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EU Accession to the ECHR

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Overview

1. Current relationship
2. EU Accession: overview
3. The 2013 Accession Agreement
4. Opinion 2/13
5. Way forward

Current relationship

- No formal relationship
 - except reference to the ECHR in Article 6 (3) TEU and Article 52 (3) CFR
- **instead:**
 - **cross-fertilization**
 - Charter partly based on ECHR
 - until Charter's arrival: ECHR was main 'source of inspiration' for the CJEU in fundamental rights cases
- **and MS responsibility for EU violations of the ECHR**
 - *Matthews v United Kingdom*
 - “The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer”.
 - *Bosphorus v Ireland*
 - rebuttable presumption of compliance with the ECtHR where the MS had no discretion
 - *Connolly v 15 Member States*
 - for responsibility to occur applicant must have been in the jurisdiction of one of the MS

EU Accession to the ECHR

- **Why?**
 - would lead to a 'proper' attribution of responsibility and close existing gaps
 - would strengthen the ECHR system as a whole
 - would remove the potential for contradictory case law.
- **Possible since Lisbon Treaty/Protocol 14 ECHR:**
 - Article 6 (2) TEU gives EU competence to accede
 - Article 59 ECHR opens the ECHR to EU membership (normally only open to states)
- First attempt failed however: Opinion 2/13 of the ECJ (2014)
- Accession negotiations recommenced in the autumn of 2020

EU Accession to the ECHR

Challenges:

- **political:**
 - EU: unanimity in the Council consent of the EP (Art. 218 (6)&(8) TFEU)
 - Council of Europe: consent of all 47 CoE high contracting parties
- **legal:**
 - correct attribution of responsibility: MS or EU or both?
 - relationship between CJEU and ECtHR;
 - protection of the autonomy of the EU legal order.

The 2013 Accession Agreement

- **Draft Accession Agreement was negotiated and agreed in 2013**
 - complex mechanism for allocating responsibility between the EU and its Member State (co-respondent mechanism)
 - Problem: the autonomy of the EU legal order: ECtHR must not be given jurisdiction to decide the allocation of competences between EU and MS
 - hence: introduction of a co-respondent mechanism
 - complex mechanism for involving the ECJ in cases where not reference had previously been requested
 - and lots more

The 2013 Accession Agreement

Attribution of responsibility:

1. EU Member States implement EU law, but remain parties to the ECHR
 - hence they may violate the ECHR when implementing EU law, but also when not implementing EU law
 - how to distinguish between these situations?
 - and who decides? CJEU or ECtHR?
2. Difficulty: the autonomy of the EU's legal order
 - Opinion 1/91: Agreement concluded by the EU must not confer on an international court jurisdiction to determine the allocation of competences between EU and MS.

The 2013 Accession Agreement

Solution in the Accession Agreement (2013)

1. Rule of attribution in Article 1 (4)

- For the purposes of the [ECHR], an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf **shall be attributed** to that State, **even if** such act, measure or omission occurs when **the State implements the law of the European Union**,[...]. This shall not preclude the European Union from being responsible as **a co-respondent**

2. Co-respondent mechanism in Article 36 (4) ECHR (new)

- The European Union or a member State of the European Union may become a co-respondent to proceedings by **decision of the Court** in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent **is a party** to the case. The **admissibility** of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.

The 2013 Accession Agreement

Solution in the Accession Agreement (2013)

1. EU as co-respondent: Art 3 (2) Accession Agreement

Where an application is directed against one or more member States of the [EU], the [EU] **may become** a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it **appears** that such allegation **calls into question** the compatibility with the rights at issue defined in the [ECHR] of a provision of [EU] law [...], **notably** where that violation could have been avoided only by disregarding an obligation under [EU] law.

2. Procedure: Art 3 (5) Draft Agreement

A High Contracting Party shall become a co-respondent either **by accepting** an invitation from the Court or by decision of the Court upon **the request** of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it **is plausible** that the conditions in paragraph 2 or paragraph 3 of this article are met

The 2013 Accession Agreement

Relationship between the two courts

What if a case reaches the ECtHR and the CJEU has not yet decided, e.g. because no reference request (Art 267 TFEU) was made:

- would it be acceptable if the EU became co-respondent without prior CJEU involvement?
- Article 3 (6) Draft Agreement

In proceedings to which the [EU] is a co-respondent, if the [ECJ] has not yet assessed the compatibility with the rights at issue defined in the [ECHR] of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the [ECJ] to make such an assessment, and thereafter for the parties to make observations to the Court. The [EU] shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. **The provisions of this paragraph shall not affect the powers of the Court.**

