

EU ACCESSION TO THE ECHR AND THE MECHANISM FOR IMPLEMENTATION OF THE CONSULTATIVE FUNCTIONS

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The article considers the issue of the EU's accession to the ECHR and the mechanism for implementing advisory functions. Though ratification of the Convention is a prerequisite for the countries to join the EU, and its fundamental rights are integrated into the general principles of Union law, the European Union itself is still not a party to the Convention. At the same time, according to Protocol No. 16 to the European Convention on Human Rights, although the decisions of the ECHR are not legally binding on the requesting court or tribunal, they have legal effects on states, including those that have not ratified the Protocol. Nevertheless, the key feature is a completely non-binding nature of this mechanism. It is voluntary on three levels: national courts are not obliged to request an advisory opinion, the ECHR is not obliged to respond if an advisory opinion is requested, and, if the ECHR delivers an opinion, national courts are not bound by its content. According to Article 46 (1) of the ECHR, the ECHR's decisions in the disputed cases are binding only between the parties, that is, as regards the respondent State and within the specific subject matter of the case. However, the introduction of advisory opinions, as well as, for example, the use of «principle judgments», are intended to broaden this scope. Even if the interpretation given in an advisory opinion is not binding on other States Parties to the Convention, it gives the ECHR the opportunity to express itself on the issues of special importance in the most authoritative judicial forum. The ECHR's interpretation provides important guidance for national courts, which are in fact called upon to interpret and apply the Convention on a daily basis. It is worth noting that the advisory opinion mechanism is designed to assist the requesting court in this interpretative task. It also aims more generally to facilitate the application of the Convention at national level, in particular, by clarifying the case-law of the ECHR and thus preventing inconsistencies.

Key words: European Union, European Convention on Human Rights, European Court of Human Rights, Court of Justice of the European Union, advisory powers, advisory functions.

Полежака К.О. Приєднання ЄС до ЄКПЛ та механізм здійснення консультативних функцій.

У статті розглядається питання про приєднання ЄС до ЄКПЛ та механізм реалізації консультативних функцій. Хоча ратифікація Конвенції є обов'язковою умовою для вступу країн до ЄС, а її основні права інтегровані в загальні принципи права Союзу, сам Європейський Союз досі не є учасником Конвенції. Водночас, згідно з Протоколом № 16 до Європейської конвенції з прав людини, хоча рішення ЄСПЛ не є юридично обов'язковими для суду або трибуналу, що звернувся із запитом, вони мають юридичні наслідки для держав, у тому числі тих, що не ратифікували Протокол. Проте, ключовою особливістю є повністю необов'язковий характер цього механізму. Він є добровільним на трьох рівнях: національні суди не зобов'язані звертатися за консультативним висновком, ЄСПЛ не зобов'язаний відповідати, якщо запит про консультативний висновок надійшов, і, якщо ЄСПЛ надає висновок, національні суди не зобов'язані дотримуватися його змісту. Відповідно до статті 46 (1) ЄКПЛ, рішення ЄСПЛ у спірних справах є обов'язковими лише між сторонами, тобто стосовно держави-відповідача та в межах конкретного предмета справи. Однак запровадження консультативних висновків, а також, наприклад, використання «принципових рішень», мають на меті розширити цю сферу. Навіть якщо тлумачення, надане в консультативній думці, не є обов'язковим для інших держав-учасниць Конвенції, воно дає ЄСПЛ можливість висловити свою думку з питань особливої важливості в найбільш авторитетному судовому форумі. Тлумачення ЄСПЛ є важливим орієнтиром для національних судів, які фактично покликані щодня тлумачити та застосовувати Конвенцію. Варто зазначити, що механізм консультативних висновків призначений для надання допомоги суду, який звернувся із запитом, у виконанні цього завдання з тлумачення. Він також має на меті в більш загальному плані сприяти застосуванню Конвенції на національному рівні, зокрема, шляхом уточнення прецедентного права ЄСПЛ і, таким чином, запобігання невідповідностям.

