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Accession of the European Union to the
European Convention for the
Protection of Human Rights and Fundamental
Freedoms (ECHR) – Analysis of Opinion 2/13
of the European Court of Justice

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Abbreviation list

ECtHR	European Court of Human Rights
CJEU/ECJ/ the Court	European Court of Justice
AG	Advocate General
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
CFREU/The Charter	Charter of Fundamental Rights of the European Union
ECHR/The Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
FCC	German Federal Constitutional Court
AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy of the EU
PJCC	Police and Judicial Co-operation in Criminal Matters
EEAS	European External Action Service
<i>CDDH</i>	Steering Committee for Human Rights
UNCLOS	United Nations Convention on the Law of the Sea

1 Introduction

On the 18th of December 2014, the Court of Justice of the European Union (“the Court”) delivered the historic Opinion 2/13¹ (“the Opinion”), where it ruled that the agreement² (“the draft agreement”) on the accession of the European Union (“EU”) to the European Convention for the Protection of Human Rights and Fundamental Freedoms³ (“ECHR”) is not compatible with Article 6(2) of the Treaty on European Union⁴ (“TEU”) or with Protocol (No 8) relating to Article 6(2) TEU⁵.

The accession of the EU to the ECHR has been much anticipated for a long period and highly debated for a plethora of reasons. Following the first unsuccessful attempt, almost twenty years ago, when the Court highlighted, in Opinion 2/94⁶, the lack of a legal basis that could provide competence to the European Community to accede to the ECHR, many changes had occurred. Most importantly, after the entry into force of the Treaty of Lisbon⁷, in December 2009, the accession of the EU to the ECHR obtained a specific legal basis in the form of Article 6(2) TEU where it was clearly stated that:

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

The constitutional significance placed upon the accession, triggered a long sequence of negotiations and compromises between the parties that culminated in 2013 in the text of the draft agreement for the EU’s accession to the ECHR. The achieved consensus created great expectations for the beginning of a new era in the protection of fundamental rights, as expressed in the preliminary remark of Advocate General (“AG”) Kokott in her View on Opinion procedure 2/13 (“the View”) delivered on 13 June 2014:

“The proposed accession of the EU to the ECHR will create a special, possibly even unique, constellation in which an international, supranational organisation — the EU — submits to the control of another international organisation — the Council of Europe — as regards compliance with basic standards of fundamental rights. As a result, in areas governed by EU law, not only national courts and tribunals and the EU Courts, but also the European Court of Human Rights (ECtHR) will be called upon to oversee the observance of fundamental rights”⁸.

However, as also indicated by AG Kokott, “the devil is [...] in the detail”⁹. Subsequently, the hopes and expectations created did not prevent the Court from rejecting the compatibility of the proposed draft agreement with EU law, by placing the protection of the autonomy and specific characteristics of the EU legal order in the epicentre of its argumentation. In terms of practical effects, the Court’s

¹ Opinion 2/13 of the Court (full Court), 18 December 2014, EU:C:2014:2454.

² Final Report to the CDDH, Council of Europe, Appendix I (2013), link: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf, (Accessed: 06/04/2016).

³ European Convention for the Protection of Human Rights and Fundamental Freedoms, amended by Protocols Nos.11 and 14, Nov. 4, 1950, 213 U.N.T.S. 221.

⁴ Consolidated Version of the Treaty on European Union, Art. 6 (2), May 9, 2008, 2008 O.J. (C 115) 13

⁵ See Opinion 2/13, EU:C:2014:2454, paragraph 258.

⁶ Opinion 2/94 of the Court, On Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms 28 March 1996, EU:C:1996:140.

⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007/C 306/01).

⁸ See View of Advocate General Kokott delivered on 13 June 2014 EU:C:2014:2475, paragraph 25.

⁹ Ibid, paragraph 4.

long list of objections to the draft agreement as expressed in Opinion 2/13, blocked, at least temporarily, the road towards the accession of the EU to the ECHR. Furthermore, in symbolic terms, Opinion 2/13 reflected the Court's fundamental disagreement with the Commission, the Council, the European Parliament, and the 24 Member States that submitted their observations in the context of the Opinion request, all concluding that "the draft agreement is compatible with the Treaties"¹⁰. Finally, in terms of internal organization and function, Opinion 2/13 exposed the division between the Court and the Advocate General Kokott, who had concluded in her View¹¹ that under certain conditions, the draft agreement is compatible with EU law. It is, therefore, evident that there are many aspects of Opinion 2/13 that require thorough analysis and interpretation.

1.1 Purpose

The main purpose of this Thesis is to assess the objections of the Court as presented in Opinion 2/13 that led to the conclusion that the draft agreement on the accession of the EU to the ECHR was incompatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) TEU. On an introductory basis, this Thesis shall present a timeline of the historic evolution in the fundamental human rights' protection within the EU and attempt to explain the significance of the EU's accession to the ECHR. Subsequently, it shall analyze and scrutinize, where applicable, the arguments employed and the Court's objections to the proposed accession. This Thesis also aims to present shortly the main effects on the protection of human rights, stemming from the second unsuccessful attempt of the EU to accede to the ECHR. Finally, it shall explore the way forward for the protection of the human rights in Europe i.e. in the post-Opinion era.

The core of this Thesis will be an attempt to answer the following questions:

1. Did the Court fully and adequately justify its negative Opinion to the question of the European Commission on the following issue: "is the draft agreement providing for the accession of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') compatible with the Treaties?"?
2. How is the protection of human rights in Europe affected by the Court's rejection of the accession of the EU to the ECHR and what is the way forward?

1.2 Method and material

The method employed by the author of this Thesis in order to achieve the aforementioned objectives is the traditional legal dogmatic method and the methods of interpretation used are the literal, purposive and contextual. The legal-dogmatic method pertains to exploring and analyzing positive law as stipulated in written and unwritten European or international sources, principles and doctrines, including a review of the available case-law and annotations in the scholar literature. As described by McCrudden: "[i]ts sources are predominantly those that are thrown up by the legal process: principally statutes and decided cases, supplemented where possible with lawyers' literature expounding the rule and occasionally reflecting on them"¹².

¹⁰ See Opinion 2/13, EU:C:2014:2454, paragraph 109.

¹¹ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 280.

¹² C. McCrudden, 'Legal Research and the Social Sciences', *Law Quarterly Review* 2006, Vol. 122, p. 632-650

In order to address the aforementioned questions, this Thesis will mainly analyze Opinion 2/13 taking into consideration the provisions of the draft agreement in the light of the TEU, the TFEU, the Charter of Fundamental Rights of the EU ("the Charter") and the ECHR. Furthermore, this Thesis shall assess the arguments and objections presented by the Court by referring, where applicable, to the View of Advocate General Kokott and to relevant case law of both the Court and the ECtHR. Finally in the context of this Thesis there will be presented and processed views and opinions expressed in secondary sources i.e. books, editorial comments and articles, blog posts and opinion pieces in support of the critical analysis performed.

1.3 Delimitations

This Thesis shall not attempt a comparative analysis of the Court's Opinions 2/94 and 2/13, since reference to the former will only be made in the context of a historical overview. Furthermore, in this Thesis there shall not be performed a separate analysis of the View of Advocate General Kokott of 13 June 2014. Instead, the main arguments of the Advocate General will be presented in the context of this Thesis in combination with or in contrast to the legal reasoning of the Court, as expressed in Opinion 2/13. Finally, this Thesis shall present but not address in depth the various opinions expressed and solutions proposed, regarding the future of the accession of the EU to the ECHR in the post-Opinion 2/13 era.

2 The way to Opinion 2/13

2.1 Background

The protection of fundamental rights within the legal order of the European Union had undergone a long period of evolution before the Court's Opinion 2/13 was delivered on the 18th of December 2014. As a starting point, the founding Treaties did not contain specific provisions on the protection of fundamental rights, since the drafting parties were mainly concerned with the creation of a common market. The first reference to the protection of human rights was made by the Court in 1969 in the "Stauder" case, where the following sentence was included in the grounds of judgment:

*"Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court"*¹³.

The following year, in December 1970, the Court took a step forward in its ruling in "Internationale Handelsgesellschaft" where it stated that:

*"...respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community"*¹⁴.

However, it was not until 1975, when the Court took the ECHR into consideration for the first time in the "Rutili" case, where it was maintained that:

¹³ See judgment in Stauder, C-29/69, EU:C:1969:57, paragraph 7.

¹⁴ See judgment in Internationale Handelsgesellschaft, C-11/70, EU:C:1970:114, paragraph 4.

“...these limitations placed on the powers of Member States in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950”¹⁵.

Admittedly, the change in the Court’s stance was affected by the dynamics created following the judgment of the German Federal Constitutional Court (“FCC”) in the famous case “Solange I”¹⁶. In 1974, the FCC ruled that as long as (in German: “solange”) the integration process had not progressed so far that the Community law received a catalogue of fundamental rights equivalent to that contained in the German Constitution, “a reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings is admissible and necessary”¹⁷. Interestingly, the FCC reversed its position twelve years later in “Solange II”¹⁸, where it ruled that it will “no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation [...] and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law”¹⁹. The FCC, decided to abandon the position it had taken in “Solange I” as long as “the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights [...] to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution”²⁰. Subsequently, the FCC acknowledged the enhanced protection of the fundamental rights within the European Communities that was mainly achieved through the development of the case-law of the Court.

The idea of the accession to the ECHR emerged almost forty years ago, in 1979, when the Commission issued a Memorandum and officially recommended “the formal accession of the Community to the ECHR”²¹. Notably, even though the Commission did not see any obstacles for the realization of the accession, it acknowledged that “the accession of the European Communities to the ECHR will give rise to not inconsiderable difficulties on account of the Communities’ particular structure”²². Furthermore, in November 1990, the Commission repeated its proposal in a Communication to the Council, where it was maintained that the accession to the ECHR would fill the “conspicuous gap in the Community legal system”²³.

The first serious reservations, regarding the prospects of the Community’s accession to the ECHR were expressed in 1996 in the Court’s Opinion 2/94²⁴. In its assessment, the Court acknowledged

¹⁵ See judgment in Rutili, C-36/75, EU:C:1975:137, case 36/75, paragraph 32.

¹⁶ Solange I: Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel, decision of 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540.

¹⁷ Ibid, headnote, link: <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>, (Accessed: 21/04/2016).

¹⁸ Solange II: Wünsche Handelsgesellschaft, decision of 22 October 1986, BvR 2, 197/83; 1987 3 CMLR 225

¹⁹ Ibid, headnote, link: <https://law.utexas.edu/transnational/foreign-law-ranslations/german/case.php?id=572>, (Accessed: 21/04/2016).

²⁰ Ibid.

²¹ See the Commission’s Memorandum on the Accession of the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Bull. EC Supp. 2/79, part I, § 7.

²² Ibid.

²³ Communication of the Council of 19 November 1990, Bull. EC 10-1990, p. 76.

²⁴ See Opinion 2/94 of the Court, 28 March 1996, EU:C:1996:140.

that “respect for human rights is a condition of the lawfulness of Community acts”²⁵, but maintained that “no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field”²⁶. In search of alternatives, the Court assessed whether Article 235 of the Treaty could “constitute a legal basis for accession”²⁷. However, the Court found that “such a modification of the system for the protection of human rights in the Community [...] could be brought about only by way of Treaty amendment”²⁸. Subsequently, the Court concluded by ruling that the Community had “no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”²⁹.

