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The position papers have been written by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

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# The relationship between the ECHR and the EU

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## Introduction

The European Union (EU) is a Union of 28 states. The Council of Europe is an intergovernmental organisation with 47 Member States, 28 of whom are also Member States of the EU and a further four Council of Europe states are members of another intergovernmental organisation the European Free Trade Association (EFTA). The relationship between the EU and EFTA is particularly important, as the EFTA states have opted into many of the EU measures that the UK has not joined.

The European Convention on Human Rights (ECHR) is a Council of Europe treaty. The European Court of Human Rights is a Council of Europe court which sits in Strasbourg and exists to ensure the observance by states of their obligations under the ECHR by considering complaints by individuals that their rights have been breached. The Court of Justice of the EU, which sits in Luxembourg, provides definitive rulings on EU law. It is not normally possible for individuals to take complaints to the Court of Justice. The EU and the Council of Europe, their treaties, their two courts, and their functions, are entirely separate from one another.

The Council of Europe and the EU had agreed that the EU should be bound by the ECHR and, that by acceding to the ECHR, it would also be subject to the same supervision of its acts and omissions by the European Court of Human Rights. The term 'accede' in relation to a treaty means to agree to be bound by its terms. Accession would give the EU the same status as a country in the eyes of the European Court of Human Rights. This would enable the European Court of Human Rights to deliver judgments in relation to any alleged breaches of the ECHR by the EU. A long series of negotiations between the EU and the Council of Europe took place (EFTA was not consulted). Finally a draft accession agreement was agreed in April 2013, but it required the endorsement of the Court of Justice.

On 18 December 2014, the Court of Justice concluded in Opinion 2/13 that the draft accession agreement was incompatible with the EU treaties. The Court stated that the approach adopted in the agreement envisaged, which is to treat the EU as a Member State and to give it a role like that of any other contracting party, 'disregarded the intrinsic nature of the EU' (although

the agreement had in fact contained many complex provisions to accommodate the unique nature of the EU). The agreement was rejected and the accession process could not proceed to the next stage.

This paper looks at the 'protection gap' and the halted accession process, and concludes with some thoughts on the impact of the relationship between the EU and the ECHR on a post-Brexit UK.

## Accession of the EU to the ECHR

In 1994 the firm suggestion was made that the EU should accede to the ECHR in part because of the perception that if the Union acted in a manner which was incompatible with human rights, there was no mechanism whereby this could be challenged.

In 2000 the Charter of Fundamental Rights was adopted, and in 2008 in the Lisbon Treaty it was given the same status as the EU treaties themselves. This meant that it became legally binding and had to be applied in any action implementing EU law, and could be relied upon in any court applying EU law. The Charter basically combines the provisions of the ECHR and the Council of Europe's Social Charter but also includes some additional provisions—such as the right to asylum and the right to good administration. The Lisbon Treaty provided for accession to the ECHR.

The amendment in the Lisbon Treaty went further than necessary. The text says that the Union *shall* accede and not that the Union *may* accede. Protocol 8 to the Lisbon Treaty states that accession to the ECHR must make provision for preserving the specific characteristics of the Union and Union law. This mandatory language has placed the Union in a very difficult position as it would appear to be under a *treaty obligation* to negotiate an accession solution which is acceptable both to the Member States of the Council of Europe and to the Court of Justice.

To facilitate this accession, treaty amendments to the ECHR approved by the 47 Member States of the Council of Europe were also necessary. The ECHR had to be amended (by Protocol 14) to allow the EU, which is not a state, to accede to the ECHR.

The draft accession agreement, concluded after years of negotiation, was sent to the Court of Justice to give its Opinion on its compatibility with EU law. On 18 December 2014, in what has been described as the Christmas bombshell, the Opinion was delivered. The Court of Justice found that the draft agreement that it had been asked to consider was incompatible with EU law.

One reason the Court gave for this was that for the European Court of Human Rights to deliver judgment on a matter of EU law, it would first have to decide on the interpretation or application of the treaties, a matter solely for the Court of Justice. If the European Court of Human Rights was to give an interpretation of EU law, there might be a risk of two competing interpretations by the two separate courts. This was unacceptable in the eyes of the Court of Justice. The Court appears to have lost sight of the object and purpose of accession, as mandated by the Lisbon Treaty. This purpose was precisely to bring the acts and omissions of the Union under the judicial scrutiny of the European Court of Human Rights and thereby fill the gap in judicial accountability that exists within the EU legal order. This gap is an irony, given that effective judicial protection is a fundamental tenet of EU law.

