

DEVELOPMENTS IN EUROPEAN LAW

Sources of EU Law: A Review in Light of the Accession of the Union to the ECHR

A Matter of Principle*

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Abstract

The accession of the EU to the ECHR raises several problems. This article argues that procedural problems are fundamentally rooted in substantive issues, with specific regard to the sources of EU law. More precisely, in order to allow accession, it would be essential to review Article 6(3) TEU so as to lower the level of the ECHR as a source of general principles of EU law to (at least) the same hierarchical level as the founding treaties. Yet, while this solution can be satisfactory for EU Member States that are parties to the ECHR and its protocols, it is not necessarily appealing to non-EU States that are parties to the ECHR system, similar to the stall generated by the Energy Charter Treaty in the field of investment. Furthermore, the solution fundamentally clashes with the consolidated priority of the general principles of EU law crystallized in cases such as Kadi.

Keywords: EU, sources of EU law, ECHR, accession, general principles of EU law.

1. Introduction

In order to guarantee full human rights protection in the Union, since the 1950s first the accession of the European Community (EC) and later the EU to the ECHR has been envisaged. Called upon by the Council of the EU to provide an advisory opinion on the matter, in 1994 the ECJ found accession to be impossible, as it

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would have implied a fundamental change in the institutional structure of the EC.¹ To allow the accession of the EU to the ECHR, the EU founding treaties have therefore been amended via the Lisbon Treaty, along the lines of the Constitution for Europe.² Article 6(3) TEU now establishes that: “[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, provided that accession “shall not affect the Union’s competences as defined in the Treaties.” At the same time, Article 59(2) ECHR establishes that “the European Union may accede” to ECHR.

Negotiations based on Article 6(3) TEU led to adopting a Draft Accession Agreement of the EU to the ECHR in June 2013.³ Nevertheless, via Advisory Opinion 2/13 of 18 December 2014, the CJEU rejected yet again the viability of the agreement.⁴ The Opinion negated the possibility of accession essentially based on: (i) the hierarchical status of the ECHR with respect to primary and secondary EU law; (ii) the interference of the ECtHR with the role of the CJEU as the sole interpreter of EU law under Article 344 TFEU; (iii) the co-respondent mechanism as an avenue for the ECtHR to interfere with the division of competences between the EU and its Member States; and (iv) the possibility for the ECtHR to adjudicate upon the Common Foreign and Security Policy (CFSP) of the Union, which in turn is excluded from the jurisdiction of the CJEU. In all these matters, arguably substance and procedure are strictly intertwined. Negotiations for accession resumed in October 2020 and the future draft instrument for the accession of the EU to the ECHR must necessarily build on the 2014 opinion of the CJEU.⁵

This article focuses on the specific problem of the relationship between the ECHR and EU law from the substantive viewpoint of legal sources, which arguably has relevant implications for the procedural relationship between the CJEU and the ECtHR. The analysis proceeds in two steps. (i) First, the investigation critically reviews the main questions raised by a possible accession of the EU to the ECHR and the sources of EU law in this context. (ii) On this basis, the article secondly assesses the problem of the hierarchical relationship between EU law and the ECHR, notably in light of the general principles of EU law, as a key to address

- 1 Opinion of 28 March 1996, *Opinion 2/94 Pursuant to Article 228 EC Treaty*, ECLI:EU:C:1996:140, where the CJEU considered that, “in the absence of express or implied powers” a “modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and [...] could be brought about only by way of [EC] Treaty amendment”. See paras. 28, and 35.
- 2 Draft Establishing a Constitution for Europe, 29 October 2004, at www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/draft-treaty-establishing-a-constitution-for-europe.
- 3 Council of Europe, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the Steering Committee for Human Rights, Doc. 47+1(2013)008rev2, 10 June 2013.
- 4 Opinion of 18 December 2014, *Opinion 2/13 Pursuant to Article 218(11) TFEU*, ECLI:EU:C:2014:2454.
- 5 Council of Europe, EU Accession to the ECHR, at www.coe.int/en/web/human-rights-intergovernmental-cooperation/accesion-of-the-european-union-to-the-european-convention-on-human-rights.

accession problems, with special attention to the interaction between the CJEU and the ECtHR, considering CJEU Opinion 2/13.

