CONTRIBUTION

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The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward

Public Hearing on “Accession to the European Convention on Human Rights (ECHR): Stocktaking after the ECJ's Opinion and way forward” European Parliament’s Committee on Constitutional Affairs

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Executive Summary

The present contribution provides an overview of the current state of affairs in relation to the process of the Accession of the European Union (EU) to the European Convention of Human Rights (ECHR) and it offers recommendations as to possible solutions in the aftermath of Opinion 2/13 of the Court of Justice of the European Union (CJEU) on the compatibility of the Draft Accession Agreement (DAA) with EU Law.

The contribution builds upon and reflects on information gathered in the course of a socio-legal project entitled ‘Reflections on the Architecture of the European Union after the Treaty of Lisbon: The European Approach to Fundamental Rights’. The project, which started in 2010 and is still in progress, combines elements of doctrinal, comparative and empirical methodologies.

The contribution is divided into four basic sections: a section on the EU pre-requisites and principles for Accession, a section on the main legal issues raised in Opinion 2/13, followed by a section on the discussion and the analysis of these issues and finally a section on the proposed solutions and recommendations regarding the way forward.

Opinion 2/13: Objections, Autonomy and Incompatibility with EU Law

The much awaited Opinion of the Court of Justice declared the incompatibility of the DAA with EU law and provided a list of concerns and action points that need to be taken into account before the Accession can be completed.

These five areas are wide-ranging and cut across theoretical constructions, procedural issues and legal arrangements. More specifically, these areas pertain to:

1) The autonomy of the EU legal order, which includes:
   A. The incompatibility between Article 53 ECHR and Article 53 Charter;
   B. Mutual trust between the Member States
   C. Protocol No16 and the advisory jurisdiction of the ECtHR;
2) The exclusive jurisdiction established by Article 344 TFEU
3) The co-respondent mechanism;
4) The procedure for the prior involvement of the CJEU;
5) The CJEU’s limited jurisdiction in the area of the Common Foreign and Security Policy (CFSP).

Proposals, Solutions and the Way Forward

This contribution goes beyond the narrow scope of academic commentary and attempts to approach Opinion 2/13 from a practical and pragmatic point of view. A number of solutions and recommendations have been put forward in an attempt to determine whether the aims of the Accession (namely the strengthening and harmonisation of human rights protection across the European continent) can be achieved in the future and which steps need to be taken by all the parties involved in order to overcome the obstacles that the Judges of the CJEU identified.

The proposed solutions and recommendations have been carefully devised in such a way that all the issues raised by the Court are examined and a number of alternative options are considered. In this way, regard is given not only to the legal and constitutional aspects of the solutions, but also to the effects they will have on the relationships and interactions between the two Courts, between the national courts and the two regimes, and between the EU and the Council of Europe. Consideration has also been given to the justifications provided by the CJEU and its overall concerns, even where they have attracted criticism from the academic community, as these will nevertheless form the basis of any future negotiations.

From a pragmatic point of view, there are many obstacles to be overcome and there needs to be strong political will, motivation and commitment to finalise the Accession. It is not clear yet whether priority will be given to the amendment of the DAA, whether a new revision of the Treaties will be sought or whether a combination of these two approaches will be deemed most appropriate. Irrespective of which pathway is chosen, the EU and the Council of Europe are at a crossroads and they need to take bold decisions for the future of human rights protection in Europe. Opinion 2/13 was a reality check for all interested parties that more efforts are required for the Accession to happen and for the clearest and most coherent rights protections to be achieved.

The five main requirements mentioned in the CJEU Opinion 2/13 need to be met. We believe that the question of autonomy can be resolved through measures that can be taken to address each of the five areas. One main consideration at this stage is the fact that the power is in the politics. The law is effective only when political will is on its side. Changes occur when the politicians decide so. Thus, the politics strengthen the law. A lack of real commitment makes legal provisions ‘paper tigers, fierce in appearance but missing in tooth and claw.’
Our solutions follow the five main areas:

1. **Autonomy of the EU Legal Order and EU Law**

   In this area there are **three main issues** which require attention:

   **A. Incompatibility between Article 53 ECHR and Article 53 Charter**

   Three possible solutions are proposed for resolving the finding of incompatibility between Art 53 Charter and Art 53 ECHR:

   a. **To adopt an interpretive declaration to be added to the DAA**

      A separate memorandum of understanding could be adopted which would affirm that Art 53 of the ECHR does not grant a licence to the Contracting Parties to apply higher standards of fundamental rights protection in such a way that would compromise the protection established in the Charter or the primacy, unity or effectiveness of EU law.

   b. **To amend the DAA in the form of an additional article**

      An additional provision could be included directly in the DAA which would clarify the relationship between Arts 53 ECHR and 53 Charter in setting the standards of fundamental rights protection.

   c. **To amend Art 53 of the Charter and possibly Art 53 of the ECHR**

      Both articles could potentially be amended so that their text aligns more closely with and more clearly expresses the meaning that they have been interpreted as expressing.

   Both the first and the second solutions are possible, however we recommend the second solution to fully satisfy the CJEU’s requirements.

