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**The Court of Justice delivers its opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law**

The European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') is a multilateral international agreement concluded in the Council of Europe.<sup>1</sup> It entered into force on 3 September 1953. All the members of the Council of Europe are Contracting Parties to the ECHR.

By an Opinion given in 1996,<sup>2</sup> the Court had then concluded that, as Community law stood at the time, the European Community had no competence to accede to the ECHR.

Since then, the European Parliament, the Council of the European Union and the Commission have, in 2000, proclaimed the Charter of Fundamental Rights of the European Union ('the Charter'), which has been given the same legal value as the Treaties by the Treaty of Lisbon, which entered into force on 1 December 2009. The Treaty of Lisbon also amended Article 6 of the EU Treaty, which now provides (i) that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law, and (ii) that the EU is to accede to the ECHR.<sup>3</sup> As regards such accession, Protocol No 8<sup>4</sup> provides, however, that the accession agreement must fulfil certain conditions so as, in particular, to make provision for preserving the specific characteristics of the EU and EU law and to ensure that accession of the EU does not affect its competences or the powers of its institutions.

Upon the recommendation of the Commission, the Council adopted a decision on 4 June 2010 authorising the opening of negotiations for an accession agreement. The Commission was designated as negotiator. On 5 April 2013, the negotiations resulted in agreement on the draft accession instruments. In that context, on 4 July 2013, the Commission asked the Court of Justice to give its Opinion on the compatibility of the draft agreement with EU law, pursuant to Article 218(11) TFEU.<sup>5</sup>

In its Opinion delivered today, the Court, after noting that the problem of the lack of any legal basis for the EU's accession to the ECHR has been resolved by the Treaty of Lisbon, points out that since the EU cannot be considered to be a State, such accession must take into account the

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<sup>1</sup> The Council of Europe was created by an international agreement, signed in London on 5 May 1949 and entering into force on 3 August 1949, in order to achieve a greater unity between its members. Its purpose is to safeguard and realise the ideals and principles of the common heritage of its members and to facilitate economic and social progress in Europe. At present, 47 European States are members of the Council of Europe, including the 28 Member States of the European Union.

<sup>2</sup> Opinion of the Court of 28 March 1996 ([2/94](#)).

<sup>3</sup> Article 6(2) of the EU Treaty.

<sup>4</sup> Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

<sup>5</sup> Twenty-four Member States intervened in the procedure.

particular characteristics of the EU, which is precisely what is required by the conditions to which accession is subject under the Treaties themselves.

Having clarified this, the Court observes first of all that, as a result of accession, the ECHR, like any other international agreement concluded by the EU, would be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law. In that case, the EU, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms provided for by the ECHR. The EU and its institutions would thus be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and judgments of the European Court of Human Rights ('the ECtHR').

The Court notes that it is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would be binding on the EU and all its institutions and that, on the other, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the ECtHR. However, it states that that cannot be the case as regards the interpretation of EU law, including the Charter, provided by the Court itself.

The Court points out in particular that, in so far as the ECHR gives the Contracting Parties the power to lay down higher standards of protection than those guaranteed by the ECHR, **the ECHR should be coordinated with the Charter**. Where the rights recognised by the Charter correspond to those guaranteed by the ECHR, the power granted to Member States by the ECHR must be limited to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised. The Court finds that **there is no provision in the draft agreement to ensure such coordination**.

The Court considers that the approach adopted in the draft agreement, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU. In particular, this approach does not take account of the fact that, as regards the matters covered by the transfer of powers to the EU, the Member States have accepted that their relations are governed by EU law to the exclusion of any other law. In requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Parties which are not members of the EU but also in their relations with each other, **the ECHR would require each Member State to check that the other Member States had observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States. In those circumstances, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law**. However, the agreement envisaged contains no provision to prevent such a development.

The Court notes that **Protocol No 16 to the ECHR**, signed on 2 October 2013, permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto. Given that, in the event of accession, the ECHR would form an integral part of EU law, **the mechanism established by that protocol could affect the autonomy and effectiveness of the preliminary ruling procedure** provided for by the FEU Treaty, notably where rights guaranteed by the Charter correspond to rights secured by the ECHR. It cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a national court or tribunal could trigger the procedure for the 'prior involvement' of the Court,<sup>6</sup> thus creating a risk that the preliminary ruling procedure might be circumvented. The Court considers that the draft agreement fails to make any provision in respect of the relationship between those two mechanisms.

Next, the Court recalls that the FEU Treaty 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 by the Treaties**.<sup>7</sup> Consequently, where EU law is at

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<sup>6</sup> This procedure is envisaged by the draft agreement itself and is designed to enable the Court to be involved in cases brought before the ECtHR in which EU law is at issue but has not yet been interpreted by the Court.

<sup>7</sup> Article 344 of the FEU Treaty.

issue, the Court has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR. The fact that, according to the draft agreement, proceedings before the Court are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with the ECHR is not sufficient to preserve the Court's exclusive jurisdiction. The draft agreement still allows for the **possibility that the EU or Member States might submit an application to the ECtHR concerning an alleged violation of the ECHR by a Member State or the EU in relation to EU law**. The very existence of such a possibility **undermines the requirements of the FEU Treaty**. In those circumstances, the draft agreement could be compatible with the FEU Treaty only if the ECtHR's jurisdiction were expressly excluded for disputes between Member States, or between Member States and the EU, regarding the application of the ECHR in the context of EU law.

In addition, in the draft agreement, **the co-respondent mechanism** has the aim of ensuring that proceedings brought before the ECtHR by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate. The draft agreement provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party. If the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must prove that the conditions for their participation in the procedure are met, with the ECtHR deciding on that request in the light of the plausibility of the reasons given. In carrying out such a review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions. The ECtHR could adopt a final decision in that respect which would be binding both on the Member States and on the EU. To permit the ECtHR to adopt such a decision **would risk adversely affecting the division of powers between the EU and its Member States**.

The Court also expresses its view on the **procedure for the prior involvement of the Court**.<sup>8</sup> It notes, first, that, to that end, the question whether the Court has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR can be resolved only by the competent EU institution, that institution's decision having to bind the ECtHR. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court. Consequently, that procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent institution is able to assess whether the Court has already given a ruling on the question at issue and, if not, to arrange for the prior involvement procedure to be initiated. Secondly, the Court observes that **the draft agreement excludes the possibility of bringing a matter before the Court in order for it to rule on a question of interpretation of secondary law** by means of that procedure. **Limiting the scope of that procedure** solely to questions of validity **adversely affects the competences of the EU and the powers of the Court**.

Lastly, the Court analyses the specific characteristics of EU law as regards **judicial review in matters of the common foreign and security policy ('CFSP')**. It notes that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court. That situation is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone. Nevertheless, on the basis of accession as provided for by the draft agreement, **the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP**, notably those whose legality the Court cannot, for want of jurisdiction, review in the light of fundamental rights. Such a situation would effectively **entrust**, as regards compliance with the rights guaranteed by the ECHR, **the exclusive judicial review** of those acts, actions or omissions on the part of the EU **to a non-EU body**. Therefore, the draft agreement **fails to have regard to the specific characteristics of EU law with regard to the judicial review** of acts, actions or omissions on the part of the EU **in the area of the CFSP**.

In the light of the problems identified, **the Court concludes that the draft agreement on the accession of the European Union to the ECHR is not compatible with EU law**.

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<sup>8</sup> See footnote 6.

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**NOTE:** A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

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The [full text](#) of the Opinion is published on the CURIA website.

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