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Reaction to Leonard Besselink's ACELG Blog

January 6, 2015



Thanks to Leonard Besselink for giving a **fast, sensible and innovative approach** to get the Union out of the quagmire created by the Court's **Opinion 2/13**. He proposes an amending Protocol to the TEU, which will basically amend Article 6(2) of that Treaty by announcing that this accession will happen "notwithstanding" the Opinion of the Court, effectively setting it aside. However, that solution might be too radical for many in the EU Institutions and even the Member States.

By Pieter Jan Kuijper

How could one accommodate most, perhaps all, of the problems of the Court, without returning to the negotiating table, where the EU will once again meet some very unwilling negotiation partners? Of these certainly Russia by now will have become totally intractable. There is simply not much hope that it will agree to anything of the kind. Moreover, it would be the second time that the Union returns before its own Members and other Member States of the Council of Europe to ask them to help solve **its** problems (which, once again, are largely the problems of the Court). This is simply not a situation in which any negotiator should want to be put. The Union would be in an incredibly feeble position.

Perceived risks

If one reads the Opinion, it is striking that the Court (like most modern politicians and citizens) is totally risk-averse.

(1) The Member States **might** want to use the facility given to them under the ECHR to give greater protection to fundamental rights than required under the ECHR. And in turn this **might** compromise the primacy, unity and effectiveness of EU law.

(2) The Member States **may** want to exercise surveillance about how other Member States fulfill their obligations under the ECHR and this, accordingly, **may** harm the mutual trust that Member States owe each other and undermine the autonomy of EU law.

(3) The new advisory opinion procedure created by Protocol No.16 to the ECHR **might** trigger the procedure of 'prior involvement', thus creating the **risk** that the preliminary ruling procedure **might** be circumvented. (I must be gravely mistaken to think that that was precisely the idea behind the prior involvement procedure,

namely to kick in when a preliminary procedure was avoided *inter alia* by the highest court in a Member State pretending that there was an 'acte claire' or 'acte éclairée'. The avoidance of the preliminary ruling procedure through recourse to Protocol 16 is not fundamentally different.).

(4) The draft agreement still allows for the **possibility** that the EU or Member States **might** avail themselves of the possibility to submit an application to the ECtHR concerning an alleged violation of the ECHR by a Member State or the even the EU itself in relation to EU law.

(5) The co-respondent mechanism inevitably involves a 'foreign jurisdiction' being confronted with the choice that the EU has made in respect of the defense of its own interests before that jurisdiction and on the division of responsibility and competences between the Member States and the EU. This **risks** adversely affecting the division of powers between the EU and its Member States.

(6) On the 'prior involvement' procedure the Court has two worries: (a) a 'foreign jurisdiction' may rule on the case law of the Court, especially whether the Court has already ruled on the matter at issue in a different form before the EUCtHR, and this is unacceptable, and (b) the prior involvement procedure concerns only questions of validity and not of interpretation.

Constitutional and international law are not for the faint-hearted, but the Court seems unwilling to live with any risk. It has no faith in its own case law and the fact that a case like MOX-plant has become part of the constitutional landscape of the Union. One may after all expect that no Member State in the context of points (2) and (4) would consciously go against that case. The Court must also trust that the Commission, confronted to any such tendency in a Member State, would start an accelerated infringement procedure, demanding provisional measures against the Member State in question, if necessary.

Possible solutions

The most important point that flows from the fact that the Court is so afraid of **risks and possibilities**, however, is that the realization of these risks and possibilities is almost wholly in the hands of the institutions and of the Member States themselves. It is not the text of the Accession Agreement itself that is contrary to the TFEU, but rather the use and the interpretation of the Agreement that the institutions and the Member States **could** make of the Agreement or the gaps that are left in it. This gives the Union and the Member States a way to escape from renegotiation by making a number of unilateral declarations and interpretations. Some of these can be entirely internal and others will have to be given to the other parties to the draft accession agreement merely as a matter of fact, not for agreement on their part.

On point (1) mentioned above, the Member States can give a solemn declaration (or even conclude an agreement among themselves and with the EU) to the effect that they will not avail themselves of their right to go beyond the level of protection required by the ECHR, if that could put the primacy, unity and effectiveness of EU law in danger. The Commission might back this up with a declaration to the effect that it will prosecute any Member State that does not hold this promise in a concrete case.

Points (2) and (4) above concern the use of the surveillance and enforcement mechanisms of the ECHR by the EU and the Member States *inter se* for disputes relating to the application of the ECHR relating to EU matters. The EU has already issued at least one unilateral so-called disconnection declaration which stated that the Member States of the Union which are party to the Convention (next to the EU itself) will apply the provisions of the agreement in question in their mutual relations in accordance with the Union's internal rules and without prejudice to appropriate amendments being made to these rules (Annex 2 of the UNESCO Convention on cultural diversity). With an added assurance that this does not preclude the full respect of the

rights and duties that the EU and its Member States have in relation to the other parties to the ECHR, this should be a sufficient guarantee for the Court that the risks mentioned under (2) and (4) are fully precluded. The Council of Europe Conventions have almost habitually included disconnection clauses, if the subject matter of the Convention overlapped in whole or in part with EU law. Hence a disconnection declaration of the same nature should not be problematic. Again the Commission could declare that it will fully uphold the MOX Plant case law through the infringement procedure as an *ultimum remedium*.