Based on the understanding that the accession to the ECHR could not be achieved without fundamental Treaty amendments, the European Parliament, the Council of Ministers and the European Commission solemnly proclaimed in 2000 in Nice the Charter of Fundamental Rights of the European Union (“the Charter”). The Charter became the Union’s very own legal instrument for the protection of human rights, as it defined the fundamental rights that must be respected both by the EU and the Member States when implementing EU law. It contains rights and freedoms under six titles i.e. Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice and became legally binding on the 1st of December 2009³⁰, when the Treaty of Lisbon entered into force.

The Lisbon Treaty was a landmark for the effective protection of the fundamental rights within the EU, since it validated the constitutional status of the Charter and opened the door for the accession of the EU to the ECHR. The latter happened through the amendment of Article 6 TEU. The revised Article 6(2) TEU in the post-Lisbon Treaty era stipulated that:

“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”.

According to Advocate General Kokott, “since the entry into force of the Treaty of Lisbon, it has been clear from Article 6(2) TEU that not only does the EU have the power to accede to the ECHR, but it has been placed under an obligation by the Member States to follow that path”³¹. That practically meant that “the aim of acceding to the ECHR has had constitutional status within EU law”³². The accession was furthermore facilitated with Protocol No. 8 relating to Article 6(2) of the TEU on the accession of the Union to the ECHR³³ that “set out a number of further requirements for the

²⁵ See Opinion 2/94 of the Court, EU:C:1996:140, paragraph 34.

²⁶ Ibid, paragraph 27.

²⁷ Ibid, paragraph 28.

²⁸ Ibid, paragraph 35.

²⁹ Ibid, paragraph 36.

³⁰ According to article 6(1) of the Treaty on European Union (TEU) ‘[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...], which shall have the same legal value as the Treaties’.

³¹ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 3.

³² Ibid.

³³ Protocol No. 8 consists of three articles, which are worded as follows: ‘Article 1

The [accession agreement] provided for in Article 6(2) [TEU] shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

- (a) the specific arrangements for the Union’s possible participation in the control bodies of the [ECHR];
- (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

conclusion of the Accession Agreement”³⁴. Finally, the Council of Europe amended the ECHR by introducing Protocol No. 14, thus specifically stating that: “The European Union may accede to this Convention”³⁵.

The negotiations for the accession of the EU to the ECHR were initiated on the 4th of June 2010 by a decision of the Council and the Commission was designated as negotiator. On 5 April 2013, after three years of painstaking negotiations, the parties reached an agreement on the draft accession instruments. Ultimately, “in view of the constitutional significance of the EU’s proposed accession to the ECHR and to ensure legal certainty, the Commission, by an application dated 4 July 2013, sought the opinion of the Court of Justice pursuant to Article 218(11) TFEU on the following question:

‘Is the draft agreement providing for the accession of the European Union to the [European] Convention for the protection of Human Rights and Fundamental Freedoms compatible with the Treaties?’”³⁶

The Court reviewed the documents provided by the Commission³⁷, took into consideration the observations submitted by the parties and on the 18th of December 2014, delivered Opinion 2/13. In addition to the Court, Advocate General Kokott also assessed the issue in her View that was delivered on the 13th of June 2014 and published on the same day as Opinion 2/13.

2.2 The importance of the accession of the EU to the ECHR

Admittedly, in the post-Lisbon era the protection of human rights within the EU was significantly enhanced, since it was recognized that “the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 [...] shall have the same legal value as the Treaties”³⁸. Consequently, the Charter became legally binding for both the EU institutions and the Member States when implementing EU law, thus recognizing and making explicitly visible the role of fundamental rights in the legal order of the Union. In that context, it would be natural to question the necessity of the accession of the EU to the ECHR which is expressed in the most emphatic manner in Article 6(2) TEU.

The amendment of Article 6 TEU created a safe haven within Europe, where the protection of the fundamental human rights was effectively safeguarded. However, the authors of the Treaty of Lisbon

Article 2

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the [ECHR], in particular in relation to the Protocols thereto, measures taken by Member States derogating from the [ECHR] in accordance with Article 15 thereof and reservations to the [ECHR] made by Member States in accordance with Article 57 thereof.

Article 3

Nothing in the agreement referred to in Article 1 shall affect [Article 344 TFEU].’

³⁴ See ‘Accession by the European Union to the European Convention on Human Rights Answers to frequently asked questions’, 1 June 2010, link: http://www.echr.coe.int/Documents/UE_FAQ_ENG.pdf, (Accessed: 20/04/2016).

³⁵ See Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No.194, Article 17.

³⁶ See View of Advocate General Kokott, paragraph 8.

³⁷ See Opinion 2/13, EU:C:2014:2454, paragraph 2 for an overview of the documents sent by the Commission to the Court as annexes to its request.

³⁸ See Article 6(1) TEU.

chose to give constitutional status to the accession of the EU to the Convention in order to “enhance coherence in human rights protection in Europe by strengthening participation, accountability and enforceability in the Convention system”³⁹. In other words, the Member States of the EU being simultaneously members of the Council of Europe, decided the accession to the ECHR, in order to submit the Union’s legal system under the independent external control of the ECtHR. In that way, the EU would “close gaps in legal protection by giving European citizens the same protection vis-à-vis acts of the Union as they presently enjoy vis-à-vis all member States of the Union”⁴⁰.

Given the fact that the EU has not presently acceded to the ECHR, it is impossible for applicants to challenge an act, measure or omission of the EU in front of the ECtHR and on the basis of the rights conferred by the Convention. As Daniel Halberstam maintains, “EU actions are reviewable in Strasbourg only indirectly by holding Member States liable either for bringing about an offensive EU measure by unanimous vote, or for implementing an EU measure”⁴¹. In that sense, the implementation of an EU measure could be currently challenged in front of the ECtHR, only on the condition that the “Bosphorus equivalence doctrine”⁴² has been rebutted i.e. where a Member State applied discretion or where “the protection of Convention rights was manifestly deficient”⁴³. The accession of the EU to the ECHR is expected to close this gap by allowing “the same rules to apply to itself as those which, time and again, it requires current and prospective Member States to accept”⁴⁴. Furthermore, the accession to the ECHR will allow the proper defence and representation of the EU’s positions, which shall be party to the proceedings before the ECtHR and will safeguard that the EU would remedy the violations identified, thus achieving the effective execution of the judgments delivered.

On a practical level, the accession of the EU to the ECHR is “the best means of ensuring the harmonious development of the case-law of the European Court of Justice and the European Court of Human Rights in human rights matters”⁴⁵. According to Article 52(3) of the Charter, “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention”. Admittedly, the judicial dialogue between the ECtHR and the Court has, so far, been productive, thus expressing, in principle, the wish of both

³⁹ Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 1.

⁴⁰ See 34.

⁴¹ Daniel Halberstam, 'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward.' German L. J. 16, no. 1 (2015): 105-46.

⁴² The doctrine was introduced with the ruling of ECtHR in case *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v Ireland*, application no. 45036/98, CE:ECHR:2005:0630JUD004503698. Based on the doctrine: the actions of a Member State arising completely from its obligations towards the EU (i.e. where there is no discretion left to the Member State) will be deemed by the ECtHR compliant with the ECHR as long as the EU is considered to protect fundamental rights, both in substance as well as in its control mechanisms, in a way which can be considered to be at least equivalent (i.e. comparable) to that provided by the Convention. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. See in particular paragraphs 155-157 of the ECtHR’s ruling.

⁴³ *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v Ireland*, CE:ECHR:2005:0630JUD004503698, paragraph 156.

⁴⁴ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 1.

⁴⁵ See 34.

courts to avoid conflicts⁴⁶. However, for as long as the accession is not realized, the Court will mainly focus on applying the Charter, which includes provisions that “are based on, but not identical to, those of the ECHR”⁴⁷, thus leading to deviations from the ECHR acquis. Finally, the increasing number of human rights-related cases adjudicated by the Court and the ECtHR creates a significant risk of divergences and dynamic changes in the case-law of two courts. It is, therefore, evident that the accession of the EU to the ECHR would align the case-law produced by the Court and the ECtHR and enhance the harmonization of protection of the fundamental human rights.

Finally, on a symbolical level, the accession of the EU to the ECHR will increase the Union’s credibility by giving “a strong political signal of coherence between the EU and ‘greater Europe’”⁴⁸. “The EU itself will be subject to a form of external control as regards compliance with basic standards of fundamental rights that has long been widely called for”⁴⁹. Consequently the Union will send a clear message that it is not ‘above the law’ and prove in practice its commitment to the effective protection of the fundamental human rights.

3 The Opinion 2/13.

3.1 Introduction

In its historic Opinion of 18 December 2014⁵⁰ the Court, following an analysis comprising 258 paragraphs, reached the conclusion that:

*“The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.”*⁵¹

On an introductory basis, it could be maintained that with its Opinion, the Court closed the door to the possibility of the EU’s accession to the ECHR, under the current form of the draft agreement. Indeed, the Court ruled that the draft agreement is incompatible with the EU law and did not imply any specific alternatives or possible remedies that would make the accession feasible.

On a structural basis, the Court made a rather long introduction in its Opinion, presenting among others the institutional framework and the European Convention for the protection of Human Rights and Fundamental Freedoms⁵², a synopsis of the relationship between the EU and the ECHR⁵³ and a timeline of the most important events towards the accession of the EU to the ECHR⁵⁴. Furthermore, it

⁴⁶ According to the CURIA database, during 2010-2011 the ECJ mentioned the ECHR in 57 judgments. See to that effect see study: ‘Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights’, Directorate General For Internal Policies, Policy Department C: Citizens' Rights And Constitutional Affairs Civil Liberties, Justice And Home Affairs, © European Parliament, 2012, link: <http://www.statewatch.org/news/2012/may/ep-study-ecj-echr.pdf>, (Accessed: 20/04/2016).

⁴⁷ See 34.

⁴⁸ See 34.

⁴⁹ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 1.

⁵⁰ Opinion 2/13, EU:C:2014:2454.

⁵¹ See Opinion 2/13, EU:C:2014:2454, paragraph 258.

⁵² Ibid, paragraphs 3 – 36.

⁵³ Ibid, paragraphs 37-35.

⁵⁴ Ibid, paragraphs 46-48.

is worth mentioning that a large part of the Court's Opinion considered the arguments presented by the Commission⁵⁵ and the observations submitted by the EU Institutions and Member States. This practically means that the Court used only just over one quarter of its Opinion, in order to present its own views and arguments, as it only entered the substance of the issue on paragraph 153, by presenting its preliminary considerations.

Before entering into a detailed assessment, the Court acknowledged that the Treaty of Lisbon has now provided "a specific legal basis points in the form of Article 6 TEU"⁵⁶ for the accession of the EU to the ECHR, unlike the circumstances under which Opinion 2/94 was delivered. The Court then went on to highlight the specific character of the EU as "a new kind of legal order possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights"⁵⁷, a status that is also reflected in its case-law⁵⁸. At this stage, the Court made a clear statement that the EU bears little to no resemblance to the regular State entities-parties to the ECHR and that specific care should be taken in order to preserve "the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions"⁵⁹.