Ключові слова: Європейський Союз, Європейська конвенція з прав людини, Європейський суд з прав людини, Суд Європейського Союзу, консультативні повноваження, консультативні функції.

Statement of the problem. Convention for the Protection of Human Rights and Fundamental Freedoms [1] (hereinafter referred to as the ECHR, Conventions of 1950), which celebrates its 75th anniversary in 2025, is one of the most important achievements of the Council of Europe and the basis of all its activity. In its turn, accession of the European Union (hereinafter referred to as the EU) to the European Convention on Human Rights is an important step towards strengthening the system of protection of human rights in Europe. This event has a decisive importance for the formation of a single European system of human rights protection mechanisms, and also has a positive impact on implementation of the consultative functions and, accordingly, is a problem, which has a great practical importance for the modern science of the international and European law.

Purpose of the article is to consider peculiarities of the EU accession to the ECHR and the mechanism for implementing the consultative functions.

Status of work on the issue. Analysis of research and publications shows that the issue of the EU accession to the European Court of Human Rights is the subject of a significant number of scientific works by the Ukrainian and foreign researchers, including J. Callewaert [2], O. Polivanova [3], L. Falalieieva [4], N. Khronovski [5], etc.

However, its impact on improving the mechanisms for implementing the consultative functions has hardly been studied by researchers.

Presentation of the main material. The Convention system and the European Union were established after the Second World War. For a long time, they developed independently of each other. Only gradually, as the European Union's competence expanded, its actions acquired the potential to affect the fundamental rights and even violate them, as a result of which the EU law began to organize their protection, mainly through the case-law of the Court of Justice of the EU [2].

However, despite the fact that recognition of the provisions of the ECHR is one of the criteria for new states to become the EU members, the possibility of the EU itself to join the ECHR has been actively discussed for a long time by researchers of the issue of human rights protection in the EU. It was primarily due to the fact that for a long time the EU was not legally endowed with an international legal personality, and the provisions of the ECHR confirmed the possibility of its signing exclusively by states. In particular, the Statute of the Council of Europe (Article 4) established the possibility of membership in it for any European state, and the preamble to the ECHR approved the member states of the Council of Europe as its signatories. The founding treaties of the EU also did not stipulate the possibility of its joining the ECHR, since initially the European Communities functioned exclusively as structures of an economic nature [3; p. 222].

Though ratification of the ECHR is a prerequisite for accession to the EU and the fundamental rights guaranteed by the Convention form a part of the general principles of the Union law, the European Union is not yet a party to the Convention and its institutions have no direct connection herewith. It means that the Member States of the European Union – all Member States of the Council of Europe and parties to the Convention – may be held liable for violations of the rights guaranteed by the Convention before the European Court of Human Rights (the «Court») even when implementing or applying the European Union law, while the actions of the European Union institutions themselves are not subject to the same external judicial control. It is problematic, taking into account the increasingly broad competences conferred on the European Union, which makes it difficult to accept that the European Union institutions should be the only authorities and «legal space» operating in the Member States of the Council of Europe, not subject to external supervision by the Court. Such imbalance could lead to confusion and perceived or actual unequal legal protection, which would be detrimental to the citizens of the European Union and to the protection of human rights in Europe.

However, it should be noted that, in general, the idea of the EU accession to the Convention has been actively discussed by both politicians and lawyers since the late 1970s. In 1979, the European Commission first presented a memorandum on accession of the EU to the ECHR. It should be noted that the Memorandum of the European Commission on accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms adopted on April 4, 1979, contains an early and comprehensive analysis of the issues related to accession [6].

