



EU AND COMPETITION LAW

DECEMBER 2014

OPINION 2/13 OF THE COURT OF JUSTICE ON THE ACCESSION OF THE EU TO THE ECHR

On 18 December 2014, the anticipated Opinion 2/13 on the agreement on the accession of the EU to the European Convention on Human Rights.

On 18 December 2014, the anticipated Opinion 2/13 on the agreement on the accession of the EU to the European Convention on Human Rights (hereinafter, "ECHR") was issued by the Court of Justice (hereinafter, "ECJ"). This opinion follows the amendments introduced by the Lisbon Treaty. In fact, the Lisbon Treaty expressly sets forth, in Article 6 (2) TEU, that the EU accedes to the ECHR, in order to solve the issue of lack of competence of the EU pointed out by the ECJ in its Opinion 2/94, upon the first attempt at accession. This new opinion is the culmination of several years of negotiations between the Commission and the Council of Europe with a view to the accession.

In fact, although all 28 EU member States are members of the Council of Europe and of the ECHR, the EU as such is not a party to the ECHR. In practice, this means that (i) the acts and omissions carried out by the institutions, bodies and agencies of the EU cannot be contested before the European Court of Human Rights (hereinafter, "ECtHR"), and (ii) although the established case law of the EU courts affirms the special significance of the ECHR as regards the protection of fundamental rights, the case law of the ECtHR cannot be relied on by individuals and companies before the EU courts, given that the latter are not bound by said case law.

Notwithstanding the amendments introduced by the Lisbon Treaty, the ECJ has again taken the view that the accession agreement is incompatible with EU law, not because of competence issues as before, but rather because it considered that the accession agreement is not compatible with Article 6 (2) TEU and Protocol no. 8 on the same provision.



FUNDAÇÃO
PLMJ

LÚCIA PRANCHA

Formas Desenhadas a Partir das Sombras de Objetos de Arte Popular Encontrados na Casa de Vidro, 2011 (detail)
Vidro acrílico cortado a laser, arame, tinta em spray e borracha
Dimensões variáveis
From the Collection of the PLMJ Foundation

The incompatibility pointed out by the ECJ is based on several technical legal reasons listed below:

I – The autonomy of EU law is not safeguarded, for the following reasons:

- (i) The concatenation of Article 53 ECHR and Article 53 of the Charter of Fundamental Rights of the EU (hereinafter, “Charter”) is not ensured, given that the former allows the Contracting Parties to provide for higher standards of protection of fundamental rights at national level, but does not provide that, when said rights are also protected by the Charter, the level of protection granted by the Charter cannot be compromised by EU member States;
- (ii) The principle of mutual trust, which obliges Member States to presume, when applying EU law, that other Member States comply with their obligations under EU law, also as regards fundamental rights, is not ensured;
- (iii) An articulation of the mechanism set forth in Protocol no. 16 to the ECHR and the reference for a preliminary ruling to the ECJ, described by the ECJ as the “keystone of the judicial system established by the Treaties”, is not provided for. Therefore, Member States can resort to Protocol no. 16 to the detriment of the preliminary ruling mechanism.

II – The accession agreement is capable of affecting the application of Article 344 TFUE, which obliges Member States not to submit disputes concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. Given that there is no obstacle to the submission to the ECtHR of disputes between Member States, or between those and the EU, when said disputes pertain simultaneously to the material scope of application of EU law and ECHR law, the ECJ considered that compliance with the aforementioned provision was not guaranteed.

III – The co-respondent mechanism, aimed at allocating liability among the member States and the EU in procedures submitted to the ECtHR, does not sufficiently safeguard the position of the ECJ, which should have the last say on this matter, given that this is, in the ECJ’s view, still a matter of EU law.

IV – As regards the Common Foreign and Security Policy (hereinafter, “CFSP”), an area in which the jurisdiction of the ECJ is very limited, the fact that no limitation to the ECtHR’s jurisdiction is provided for would mean that the judicial review of some acts, actions and omissions practiced in the framework of the CFSP would fall under the exclusive jurisdiction of a non-EU body.

Although this opinion does not allow for the long awaited “closing of the circle” of fundamental rights’ protection in Europe – the EU’s accession to the ECHR being thus delayed until such time when, following new negotiations, these obstacles have been overcome –, it is important to note that this opinion does not revert the previous ECJ case law on fundamental rights, in particular the special significance of the ECHR in this regard.

Although this opinion does not allow for the long awaited “closing of the circle” of fundamental rights’ protection in Europe, it is important to note that this opinion does not revert the previous ECJ case law on fundamental rights, in particular the special significance of the ECHR in this regard.

This Informative Note is intended for general distribution to clients and colleagues and the information contained herein is provided as a general and abstract overview. It should not be used as a basis on which to make decisions and professional legal advice should be sought for specific cases. The contents of this Informative Note may not be reproduced, in whole or in part, without the express consent of the author. If you should require further information on this topic, please contact **Ricardo Oliveira** (ricardo.oliveira@plmj.pt) or **Inês Melo Sampaio** (ines.melosampaio@plmj.pt).

Portuguese Law Firm of the Year
Chambers European Excellence Awards, 2009, 2012, 2014

Iberian Law Firm of the Year
The Lawyer European Awards, 2012

Top 50-Most Innovative Law Firms in Continental Europe
Financial Times – Innovative Lawyers Awards, 2011-2014