The Court closed its introductory part by presenting a short analysis of the "specific characteristics" of the EU arising from its structure, institutions and its very own nature⁶⁰. These characteristics combine the principle of conferral of powers (Articles 4(1) TEU and 5(1) and (2) TEU), the institutional framework established in Articles 13 TEU to 19 TEU, the primacy and independency of EU law over the laws of the Member States stemming directly from the Treaties⁶¹ and the direct effect of a wide scope of its provisions⁶². The Court indicated that the EU is founded on a set of common values, expressed in Article 2 TEU⁶³, shared by all the Member States, "which implies and justifies the existence of mutual trust between the Member States that those values will be recognized"⁶⁴. Reference was also made to the fundamental rights recognized by the Charter, which bear the same legal value as the Treaties and the autonomy of EU law that "requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU"⁶⁵. Finally, the Court reflected on its own role and that of the national courts of the Member States "to ensure the full application of EU law in all Member States"⁶⁶, based on the keystone function of the preliminary ruling procedure provided for in Article 267 TFEU⁶⁷.

⁵⁵ See Opinion 2/13, EU:C:2014:2454, paragraphs 71- 107.

⁵⁶ Ibid, paragraph 153.

⁵⁷ Ibid, paragraph 157.

⁵⁸ See, in particular, judgments in *van Gend & Loos*, C-26/62, EU:C:1963:1, p. 12, and *Costa/ENEL*, C-6/64, EU:C:1964:66, p. 593, and Opinion 1/09 of the Court (full Court), 8 March 2011, EU:C:2011:123, paragraph 65.

⁵⁹ See Opinion 2/13, EU:C:2014:2454, paragraph 161.

⁶⁰ Ibid, paragraphs 164-177.

⁶¹ See, to that effect, judgments in *Costa/ENEL*, EU:C:1964:66, p. 594, and *Internationale Handelsgesellschaft*, , C-11/70, EU:C:1970:114, paragraph 3; Opinions 1/91, EU:C:1991:490, paragraph 21, and 1/09, EU:C:2011:123, paragraph 65; and judgment in *Melloni*, C- 399/11, EU:C:2013:107, paragraph 59

⁶² See judgment in *van Gend & Loos*, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, paragraph 65

⁶³ According to Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

⁶⁴ See Opinion 2/13, EU:C:2014:2454, paragraph 168.

⁶⁵ See, to that effect, judgments in *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 4, and *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 281 to 285.

⁶⁶ See Opinion 1/09, EU:C:2011:123, paragraph 68

⁶⁷ According to Article 267 TFEU: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

3.2 The Court's objections

After the presentation of its initial comments, the Court proceeded to the main part of its assessment of the compliance of the draft agreement with EU primary law⁶⁸. The Court focused on ascertaining whether the draft agreement could potentially have adverse effects on the “specific characteristics of the EU law” and further on assessing if the procedures indicated in the draft agreement were compliant with the conditions set in the Treaties for the EU’s accession to the ECHR. Consequently, the Court expressed five main objections to the compatibility of the draft agreement with EU law (including certain sub-categorized arguments):

1. The specific characteristics and the autonomy of EU law
 - (a) Article 53 of the ECHR
 - (b) Principle of mutual trust between Member States
 - (c) Protocol No.16
2. Article 344 TFEU
3. The co-respondent mechanism
4. The procedure for the prior involvement of the Court of Justice
5. The specific characteristics of EU law as regards judicial review in CFSP matters

The Court’s objections are further discussed and analyzed in the following paragraphs.

3.2.1 The specific characteristics and the autonomy of EU law

3.2.1.1 Article 53 of the ECHR

As a starting point in its assessment, the Court expressed its concern that the uncoordinated interplay between Article 53 of the Charter and Article 53 of the ECHR could compromise “the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law”⁶⁹. Article 53 of the ECHR titled “safeguard for existing human rights” indicates that:

“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”.

On the other hand Article 53 of the Charter stipulates that:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law [...] including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”.

Furthermore, the Court referred to its judgment in the Melloni case⁷⁰ where it clarified that “Article 53 of the Charter of Fundamental Rights of the European Union must be interpreted as not allowing a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;”

⁶⁸ See Opinion 2/13, EU:C:2014:2454, paragraphs 178 – 258.

⁶⁹ Ibid, paragraph 189.

⁷⁰ See judgment in Melloni, C-399/11, EU:C:2013:107.

the right to a fair trial and the rights of the defence guaranteed by its constitution”⁷¹. The Court expressed the view that “a different interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution”⁷².

On the level of verbatim interpretation of the two provisions it could be construed that they indeed seem to be creating a certain level of uncertainty, since the provision of the ECHR permits a wider scope of protection of fundamental rights than that of the Charter. In that sense, the Charter seems to focus on a uniform level of protective application within the EU, while, as observed by the Court, the ECHR “essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR”⁷³ itself.

It is rather obvious that the Court’s reservations aim to ensure that the Member States will not practically be in a position of using the ECHR provision as a Trojan horse in order to override its ruling in Melloni, thus providing a higher level of protection of the human rights, based on the provisions of their national law. However, it could be suggested that the Court, in its struggle to protect the primacy of the EU law, seemed to adopt a rather one-sided interpretation of the ECHR. Indeed, the Court did not take into consideration the main function of the Convention, which inspired by the Universal Declaration of Human Rights⁷⁴, aims to set “minimum standards”⁷⁵ for the protection of human rights. The Convention does not, therefore, aim to provide a fully harmonized level of protection of the fundamental rights within a closed Member State system. Based on the ECtHR’s case-law⁷⁶, it becomes evident that Article 53 of the ECHR does not empower Parties to apply a higher level of protection, but simply leaves that option open to their discretion. As Michl observes, should a similar-to-Melloni scenario arise: “the Member States’ courts are obliged to apply exclusively the fundamental rights regime of the EU – which already provides that the ECHR is the minimum standard the Charter may only improve upon but never fall short of”⁷⁷. This practically means that in case of doubt as to the level of protection applicable, where the questions submitted concern the interpretation of EU law, the national courts are obliged to revert to the Court for a preliminary ruling⁷⁸, which based on its views expressed in Melloni and its previous case-law⁷⁹, shall safeguard EU’s autonomy and specific characteristics.

To conclude, it could be supported that the Court with its brief argumentation did not manage to prove beyond the shadow of a doubt, that Article 53 ECHR could pose a threat to the specific characteristics of the EU. It must also be highlighted that the issue of the problematic co-existence of

⁷¹ See judgment in Melloni, EU:C:2013:107, paragraph 64.

⁷² Ibid, paragraph 58.

⁷³ See Opinion 2/13, EU:C:2014:2454, paragraph 189.

⁷⁴ See Universal Declaration of Human Rights, the United Nations, 1948, link: <http://www.un.org/en/universal-declaration-human-rights/>, (Accessed: 07/05/2016).

⁷⁵ See 34.

⁷⁶ See to that effect: case E.B. v. France, application no. 43546/02, CE:ECHR:2008:0122JUD004354602, paragraph 49.

⁷⁷ Walter Michl, ‘Thou Shalt Have No Other Courts Before Me’ (December 23, 2014), Verfassungsblog, link: <http://www.verfassungsblog.de/en/thou-shalt-no-courts/> (Accessed: 04/04/2016).

⁷⁸ As stipulated under Article 267 TFEU. See, inter alia, joined cases Paint Graphos and Others, C- 78/08 to C- 80/08, EU:C:2011:550, paragraph 30.

⁷⁹ See judgment in Mannesmannröhren-Werke AG, T-112/98, EU:T:2001:61, paragraph 84.

the two provisions was neither raised in the View of Advocate General Kokott⁸⁰, nor in the summary of the submissions. Finally it is remarkable that the Court did not choose to propose a remedy to that issue, in the form of a specific provision bridging the level of protection provided by both Articles as per its view. Instead, it limited its contribution in maintaining that “there is no provision in the agreement envisaged to ensure such coordination”⁸¹.

3.2.1.2 Principle of mutual trust between Member States

At the second point of its assessment, the Court focused its attention on the “principle of mutual trust” between the EU Member States⁸². According to that principle, each Member state is required, “save in exceptional circumstances”, to regard “all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law”⁸³. The Court criticized the draft agreement for lacking a provision preventing the ECHR from requiring “a Member State to check that another Member State has observed fundamental rights”, despite the fact that “EU law imposes an obligation of mutual trust between those Member States”. According to the Court, this flaw of the draft agreement may “upset the underlying balance of the EU and undermine the autonomy of EU law”⁸⁴.

The principle of mutual trust is directly connected with the EU’s “Area of Freedom Security and Justice” - (AFSJ) originally introduced in Article 3(2) TEU which is stipulating that:

“The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.

Furthermore, Title V of the TFEU (Articles 67 to 89) is titled after and directly refers to the AFSJ, the objectives of which are specifically presented in Article 67 TFEU⁸⁵. The importance of the principle for the EU is also evident on the Commission’s references, since it was characterized “the bedrock upon which EU justice policy should be built”⁸⁶, while, as Weller indicated: “even the European Court of Human Rights has recently acknowledged that the core instruments of judicial co-operation in the

⁸⁰ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 280.

⁸¹ See Opinion 2/13, EU:C:2014:2454, paragraph 190.

⁸² Ibid, paragraph 191.

⁸³ Ibid.

⁸⁴ Ibid, paragraph 194.

⁸⁵ According to Art. 67 TFEU: “1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”.

⁸⁶ See European Commission, ‘Towards a True European Area of Justice: Strengthening Trust, Mobility and Growth’, Press Release IP/14/233 of 11 March 2014.

European Union ground “sur le principe de ‘confiance réciproque dans la justice’ au sein de l'Union”⁸⁷.

In an attempt to understand the concerns raised about the possible adverse effect of the draft agreement on the principle of mutual trust, it would be useful to review the judicial dialogue between the Court and the ECtHR. Indeed, the Court has referred to the principle on various occasions in its case-law⁸⁸. Notably, in *N.S.*, where it was ruled that an asylum seeker may not be transferred to a Member State where he risks being subjected to inhuman treatment, the Court stated that:

“Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States [...] observe fundamental rights [...] and that the Member States can have confidence in each other in that regard”⁸⁹.

However, in the same case the Court indicated that in cases of “systemic deficiencies in the asylum procedure”, “the presumption underlying the relevant legislation [...] that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable”⁹⁰. Accordingly, the Court raised the threshold for the rebuttal of the mutual trust principle on the level of systemic malfunctions, thus setting the Member States’ obligations in a rather vague framework. In fact, it is rather difficult to define when systemic deficiencies have arisen in sensitive areas, such as the asylum procedure, and what would constitute adequate evidence towards that direction.

On the other hand, the ECtHR acknowledged the Court’s views in *N.S.*, but chose a quite different approach in its ruling in *Tarakhel*⁹¹. The Strasbourg Court held that “the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention”⁹². This practically means that the ECtHR took a step forward in comparison to the ECJ’s position, and ruled that the mutual trust principle is rebuttable (i.e. the States will have to individually examine the risk sources) on a case-by-case level, “where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country”⁹³.

