

The European Court of Justice blocks the EU's accession to the ECHR

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The long road to accession

The European Court of Justice delivered a long-awaited opinion on the accession of the European Union to the European Convention of Human Rights (Opinion 2/13) on 18 December 2014. To the surprise of many, the judges in Luxembourg held that the draft Accession Agreement is not compatible with the EU treaties because it undermines the autonomy of EU law. As a consequence, the negotiators will be called back to the drawing board to take the Court's conclusions into account, or to come up with other solutions. The Accession Agreement would require a major revision, not just cosmetic changes. Moreover, any deal would require the consent of all ECHR contracting parties, including Turkey and Russia. With this opinion, the Court of Justice went against the will of the member states and has thus put itself on a collision course with them.

In recent decades the Court has gradually incorporated substantive references to the ECHR in its case law, but the journey to formally join the ECHR started more than 20 years ago. This journey stalled in 1996 when the Court of Justice held that, as the treaties stood then, the European Community had no competence to accede to ECHR (opinion 2/94). In the wake of this ruling the EU developed its own Charter of Fundamental Rights and member states revised Article 6 TEU to oblige the EU to seek accession to the ECHR, on the condition that this would not affect the Union's competences as defined in the treaties. Protocol No. 8 added that the Accession Agreement should preserve the characteristics of the Union and its legal order; that it may not affect powers of the EU institutions; the position of the member states in relation to the ECHR and Article 344 TFEU, which guarantees that all disputes between member states regarding "the interpretation or application of the Treaties" shall be resolved only by the Court of Justice.

Opinion 2/13

In Opinion 2/13 of December 2014, the Court of Justice declared the draft Accession Agreement to be incompatible with EU law on a number of grounds. The Court argued that the EU's potential accession to the ECHR would have significant distinctive features because the EU is not a state. It repeated the old mantra that the EU is a new legal order of "specific

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characteristic arising from the very nature of EU law” (para. 166); one that is autonomous from national legal orders and public international law. The protection of the autonomy of the EU legal order is central to the Court’s opinion. Interestingly, the judges underlined that they did not object to being subjected to the jurisdiction of another court, yet hastened to add that this would happen only if it would not produce adverse effects on the autonomy of EU law. The Court added that

“any action by the bodies given decision-making powers by the ECHR [...] must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of EU law” (para. 184).

Neither of these, according to the Court of Justice, is guaranteed by the draft Accession Agreement. It can therefore be argued that in this opinion the Court is in fact guarding its own exclusive jurisdiction. In the same vein, the judges in Luxembourg found fault with the procedure for involving them before a case reaches the Strasbourg-based European Court of Human Rights. The Court of Justice of the EU suggested that the coordination mechanism be constructed in such a way so as to allow for the interpretation of EU secondary legislation (not only for the purposes of checking its validity).

While the Court continuously stresses that the EU is not a state and that the special characteristics of the EU have not been taken into account, these are not really new arguments. In fact, the special situation of the accession of an organisation with a complex division of competences has been at the heart of the debates in recent years. This, for instance, led to the introduction of the so-called ‘co-respondent mechanism’ to ensure that proceedings brought before the ECtHR by non-EU member states and individual applications would be correctly addressed to member states and/or the EU, as appropriate. This mechanism also allows the ECtHR to implicitly decide on the division of competences between the EU and its member states. In doing so, the ECtHR would have to interpret EU law; something that in the eyes of the Court of Justice can only be done in Luxembourg. Admittedly, the Court of Justice has a point. Article 344 TFEU aims to preserve the autonomy of the EU legal system and the Court is obliged to safeguard this principle. In relation to many issues the Opinion points to the fact that this is actually quite difficult on the basis of the draft Accession Agreement.

