Once more unto the breach? The resumption of negotiations on the EU's accession to the ECHR

The planned accession of the European Union to the European Convention on Human Rights is probably one of the most discussed issues of European public law. This concept has gone from a theoretical question to a formally drafted accession agreement, which was however torpedoed by the famous (or infamous?) Opinion 2/13 of the Court of Justice of the EU in December 2014. As the opinion had been delivered under Article 218 of the Treaty on the Functioning of the European Union, it was binding on the EU, leaving only two solutions that would allow the accession to go forward: amending the EU treaties themselves or drawing up a new accession agreement – and as the first option was definitely not on the agenda, the second one was pursued, though that is not to say that this latter path was necessarily a much easier one. Following Opinion 2/13, the Member Stated sitting in the Council of the EU agreed that a period of reflection was necessary while also reaffirming their commitment to accession.[1]

It was the task of the Commission to analyse the obstacles as laid out by Opinion 2/13. The analyses were in turn discussed by the Council Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP) which further requested the Commission to prepare proposals on how to rework the accession agreement.[2]

The Commission and the Council of Europe (CoE) have both reiterated that the intention to make the EU's accession to the ECHR possible was unchanged. Following an informal meeting in June 2020[3], accession negotiations were formally resumed in September 2020. [4]

As Opinion 2/13 essentially represents a mandatory wish list of issues to solve, the negotiating committee has its work cut out. I will only highlight one of the most difficult issues here.

One of the most lamented elements of Opinion 2/13 is the issue of jurisdiction over the Common Foreign and Security Policy (CFSP). As is known, the CJEU has very limited competence in CFSP matter, as it may only monitor compliance with Article 40 TEU and review the legality of certain decisions as provided for by Article 275(2) TFEU. This means that most acts adopted in the context of the CFSP fall outside the scope of judicial review by the CJEU.[5] The original draft accession agreement would have empowered the ECtHR to rule on the compatibility with the ECHR of certain acts, actions or omissions arising in the context of the CFSP, thus entrusting judicial review to a non-EU institution. The CJEU countered this by proclaiming that jurisdiction to carry out a judicial review of acts, actions or omissions of the EU cannot be conferred exclusively on an international court falling outside the institutional and judicial framework of the EU.

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[1] Council of the European Union: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of play (14963/17), p. 3.

[2] See Council of the European Union: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of play (14963/17), p. 3 and General Secretariat of the Council: Outcome of the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP), 14639/18, 10 December 2018, p. 1.

[3] Virtual Informal Meeting of the CDDH ad hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights – Meeting Report, 22 June 2020 [47+1(2020)rinf]

[4] https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=09000016809fbd51 (1 June 2021)

[5] Although one cannot disregard recent case law developments in this context. See *e.g.* T. Verellen, *In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (Bank Refah Kargaran)*, European Papers, Vol. 6, No. 1, 2021, European Forum, Insight of 29 March 2021, pp. 17-24.

Now in the resumed negotiations, the EU is proposing a solution to sidestep the jurisdictional clash (or challenge to the autonomy of the EU legal order, if you will) perceived by the CJEU and at the same time close the justiciability gap. This solution would entail introducing a rule of reattribution applicable to CFSP acts. According to the solution proposed in March 2021, the EU should be enabled to allocate responsibility for a CFSP act of the EU to one or more member state in case the act is excluded from CJEU jurisdiction.[6] So essentially acts which the EU could not be held responsible for either by the CJEU or the ECtHR will be attributed to member states. Attribution of responsibility is one of the most complex areas of the law of the responsibility of international organisations (IOs). The international responsibility of IOs is not regulated by treaty law, but is arguably governed by customary law. Arguably, as the Articles on the Responsibility of International Organisations (ARIO) [7] from 2011 admittedly contain many provisions which are rather progressive developments of international law than mere codification.[8] In this context, the concept of the attribution of responsibility (*nota bene*: not the attribution of *conduct*) relates to a situation where an internationally wrongful act is committed collectively by an IO and one or more states. The attribution of responsibility does not necessarily result in *multiple* responsibility, however.[9] A reattribution clause *per se* would not be foreign to the logic of the ARIO. It would however definitely mean overriding the general logic of attribution in a way, and at this point it is not known how or on what basis the EU itself would reattribute responsibility to certain member states. One has to assume it would be something more elaborate than a *Prügelknabe* arrangement.