It could, therefore, be argued that from a human rights protection point of view, the Court may be sending the wrong message to the Member States, as it defends the idea of invoking EU law so as not

⁸⁷ See judgment in *Avotinš v Latvia*, application no 17502/07, CE:ECHR:2014:0225JUD001750207, paragraph 49, on the mutual recognition of judgments under the Brussels I Regulation, as found on Matthias Weller, ‘Mutual trust: in search of the future of European Union private international law’, *Journal of Private International Law*, Volume 11, Issue 1, January 2015, pages 64-102, published online: 26 May 2015, link: <http://www.tandfonline.com/doi/full/10.1080/17536235.2015.1033203#.VwQ4gfmLS7Q>, (Accessed: 06/04/2016).

⁸⁸ See judgments in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80, and Melloni, EU:C:2013:107, paragraphs 37 and 63.

⁸⁹ See judgment in *N. S. and Others*, EU:C:2011:865, paragraphs 79.

⁹⁰ See judgment in *N. S. and Others*, EU:C:2011:865, paragraphs 106 and 104 respectively.

⁹¹ See judgment in *Tarakhel v. Zwitterland*, application no. 29217/12, CE:ECHR:2014:1104JUD002921712, para. 33.

⁹² *Ibid*, para. 93.

⁹³ *Ibid*, para. 93.

to assess possible violations by other Member States and simultaneously sets rather vague rebuttal margins for the principle of mutual trust. Furthermore, it could be supported that the Court emphasizes on the importance of protection of the autonomy of EU law by adopting a form over substance view, in a manner that does not directly reflect the spirit of the EU, which is directly founded on the respect for human rights (Article 2 TEU). Finally, it should be noted that AG Kokott did not seem to share the Court's concerns on the mutual trust principle disparities, since she chose not to refer to that issue in her View⁹⁴.

3.2.1.3 Protocol No. 16

The Court concluded its reference to the specific characteristics and the autonomy of EU law by focusing its attention on Protocol No.16 to the ECHR⁹⁵. This protocol was signed on the 2nd of October 2013, almost six months after the 5th of April 2013, when the negotiation process for the draft accession instruments was successfully completed. In its assessment, the Court recognized that the EU is not going to accede to Protocol No. 16, nevertheless highlighted that the advisory opinions' mechanism established there "could affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU", "since the ECHR would form an integral part of EU law"⁹⁶.

According to Article 1 of Protocol No.16:

"Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court (i.e. the ECtHR) to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto".

The Court particularly objected to the lack of a coordinating provision in the draft agreement, an omission that could allow the supreme court of a Member State that had acceded to that Protocol to trigger the prior involvement procedure. According to the Court that could create a risk "that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented"⁹⁷.

Interestingly, the Court's concerns about the Protocol No.16 mechanism were dismissed by AG Kokott. In her View, the Advocate General accepted that the Court's role "in relation to the interpretation of the ECHR within the EU" may be "indirectly affected" by Protocol No. 16 (for the same reasons indicated in the Court's Opinion)⁹⁸. However, the AG then swiftly pointed out that such a risk is not inherent in the accession of the EU to the ECHR, as "even without the proposed accession of the EU, courts and tribunals of Member States which have ratified Protocol No 16 can turn to the ECtHR with questions on fundamental rights relating to the interpretation of the ECHR, instead of referring to the Court of Justice questions that are identical in substance but relate to the interpretation of the Charter of Fundamental Rights"⁹⁹. Indeed, Protocol No. 16 is optional and its entering into force is directly connected with receiving the necessary number of ratifications (i.e. ten ratifications are required) and does not depend on the accession of the EU to the Convention. In fact,

⁹⁴ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 280.

⁹⁵ See Opinion 2/13, EU:C:2014:2454, paragraphs 196-199.

⁹⁶ Ibid, paragraph 197.

⁹⁷ Ibid, paragraph 198.

⁹⁸ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 139.

⁹⁹ Ibid, paragraph 140.

as at 6 May 2014, the Protocol had been signed by only seven Member States of the EU and was not been ratified by any of them, while on a more recent update (as of 16 March 2016), six states have ratified it and another 10 have signed it.

In addition to her assessment, AG Kokott proposed a simple solution to the Protocol No. 16 issue by making a reference to the third paragraph of Article 267 of the TFEU, “which imposes on the Member States’ courts and tribunals of last instance a duty to refer matters to the Court of Justice for a preliminary ruling”¹⁰⁰. This would practically mean that since Article 267 supersedes Protocol No.16, the national Courts would be obliged to “to refer questions concerning fundamental rights primarily to the Court of Justice and to respect primarily the decisions of that court”¹⁰¹.

It could, therefore, be considered that the Court’s argumentation, regarding the possible risks due to the mechanism of Protocol No. 16, was ill founded, since it neglected the lack of connection with the EU’s accession to the Convention. In that context, it is rather unsure whether such an assessment did in fact fall within the Court’s jurisdiction. Consequently, the Court’s concerns were swiftly refuted by AG Kokott, who also proposed a solution safeguarding the specific characteristics of the EU, by making direct reference to the primacy of the EU law¹⁰².

3.2.2 Article 344 TFEU

Moving forward to the next point of scrutiny¹⁰³, the Court assessed the impact of the draft agreement on its exclusive jurisdiction and (on a wider scope) the autonomy of the EU legal system, as expressed under Article 344 TFEU which stipulates that:

“Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”.

This practically means that the EU Member States have “granted the Courts of the EU a monopoly on the resolution of disputes”, “for the purpose of settling their disputes in matters concerning EU law”¹⁰⁴. That monopoly is applicable on both disputes between EU Member States and the EU and one or more of its Member States. The Court made also reference to Article 3 of Protocol No 8 EU where it is expressly stated that:

“Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union”.

In addition to the EU law provisions, the Court presented its case law¹⁰⁵ and particularly its judgment in *Commission v Ireland*, where it ruled that Ireland had disregarded the Court’s exclusive jurisdiction

¹⁰⁰ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 141.

¹⁰¹ Ibid.

¹⁰² See to that effect judgment in *Costa/ENEL*, EU:C:1964:66: “It follows [...] that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”.

¹⁰³ See Opinion 2/13, EU:C:2014:2454, paragraphs 201-214.

¹⁰⁴ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 107.

¹⁰⁵ See to that effect, Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgment in *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 282.

by commencing proceedings against the UK in the Arbitral Tribunal provided for by the UNCLOS¹⁰⁶ in order to settle a dispute relating to the MOX nuclear fuels at the Irish Sea¹⁰⁷.

In the aforementioned context, the Court reviewed Article 5 of the draft agreement, which aims to safeguard its jurisdiction by providing that “proceedings before the Court of Justice are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR¹⁰⁸”¹⁰⁹. However, the Court was not satisfied with the level of protection provided by Article 5, since it “still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR¹¹⁰”¹¹¹, thus demanding “the express exclusion of the jurisdiction of the ECtHR under Article 33 of the ECHR over disputes [...] in relation to the application of the ECHR within the scope *ratione materiae* of EU law”.

It is worth mentioning that AG Kokott had also highlighted that issue, without reaching the same conclusion with the Court. In fact, the AG examined the possibility of introducing a rule in the draft agreement, which would safeguard the precedence of Article 344 TFEU over Article 33 ECHR, i.e. in a similar spirit as that essentially proposed by the Court. However, the AG pointed out that “such a far-reaching provision [...] does not [...] appear [...] to be strictly necessary for the purpose of ensuring the practical effectiveness of Article 344 TFEU and thus of preserving this Court’s monopoly of dispute resolution”¹¹². The AG also highlighted that the introduction of such a clause would “implicitly mean that numerous international agreements which the EU has signed in the past are vitiated by a defect, because no such clauses are included in them”¹¹³. Finally the AG concluded that “the possibility of conducting infringement proceedings [...] against Member States that bring their disputes concerning EU law before international courts other than the Court of Justice of the EU, with the added possibility that interim measures may be prescribed within those proceedings if necessary [...] is sufficient to safeguard the practical effectiveness of Article 344 TFEU”¹¹⁴.

It could be suggested that the Court reached a rather strict conclusion in its assessment of the possible effects of the draft agreement on Article 344 TFEU. Indeed, as soon as the ECHR forms an integral part of the EU, it should be safeguarded that any ECHR based and EU law related disputes (between the Member States themselves and/or the EU) should be subject to the Court’s exclusive jurisdiction. However, the preclusion of “any prior or subsequent external control” demanded by the Court¹¹⁵, leads simultaneously to the complete exclusion of any further review by the ECtHR i.e. even after the Court has exclusively ruled on a specific EU law related issue. As Eeckhout commented: “it is hard to see why an Art 33 “intra-EU” case ought to be excluded, if the dispute has first been dealt

¹⁰⁶ United Nations Convention on the Law of the Sea of 10 December 1982.

¹⁰⁷ See judgment in *Commission v Ireland*, C-459/03, EU:C:2006:345, paragraphs 20-58, 123 and 136.

¹⁰⁸ Art. 55 of the ECHR stipulates that: “The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention”.

¹⁰⁹ See Opinion 2/13, EU:C:2014:2454, paragraph 206.

¹¹⁰ Art. 33 of the ECHR stipulates that: “Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party”.

¹¹¹ See Opinion 2/13, EU:C:2014:2454, paragraph 207.

¹¹² See View of Advocate General Kokott, EU:C:2014:2475, paragraph 116.

¹¹³ *Ibid*, paragraph 117.

¹¹⁴ *Ibid*, paragraph 118.

¹¹⁵ See Opinion 2/13, EU:C:2014:2454, paragraph 210.

with by the CJEU”¹¹⁶. Furthermore, in the same spirit, it would be fair to agree with Eeckhout’s comment that: “such a potential case, which may presumed to be rare in practice, would raise questions about the compatibility of EU law with the Convention over which the ECtHR has jurisdiction any way, in the context of individual applications”¹¹⁷. It could, therefore, be argued that the formalistic interpretation of the draft agreement, in terms of its effects on Article 344 TFEU, proposed by the Court, overshadows the main purpose of the accession of the EU to the ECHR i.e. the enhancement of protection of human rights by subjecting the EU and its legal system to independent external control¹¹⁸.

3.2.3 The co-respondent mechanism

The Court continued by evaluating the specific features of the new co-respondent mechanism introduced by the draft agreement¹¹⁹, in order to facilitate the EU accession to the Convention. More specifically, the co-respondent mechanism aimed to “allow the EU to become a co-respondent to proceedings instituted against one or more of its member States and, similarly, to allow the EU member States to become co-respondents to proceedings instituted against the EU”¹²⁰. Indeed this mechanism had been articulated in order to regulate a “unique situation in the Convention system in which a legal act is enacted by one High Contracting Party (i.e. the EU) and implemented by another (i.e. the EU Member States)”¹²¹. The co-respondent mechanism was created in order to facilitate the co-existence of the EU with its Member States within the framework of the Convention and constitutes “a way to avoid gaps in participation, accountability and enforceability in the Convention system”¹²². In its assessment, the Court found three main flaws of the co-respondent mechanism that shall be presented in the following paragraphs.

3.2.3.1 The plausibility assessment by the ECtHR

At a first point, the Court reviewed the systemic implications of the co-respondent mechanism under a scenario, where “the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR”¹²³. According to Article 3(5) of the draft agreement:

“When deciding upon such a request, the Court (i.e. the ECtHR) shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met”.

¹¹⁶ Piet Eeckhout, ‘Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy Or Autarky’, ISSN 2161-0320 (online) Copy Editor: Danielle Leeds Kim © Piet Eeckhout 2015 New York University School of Law New York, NY 10011 USA, pages 976-977, link: <http://jeanmonnetprogram.org/wp-content/uploads/2015/04/JMWP-01-Eeckhout1.pdf> (Accessed: 10/04/2016).

