Momentum

EU and Competition

24 February 2015

OPINION 2/13: ECJ REJECTS EU'S ACCESSION TO THE ECHR

As is well known, EU law is both independent from the legal systems of each of its Member States (MS) and, at the same time, an integral part of them. Since the MS of the EU are Contracting Parties do the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention), the accession of the EU to the ECHR is generally seen as the *missing building block in the edifice of European human rights law*[1]. Indeed, because the EU itself is not a party to the ECHR, proceedings for violations of human rights by the EU cannot be brought before the ECtHR, the European court specialized in human rights disputes (see *Matthews vs. UK*, nr. 32).

In 1996 the Court of Justice of the European Union (ECJ or Court) rejected the accession of the EC to the ECHR (Opinion 2/94)[2], owing to the fact that it had no legal competence to accede. That obstacle is currently surpassed (article 6 of the TEU was amended to that effect and Protocol No. 8 was adopted). Meanwhile, given that the EU is not a state, article 59 of the ECHR was also amended to accommodate the accession.

However, in Opinion 2/13 of December 2014, the ECJ considered that the draft agreement on the accession that had been submitted by the Commission (after years of lengthy negotiations) was incompatible with EU

[1] Paul Gragl, *POMFR: The EU Accession to the ECHR*, http://europeanlawblog.eu/?p=2633
[2] http://curia.europa.eu/juris/liste.jsf?pro=AVIS&num=c-2/94

law, mainly because it did not take into account the *special characteristics of the EU*; according to the following reasons.

1) The specific characteristics and the autonomy of EU law

The Court does not oppose the existence of an external control *per se* and acknowledges that decisions of the ECtHR may very well be binding on the ECJ in what regards the interpretation of the ECHR. Yet, in the Court's opinion, trouble comes when the ECJ is called upon to interpret the Charter of Fundamental Rights of the European Union (Charter), which is EU law and has the same legal value as the Treaties.

Firstly, while article 53 of the ECHR allows the Contracting Parties to have higher standards of protection of the rights enshrined in the Convention, according to the Court's jurisprudence on article 53 of the Charter[3], on harmonized areas of EU law MS may not have higher standards then those established in the Charter. There was no provision in the agreement that would ensure the coordination of those provisions.

Secondly, the obligation of mutual trust between MS would be hampered, as «the ECHR would require a Member State to check that another Member State has observed fundamental rights».

Thirdly, Protocol 16 to the ECHR (adopted on October 2013) establishes that national courts of Contracting Parties may address the ECtHR for advisory opinions. Even though the agreement does not contemplate EU's accession to this protocol, the accession may undermine the preliminary ruling mechanism established in article 267 TFEU. In this regard it should be noted, however, that while decisions of the ECJ about the interpretation of EU law

[3] Decision of the Court of Justice of February 26th 2013, *Stefano Melloni v Ministerio Fiscal*, case C-399/11, § 63.

in the context of preliminary rulings are binding on MS's courts, advisory opinions under that protocol are not.

2) Article 344 TFEU

The draft agreement submitted by the Commission does not prevent MS to use the ECtHR to settle disputes concerning the interpretation or application of the Treaties, which leaves the door open for MS to breach article 344 TFEU, according to which they may not submit those disputes «to any method of settlement other than those provided for [in the Treaties]».

3) The co-respondent mechanism

According to this mechanism a Contracting Party may become co-respondent in proceedings brought by non-MS either by invitation of the ECtHR or by a decision of the same court upon the request of that Contracting Party. This mechanism inherently involves the assessment by the ECtHR of EU law, namely the division of powers between the EU and its MS and the attributability of the act or omission in dispute.

4) The procedure for the prior involvement of the Court of Justice

The draft agreement provides for the prior involvement of the ECJ in cases brought before the ECtHR, mainly for the former to «examine the compatibility of the provision of EU law concerned with the relevant rights guaranteed by the ECHR or by the protocols to which the EU may have acceded». However the Court notes that this procedure leaves out the assessment of secondary law.

5) The specific characteristics of EU law as regards judicial review in CFSP matters

The ECJ's jurisdiction over common foreign and security policy is rather limited (article 275 TFEU). The Court considers that the accession (as

proposed in the draft submitted) would empower the ECtHR to rule on the compatibility with the ECHR of acts to which the ECJ does not have jurisdiction to review in light of fundamental rights. This means that the ECtHR would inevitably be able to decide and interpret EU law without the prior intervention of the ECJ.

The Court is adamant in affirming its ultimate jurisdiction over the interpretation and application of EU law. Yet, given the special nature/importance of human rights disputes, one would perhaps expect a deeper reasoning for the rejection of the accession, beyond the formal obstacles thoroughly identified in the Opinion.

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