

EU accession to the European Convention on Human Rights (ECHR)

SUMMARY

Neither of the founding treaties of the European Communities – the Treaty of Paris (1951) or the Treaty of Rome (1957) included any reference to fundamental rights. Nonetheless, in its case law the European Court of Justice started to treat such rights as unwritten 'general principles of Community law', thereby granting them the status of primary law. As for the source of these general principles of Community law, the Court referred to the common constitutional traditions of the Member States, and to international treaties to which at least a majority of Member States were party, in particular the European Convention on Human Rights (ECHR) of 1950.

When the European Union was formally established by the Treaty of Maastricht (1992), this case law of the Court of Justice on the dual sources of fundamental rights in the EU was codified in the new Treaty on European Union in its Article F(2). The entry into force of the Charter of Fundamental Rights as a binding legal act in 2009 did not, however, deprive the ECHR of its role in the EU legal system as a source of fundamental rights in the form of general principles.

The Treaty of Lisbon provided for a duty of the EU to accede to the ECHR. However, when the negotiated agreement was put to the Court of Justice for opinion, it ruled (in December 2015) that the agreement did not provide for sufficient protection of the EU's specific legal arrangements and the Court's exclusive jurisdiction. For the time being, no new accession agreement has been drafted, but both the Parliament and the Commission underline the need for EU accession. Scholars remain divided, some considering that accession would bring added value, whilst others express the view that accession would actually do more harm than good to EU citizens.



European Court of Human Rights, Strasbourg.

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Background

ECJ case law referring to fundamental rights

Neither of the founding treaties of the European Communities – the Treaty of Paris (1951) or the Treaty of Rome (1957) included any reference to fundamental rights. Nonetheless, in its case law the European Court of Justice (ECJ) started to treat such rights as unwritten 'general principles of Community law', thereby granting them the status of primary law.¹ This was part of building the EEC as a '[community of law](#)' by the ECJ. As for the source of these general principles of Community law, the ECJ referred to the common constitutional traditions of the Member States and to international treaties to which a majority of Member States were party, and in particular the European Convention on Human Rights (ECHR) of 1950. In its judgment of 12 November 1969 in [Case 29/69 Stauder v. Stadt Ulm](#) – a case concerning the sale of butter at reduced prices to beneficiaries under certain social welfare schemes – the ECJ ruled that 'the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court'.

Two sources of EU fundamental rights

This approach was developed in the subsequent ECJ judgment of 17 December 1970 in [Case 11/70 Internationale Handelsgesellschaft](#), a case concerning export-licence deposits. The German court which submitted the preliminary reference considered that the Community rules violated 'certain structural principles of national constitutional law which must be protected within the framework of Community law, with the result that the primacy of supranational law must yield before the principles of the German Basic Law'. The ECJ rejected the national court's position, arguing that Community law cannot be over-ridden even by fundamental rights enshrined in national constitutional law. Nonetheless, it proclaimed that fundamental rights are protected by EU legal order, noting that:

...respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

However, it was only in the judgment of 14 May 1974 ([Case 4/73 Nold](#)) that the ECJ made a reference to the ECHR (although not named explicitly) as its source of inspiration. In this case, concerned with the regulation of the mining sector, the Court reiterated that 'fundamental rights form an integral part of the general principles of law, the observance of which it ensures', indicating two parallel sources of inspiration:

- 'constitutional traditions common to the Member States', and
- 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.

This second element was an open allusion to the ECHR. Nonetheless, as P. Craig and G. de Búrca point out, 'the ECJ ... never ruled that the ECHR was formally binding upon the EU, or that its provisions were formally incorporated into EU law',² leaving it the ambiguous status of a source of inspiration for general principles of EU law.

Codification of reference to ECHR

When the European Union was formally established by the [Treaty of Maastricht](#) (1992), this case law of the ECJ on the dual sources of fundamental rights in the EU was codified in the new Treaty on European Union. Its Article F(2) provided that:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Nonetheless, despite this explicit reference to the ECHR, the ECJ continued to treat the Convention as a 'source of inspiration rather than a formally binding or fully incorporated bill of rights'.³ This gave it more discretionary power which it exercised in interpreting the scope of fundamental rights differently to the European Court of Human Rights (ECtHR), rather than being formally bound by the Strasbourg court's case law.

The ECJ has underlined the special significance of the ECHR in its interpretation of fundamental rights in such cases as *ERT* ([Case C-260/89](#)), and *Kadi* ([Joined Cases C-402/05 P and C-415/05 P](#)).