¹¹⁷ See 116.

¹¹⁸ This view was fully shared by members of the EU Convention that prepared the Constitutional Treaty, see Final report of Working Group II, CONV 354/02 of 22 October 2002, pp. 10-11: ‘Incorporation of the Charter//accession to the ECHR’, available on the page: <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00354.en02.pdf> (Accessed: 10/04/2016).

¹¹⁹ See Art. 3 of the Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹²⁰ Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 37.

¹²¹ Ibid, paragraph 38.

¹²² Ibid, paragraph 39.

¹²³ See Opinion 2/13, EU:C:2014:2454, paragraph 223.

In that sense, the Court indicated that such a binding decision would necessarily require the ECtHR to enter a plausibility assessment of “the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions”¹²⁴. However, such an assessment would not be acceptable by the Court, since it would result in the ECtHR’s interference with “the division of powers between the EU and its Member States”¹²⁵.

In the same tone with the Court, AG Kokott reviewed the plausibility assessment as an “obvious shortcoming in the design of the co-respondent mechanism”¹²⁶, which would create a situation “incompatible with the autonomy of the EU legal order”¹²⁷, thus putting into risk “the aim of ensuring an effective defence of EU law before the ECtHR that underpins Article 1(b)¹²⁸ of Protocol No 8”¹²⁹. According to the AG’s view, the EU law autonomy is “predicated on the EU and its Member States being able to decide on their own responsibility, without any non-EU entity being entitled to influence that decision, whether a case concerns EU law and whether participation as a co-respondent appears, therefore, to be necessary”¹³⁰. The AG concluded in a similar fashion with the Court, that the compatibility of the co-respondent mechanism with Article 1(b) of Protocol No 8 would be accomplished “only if any requests for leave to become a co-respondent are not subjected to a plausibility assessment by the ECtHR”¹³¹.

At this point, it could be suggested that the strict approach adopted by both the Court and the AG emphasizing on the possible implications of the plausibility assessment by the ECtHR seems to be partially justified. On the other hand, as Lazowski and Wessel indicated: “shutting out a role of an external court whenever the interpretation of Union law is at stake could violate the very idea of the Strasbourg system”¹³². Indeed, if the ECtHR is not allowed to assess EU law, while fulfilling its external control role, it shall not be able to ensure the effective protection of the fundamental human rights. In other words, the accession of the EU to the Convention might seemingly cause certain vulnerabilities, nevertheless it constitutes a constitutional obligation¹³³ leading to certain necessary sacrifices.

3.2.3.2 Joint responsibility of respondent and co-respondent – possibility of reservations

As a second point, the Court examined Article 3(7) of the draft agreement¹³⁴, which indicates that:

“If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation”.

¹²⁴ See Opinion 2/13, EU:C:2014:2454, paragraph 224.

¹²⁵ Ibid, paragraph 225.

¹²⁶ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 233.

¹²⁷ Ibid, paragraph 232.

¹²⁸ Article 1(b) of Protocol No. 8 stipulates that the draft agreement “shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate”.

¹²⁹ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 231

¹³⁰ Ibid, paragraph 232.

¹³¹ Ibid, paragraph 232.

¹³² Adam Lazowski & Ramses A. Wessel, ‘When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR’, 16 GERMAN L. J. 179 (2015), link:

<https://www.utwente.nl/bms/pa/research/wessel/wessel108.pdf>, pages 12-13 (Accessed: 10/04/2016).

¹³³ See Article 6(2) of the TEU.

¹³⁴ See Opinion 2/13, EU:C:2014:2454, paragraphs 226-228.

Accordingly, the Court highlighted that this provision is failing to take into consideration the possibility that a Member State “may have made a reservation in accordance with Article 57 of the ECHR^{135/136}, thus precluding its responsibility. The Court concluded that the aforementioned provision was “at odds with Article 2 of Protocol No 8 EU, according to which the accession agreement is to ensure that nothing therein affects the situation of Member States in relation to the ECHR, in particular in relation to reservations thereto”¹³⁷.

Furthermore, AG Kokott shared the Court’s concerns and similarly indicated that the draft agreement could only be concluded “if it contains appropriate clarification to the effect that the principle of joint responsibility of respondent and co-respondent is not to affect any reservations made by the contracting parties within the meaning of Article 57 ECHR”¹³⁸.

The arguments expressed by the Court and the AG referred to an actual but rather unlikely situation. Indeed, there are several parties that have expressed reservations to the ECHR and its protocols. However, such reservations are known¹³⁹ to the ECtHR and have, mostly, a limited scope. Furthermore, it must be highlighted that the character of the co-respondent is voluntary. This means that an EU Member State “may become co-respondent”¹⁴⁰ either by accepting the ECtHR’s invitation or by decision of the ECtHR upon the request of the EU Member State¹⁴¹. Accordingly, if the Member State’s responsibility is specifically precluded due to a reservation, that Member State may refuse becoming a co-respondent.

3.2.3.3 Determination of responsibilities in the relationship between the EU and its Member States

On the third and final point of its co-respondent related analysis, the Court commented on the second part of Article 3(7) of the draft agreement where it is stated that the respondent and co-respondent shall be deemed jointly responsible for the ECHR violations “*[u]nless the Court (i.e. the ECtHR), on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible*”.

Furthermore, the Court also referred to paragraph 62 of the explanatory report where it is further explained that “[a]ppportioning responsibility separately to the respondent and the co-respondent(s) on any other basis would entail the risk that the Court would assess the distribution of competences between the EU and its member States”¹⁴².

Despite the restrictive scope of the ECtHR’s discretion to determine such responsibilities, neither the Court nor the Advocate General seemed to be convinced that the autonomy of the EU law was safeguarded. According to AG Kokott, when the ECtHR is applying “this clause in a way that is binding

¹³⁵ Article 57 of the ECHR stipulates that: “Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article”.

¹³⁶ See Opinion 2/13, EU:C:2014:2454, paragraph 227.

¹³⁷ Ibid, paragraph 228.

¹³⁸ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 265

¹³⁹ For a list of the reservations see link: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=RmjwnRNH, (Accessed: 10/04/2016).

¹⁴⁰ See to that effect Art. 3(2) and 3(3) of the draft agreement.

¹⁴¹ See to that effect Art. 3(5) of the draft agreement.

¹⁴² Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 62.

on the institutions and Member States of the EU, the ECtHR is stating its views on their respective competences and responsibilities as defined in EU law¹⁴³. The Court also dismissed Article 3(7) and concluded that permitting “the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility” would be identical to “allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter’s exclusive jurisdiction”¹⁴⁴.

The argumentation of both the Court and the Advocate General seem to propose a rather restrictive view of the ECtHR’s role in the context of the ECHR application by the EU and its Member States. However, as Eeckhout highlighted: “the CJEU confuses attribution of international responsibility with the EU internal division of powers”¹⁴⁵. According to Eeckhout, the attribution of international responsibility “is built on the attribution of a breach - in the ECHR case to either the EU, a Member State, or both the EU and a Member State”¹⁴⁶. In that sense, as reiterated in the explanatory report, the ECtHR’s role simply cannot be interfering with the autonomy of the EU, as it merely focuses on “whether there has been a violation of the Convention and not on the validity of an act of a High Contracting Party or of the legal provisions underlying the act or omission that was the subject of the complaint”¹⁴⁷.

3.2.4 The procedure for the prior involvement of the Court of Justice

3.2.4.1 Introduction

Moving forward, the Court expressed its dissatisfaction with the prior involvement procedure¹⁴⁸, as described in Article 3(6) of the draft agreement, which stipulates the following:

“In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded [...] sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court”.

Accordingly, the procedure for the prior involvement of the Court had been introduced in order to coordinate the EU’s accession to the Convention with the requirements of both the EU legal order and the ECHR itself. Indeed, the scope of application of the prior involvement procedure was practically outlined in the joint communication from the Presidents of the two courts¹⁴⁹. In the aforementioned communication, a clear distinction was made between:

¹⁴³ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 179.

¹⁴⁴ See Opinion 2/13, EU:C:2014:2454, paragraph 234.

¹⁴⁵ See 116.

¹⁴⁶ See 116.

¹⁴⁷ Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 62.

¹⁴⁸ See Opinion 2/13, EU:C:2014:2454, paragraphs 236-248.

¹⁴⁹ See ‘Joint communication from Presidents Costa and Skouris’, Strasbourg and Luxembourg, 24 January 2011, link: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf, (Accessed: 10/04/2016).

- a. The direct actions i.e. “individual applications directed against measures adopted by EU institutions subsequent to the accession of the EU to the Convention”¹⁵⁰ and;
- b. The indirect actions i.e. “applications against acts adopted by the authorities of the Member States of the EU for the application or implementation of EU law”¹⁵¹.

Subsequently, it was indicated that in the case of direct actions, the applicants would be obliged by the principle of subsidiarity, expressed in Article 35(1) of the ECHR to “refer the matter first to the EU Courts, in accordance with the conditions laid down by EU law”¹⁵². According to the aforementioned provision of the Convention:

*“The Court (i.e. ECtHR) may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken”*¹⁵³.

The principle of subsidiarity would, therefore, constitute an internal safety mechanism, guaranteeing that “the review exercised by the ECHR will be preceded by the internal review carried out by the CJEU”¹⁵⁴

However, in the case of indirect actions, it would be possible, yet not a usual phenomenon, that the prior involvement procedure would need to be triggered. That would be the case if “for whatever reason, a reference for a preliminary ruling –under Article 267 TFEU- were not made”, by the national courts and tribunals, thus depriving the Court of the “opportunity to review the consistency of that law with the fundamental rights guaranteed by the Charter”¹⁵⁵.

In that context, the Court expressed two main objections to the prior involvement procedure, which will be further discussed below and led to the conclusion that “the arrangements for the operation of the procedure for the prior involvement of the Court of Justice provided for by the agreement envisaged do not enable the specific characteristics of the EU and EU law to be preserved”¹⁵⁶.

3.2.4.2 The assessment of the question whether the prior involvement of the ECJ is necessary

Firstly, the Court expressed its disagreement with Article 3(6) of the draft agreement and with paragraphs 65 and 66 of the draft explanatory report, in that they do not exclude the possibility that the ECtHR would decide if the Court “has already given a ruling on the same question of law”¹⁵⁷. According to the Court, permitting “the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice”. In that sense, the Court stated that such a question should be assessed by “the competent EU institution”¹⁵⁸, “whose decision should bind the ECtHR”¹⁵⁹. Subsequently, the Court emphasized on the need to amend the prior

¹⁵⁰ See 149.

¹⁵¹ See 149.

¹⁵² See 149.

¹⁵³ See to that effect, judgments in *Akdivar And Others -v- Turkey*, application no. 21893/93, CE:ECHR:1998:0401JUD002189393, paragraphs 65 and 66, Reports of Judgments and Decisions 1996-IV, and in *Burden v. the United Kingdom* [GC], application no. 13378/05, CE:ECHR:2008:0429JUD001337805, paragraph 2.

¹⁵⁴ See 149.

¹⁵⁵ See 149.

¹⁵⁶ See Opinion 2/13, EU:C:2014:2454, paragraph 248.