Subsequently, in 1982 and 1985 respectively, the European Parliament asked the Commission to open the formal negotiations on accession to the ECHR. Since the Commission did not receive the support of all EU members, it forwarded a formal proposal to the Council. Finally, in 1990, the Council asked the Court of Justice of the EU to give its opinion on whether accession to the ECHR was compatible with the provisions of the Treaty establishing the European Community. However, the Court of Justice

of the EU ruled that the European Community did not have enough powers to accede to the ECHR. In particular, the Court of Justice of the EU, in its judgment 2 / 94 dated March 28, 1996 [7], indicated that the European Community did not have the necessary powers to accede to the Convention and that such step would require an amendment to the founding treaties. The Court of Justice of the EU ruled that «the principle of respect for powers must be observed both in the internal affairs of the Community and in the Community's international activity. [...] Provisions of the Treaty do not confer on the Community institutions the general powers to adopt any rules on human rights or to conclude international conventions in this field. [...] Accession to the Convention [...] entails substantial changes in [...] the system of human rights protection in the Community, since it involves accession of the Community to various international institutional systems and integration of all provisions of the Convention into the Community legal order. Such change in the system of protection of human rights in the Community, as well as the significant institutional consequences for the Community and the Member States would have constitutional implication and therefore go beyond the scope of Article 235. It is only possible by amending the Treaty» [7]. At the same time, it was emphasized that Article 235 of the Treaty on Functioning of the European Union (TFEU) [8] is not a proper legal basis for accession.

After publication of this legal position of the EU Court, the process of accession of the EU to the Convention did not take place for a long time, until it became obvious that accumulation of the case-law of the Luxembourg Court in the field of human rights protection based on application of the provisions of the EU Charter (in particular, those enshrining human rights identical to those guaranteed by the Convention) entailed a gradual divergence of the human rights practice of the EU Court and the Convention. More than five years later, during the drafting of the Union Constitution (February 2002 – July 2003), the Working Party on Fundamental Rights formulated the idea that a political decision should be taken on the need to accede to the Convention [9; p. 18]. In particular, the significant preparatory work on this issue was carried out by Working Group II of the Convention on the Future of Europe under the leadership of Esko Helle, Vytenis Andriukaitis and Neil McCormick in 2002–2003, which ultimately led to removal of the legal obstacles to accession after the entry into force of the Lisbon Treaty through Article 6 (2) of TEU, as well as through ratification of Protocol 14 to the ECHR and the subsequent entry into force of Article 59 (2) of ECHR on June 1, 2010 [6]. Thus, the Lisbon Treaty of the European Union (EU), which entered into force on December 1, 2009, stipulates the obligation of the EU to accede to the European Convention on Human Rights (ECHR). Article 6 of the consolidated Treaty on the European Union indicates that the Union shall accede to this Convention for the Protection of Human Rights and Fundamental Freedoms. At the same time, it is emphasized that such accession shall not affect the competence of the Union as defined in the Treaties. It means that the EU, like its Member States, will be bound by the general human rights law and will be subject to external monitoring. It is also stipulated that, once it has acquired a single legal personality under the Lisbon Treaty, the EU may become a full member of the Council of Europe. In its turn, Protocol No. 14 to the ECHR, which entered into force on June 1 2010, opened the legal possibility for the European Union to accede to the Convention. Suchwise, in July 2010, negotiations began on accession of the EU to the ECHR, which resulted in the development of a draft treaty [10; p. 120].

On April 5, 2013, the representatives of the EU and the Council of Europe completed the work on the draft agreement on accession to the ECHR. The next steps were to be an opinion from the European Court of Justice (ECJ), the unanimous support for this initiative from the EU Member States, approval of the agreement by a two-thirds vote in the European Parliament, and ratification by the parliaments of the Council of Europe Member States. However, the process was suspended a few months later. The European Court of Justice, in its Opinion 2 / 13, found the draft agreement incompatible with Article 6 (2) of the Treaty on the European Union. It is also important to note the legal position of the Court on the EU's accession to the Convention of 1950 set out in its Opinion 2 / 13 of the Court of Justice dated December 18, 2014 [11] on the draft Agreement on Accession of the EU to the Convention of 1950, according to paragraph 258 of which the latter is contrary to part 2 of Article 6 of the TEU and Protocol No. 8 thereto. The Court has found out that the draft Agreement on Accession of the EU to the Convention of 1950 is liable to affect the features and autonomy of the EU legal order, since it does not ensure consistency between Article 53 of the Convention of 1950 and Article 53 of the Charter of 2007, and it does not eliminate the risk of breaching the principle of sincere cooperation as a general principle of the EU law, as well as it does not contain any provisions on the relationship between the mechanism stipulated by Protocol No. 16 to the Convention of 1950 and the preliminary ruling procedure established by Article 267 of TFEU. It was also stated that the draft Agreement on Accession of the EU to the Convention of 1950 would affect application of Article 344 of TFEU, since it does not exclude the possibility of disputes arising between the Member States, or between them and the EU regarding application of the Convention of 1950 within *ratione materiae* of the EU law, when considering