2. Key Problems Raised by the Accession of the EU to the ECHR: Substance or Procedure?

The accession of the EU to the ECHR raises several questions,⁶ to which the draft accession agreement as consolidated in March 2023 seeks to find a solution.⁷ The current draft is quite a short document, outlined on the basis of the draft assessed by the CJEU in Opinion 2/13.

Fundamentally, accession will make the EU liable for human rights violations under the norms of the ECHR, like any other parties to the convention. The agreement therefore addresses the division of responsibility between the EU and its member States via the co-respondent mechanism, whereby both the EU and its Member States may be involved in proceedings before the ECtHR (Article 3). While the mechanism outlined in Article 3 addresses the involvement of the EU and its Member States when a complaint is directed against a Member State rather than the Union, the rule does not resolve the issue of the substantive division of liability between the Union and its Member States. The latter is rooted in the interaction between primary and secondary EU law, on the one hand, and in the law of the Member States implementing the EU normative layer, on the other.⁸

A second issue regulated by the accession agreement concerns the participation of the Union in the procedural mechanisms underpinning the functioning of the ECHR, particularly the election of judges (Article 6) and the meetings of the Committee of Ministers of the Council of Europe (Article 7), which, *inter alia*, have an enforcement function with respect to the judgments delivered by the ECtHR.⁹ Article 4 further addresses the relationship between the CJEU and the ECtHR in inter-party disputes, that is, cases brought by the EU against a Member State, or *vice versa*, as well as disputes between Member States.¹⁰ In cases concerning the interpretation or application of EU law, intra-EU action in the ECtHR is precluded, to ensure respect of Article 344 TFEU, which commits EU Member States to refrain from submitting a dispute concerning the interpretation or application of the

6 Cf. Tonje Meinich, 'EU Accession to the European Convention on Human Rights – Challenges in the Negotiations', *International Journal of Human Rights*, Vol. 24, Issue 7, 2020, p. 993.

7 Council of Europe, Final Consolidated Version of the Draft Accession Instrument, Doc. 46+1(2023)36, 17 March 2023.

8 See e.g. Inga Daukšienė and Simas Grigonis, 'Accession of the EU to the ECHR: Issues of the Co-respondent Mechanism', *International and Comparative Jurisprudence*, Vol. 1, Issue 2, 2015, pp. 99-100; Ágoston Mohay, 'Once More unto the Breach? The Resumption of Negotiations on the EU's Accession to the ECHR', *Pécs Journal of International and European Law*, 2021/1, p. 6.

9 See Oana-Mariuca Petrescu, 'EU Accession to the European Convention on Human Rights: The Modalities to Select and to Appoint the EU Judge to the European Court of Human Rights', *Pandectele Romane*, Vol. 8, 2012, p. 60.

10 Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights*, Hart, Oxford, 2013, p. 174.

founding treaties to settlement means other than those embedded in the founding treaties.

Other than that, however, the agreement does not yet embed provisions coordinating EU law and the ECHR as sources of rights and duties or implications for the action of the CJEU and the ECtHR.¹¹ While it is still a draft, and thus work in progress, the draft agreement approaches the problems raised by accession mostly, if not exclusively, from a procedural point of view, sidelining substantive questions. In particular, no mention is made in the agreement of the sources of EU law and how they will be shaped by accession, and no reference is made, in this context, to the role of human rights as general principles of EU law.