¹⁵⁷ Ibid, paragraph 238.

¹⁵⁸ Ibid, paragraph 241.

¹⁵⁹ Ibid, paragraph 238.

involvement procedure, so that that the EU would be “fully and systematically informed” about any pending case in front of the ECtHR, thus allowing the reviewing intervention of the “competent EU institution”¹⁶⁰.

In the same spirit with the Court, AG Kokott observed that it would not be in line with the EU law autonomy to assign the ECtHR solely with “the decision regarding the necessity of the prior involvement of the Court”¹⁶¹. However, the AG seemed to be adopting a more mild view, since she did not deem necessary to replace the ECtHR in its prior involvement procedure role with an EU institution. Instead, the AG chose to stress out the need to clarify that “the ECtHR may dispense with the prior involvement of the Court of Justice only when it is obvious that the Courts of the EU have already dealt with the specific legal issue raised by the application pending before the ECtHR”¹⁶². The AG practically assimilated the ECtHR’s function and its inherent problems in the prior involvement procedure with the duty of the supreme national courts to “make references for preliminary rulings to the Court of Justice pursuant to the third paragraph of Article 267 TFEU”¹⁶³. In that sense, the AG’s proposal for the rationalization of the margin of discretion within the prior involvement procedure was founded on the “act éclairé” and “acte clair” doctrines, introduced in CILFIT¹⁶⁴. In that landmark case, the Court stated that a national supreme court: “is required, where a question of community law is raised before it, to comply with its obligation to bring the matter before the court of justice, unless it has established that the question raised is irrelevant or that the community provision in question has already been interpreted by the court of justice or that the correct application of community law is so obvious as to leave no scope for any reasonable doubt”¹⁶⁵.

In that respect, it could be suggested that is difficult to see why the prior involvement procedure in its proposed form constituted an insurmountable obstacle for the accession of the EU to the Convention. Firstly, as confirmed by the AG in her view, “the ECtHR does not make any pronouncements in its judgments regarding the binding interpretation or validity of the legislation of the contracting parties concerned. Instead, it confines itself to interpreting the ECHR and establishing any violations of the fundamental rights enshrined within it”¹⁶⁶. This statement should suffice for safeguarding the autonomy of EU law, since the ECtHR cannot, by its very own nature, interfere with the Court’s monopoly in interpreting EU law. Furthermore, according to Besselink: “the prior involvement procedure is premised on a situation which is unlawful”¹⁶⁷. That means that under the scenario of indirect actions, national supreme courts would be normally obliged to refer a question to the Court for a preliminary ruling, unless the CILFIT doctrines would be applicable. Subsequently, a failure of a national supreme court to submit a question to the Court, despite the fact that such a

¹⁶⁰ See Opinion 2/13, EU:C:2014:2454, paragraph 241.

¹⁶¹ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 183

¹⁶² Ibid, paragraph 184

¹⁶³ Ibid, reference 122

¹⁶⁴ See, judgment in Cilfit and Others, C-283/81, EU:C:1982:335, specifically paragraphs 14 and 16.

¹⁶⁵ See, judgment in Cilfit and Others, EU:C:1982:335, operative part.

¹⁶⁶ See View of Advocate General Kokott EU:C:2014:2475, paragraph 122. See also judgment of the ECtHR in *Kruslin v France*, application No 11801/85, CE:ECHR:1990:0424JUD001180185 paragraph 29, Series A no. 176-A, and its decision in *W. v. the Netherlands*, application no. 20689/08, CE:ECHR:2009:0120DEC002068908.

¹⁶⁷ Leonard F. M. Besselink, ‘Should the European Union Ratify the European Convention on Human Rights?’ in Follesdal (ed.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge: CUP, 2014), pp.301–333, link: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2334698, (Accessed: 12/04/2016).

question is not irrelevant and does not fall under the “act éclairé” or “acte clair”, would trigger the liability of that Member State for judicial breaches of EU law¹⁶⁸.

3.2.4.3 The interpretation of secondary law by the Court, through the prior involvement procedure

Secondly, the Court expressed its dissatisfaction about its limited role within the prior involvement procedure, specifically regarding the assessment of secondary law, emanating from Article 3(6) of the draft agreement and paragraph 66 of the draft explanatory report¹⁶⁹. Article 3(6) of the draft agreement is enabling the Court to assess “the compatibility with the rights at issue defined in the Convention”. However, as further clarified on paragraph 66 of the draft explanatory report: “assessing the compatibility with the Convention shall mean to rule on the validity of a legal provision contained in acts of the EU institutions” i.e. secondary law “or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments” i.e. primary law. The Court, therefore, objected to its limited scope of action in terms of secondary law and claimed that it “adversely affects the competences of the EU and the powers of the Court of Justice”. According to the Court, that is the case since it is restricted from providing “a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR”¹⁷⁰. Additionally, the Court remarked that if it is not allowed to “provide the definitive interpretation of secondary law”, while the ECtHR “had itself to provide a particular interpretation from among the plausible options”, the Court’s exclusive jurisdiction over the definitive interpretation of EU law would be breached¹⁷¹.

In her View, the Advocate General Kokott similarly highlighted the negative effect of the Court’s limited powers of assessment in connection with its role in the prior involvement procedure. According to the AG, limiting “the subject-matter of prior involvement to questions of pure legality or validity would be to blatantly disregard the powers of the Courts of the EU, as though the only choice available [...] were between black and white”¹⁷². However, the AG focused its scrutiny only on the explanatory report, since she suggested that the term “assessment of compatibility in Article 3(6) of the draft agreement”¹⁷³ was “sufficiently broad”¹⁷⁴ to empower the Court with full interpretative authority i.e. both on primary and secondary law. Finally, in contrast with the Court’s negative conclusion, the AG determined that “the draft agreement should therefore be declared compatible with the Treaties”¹⁷⁵ under one fundamental condition: it must be clarified that “the assessment of the compatibility of EU law with the ECHR [...] under Article 3(6) of the draft agreement [...] covers questions of interpretation not only in respect of EU primary law but also in respect of secondary law”¹⁷⁶.

Further to the points raised by the Court and the Advocate General, it is worth mentioning that the issue of the Court’s role with regard to the prior involvement procedure had been widely discussed during the accession negotiations. Accordingly, the French delegation had supported the idea of

¹⁶⁸ See that that effect judgment in *Köbler v Republik Österreich*, C-224/01, EU:C:2003:513.

¹⁶⁹ See Opinion 2/13, EU:C:2014:2454, paragraphs 242-247.

¹⁷⁰ *Ibid*, paragraph 247.

¹⁷¹ *Ibid*, paragraph 246.

¹⁷² See View of Advocate General Kokott, EU:C:2014:2475, paragraph 131.

¹⁷³ *Ibid*, paragraph 132.

¹⁷⁴ *Ibid*.

¹⁷⁵ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 135.

¹⁷⁶ *Ibid*.

extending the Court's role into the interpretation of secondary law and had for that reason proposed the following wording for Article 3(6):

"In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with or interpretation with regard to (emphasis added) the Convention rights at issue of the provision of European Union law [...] then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment [...] The provisions of this paragraph shall not affect the powers of the Court in matters relating to the interpretation of the Convention (emphasis added)"¹⁷⁷.

That proposal did not become part of the final text of the draft agreement, which might have contributed to the uncertainty created by the clarifications included in paragraph 66 of the draft explanatory report. However, taking into consideration the possibility of an internal solution to the issue, in the form of the clarifications proposed by the Advocate General, it could not be supported that the Court's objection about its role in the prior involvement procedure could be deemed sufficient to justify halting the accession of the EU to the ECHR.

3.2.5 The specific characteristics of EU law as regards judicial review in CFSP matters

3.2.5.1 Introduction

The Common Foreign and Security Policy of the EU ("CFSP") had been introduced by the 1993 Maastricht Treaty¹⁷⁸ and constituted one of the three pillars of the European Union (alongside with the European Communities and the Police and Judicial Co-operation in Criminal Matters ("PJCC")). The Lisbon treaty, which came into force in 2009, abolished the concept of the pillar system and established the EU's legal personality¹⁷⁹. That practically signaled the EU's ability to conclude and negotiate international agreements and join international conventions, such as the ECHR¹⁸⁰. Furthermore, Lisbon Treaty reinforced the status and functions of the CFSP, specifically with the introduction of the post of EU High Representative for Foreign Affairs & Security Policy and the European External Action Service (EEAS), EU's diplomatic service. The objectives of the CFSP are, among others, to preserve peace, strengthen international security, promote international cooperation, consolidate and support democracy, the rule of law, human rights and the principles of international law¹⁸¹.

3.2.5.2 Analysis

In the final part of its Opinion, the Court criticized the draft agreement focusing on the judicial review of "certain acts, actions or omissions performed in the context of the CFSP" and more specifically on "those whose legality the Court of Justice cannot [...] review in the light of fundamental rights"¹⁸².

¹⁷⁷ Council of the European Union, Accession of the European Union to the ECHR: Working Document from the Presidency (November 4, 2011) Doc.No.DS1675/11, para.19, link: <http://www.statewatch.org/news/2011/nov/eu-council-echr-accession-fop-ds-1675-11.pdf>, (Accessed: 13/04/2016).

¹⁷⁸ The Treaty on European Union (TEU), signed in Maastricht on 7 February 1992, entered into force on 1 November 1993.

¹⁷⁹ See to that effect, Art. 47 TEU.

¹⁸⁰ As stipulated in Article 6(2) of the TEU.

¹⁸¹ See to that effect, Art. 21 TEU under title V ("General Provisions on the Union's External Action And Specific Provisions on the Common Foreign and Security Policy").

¹⁸² See Opinion 2/13, EU:C:2014:2454, paragraph 254.

Indeed, the Court enjoys only limited jurisdiction within the CFSP area, as clearly reflected in Article 24(1) TEU, which restricts its role “to monitor compliance with Article 40 TEU” and “to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union¹⁸³”.

On the other hand, following the accession of the EU to the Convention, the ECtHR would obtain an influential role in the CFSP matters. As highlighted by AG Kokott, “the ECtHR will have the task of examining applications from persons and States in all areas of EU law — including, therefore, the CFSP — and of establishing any violations of the ECHR for which the EU may be responsible as respondent [...] or as co-respondent”¹⁸⁴. This could practically lead to a post-accession scenario, where the ECtHR could hold the EU liable for violating the Convention in CFSP matters (for example in the case of an EU military action), either as a respondent under Article 1(3) of the draft agreement or as a co-respondent, under Art 1(4) respectively.

It is, therefore, evident that the broad jurisdiction of the ECtHR within the CFSP area in contrast with the limited scope of action granted to the Court in the same sector creates certain discrepancies. According to the Court that happens because a non-EU body i.e. the ECtHR, is exclusively empowered to assess if certain “acts, actions or omissions on the part of the EU” performed in the context on the CFSP are in accordance with the Convention¹⁸⁵. Subsequently, the Court referred to its Opinion of 8 March 2011, where it ruled that “jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU”¹⁸⁶. The Court, therefore, concluded that the draft agreement “fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters”, even though it simultaneously admitted that this failure “is a consequence of the way in which the Court’s powers are structured at present”¹⁸⁷.