the applications to the ECHR, and that the draft Agreement on Accession of the EU to the Convention of 1950 does not regulate functioning of the «co-respondent» mechanism and the procedure for the prior involvement of the Court, which would ensure that the features of the EU and the EU law are taken into account. It was also mentioned that the draft Agreement on Accession of the EU to the Convention of 1950 does not take into account the specifics of the EU law regarding the challenge of the EU acts, actions or inaction in the field of the Common Foreign and Security Policy and grants the judicial body (ECHR) the exclusive right to exercise the judicial control over such acts, actions or inaction for their compliance with the human rights standards guaranteed by the Convention of 1950 [12].

After a long pause, the accession negotiations renewed in 2020. Thus, following an informal online meeting in June 2020, the ad hoc negotiating group held 13 more meetings between September 2020 and March 2023. At the final meeting, the group concluded negotiations on all issues, except for the issue concerning jurisdiction of the Court of Justice of the EU regarding the claims on fundamental rights violations related to the actions or inaction under the EU's common foreign and security policy. The EU stated its intention to resolve this issue internally and to notify the Committee on Human Rights and Civil Society about the development of events at the appropriate intervals. At an extraordinary meeting in April 2023, the CDDH adopted its interim report for the Committee of Ministers, recording the preliminary agreement at the negotiator level on the revised accession package. In May 2024, the Committee of Ministers welcomed the preliminary agreement and the EU's intention to resolve this outstanding issue internally [13].

A new draft of the Association Agreement (DAA) was completed in 2023, raising hopes that the EU would finally accede to the European Convention on Human Rights (ECHR). This development of events promises the significant benefits, including the improved access to justice for the victims of the human rights violations and greater accountability, as the EU would come under the scrutiny of the European Court of Human Rights (ECHR).

A resolution on the legal aspects of accession of the European Union (EU) to the European Convention on Human Rights (ECHR) was adopted in spring 2025. The resolution calls on the EU institutions, in particular, the European Commission and the Council of the European Union, to immediately request the Court of Justice of the European Union (CJEU) to give an opinion on compatibility of the revised draft accession instruments with the European Union Treaties and, if the opinion is positive, to conclude the agreement as soon as possible, in accordance with their internal procedures. The resolution also emphasizes that the draft agreement takes into account the position of the Court of Justice of the EU on the features of the EU law, while preserving the integrity of the ECHR system and the role of the Court. Numerous parliamentarians insisted on that accession to the EU would provide all people living in the EU Member States with the additional legal remedies and judicial guarantees in the event of a violation of their human rights by the EU institutions, and that accession to the EU would ensure avoidance of duplication and the contradictory decisions in the case law of the Court of Justice of the EU and the European Court of Human Rights [14]. However, accession as of May 2025 still remains a very difficult task.

As for the consequences of the EU accession to the ECHR and its impact on improving the mechanisms for implementing the consultative functions, it should be noted as follows. In Protocol No. 8 [15] with regard to part 2 of Article 6 of TEU on accession of the EU to the Convention of 1950, it is indicated that the EU may participate in the supervisory bodies of the Convention of 1950, and that there is a need to ensure the correct identification of the defendant (the Member States and / or the EU), when considering the claims duly brought by third countries or individuals against the Member States and / or the EU (Article 1 of Protocol No. 8). Accession of the EU to the Convention of 1950 means that its provisions will formally become binding on the EU, its institutions, bodies, agencies, and their officials. Individuals will be able to apply to the ECHR for protection of the rights stipulated by the Convention of 1950, which have been violated, in particular, as a result of adoption of the legal acts by the EU institutions or the regulatory legal acts by the Member States, while performing their obligations under the EU law, in the process of implementing the EU legal acts.

