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CASE AND COMMENT

KILLING TWO BIRDS WITH ONE STONE? THE COURT OF JUSTICE'S OPINION ON THE EU'S ACCESSION TO THE ECHR

ACCESSION to the European Convention on Human Rights (ECHR) has long been on the EU's political agenda. The EU's membership of the ECHR is not only seen as symbolically significant, but is also aimed at filling an important gap in the enforceability of human rights across Europe. At present, the EU cannot be brought before the European Court of Human Rights (ECtHR) and, while all EU Member States are parties to the ECHR, as long as the EU protects fundamental rights to a standard equivalent to that required under the ECHR, Member States cannot be held responsible for alleged violations of the Convention resulting from EU law either (*Bosphorus v Ireland* (2006) 42 E.H.R.R. 1).

But the EU's judicial branch has been rather more resistant to accession. Back in 1994, the Court of Justice stated that the Community, as it was then known, did not have the competence to accede to the ECHR (Opinion 2/94 [1996] E.C.R. I-1759) and that such competence could only be granted through a Treaty amendment. The Member States took the Court's suggestion to the letter and the Treaty of Lisbon added an express obligation for the EU to join the ECHR in Article 6(2) TEU. After protracted negotiations, the EU and the Council of Europe finally reached an agreement (the "draft agreement"), which was designed to ensure compliance with a number of conditions set out in Article 6 TEU and Protocol No. 8 to the Treaty of Lisbon – themselves largely a reflection of the Court's case law. However, when the Court was asked whether the draft agreement was compatible with the Treaties, its answer was again a robust "no" (Opinion 2/13 of 18 December 2014, ECLI: EU:C:2014:245).

Although grouped under five headings that are seemingly distinct, most of the reasons for the Court's opinion can be linked back to the fact that the draft agreement undermines the specific characteristics of the EU and of EU

law. As the Court indeed explained in its preliminary remarks, the conditions to which accession is subject are designed to accommodate the fact that the EU is not a state but instead a new kind of entity with its own unique features. As such, the question before the Court had a strong constitutional law dimension and called upon it to assess whether sufficient account was taken of the EU's main constitutional and institutional principles, including the autonomy of the EU legal order and the role of the Court in ensuring that these features are preserved.

For the sake of simplicity, the Court's concerns can be divided into two categories. On the one hand, some concerns were voiced about some of the more substantive and/or systemic aspects of the draft agreement. While the Court accepted that the EU's submission to an external body is not as such problematic, the conditions necessary to maintain the specificity and autonomy of the EU legal order were found to be lacking. First, there was no provision to ensure that Article 53 ECHR, which preserves the Member States' right to lay down higher standards of protection than those guaranteed under the ECHR, would not jeopardize the primacy and unity of EU law, which essentially means that, when they act within the scope of EU law, Member States cannot apply higher standards of fundamental rights protection than those recognised in the Charter (Case C-399/11 *Melloni* ECLI:EU:C:2013:107). Second, the draft agreement did not preclude Member States from reviewing each other's decisions on human rights grounds, which could undermine the principle of mutual trust. Third, there was no mechanism to ensure that the power granted to the highest domestic courts and tribunals to ask the ECtHR for an advisory opinion would not undermine the preliminary reference procedure. Finally, the envisaged framework did not take account of the special features of judicial review in the area of the Common Foreign and Security Policy (CFSP). According to the Court, given its own limited jurisdiction in this area, the draft agreement amounted to conferring exclusive jurisdiction to a non-EU body over certain questions of EU law.

On the other hand, another set of concerns was more specifically directed at the procedural and institutional mechanisms designed to govern the litigation of cases with an EU law dimension. The Court first found that the possibility, not specifically excluded by the relevant rules, for the EU or a Member State to submit an application against the EU or another Member State to the ECtHR breached Article 344 TFEU, which grants the CJEU exclusive jurisdiction over disputes concerning EU law and hence, following accession, the ECHR. The Court also expressed concerns over the co-respondent mechanism. The mechanism has two main components. On the one hand, it enables the EU or a Member State to be joined to proceedings, either by invitation or upon request, in cases where the individual application may not have named the correct respondent. On the other hand, it provides for the joint responsibility of the EU and any

