly invites:

a) the European Union to:

- i) explore possible synergies with existing Council of Europe mechanisms in the fields of human rights, democracy and the rule of law before setting up new structures or further expanding the activities of recently created bodies;
- ii) in particular, to continue to make use of the expertise of relevant Council of Europe bodies such as the Venice Commission, the Parliamentary Assembly and relevant specialised monitoring mechanisms, including those set up under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126), the revised European Social Charter (ETS No. 163), the Convention on Action against Trafficking in Human Beings (CETS No. 197), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (ETS No. 141), as well as with the Group of States against Corruption and the European Commission against Racism and Intolerance;
- iii) explore modalities of co-operation with the Council of Europe in promoting and implementing the above-mentioned Council of Europe conventions and becoming a Party to them to the extent possible;
- iv) accelerate the accession of the European Union to the European Convention on Human Rights;

b) the member States of the Council of Europe to facilitate co-operation between the Council of Europe and the European Union at all levels, including by ensuring that relevant conventions are drafted or adapted in such a way as to facilitate accession by the European Union;

c) those member States of the Council of Europe which are also members of the European Union to exercise their influence in the Union in such a way as to minimise duplication and maximise synergies between the European Union and the Council of Europe in the field of human rights, democracy and the rule of law.

[...]

d) the Committee of Ministers :

- i) to report back urgently to the Assembly on what it is doing to enhance the Council of Europe's role as the benchmark for human rights, the rule of law and democracy in Europe, as is set out in the Memorandum of Understanding between the Council of Europe and the European Union concluded in May 2007;
- ii) to take all necessary action to ensure that the European Convention on Human Rights is not undermined as the European legal instrument which addresses human rights, democracy and the rule of law among all member States of the Council of Europe, including those countries which are also members of the European Union.

4. From the outset, the CAHDI notes that the protection and promotion of human rights is a common objective of the Council of Europe and the European Union. As such, this issue is central to the cooperation between the Council of Europe and the European Union, as enshrined in the Memorandum of Understanding of 2007 concluded between these two entities. In this memorandum, which remains the relevant applicable framework, the European Union recognises the role of the Council of Europe as the Europe-wide reference source for human rights, both with respect to the relevant norms developed by the Council of Europe as to the decisions and conclusions of its monitoring structures which the European Union undertakes to take into account where relevant. Moreover, the CAHDI welcomes the recent initiatives undertaken by the Secretary General aimed at optimising the functioning and coordination of these monitoring mechanisms, as well as a better use of their conclusions.

5. To the extent that the proposals to reinforce the monitoring of fundamental rights and judicial systems are likely to cover shared priority areas of cooperation between the Council of Europe and the European Union, the CAHDI notes that they fall within the scope of the political and technical consultation called for in the aforementioned 2007 Memorandum. Such consultation remains subject to the principles framing the cooperation between the Council of Europe and the European Union which are set out in the Memorandum, namely the principles of indivisibility and universality of human rights, the independence of the judiciary, respect for the standards set out in this field by the fundamental texts of the United Nations and the Council of Europe, in particular the European Convention on Human Rights (ECHR), as well as the preservation of the cohesion of the human rights protection system in Europe.

6. Concerning in particular the cooperation between the European Union Agency for Fundamental Rights and the Council of Europe, the CAHDI notes that pursuant to the terms of the cooperation agreement which was concluded in 2008 between the European Union and the Council of Europe and which refers to the 2007 Memorandum, the Agency respects the unity, validity and effectiveness of the instruments used by the Council of Europe to monitor the protection of human rights in the member States of the European Union.

7. The CAHDI recommends that any initiative pertaining to the areas of cooperation between the Council of Europe and the European Union, and in particular to the Agency's present and future activities, take into account the principles for cooperation under the agreements concluded, in particular the concern to avoid duplication and promote complementarity in view of ensuring their added value.

8. Regarding the participation of the European Union to the Council of Europe conventions, the CAHDI takes note of the relevant decisions of the Deputies related to the review of Council of Europe conventions. Within this framework, the Deputies agreed that this question should be examined at the appropriate time in order to avoid any interference with the current negotiations on EU accession to the ECHR, whilst noting that the European Union had expressed its readiness to examine with the Council of Europe the possibility for the European Union to join certain Council of Europe's conventions. The CAHDI stands ready to assist, when appropriate, the Committee of

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Ministers in its examination of the modalities aimed in general to allow and/or facilitate the participation of the European Union to the conventions of the Council of Europe. The CAHDI recalls that the Committee of Ministers might wish to call upon its expertise also with respect to ongoing negotiations aimed at the accession of the European Union to any Council of Europe convention and/or mechanism in particular. The CAHDI refers in this regard to its contribution to the study of the consequences of the so-called “disconnection clause” in international law in general and for Council of Europe conventions in particular.

8. The CAHDI welcomes the measures taken by the European Union to foster the participation of States members and non-members of the European Union to the conventions of the Council of Europe and encourages any initiative which would reinforce such support.

9. The CAHDI underlines that it has closely followed the negotiations aimed at the accession of the European Union to the ECHR, through the participation of an observer of the CAHDI to the meetings of the CDDH and the informal group 47+1 in charge of finalising the legal instruments establishing the modalities of accession. It welcomes the successful conclusion of these negotiations, as an important step in the perspective of creating a unique European legal area concerning the protection of fundamental rights and expresses its commitment to continue following and supporting this process.