It should be also noted that, prior to the signing and entry into force of the new revised Agreement on Accession of the EU to the Convention of 1950, which will take into account the Opinion 2 / 13 [11] of the Court dated December 18, 2014 on the compliance of the draft Agreement with the founding treaties and values of the EU, it is possible to submit the individual complaints to the ECHR exclusively against the Member States, despite the existence of a preliminary ruling by the Court [4; , p. 156].

At the same time, it should be noted that a very limited advisory competence was already granted on the basis of Article 47 of the ECHR in the EU context. However, an advisory opinion could only be requested by the Committee of Ministers and could only be given by the Court on the issues not related to interpretation of the rights set out in the Convention. In its turn, the strict restrictions, both *ratione*

personae and ratione materiae, on requesting and obtaining an opinion rendered this provision invalid [16].

Ultimately, Protocol 16 [17] was adopted, allowing the highest national courts and tribunals designated by the member states of the Council of Europe, which have ratified the Protocol, to request the ECHR to provide the advisory opinions on the principle issues related to interpretation or application of the rights and freedoms set out in the Convention or the Protocols thereto. The then President of the ECHR described this new procedure as opening a formal and direct channel for dialogue between the national and European judges. The Strasbourg Court acquires a more constitutional role, and the dialogue with the national courts becomes more formal and institutionalized. The ground for introducing this advisory procedure was to strengthen the cooperation between the Strasbourg and national courts, while contributing to a more effective implementation of the ECHR and, as a result, to a reduction in the workload of the ECHR. It was clearly expected that the principle of subsidiarity would encourage the national courts to interpret and apply the provisions of the Convention more effectively, and that it would, in its turn, lead to significantly fewer applications to the ECHR. It should be noted that although the EU as an organization has not acceded to this Protocol, the Court of Justice of the EU regards it as a threat to the autonomy of the EU law, since the national courts may prefer to seek an advisory opinion from Strasbourg on compatibility of the EU law with the ECHR rights rather than a preliminary ruling from Luxembourg [18].

It is interesting that under Protocol No. 16 to the European Convention on Human Rights, although the advisory opinions of the ECHR are not legally binding on the requesting court or tribunal, they have a legal effect on the States, including those, which have not ratified the Protocol. A key feature of this mechanism is the completely non-binding nature of this mechanism. It is voluntary on three levels: the national courts are not obliged to request an advisory opinion, the ECHR is not obliged to respond if an advisory opinion is requested, and, if the ECHR provides an opinion, the national courts are not bound by its content. According to Article 46 (1) of the ECHR, the ECHR's decisions in the disputed cases are binding only between the parties, that is, as regards the respondent State and within the specific subject matter of the case. However, introduction of the advisory opinions, as well as, for example, the use of «principle decisions», intends to expand this scope. Even if interpretation given in an advisory opinion is not binding on the other Contracting States to the Convention, it gives the ECHR the opportunity to express its views on the issues of special importance in the most authoritative judicial forum. Interpretation of the ECHR provides the important guidance for the national courts, which are, in fact, called upon to interpret and apply the Convention on a daily basis. It is worth noting that the advisory opinion mechanism is designed to assist the requesting court in this task of interpretation. It also aims more generally to facilitate application of the Convention at the national level, in particular, by clarifying the case-law of the ECHR and, thus, preventing inconsistencies [19].

