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Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13

December 24, 2014



The **Court's Opinion** may have shattered expectations. Who had thought that the revised accession agreement that was renegotiated by the EU and its Member States with the State Parties to the ECHR, after an initial rejection in the Council by the UK and France, would be dodged by the Court? After all, on all the points that **the Court** and its **President** had made known to the negotiators, namely the guaranteed 'prior involvement', the Court seemed to have been granted a privileged position, that has not been granted to any other court of any of the parties to the ECHR. Was the Court's **membership of the Council Committee** in charge of supervising the negotiations on this and other points in vain?

By *Leonard Besselink*

It is too early to give an in-depth assessment of the position taken by the Court on various points. We do now know that we have to take the President seriously when he announced in the plenary debate at the closing session of the FIDE Conference 2014 powerfully:

“The Court is not a human rights court: **it is the Supreme Court of the Union.**”

It took this in a more literal way than could be expected, and gave a resounding: NJET.

What's to do now? **Tobias Lock** has suggested that '[i]t is clear that the drafters of the DAA will have to return to the negotiating table'. I respectfully disagree.

Whether one finds the Court's rejection and its concept of autonomy a form of autarky or a symptom of autism, and whether or not its judges behave like **Humpty Dumpty**, spoilt brats, or overly severe schoolmasters dealing out a bad marks to the Commission, the reality is that there is little political prospect that the non-EU parties to the ECHR will be willing to reopen the negotiations on accession, and give up all the compromises that in the end they were willing to strike. I refer in particular to Switzerland, Turkey and the Russian Federation. The declaration of Russia at the re-opening of the negotiations after a few EU Member States rejected the earlier version of the Accession Agreement, stands as an omen (see **Appendix VI** to the Minutes of the relevant meeting).

So if renegotiating the Accession Agreement is hardly feasible, the other alternative that the TFEU leaves open in its [Article 218\(11\)](#), is to amend the EU Treaties. It is this option that I here consider, in light of the fact that 24 of the Member States concluded before the Court that the revised Accession Agreement is in accordance with the Treaties, and so did the Council and Parliament – though not necessarily on the same grounds as the Commission did (see point 108 of the Opinion).

The points on which the Court rejected the Accession Agreement are numerous, and some of them concern points that are not in the Treaty at all, in particular the issue of ‘autonomy’ of the Court. It is also for these – but not only – that the solution here proposed would be a way out.

Seeking inspiration in clauses of national constitutions of some of the Member States that provide a constitutional way out of constitutional divergences for the sake of further European integration, I propose solving the matter with a “Notwithstanding Protocol”.

It should read:

‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014.’

In this manner the Treaties have been amended fully in accordance with the requirements of the Court as well as [Article 218 \(11\)](#) of the TFEU. All of the several objections of the Court are covered by such a Protocol. Should there arise any doubts on this, the proposed provision can be accompanied by either a consideration in the Preamble or another protocol provision, that reads:

‘This Protocol effects a revision of the Treaties in the sense of Article 218(11) of the Treaty on European Union.’

True, not all 28 Member States took the same position before the Court on whether accession agreed with the Treaties. Nevertheless, of at least of 24 we can assume that they disagree with the Court. The four Member States not intervening at the Court were Croatia, Slovenia, Luxembourg and Malta. Although we cannot be absolutely certain, but none of them seem to have had any major objections to the terms of accession.

But even if they would, it will certainly be easier to straighten out and negotiate a Notwithstanding Protocol with potentially four (partly) dissenting EU Member State than having to go through highly embarrassing negotiations with the parties to the ECHR plus the Council of Europe (and European Court of Human Rights representatives).

There is of course a constitutional presumption underlying such a Notwithstanding Protocol.

The rejection of the first draft Accession Agreement had cast doubt on the sincerity of some of the Member States to take their commitment to let the EU accede to the ECHR seriously. The Court of Justice has now driven its recent position of not accepting any EU legal commitment that anchors it within a broader legal

order to the very extreme on the issue of the protection of fundamental rights of EU citizens within the strictly European context.

Thus, the Court casts doubt on its constitutionalist commitment to the project of European integration. It is now for the EU Member States to show what the protection of the rights of their citizens is worth to them, and whether they think it useful to anchor it externally and consent to protection according to the pan-European minimum standard by a European Court that has so successfully provided a true safety valve, should the EU institutions fail to do so.

This article has previously appeared in slightly different form on [Verfassungsblog.de](#).

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