The prospects of any renegotiated agreement being reached in the near future are slim. This is firstly because the non-EU Member States of the Council of Europe had bent over backwards to accommodate the EU's concerns in the negotiation process and, with great difficulty, reached the final draft and secondly because what appetite there was in the Council of Europe for the accession of the EU has now largely gone. Those entrusted with the negotiation process are justifiably unlikely to spend months on a renegotiation only to have the fruits of their labours rejected again.

The eventual accession of the EU to the ECHR will enable individuals who were victims of violations of the ECHR caused by acts or omissions of the EU to seek redress from Strasbourg. Strasbourg will, for the time being, continue to be able only to offer redress to individuals for violations by national authorities who were acting in accordance with their EU law obligations,rather than from the EU itself.

## The EU from the perspective of the European Court of Human Rights: the protection gap

Can the European Court of Human Rights presume that the EU guarantees fundamental rights to the same extent as the ECHR, and what should happen when it does not do this? The approach of the Court of Justice in Opinion 2.13 was dogmatic:

*'…the principle of mutual trust between the Member States is of fundamental importance in EU law,… and requires, … each of those States, save in exceptional circumstances,* ***to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.***

*When implementing EU law, Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases,* ***they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.****'*

This statement is inherently at odds with the protection of human rights guaranteed by the ECHR. The Strasbourg Court considers that where evidence is adduced indicating the existence of a failure to comply with both EU law and the Convention, the national authorities are *required* to verify the actual situation. They must satisfy themselves that the individual will not be exposed to a risk in another Member State or to take the necessary steps to prevent it. Where there is a real risk that a judicial decision in one Member State is unsafe because the safeguards of a fair trial set out in Article 6 ECHR are not (or are plausibly alleged not to have been) respected, the state party to the ECHR is required to verify the allegation.

The approach of the European Court of Human Rights is different. States who have signed up to the ECHR remain responsible for their human rights breaches even if they were required to act the way they did by their membership of an international organisation such as the EU. However, the European Court of Human Rights held in its *Bosphorus Airways* judgment that if state action is taken to comply with other international legal obligations, it may be justified if the organisation in question protects fundamental rights to at least the same level as the ECHR. This judgment was re-visited by the European Court of Human Rights Grand Chamber in May 2016 in *Avotins v Latvia*, after the Court of Justice's Opinion on accession. The European Court of Human Rights found that in mutual trust cases the Court of Justice (in its Opinion) had said that the power of the state to review the observance of fundamental rights by the state of origin of the judgment must be limited to exceptional cases. The European

Court of Human Rights found that 'exceptionality' standard unacceptable. The court being asked to trust the acts of another state must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the state of origin, in order to ensure that the protection of those rights is not manifestly deficient. EU law as set out in the Opinion on the other hand would require that state to turn a blind eye. The two sets of legal obligations are mutually exclusive.

Determining the content of EU law is the prerogative of the Court of Justice. It does this, for example, when it answers questions of EU law referred to it by national courts which are posed in order to avoid an incorrect interpretation of EU law. Where a national court decides not to make a reference, when asked, it must give reasons for its decision. If it does not give reasons, it will be in breach of Article 6 ECHR.

In an Irish case[1], the Irish High Court refused execution of a European Arrest Warrant from Romania because there were substantial grounds for believing the trial at which a woman had been convicted 16 years ago amounted to a flagrant denial of justice. The Court held there was a wide practice of discrimination against Roma in Romania; there were reasonable grounds for believing that the respondent, who was Roma and illiterate, had suffered discrimination in her trial such that her return and subsequent imprisonment would constitute a breach of the ECHR. EU law could not only have required her return but also prevented the Irish court from making enquiries as to whether there might have been (or be) a breach of her fundamental human rights in Romania. The ECHR as interpreted by the European Court of Human Rights demands that these enquiries are made.

## The impact of the relationship between the EU and the ECHR on a post-Brexit UK

If Brexit occurs it will be decades before the UK can disentangle national measures derived from EU law from non-EU derived national law. Furthermore, the reach of EU law now goes far beyond the confines of EU membership. The UK will still be a member of the Council of Europe. In addition, sometimes non-EU Member States will have opted in to EU measures. Many Council of Europe countries which are candidates for accession to the EU are in the process of expressly harmonising their national laws with EU law, increasing its reach even further. The European Court of Human Rights regularly takes into account EU measures which have been widely adopted across Europe, but not by the state in question, to inform its jurisprudence on particular provisions of the ECHR. EU law is now a significant factor in the judgments of the European Court of Human Rights even in cases against states which are not EU Member States. So were the UK to leave the EU, it would still be affected by EU law when it comes before the European Court of Human Rights.

*You can read the full paper by Nuala Mole on ILPA's website. This will be of particular interest to lawyers interested in the precise legal interrelation between the EU and the ECHR, and the relevant case law.*

[1] *The Minister for Justice and Equality v Magdalena Rostas* [2014] IEHC 391