On point 3 above, the Member States could, as under (1), make a solemn common statement or agreement that they would have recourse only exceptionally to the facility of Protocol 16 and under the strictest observance of the requirements of EU law. That should constitute sufficient guarantee for the Court.

Where points 5 and 6(a) are concerned, it should be made clear in no uncertain terms to the Court of Justice that, if the EU wants to participate in international life and international dispute settlement, it simply must be willing to run these risks (as the Court sees them). The EU has been exposed several times before the jurisdictions of the WTO to the "risk" that these would have a view on the division of competences and responsibility between the MS and the Union that the EU institutions, including the Court, might not have agreed with, but it has survived so far. And the Union has always the possibility (as the US has had to do in the *Avena* case, the Italian Constitutional Court believes Italy should do in the 'compensations for war crimes' case against Germany and the Court itself implicitly made the Union institutions do through *Kadi I* and *II*) to say that constitutionally it is not in a position to implement in the way the other parties to the agreement would like. Which obviously does not diminish the EU's international obligation to offer compensation or satisfaction instead.

Moreover, no partner of the EU in any international dispute settlement system would be willing to give to the Court a kind of exclusive last word on the interpretation of Union law (of whatever rank), when an international jurisdiction must judge the question whether that piece of Union law conforms to the international agreement covered by that jurisdiction. In the same way the EU will never accept, for instance, that the US Supreme Court has the absolute last word on the interpretation of US legal rules that must be judged by the WTO Appellate Body in the framework of a WTO dispute on their conformity with WTO law. The Appellate Body may consider Supreme Court judgments an important fact enabling it to construct a plausible interpretation of US law that will be reviewed for its conformity with the WTO Agreement, but nothing more than that. It should be no different for the ECJ. If one subjects oneself to an international jurisdiction, one must accept that inevitably that cannot happen in a situation, which is always the most advantageous from an internal constitutional point of view.

On point 6(b) above an interpretative declaration by EU could simply state that in the light of the object and purpose of the 'prior involvement' procedure, namely to be a safety net for the preliminary question procedure, validity should be interpreted so as to include interpretation.

This leaves only one point, namely the problem of the lack of jurisdiction of the Court in the field of the CFSP. All the beautiful words of the Court on this subject cannot hide that here the emperor is naked. The Court has no jurisdiction except in two well-circumscribed cases and that is it. That the Court in Strasbourg will have something to say about upholding fundamental rights in the CFSP can only be welcome news. Just as it has always been welcome news that in countries, where there is no constitutional review of the laws passed by Parliament in the light of the bill of rights (as in the Netherlands), there is at least the Court in Strasbourg that will uphold a minimum level of human rights in these countries. I fail to see why that would not be the case for the CFSP, in a situation where there is no constitutional review in part of CFSP 'law' and why the Court of Justice should not be able to live with that, if the Supreme Courts of some Member States have been able to live with that.

This last point perhaps needs further thought, but for the other points the road of formal internal assurances or agreements and external unilateral declarations on the interpretation of the draft accession agreement can certainly be followed without needing the agreement of the other parties, since these internal and unilateral acts will not abridge their rights under the ECHR at all. Moreover, the methods employed are wholly in line with international law and/or EU law. Solemn unilateral declarations not to do certain things have been considered binding in international law, as the ICJ has explained in the Nuclear Test cases. Internal agreements between the Member States on matters covered in the TFEU are ok, as long as they do not go against EU law, as we know from the ECJ's case law on agreements concerning economic policy and the EMU.

The difficulty for the points 5 and 6(a) above remains, but the Union institutions and Member States do not need to follow the Opinion of the Court (which after all remains an Opinion), if they agree that these are risks are inherent in subjecting the EU to binding international dispute settlement and need to be taken, since they are taken habitually by all parties to international agreements creating binding international dispute settlement.

In the end, therefore, my preference is for a modification of (the application) of the draft agreement of accession to the ECHR, and not for a Treaty amendment by a Protocol modifying Article 6 TFEU, as Leonard Besselink proposes. It has the advantage of showing some good will to the Court, even while setting aside some of its qualms as exaggerated or totally impracticable in international dispute settlement, whereas Besselink's solution through its "notwithstanding" formula, sets the judgment aside as a whole. My solution may well be more risky, but, as I said at the beginning, the practice of international and (European) constitutional law is not for the squeamish.

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