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Enlighten...

Accession after Opinion 2/13? The way forward

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Overview

1. The seven issues to be addressed
2. Technical options
3. The deficient provisions of the DAA
4. Coordination between the Articles 53
5. Mutual recognition
6. The CFSP
7. Is accession still desirable?



The seven issues with the DAA

- 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



Technical Options

- Treaty amendment, e.g. a 'notwithstanding Protocol'
- Reservations under Article 57 ECHR
- Unilateral commitments/internal agreements
- Amendments to the Draft Accession Agreement (DAA)



The EU as co-respondent

Art 3 (2) DAA

Where an application is directed against one or more member States of the European Union, the European Union **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 European Union law [...], **notably** where that violation could have been avoided only by disregarding an obligation under European Union law.



Co-respondent: procedure

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**



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.**



Co-respondent and reservations

- Court: the DAA does not contain a provision that respects Member State reservations to the ECHR
- SOLUTION: clarifying provision



Prior involvement of the CJEU

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.



Prior involvement

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
- SOLUTION:
 - ‘ECtHR must suspend proceedings if EU as a co-respondent informs it that the prior involvement has been triggered’
 - And express extension of prior involvement mechanism to cases raising questions of interpretation



Article 344 TFEU

Include express exclusion of the ECtHR's jurisdiction in inter-party cases between Member States.

- P: collateral damage: excludes more cases than absolutely necessary
- A less restrictive formulation would be problematic as regards the autonomy of EU law



Coordination between Art 53

- Problem is that this is an imagined problem
 - Makes solution difficult
- Suggestion: clarifying sentence in the DAA that ‘Article 53 CFR remains unaffected’ or that ‘Article 53 ECHR shall not be interpreted as requiring a higher standard’



Mutual recognition

ECJ: ‘In so far as the ECHR would [...] 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. However, the [DAA] contains no provision to prevent such a development.’



Mutual recognition

- Reservation: difficult to phrase as mutual recognition potentially affects a number of rights and is laid down in numerous provisions of EU law
- Amendment to the DAA
 - P: any mention of ‘mutual recognition’ might be construed by ECJ as violation of the autonomy of EU law
 - Safe option: ‘Member States of the EU cannot be held responsible under the ECHR for failing to carry out a review of another Member State’s compliance with ECHR rights’



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CFSP

- Similar difficulties as with mutual recognition: any mention of the CFSP in the DAA might be construed as violation of autonomy of EU law
- BUT: difficult to conceive of a formulation that would not mention CFSP/require the ECtHR to ascertain whether the measure at issue is one over which the CJEU has no jurisdiction
- Catch-22?
 - Only solution would be Treaty change to give CJEU jurisdiction



Is accession still desirable?

- Currently: under *Matthews* MS are responsible for ECHR violations even if they have their origin in EU law
 - *Bosphorus*: presumption of compliance if secondary law and no discretion on part of MS
 - *Connolly*: no responsibility if no MS involvement in the case whatsoever
- If the ECJ's demands were complied with, would accession still lead to an improvement of the protection of human rights in Europe?



Thank you!



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