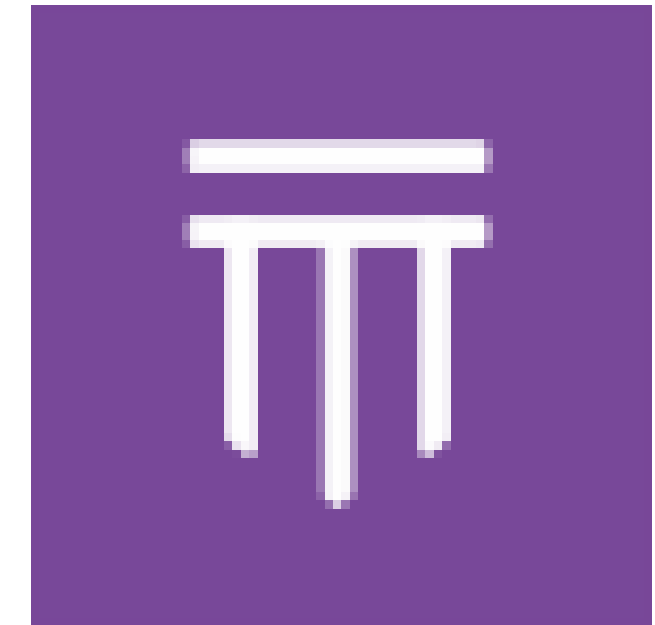


Brno, 20 November 2023

Accession to ECHR



JUSTIN
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Article 6
(ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, **shall constitute general principles of the Union's law.**



History of the Accession to ECHR

- 1970s
- ECHR vs own charter
- **Opinion 2/94**
- Constitutional Treaty
- Lisbon Treaty
- **Opinion 2/13**



History of the Accession to ECHR

		EU CHARTER	
		NO	YES
ACCESSION	No		
	Yes		



Opinion 2/94

		ADMISSIBILITY	
		NO	YES
Legal Basis for the Accession	No	United Kingdom, Ireland	France, Portugal, Spain
	Yes	Denmark, Finland, Sweden	EC, EP, Belgium, Germany,, Italy, Greece, Austria



Opinion 2/94

34 Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.

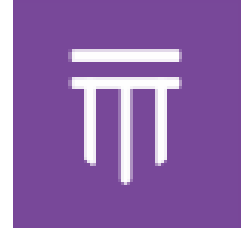
35 Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.

36 It must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention.



Opinion 2/94

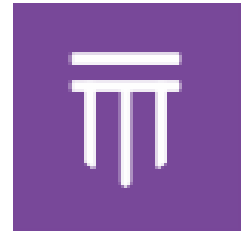
- Only with amendment of Treaties
- Hence Lisbon inserts A6.2
- Plus accession treaty



CJEU and ECtHR

- Commission as a competition authority
- Connolly situation

- ECtHR: Matthews, Bosphorus
- ECtHR, CJEU: N.S. and MSS – Dublin II Regulation



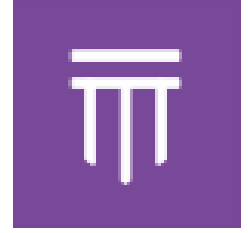
Matthews vs The United Kingdom (24833/94)

- 32. The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a contracting party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer.
- 33. In the present case, the alleged violation of the Convention flows from an annex to the 1976 Act, entered into by the UK, together with the extension to the EP’s competence brought about by the Maastricht Treaty. The Council Decision, and the 1976 Act and the Maastricht Treaty ... all constituted international instruments which were freely entered into by the UK. Indeed, the 1976 Act cannot be challenged before the ECJ for the very reason that it is not a “normal” act of the Community, but is a treaty by which a revision of the EEC Treaty was brought about. The UK, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequence of that Treaty.



