The battle over Strasbourg

The protection of human rights across Europe has suffered a setback, thanks to the Court of Justice of the European Union

*by **Michel Petite****

There is a cloud over the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Competition lawyers increasingly refer to fundamental rights when building a case. They might therefore not be indifferent to the latest stage of the journey of the EU's accession to the ECHR. On 18 December 2014 – and for the second time in 10 years – the Court of Justice in Luxembourg (the CJEU) delivered a negative opinion on the draft agreement (the Agreement) regarding the EU's accession and on the related implications for the European Court of Human Rights (the ECtHR) in Strasbourg.

This comes as a major setback for a process that was carefully prepared by the European Commission, discussed and negotiated between the member states of the Union, and between the EU and the Council of Europe.

A long journey

The adhesion of the EU to the ECHR has long been called for, essentially in order to end the anomaly whereby its member states are members of the ECHR and subject to the form of external control provided by the Convention and its court in Strasbourg, while the EU itself is not. The EU adhesion would send a strong political signal and make general compliance with the standards of fundamental rights more constitutionally consistent.

Fundamental rights already form part of EU law, and have done since the EU was set up. Fundamental rights – as guaranteed by the ECHR – constitute general principles of the Union's law (article 6 of the EU treaty). Under the 2007 Lisbon treaty, an EU charter of fundamental rights – to a large extent directly derived from the ECHR – also applies with the same legal value as the EU treaties to the EU institutions and to the member states when they apply EU law.

It is therefore not so much the substance of human rights and fundamental freedoms which is at stake here, but the interface between the two systems of the Convention and of the EU treaties, in particular their jurisdictional arrangements between the courts in Luxembourg and in Strasbourg.

Ten years ago, the European Court of Justice was asked for its view on the subject (see Opinion 2/94). It simply found that the EU was not competent to accede to the ECHR, in the absence of any EU treaty provision conferring such power. Since then, the Lisbon treaty has provided for such empowerment, and even obligation: "The Union shall accede to the ECHR. Such accession shall not affect the Union's competence as defined in the treaties." (article 6-2, TEU)

With this explicit treaty base, and difficult negotiations completed within the Council of Europe (in particular with a reluctant Russia and Turkey), the Commission must have been relatively confident when it submitted the draft Agreement to the Court of Justice. Accordingly, the latest opinion must have come as a bad surprise for the Commission and the 28 member states of the Union that had supported the Agreement.

Why did the Court come to a negative opinion?

The central condition outlined in the Lisbon treaty for the European Union to be able to accede to the ECHR reads: "(it) shall make provision for preserving the specific characteristics of the Union".

This condition is challenging, insofar as the Union has created its own legal order, the autonomy of which needs to be fully preserved. Furthermore, account must be taken of the complex interaction between the EU and the member states' acts and responsibilities, which include such rules as the primacy of EU law over the laws of the member states, and the direct effect on nationals and member states of many EU law provisions. There is no doubt that the CJEU was entirely within its duty to make sure that the specificities and the autonomy of the Union's legal order were not put at risk: the institutional balance achieved within the EU is subtle, even fragile, and one can understand why the judges in Luxembourg might take a conservative position on such an issue.

The Court found five main issues where the compatibility of the Agreement with EU primary law remains wanting:

(1) It is axiomatic that the Court of Justice retains the ultimate interpretation of EU law, including the fundamental rights of the charter which is part of it. In this respect, it calls for a uniform standard within the EU. By contrast, the possibility given by the Convention to its members of laying down higher standards of rights than those guaranteed by the Convention opens up the possibility of putting the unity of EU law in question.

(2) Under the Convention, it is possible for the highest courts of its members to request advisory opinions from the ECtHR on questions relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR. This mechanism, if triggered by a court of an EU member state, could pre-empt the procedure of preliminary rulings of the Court of Justice of the EU, which crucially ensures the uniformity of interpretation of EU law. The risks associated with this would be high where the interpretation concerns rights guaranteed by the charter.

(3) The EU treaties include an article 344 which is one of the guarantors of the autonomy of the EU legal system:

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"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". However, after the accession, the ECHR would itself form part of EU law and it would be applied between member states as such. As a result, the dispute resolution mechanism of the ECHR could apply to a member state of the EU or the EU itself, in breach of article 344.