One specific argument used by the Court concerns the Common Foreign and Security Policy (CFSP), an area in which it has almost no jurisdiction. Stating that “certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice” (para. 252), it expresses its displeasure with the idea that the ECtHR would be able to rule on the compatibility with the ECHR of “certain acts, actions or omissions performed in the context of the CFSP” in cases falling outside of its purview. The question, however, is whether the choice by the EU treaty negotiators at the time to maintain a special position for many CFSP norms, as far as their judicial review is concerned, implies that possible human rights violations in relation to CFSP actions should in general be exempt from judicial scrutiny. Arguably, the reason for the special EU arrangement was to prevent judicial activism in this area of EU competence. It is questionable whether the Court of Justice can legitimately claim its exclusive jurisdiction in this area. While the Lisbon Treaty has certainly put the exclusion of the Court (and perhaps also of domestic courts – as hinted at by Advocate General Kokott) in relation to CFSP into perspective, there are still clear shortcomings and allowing the Strasbourg system to fill some of those gaps would have been a welcome improvement. Also, for some member states, it is not at all uncommon to trust the ECtHR to play a key role in constitutional protection.

In general, the Opinion reflects the solid legal reasoning that is in line with six decades of the Court’s case law. Yet the arguments made by the Court are so fundamental that one wonders

if the demands made by Luxembourg judges can actually be met. To put it differently, the question is to what extent the principle of autonomy can be squared with a voluntary acceptance of external norms. For states joining the Strasbourg system, it implies acceptance of external control. Why should this be different for the European Union? After all, to make the EU subject to external norms on fundamental rights was the whole purpose of joining the Strasbourg system, as expressed in Article 6(2) TEU.

Quo vadis?

Opinion 2/13 thus triggers an existential question: *quo vadis?* In the short term the Court of Justice has ultimately blocked the accession of the European Union to ECHR. It is notable that the judges did not agree with Advocate General Kokott, who recommended that the Court clear the accession, subject to a number of conditions being met. The Opinion is likely to put the Court of Justice on a collision course with the member states that invested much effort in making the accession to ECHR a reality and participated in large numbers in Luxembourg proceedings. At the same time, it is not surprising to see the Court of Justice once again taking a bold step to protect its exclusive jurisdiction. Over the years it has come to be a tradition that when spotting a different court on the horizon the judges in Luxembourg eliminate the competition in advance. In 1996 the ultimate argument for a negative opinion on accession to the ECHR was lack of competence. This time the EU has the competence but, according to the Court, the caveats laid down in TEU and Protocol 8 have not been adequately addressed by the Accession Agreement and the Court sees too many risks that EU law (and its own jurisdiction) will be interpreted and affected from outside Strasbourg. The Court in its opinion clarified, to a degree, what is expected. For instance the Court held that the jurisdiction of the Strasbourg Court should be excluded over disputes between the member states (or member states and the EU) about application of ECHR within the scope of EU law (para. 213).

While the possibility of solving certain points on the basis of interpretative declarations should not be excluded, it is questionable whether this will suffice to meet the Court's quite fundamental objections. If one looks at Article 218(11) TFEU, on which the Opinion is based, the options are twofold. Firstly, the EU may request re-negotiation of the Accession Agreement. Secondly, it may change the Founding Treaties to accommodate the negotiated text. The latter option is political fantasy, so the only way forward seems to be a return to the drawing board and re-negotiate the Agreement. Judging by the experience thus far, it will be a rather tortuous exercise that is likely to take time. It will give the Court of Justice a chance to continue building its line of case law based on the Charter of Fundamental Rights and, in the long run, minimise the direct impact of the Strasbourg Court on EU law. No doubt, opening the agreed text of the Agreement for further negotiation will not be welcomed by some the member states, or by several non-EU parties to the ECHR. At the same time, however, some other member states of the Union, the UK in particular, may heave a sigh of relief. For the negotiators, particularly those from the European Commission, setting a new negotiation agenda will be the first challenge to address. It will not dramatically change the dynamics between the member states and the EU institutions. Yet, finding a balanced compromise will inevitably pose certain difficulties. One key question remains: how to satisfy the Court's demands without undermining the rationale behind accession.