Matthews vs The United Kingdom (24833/94)

- 34. In determining to what extent the United Kingdom is responsible for “securing” the rights in Article 3 of Protocol No. 1 in respect of elections to the European Parliament in Gibraltar, the Court recalls that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see, for example, the above-mentioned United Communist Party of Turkey and Others judgment, pp. 18-19, §33). It is uncontested that legislation emanating from the legislative process of the European Community affects the population of Gibraltar in the same way as legislation which enters the domestic legal order exclusively via the House of Assembly. To this extent, there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to “secure” the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be “secured” in respect of purely domestic legislation. In particular, the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom’s responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act. Further, the Court notes that on acceding to the EC Treaty, the United Kingdom chose, by virtue of Article 227(4) of the Treaty, to have substantial areas of EC legislation applied to Gibraltar (see paragraphs 11 to 14 above).
- 35. It follows that the United Kingdom is responsible under Article 1 of the Convention for securing the rights guaranteed by Article 3 of Protocol No. 1 in Gibraltar regardless of whether the elections were purely domestic or European.



Accession to ECHR – Opinion 2/13

- EU is not a state
 - Only states are member parties of the Convention (ECHR). The accession agreement (AA) treats the EU as a state, which is not adequate. **EU is a new legal order**
 - under international law, the EU is precluded by its very nature from being considered a State
- Autonomy of EU law



Accession to ECHR – Opinion 2/13

1. Autonomy of EU law

- Needs to be protected
- Strasbourg interpretation of ECHR would bind the EU, but ECtHR cannot review interpretations and scope of EU law
 - A53 ECHR allows MS to lay down higher standards of HR protection than ECHR. But A53 Charter (Melloni): MS cannot have higher standards than EU Charter in fully harmonised area.
 - Principle of mutual trust would be compromised
 - Protocol 16 is a threat to autonomy of EU law (PR to Strasbourg instead of Luxembourg)



Accession to ECHR – Opinion 2/13

2. Treaty interpretation/application: CJEU.

- but, AA does not exclude the possibility of the ECtHR to settle such disputes

3. Co-respondent mechanism

- EU law implemented by MS – hence applicant will mostly go against the state. But MS have little discretion over EU actions.
- How to split responsibility between MS and EU?
 - C-R on request of the ECtHR or the contracting party
 - But, ECtHR would need to assess the rules of EU law governing the division of powers between EU and MS.



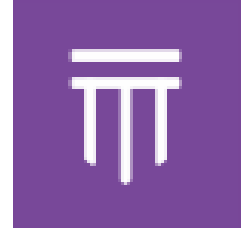
Accession to ECHR – Opinion 2/13

4. Prior involvement of the CJEU

- CJEU must have a chance to interpret and rule on the issue of EU law before it reaches the ECtHR.
- But national courts sometimes might not refer PR to CJEU.
 - Costa and Skouris: joint communication that part of AA would be an internal procedure for indirect actions (allowing CJEU to make a ruling).
 - CJEU did not find the procedure sufficient:
 - CJEU has not reserved right to rule whether it already dealt with an issue (it allowed to do so for ECtHR)
 - Did not permit the CJEU to rule on the interpretation (only validity of EU law)

5. Specific characteristics of EU law as regards review in CFSP matters

- Limited powers of CJEU in CFSP => no interpretation of EU law prior to ECtHR ruling.
- E.g. HR violation due to EU military action -> exclusive JR for ECtHR



Accession to ECHR – Opinion 2/13

Repercussions:

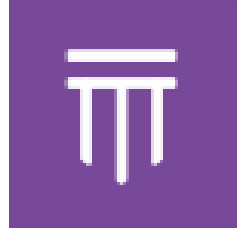
- Commission can initiate infringement if the EU does not accede to ECHR
- Amendment of the Treaties: explicitly asking the EU to proceed notwithstanding A 6.2 TEU, Protocol 8 and Opinion 2/13?
- Courts try to engage more in a dialogue
- More considerations to application of some doctrines (mutual trust)
- Core issue: for EU, FR still only instrumental to achieving other policy goals
- Sn: how to solve the increasing caseload?