Charter of Fundamental Rights

From political declaration to binding act of primary law

In parallel to the creation of a body of 'judge-made' EU fundamental rights law in ECJ case law, the [European Convention](#), upon a mandate from the European Council, elaborated the EU's own bill of rights – the [EU Charter of Fundamental Rights](#) (CFR) – in 1999 and 2000. The Charter was officially proclaimed in December 2000 at the Nice European summit, although at first it was not formally binding. It was only with the entry into force of the Treaty of Lisbon (1 December 2009) that the CFR became a binding source of EU primary law, on the same hierarchical level as the Treaties. As regards the legal force of the CFR, Article 6(1) TEU provides that the EU 'recognises the rights, freedoms and principles set out in the' CFR, and that CFR enjoys 'the same legal value as the Treaties.' Nonetheless, the CFR's provisions 'shall not extend in any way the competences of the Union as defined in the Treaties'.

Role of references to ECHR after 2009

The entry into force of the CFR as a binding legal act does not, however, deprive the ECHR of its role in the EU legal system. In effect, Article 6(3) TEU still upholds the doctrine of fundamental rights as general principles of EU law and their double source, providing that:

Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Treaty obligation to accede to the ECHR and ECJ's opinion

Legal impossibility to accede under the Maastricht Treaty

Following the entry into force of the Maastricht Treaty, in 1994 the Council of the European Union [requested an opinion](#) from the ECJ on the possibility of EU accession to the ECHR. On 28 March 1996, the ECJ delivered its [opinion 2/94](#), indicating that: 'No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field', and adding that accession to the ECHR 'would ... entail a substantial change in the present Community system for the protection of human rights', and therefore considered the accession of the EU to the ECHR to be legally impossible.

Legal framework for accession

The legal mandate for accession in Article 6 TEU

This situation changed on 1 December 2009, when the Treaty of Lisbon entered into force. That Treaty not only made the CFR a binding source of primary EU law, but also

imposed upon the EU a legal duty to accede to the ECHR. This duty is formulated briefly in Article 6(2) TEU:

The Union shall accede to the [ECHR]. Such accession shall not affect the Union's competences as defined in the Treaties.

The provision of Article 6(2) TEU does not indicate either any deadline, or any conditions for EU accession to the ECHR, nor the actual legal effects of such accession, save for the fact that it must not affect the EU's competences.

Protocol No 8 to the Treaty of Lisbon

Whilst Article 6(2) TEU is formulated succinctly, additional conditions for EU accession to the ECHR are laid down in [Protocol No 8](#), which – according to Article 51 TEU – is an integral part of the Treaties, and is therefore legally binding as a source of primary law. Article 1 of the Protocol requires that the EU's accession agreement to the ECHR must 'make provision for preserving the specific characteristics' of the EU and its legal system, and in particular:

- the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
- the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2 of the Protocol requires that the accession agreement must 'ensure that accession ... shall not affect the competences of the Union or the powers of its institutions', as well as that it does not 'affects the situation of Member States in relation to the' ECHR and its protocols. Finally, Article 3 requires that the agreement must not affect Article 344 TFEU which provides that 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'

Procedural aspects – Article 218 TFEU

Furthermore, a procedural rule is set out in Article 218(6)(a)(ii) TFEU which provides that it is for the Council to adopt the decision concluding the agreement on EU accession to the ECHR after obtaining the consent of the Parliament. According to Article 218(8) TFEU the Council is to act unanimously and that its decision is to enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

Protocol No 14 to the ECHR

On the ECHR side, the accession of the EU to the Convention was made legally possible as from 1 June 2010, with the entry into force of [Protocol No 14](#) of 13 May 2004. By virtue of Article 17 of the Protocol, a new paragraph (2) was added to Article 59 ECHR, which simply provides that: 'The European Union may accede to this Convention.' It is worth noting that Protocol No 14 had been signed five years *before* the entry into force of the CFR as part of EU primary law.

Accession agreement

By decision of 4 June 2010, the Council, upon the recommendation of the Commission authorised the opening of negotiations⁴ on the accession agreement, designating the Commission as the EU's negotiator. On 5 April 2013, the negotiators finalised a draft accession agreement of the EU to the ECHR. The draft agreement provided in particular that the EU accedes to the ECHR itself and to the two protocols to which all Member

States are party, while permitting the EU to accede to other protocols at a later stage. The EU's accession would impose upon its institutions, bodies, offices and agencies the duty to respect the ECHR, but at the same time would not require them to adopt any act or measure for which the EU would not have competence under EU law itself. Due to the specific nature of shared competences, the EU could be sued before the ECtHR as 'co-respondent' with one or more of its Member States. The draft agreement also provided that a delegation of the European Parliament would be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe (PACE) whenever the PACE exercises its functions related to the appointment of ECtHR judges.