The ambivalence of the question is nicely illustrated by the meeting report's brief account of the relevant discussions: "Several delegations noted that an attribution clause would be in accordance with public international law. (…) Some delegations raised reservations against having such an attribution clause, *inter alia*, on the grounds of its compatibility with international law." One other reported statement however, claiming that "it did not matter so much to whom CFSP acts were attributable, as long as applicants could raise before the Court their compatibility with the Convention" seem difficult to reconcile with an ideal concept of responsibility – and justice. One cannot help but note also the irony in the EU's stated reassurance that not only would situations requiring reattribution arise rarely to begin with, but the CJEU continues to broaden (or as the report more euphemistically puts it: "continues to clarify the extent of") its jurisdiction over the CFSP via its case law anyway.[10] This may be true, but acts which continue to remain outside the remit of the CJEU nonetheless notably include actions taken within military and civil operations in the CFSP framework where instances where the invoking of international responsibility is not difficult to imagine.[11]

It should be mentioned that the CFSP-conundrum is only one of the issues connected to the question of responsibility in the accession context. The effects of the co-respondent mechanism on international responsibility of the EU and/or its Member States could also be elaborated upon.[12]

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[6] 9th meeting of the CDDH ad hoc negotiation group ("47+1") on EU accession to the European Convention on Human Rights. Meeting Report 25 March 2021. p. 3.

[7] GA Res. 66/100, 9 December 2011, Responsibility of international organizations.

[8] *United Nations: Draft articles on the responsibility of international organizations, with commentaries*, Yearbook of the International Law Commission, Vol. 2, Part 2, 2011, pp. 46–47.

[9] S. Ø. Johansen, *Dual Attribution of Conduct to both an International Organisation and a Member State*, Oslo Law Review, Vol. 6, No. 3, 2019, p. 182.

[10] 9th meeting of the CDDH, Meeting Report 25 March 2021, p. 4.

[11] J. M. Cortés-Martín, *The Long Walk to Strasbourg: About the Insufficient Judicial Protection in Some Areas of the Common Foreign and Security Policy before the European Union's Accession to the ECHR*, The Law & Practice of International Courts and Tribunals, Vol. 17, No. 2, 2018, p. 404.

[12] F. Korenica & D. Doli, *The CJEU likes to blame loudly and to applaud quietly: the co-respondent mechanism in the light of opinion 2/13.*, Maastricht Journal of European and Comparative Law, Vol. 24, No. 1, 2017, pp. 86-107.

It could further be mentioned that the ECtHR's case on attribution in general as well as on shared responsibility is far from unambiguous.[13]

A lot of uncertainty remains, but the accession of the EU to the ECHR could elevate the relationship between the two legal orders (EU law and CoE law) to a new level and result in a clearer situation in terms of the multilevel fundamental rights architecture of Europe. Although a great deal of discussion surrounds the relationship of the two courts, the accession of the EU to the ECHR should not be seen or realised as a form of subordination of one court to another: the CJEU and the ECtHR as judicial forums are crucial pillars of the European legal space which always have had - and in all probability will continue to have - regard to each other's case law following the eventual accession.[14] In Europe today, the question is perhaps less about whether certain fundamental rights are enforceable before a supranational court (provided of course that relevant requirements are met), and more about before which judicial the enforcement can take place.[15] Recent cases such as Dorobantu[16] and Gavanozov I-II[17] continue to highlight the relevance of the interplay between European human rights systems and the need for a consistent interpretation and a well-defined relationship between the European standards of human rights protection.

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[13] See *e.g.* M. Milanovic & T. Papic, *As Bad as It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law,* International & Comparative Law Quarterly, Vol. 58, No. 2, 2009, pp. 779-800. and M. den Heijer, *Issues of Shared Responsibility before the European Court of Human Rights*, SHARES Research Paper 06 (2012), ACIL 2012-04. pp. 1-48.

[14] T. Lock, *The European Court of Justice and International Courts*, Oxford University Press, Oxford 2015. pp. 167-218. and p. 244.

[15] See E. Szalayné Sándor, *Gondolatfoszlányok az európai alapjogvédelem mai állapotáról*, in E. Bodnár & Z. Pozsár Szentmiklósy & B. Somody (Eds.), Tisztelgés a 70 éves Dezső Márta előtt, Gondolat Kiadó, Budapest 2020, p. 222. This of course does not mean that vital questions of interpretation do not arise both within the various human rights system and related to their interaction, yet again connected to the attribution of responsibility for human rights violations in border control missions, to name but one. Cf. B. Kis Kelemen & J. van Rij*, Private Military and Security Companies on E.U. Borders: Who Will Take Responsibility for their Human Rights Violations? – A Theoretical Analysis*. in B. Kis Kelemen & Á. Mohay (Eds.), EU Justice and Home Affairs Research Papers in the Context of Migration and Asylum Law, Centre for European Research and Education, Pécs 2019, pp. 95-110.

[16] Case 128/18 Dumitru-Tudor Dorobantu [EU:C:2019:857]. For analysis see Á. Mohay, *The Dorobantu case and the applicability of the ECHR in the EU legal order*, Pécs Journal of International and European Law, Vol. 7, No. 1, 2020, pp. 85-90.

[17] For analysis see in this issue I. Szijártó: *The implications of the European Investigation Order for the protection of fundamental rights in Europe and the role of the CJEU*. Pécs Journal of International and European Law, vol. 8, No. 1, 2021.