relevant Member State(s) in cases of violation of the ECHR save for exceptional circumstances where the ECtHR, on the basis of the reasons put forward by the parties, can itself decide the issue of attribution. The Court considered that part of the relevant rules would call upon the ECtHR to consider the division of powers in the EU – a question of EU law reserved for the Court of Justice. Furthermore, the Court took the view that the provisions on joint responsibility affected the Member States' position under the ECHR as they could lead them to be accountable for the violation of a provision in relation to which they had entered a valid reservation. Finally, the Court identified two shortcomings in the prior involvement procedure, a mechanism designed to enable it to consider the compatibility of an EU law provision with the ECHR if it did not yet have the opportunity to do so. First, the draft agreement did not reserve the power to decide whether the Court had already ruled on the question of EU law that was relevant to the proceedings to an EU institution. Second, it excluded from those questions issues pertaining to the interpretation – as opposed to the validity – of secondary EU legislation.

From a practical viewpoint, Opinion 2/13 makes accession, at least in the near future, rather difficult. This contrasts sharply with the position of Advocate General Kokott who, having identified some room for improvement, was nonetheless willing to endorse the compatibility of the draft agreement with the Treaties. In one sense, the outcome is not, however, entirely unexpected. Indeed, it is not the first time the principle of autonomy has been used by the Court to guard the constitutive features of the EU legal order against external intrusion and a number of envisaged agreements have faced a similar fate on that basis (e.g. Opinion 1/09 [2011] E.C.R. I-1137). Yet, the particular human rights context of the opinion raises serious questions about the nature of EU constitutionalism. The Court claims to be standing in defence of the EU's constitutional features, but the opinion displays a rather thin commitment to the substantive protection of fundamental rights. This is particularly noticeable on the point about the CFSP, where the Court essentially opted for the immunity of CFSP acts over the possibility of control by an external body. But it is also more broadly discernible in the prioritization of other constitutional principles such as the effectiveness and primacy of EU law over the respect for human rights.

Particularly in the EU context, the Court's strategy is problematic. In the face of the EU's political and democratic deficit, human rights are at the heart of the EU as a constitutional project. By undermining the EU's apparent commitment to human rights, the Court is thus not reinforcing, but rather weakening, the EU's constitutional credentials. By holding on to a rather dogmatic and formalistic version of autonomy, the Court is not preserving the specific features of EU law, but largely showing their limitations as expressions of a more substantive vision. By distancing itself from its European counterpart at Strasbourg, the Court of Justice is not

necessarily safeguarding the distinctiveness of the EU's identity but risks losing an important ally in the EU's attempt at building a genuine European polity. At the moment, it is unclear how the conundrum will be solved. But, if the question of accession was rightly not only about human rights but also about the preservation of the EU's constitutional order, the Court may not only have jeopardized its relationship to the ECtHR but ultimately also undermined rather than furthered its own constitutionalist agenda.

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THE NEW FUNDAMENTAL NORM OF RECOVERY FOR LOSSES TO EXPRESS TRUSTS

THE principles for recovering monetary relief for losses to express trusts have recently been uncertain, especially in "commercial" situations. Where trustees undertook to hold money on trust for a lender and to advance the money to a borrower after receiving security documents, the trustees no doubt breach the trust by advancing the money without first receiving the security documents. However, since *Target Holdings v Redferns* [1996] A.C. 421, it has been uncertain what measure of relief the lender-beneficiary can recover – and especially whether the measure differs according to (1) whether the form of relief claimed is a general accounting or "equitable compensation" for only particular defaults or (2) whether the circumstances are "commercial". Under the accounting doctrines as traditionally applied, trustees unable to vouch for trust assets they earlier received could not reduce their liability by showing that part or all of the loss would have been suffered even had they performed the trust correctly. The trustees were responsible for the misapplied sum regardless of causal enquiries. But, in *Target*, the House of Lords – emphasizing the commercial nature of the case – denied a lender-beneficiary's claim to recover the full sum wrongly disbursed by trustees. The significance of the case has been contested. Did *Target* change a fundamental norm of monetary relief for losses suffered through breach of trust – a norm applicable regardless of whether the form of relief claimed is a general accounting or equitable compensation for only particular defaults? Did *Target* instead leave the traditional accounting doctrines untouched, and create a new remedy of equitable compensation for breach of trust? Or did *Target* establish a "commercial" exception to traditional principles of trustee accountability, an exception limiting the quantum of relief? Indeed, was *Target* decided *per incuriam*?

In *AIB Group (U.K.) plc v Mark Redler and Co. Solicitors* [2014] UKSC 58, [2014] 3 W.L.R. 1367, the Supreme Court found that *Target* did only

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