Court of Justice opinion

On 4 July 2013, the Commission submitted a request to the Court of Justice for its opinion, asking whether the draft agreement was compatible with the Treaties. On 18 December 2014, the Court delivered its negative opinion on the draft accession agreement ([Opinion 2/13](#)). The Court of Justice pointed to four reasons for its negative opinion, noting that the draft accession agreement:

- was liable adversely to affect the **specific characteristics and the autonomy of EU law**, by not ensuring coordination between Article 53 ECHR and Article 53 CFR (regarding the level and extent⁵ of protection of fundamental rights⁵), did not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and did not address the relationship between the preliminary reference mechanisms to the Court of Justice (Article 267 TFEU) and the ECtHR ([Protocol No 16](#) to ECHR),
- was liable to affect **Article 344 TFEU** as it did not preclude the possibility of disputes between Member States, or between Member States and the EU, concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR,
- did not lay down arrangements for the operation of the **co-respondent mechanism**⁶ and a procedure for the prior involvement of the Court of Justice that would enable the specific characteristics of the EU and EU law to be preserved,
- did not address the specific characteristics of EU law concerning judicial review in the sphere of the common foreign and security policy, by allowing for judicial review of such acts only by the ECtHR.

European Parliament's position

Resolution on fundamental rights in 2004-2008

In its [resolution](#) of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, the Parliament welcomed 'the prospect of the Union acceding to the ECHR, even if that accession does not bring about fundamental changes', considering (quoting Jean-Claude Juncker's [report](#) of 2006) that the 'when questions relating to the rights and freedoms enshrined in the ECHR are raised before the [ECJ], the latter treats the ECHR as forming a genuine part of the EU's legal system'.

Resolution on fundamental rights in 2009

In its [resolution](#) of 15 December 2010 on 'the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon', the EP considered that EU accession to the ECHR will provide for a 'minimum level of protection' of human rights and an 'additional mechanism' for their enforcement, adding that ECtHR case law 'will ... provide extra input for current and future EU action

on the respect for, and promotion of, fundamental freedoms in the areas of civil liberties, justice and home affairs'.

Resolution on the Commission work programme for 2016

On 16 September 2015, the Parliament adopted a [resolution](#) on the preparation of the European Commission's 2016 work programme, in which it 'encouraged' the Commission 'to take into account the Court of Justice opinion in progressing towards EU accession to the [ECHR] and addressing the remaining legal challenges', as well as called upon that institution 'to step up its efforts to ensure EU accession to the [ECHR], while taking into account the legal arguments recently raised by the [ECJ]'.

Hearing at the EP Committee on Constitutional Affairs

On 20 April 2016, Parliament's Committee on Constitutional Affairs (AFCO) organised a [public hearing](#) on 'Accession to the European Convention on Human Rights (ECHR): stocktaking after the ECJ's opinion and way forward', to explore ways of relaunching the accession process. Speaking on behalf of the Council of Europe's Legal Service, Prof. Jörg Polakiewicz [indicated](#) that there is a need to 'address the [ECJ's] objections one by one, identifying solutions which respect both the requirements of EU constitutional law and the integrity of the ECHR system', and then re-submit a new agreement to the ECJ. From the EU side, Prof. Jean Paul Jacqu e [stressed](#) that fundamental rights are not in danger in the EU, and that the ECJ, after its opinion 2/13, will surely be even more vigilant in ensuring their respect by the EU institutions. Two academics, Dr Sonia Morano-Foadi (Oxford Brookes University) and Dr Stelios Andreadakis (University of Leicester) also expressed their [opinions](#) on the matter.

Resolution on fundamental rights in 2015

On 13 December 2016 the EP adopted a [resolution](#) on the situation of fundamental rights in the European Union in 2015 (rapporteur: Cristian Dan Preda, EPP, Romania). In the resolution, the EP stressed 'that the accession of the Union to the ECHR is a Treaty obligation under Article 6(2) TEU', and noted 'that this would strengthen fundamental rights protection in the EU'. It expressed the hope that the 'legal obstacles' to EU accession will be 'eliminated as soon as possible'.

Recent developments in the Commission

The topic of EU accession to the ECHR was not mentioned among the Juncker Commission's [10 priorities](#). This has been pointed out⁷ in the EP's resolution on the Commission work programme, discussed in the previous section.