3. Sources of EU Law and ECHR

Owing to the nature of the EU as a supranational legal system, its legal sources are not strictly crystallized into a hierarchy.¹² Internally, the TEU, TFEU and EU CFR, that is, primary EU law,¹³ are complemented by secondary EU 'legislation'.¹⁴ Externally these layers interact with international law outlined in treaties or customary practices under Article 38(a) and (b) of the Statute of the ICJ. In this context, the general principles of law inferred from domestic legal orders, international treaties, and therefore also the general principles EU law, mostly have a gap-filling function.¹⁵

Despite the above described simple and straightforward logic, the picture is complicated by the complexities of legal language. Article 6(1) TEU indeed provides that "[t]he Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union", which "*shall have the same legal value as the Treaties*".¹⁶ Nonetheless, Article 52(2) EU CFR acknowledges that the

"[r]ights recognized by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised *under the conditions and within the limits defined by those Treaties*."¹⁷

Furthermore, according to Article 53 EU CFR, "[n]othing in this Charter shall be interpreted as *restricting or adversely affecting human rights and fundamental*

11 Mohay 2021, p. 8.

12 Cf. Roland Bieber & Isabelle Salomé, 'Hierarchy of Norms in European Law', *Common Market Law Review*, Vol. 33, Issue 5, 1996, p. 909.

13 See Paul Craig & Gráinne De Búrca, *EU Law: Texts, Cases and Materials*, Oxford University Press, Oxford, 7th edition, 2020, p. 142, stating that the TEU and TFEU "sit at the top of the hierarchy of norms in the EU".

14 EurLex, Sources of European Union Law, at <https://eur-lex.europa.eu/EN/legal-content/summary/sources-of-european-union-law.html>.

15 Article 38(c) of the Statute of the ICJ.

16 Emphasis added.

17 Emphasis added.

*freedoms as recognized [...] by Union law.*¹⁸ Scholars further argue that the EU CFR orients the interpretation of the TEU and TFEU.¹⁹

Concerning the international agreements of the Union, in line with the prevailing interpretation of Article 218(11) TFEU, the EU founding treaties override international agreements concluded by the Union,²⁰ whereas, according to the mainstream interpretation of Article 351 TFEU, Member States' agreements essentially rank below secondary EU law.²¹ Mixed agreements are regarded as hierarchically equivalent to treaties concluded by the EU in matters pertaining to the Union's exclusive competence – thereby ranking below the EU founding treaties. At the same time, they are considered superior to EU Member States' agreements in matters of shared competence or exclusive Member State competence, which in turn, rank below EU secondary law.²² As all EU Member States are parties to it, the ECHR should thus currently rank below secondary EU law, meanwhile, following EU accession it should rank below the EU founding treaties. This approach is certainly viable from an internal EU viewpoint, but fundamentally clashes with the principle of sovereignty under international law (*par in parem non habet imperium*).²³ Furthermore, Article 53 EU CFR explicitly provides that the Charter, that is, primary EU law, must be interpreted in accordance with the international agreements of the Union, and should thus also be consistent with the ECHR.

The general principles of EU law, which are largely a human rights matter,²⁴ are usually inferred from EU domestic legal orders, international rules, and the EU founding treaties themselves.²⁵ Their ranking within the hierarchy of EU law is nonetheless controversial, being placed either between primary and secondary EU

18 Emphasis added.

19 Craig & De Búrca 2020, p. 142.

20 Judgment of 10 September 1996, *Case C-61/94, Commission v Federal Republic of Germany*, ECLI:EU:C:1996:313, para. 52; Jan Willem van Rossem, 'The EU at Crossroads: A Constitutional Inquiry in to the Way International Law Is Received within the EU Legal Order', in Enzo Canizzaro *et al.* (eds.), *International Law as the Law of the European Union*, Brill, Leiden, 2012, p. 68; Klaus-Dieter Borchardt, *ABC of EU Law*, EU Publications Office, Brussels, 2010, p. 80.

21 Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States', *Fordham International Law Journal*, Vol. 34, Issue 5, 2011, p. 1314.

22 Eleftheria Neframi, 'Mixed Agreements as a Source of European Union Law', in Canizzaro *et al.* (eds.) 2012, pp. 48-49.