Accession to ECHR – 2023

- Negotiations since 2020, 14 meetings between working groups
- 46+1 working group stroke deal on 17 March 2023
- Most of the CJEU objections have been solved

- Doctrine of positive obligations?
- New admissibility?
 - Who will bring the case against the EU? Individuals, NGOs, groups of individuals
 - After they exhaust all remedies under the EU law
 - Co-respondent mechanism
 - The European Union or a member State of the European Union may become a correspondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings



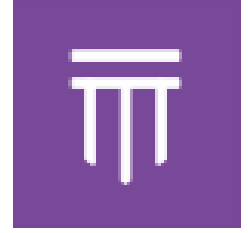
Kadi case

- Can EU courts review the legality of EU acts implemented on the basis of SC's resolutions?
- KADI I
- Facts
 - SC Resolution 1267 (Oct 1999): freezing funds of Taliban -> EU implements it as Reg 337/2000, flight ban and freeze of funds of Taliban of Afghanistan
 - Resolution 1333 – strengthened, both adopted in Common Position and Regulation. Annex I – list of persons...affected by freezing.
 - Kadi seeks annulment of regulations: breach of his FR: to be heard, to respect for property, proportionality, effective jud review
- Tribunal
 - EC may not infringe the obligation imposed on MS by the Charter.
 - But it also cannot review implementation of UN obligation.
- CJEU
 - UN Charter has no primacy over the EU law
 - FR of Kadi were indeed in breach with EC law
 - the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty



Kadi case

- KADI II
 - Commission adopted the contested regulation...but, in view of all comments received from Mr Kadi and given the preventive nature of the freezing of funds...it considered that the listing of Mr Kadi is justified for reasons of his association with the Al-Qaida network.
 - FR in EU – breach of Kadi’s right of defense.
- ECJ:
 - The contested regulation could not be afforded any immunity from jurisdiction on the ground that its objective is to implement resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.
 - ...none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.



Kadi case - summary

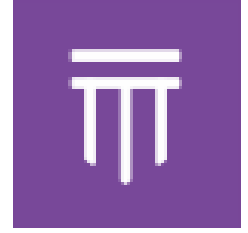
- Pluralist approach to the relationship between EU law and international law
- Departure from traditional embrace of IL by the EU law
- What is the message for domestic courts on the enforcement of SC's resolutions?
- Risk of undermining the image of EU

- But judgment warmly welcomed
- US SC Medellin v Texas – a similar case
- Kadi at SC: expansion of authority without accountability
- multilevel system of authority; but: international organization envisages no legal mechanism for review and national levels of authority lack responsibility for the act in question -> **vacuum of legal responsibility.**
- EU: deficit of legitimacy



Kadi case - summary

- Varying judicial conceptions of the international legal order
- 1. Strong substantive deference
 - ECtHR: acts are attributable to SC, not states.
 - No jurisdiction of ECtHR
- 2. Moderate
 - CFI – EU indirectly bound by SC Regulation, no direct jurisdiction to review them
 - EU member states are bound by overriding obligations imposed by the SC Resolutions
- 3. No deference to SC
 - ECJ: no international treaty could affect the autonomy of ECJ.

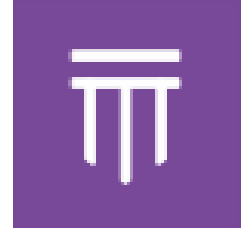


Team Project 1: C-115/22

Parties to the proceedings:

Summary of the facts:

Preliminary question:



Team Project 1: C-115/22

Parties to the proceedings:

- Austrian professional athlete found guilty of breaching the anti-doping rules

Summary of the facts:

Preliminary question:



Team Project 1: C-115/22

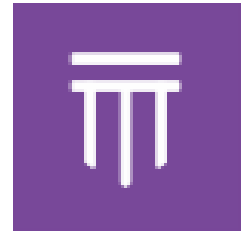
Parties to the proceedings:

- Austrian professional athlete found guilty of breaching the anti-doping rules

Summary of the facts:

- Applicant represented Austria between 1998 and 2015
- 2021 investigation, applicant SO found guilty of breaching IAAF rules (use of prohibited substance – she possessed and used prohibited substances in 2015)
- Her results between 2015 and the date of decision invalid, and all entry fees and prize money revoked. Banned from further participation for 4 years
- Her personal details published on website, contrary to her wishes (request rejected, the publication is mandatory for the time of the suspension)

Preliminary question:



Team Project 1: C-115/22

Parties to the proceedings:

- Austrian professional athlete found guilty of breaching the anti-doping rules

Summary of the facts:

- Her personal details published on website

Preliminary question:

- Is such a practice compatible with the GDPR?
- Is the information...a data concerning health within the meaning of A9 of GDPR?
- Does GDPR (A6.3) preclude a national provision that provides a disclosure of person's name...?
- Balance of interests?
- Is it a processing of personal data related to criminal convictions and offences (A10)?



Team Project 1: C-115/22

AG Capeta:

- 0. Jurisdiction (Is the committee a court?) YES
- 1. Is the publication a i) processing, of (b) personal data, (c) by automated means? Yes. But does the GDPR apply?
 - EU does not have competence to regulate sport (88)
 - But, EU law applies to sport as an economic activity
 - Anti-doping rules primarily regulate sport as sport, but! EU could theoretically harmonise national anti-doping rules, if this was justified as necessary to remove obstacles to cross-border movements. No EU rules as of time, however. LINK WITH EU LAW difficult -> **GDPR does not apply.** But if CJEU thinks otherwise:
- 2. Interpretation of the GDPR



Team Project 1: C-115/22

AG Capeta:

2. Interpretation of the GDPR

- A. Is the Austrian law, which requires the availability without individualised review of proportionality, in line with the GDPR?
- B. Was the publication on website necessary?

- **A. Is it data concerning health?**
 - Personal data related to the physical or mental health of a natural person, disclosing info on the natural person's health status. NO

- **B. Does the public disclosure of details and penalty constitute processing of personal data relating to criminal convictions? Sanctions were not criminal, but impact was significant – YES, i.e. we are in the scope of A 10 of GDPR**
- Hence the interest of the data subject must be given more weight in the balancing exercise



Team Project 1: C-115/22

AG Capeta:

2. Interpretation of the GDPR

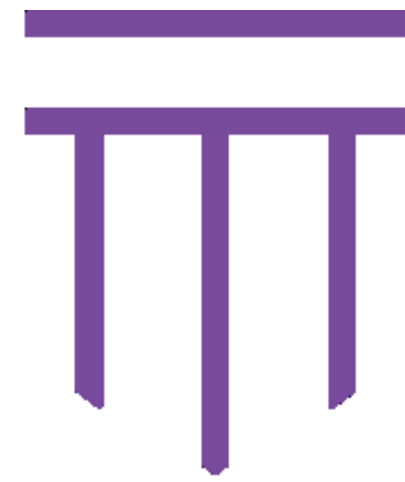
- A. Is the Austrian law, which requires the availability without individualised review of proportionality, in line with the GDPR?
- B. Was the publication on website necessary?
- **C. Is the disclosure to the general public compatible with the conditions of lawfulness and data minimization?**
 - **Does the GDPR require a review of proportionality by the data controller in each individual case?**
 - No, the controller must rely on the review undertaken by the legislature, otherwise risk of abuse and corruption
 - Did the legislation strike the balance?



Team Project 1: C-115/22

Reasonings behind the publication

- Deterrence
- Awareness building
- But is also the information on the name important? YES
- Need to inform relevant stakeholders that the athlete cannot participate in events
- Is it necessary?
 - Yes, because no other system of certificates currently exists



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