On 15 May 2017, the Commission published a [staff working document](#) accompanying its communication, 2016 [Report](#) on the Application of the EU Charter of Fundamental Rights. In this the Commission staff stress that the Treaty of Lisbon 'imposed an obligation' of EU accession to the ECHR, adding that it 'remains a priority' for the Commission. The authors of the document believe that such an accession would 'improve the effectiveness of EU law and enhance the coherence of fundamental rights protection in Europe'. Regarding the need for redrafting the accession agreement, the Commission 'as EU negotiator ... continues to consult with the relevant Council working party on solutions to address the various objections raised by the Court' and 'is making good progress' on the issue.

Conclusions

The European Convention on Human Rights was drafted, in the direct aftermath of World War II and its atrocities, as a safeguard against fundamental rights violations by European states. At the time of signature of the ECHR (1950), the European Communities did not

even exist. However, once established, they started to gain competences potentially interfering with individual rights, including those enshrined in the ECHR. The ECJ's initial approach was reserved, but from the 1970s onwards, faced with challenges from national courts, it started to apply fundamental rights scrutiny. As for the sources of EU fundamental rights, the Court declared that these enjoy the legal status of 'general principles of Community law' and follow from the common constitutional traditions of the Member States and international agreements to which they are party, in particular the ECHR. This case law was codified in the Treaty of Maastricht. Following that, the idea of the newly founded EU's accession to the ECHR emerged and was submitted for review to the ECJ. At that stage of development of EU law, however, accession to the ECHR would have been outside the EU's competences. It was only in the Treaty of Lisbon that such a possibility was created legally. At the same time, however, the EU's own bill of rights, 'closely modelled on the ECHR'⁸ – the Charter of Fundamental Rights – became legally binding, raising the question of whether a double set of fundamental rights and a double protective scheme (Court of Justice and ECtHR) are necessary.

Outlook: should the EU still accede to the ECHR?

Scholarly opinions on the feasibility and desirability of EU accession to the ECHR after the Court's opinion vary. According to Adam Łazowski and Ramses Wessel, the added value of EU accession to the ECHR would grant individuals better protection of their fundamental rights as affected by acts of the EU institutions, provide for the necessary external scrutiny of EU action and contribute to a uniform interpretation of the ECHR and CFR.⁹ Steve Peers is more sceptical. In his view 'EU accession to the ECHR, on the terms defined by the [ECJ] in its opinion, *would actually reduce the standard of human rights protection as regards [justice and home affairs] matters in particular*'.¹⁰ Therefore, he considers that 'it has unfortunately become necessary to oppose the EU's accession, instead of supporting it'. Daniel Halberstam takes a more moderate view, pointing out that most of the Court of Justice's concerns can be accommodated, nonetheless others are 'misguided' and should be 'pushed back'.¹¹ Finally, Joakim Nergelius considers that following the Court's opinion, for the EU to accede to the ECHR another Treaty change would be necessary.¹²

Main references

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Peers, S. '[The EU's Accession to the ECHR: The Dream Becomes a Nightmare](#)', *German Law Journal*, 1/2016.

Endnotes

- ¹ M.M. Kenig-Witkowska, A. Łazowski, in: M.M. Keing-Witkowska (ed.), *Prawo instytucjonalne Unii Europejskiej*, 6th ed., C.H. Beck, 2015, p. 166-167.
- ² P. Craig, G. de Burca, *EU Law*, 5th ed., OUP, 2011, p. 367.
- ³ P. Craig, G. de Burca, *EU Law*, 5th ed., OUP, 2011, p. 367.
- ⁴ For an overview of the main contentious issues at an earlier stage of negotiations see the analysis by X. Groussot, T. Lock, L. Pech, '[EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011](#)', *European Issues* 218 (2011).
- ⁵ Article 53 ECHR: 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.' Article 53 CFR: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions.'
- ⁶ For a critical evaluation of this aspect see I. Daukšienė, S. Grigonis, '[Accession of the EU to the ECHR: Issues of the co-respondent mechanism](#)', *International Comparative Jurisprudence* 1.2 (2015): 98-105.
- ⁷ É. Bassot, W. Hiller, '[The Juncker Commission's ten priorities State of play in mid-2016](#)', EPRS, European Parliament, 2016, p. 30.
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- ⁹ A. Łazowski, R.A. Wessel, '[When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR](#)', *German Law Journal*, 1/2016, p. 212.
- ¹⁰ S. Peers, '[The EU's Accession to the ECHR: The Dream Becomes a Nightmare](#)', *German Law Journal*, 1/2016, p. 222.
- ¹¹ D. Halberstam, '[It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward](#)', *German Law Journal*, 1/2016, p. 146.
- ¹² J. Nergelius, '[The accession of the EU to the European Convention on Human Rights: A critical analysis of the Opinion of the European Court of Justice](#)', Swedish Institute for Policy Studies, 2015, p. 50.

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