23 Judgment of 21 September 2005, *Case T-315/01, Kadi*, ECLI:EU:T:2005:332, paras. 213-232; Judgment of 21 September 2005, *Case T-306/01, Yusuf & Al Barakaat*, ECLI:EU:T:2005:331, paras. 264-282; and Pierre Pescatore, *L'ordre juridique des Communautés européennes: étude des sources du droit communautaire*, Presses Universitaires, Paris, 1975, p. 156.

24 Rudolf Streinz, 'The Various EU Fundamental Rights Sources in Their Interaction', *Zeitschrift für Öffentliches Recht*, Vol. 68, Issue 4, 2013, p. 663.

25 EurLex, Sources of European Union Law, at <https://eur-lex.europa.eu/EN/legal-content/summary/sources-of-european-union-law.html>; Judgment of 3 September 2008, *Joined Cases C-402/05 P and C-415/05 P, Kadi*, ECLI:EU:C:2008:461, paras. 5, and 283. See further Chiara Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights*, Edward Elgar, Northampton, 2018, p. 95.

law,²⁶ or at the same level as, or above, the founding treaties.²⁷ Consistent with the latter interpretation, Article 6(3) TFEU provides that fundamental rights, as guaranteed by the ECHR and the constitutional traditions common to EU Member States, “shall constitute general principles of the Union’s law”. At the same time, Article 52(3) EU CFR establishes that the meaning and scope of rights under the Charter ‘shall be the same as’ those laid down by the ECHR.

In summary, subject to the above mentioned caveats, the sources of EU law can be sensibly ranked as follows: (i) General principles of EU law, including the ECHR by virtue of Article 6(3) TFEU; (ii) TEU, TFEU and EU CFR (primary EU law); (iii) EU international agreements; (iv) EU regulations, directives and decisions (secondary EU law); (v) EU Member States’ international treaties; and (vi) EU Member State’s legislation. Provided that the principles of clarity and non-conditionality are fulfilled, such sources should have direct or indirect vertical and horizontal effects within the Member States.²⁸

4. The ECHR and the General Principles of EU Law as a Key to Accession: Substantive Issues and Procedural Implications

In its Opinion 2/13 of 18 December 2014, the CJEU considered the accession of the EU to the ECHR in light of Article 6(2) TEU, which provides that accession shall not affect the competences of the Union outlined in the founding treaties. This stance is in line with the Lisbon Declaration on Article 6(2) TEU,²⁹ which is part of primary EU law and establishes that the accession agreement must preserve the specific characteristics and competences of the EU, the powers of its institutions, and the situation of the Member States, particularly under Article 344 TFEU.³⁰ Furthermore, the autonomy of EU law requires that fundamental rights be interpreted consistently with the objectives of the EU.³¹ In this context, EU Member States are compelled, by reason, inter alia, of the principle of sincere cooperation under Article 4(3) TEU, to ensure the application of EU law in their territories. Specifically, Article 6(3) TEU provides that fundamental rights under the ECHR embed general principles of EU law and, based on Article 216(2) TEU,³² as a result of accession, the ECHR would be binding upon the institutions of the EU and on its

26 Craig & De Búrca 2020, pp. 142-43.

27 Takis Tridimas, *The General Principles of EU Law*, Oxford University Press, Oxford, 2013, pp. 4-5; Jacques Ziller, ‘Hierarchy of Norms: Hierarchy of Sources and General Principles in European Union Law’, in Ulrich Becker et al. (eds.), *Verfassung und Verwaltung in Europa*, Nomos, Baden-Baden, 2015, p. 351; *Joined Cases C-402/05 P and C-415/05 P, Kadi*, para. 5.

28 Judgment of 5 February 1963, *Case C-26/62, Van Gend en Loos*, ECLI:EU:C:1963:1, para. 76.

29 Declarations, Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, signed on 13 December 2007.

30 *Opinion 2/13*, paras. 161-162.