Interestingly, the Advocate General, did not share the Court’s criticism of the draft agreement’s effects on the special characteristics of EU law in her analysis. Quite on the contrary, the AG highlighted that “the authors of the Treaty of Lisbon did not themselves see any contradiction between the very limited jurisdiction of the Courts of the EU in relation to the CFSP, on the one hand, and recognition of the jurisdiction of the ECtHR in consequence of the EU’s accession to the ECHR, on the other”¹⁸⁸. Furthermore, the AG maintained that “the effectiveness of legal protection for individuals is strengthened, rather than weakened, in such a situation by the recognition of an international jurisdiction”¹⁸⁹ i.e. the ECtHR. In that context, the AG remained reassured that the ECHR shall be effectively applied within the CFSP area by the legal protection provided by the ECtHR and

¹⁸³ The second paragraph of Art. 275 TFEU stipulates: “However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union”.

¹⁸⁴ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 187.

¹⁸⁵ See Opinion 2/13, EU:C:2014:2454, paragraph 255.

¹⁸⁶ See, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 78, 80 and 89.

¹⁸⁷ See Opinion 2/13, EU:C:2014:2454, paragraph 257.

¹⁸⁸ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 194.

¹⁸⁹ Ibid, paragraph 193.

the national courts and tribunals. As the AG remarked, “it is for those national courts and tribunals to penalise any violations of the ECHR in connection with the CFSP and to help to implement the ECHR¹⁹⁰, unless the Courts of the EU, exceptionally, have jurisdiction pursuant to the second paragraph of Article 275 TFEU¹⁹¹. The AG reached, therefore, the opposite conclusion than that of the Court, as she clearly stated that “the principle of the autonomy of EU law does not preclude the EU from recognising the jurisdiction of an international court whose jurisdiction in [...] the field of the common foreign and security policy [...] extends further than that of the [...] Court of Justice of the EU”¹⁹².

Admittedly, the analysis of the Advocate General Kokott, exposed the ineffectiveness of the Court’s argumentation in attempting to connect the disparity between its restricted role within the CFSP matters and the enhanced presence of the ECtHR in the same area with the specific characteristics of the EU law. In that sense, the AG pointed out that “the absence of sufficient arrangements within the EU, by which the autonomy of EU law alone can be protected, can hardly be used as an argument against recognition of the jurisdiction of the judicial body of an international organization”¹⁹³. As Peers suggested, the Court’s objections to the ECtHR’s role is “the judicial politics of the playground”¹⁹⁴. Indeed, it must be highlighted that in addition to the Court’s Opinion, the ECtHR’s jurisdiction within the CFSP was also widely debated during the phase of negotiations, as some of the parties were openly supporting its exclusion from the draft agreement. As particularly indicated in a Meeting report from 2013: “the proposed exclusion of CFSP causes major concern for different reasons (political sensitivity; restriction of the jurisdiction of the Strasbourg Court) and should be deleted”¹⁹⁵. However, taking into consideration the case-law of the ECtHR, it is difficult to see how the Member States could effectively achieve excluding ECtHR’s jurisdiction in CFSP matters. In *M.S.S.*, the ECtHR referred to “the Bosphorus equivalence doctrine”¹⁹⁶ and maintained the view that its scope is limited “to Community law in the strict sense – at the time the “first pillar” of European Union law”¹⁹⁷. Accordingly, in case of an alleged breach of the ECHR within the CFSP matters, which traditionally do not constitute part of the EU law hard core, the ECtHR could hold the Member States involved fully liable for their actions, as they could be deemed exercising State discretion. As concluded by Eeckhout: “this scenario is worse for the EU than a review post accession, because the EU cannot participate in the ECtHR proceedings to defend itself”¹⁹⁸.

¹⁹⁰ See to that effect the second subparagraph of Article 19(1) TEU, in conjunction with Article 274 TFEU.

¹⁹¹ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 195.

¹⁹² Ibid, paragraph 191.

¹⁹³ Ibid, paragraph 193.

¹⁹⁴ Steve Peers, ‘The CJEU and the EU’s Accession to the ECHR: A Clear and Present Danger to Human Rights Protection’ (December 18, 2014), EU Law Analysis, link: <http://eulawanalysis.blogspot.be/2014/12/the-cjeu-and-eus-accession-to-echr.html>, (Accessed: 14/04/2016).

¹⁹⁵ Fourth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Meeting Report, 47+1(2013) R04, Strasbourg, 23 January 2013, page 14, link: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/Web_47_1\(2013\)R04_EN_final.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/Web_47_1(2013)R04_EN_final.pdf), (Accessed: 14/04/2016).

¹⁹⁶ See 42.

¹⁹⁷ See judgment in *M.S.S. v Belgium and Greece*, application No 30696/09, CE:ECHR:2011:0121JUD003069609, paragraph 338.

¹⁹⁸ See 116.

4 The effects of Opinion 2/13

The incompatibility of the draft agreement with EU law, as opined by the Court, signals a prolonged period of stagnation for all the hopes and expectations emanating from the realization of the EU's accession to the ECHR. Revisiting the aims and the desired effects of the accession, it could be suggested that the Court's Opinion has been detrimental to the interests of the parties involved in – and directly affected by – this procedure.

In that sense, due to the Court's rejection of the draft agreement, the gap in human rights legal protection shall remain unbridged, as the EU will continue being unbound by the Convention and unaffected by the ECtHR's jurisdiction. The European citizens will continue being unprotected when their human rights are affected by the actions or omissions of the EU. Furthermore, the EU will continue being regarded as 'above the law', since it will not be bound by the same rules and obligations "as those which, time and again, it requires current and prospective Member States to accept"¹⁹⁹. With its Opinion, the Court dismissed "this element of external judicial control of compliance with basic standards of fundamental rights"²⁰⁰ that according to the AG Kokott would "constitute the most significant difference in comparison with the present legal position [...] representing the real 'added value' of the EU's proposed accession to the ECHR"²⁰¹.

Furthermore, the Court set under scrutiny the harmonious development of the case-law in human rights matters, thus creating insecurity regarding the applicable level of protection. As it was noted by Douglas-Scott, in the period prior to Opinion 2/13: "the ECHR has been recognised by the ECJ as an integral part of EU law for over 40 years and there has not been a case in which the CJEU has deliberately gone against Strasbourg's interpretation of the ECHR"²⁰². However, in the light of Opinion 2/13, it would be natural to assume that the ECtHR could change its stance towards the Court. The first signs of such a possibility became immediately evident as Dean Spielmann, President of the Strasbourg Court, commented that following Opinion 2/13 "the onus will be on the Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of this situation"²⁰³. It could, therefore, be expected that the ECtHR might consider expanding its jurisdiction by setting aside "the Bosphorus equivalence doctrine" or applying stricter criteria to the EU's principle of mutual trust, while the Court would simultaneously elaborate on its own protection standards focusing on the Charter provisions, thus sidelining the ECHR. Accordingly, the national courts and consequently the EU citizens could potentially be bound by both the ECtHR's and the Court's contradicting interpretations, regarding the level of protection stemming from the same fundamental right. An example of this controversy could be traced in collective action-related disputes, where in certain cases the ECJ has arguably provided less protection than the minimum²⁰⁴ established by the ECtHR's case law. Indeed, the Court has stated in *Viking* that "collective action such as that at issue in the main proceedings constitutes a restriction on freedom of

¹⁹⁹ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 1.

²⁰⁰ *Ibid*, paragraph 164.

²⁰¹ *Ibid*.

²⁰² Sionaidh Douglas-Scott; 'The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon', Submitted for publication in de Vries, Bernitz & Weatherill; *Five Years Binding EU Charter of Fundamental Rights*. Hart Publishing, 2015 (forthcoming), page 14.

²⁰³ Annual Report 2014, Registry of the European Court of Human Rights Strasbourg, 2015, ISBN: 978-92-871-9919-5, France, March 2015.

²⁰⁴ See Article 53 of the ECHR.

establishment”²⁰⁵. On the other hand, the ECtHR condemned the Turkish Government in *Enerji Yapi-Yol Sen*²⁰⁶ for preventing public-sector employees from taking part in a one-day national strike. The ECtHR concluded that the Turkish Government “had failed to justify the need for the impugned restriction in a democratic society” and that the ban “did not answer a ‘pressing social need’ and constituted a “disproportionate interference with the applicant union’s rights”²⁰⁷. In that sense, a comparison of the judgements delivered by the two courts on the limitations of the right to strike can be indicative of the divergences that may occur in the near future, that being a direct consequence of the deregulating effect of the Court’s Opinion.

Finally, it could be fair to comment that Opinion 2/13 has affected the credibility of the EU and simultaneously weakened the strength of the ECHR. In fact, the Court’s rejection of the draft agreement and the long list of flaws it attributed to the outcome of a long negotiation process reflected the incoherence between the Union and the “greater Europe”²⁰⁸. The Court confirmed the EU’s reluctance to accept any form of external control despite the fact that “Member States have transferred substantial competences to the Union and that adherence to the ECHR has been made a condition for membership of new States in the Union”²⁰⁹. The EU could be, therefore, perceived as having a standing above the law, since it denies fulfilling its own primary law obligations²¹⁰, while simultaneously criticizing other EU and non EU-States for not effectively protecting the fundamental human rights. At the same time, the Court sent a direct message to certain member states of the Council of Europe (among others Turkey and Russia) that the applicability of the fundamental rights emanating from the ECHR is negotiable, thus encouraging them to raise their own shield of autonomy against the ECtHR’s jurisdiction.

5 The way forward

As mentioned above, the Opinion 2/13 of the Court has postponed the accession of the EU to the ECHR ‘ad kalendas Graecas’. Given the indisputable fact that EU is obliged to accede to the Convention, the Court’s conclusion constituted a surprise and attracted rather strong criticism²¹¹. The reaction of Dean Spielmann, President of the Strasbourg Court, as expressed in Strasbourg Court’s Annual Report, was characteristic of the level of discomfort:

²⁰⁵ See judgment in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP*, C-438/05, EU:C:2007:772, paragraph 74.

²⁰⁶ See judgment in *Enerji Yapi-Yol Sen v Turkey*, application no 68959/01, CE:ECHR:2009:0421JUD006895901.

²⁰⁷ See to that effect, press release issued by the Registrar Chamber Judgment *Enerji Yapi-Yol Sen V. Turkey*, 21.04.2009.

²⁰⁸ See to the opposite: Chairman of Working group II ‘Incorporation of the Charter/ accession to the ECHR’; ‘Final Report of Working Group II’, CONV 354/02 WG II 16, 2002, pages 11-12, link: <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00354.en02.pdf>, (Accessed: 18/04/2016).

²⁰⁹ Ibid.

²¹⁰ See Art. 6(2) of the TEU.

²¹¹ See to that effect: Walther Michl, ‘Thou shalt have no other courts before me’ *Verfassungsblog*, 23 December 2014, link: <http://www.verfassungsblog.de/en/thou-shalt-no-courts/> (Accessed: 04/04/2016); Steve Peers, ‘The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection’ 18 December 2014, *EU Law Analysis*, link: <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html> (Accessed: 14/04/2016); Aidan O’Neill, ‘Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty’, *EUtopia Law*, 18 December 2014, link: <http://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/> (Accessed: 15/04/2016).

“Bearing in mind that negotiations on European Union accession have been under way for more than thirty years, that accession is an obligation under the Lisbon Treaty and that all the member States along with the European institutions had already stated that they considered the draft agreement compatible with the Treaties on European Union and the Functioning of the European Union, the CJEU’s unfavourable opinion is a great disappointment”²¹².