(4) One of the most difficult issues with the adhesion of the EU to the ECHR was always going to be the correct allocation of application and responsibility between the member states and/or the EU. This allocation depends on the division of powers between the EU and its member states, which requires an assessment of the EU law. In the event that such an issue arises before the ECtHR, a specific "co-respondent mechanism" has been created, in order to allow for the possibility of an intervention of either the EU or a member state. However, the Court of Justice notes that, where the EU or the member states request(s) leave to intervene as a co-respondent, the ECtHR is required to ascertain whether it is "plausible" that the conditions for the intervention are met. And the Court of Justice concludes that, in doing so, the ECtHR would have to assess the rule of EU law governing the division of powers between the EU and the member states.

(5) A procedure of "prior involvement" of the Court of Justice has been established for cases brought before the ECtHR in which EU law is at issue. The Court indeed finds such a mechanism necessary but identifies some loopholes in its functioning. It should be explicit that the question should be answered by the EU institutions and made binding on the ECtHR.

Criticism of the CJEU over this new setback

The fact that the opinion goes against the position taken by all member states and the European Commission cannot be a surprise. The Agreement had been secured between them, after difficult negotiations with the Council of Europe, and it is clear that further requests for amendments made to the Council of Europe could be met with some resentment. These are certainly important political considerations but it is the function of the Court of Justice to factor them in against the legal assessment which they are due to deliver.

Some critics point to the fact that the advocate general, while identifying almost exactly the same issues as the full court, more leniently concluded that the Agreement was compatible, so long as the issues raised were solved in a manner that was "binding under international law". The practical difference between the advocate general's opinion and the later negative opinion of the Court is not obvious: both a decision of incompatibility and a decision of qualified compatibility require a proper solution to the identified problems. And as a matter of principle, one can understand the reluctance of the Court to vet an Agreement on such fundamental issues as "half-compatible"!

Finally, the Court will be portrayed as conservative and risk-averse, possibly driven by issues of turf and power in relation to the ECtHR. The problems identified, converging to a conclusion of incompatibility, might look petty and esoteric compared to the majesty of the adhesion of the EU to the ECHR. But the reality is that they involve basic issues of primary law and of institutional balance within the EU system. In this respect, the Court of Justice has, for example, always been consistent in refusing to risk weakening the procedure of preliminary ruling, which is indeed central to the EU system.

How to surmount the difficulties identified by the Court of Justice

Obviously, ignoring the opinion of the Court and proceeding with the adhesion of the EU to the ECHR is not an option, if only for reasons of legal certainty for the future.

The logical next step would be to reopen the negotiations with the Council of Europe. On some of the procedural issues mentioned above – **(4)** and **(5)** would be likely candidates – it will probably be necessary, even if it is not welcome by some of the contracting parties to the ECHR, who may well feel that they have already reached the limit of what are acceptable concessions.

A light at the end of the tunnel is that the most problematic issues could logically be solved within the EU, without the need to reopen negotiations with the Council of Europe. Under **(1)** above, member states could commit to refrain from checking the level of fundamental rights between themselves. Under **(2)**, member states could commit to give absolute priority to the procedure of preliminary rulings of the CJEU over any advisory opinions of the ECtHR. And under **(3)**, they could commit to never use the resolution of conflicts mechanism of the ECHR between themselves.

In this optimistic scenario, a long shadow is cast by the Court in the final paragraphs of its opinion. It says that it has no jurisdiction over the common foreign and security policy (CFSP) except in the narrow area of "restrictive measures" against individuals. In contrast, given that it is tied into the ECHR, the ECtHR would be empowered to rule on the compatibility of actions or omissions performed by the EU in the context of its foreign policy, thus entrusting its judicial review exclusively to a non-EU body (admittedly, only as regards the rights guaranteed by the ECHR).

It is unclear what the Court of Justice makes of this state of affairs. If it is a call for an extension of its jurisdiction over the CFSP, it is a very long shot. If it is a firm "incompatibility" conclusion, and a call for a carve-out of the European Court of Human Right's competence over the EU foreign policy, it will make uncomfortable reading for Mr Putin to learn that his foreign policy is subject to review under the ECHR, while the EU's is not.

It is a fact recalled by the advocate general that, at present, the EU system of legal protection in foreign policy is covered by a combination of the Court of Justice in defined cases, and otherwise by the national courts under the umbrella of the ECHR. And it seems that nothing much other than cosmetic changes can be made at this stage.

On balance, the opinion of the Court sounds like a recall to order. It puts the EU in a difficult but not impossible position, where it must fulfil its obligation to adhere to the ECHR. But for a journey that began over 10 years ago, the EU still does not have a clear road ahead. For the Commission, there is (among other hurdles that will have to be overcome) the probable prospect of having to request the Court's opinion a third time.