31 Judgment of 17 December 1970, *Case C-11/70, Internationale Handelsgesellschaft*, para. 4; *Joined Cases C-402/05 P and C-415/05 P, Kadi*, paras. 281-285.

32 ‘Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States’.

Member States, and would therefore become an integral part of EU law.³³ However, according to the principle of mutual trust, EU Member States must abide by EU law, and thus the submission of the EU to the ECHR would be inconsistent with such a principle: it namely disregards the intrinsic nature of the EU and the transfer of power from the Member States to the Union as a supranational institution.³⁴ In other words, as a consequence of accession, an EU Member State would be involved in a triangular situation, with conflicting obligations under EU law and the ECHR, whereby the latter incorrectly prevails over the former.

Substantive questions entail procedural implications that short-circuit the EU legal system. Fundamentally, as a consequence of accession, the EU and its institutions, including the CJEU, would be subject to the adjudication mechanisms under the ECHR, notably, the judgments of the ECtHR. According to the CJEU, an international agreement creating a court that can provide a binding interpretation of EU law for its institutions is not completely inconsistent with EU law,³⁵ provided that such interpretation respects the essential nature of EU powers, excluding any adverse effect on the autonomy of the EU legal order.³⁶ Notably, action by ECHR institutions should not bind the EU and its institutions to a particular interpretation of EU law in the exercise of their internal powers.³⁷ By contrast, following accession, the interpretation of the ECHR developed by the ECtHR would be binding on the EU and its institutions, notably the CJEU, while the interpretation of EU law, including the EU CFR, and the ECHR provided by the CJEU would not be binding on the ECtHR.³⁸ Accession would thus be in breach of Article 344 TFEU.

More specifically, Article 1 of Protocol 16 to the ECHR³⁹ allows the highest courts and tribunals of the States parties, including EU Member States, to request the ECtHR to issue advisory opinions on questions concerning the interpretation and application of the rights and freedoms under the ECHR and its Protocols. This procedure may affect, and thus come into conflict with, the mechanism outlined in Article 267 TFEU, whereby the courts and tribunals of EU Member States can request a preliminary ruling from the CJEU, a procedure that is a cornerstone of the EU judicial system. This would be in breach of a Member State's general duty of loyalty resulting from Article 4(3) TEU as well as Article 344 TFEU, whereby EU Member States commit not to submitting a dispute concerning the founding treaties to settlement procedures other than those established in the founding treaties.⁴⁰

33 *Opinion 2/13*, para. 180.

34 *Id.* para. 166.

35 Opinion of 14 December 1991, *Opinion 1/91 Pursuant to Article 228 EEC*, ECLI:EU:C:1991:490, paras. 40 and 70; Opinion of 8 March 2011, *Opinion 1/09 Pursuant to Article 218(11) TFEU*, ECLI:EU:C:2011:12, para. 74.

36 Opinion of 18 April 2002, *Opinion 1/00 Pursuant to 300(6) EC*, ECLI:EU:C:2002:231, paras. 21, 23 and 26; *Opinion 1/09*, para. 76.

37 *Opinion 1/91*, paras. 30-35; *Opinion 1/00*, para. 13.

38 *Opinion 2/13*, paras. 181 and 186.

39 Council of Europe, Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, 2 October 2013.

40 *Opinion 2/13*, paras. 202-203.

Essentially, this approach postulates the priority of EU law over international law and its judicial system posited by the CJEU in *Achmea*.⁴¹ To resolve this problem, it would be necessary to lower the status of ECHR norms from the level of the general principles of EU law to (at least) the level of primary EU law.⁴² Prioritizing EU law over the ECHR from the standpoint of substance should exclude the necessity of prioritizing the EU adjudication system over the ECtHR in ECHR disputes where EU law is involved, as signaled by the CJEU,⁴³ whereby the provision in the draft agreement on the prior involvement of the CJEU in a case brought before the ECtHR in which EU law is involved should be complemented by a requirement that the decisions of the CJEU be binding on the ECtHR.⁴⁴ Such a carve-out would indeed be problematic in the context of the ECHR, which involves intra- and extra-EU relationships, similar to the regime of bilateral and multilateral investment agreements, where EU Member States have terminated inter-se agreements, but have not yet been able to make a decision on the Energy Charter Treaty, involving not only the EU and its Member States, but also third parties.⁴⁵