   **B. Mutual Trust (see solution 5)**

   **C. Protocol 16 and the advisory jurisdiction of the ECtHR**

   The following solutions are possible:

   a. **To include a provision in the DAA whereby the courts of the Member States must abstain from requesting an advisory opinion from the ECtHR on the interpretation,**
application and validity of EU law, and must instead refer the question to the CJEU through the preliminary ruling procedure. This option is suggested to overcome any issue in relation to EU autonomy and the role of the CJEU within the EU legal order.

b. To require an express undertaking on the part of the EU Member States that they are not going to sign or ratify Protocol 16.

We recommend the first solution, as we believe the second solution might not be politically acceptable and would not satisfy the CJEU.

2. Resolving the Art 344 TFEU tension
Two alternative solutions are possible:

a. To adopt a provision in the DAA expressly excluding the competence of the ECtHR under Art 33 ECHR from disputes between EU Member States or between them and the EU in issues concerning the application of the ECHR within the scope ratione materiae of EU law;

b. To ask Member States prior to the accession to draft a binding declaration under international law that they will not initiate or engage in proceedings under Art 33 ECHR where the object of the dispute falls within the material scope of EU law.

We recommend the first solution as the CJEU might not be satisfied by the second suggestion.

3. Co-respondent Mechanism: Involvement and allocation of responsibility
There are two main issues: the procedure for the involvement of the co-respondent and the allocation of responsibility between the EU and the Member State involved. We propose solutions in relation to both of these.

a. In relation to involvement, to revise Art 3(5) DAA, allowing the EU or a Member State to be granted automatic status of co-respondent upon their request without any form of review from the Strasbourg Court.

b. In relation to the allocation of responsibility, to revise Article 3(7) DAA, deleting
the part were the ECtHR can decide, as an exception to the joint responsibility rule, that only one co-respondent is held responsible.

c. To further clarify Art 3(7) DAA in relation to reservations made by a Member State, clearly stating that a Member State cannot be held responsible either as a respondent or as a co-respondent in so far as it has made a reservation.

4. Prior involvement of the CJEU

Three options are proposed. These are not mutually exclusive and can be combined during the process of revising the DAA.

a. To include in the DAA a specific and clear rule that the ECtHR “must suspend proceedings if the EU as a co-respondent informs it that the CJEU would be involved”.

b. To add a clarification in the DAA to eliminate the risk that the ECtHR would decide on the admissibility of a prior involvement in cases where the CJEU has not yet interpreted the EU law at issue.

c. To include a provision in the DAA requiring the ECtHR to fully and systematically inform the EU in relation to any case pending before Strasbourg in which the EU could potentially be a co-respondent.

5. The CFSP and the principle of mutual trust in the AFSJ

There are several legal solutions proposed in relation to these issues:

a. The EU could make a reservation to the ECHR excluding the CFSP and the AFSJ from the ECtHR’s jurisdiction, when signing or expressing its consent to be bound by the provisions of the Treaty of Accession Agreement, in accordance with Article 10. This option would not require the DAA to be amended.

b. To amend the Draft Accession Agreement to include a provision which excludes this area from the ECtHR’s jurisdiction, and to add a provision clarifying the scope of the principle of mutual trust.
c. To amend EU primary law (EU Treaties) in order to extend the CJEU’s jurisdiction over CFSP and clarify the scope of the principle of mutual trust in relation to the AFSJ.

We recommend the second solution, which seems the most feasible solution.

Conclusions

The publication of Opinion 2/13 shook the ground under the feet of everybody who was under the impression that the CJEU would find the DAA compatible with EU law, especially after the positive, in principle, view of AG Kokott.

The initial reactions by both academics and judiciary reflected the shock and distress and an atmosphere of disappointment and pessimism was created across the European continent. Today, 16 months later, things look more stable as disappointment has been replaced by reflection and distress has become pragmatism. Accession remains an extremely significant step towards strengthening human rights protection and achieving uniformity across the European continent. Opinion 2/13 has been a setback, but instead of treating it as a ‘bombshell’ or an ‘unmitigated disaster’, it is better to consider the Opinion as a reality check. In 2011, Presidents Skouris and Costa talked about gradual convergence between the standards of protection afforded by the two regimes, so that normative clarity and consistency is achieved.

The Opinion did not specify that such convergence is not possible or that such a vision for European human rights protection is too idealised; it just underlined the complexities of this venture and the need for further calibration. To paraphrase AG Kokott, the devil can be in the detail and it is up to both sides to use this period of time to reflect on what went wrong, what can be improved and what the most appropriate way forward is. Article 6(2) TFEU still provides for Accession, while nobody can overlook the benefits of a more pluralistic and inter-institutional framework of fundamental rights protection.

Our analysis provides an overview of the current status quo after the CJEU Opinion and offers some recommendations and potential solutions on the basis of the requirements set out by the Court of Justice. Further negotiations need to take place and all parties involved will have to adopt a different - more pragmatic - approach, with view to tick all the boxes, fill in all the gaps and come up with a workable Accession Agreement. Once this happens, it will be a matter of commitment and political will, because, as mentioned earlier, politics is always the driving force for changes and changes in the law happen only when supported by political will.
Our findings indicate that the Accession is still possible, but it will require a considerable amount of time and effort before it becomes reality. Amendments to the DAA are inevitable if Accession is to progress and be achieved, and this will bring challenges related to reopening the DAA to negotiation.