However, among the numerous objections to the draft Accession Agreement, the Court of Justice of the EU mentioned the potentially negative impact of the advisory mechanism contained in Protocol No. 16 on the preliminary ruling procedure stipulated by Article 267 of TFEU. In particular, according to the Court of Justice of the EU, the draft Accession Agreement should exclude the possibility for the national courts to refer to the ECHR. Since the ECHR will form an integral part of the EU law, it will be of special importance «when the issue concerns the rights guaranteed by the Charter of Fundamental Rights of the EU, which correspond to those protected by the ECHR. Thus, according to the position of the CJEU, the advisory mechanism enshrined in Protocol 16 may, in this case, «affect the autonomy and effectiveness of the preliminary ruling procedure stipulated by Article 267 of TFEU [19]. It is also worth noting that in the provisions of Article 5 of the draft revised Agreement on Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms submitted in the Interim Report to the Committee of Ministers, for information, on the negotiations on accession of the European Union to the European Convention on Human Rights, including the revised draft accession instruments in appendix [11]), the issue of the competing jurisdiction of the Court of Justice of the EU regarding the preliminary rulings and requests by the highest courts of the states for the advisory opinions from the ECHR was resolved in such a way that it made it possible to resolve the problem of «encroachment» on the autonomy of the EU law.

Conclusions. Thus, in summary, it may be noted as follows.

Despite the fact that recognition of the provisions of the European Convention on Human Rights is an important criterion for accession of new states to the European Union, the possibility of the EU itself to join this Convention has caused long discussions among researchers of the human rights protection. It was due to the fact that legally the EU did not have an international legal personality for a long time, while the provisions of the ECHR allowed only the states to join. In particular, the Statute of the Council of Europe (CoE) defines only the European states as members

of the organization, and the preamble of the ECHR also clearly indicates the member states of the Council of Europe as its signatories. In addition, the founding treaties of the EU did not stipulate the possibility of the Union to join the Convention, since initially the organization functioned as an exclusively economic structure.

Though ratification of the Convention is a prerequisite for the countries to join the EU, and its fundamental rights are integrated into the general principles of the Union law, the European Union itself is still not a party to the Convention. The EU institutions are not subject to its direct action. Therefore, the EU Member States, which are also members of the Council of Europe and parties to the Convention may be held liable for the human rights violations under the ECHR. It includes the cases of implementation or application of the EU law. At the same time, the actions of the Union institutions themselves are not subject to the external judicial control, which currently makes a problem. Given the growing role and powers of the EU, such situation leads to a legal imbalance, making it difficult to accept that the EU institutions remain *de facto* the only authorities in the Council of Europe Member States, which are not subject to supervision by the European Court of Human Rights. It may lead to uneven enforcement of the citizens' rights and undermine the overall level of the human rights protection in Europe.

According to Protocol No. 16 to the European Convention on Human Rights, though the decisions of the ECHR are not legally binding on the requesting court or tribunal, they have a legal effect on the States, including those, which have not ratified the Protocol. Nevertheless, the key feature is a completely non-binding nature of this mechanism. It is voluntary on three levels: the national courts are not obliged to request an advisory opinion, the ECHR is not obliged to respond if an advisory opinion is requested and, if the ECHR provides an opinion, the national courts are not bound by its content. According to Article 46 (1) of the ECHR, the ECHR's decisions in the disputed cases are binding only between the parties, that is, as regards the respondent State and within the specific subject matter of the case. However, introduction of the advisory opinions, as well as, for example, the use of «principle decisions», intends to expand this scope. Even if interpretation given in an advisory opinion is not binding on other States Parties to the Convention, it gives the ECHR the opportunity to speak on the issues of special importance in the most authoritative judicial forum. The ECHR's interpretation provides the important guidance for the national courts, which are in fact called upon to interpret and apply the Convention on a daily basis. It is worth noting that the advisory opinion mechanism is designed to assist the requesting court in this interpretative task. It also aims more generally to facilitate application of the Convention at the national level, in particular, by clarifying the ECHR's case-law and, thus, preventing inconsistencies.

It is also worth noting the resolution in the Opinion in Case 2 / 13 of the issue of the competing jurisdiction of the Court of Justice of the EU regarding the preliminary rulings and requests by the highest courts of the states for the advisory opinions from the ECHR. In particular, this issue was resolved in the way, which ensured removal of the problem of «encroachment» on the autonomy of the EU law. That is, the concerns about the autonomy of the EU law were taken into account.

Finally, we should like to mention that the issue of the mechanism for implementing the consultative powers requires further scientific research.

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