Opinion 2/13

- Accession Agreement was put before the Court of Justice under Article 218 (11) TFEU
- In Opinion 2/13 Court of Justice declared the agreement incompatible with the EU Treaties
 - accession cannot therefore happen, unless certain issues are addressed
- Most of these are technical and can be fixed
 - requires re-negotiation (currently happening)

Opinion 2/13

Opinion 2/13: seven issues with the accession agreement

- Co-respondent mechanism
- Prior involvement of the ECJ
- Article 344 TFEU and inter-party cases
- Coordination between Articles 53 CFR and 53 ECHR
- Protocol No 16
- Exclusion mutual trust/recognition cases
- Exclusion of jurisdiction over CFSP measures

Co-respondent mechanism

A High Contracting Party shall become a co-respondent either **by accepting** an invitation from the Court or by decision of the Court upon **the request** of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. **When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.**

. OPINION 2/13

Plausibility review by ECtHR incompatible with the autonomy of EU law because
'ECtHR would be required to assess the rules of EU law governing the division of power between the EU and the Member States as well as the criteria for the attribution of their acts and omissions.'

Prior involvement

In proceedings to which the European Union is a co-respondent, **if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue** defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, **sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment**, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

. OPINION 2/13

- Present version incompatible with autonomy of EU law
- ECtHR would be required to interpret the case law of the ECJ
- AND undue restriction to review of compatibility (=validity) of EU law with Treaties: must be extended to all interpretation questions

Attribution of responsibility

Art 3 (7) DAA

If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, **unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.**

• OPINION 2/13

- Possibility for ECtHR to attribute responsibility at the request of respondent and co-respondent is violation of autonomy of EU law
- And: doesn't take into account MS reservations to the ECHR

Can we fix it?

This is the main task of the renewed accession negotiations that are under way:

Method:

- amendments to the Draft Accession Agreement
- adoption of EU internal rules

“Inspiration”:

- Council of the EU (leaked document of 20 Sept 2019) <https://bit.ly/2UsU5q1>
- Negotiation meeting reports (CDDH47+1)

Possible fixes

- Co-respondent mechanism
- Prior involvement of the CJEU
- Article 344 TFEU and inter-party cases
- Protocol No 16

CDDH47+1(2021)R12

- right for EU/MS to become co-respondents if conditions are met (assessed by EU only); no assessment by ECtHR
- no departure from the rule of joint responsibility in any circumstances (exception: MS reservations)
- unconditional right for the EU to request 'sufficient time' for the prior involvement of the CJEU
- to be extended to cases raising questions of interpretation (and not just validity) of EU law

CDDH47+1(2021)R11 (Appendix IV)

- no inter-party cases between EU and MS
- inter-party cases between MS: duty to suspend the procedure to allow EU to assess whether the dispute concerns EU law; if so: application inadmissible/struck out

Trickiest issues arising from Opinion 2/13

- But two problematic ones:
 - Accession Agreement did not exclude the jurisdiction of the ECtHR over cases concerning the Common Foreign and Security Policy (even though ECJ has no jurisdiction here)
 - And Accession Agreement did not exclude the ECtHR's review in the AFSJ and mutual trust cases

Possible fixes: CFSP

Problem: lack of jurisdiction of ECJ over (some) CFSP measures (Art 24 (1) TEU)

- hence: after accession ECtHR would have had the power to rule on their compliance with the ECHR without the ECJ having jurisdiction to do likewise.

Solution (Council of the EU)?

- New clause in accession agreement: attribution of such acts to one (or more) MS only if ECJ does not have jurisdiction
 - would happen by joint declaration on the basis of internal rules as to which MS should be designated as MS responsible for these purposes
 - consequence: suspension of proceedings before ECtHR for 3 months allowing for launch of domestic proceedings
- Convincing?

Possible fixes: mutual trust

With regard to **mutual trust** in the AFSJ, the ECJ held in Opinion 2/13:

it must be prevented that “the EU and the Member States [are] considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law [and] require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law”.

Possible fixes: mutual trust

Solution: (CDDH47+1(2021)R12)

Article 5b – *Mutual trust under European Union Law*

Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured.

- Effect? presumably to exclude ECtHR jurisdiction in (most) mutual trust cases
 - but there would (probably) be exceptions in accordance with current case law (e.g. where there is a real risk of inhuman or degrading treatment)

Thank you very much for listening



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