According to the CJEU, lowering the status of the ECHR below that of the EU CFR would be in line with Article 53 EU CFR, which provides that the Charter shall not be interpreted as restricting or adversely affecting fundamental rights under EU law and international law, including EU and Member States' international agreements, Member States' constitutions and the ECHR.⁴⁶ Following the consolidated view developed by the CJEU, this rule should indeed be interpreted in the sense that national human rights standards must not affect the level of protection established in the Charter or the primacy, unity and effectiveness of EU law.⁴⁷ Such an approach would be essentially confirmed by Article 53 ECHR, establishing the European Convention as the minimum standard for human rights protection and thus vesting the contracting parties with the power to lay down higher standards of protection for fundamental rights under the EU CFR. This requires coordination, to safeguard the (higher) level of protection provided in the Charter and the primacy, unity and effectiveness of EU law.⁴⁸ Nonetheless, this might collide with Article 52(3) EU CFR, which by contrast posits the priority of

41 Judgment of 6 March 2018, *Case C-284/16, Achmea*, ECLI:EU:C:2018:158.

42 Equality, though, would not be sufficient to exclude that the ECHR be prioritized over primary EU law.

43 The provision under Article 5 of the draft accession agreement that proceedings before the CJEU are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 ECHR is not considered sufficient to safeguard the exclusive jurisdiction of the CJEU. *Opinion 2/13*, para. 206.

44 Furthermore, the procedure under Article 3(6) of the draft accession agreement enabling the CJEU to examine the compatibility of a provision of EU law with the ECHR and its protocols should concern both the validity and the interpretation of primary and secondary EU law, as limiting the scope of the prior involvement procedure, particularly as concerns secondary law, to sole questions of validity adversely affects the competences of the EU and the powers of the CJEU. *See Opinion 2/13*, paras. 242 *et seq.*

45 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, Doc. SN/4656/2019/INIT, Preamble.

46 *Opinion 2/13*, para. 258.

47 *Id.* para. 180; Judgment of 26 February 2013, *Case C-399/11, Melloni*, ECLI:EU:C:2013:107, para. 60.

48 *Opinion 2/13*, para. 189.

the ECHR over the Charter. More fundamentally, the stance of the CJEU might clash with the jurisprudence developed by the Court in *Kadi*, whereby the general principles of EU law, including the ECHR, according to Article 6(3) TEU, necessarily rank above all the other sources of EU law.

5. Conclusion

The draft instrument governing the accession of the EU to the ECHR addresses procedural issues and the division of responsibility between the Union and its Member States, without (yet) addressing the general principles of EU law as a key problem within the framework of the legal sources of the Union. Arguably, in order to allow accession, Article 6(3) TEU should be amended (if not entirely repealed) so as to lower the position of the ECHR to the level of (or rather below) the primary sources of EU law. Such a substantive approach is a preliminary condition to the institutional coordination prescribed in Opinion 2/13, whereby the CJEU should be prioritized over the ECtHR. However, this amendment seems to be in contrast with the current formulation of Article 52(3) EU CFR and the consolidated jurisprudence developed by the CJEU, notably in *Kadi*. Furthermore, while reviewing Article 6(3) TEU might be palatable to the EU Member States that are parties to the ECHR and its protocols, it is certainly more problematic and less acceptable for States that are parties to the ECHR and its protocols, but not members of the EU: carving out intra-EU relationships from the ECHR is fundamentally unacceptable, similar to the Energy Charter Treaty in the investment regime. The fundamental question therefore remains whether the EU can effectively accede to the ECHR.