The surprise created by the Court’s rejection of the draft agreement is further enhanced, given the fact that Court was aware of the negotiations progress and was provided the chance to express its comments and concerns²¹³ on multiple occasions. In fact a delegate of the Court was allowed to participate as an observer “in the meetings of the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons [...] for the duration of the negotiation process of the Agreement for the Accession of the European Union to the European Convention on Human Rights”²¹⁴. Interestingly, in Opinion 2/13, the Court refrained from proposing remedies to the incompatibility of the draft agreement with the Treaties, which delivers a clear message about the distance that needs to be covered towards the fulfilment of the accession target. Quite on the contrary, Advocate General Kokott adopted a rather positive view by concluding that the draft agreement “is compatible with the Treaties”²¹⁵ provided that certain binding reassurances shall be provided under international law.

Accordingly, the accession of the EU to the ECHR appears to have reached a dead end road at its current form. On the one hand, the accession is binding, an effect that cannot be ignored by the EU institutions. Indeed, failure to act shall mean an infringement of the Treaties and will empower “the Member States and the other institutions of the Union” to “bring an action before the Court of Justice of the European Union to have the infringement established”²¹⁶. On the other hand, the Opinion of the Court can equally not be by-passed, as based on Article 218(11) of the TFEU “where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised”. In that given context, the EU is obliged to accede to the ECHR by either proceeding to an amendment of the Treaties or by re-opening the draft agreement negotiations process.

As a first alternative, the Member States of the EU could consider amending the Treaties by taking into consideration the points raised in Opinion 2/13 and specifically that Court’s comment that “as the EU has not acceded to the ECHR, the latter does not constitute a legal instrument which has been

²¹² Annual Report 2014, Registry of the European Court of Human Rights Strasbourg, ISBN: 978-92-871-9919-5, France, March 2015.

²¹³ See to that effect, ‘Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms’, link: http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf (Accessed: 15/04/2016) and ‘Joint communication from Presidents Costa and Skouris’, Strasbourg and Luxembourg, 24 January 2011, link: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf, (Accessed: 10/04/2016).

²¹⁴ See 13714/10. IS/tt. 1. DG H 2B, Council of the European Union, Brussels, 17 September 2010, link: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013714%202010%20INIT> (Accessed: 15/04/2016).

²¹⁵ See View of Advocate General Kokott, EU:C:2014:2475, paragraph 280.

²¹⁶ As stipulated in Art. 265 TFEU.

formally incorporated into the legal order of the EU^{217,218}. Given the fact that this option would be time consuming and technically complicated, Morijn²¹⁹ recommended amending “the existing Treaty text or that of the Charter” by focusing “not so much at facilitating EU accession at any cost, but at clarifying the desired status of the ECHR as a matter of Union law”. In that sense Morijn proposed to “insert an explicit instruction (including for the Court) in article 6 TEU and/or the Charter and/or the Charter’s Explanations to the effect that the Charter and Union law general principles can only be given meaning by explicitly referring to (and taking on board the substantive content of) the ECHR and the Strasbourg Court’s interpretation of it”²²⁰. Notwithstanding the practical effect of such a proposal, the solution of a Treaty amendment may not currently find many supporters within the EU, given the fact that 24²²¹ of the 28 Member States had already concluded that “the draft agreement is compatible with the Treaties”²²².

As a second alternative, the drafters of the rejected accession agreement would need to return to the table of negotiations, taking into account the rather long list of conflict points highlighted by the Court. However, given the tedious negotiations among the 47 Members of the Council of Europe and the stance of specific countries (for example: Russia) during that process, the chances of a successful re-negotiation are rather low. In that sense, the statement made by the Representative of Russia during the second negotiation meeting in response to draft amendments proposed by the EU, at that time, is indicative of the atmosphere during a possible re-negotiation process:

“Therefore, we will look at the EU proposals having in mind that we will also have the right to present our own amendments to the draft that was agreed by the CDDH Working Group, as well as to the documents circulated by the EU. We assume that our possible proposals will have the same status as the draft amendments proposed by the EU. We hope as well that future negotiations will really be negotiations between 47 individual member States and the European Commission and not between a «European Union block » and those who are not members of the European Union”²²³.

As an additional and rather ground-breaking solution, Besselink proposed solving the issue of the accession of the EU to the ECHR following the Court’s disapproval of the draft agreement by introducing a “Notwithstanding Protocol”, stipulating:

²¹⁷ See to that effect, to that effect, judgments in Kamberaj, C 571/10, EU:C:2012:233, paragraph 60, and Åkerberg Fransson, C 617/10, EU:C:2013:105, paragraph 44.

²¹⁸ See Opinion 2/13, EU:C:2014:2454, paragraph 179.

²¹⁹ John Morijn, ‘After Opinion 2/13: how to move on in Strasbourg and Brussels?’, Posted on January 5 2015, link: <https://eutopialaw.com/2015/01/05/after-opinion-213-how-to-move-on-in-strasbourg-and-brussels/>, (Accessed: 17/04/2016).

²²⁰ See 219.

²²¹ Based on the observations that were submitted to the Court in writing or orally at the hearing by the Belgian, Bulgarian, Czech, Danish, German and Estonian Governments, Ireland, the Greek, Spanish, French, Italian, Cypriot, Latvian, Lithuanian, Hungarian, Netherlands, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish and United Kingdom Governments, and by the Parliament and the Council.

²²² See Opinion 2/13, EU:C:2014:2454, paragraph 109.

²²³ See document 47+1(2012)002, ‘Second negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights’, ‘Relevant excerpts from the report of the 75th meeting of the CDDH’, Strasbourg, 17-19 September 2012, link: http://www.coe.int/t/dghl/standardsetting/hrpolicy/accesion/Working_documents/47_1%282012%2902_Ext_racts_CDDH_Report_EN.pdf, (Accessed: 17/04/2016).

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014”²²⁴.

According to Besselink, “in this manner the Treaties have been amended fully in accordance with the requirements of the Court as well as Article 218 (11) of the TFEU. All of the several objections of the Court are covered by such a Protocol”²²⁵. However, the legality and the binding effect of such a “Notwithstanding Protocol” are rather doubtful, given the fact that it seems to disregard Art 48 TEU which clearly defines the revision procedures that must be followed for the amendment of the Treaties. In that sense, by introducing such a Protocol, the Member States would be committing an infringement of the Treaties creating an even more unclear environment for the protection of the human rights.

It can be concluded that the Court’s Opinion has produced more questions than answers, regarding the EU’s prospect of acceding to the ECHR, while, up to this point, the official reaction of the EU has been hypotonic. Indeed, the commitment to EU accession had been reiterated during the first informal exchange of views organized by the Latvian Presidency on 28 January 2015, while, on the other hand, it was simultaneously acknowledged that “a period of reflection was needed on the next steps to be taken before returning to the negotiations”²²⁶. Furthermore, on 23 June 2015, the Council adopted conclusions on the application of the Charter of Fundamental Rights in 2014, where it sufficed to reaffirm “its strong commitment to the accession to the ECHR”²²⁷. Consequently, the need for further action on behalf of the EU was highlighted by the Presidency of the Council in stating that:

“There is a need for concrete follow-up action to the opinion of the CJEU, by identifying options to address the issues raised by the opinion. The Commission in its role as the EU negotiator is invited to come forward with a comprehensive analysis on the ways to address Opinion 2/13 by submitting to the Council technical written contributions on all aspects to be discussed”²²⁸.

6 Conclusion

Following the analysis of the Court’s argumentation in Opinion 2/13, which practically halted the EU’s accession to the ECHR, it can be concluded that the objections presented cannot justify the adverse effect produced. In other words, the Court’s arguments regarding the special characteristics and the autonomy of the EU law cannot be considered as conclusive proof of the incompatibility of the draft agreement with “Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on

²²⁴ Leonard F.M. Besselink, ‘Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13’, (December 23, 2014), Verfassungsblog, link: <http://www.verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213/#.VJk9aP8k0>, (Accessed: 17/04/2016).

²²⁵ See 224.

²²⁶ See 12528/15, Presidency, LIMITE JAI 702 FREMP 199, Brussels, 2 October 2015, Subject: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) - State of play, link: <http://www.statewatch.org/news/2015/oct/eu-council-accession-ECHR-state-of-play-12528-15.pdf>, (Accessed: 17/04/2016).

²²⁷ See 9409/15, General Secretariat of the Council, Brussels, 12 June 2015, Subject: Draft Council conclusions on the application of the Charter of Fundamental Rights in 2014 – Adoption, link: <http://data.consilium.europa.eu/doc/document/ST-9319-2015-INIT/en/pdf>, (Accessed: 17/04/2016).

²²⁸ See 226.

European Union”²²⁹. In that sense, Opinion 2/13 has can be viewed as “a major setback for human rights in Europe”²³⁰.

It could, therefore be commented, that the Court insisted on promoting the concept of the EU law autonomy and its own exclusive jurisdiction in a rather formalistic manner, while neglecting any reference to the binding status of the obligation assumed by the drafting parties after the introduction of Article 6(2) in the TEU. When the Court objected to the terms of the draft agreement, it failed to take into consideration that the main target of the accession is to “submit the acts, measures and omissions of the EU, like those of every other High Contracting Party, to the external control exercised by the Court in the light of the rights guaranteed under the Convention”²³¹. As Peers suggested: “the Court is seeking to protect the basic elements of EU law by disregarding the fundamental values upon which the Union was founded”²³². Furthermore, the fact that the Court’s conclusion was not reaffirmed in the View of the Advocate General Kokott, who, instead, proposed the compatibility of the draft agreement with the Treaties and promoted remedies where deemed necessary is an additional sign that the rejection of the draft agreement was not the only available, let alone rational, choice.

Based on the analysis performed in this Thesis, it would be sensible to conclude by agreeing with the critical view of Opinion 2/13 as expressed by Christopher Grayling, UK Lord Chancellor and Minister of Justice:

“If you cut through all of the judgment, you come down to a simple proposition, which is that the ECJ is unimpressed by the idea that it will become a junior court [...] Because it has an unlimited jurisprudence, and because it can interpret different aspects of our daily life as being affected by human rights laws, it has a legal blank cheque to decide different things in different areas in the way that it chooses. That Court has been very clear—indeed, its President said so recently—that it sees itself as the ultimate arbiter. It believes that Parliaments and other courts should follow its rulings, and fundamentally what has happened is that the ECJ has said they do not like that very much, because of a very clear situation where two member states end up in a case in the European Court of Human Rights, on a legal matter related to European law, and it is there that the decision is taken, rather than the ECJ”²³³.

²²⁹ See opinion 2/13, EU:C:2014:2454, para. 258.

²³⁰ The AIRE Centre, Amnesty International, the International Commission of Jurists, Joint Public Statement, ‘EU Court Opinion a Major Setback for Human Rights in Europe’, December 18, 2014, link: <http://www.airecentre.org/news.php/173/eu-court-opinion-on-accession-to-the-echr-a-major-setback-for-human-rights-in-europe>, (Accessed: 19/04/2016).

²³¹ Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 5.

²³² See 194.

²³³ UK Parliament, European Scrutiny Committee, 30th report, 21 January 2015, link: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/219-xxix/21909.htm>, (Accessed: 18/04/2016).

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